VICTORIA

MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

VOL. 3
SESSION
1982-85

MINUTES OF THE PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF VICTORIA

SESSION 1982-85

VOLUME 3

DOCUMENTS ORDERED TO BE PRINTED

By Authority F D Atkinson Government Printer Melbourne

VOLUME 3

CONTENTS

ECONOMIC AND BUDGET REVIEW COMMITTEE

FINAL RECOMMENDATIONS AND OPTIONS FOR THE FUTURE REFORM OF VICTORIAN PUBLIC SECTOR SUPERANNUATION

Ordered to be Printed

D.40

PREFACE

The Economic and Budget Review Committee is constituted under the Parliamentary Committees (Joint Investigatory Committees Act) 1982 to investigate and review matters referred to it under the following Terms of Reference:

- to inquire and report to the Parliament on any proposal, matter or thing connected with public sector or private sector finances or with the economic development of the State where the Committee is required or permitted to do so (by or under its Act).

- to inquire into, consider and report to the Parliament on any annual report or other document relevant to the functions of the Committee which is laid before either House of Parliament pursuant to a requirement imposed by or under an Act.

- to inquire into, consider and report to the Parliament on any matter arising out of the annual Estimates of Receipts and Payments of the Consolidated Fund or other Budget Papers.

TERMS OF REFERENCE OF THE INQUIRY INTO VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

On 21 December 1982, the Governor-in-Council approved of the Terms of Reference of the Inquiry.

A. The adequacy of present provisions for the management of all Victorian public sector superannuation schemes, including:

(a) structure and management of schemes;
(b) representation of contributors;
(c) actuarial assessment and valuation;
(d) reporting to Government and contributors, and contributors' access to information; and
(e) auditing requirements.

in terms of the efficient operations of these funds and the protection of the interests of contributors and the Government.

B. Whether uniform provisions for the management of schemes are feasible and desirable, and if so what these might be.

C. Whether existing administration of schemes is efficient and administrative costs are reasonable.

D. Whether the current organisational structure of superannuation schemes in the Victorian public sector is the most suitable having regard to:

(a) differences in the financial independence of various agencies and authorities involved;
(b) possible benefits from reduction of duplication and economies of scale; and
(c) any disadvantages from competition between schemes.

and whether a reduction in the number of separate schemes is feasible and desirable.

E. Whether the terms and conditions governing eligibility for membership of various schemes are reasonable in comparison with other schemes in Australia and whether these terms and conditions are equitable between different employees.

F. The appropriateness of the current benefits, having regard to:

(a) the needs of contributors, superannuants and beneficiaries;
(b) comparable benefits for public sector employees in other States and in the Commonwealth Government and those prevailing in the private sector, also having regard to any differences in salary packages and to the role of the superannuation in the recruitment and retention of Victorian Government employees; and
(c) vesting.

and including the reasonableness of provisions governing breaks in service, resignation, early retirement, ill health retirement, retrenchment or redundancy.

G. The adequacy of portability and preservation arrangements between schemes, and between them and other Australian superannuation schemes.

H. The suitability of the present basis of Government funding of the various schemes including the funding of administrative costs, and the future financial implications for Government of existing basis of funding.

I. Whether the existing investment powers and pattern of investments of these schemes is optimal from the point of view of contributors and of the Government; and whether existing arrangements provide the most efficient mechanism for maximising the investment income of the schemes.

J. Future options for public sector superannuation, including new relationships between public sector and private sector superannuation schemes.

K. The adequacy of the existing legislative and regulatory framework for the operation of schemes and the appropriate legislative framework for any recommended changes in the structure and operation of schemes.

The Committee was required to report to Parliament by 31 December 1983 if Parliament was then sitting or if the Parliament was not then sitting within seven days after the next meeting of Parliament.

As this has not been possible, approval has been granted for an extension to 30 June 1984 if Parliament is sitting or within seven days of the next sitting, which is 18 September 1984.

The Committee tabled its first reports, "A Review of Superannuation in the Victorian Public Sector" and "Summary of Victorian Public Sector Superannuation Schemes" on 18 April 1984.

COMMITTEE MEMBERS

Mr. B.J. Rowe, M.P. (Chairman)
Hon. D.K. Hayward, M.L.C. (Deputy Chairman)
Hon. G.P. Connard, M.L.C.
Hon. B.P. Dunn, M.L.C.
Mr. P.M. Gavin. M.P.
Hon. J.V.C. Guest, M.L.C.
Mr. J.D. Harrowfield. M.P.
Mr. A. McCutcheon, M.P.
Mr. P.J. McNamara, M.P.
Hon. J.H. Ramsay, M.P.
Hon. G.A. Sgro, M.L.C.
Mr. A.J. Sheehan, M.P.

Inquiry into Victorian Public Sector Superannuation Schemes

SUB-COMMITTEE MEMBERS

Mr. B.J. Rowe, M.P. (Chairman)
Hon. G.P. Connard, M.L.C.*
Mr. P.M. Gavin, M.P.
Hon. J.V.C. Guest, M.L.C.
Mr. J.D. Harrowfield, M.P.
Mr. A. McCutcheon, M.P.
Hon. J.H. Ramsay, M.P.
Hon. G.A. Sgro, M.L.C.

RESEARCH STAFF

Ms. H. Silver, Director of Research
Mr. Paul Belin
Mr. Ron McDonald
Mr. Gary Smith

ADMINISTRATION

Mr. Graeme George, Acting Secretary
Mr. Jacques Collard
Mrs. Muriel O'Gorman
Ms. Anne Ruck
Ms. Janina Nowak

* Alternative member from 9 August to 3 September 1984.

CONTENTS

SECTION 3.3 CONTRIBUTION AND BENEFIT STRUCTURE OF THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

CHAPTER 4 THE NEW SCHEME - COST, TRANSITION ARRANGEMENTS AND OPTIONS FOR EXISTING SCHEME MEMBERS

SECTION 4.1 MEMBERSHIP AND MANAGEMENT OPTIONS

CHAPTER 6 DISABILITY RETIREMENTS WITH SPECIAL REFERENCE TO THE STATE SUPERANNUATION SCHEME

SECTION 6.1 THE ISSUE OF DISABILITY RETIREMENTS

SECTION 6.2 WORKER'S COMPENSATION AND ITS RELATION TO SUPERANNUATION PROVISIONS IN THE PUBLIC SECTOR

SECTION 6.3 DEFINITION OF DISABILITY IN THE STATE SUPERANNUATION SCHEME

SECTION 6.4 DISABILITY BENEFIT STRUCTURES

SECTION 6.5 THE STATISTICAL BASE

SECTION 6.6 CONTRIBUTOR SELECTION PROCEDURES

TABLES

TABLES (cont'd)

TABLES (cont'd)

FIGURES

APPENDICES

CHAIRMAN'S INTRODUCTION

This report contains final recommendations and options for the reform of the 42 public sector superannuation schemes identified in the Committee's first report, "A Review of Superannuation in the Victorian Public Sector".

The primary theme of this Report is the need for equitable treatment for Victoria's 300,000 public sector employees. This is to be seen in terms of their access to superannuation, coverage and benefits, as well as the State's need to provide a framework for improving the efficient use of human and financial resources in the public sector.

The recommendations made in this Report are in response to a number or factors. These include the issues raised in the first Report, submissions to the Committee, public hearings, seminars and the changing environment for superannuation provisions and policy at state and national levels.

The major emphasis of the first Report was the need for equity and efficiency in the provision of public sector superannuation in Victoria. The major equity issues are:

(a) the different level of benefits received by public sector employees covered by superannuation arrangements. As an example of the range of benefits available to public sector employees, a 'blue collar' employee of the City of Melbourne, having served 30 years would receive only 1.4 times final salary on retirement at age 65 whereas a Port Phillip Sea Pilot with the same service would receive benefits worth approximately 6.5 times final salary;

(b) the level of medical discrimination in the State Superannuation scheme for which 30% of entrants are on limited or service benefits; and

(c) the diversity of withdrawal provisions available and the substantial numbers of contributors to the State Superannuation scheme who leave the service before being eligible for a pension benefit - in

1982-83 this situation applied to 60% of permanent Victorian Public Service officers who left the service.

The major efficiency issues are:

(a) the lack of appropriate employment policies for job mobility and redeployment which would increase the efficiency of the Victorian public sector and its ability to respond to changing labour needs as well as widening the career paths open to individuals;

(b) the control of the costs of public sector superannuation provisions, which for one scheme alone - the State Superannuation scheme - increased in real terms by 169% over the past decade, and whose current annual cost is greater than the present annual vote for the Department of Community Welfare Services;

(c) the requirement for improved performance by superannuation investment funds; the poor investment performance in the past has resulted in substantial revenue foregone; and

(d) the need for proper recognition in public sector accounting, of the full costs of superannuation.

The Committee has maintained a continuing process of full and open community and interest group consultation throughout the 18 months of the Inquiry. As part of this process, the Committee received submissions from the public and conducted hearings. The Committee also arranged a number of public seminars to which fund managers, senior public servants and public sector unions were invited. The Hon. R.A. Jolly, M.P., Treasurer, and Mr. Peter Marsh, Assistant Secretary of the Victorian Trades Hall Council, addressed the public sector union seminar.

A number of commissioned studies and Consultants' reports were released in July for public comment. These reports canvassed a number of options covering disability retirements, investment performance, financial and actuarial reporting, and computer administration.

Initially, it was the intention of the Committee that the first Report would be followed by two further reports, one focussing on options for reform and the other making recommendations. However, the Treasurer indicated by letter on 2 July 1984 that, given the desire of the Government to act upon the problems facing Victorian public sector superannuation as indicated in the Committee's first Report, the Committee should complete its Inquiry by the date specified in the current timetable, 18 September 1984. Consequently, it was decided to produce one rather than two further reports. The present volume therefore reflects the Committee's consideration of responses to the first Report, discussion of the various options and the Committee's final recommendations.

The Committee would see it as essential for the Government to accept its recommendations as laying the groundwork for a real reform of the Victorian public sector superannuation system. The essence of the Committee's approach is to ensure all individuals have equal access to superannuation within the constraint of available public sector resources.

As Chairman, I am under no illusion that any attempt to reform public sector superannuation benefits on an equitable basis will generate a major response from those who are already well served by present superannuation provisions while those in real need will remain silent.

The Committee sees this final report as providing the Government with an agenda and long term planning document for the reform of public sector superannuation. The Committee commends the Government for initiating this review and allowing a problem which would have remained unresolved for a number of years, to be subjected to detailed Parliamentary scrutiny.

The Committee was also conscious of the changing environment in which superannuation operates in Australia. This is seen in the lump sum taxation of superannuation benefits and the introduction of the assets test. The former change will lead to a more equitable taxation system. Other changes are the possible introduction of a National Superannuation scheme which I see as a significant and necessary initiative.

The Committee's major proposals for reform embodied in the present Report are:

(a) the introduction of a new standard superannuation scheme, to be called the Victorian State Employees Superannuation Scheme (VICSESS), covering all new public sector employees joining the Victorian public service from 1 January 1986. This scheme will provide equity for all public sector employees and remove most forms of discrimination. The major features of this new scheme are:

(i) universal compulsory minimum cover with the option to purchase additional benefits;

(ii) early retirement benefit from age 55;

(iii) no medical classification for compulsory minimum cover; and

(iv) cash vesting of employer's contribution.

The scheme provides a person with 30 years membership, who makes the maximum contribution of $6\frac{1}{2}\%$ of salary, with a retirement benefit of 5.85 times final salary;

(b) the establishment of a new investment trust called the Victorian Superannuation Investment Trust (VICSIT), to manage initially the investments of the State Superannuation, SERB and other smaller superannuation schemes (with combined assets of approximately $1 billion) and later the new scheme;

(c) the introduction of legislative changes to allow the Treasurer effective control and co-ordination of public sector superannuation provisions and management. The abolition of the Treasurer's Consultative Council and Superannuation Advisory Group and the introduction of a new, Consultative Committee which is to report to a Superannuation Task Force or the Treasurer;

(d) the development of provisions for wider participation by members in scheme management;

(e) the standardisation and timely annual reporting by the separate schemes;

(f) the introduction of specific changes to the State Superannuation scheme and to general management practices in the public sector to ensure a reduced incidence of disability retirements;

(g) the initiation of specific changes to the financing requirements of several 'commercial' bodies' superannuation schemes to ensure full funding of liabilities and the provision in authorities and departmental budgets of the ongoing cost of superannuation; and

(h) the widening of investment powers and a closer monitoring of the investment performance of the separate schemes.

The Committee's view is that the only effective method of achieving the required reforms in public sector superannuation is to introduce a single standard superannuation scheme. Such a scheme would eliminate discrimination and artificial barriers to job mobility and redeployment. This would not only increase the efficiency of the Victorian public sector and its ability to respond to changing labour needs, but would also widen the career paths open to individuals. Public sector employees would be able to match their superannuation cover to their individual needs. The new scheme therefore moves away from the current inflexibility of public sector schemes and meets the needs of the individual.

In proposing the establishment of the new scheme, the Committee is conscious of the need to protect the interests of members of existing public sector schemes. Existing members will have the option of continuing their present schemes or transferring to the new arrangements.

The Committee believes that the introduction of the new scheme will not only widen the coverage and increase the flexibility of Victorian public sector

superannuation, but will also, in the medium term, reduce projected costs of the State Superannuation scheme to the Consolidated Fund.

Clearly, a number of the proposed reforms, such as the new scheme, will need careful consideration and wide consultation before their introduction. The crucial point is that an all-party Committee considers these reforms provide an agenda for change which is considered to be both necessary and appropriate.

The Committee wishes to express its appreciation of the co-operation it received from individuals and organisations who made submissions or gave evidence during the course of the Inquiry. I should like to express my personal thanks to the other members of the Superannuation Sub-Committee for the time and energy they devoted to this Inquiry.

On behalf of the Committee I wish to thank our research staff - Ms. Helen Silver, Director of Research; Mr. Ron McDonald, Actuarial Adviser; Research Officers, Mr. Paul Belin and Mr. Gary Smith; and Dr. Paul Langley, Consultant Economist - for their professional and dedicated input to the Inquiry.

Finally, the Committee is indebted to its administrative and typing staff, especially Mrs. M. O'Gorman, Ms. A. Ruck and Ms. J. Nowak for their assistance in the smooth and timely production of this Report.

B.J. Rowe, M.P.,
Chairman.

COMMITTEE'S RECOMMENDATIONS

A full list of the Committee's recommendations follows. The recommendations are in the order they appear in the text and should be considered in light of the discussion in the relevant chapter. The list begins with the recommendations of Chapter 3 as there are no recommendations arising from Chapters 1 and 2.

Recommendations of Chapter 3
The New Victorian State Employees Superannuation Scheme

3.1 That public sector employees should be covered by a standard superannuation package irrespective of employing authority or nature of work performed.(p.40)

3.2 That the Government introduce a new superannuation scheme for all eligible Victorian public sector employees. This scheme, the Victorian State Employees Superannuation Scheme, should be the only scheme open to new entrants to the Victorian public sector from 1 January 1986.(p.42)

3.3 That in establishing eligibility, contribution and benefit provisions for the Victorian State Employees Superannuation Scheme, the Government recognises the following principles:

(a) the scheme is to have a basic compulsory cover with supplementary voluntary components;

(b) medical assessment for membership should be restricted to the supplementary components;

(c) the benefits available on retirement, death and resignation should be on a lump sum basis, with pensions for disability retirement and dependency payments on death;

(d) the retirement age is to be between 55 and 65;

(e) retirement benefits are to be based on final salary;

(f) cash vesting will be granted on resignation on a graduated basis after a minimum service period;

(g) members will be offered both half or full scale optional supplementary benefits with limited or full cover; and

(h) contributions will match the benefits proposed, with a maximum contribution of 6.5% of member's scheme salary.(p.59)

Recommendations of Chapter 4
The New Scheme - Cost, Transition Arrangements and Options for Existing Scheme Members

4.1 That the Treasurer develop guidelines for establishing transfer values for existing scheme members moving to the new Victorian State Employees Superannuation Scheme.(p.81)

Recommendations of Chapter 5
Co-ordination, Administration and Management

5.1 That legislation of a similar nature to the SEC model be implemented immediately giving the Treasurer power to exercise overall direction of public sector superannuation schemes and that any directive from the Treasurer should be published by the Board of Management or Trustees of the relevant scheme in its annual report.(p.118)

5.2 That the Treasurer establish and monitor managerial and administrative standards and annual reporting procedures for all Victorian public sector superannuation schemes.(p.119)

5.3 That the Treasurer undertake regular reviews of the administrative functions of all public sector superannuation schemes using either the Public Service Board or independent private consultants.(p.119)

5.4 That the Treasurer report to Parliament on an annual basis in respect of the management, administration and investment performance of all public sector superannuation schemes in Victoria.(p.119)

5.5 That there be established a Victorian Superannuation Investment Trust.(p.120)

5.6 That a new Board be established to administer all aspects of the new Victorian State Employees Superannuation Scheme other than investment.(p.121)

5.7 That the Government Statist and Actuary should play an independent professional role advising Government and the Director of Superannuation and should not be involved in the management of any particular scheme.(p.122)

5.8 That actuarial services required by Victorian public sector superannuation schemes should be met by increased use of the services of the Government Statist and Actuary and by competitive tendering from consulting firms.(p.122)

5.9 That the Treasurer institute a training program for representatives on public sector superannuation governing boards.(p.127)

5.10 That for small schemes, the Board should comprise a Government-appointed Chairman, an employer representative and a member representative, plus an external appointee such as an investment adviser or an actuary.(p.127)

5.11 That for large schemes - those with over 5,000 members - the Board should comprise a Government-appointed Chairman, two employer representatives and two member representatives, plus an external appointee such as an investment adviser or an actuary.(p.127)

5.12 That for the State Employees Retirement Benefit scheme, the Board should comprise a Government-appointed Chairman, two employer representatives and two member representatives.(p.128)

5.13 That for the State Superannuation scheme, the Board should comprise:

(a) a Government appointed Chairman;
(b) three members elected under current arrangements in the Superannuation Act 1958;
(c) the General Manager of the State Superannuation scheme;
(d) a representative of the Public Service Board; and
(e) a representative of the Department of Management and Budget.(p.129)

5.14 That the administration Board of the new Victorian State Employees Superannuation Scheme should comprise:

(a) a Government-appointed Chairman;
(b) three members elected by scheme members;
(c) the Secretary of the Victorian Trades Hall Council or his/her nominee representing public sector contributors;
(d) one member representing the Department of Management and Budget;
(e) one member representing the Public Service Board;
(f) one member representing the large statutory authorities; and
(g) the General Manager of the new Victorian State Employees Superannuation Scheme.(p.130)

5.15 That the Board of the Victorian Superannuation Investment Trust be as follows:

(a) a Government-appointed Chairman;
(b) two members elected by scheme members;
(c) the General Manager of the Victorian Superannuation Investment Trust;

(d) one member representing the Department of Management and Budget; and

(e) one private sector investment specialist.(p.130)

5.16 That all Victorian public sector superannuation schemes be required, by open and direct election, to have member representation on their governing bodies.(p.131)

5.17 That the Treasurer review employee selection procedures for Trustee or Board representation and ensure that, wherever practicable, the recommendations are implemented after appropriate consultation.(p.132)

5.18 That elections for contributor representatives be held at intervals of no more than four years, and that no Board or Trustee member be allowed to serve more than two consecutive terms.(p.132)

5.19 That as a first step towards increasing the number of female Trustees the Government should, where possible, ensure female representation on the Board of the new Victorian State Employees Superannuation Scheme.(p.132)

5.20 That with any reconstitution of the State Superannuation Board the Government should, where possible, ensure one of the Government appointees is female.(p.133)

5.21 That the Treasurer, in consultation with scheme management, establish reporting standards and formats for Victorian public sector superannuation schemes. These should include:

(a) statements of scheme benefits, contributions and conditions;

(b) a summary actuarial review of scheme costs and scheme performance;

(c) an outline of management structures and list of Board members and senior administrative staff; and

(d) proposals for rule changes.(p.133)

5.22 That the presently constituted Treasurer's Consultative Committee on Superannuation and the Superannuation Advisory Group be wound up, and that

the functions of these committees be taken over by a special Consultative Committee which would report to a new Superannuation Task Force or, where relevant, directly to the Treasurer.(p.134)

5.23 That the 'permanent' members of the Consultative Committee should be:

(a) a Chairperson nominated by the Government;
(b) a representative of public sector contributors elected under the auspices of the Trades Hall Council;
(c) Chairpersons of the State Superannuation scheme, the State Employees Retirement Benefit Board and the Victorian State Employees Superannuation Scheme, once established; and
(d) a representative of the Ministry of Industrial Affairs.

Depending on the issue under discussion, such as scheme membership, administration, or cost effectiveness, other representatives would join the 'permanent' members.(p.136)

5.24 That the Consultative Committee, with its administrative membership, review the Campbell and Cook Computer Services report and make recommendations. It should also advise the Treasurer on the most appropriate system for the new Victorian State Employees Superannuation Scheme.(p.138)

5.25 That, in association with other reforms, the Committee recommends the replacment of the unit system of contributions in the State Superannuation and Port of Melbourne schemes.(p.139)

5.26 The Local Authorities scheme be brought more into line with the Hospitals Superannuation and State Employees Retirement Benefit schemes by phasing out reference to endowment assurance. This should be done in such a manner that existing members are not disadvantaged.(p.140)

5.27 That the Government should introduce legislation making superannuation portability automatically available throughout the Victorian public sector.(p.141)

5.28 That the Treasurer require all Victorian public sector superannuation schemes to introduce, for the 1985-86 financial year, accounting and reporting standards wich meet those recommended by the Association of Superannuation Funds of Australia.(p.143)

5.29 That all Victorian public sector superannuation schemes be declared as public bodies under the Annual Reporting Act 1983.(p.144)

5.30 That, in implementing recommendations 5.28 and 5.29, the Treasurer require accounting and reporting standards where:

(a) actuarial reviews cover both funded and unfunded benefits;
(b) annual costs to employers are detailed;
(c) actuarial reports are submitted on a three year cycle; and
(d) actuarial reports should be submitted within six months of the close of the reporting period.(p.145)

5.31 That the Treasurer prepare an approved set of public sector superannuation scheme definitions and provisions and that, where feasible, existing Victorian public sector schemes be encouraged to introduce them.(p.147)

5.32 That the Victorian State Employees Superannuation Scheme be introduced by way of present administration (alternative (a)) in cases approved by the Treasurer. A new centralised administration should be adopted in all other cases. Approval for use of alternative (a) would be conditional on size and efficiency of present administration.(p.149)

Recommendations of Chapter 6
Disability Retirements with Special Reference to the State Superannuation Scheme

6.1 That, in view of the information received by the Committee and the potential cost to the State, the Government should consider what action, if any, should be taken in cases where disability pensions from the State Superannuation

scheme are being paid in conjunction with the worker's compensation benefit.(p.157)

6.2 That the definition of disability be altered to include the phrase "unable to perform in any occupation for which the member is suited by training, education or experience or would be suited as a result of re-training."(p.159)

6.3 That, in conjunction with the change in definition, the Committee recommends:

(a) establishment of specific provisions for early retirement from age 55;
(b) the disability pension for members over age 55 being equal in amount to the early retirement pension available but, for younger members, the disability pension would be equal to the early retirement benefit which would apply to the member if he or she had attained age 55; and
(c) provision for payment of approved medical expenses up to a maximum, being the difference between the normal and early retirement pensions.

That is, the disability pension should not exceed the amount available on early retirement, both in relation to the State Superannuation scheme and to other continuing schemes.

The Committee also recommends that Section 47(1)(c) of the Superannuation Act 1958 be redrafted so that the pension payable can be reduced to any extent the Board sees fit.

Any such measures should be co-ordinated with the provisions for early retirement benefits and with the revised personnel practices mentioned below.(p.162)

6.4 That the Treasurer establish standards for data collection and data reporting by Victorian public sector superannuation schemes, and that a review of disability experience be an integral part of the Treasurer's annual reporting

responsibilties. Such standards of reporting must at least match those established by the Australian Government Retirement Benefits Office.(p.163)

6.5 That the Treasurer, with the Public Service Board and other employing authorities, establish standards for personnel reporting procedures and ensure that these are in place as soon as possible. That, in particular, the Education Department should immediately review its personnel reporting and monitoring systems to ensure adequate tracking of sick leave and other personnel details relevant to disability or stress management.(p.165)

6.6 That the Government investigates the possibility of placing police recruits on short term contract during the period of their academy training and swearing them in on graduation.(p.169)

6.7 That the Treasurer and Minister for Police and Emergency Services institute a review of police selection procedures with a special emphasis on those procedures adopted to test for resistance to stress.(p.170)

6.8 That the Treasurer and the Minister of Education institute a review of teacher selection procedures to ensure they do not contribute to increased disability retirements especially due to mental disorders.(p.171)

6.9 That a committee be set up to review the provision of medical services for employment and superannuation purposes and to determine who should be involved and whether services should be centralised.(p.173)

6.10 That the Government through the relevant personnel agencies review welfare and counselling policies and programmes to ensure they are adequately resourced and provide an effective mechanism to identify and assist officers likely to apply for a disability retirement.(p.175)

6.11 That the Treasurer establish a task force, including member representation, to examine the feasibility of introducing legislation for dealing with retirement and redeployment in the Victorian public sector taking the Commonwealth Employees' (Retirement and Redeployment) Act as a starting model.(p.181)

6.12 That the State Superannuation scheme be given additional skilled staff to monitor invalidity retirees.(p.184)

6.13 That the Treasurer review current procedures for an annual monitoring of invalidity pensioners and recommend changes where appropriate to bring Victorian practice into line with that exercised by the Australian Government Retirement Benefits Office.(p.185)

Recommendations of Chapter 7
Financing the Victorian Public Sector
Superannuation Schemes

7.1 That commercial statutory authorities should have fully funded superannuation schemes and that they fully fund accruing liabilities for new employees who will come under the Victorian State Employees Superannuation Scheme.(p.197)

7.2 That the expected cost of pension indexation should be included in the actuarial calculation of the employer's contribution rate. This should apply to all schemes offering indexed pensions.(p.199)

7.3 That the Port of Melbourne Authority Superannuation scheme should be fully funded and own undertaking investments should be kept to a minimum.(p.200)

7.4 That the Grain Elevators Board fully fund its share of superannuation liabilities that are accruing under the State Employees Retirement Benefit and State Superannuation schemes, and that will accrue under the Victorian State Employees Superannuation Scheme. This could be achieved by the Grain Elevators Board establishing a separate investment fund.(p.201)

7.5 That the State Insurance Office set up a separate superannuation investment fund, with employer contributions as determined by an actuary.(p.202)

7.6 That the superannuation schemes covering the Port of Geelong Authority, Totalizator Agency Board, Victorian Egg Marketing Board and Port Phillip Pilots remain fully funded.(p.202)

7.7 That all fully funded schemes continue to be fully funded.(p.204)

7.8 That the Metropolitan Fire Brigades scheme should be fully funded and that the Government should explore ways of reducing its actuarial deficit.(p.206)

7.9 That the Country Fire Authority's superannuation liabilities under the State Superannuation scheme should be fully funded.(p.206)

7.10 That the actuarial position of the Country Fire Authority should be reassessed and that contribution rates should be set, to fully fund superannuation liabilities.(p.207)

7.11 That contribution rates for the Hospitals and Local Authorities schemes should be actuarially-determined to at least finance benefits accruing in the future.(p.208)

7.12 That Victorian public sector organisations of a temporary nature should be required to pay actuarially-determined employer contributions. This should also encompass temporary secondments of officers to other organisations.(p.209)

7.13 That in order to achieve cost recognition for the State Superannuation, State Employees Retirement Benefit and Superannuation Lump Sum schemes, notional funding be adopted. Notional funding would also apply to all organisations currently covered by these schemes when new employees enter the Victorian State Employees Superannuation Scheme.(p.211)

Recommendations of Chapter 8
Investment Policies for Public Sector Schemes

8.1 That the Government gives due recognition to the impact of investment performance on the cost of providing superannuation benefits, and therefore gives priority to increasing the efficiency of public sector superannuation investment arrangements.(p.216)

8.2 That there be established a Victorian Superannuation Investment Trust as proposed in Section 8.3.2.(p.228)

8.3 That:

(a) it is both desirable and necessary to introduce uniform powers specifying the avenues available for the investment of Victorian public sector superannuation moneys. This would provide substantially wider powers than currently available to many schemes;

(b) the powers listed in Section 8.4 provide a starting point for a set of up-to-date investment powers;

(c) the Treasurer, with the assistance of senior legal counsel, be responsible for developing appropriate investment powers as a matter of priority;

(d) provision be made for professional private sector investment managers to be delegated the responsibility of investing part of the funds concerned; and

(e) efficient machinery be in place for the periodic review and prompt amendment of investment powers, e.g., the Treasurer should be able to initiate changes by regulation.(p.232)

8.4 That positive investment review policies be instituted by Victorian public sector superannuation investment managers.(p.234)

8.5 That:

(a) the investment powers applicable to the investment of public sector superannuation funds include the ability to invest and trade in shares of companies with Australian Stock Exchange listing; and

(b) funds be restricted from being the controlling shareholder of a company.(p.236)

8.6 That complementary activities of the proposed Property Advisory Committee and the Victorian Superannuation Investment Trust be co-ordinated to provide public sector superannuation investment managers with advice on property investment and, through the Trust, access to a pooled property investment service.(p.237)

8.7 That:

(a) consistent and comparable investment performance measurement techniques be employed by Victorian public sector superannuation investment funds. Reports should be available quarterly; and

(b) the Treasurer oversee the implementation of investment performance measurement procedures.(p.239)

ABBREVIATED NAMES OF

VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

	FULL TITLE	ABBREVIATED TITLES
1.	Australian Barley Board Staff Superannuation Fund	Australian Barley Board
2.	Chairman General Sessions - County Court (Jurisdiction) Act 1968 (No.7705)	Chairman General Sessions
3.	City of Melbourne Gratuities Scheme	City of Melbourne Gratuities
4.	City of Melbourne Officers' Superannuation Fund	City of Melbourne Officers'
5.	Coal Mine Workers' Pensions Fund (The)	Coal Mine
6.	County Court Associates Superannuation Scheme (The)	County Court Associates
7.	Egg Board Staff Superannuation Scheme (The)	Egg Board Staff
8.	Gas and Fuel Corporation of Victoria Superannuation Fund	Gas and Fuel Corporation
9.	GEB Superannuation Fund(a)	Grain Elevators
10.	Governor's Pension - Constitution Act 1975 (No.8750), Constitution (Governor's Pension) Act 1979 (No.9251)	Governor's Pension
11.	Greyhound Racing Control Board Superannuation Plan	Greyhound Racing Control Board
12.	Harness Racing Board Staff Superannuation Scheme(b)	Harness Racing Board
13.	Hospitals Superannuation Fund	Hospitals
14.	Judges - County Court - County Court Act 1958 (No.6230)	Judges - County Court
	Judges - Supreme Court - Constitution Act 1975 (No.8750)	Judges - Supreme Court
15.	Legal Aid Committee Staff Superannuation Fund	Legal Aid Committee

ABBREVIATED NAMES (cont.)

	FULL TITLE	ABBREVIATED TITLES
16.	Local Authorities Superannuation Scheme	Local Authorities
17.	Melbourne and Metropolitan Board of Works Provident Fund.	MMBW Provident
18.	Melbourne and Metropolitan Board of Works Superannuation Scheme	MMBW Superannuation
19.	Melbourne Underground Rail Loop Authority Superannuation Scheme	MURLA
20.	Metropolitan Fire Brigades Superannuation Fund	Metropolitan Fire Brigades
21.	Metropolitan Transit Authority Retiring and Death Gratuities Scheme (The)	MTA Gratuities
22.	Mint - The Mint Act 1958 (No.6323) (The)	Mint
23.	Parliamentary Contributory Superannuation Fund	Parliamentary
24.	Pilot Service Staff Fund (The)	Pilot Service Staff
25.	Police Pensions Fund	Police Pensions
26.	Port of Geelong Authority Superannuation Scheme	Port of Geelong
27.	Port of Melbourne Authority Superannuation Scheme	Port of Melbourne
28.	Port Phillip Pilot Sick and Superannuation Fund	Port Phillip Pilot Sick and Superannuation
29.	Port Phillip Pilots Staff Life Assurance and Pension Scheme (The)	Port Phillip Pilots Life Assurance
30.	State Bank of Victoria Provident Fund (The)	State Bank
31.	State Electricity Commission Employees Retirement and Benefit Fund	SEC Employees
32.	State Electricity Commission Superannuation Fund	SEC Superannuation
33.	State Employees Retirement Benefits Fund	SERB

ABBREVIATED NAMES (cont.)

	FULL TITLE	ABBREVIATED TITLES
34.	State Superannuation Lump Sum Fund	Superannuation Lump Sum
35.	State Superannuation Scheme	State Superannuation
36.	Supreme Court Associates Superannuation Scheme (The)	Supreme Court Associates
37.	Tobacco Leaf Marketing Board Superannuation Fund (The)	Tobacco Leaf Marketing Board
38.	Totalizator Agency Board Superannuation Fund	TAB
39.	Victorian Dried Fruits Board Superannuation Plan	Vic. Dried Fruits Board
40.	Westgate Bridge Authority Employee Superannuation Fund (The Colonial Mutual Life Assurance Society Limited)	Westgate (CML)
41.	Westgate Bridge Authority Staff Superannuation Plan (National Mutual Life Association of Australasia Limited)	Westgate (NMLA)
42.	Zoological Board of Victoria Superannuation Fund	Zoo

(a) This is the formal title, on trust deed, for the Grain Elevators Board's Superannuation Fund.

(b) Reference to this scheme includes the National Coursing Association of Victoria.

CHAPTER 1

POLICY ISSUES IN VICTORIAN PUBLIC SECTOR SUPERANNUATION

SECTION 1.1 THE CENTRAL POLICY ISSUES

1.1.1 The Need for Policy

As the Committee emphasised in its previous report, A Review of Superannuation in the Victorian Public Sector, hereafter referred to as the Review Report, there was a clear lack of co-ordination and accountability in the management of Victorian public sector superannuation. Victoria now faces a number of serious and pressing problems in the provision of public sector superannuation. The causes and magnitude of these problems are detailed in Chapter 2 below.

Superannuation, as the Review Report emphasises, is one of the most significant elements in the remuneration of public sector employees. It has important social and economic functions. The environment in which superannuation operates is continually changing and in 1984, with assets test and income tax changes, the tempo of change has, if anything, accelerated. There are other more gradual changes with important long-term impacts, such as the greater involvement of women in career occupations and the increasing tendency for people to have a number of employers during a working lifetime. The various Victorian public sector schemes, constituted as they are by way of legislation or trust instrument, tend to be slow in responding to such changes, and the structure of the superannuation system in Victoria is such that it is not practical, or even desirable, to wipe the slate clean and make a fresh start. It should, however, be possible to adapt the system gradually so that it more effectively meets current and future needs. This report conveys the Committee's considered views of the changes which should be made and how they should be carried out.

1.1.2 Scheme Characteristics and Coverage

The hallmark of Victorian public sector superannuation is its diversity - a situation which, as the Review Report pointed out, is the end result of a lack, over many years, of central control and co-ordination or even clear statement of principle. Consequently, Victoria now has, at least, 42 separate public sector superannuation schemes, covering some 200,000 public servants in State and Local government.

Not all employees, however, are covered by superannuation provisions. As at June 1982, only 63.7% of State and Local government public sector employees were covered by superannuation. A significantly higher proportion of males are covered (80.3%) than females (40.9%). While the Committee would not argue for total, compulsory coverage for all public sector employees, individuals and groups who want the option of superannuation cover have been excluded in the past for reasons of various forms of discrimination or type of work performed. Although efforts have been made in recent years to overcome such anomalies, scheme coverage still includes discriminatory and idiosyncratic elements in terms of eligibility, contribution levels and benefits.

A further important feature of Victorian public sector superannuation is the dominant position of the larger schemes. Thus, in June 1983, the State Superannuation scheme accounted for just over 50% of all superannuation contributors, and the ten largest schemes represented 97.4% of the total contributors. This pattern of coverage does not reflect a preferred or optimum position (as a result of conscious Government decision making); it is simply one more result of the lack of central control and co-ordination.

Additional evidence of the ad hoc evolution of public sector superannuation schemes is to be found in the range of variability in individual scheme contribution and benefit structures.

On the benefit side, for example, schemes vary in their averaging periods for calculating retirement benefits, in their level of indexation, in their commutation factors, in their early retirement provisions, their retirement (pension or lump sum) benefits and in the level and availability of a spouse pension.

The apparent inequities in both contributions and benefits are substantial. Left unchanged they would undoubtedly persist since there is not only a lack of interest (and information) by scheme managers and members in other schemes, but there is no existing mechanism to permit comparative evaluation. On the other hand, any attempt to standardise public scheme benefits to the highest levels now available among such schemes would have serious cost implications for the public purse.

1.1.3 Public Versus Private Sector Schemes

Despite the diversity in contribution and benefit structures, most public sector superannuation schemes are superior to schemes in the private sector. Whether unintentionally or by design, virtually all public sector schemes offer benefits significantly greater than those in the private sector. The State Superannuation scheme, an important example, is far more generous than corresponding private sector schemes in its offer of a pension of 70% final salary, a survivor's pension and full CPI indexation. The State Superannuation scheme also offers a more generous retirement benefit than the Commonwealth Superannuation scheme.

The limited work done by the Victorian Public Service Board on the subject of total remuneration packages (including superannuation) suggested that remuneration in the public service, except for the most senior staff, is higher as a cost to the employer than in the private sector. Furthermore, remuneration in the public service (including superannuation), as a net benefit to the employee, is also higher than in the private sector, again except for the most senior staff.

The Committee is concerned that in framing benefit provisions no attempt has been made, in the larger schemes at least, to contrast provisions with those available in the private sector or to cost the level of the provisions from time to time. Again, a set of guidelines laid down by Government should have been established and adhered to.

1.1.4 Options for Reform

There can be little doubt that within the present public sector superannuation system there is a clear and pressing need for significant reforms. These reforms, as emphasised in the Review Report, should encompass more than just provisions for eligibility, contribution and benefit levels. As the Committee argues below, reform should also include asset structure, financing and investment, and management and administration.

Reforms must recognise the interest of existing scheme members. The Committee believes that the proposals embodied in this Report meet this objective and will receive wide support.

SECTION 1.2 THE BUDGETARY IMPACT OF PUBLIC SECTOR SUPERANNUATION

1.2.1 The Financing of Defined Benefit Schemes

As already noted, the dominant public sector superannuation scheme is of the defined benefit type with over 99% of public sector contributors enrolled in such schemes. Under such a scheme, the employer (in this case the Government or a Statutory Authority) is required to make up any shortfall between employee contributions plus interest and the cost of benefits. This is done on a regular basis throughout the employee's membership in the case of funded schemes or at the time benefits are paid in the case of pay-as-you-go (PAYG) schemes. Poor scheme management or inappropriate or unheeded professional advice can involve substantial and unanticipated costs.

In presenting its Review Report the Committee emphasised the need to ensure financial responsibility, and the necessity of making public sector authorities aware of current and expected employer costs for both PAYG and partially funded superannuation schemes.

1.2.2 The State Superannuation Scheme

The State Superannuation scheme is the largest Victorian public sector superannuation scheme and is heavily dependent on the Consolidated Fund for meeting the costs of benefit payments. In practice, the Superannuation Fund pays the pension and is then reimbursed for the Government's share by payment from the Consolidated Fund. The Government's share of the costs of indexing pensions is also met on a PAYG basis with payments from the Consolidated Fund to a Pensions Supplementation Fund.

For the majority of scheme members, employing authorities are not charged with the costs of superannuation - payment is made directly from the Consolidated Fund. As a result there is little accountability for current and expected employer costs.

With an open-ended commitment to finance the balance of benefit payments not met by member contributions and interest, the Government's share has risen. This has been due in large part to the adoption of a 9% ceiling on member's contributions together with a generous early retirement benefit at age 60.

It is clear from evidence presented to the Committee that before the initiation of the Cook-Ryder investigation in 1980, the long-term costs of the State Superannuation scheme to the Consolidated Fund were not considered important by either management or their actuarial advisers. Indeed, even under present actuarial arrangements, there is no provision for estimating the accruing liability of the scheme to the Government, nor are there any formal mechanisms to gauge either the long-term costs of benefit changes or of anticipated developments in public sector employment levels, salary structure or terms of employment.

In its Review Report, the Committee expressed considerable concern over the long-term costs of the scheme to the Consolidated Fund. In 1983-84, for example, the cost to the Consolidated Fund is estimated at $225 million -an increase, in real terms, of about 169% since 1974-75. This sum is greater than the present annual vote of the Community Welfare Services Department.

Cost projections for the State Superannuation scheme are also disturbing. From evidence supplied by consultant actuaries it is likely, even with favourable assumptions, that the emerging cost of the scheme to the Consolidated Fund will rise substantially in real terms over the period to 2030. In terms of 1981 dollars, there would be an increase from $140 million in 1981 to one thousand million dollars in 2030.

Unless the State Government is prepared to commit itself and future Governments to meeting these costs out of the Consolidated Fund by either increased taxes or reduced expenditure in other areas, the Government has little option but to pre-empt such a cost escalation by a redesign of superannuation arrangements in Victoria. There are a number of other important reasons for redesigning superannuation arrangements in Victoria such as the need for greater choice of arrangements for contributors, greater

flexibility, better resignation benefits, and increased portability within the public sector.

1.2.3 Other Superannuation Schemes

Unfortunately, it was not possible for the Committee to review the emerging costs of the other PAYG public sector superannuation schemes. The Committee took the view, however, that public sector bodies should be made aware of the current and expected employer costs of such schemes. Whenever a change to superannuation provisions is proposed, it should be adequately costed and, if approved, should be reflected in future budgets.

SECTION 1.3 DISCRIMINATION AND DISADVANTAGE IN PUBLIC SECTOR SUPERANNUATION

1.3.1 Issues in Discrimination

The Committee noted in its Review Report that although many of the more overt forms of discrimination in Victorian public sector superannuation schemes had been removed in recent years - including some current moves to extend coverage to part-time permanent employees - there still remain a number of areas of concern. The more important of these are:

(a) discrimination by occupation and workplace;

(b) discrimination by medical classification; and

(c) discrimination in withdrawal benefits.

1.3.2 Occupational and Workplace Segregation

A most undesirable feature of Victorian public sector superannuation is the extent to which the various schemes have the tendency, owing to increasing costs of job transfers, to lock individuals into a particular occupational category or workplace situation. The exclusive nature of the respective scheme contribution, benefit and withdrawal provisions reinforces existing barriers to intra-public sector employment mobility. The effect of this is not only to deny individuals equality of treatment in career paths and career choices but to lead them to join schemes which, in many respects, are clearly inferior to those open to individuals performing similar kinds of work in other public sector jurisdictions.

The Committee is opposed to any form of discrimination that is the result of occupational or workplace segregation, which is one of the worst aspects of the unco-ordinated and uncontrolled evolution of public sector superannuation in Victoria. There is no reason, for example, why employees with similar job classifications and salary levels should receive different retirement or

withdrawal benefits simply because of the schemes they belong to. If the public sector is to operate efficiently, and make most effective use of its human resources, these barriers must be eliminated.

1.3.3 Medical Discrimination

The question of medical classification for scheme applicants is difficult to resolve. Given the insurance element in superannuation provisions, the total abolition of all forms of medical evaluation on entry would, under the present generous benefit levels, lead to a substantial increase in employer costs.

Despite the fact that almost 30% of entrants to the State Superannuation scheme are on limited or service benefits, the Committee believes that with appropriately designed benefits, it would be possible, if accepted as desirable, to reduce the present degree of discrimination against those classified unfit (and hence on 'limited' or 'service' benefit) without significantly increasing costs.

1.3.4 Withdrawal Benefits

The Committee's view is that any public sector superannuation scheme, in its provisions for vesting, preservation and portability of benefits, should not impose unreasonable costs on individuals who resign (or who are retrenched) from the public sector. The present diversity in withdrawal provisions among the various Victorian public sector schemes is not acceptable. Many of these provisions are not only inequitable but also effectively discourage the recruitment of experienced staff.

Evidence presented to the Committee indicated considerable dissatisfaction with many aspects of withdrawal provisions and withdrawal benefits, the issue of the lack of portability attracting the most criticism. As 60% of permanent officers of the Victorian Public Service who left the service in 1982/83 departed before they were eligible for a benefit from the State Superannuation scheme, this dissatisfaction is easily explained.

The Committee believes that employees should have at least the right to return of their own contributions plus interest (or its equivalent). In the scheme proposed, the Committee also favours some form of cash vesting, on the grounds of equity and labour mobility.

The Committee believes that portability of benefits should be freely available on change of employment. Until such time as there is general agreement between the public and private sectors, however, priority should be given to portability between public sector schemes. In the Committee's view the introduction of a new universal scheme for public sector employees will facilitate such portability increasingly as the scheme matures. However, it is undesirable and unnecessary to rely on the new scheme to introduce sensible portability arrangements between all public sector schemes. All that is necessary is a general agreement on principles, and legislative or documentary support for the application of those principles. Where portability is not possible, the Committee believes the preservation of benefits should be actively encouraged and that attention should be given to ensure this is an attractive option.

SECTION 1.4 MANAGEMENT PRACTICE AND ADMINISTRATIVE SKILLS

1.4.1 Management and Control

The diversity in Victorian public sector scheme provisions is matched by the diversity in management practices and administrative skills in the various schemes. Some schemes match best private sector performance in their management and administration; others are open to considerable criticism as the Review Report indicated. It is clear from evidence presented to the Committee that there has been little, if any, attempt in the past to assess management practices or to set standards for administrative performance. This lack of direction is reflected in the existing variety of trustee arrangements, in the lack of common standards in actuarial reviews and reporting, and in the absence of meaningful and relevant guidelines for investment practice and investment performance appraisal.

In reviewing the management and administration of public sector schemes the Committee found the present situation to be unsatisfactory. There is a clear need to institute regular reviews of all public sector schemes in order to ensure efficient administration and to ensure also that recommendations are implemented speedily. Such reviews should come under the authority of the Treasurer.

As a result of its assessment of the need for effective central co-ordination, the Committee believes the Treasurer should have statutory power to intervene in the running of all public sector superannuation schemes.

1.4.2 Personnel Practice, Benefit Levels and Disability Retirements

A major concern of the Committee in reviewing superannuation management has been the issue of disability retirements. In the case of the State Superannuation scheme, rates of disability or ill-health retirement have not only been substantially higher than comparable private sector schemes but also higher than comparable public sector schemes in other States. Unfortunately,

the incidence of disability retirements for other Victorian public sector superannuation schemes is not known.

The issue of disability retirements cannot be separated from the more general issues of public sector personnel policies for recruitment and medical screening, performance monitoring and evaluation and, if considered appropriate, redeployment both within and between employing authorities.

The Committee was particularly concerned with the possible connection of high benefit levels to the relatively high incidence of disability retirements under the State Superannuation scheme.

A further element concerns the actual process of disability retirement within the individual superannuation schemes and the question of whether or not this is in conflict with accepted personnel practice in other public and private sector jurisdictions. These issues, in turn, raise the important question of the grounds on which a person is to be declared unfit for further duties, the appropriate decision-making body, and procedures for re-evaluating the status of disability retirees. Of particular concern is the criterion 'unable to perform present duties', which would appear to be unnecessarily liberal.

Consultant reviews of the incidence and process of disability retirements under the State Superannuation scheme also identified a number of areas where deficient or inappropriate personnel practices could be said to be major contributory factors to the high rate of disability retirements. The Consultants also proposed some major innovations. Perhaps the most important of these was to recommend that consideration be given to the introduction of personnel and redeployment practices similar to those in place under the Commonwealth Employees (Redeployment and Retirement) Act 1979 (the CE(RR) Act).

The Committee believes that there is a clear case for improved personnel procedures. These would include improved recruitment and selection for entry to the teaching profession, the allocation of greater resources to welfare and counselling, standardised medical evaluation, retraining programmes and an effective redeployment policy. Invalidity retirements must be seen as a last resort in the public sector.

1.4.3 Employee Participation

The Committee considers it desirable that all Victorian public sector superannuation schemes should have member elected representatives on their governing bodies, which a number now fail to have. As a corollary, if there is to be more representative and effective participation, there must be a greater disclosure of information by the schemes.

the incidence of disability retirements for other Victorian public sector superannuation schemes is not known.

The issue of disability retirements cannot be separated from the more general issues of public sector personnel policies for recruitment and medical screening, performance monitoring and evaluation and, if considered appropriate, redeployment both within and between employing authorities.

The Committee was particularly concerned with the possible connection of high benefit levels to the relatively high incidence of disability retirements under the State Superannuation scheme.

A further element concerns the actual process of disability retirement within the individual superannuation schemes and the question of whether or not this is in conflict with accepted personnel practice in other public and private sector jurisdictions. These issues, in turn, raise the important question of the grounds on which a person is to be declared unfit for further duties, the appropriate decision-making body, and procedures for re-evaluating the status of disability retirees. Of particular concern is the criterion 'unable to perform present duties', which would appear to be unnecessarily liberal.

Consultant reviews of the incidence and process of disability retirements under the State Superannuation scheme also identified a number of areas where deficient or inappropriate personnel practices could be said to be major contributory factors to the high rate of disability retirements. The Consultants also proposed some major innovations. Perhaps the most important of these was to recommend that consideration be given to the introduction of personnel and redeployment practices similar to those in place under the Commonwealth Employees (Redeployment and Retirement) Act 1979 (the CE(RR) Act).

The Committee believes that there is a clear case for improved personnel procedures. These would include improved recruitment and selection for entry to the teaching profession, the allocation of greater resources to welfare and counselling, standardised medical evaluation, retraining programmes and an effective redeployment policy. Invalidity retirements must be seen as a last resort in the public sector.

1.4.3 Employee Participation

The Committee considers it desirable that all Victorian public sector superannuation schemes should have member elected representatives on their governing bodies, which a number now fail to have. As a corollary, if there is to be more representative and effective participation, there must be a greater disclosure of information by the schemes.

SECTION 1.5 INVESTMENT

1.5.1 Investment Performance

Investment income from the assets of public sector superannuation funds makes an important contribution to benefits and administrative costs. It is unfortunate, therefore, that in a number of significant areas investment performance and practice were less than adequate. With defined benefit schemes the employer, in effect, subsidises poor investment management.

The Committee recognises that many funds - particularly those established by Act of Parliament - have restricted powers of investment. The Committee takes the view that, with the uncertainties inherent in investment, funds must have equity-type investments. In particular, funds should be able to invest in shares. To disallow such investment is an unfortunate and unwarranted restriction.

Even with these restrictions on investment opportunities, a lack of active management of portfolios has reduced the returns on investment activity. Equally significantly, little emphasis has been placed by Victorian public sector superannuation schemes on measuring their investment performance. This lack of emphasis is completely at variance with the growth of investment performance surveys amongst private sector schemes over the last decade and the resulting increased use of professional investment managers.

Consultant reports to the Committee argued that the investment performances of the majority of the largest public sector schemes (for the five year period ending 30 June, 1983) were poor in contrast to a sample of 250 private sector schemes. The Review Report points out that, if the twelve superannuation funds surveyed by consultants had placed their assets in 1978 and subsequent cash flow under the control of professional investment managers, by June 1983, the market value of assets could have been some $575 million greater than the result actually achieved.

While these figures need to be treated with caution, because of the assumptions involved in the comparisons (and the period of observation), they

are indicative of the opportunity costs implicit in present scheme investment powers and present methods of investment management.

While wider and more flexible investment guidelines and more effective investment performance must not be seen as the panacea for public sector superannuation cost escalation, it is clear that a higher return on assets would permit greater flexibility in future scheme development.

SECTION 1.6 REFORM AND RATIONALISATION OF PUBLIC SECTOR SUPERANNUATION

1.6.1 Membership and Community Interests

There can be no doubt that Victorian public sector superannuation is long overdue for systematic and far-reaching rationalisation and reform. The present system is subject to continuing ad hoc pressures with many important decisions being taken without regard to either wider community interest or other superannuation groups within the public sector. The only way in which the Government can exercise control over superannuation in this State, as well as meet the genuine interests of present fund members and the wider community of Victorians, is through radical and innovative change.

Of overriding concern are the escalating cost problems of large public sector superannuation schemes. The Committee believes that these can be addressed by

(a) introducing a completely new scheme for future entrants;

(b) making participation in the new scheme voluntary for any benefit in excess of a compulsory minimum;

(c) giving present scheme members options regarding transfer to the new scheme; and

(d) varying certain conditions of present schemes within a package of changes to provisions (withdrawal benefits, early retirement, member contributions, disability benefits).

The introduction of a new superannuation scheme will not, by itself, meet all of the issues and problem areas identified in the Review Report. Even with a new scheme, the existing 42 public sector superannuation schemes will survive, with a diminishing membership, well into the next century. While the Government may ultimately be prepared to wind-up these schemes and transfer the few remaining contributors and pensioners to the

new universal scheme under appropriate conditions, there are significant issues of management and administrative performance, vesting, preservation and portability which must be dealt with in the meantime, as well as asset structure and investment activity.

There are wider issues of public sector management and control which are also crucial. First and foremost, the Treasurer must be given wide powers not only to oversee the introduction of the new scheme but also to monitor the performance of (and changes to) existing schemes. Second, there must be in place an effective personnel system for the selection, monitoring and redeployment of State officers. Disability retirements must be discouraged through active and adequately funded policies of welfare, counselling and retraining.

1.6.2 Criteria for Public Sector Superannuation

There are four criteria which the Committee believes are crucial to the operation of any public sector superannuation scheme and which must be central to any proposed new scheme. These criteria are:

(a) equitable benefits for all members;

(b) efficient and effective management of the scheme and its investment portfolio;

(c) that having regard to community standards, the scheme should meet its objectives at a reasonable cost to members, employers and present and future taxpayers of Victoria; and

(d) that it form part of the design of a considered public sector employment policy.

The Committee is confident that its recommendations, together with the wider structures of management and control within the public sector, meet these criteria. The Committee is under no illusion, however, that there will be

no transition problems and is aware that considerable resources will have to be devoted to consultation with interested parties.

Given the established interests of current scheme members and the number and complexity of the schemes, it must be recognised that reform could be difficult and could take considerable time. Nevertheless, the Committee is convinced that, in the long run, the new arrangements will benefit all Victorians.

CHAPTER 2

SUMMARY OF THE REVIEW REPORT

SECTION 2.1 SUPERANNUATION IN THE VICTORIAN PUBLIC SECTOR

2.1.1 Introduction

Policy issues in Victorian public sector superannuation were discussed in the previous chapter, and some, though not all, of the findings of the Committee's Review Report were covered. This chapter presents a summary of the Committee's Review Report, which will give important background information on the state of Victorian public sector superannuation and re-emphasise the need for change. For ease of reference similar headings are used, and in the same order, as in the Review Report.

2.1.2 Significance and Functions of Superannuation

Superannuation could be said to have two broad categories of function; firstly, an income security function upon retirement, death or permanent disability, and secondly, a labour market function in its influence on rates of remuneration, job mobility and career development. In the latter respect, the limited provision for portability between the various schemes in the Victorian public sector constitutes an unnecessary impediment to greater mobility of labour within that sector.

SECTION 2.2 ELIGIBILITY, CONTRIBUTIONS AND BENEFITS

2.2.1 The Present Diversity

The Committee's Review Report disclosed the considerable diversity that is present in every aspect of Victoria's public sector superannuation schemes. This is nowhere more evident, and in the Committee's view, less justified, than in the areas of eligibility, benefits and contributions.

2.2.2 Eligibility

2.2.2.1 Membership Classification

Superannuation coverage in the public sector is higher than in the private sector. This is explained, firstly, by the conditions of eligibility for membership and, secondly, by the availability of a superannuation scheme for the majority of public sector employees. Although most of the schemes are compulsory, entry may not necessarily be automatic and there are often qualifications.

2.2.2.2 Voluntary Versus Compulsory Membership

At the time of compiling the Review Report, 18 of the then identified 42 Victorian public sector schemes were compulsory.

Schemes that are voluntary for some or all of the staff eligible to join them include the State Bank scheme (with respect to technical and specialist staff), the Port of Melbourne Authority scheme, the MMBW Provident scheme and the Hospitals scheme.

The largest Victorian scheme, the State Superannuation scheme is compulsory. The Commonwealth Superannuation scheme and the State superannuation schemes of all other States, except South Australia and Western Australia are

also compulsory. In South Australia only 30% of public service members contribute to superannuation.

Attitudes to the question of compulsory versus voluntary membership varied among participants in Victorian public sector superannuation. Strong union support for compulsory membership was expressed at a special seminar held to discuss the findings of the Review Report with various union representatives. Their general view was that it was in the employees' long term interests to be required to join a superannuation scheme. On the other hand, the Committee received a number of submissions supporting voluntary membership. The point was made that many members of superannuation schemes have difficulty affording superannuation contributions, and if they had the choice they would opt out so as to maximise take home pay.

The Committee believes a compromise position offers the greatest flexibility in meeting the needs of contributors.

2.2.2.3 Discrimination in Eligibility Requirements

Discussion of discrimination is usually concerned with sex and marital status, but it is evident that discriminatory practices in superannuation have also been based on the occupation and category of employee. The most widespread of such practices has been the historical exclusion from schemes of wages or blue-collar employees, or the establishment of different schemes for wages employees and staff, those covering the former having generally inferior entitlements.

In the Review Report the Committee expressed support for the principle that eligibility criteria for superannuation schemes should not discriminate against a person on the grounds of sex, marital status, occupation or hours of work. The Committee was pleased to note that few schemes now discriminate regarding eligibility on the grounds of sex or marital status, and that moves are being made to extend coverage to permanent part-time employees in some areas.

Perhaps the most important area of discrimination in eligibility is that of medical classification. Most superannuation schemes provide significant insurance in the event of death and disablement. If there is no medical screening and classification, the costs of providing death or disability benefits must be considerably greater than otherwise. However, the outcome of this process of medical screening for the State Superannuation scheme has meant that more than 30% of its members are classified with less than full benefits.

2.2.3 Contributions and Benefits

The Committee found considerable diversity in members' contributions, the percentage of salaries paid ranging from $2\frac{1}{2}\%$ to $11\frac{1}{2}\%$.

Most superannuation schemes in the Victorian public sector are defined benefit schemes in which benefits on retirement, death or disability, are determined by a formula which defines benefits in terms of salary at or near retirement and years of actual scheme membership. The dominance of defined benefits in the Victorian public sector matches the situation amongst larger schemes in the private sector, but the Victorian public sector differs from the private sector in the form of the retirement benefit. In the private sector lump sums are common; in the Victorian public sector the retirement benefit ranges from a pension, which may be partly or wholly commutable, to a lump sum only.

2.2.3.1 Indexation and Commutation

Most public sector pension schemes benefits are fully indexed to changes in the Consumer Price Index (e.g., State Superannuation, Port of Melbourne Authority, SEC Superannuation and Metropolitan Fire Brigades schemes), whereas very few schemes in the private sector provide full indexation. Nevertheless, some Victorian public sector schemes offer only partial indexation (e.g., City of Melbourne Officers' scheme) while others offer no indexation at all (e.g., MMBW Superannuation scheme).

The Committee's view is that there is a strong case for uniformity in indexation provisions in the public sector.

Most pension schemes in both public and private sectors permit full or partial commutation of pension. Evidence to the Committee suggests that where commutation is available, most public sector scheme members commute the maximum to which they are entitled.

2.2.3.2 Retiring Age

Retiring age is a key item in the design of most superannuation schemes. It establishes the date at which the main benefits of the scheme become payable and is a reference point for early and late retirement, death, disability and other benefits.

For most Victorian public sector schemes the normal retiring age is either 60 or 65 years. Some schemes where normal retiring age is 65 years provide for early retirement after age 60, without penalty apart from any service necessarily foregone (e.g., SEC Superannuation and MMBW Provident schemes). Others provide for early retirement with minimal penalty.

2.2.3.3 Retirement Benefits

There are major differences between the retirement benefits offered by Victorian public sector superannuation schemes. With some schemes offering pensions only, others pensions that are partly or wholly commutable and others lump sums only, it is difficult to make meaningful comparisons. One way of making comparisons adopted in the Review Report was to express the value of the benefit payable to an average member at normal retirement date as a capital sum, not in terms of dollars but as a multiple of the member's salary at the date of retirement. On the assumptions used in the report, the retirement benefits at age 60, after 30 years' scheme membership, ranged from 10.7 times final salary for the State Superannuation and Port of Melbourne schemes, 6.9 times for Local Authorities and 5.4 times for Gas & Fuel, to a minimum of 1.2 times for the Metropolitan Transit Authority.

Employees with a similar job classification at the same salary level can thus expect to receive significantly different retirement benefits simply because of

the scheme to which they happen to belong. For example, a railway member of the State Superannuation scheme, retiring at age 60 after 30 years service, could receive 9 times as much as a tramway worker with similar service.

2.2.3.4 Death and Disability Benefits

The form and the amounts of benefit payable on death and disability are related to those payable at normal retirement, so the relative generosity of public sector retirement benefits is also true of death and disability benefits. In particular, the fully indexed pensions payable by many of the larger Victorian public sector schemes, such as the State Superannuation scheme, have few counterparts in the private sector.

The Committee found that the level of disability retirements in the State Superannuation scheme is relatively high and compares adversely with experience in other States and in the private sector. The incidence of disability retirements from the State Superannuation scheme on account of mental conditions was found to be particularly high, especially in the Police Force.

2.2.4 Withdrawal Benefits

2.2.4.1 Introduction

The Victorian public sector is not a single internal labour market. It is more properly seen as a set of independent sub-markets between which mobility is highly restricted. One of the reasons for this lack of mobility is the operation of superannuation schemes which, because of their failure to accomodate job transfers and resignations effectively, lock individuals into particular employing authorities.

The Committee has taken the view that superannuation benefit systems, particularly those with compulsory membership, should not impose unreasonable costs on those individuals who decide to resign (or who are retrenched) from the public sector. At the same time the Committee is aware

that an overly generous resignation benefit structure could impose unacceptable costs on the employing body.

In many schemes the resignation benefit is a return of the member's contributions with interest. Examples are the Hospitals, MMBW Superannuation and Provident, TAB, Superannuation Lump Sum, Port of Geelong, Supreme and County Court Associates and State Bank schemes. The State Superannuation, Port of Melbourne, and Metropolitan Fire Brigades schemes provide for a return of the member's contributions only - a situation that the Committee regards as unsatisfactory.

2.2.4.2 Vesting, Preservation and Portability

Vesting refers to an employee's right, upon termination of employment by resignation or retrenchment, to all or part of the employer contributions made to a superannuation scheme on the employee's behalf. The extent of vesting varies considerably between public sector schemes: in the State Superannuation scheme there is no vesting unless the employee elects to preserve his/her benefit; in the SEC schemes there is no vesting until after the completion of 10 years membership. Vesting in a number of schemes is determined by formula, the amount increasing with duration of membership. This is an important element in the benefit structure of most schemes because of the large number of employees who resign, especially in the early years of membership.

It should be noted that many schemes offer benefit preservation as an alternative to vesting. With preservation, a member's entitlement is retained in the scheme, to be paid subsequently on death, disablement or attainment of normal or early retiring age. Some schemes provide for vesting of employer money when the benefit is to be preserved but not otherwise. One example of this is provided by the State Superannuation scheme under section 36 of the Superannuation Act 1958; an employee who resigns after age 50 and having completed 15 years membership is entitled to a preserved pension payable at age 65.

Portability embraces both the concept of vesting and of preservation. Hearings of, and submissions to, the Committee have made, with few exceptions, little specific reference to the question of vesting. However, there was widespread demand for portability.

SECTION 2.3 MANAGEMENT AND ADMINISTRATION

2.3.1 Key Issues in Management and Administration

In the Committee's opinion, the large number of superannuation schemes in the Victorian public sector reflects the ad hoc manner in which superannuation has developed over the years and the absence of central control and direction by successive State governments. There is not - as far as the Committee could ascertain - any logical reason why there should be so much diversity. Managerial and operational guidelines are conspicuous by their absence.

Central agencies, in particular the Treasury (now the Department of Management and Budget), the Public Service Board and the Office of the Government Statist and Actuary have had, at best, a peripheral and indirect role in the introduction, development and management of the various schemes.

2.3.2 Consultation and Participation in Superannuation Schemes

Given the importance of superannuation as an industrial relations matter an issue of major concern is employee representation on the governing bodies of the schemes. The Committee believes that all public sector superannuation schemes, as a matter of principle, should have member elected representatives on the governing body. This should ensure a wider understanding and appreciation of the scheme among the workforce generally, and should enable the management to be more directly and fully informed of employees' concerns.

The Committee would emphasise that the election or selection of member trustees or representatives is only the beginning of participation. To ensure effective participation it is essential for member trustees or representatives to have maximum opportunity for training before taking up their duties.

The Committee took the view that effective consultation between scheme management and contributors would be facilitated by a co-ordinated and

consistent approach to resolving union-initiated claims for changes to provisions.

2.3.3 Disability Retirements and Personnel Practices in the Victorian Public Service

The Committee was concerned that current rates of disability retirement could, in the long run, jeopardise the financial position of public sector superannuation schemes. It initiated a review of personnel practices in order to evaluate the potential impact of revised procedures on the incidence and pattern of disability retirements. The major conclusions were:

(a) that poor selection procedures were a major contributing factor in disability retirements from the teaching profession;

(b) that welfare and counselling support can be most cost effective in reducing disability retirements and that there is a clear need for such support in the Education Department;

(c) that disability retirements are too often used as an expedient personnel tool and that, as a consequence, there is a need to consider more formal and comprehensive redeployment and retirement management systems: a possible model for disability cases is the procedure established under the Commonwealth Employees (Redeployment and Retirement) Act 1979;

(d) that there is a strong case for centralisation and standardisation of medical services under the Victorian government medical officer; and

(e) that there needs to be a more systematic and rigorous reviewing of disability pensioners.

2.3.4 Administrative Services and Record Systems

Superannuation administration is far more than contribution accounting. A complete superannuation administration service should also provide such services as record maintenance for eventual benefit calculation, member benefit statements and the reporting of financial and actuarial status to management.

To meet these requirements many schemes have computerised their administration. However, as with so many other aspects of public sector superannuation, the separate schemes have developed their own systems and purchased their own hardware, with varying results.

2.3.5 Financial Accounting and Actuarial Reporting

A Consultant's report to the Committee concluded that not one of the 13 schemes reviewed is currently producing an acceptable set of useful information for those concerned with the schemes. The Committee believes that uniform and comprehensive accounting and reporting procedures should be established for Victorian public sector superannuation schemes. Furthermore, the Committee believes that public sector superannuation schemes should be declared as public bodies for the purposes of the Annual Reporting Act 1983. Among other things, this would automatically ensure auditing by the Auditor-General.

For partially funded or pay-as-you-go (PAYG) schemes, the typical provisions for an actuarial investigation could be interpreted as precluding any reporting on the unfunded elements of the scheme. However, the Committee believes that the majority of the actuarial profession has moved to the view that a proper actuarial report on a partially funded scheme, like the State Superannuation scheme, should encompass, not only the funded section, but also future emerging costs for unfunded benefits.

SECTION 2.4 THE FINANCING OF VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

2.4.1 Alternative Financing Systems

In the Review Report, the Committee distinguished between the two basic financing systems, funding and PAYG. At the time of compiling the Review Report the Committee was aware of 42 different Victorian public sector superannuation schemes, 26 of which were funded, nine were PAYG and seven were partly-funded to various degrees. There are arguments for adopting either form of financing for public sector superannuation schemes but in practice, where existing superannuation schemes are concerned, the options for change are restricted. Once PAYG or partly-funded schemes are firmly established, taxpayers and contributors would be likely to resist their conversion to fully-funded schemes. This is because of the extra cost in building up an investment fund to provide benefits for future members whilst simultaneously having to continue paying benefits for current members for whom no contributions have been made in the past.

Whichever method of financing is adopted, the Committee felt it was important that all public sector bodies recognise in their accounts the full cost of current superannuation benefit accruals. This is already done in the fully funded schemes but would require special accounting for partly-funded and PAYG schemes.

2.4.2 Funding for Statutory Authorities

The Committee made the point that statutory commercial authorities should be covered by funded superannuation schemes and generally this is the case for those authorities which generate sufficient revenue to cover expenditure. The rationale is that such authorities should bear in their budgets the full cost of providing goods and/or services, part of which will be attributable to the accruing liability for superannuation.

2.4.3 Victorian Funded Schemes

The 26 funded superannuation schemes in the Victorian public sector include nearly all of the smaller schemes and some of the larger statutory authorities schemes. Typically the smaller schemes have their funds managed externally either through a merchant bank or, more commonly, a life assurance office. Quite clearly the provision of superannuation benefits through life assurance involves funding in advance. An example of such a scheme is the Greyhound Racing Control Board scheme which is managed by the AMP Society.

Eight of the 26 schemes are accumulation schemes. By definition these are funded because benefits are determined by the accumulation of contributions plus interest. The largest accumulation scheme is the Port of Geelong Superannuation scheme which had assets of just over $3 million at December 1982.

One scheme that is meant to be fully-funded but which has in fact accumulated a large actuarial deficit is the Metropolitan Fire Brigades Superannuation scheme. For an organisation that is dependent on levies on current fire insurance premiums for a substantial part of its budget the Committee considered that this situation was unacceptable.

Other fully-funded schemes of note include the two MMBW Superannuation schemes (Provident and Superannuation), State Bank, SEC Employees, City of Melbourne Officers', Parliamentary and Port Phillip Pilots Sick and Superannuation schemes.

2.4.4 Victorian Pay-As-You-Go Schemes

There are nine superannuation schemes in the Victorian public sector that finance all benefits on a PAYG basis and these include two gratuity schemes, i.e., the MTA Gratuities and City of Melbourne Gratuities schemes. The most notable PAYG superannuation scheme is the Port of Melbourne Authority Superannuation scheme. Although members of the scheme make contributions, the funds are retained in the working finances of the Port of Melbourne Authority (PMA). There are, therefore, no assets to back the liabilities of the

scheme and benefits are paid entirely out of current revenue. The Committee considers this to be a totally unacceptable arrangement for one of Victoria's commercial statutory authorities.

2.4.5 Victorian Partly-Funded Schemes other than the State Superannuation Scheme

There are six partly-funded superannuation schemes other than the State Superannuation scheme. These include two schemes that are close to fully funded - the SEC Superannuation and Gas and Fuel Corporation schemes. These schemes finance the adjustments to pensions on a PAYG basis, though this is an almost inconsequential item for the Gas and Fuel scheme. Nevertheless, as commercial statutory authorities they should, in the Committee's opinion, be funding this cost.

Other partly-funded schemes of note include the three broadly similar State Employees Retirement Benefit (SERB), Local Authorities Superannuation Board (LASB) and Hospitals schemes. These schemes are multi-employer schemes and a substantial proportion of the employer contribution is, in fact, a PAYG contribution calculated to meet benefits payments over a three year period.

The Committee expressed concern that, under direction from the Treasurer, some employers have been withholding their contributions to the SERB scheme, notwithstanding the fact that these are essentially instalments to meet the employer's current obligations on a PAYG basis. This means that members' contributions and interest are not fully covered by normal investments.

2.4.6 The State Superannuation Scheme

2.4.6.1 Financing the Scheme

The largest scheme, the State Superannuation scheme, is mostly unfunded. Members' contributions are paid into an investment fund but the employer's

share of benefit payments is made from the Consolidated Fund on a PAYG basis.

It was originally intended that 2/7ths of the benefits provided by the scheme were to be funded by members' contributions and the remaining 5/7ths was to be paid by the Government. However, largely because of the placement of a 9% ceiling on members' contributions and the adoption of a generous early retirement benefit at age 60, the Government's share is much greater for current retirements.

2.4.6.2 Cost Allocation

Some organisations covered by the State Superannuation scheme, which are charged for their share of benefit payments, have attempted to account for accruing liabilities by establishing internal investment funds or accounting provisions. No guidelines have been established to help these organisations, the result being that no two are accounting for this liability in the same way.

Other organisations whose employees are members of the State Superannuation scheme are charged by a contributory arrangement which absolves them from meeting the actual cost of employer contributions associated with the later payment of benefits. However, even within this arrangement, the percentage contribution and basis of calculation can vary substantially from organisation to organisation.

2.4.6.3 Long Term Costs of the State Superannuation Scheme

The cost of the State Superannuation scheme to the government has increased substantially in the last decade. In 1974-75 it was $34.7 million and in 1983-84 it was $225.6 million, an increase of about 169% in real terms. The cost to Government of the scheme can be expected to continue to rise. Actuarial cost projections of the State Superannuation scheme contained in a report to the Treasurer by the consulting actuary Mr. Bruce Cook suggest that:

(a) on a reasonable set of assumptions, including growth in the membership of the scheme of 1% per annum, salary growth of 10% per annum and pension updating of 8% per annum (equal to CPI), the cost to the State measured in 1981 prices, is projected to increase from $140 million in 1981 to $1000 million in 2030 (a 614% increase);

(b) on the same set of assumptions but expressed as a proportion of the total salaries of members, the projected increase over the same period is over 70%;

(c) on the more favourable assumptions that growth in the membership of the scheme would be zero and that there would be no real increase in salaries or pensions, the cost to the State, measured in 1981 prices, is projected to increase from $140 million in 1981 to $410 million in 2030 (a 193% increase); and

(d) a number of factors which could further increase costs include:

(i) increased longevity of pensioners;
(ii) continuing high rates of disability retirement;
(iii) widening the scope for vesting, preservation and portability; and
(iv) public service employment growing at a faster rate than private sector employment.

SECTION 2.5 INVESTMENT PRACTICE AND PERFORMANCE

2.5.1 Superannuation Asset Structure

The assets and investments of public sector superannuation schemes have grown rapidly in recent years and are now a significant presence in capital markets. By June 1983 Victorian public sector superannuation assets had grown to $2338 million, representing about 20% of the total assets of all Australian public sector schemes.

Whilst there is considerable diversity in the way the schemes have invested, the overall distribution of the assets is heavily influenced by a handful of the major investment funds. At June 1983, the State Superannuation scheme had most of its funds placed in public securities (41.4%) and mortgages (18.6% commercial and 10.3% to members for home mortgages). A portfolio more reminiscent of the private sector is the Gas and Fuel Corporation's fund, which has a considerable emphasis on shares (39.3%) and company securities (13.6%). The different portfolios of the schemes are a reflection of the investment philosophies of the schemes' managers and the existence of legal and other restrictions on the powers of investment.

2.5.2 Investment Objectives

Investment behaviour and the consequent investment income is a crucial part of superannuation. A greater investment return in the long term implies greater benefits and/or reduced contributions. Conversely, a poor investment performance means poorer benefits and/or increased contributions which, in the public sector schemes, would mean a greater call on revenues to maintain a given benefit structure. The Government, in effect, subsidises poor fund management.

The majority of the managers of Victorian public sector superannuation schemes, when interviewed by the Committee, claimed to be pursuing traditional investment objectives. Despite this there were a number of instances of what may be called 'divergent' investment. Whilst the Committee

has sympathy for the 'social' benefits attributed to divergent investment, it stated in its Review Report that, especially for investments representing a significant proportion of total assets, investment performance should be the main criterion for making investment decisions.

2.5.3 Investment Constraints and Investment Management

As a result of its investigations, the Committee found a broad consensus that superannuation funds should have wide powers of investment to give them the best opportunity of maximising their return: it also found that ten of the schemes, with total assets in excess of $1.5 billion, had no power to invest in shares. As shares and property represent a practical way of investing to produce a real return in the longer term, the Committee considered this constraint on share investment unacceptable.

Because of its variety and its volatility, share investment requires special management skills which larger funds would need to engage. These can be secured for the smaller funds by way of external professional management.

2.5.4 Own Undertaking Investment

Own undertaking investment refers to investment in the parent body, and for prudential reasons, is not considered to be a wise practice in the private sector because benefits could be jeopardised in the event of business failure. This is an unlikely outcome in the public sector. Nevertheless, not all areas of the public sector may continue indefinitely, at least in their current form, hence own undertaking investment could pose problems in some areas.

2.5.5 Property Investment

Most of the larger schemes now invest in property. Property, like shares, is commonly regarded as an appropriate investment for hedging against inflation and is, therefore, particularly well-suited to the long term investment requirements of superannuation schemes. However, in their report to the

Committee on investment performance, Campbell and Cook were somewhat wary about the schemes' experience and abilities to manage property portfolios.

2.5.6 Housing Mortgages

The provision of housing finance to scheme members has been identified as a potential avenue for divergent investment. Such a facility, if offering concessional interest rates, will of course reduce the earning capacity of a scheme's investment portfolio.

Four schemes have invested part of their assets in housing mortgages to scheme members. These are the Gas & Fuel Corporation, Hospitals, Metropolitan Fire Brigades and State Superannuation schemes. All except Gas & Fuel set their mortgage rates having regard to the prevailing bank and building society housing finance rates. Gas & Fuel offers much lower lending rates, but restricts member housing loans to a maximum of one percent of its funds.

2.5.7 Investment Performance

The Committee found that Victorian public sector schemes have placed little emphasis on consistent and comparative monitoring of investment performance. Consequently, the Committee commissioned a study by the consulting actuaries Campbell and Cook on the investment ranking and performance of 12 of the major schemes (accounting for about 99% of Victorian public sector superannuation assets).

The following findings of the Consultants' report highlight the poor investment performance achieved by the Victorian public sector schemes:

(a) the average annual investment return achieved by the public sector schemes over the five year survey period was 28% less than the average return achieved by some 250 private sector schemes regularly surveyed by Campbell and Cook.

(b) nine of the 12 surveyed public sector schemes were in the bottom ten (out of 100) positions of a notional ranking scale when compared with a large sample of private sector schemes;

(c) if, instead of relying on its own investment management during the review period, each fund had placed the value of its 1978 assets, and subsequent cash flows under the control of professional commercial managers, the consultants estimate the market value of assets at June 1983 would have been some $575 million greater than the outcome actually achieved.

The Committee qualifies the Consultants' figures for the estimated gain because they depend largely on share and other market values at particular dates. Nevetheless, the Committee considers the results indicative of a significant opportunity cost to the State if present investment policies and management continue.

CHAPTER 3

THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

SECTION 3.1 THE BASIS FOR SUPERANNUATION POLICY

3.1.1 The Need for Change

In the Committee's view the most effective, efficient and equitable solution to the present and continuing problems facing Victorian public sector superannuation lies in the establishment of a standard Victorian public sector superannuation scheme. The Committee believes that the introduction of such a scheme is the only logical solution to the issues and criticisms raised in the Review Report. The Committee does not believe that it is possible to remedy the existing situation in any other way. The issues are too important, and the potential cost to the public purse too great, for piecemeal and ad hoc solutions. Indeed, such an approach has brought us to the present untenable situation.

In advocating a systematic and far reaching reform of Victorian public sector superannuation, the Committee is responding not just to the broad issues of cost, scheme management, investment performance and fund efficiency; it is equally concerned with inequity in eligibility requirements, contribution levels and benefit provisions of the various public sector schemes. In proposing a new public sector superannuation scheme, the Committee believes it will overcome these inequities.

The diversity in superannuation schemes found by the Committee is attributable to the fact that, with few exceptions, each public sector employer has its own scheme and has enjoyed substantial, if not complete, freedom in deciding its terms and conditions. This situation is not appropriate in the public sector where conditions of employment and the requirements of meeting the public interest are common to all employing authorities. Why, for example, should engineers of a particular grade be offered entirely different retirement and other benefits according to whether they are employed in the

public service, the Gas & Fuel Corporation, the Board of Works, the SEC or the Metropolitan Transit Authority? The Committee regards the case for a standard scheme in the public sector as overwhelming.

On this point the Australian Federated Union of Locomotive Enginemen and Australian Railways Union commented that:

> "In respect of equity between public sector employees, our view would be that equity ought to be a long range goal of any proposed change. In essence, employees with similar rates of earnings/salaries, having similar lengths of service, ought to receive the same basic superannuation benefit, no matter with whom they are employed, or if white collar/blue collar."(1)

RECOMMENDATION 3.1

THAT PUBLIC SECTOR EMPLOYEES SHOULD BE COVERED BY A STANDARD SUPERANNUATION PACKAGE IRRESPECTIVE OF EMPLOYING AUTHORITY OR NATURE OF WORK PERFORMED.

This is the situation for the vast majority of Commonwealth employees. The Committee does not deny, however, that some types of public sector employment may demand special provisions. The majority of these, however, can be encompassed within a single scheme structure. On the other hand, there are special cases where the age at which appointments are made, the fixing of pay and conditions and the methods of termination differ substantially from ordinary public sector employment and the standard scheme is unlikely to be satisfactory. The Committee considers, therefore, that the following groups, because of special factors, should not be included in the new scheme: The Governor, Judges, and Members of Parliament. There are also special employment packages in place for certain senior executives on contract to the public sector who are not covered by the Committee's recommendation for a standard package. These exceptions are discussed in a separate report of the Committee entitled "Review and Recommendations for the Victorian Parliamentary Scheme, the Judges Scheme, the Governor's Pension and Other Special Superannuation Schemes".

3.1.2 The Advantages of a Standard Scheme

In eliminating both discrimination and artificial barriers to job mobility and redeployment, a single Victorian public sector superannuation scheme would not only increase the efficiency of the public sector and its ability to respond to changing manpower needs, but would also widen the career paths open to individuals. Apart from the more general advantages of a standard scheme, cost savings would also eventuate, in the long term, from one set of documentation and legislation and a standard administrative system. Also, as discussed in more detail in Chapter 8, there would be a single (but separate) investment trust for the new scheme.

3.1.3 Transition and Reform

In proposing the establishment of a new Victorian public sector superannuation scheme, the Victorian State Employees Superannuation Scheme (VICSESS), the Committee is conscious of the need to protect the interests of members of the existing public sector schemes. If the Committee's recommendations for VICSESS are accepted it will mean that, from the commencement date of the new scheme, entry to existing schemes will cease. Existing members will normally have the option of continuing their present entitlements or transferring, at least partially, to the new arrangements. However, the possibilities in the latter respect will differ from scheme to scheme. Legislative changes will, of course, be necessary to allow any transfer of accumulated benefits to the new scheme.

Apart from phasing in problems, there is the question of whether a new superannuation approach for the public sector should offer a single system of benefits and contributions or several systems. There are a number of examples in the present public superannuation system of separate schemes for different types of employees. These include State Superannuation and SERB, SEC Staff and Employees and MMBW Staff and Employees. There is, of course, an historic justification for these distinctions, which is that the so-called 'blue collar' schemes are intended to supplement Commonwealth social security provisions rather than replace them. Recent changes regarding the assets test have not significantly altered this logic.

It must be recognised, however, that there is currently no clear distinction between the level of benefits which can be integrated with social security and that which cannot. Furthermore, there is no current indication that this aspect of retirement provision will be addressed by the Commonwealth Government. In fact, recent moves have tended to defer rather than accelerate progress towards rational integration of occupational and national retirement benefits.

Indeed, in contrast to countries such as Canada where there has been a major effort to integrate occupational superannuation with social security benefit provisions - in both public and private sectors - the Australian approach to retirement provisions stands out as both rudimentary and fragmented.

In the circumstances, the Committee's view is that the aim in the Victorian public sector should be for a single system of superannuation benefits - but that such a system should offer a range of options. Such a system would give employees maximum flexibility in planning for their retirement by choosing contributions and benefits which relate to their own circumstances, and thus avoid both an undue degree of compulsion and discrimination by class of employee.

RECOMMENDATION 3.2

THAT THE GOVERNMENT INTRODUCE A NEW SUPERANNUATION SCHEME FOR ALL ELIGIBLE VICTORIAN PUBLIC SECTOR EMPLOYEES. THIS SCHEME, THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME, SHOULD BE THE ONLY SCHEME OPEN TO NEW ENTRANTS TO THE VICTORIAN PUBLIC SECTOR FROM 1 JANUARY 1986.

3.1.4 The New Scheme for Members of the Metropolitan Transit Authority

In making the above recommendation and the detailed proposals which follow, the Committee notes that, within the last month, the Government has announced a substantial new scheme for employees of the Metropolitan Transit Authority. The Committee was not advised of this proposal and had no

opportunity to comment on the terms of that offer. This conflicts with the Treasurer's edict that no major changes should be made to public sector superannuation while the Committee's Inquiry is underway.

SECTION 3.2 ESSENTIAL FEATURES OF THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

3.2.1 Recommendations and Scheme Characteristics

In recommending VICSESS, the Committee is aware of the importance of:

(a) identifying as clearly as possible the characteristics of the new scheme to potential members, in particular its eligibility requirements, contribution levels and benefit entitlements; and

(b) contrasting the proposed scheme's provisions with those presently available to members of existing public sector superannuation schemes.

The purpose of the remainder of this chapter will be to meet the first objective. Detailed recommendations to the Government on the proposed new scheme are, for convenience, held over to the last section of this chapter. Objective (b) will be considered in Chapter 4.

The benefits provided by the proposed scheme are superior to existing schemes in some respects and inferior in others. The Committee makes no apology for the latter: such an outcome is inevitable, given the requirement for fair and equitable treatment of all public sector employees eligible for coverage under State superannuation. The Committee believes that, on cost grounds, it is simply out of the question for all public sector schemes to be brought into line with the State Superannuation scheme. In any event, such a move would not be attractive to many employees.

The Committee recognises that the question of public versus private sector benefit provisions is a contentious one and that some critics have suggested, in the context of a total remuneration package, that public sector provisions are not out of line with those adopted in the private sector. The Committee cannot accept this argument and believes the Public Service Board evidence, reported in the Review Report and Chapter 1 of this report, supports the Committee's position.

3.2.2 Eligibility: Compulsory Versus Voluntary Membership

The majority of public sector employees in Victoria are covered, under present arrangements, by compulsory superannuation schemes. Attitudes to compulsory membership were canvassed by the Committee and reported on in the Review Report. From the evidence presented it was clear that there exists considerable disagreement on the practice of the requirement of compulsory membership. The Committee, however, while recognising the arguments for compulsory membership, also considers that there is a requirement to take into account the needs of individuals.

On this issue the Committee received support from the Locomotive Enginemen and Australian Railways Union who commented that:

> "Our submission on this question of voluntary vs. compulsory membership is agreement with the intermediate, more flexible approach suggested by the Committee ..."(2)

The Committee's view is that neither a completely voluntary nor a totally compulsory scheme is satisfactory. Instead, the Committee recommends a change from the present compulsory approach to State superannuation and proposes, as a reasonable compromise, a compulsory basic benefit for all public sector employees plus voluntary supplements depending on each employee's personal choice.

Under such a system all members would contribute for a basic benefit on a compulsory basis. That benefit would be subsidised by employers. Employees would also be eligible to contribute voluntarily for additional benefits and these too would be subsidised. A choice would be available regarding the type and amount of the voluntary supplement.

This approach offers employees the flexibility to meet a variety of individual requirements. For example, employees wishing to optimise their Social Security entitlements and to minimise their contribution outlays would rely entirely on the compulsory benefits.

3.2.3 Eligibility: Class of Employee

Other aspects of eligibility are whether the employee is permanent or temporary, whether the employee is engaged in full-time or part-time service, minimum and maximum age, and minimum completed period of service. The Committee has not explored the practicalities of these aspects with scheme managements but believes that the following general principles should apply throughout the Victorian public sector:

(a) eligibility should be automatically available to permanent full-time employees and to permanent part-time employees who work for more than, say, 15 hours per week, regardless of occupational classification;

(b) there should be no minimum entry age; and

(c) there should be no minimum period of service, and employees should be covered for compulsory basic benefits from the date of entry to service.

In applying these principles, there should of course be no discrimination on grounds of race, sex, marital status, or occupation.

3.2.4 Eligibility: Medical Classification

Since most superannuation schemes in both public and private sectors provide significant insurance in the event of death or disablement, it is usual for a scheme administrator to require detailed medical evidence before agreeing to an applicant's eligibility for the insurance.

The system of medical standards poses a problem for scheme administrators. Since the cost of providing death and disability benefits depends on how many claims are made, the number and costs of claims are a function of entry medical standards. This trade-off poses a dilemma for scheme management - should a scheme provide uniform but minimal benefits in the

absence of medical screening or provide relatively generous benefits for those able to meet more stringent medical requirements?

The Committee sees the separation of compulsory basic benefits from voluntary supplements as a partial solution to this dilemma. It proposes that compulsory basic benefits should be granted in full, without medical evidence or assessment by the administration of the Victorian State Employees Superannuation scheme.

Employers would be required to establish adequate health standards for entry to employment. Differing work requirements could mean differing health standards and health testing in some areas. As far as possible, however, the Committee would like to see a standard approach for each of the various medical services. The Committee recognises that this may create new difficulties for employment of disabled persons in the Victorian public service and consequently, special arrangements would be needed in this instance.

Voluntary supplements would be of two kinds, full cover and limited cover. The full cover supplement would provide retirement, death and disability benefits in the same manner as compulsory basic benefits. The death and disability elements however would be subject to medical assessment by or on behalf of scheme administration. If the full cover supplement is to commence at the same date as compulsory benefits (or within three months thereafter) the medical evidence on which the assessment is based would normally be the same as that upon which employment is based. If the supplement is to commence at any other time, or is to be increased, a fresh medical examination would be required.

The limited cover supplement would provide retirement benefits in the same manner as compulsory basic benefits. On death or disability, a reduced benefit which is proportionate to the period of supplementary contribution would be payable. The proportion would be zero at the commencement of the supplement. Because of this restriction of cover in the case of death and disability, member contributions for limited cover supplements would be at a lower rate than for full cover.

Limited cover supplements would be free of medical assessment and would be appropriate for members of two income families, members without dependents, members who have made other provision for death and/or disability and members preferring to emphasize retirement benefits in their voluntary programmes.

In the application of medical assessment procedures to those employees opting for full cover supplements, the Committee believes that two aspects of present SERB practice should be adopted. Section 28 of the State Employees Retirement Benefits Act 1979 gives the SERB Board five alternatives. Furthermore, any adverse effect on benefits reduces gradually to zero at age 65. Clearly this gives more equitable results at the assessment stage. It also gives members more satisfactory benefits at the older ages where deaths and disabilities most commonly occur.

By contrast, the State Superannuation scheme contributors are classified under Section 12(1) of the Superannuation Act 1958 as eligible for full benefits, limited benefits, or service benefits. This gives the Board a very limited range of categories to encompass the wide variety of health conditions sighted in practice. Furthermore, unless the decision is subsequently reviewed as a result of further medical evidence, the adverse impact of classification for other than full benefits persists, unaltered, to retiring age.

3.2.5 Retirement Age

As indicated in the Review Report, evidence presented to the Committee suggests that, in light of current trends and community aspirations, there should be some flexibility in the age at which scheme members can claim retirement benefits. The need for such a provision is seen in the increased number of Victorian public sector scheme members opting for retirement well before the traditional age of 65. Indeed, as the Review Report notes, the effective retirement age for the great bulk of the Victorian public sector is 60 years. The Committee also believes that the availability of early retirement benefits would reduce the pressure to claim disability benefits in the older age groups. Evidence available from Commonwealth experience would support this belief.

The Committee's view, therefore, is that the new scheme retirement benefits should be available, at the employee's option, at any time between the ages of 55 and 65 years. The Committee believes it is desirable, both from an employer and employee perspective, to allow individuals the option of early retirement.

As a consequence of this more flexible approach to retirement benefits, the Committee sees as desirable the removal of the present qualifying period of 30 years' membership for maximum benefits which applies in a number of larger schemes. The appropriate level of retirement benefit is considered to be that which has accrued on the standard scale up to the date of actual retirement. Such a change improves the equity of the scheme by making the retirement benefit proportional to the number of years for which contributions are paid. It also avoids a common cause for complaint, that in a number of schemes members must continue making substantial contributions after completing 30 years of membership, without any corresponding increase in retirement benefits.

SECTION 3.3 CONTRIBUTION AND BENEFIT STRUCTURE OF THE VICTORIAN STATE SUPERANNUATION SCHEME

3.3.1 Contributory Versus Non-contributory Schemes

The Committee's Review Report explained that, notwithstanding their obvious attractions to scheme members, especially those on lower pay levels, non-contributory schemes were the exception rather than the rule in Australian superannuation. This is in spite of the fact that for many years few employees have enjoyed any direct tax benefit as a result of their personal contributions. Judging by the prevalence of contributory schemes in both public and private sectors, the preference for them seems clear. The Committee's Review Report indicated that only 3.4% of the membership of Victorian public sector schemes is covered on a non-contributory basis.

The continuing predominance of contributory schemes appears to be due to a firm belief, by both employees and employers, that superannuation is a joint responsibility. For a given salary level, a joint contribution system can clearly produce a higher and more attractive set of benefits than either employer or employee alone could provide.

It has been suggested, in evidence to the Committee, that superannuation should be non-contributory for lower paid employees or for new entrants to the public service on the lower rungs of a salary structure. This argument recognises the priority of other needs for the individuals concerned and has a number of plausible features. Unfortunately, the proposal also raises a number of problems, the most significant of which are:

(a) deciding the pay threshold at which contributions should commence. If the threshold merely affected junior employees, it would not serve much purpose. If it was high, the additional cost to employers could be considerable;

(b) deciding whether all employees should have the benefit of non-contributory membership for their pay below the threshold level; and

(c) deciding what vesting should be available in the absence of the usual basic benefit of the member's contributions (plus interest).

A non-contributory scheme could be established for all levels of employees with a proportionately reduced level of benefits, but it is argued that such a scheme would not survive for long in that form: employee interests would be likely, before many years had passed, to press for restoration of full scale benefits but on a non-contributory basis. If this occurred, it would mean a significant increase in employer costs, unless there were to be some balancing reduction in wage and salary levels.

In the circumstances, the Committee feels that any new scheme should follow the present pattern and be on a contributory basis.

3.3.2 Form of Scheme

The Committee's preferred form of scheme for new members is made up of two elements:

(a) a compulsory structure of contributions and benefits applicable to all eligible employees; and

(b) a voluntary supplement giving members additional benefits if they make additional contributions. Voluntary benefits can either provide full scale cover on retirement, death or disability, or full scale cover on retirement and reduced scale benefits on death and disability. Furthermore, voluntary benefits can be at two levels with corresponding employee contributions.

3.3.3 The Basis for Contributions

On the whole, it would appear that most public sector employees would be comfortable with a modest compulsory contribution of 2.5% of salary. In the private sector, this rate is commonly adopted for the so-called 'blue collar' schemes and is already used in the public sector for the MMBW Provident

scheme, one of the Westgate schemes and the schemes for the Supreme and County Court Associates.

The Committee also proposes that, in addition to this compulsory component as a fixed percentage of scheme salary, members should be offered the choice of voluntary contributions on the following basis:

Half Scale	
Full Cover	2.0%
Limited Cover	1.7%
Full Scale	
Full Cover	4.0%
Limited Cover	3.4%

Thus, a member who opted for full scale and full cover superannuation would contribute a maximum of 6.5% of scheme salary.

With members' contributions as a fixed percentage of scheme salary - the precise definition of which would have to be established by scheme management - such contributions would be adjusted immediately any increase in scheme salary occurs. By the same token, benefits expressed in terms of scheme salary would be automatically adjusted on account of salary increases.

Permanent part-time employees, as defined by the respective employing authorities in agreement with scheme management, would pay pro rata contributions (both compulsory and voluntary) and would receive proportionate benefits.

Contributions and benefits would normally be reduced appropriately in the case of salary decrease. With the employer's consent, the member could be permitted to continue current contributions, in which case benefits would continue unaltered.

A further important feature of the proposed new scheme is that members would have the flexibility to take up or discontinue optional contributions as they see fit, depending upon their financial situation and other commitments. The decision to take up or discontinue optional contributions would, of course,

be subject to a number of practical management considerations. These would include:

(a) that the option applies to the whole of the member's scheme salary;

(b) that the opportunity to commence or to discontinue optional contributions would, for administrative convenience, be limited to one or two dates in each year;

(c) that appropriate medical evidence is provided when a full cover option is to commence; and

(d) that optional contributions cannot be withdrawn except on resignation.

3.3.4 Resignation Benefits

In the Review Report, the Committee demonstrated the wide variety of resignation provisions currently available for Victorian public sector superannuation scheme members. The Committee considered major public sector schemes to be unsatisfactory in this respect, either because they provide no interest on the member's contributions or return no part of the employer's contributions, or both.

3.3.4.1 Employee's Contribution

A number of schemes provide for a return of member contributions and interest on resignation, interest usually being fixed for this purpose at a low or arbitrary rate. This reflects the practical difficulties associated with allotting interest at the actual rate earned by the scheme's assets. Up-to-date accounts are rarely, if ever, available for benefit calculation purposes. Also, scheme accounts seldom reflect the real earnings - they usually ignore unrealised appreciation or depreciation of shares or property and fluctuation in the value of fixed interest investments. It is difficult to decide how to allow

for such items. If they are included the results fluctuate widely, which is difficult to explain to members.

A simple practical method, which has advantages in concept and explanation, record keeping, and actual calculation is as follows. Assume, as in the proposed scheme, the scheme member contributes 2.5% of salary. The resignation benefit would then be 2.5% of salary at the date of resignation for each year, and proportionate part of a year, for which the member has contributed. This can be regarded as giving the member a return of contributions in real terms, which may be slightly more or slightly less than the amount actually earned by the fund, depending on the progression of interest and salary increase rates.

The Committee believes this method should apply to members' basic compulsory contributions under the new scheme. The same basis should apply also to members' voluntary contributions for retirement benefits. Voluntary contributions for death and disablement benefits would not, however, be available for return on resignation because they are required to provide death and disability benefits for other members.

3.3.4.2 Employer's Contribution

Resignation benefits in respect of the employers' contributions present problems. Some present schemes provide no vesting of employer money if the employee takes the resignation benefit in cash. Others provide cash vesting on a graduated basis, often requiring completion of 5 or 10 years' membership before the vesting scale becomes operative. The position in this area is complicated by the proposals of the Federal Treasurer's Task Force on Superannuation for compulsory vesting and preservation. If implemented, these requirements could cut right across all previously established provisions.

The Committee believes that at a minimum the Victorian State Employees Superannuation scheme should provide a modest scale of cash vesting of employer money in the employee on resignation. It proposes that the resignation benefit based on the member's contributions should be increased by 25% provided five years' membership has been completed, plus a further 5%

for each year of membership thereafter, subject to a maximum increase of 100% after 20 years' membership. The Committee notes that payments under this heading on resignation will be subject to the Commonwealth Government's new tax on lump sums.

The alternatives available to a member on resignation would, therefore, be either:

(a) to receive a cash return based on the member's contributions as above, including the graduated supplement based on years of membership; or

(b) to be granted preserved or portable benefits where:

(i) the preserved benefit would be a proportion of normal scheme benefits (other than resignation) according to the ratio -

$$\frac{\text{Actual Membership}}{\text{Potential Membership to Age 60}}$$

This calculation would be performed separately for the compulsory and the voluntary elements of the total benefit. The preserved benefit would be indexed according to the Consumer Price Index (CPI) and would become available on death, total disability or at the earliest date at which early retirement benefits are available; and

(ii) the portable benefit would be in the form of a transfer value, being the cash equivalent of (i) above, as determined by the scheme's actuary, which would be payable to the trustees of another 'approved scheme' on the member's behalf.

The Committee believes that for the time being other 'approved schemes' under (ii) above should be restricted to those in the public sector. Restriction

is justified at the present time on the ground that portability is insufficiently developed in the private sector. The Committee recognises that this compromise will not assist employee mobility between public and private sectors and considers this restriction should be removed once the principle of portability becomes more fully established in the private sector.

Another question to be decided is whether the alternatives of preservation or portability should be made freely available, or whether they should be subject to minimum age or membership requirements. The Committee considers that such requirements are unnecessary.

3.3.5 Retirement, Death and Disability Benefits

The form and amount of these benefits depend primarily on whether the proposed new scheme is designed as a lump sum scheme or as a pension scheme. As indicated in the Review Report, the present large public sector schemes are mostly pension schemes, some of which have commutation facilities which make them similar to lump sum schemes. The advantages to public sector scheme members of pensions at retirement, as distinct from lump sums, are:

(a) the personal security offered by a continuing fully indexed pension; and

(b) the relatively generous provision for spouse and children.

On the other hand, pensions allow no flexibility to take account of varying circumstances. Up to the present time they have also been taxed much more severely than lump sums. Recent changes have been directed at reducing this differential, but the new Commonwealth tax rates of 15% on the first $50,000 and 30% on the excess over $50,000 apply only to benefits accrued after 1 July 1983 and not to that part of the benefit representing the return of the member's own contributions. These changes also removed the 'double taxation' which previously applied to purchased annuities. This will improve the availability of annuities for those who require them. It therefore seems

likely that lump sums will continue to enjoy more favourable tax treatment for many years.

The corresponding advantages of lump sum benefits at retirement are:

(a) the general popularity of this form of benefit. An indication of this in the public sector is given by the popularity of commutation options. Almost without exception scheme members commute for a lump sum the maximum amount available to them under the scheme rules;

(b) the flexibility to apply the benefit to obvious need, such as paying off debts, changing homes or cars, travelling etc. Ownership of home, car and household appliances, financed by a lump sum benefit, could in many cases make a more effective contribution to standards of living in retirement than an equivalent pension income;

(c) the facility, in some cases, to take optimum account of Social Security benefits. This is obviously beneficial in respect of lower amounts of benefit, whether attributable to a short period of scheme membership or to a low level of pay throughout membership; and

(d) that lump sums tend to be less costly than indexed pensions.

The main disadvantage of a lump sum retirement benefit is that, if it is to support the retiring employee adequately during future years, the amount available needs to be soundly invested. The Committee would see the necessity of the new scheme offering appropriate counselling services to resolve this and other problems.

Overall there is little doubt that most employees prefer lump sums.

The Committee's view, therefore, is that the proposed new scheme should be designed to provide a lump sum at retirement. This principle applies to both the compulsory and voluntary elements of the new scheme. Members can, of

course, at their own discretion, opt to purchase a pension from the private sector if they so desire by taking out an annuity. Such a pension could be payable during the member's lifetime or could depend also on the life of a spouse.

As mentioned previously, lump sum retirement benefits would be available on retirement at the member's option at any time between age 55 and 65.

As in the case of retirement benefits, lump sum death benefits tend to be more helpful to beneficiaries of deceased estates and less costly to finance than pensions, and the proposed new scheme therefore adheres to lump sum principles in this area. It needs, however, to be modified to account for the requirements of a dependent child who may be better served by an income benefit until, say, age 18, or until the completion of tertiary education, than by a capital sum which, by definition, cannot have regard to an uncertain period of need.

Because the permanence of a disability condition is often in doubt, the Committee does not support the payment of a lump sum in this instance. A more appropriate form of support is by way of an income benefit, payment of which can be regularly reviewed. This income benefit - pension - would be payable for life as long as the member continued to satisfy the disablement criteria and would be indexed according to changes in the CPI. The definition of disability would be more restricted than the 'own occupation' definition that currently applies. Totally and permanently disabled would be defined as being, "in the opinion of the Victorian State Employees Superannuation Board, totally and permanently unable to follow the member's own occupation or any occupation for which the member may be suited by training, education or experience or for which the member can be re-trained".

It would be feasible, and perhaps desirable, to provide for payment of a similar amount of pension for the maximum term of, say, 12 months for a member who is "totally unable to follow his/her own occupation". If the member is still absent from work at the end of that period, he/she would be medically assessed in terms of the wider definition.

Because disability is sometimes followed by early death, it is necessary to provide also for this contingency.

Lump sum death benefits would normally be payable to the member's estate, to be disposed of according to individual requirements as evidenced by the member's will. This form of benefit, being independent of marital status, is essentially non-discriminatory.

The Committee's Review Report demonstrated major differences between schemes on the salary base used to calculate retirement benefits and substantial differences between the Victorian public sector in general and the private sector. Most of the large schemes, including in particular the State Superannuation, Local Authorities, SERB and Hospitals schemes, use final salary or its equivalent as a basis for benefits. The Committee sees scope for abuse of such a basis in the form of artificial promotions within the last year or two of service. Nevertheless, it is reluctant to depart too far from a basis which has such wide current use (about 79% of current contributors).

RECOMMENDATION 3.3

THAT IN ESTABLISHING ELIGIBILITY, CONTRIBUTION AND BENEFIT PROVISIONS FOR THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME, THE GOVERNMENT RECOGNISES THE FOLLOWING PRINCIPLES:

(A) THE SCHEME IS TO HAVE A BASIC COMPULSORY COVER WITH SUPPLEMENTARY VOLUNTARY COMPONENTS;

(B) MEDICAL ASSESSMENT FOR MEMBERSHIP SHOULD BE RESTRICTED TO THE SUPPLEMENTARY COMPONENTS;

(C) THE BENEFITS AVAILABLE ON RETIREMENT, DEATH AND RESIGNATION SHOULD BE ON A LUMP SUM BASIS, WITH PENSIONS FOR DISABILITY RETIREMENTS AND DEPENDENCY PAYMENTS ON DEATH;

(D) THE RETIREMENT AGE IS TO BE BETWEEN 55 AND 65;

(E) RETIREMENT BENEFITS ARE TO BE BASED ON FINAL SALARY;

(F) CASH VESTING WILL BE GRANTED ON RESIGNATION ON A GRADUATED BASIS AFTER A MINIMUM SERVICE PERIOD;

(G) MEMBERS WILL BE OFFERED BOTH HALF OR FULL SCALE OPTIONAL SUPPLEMENTARY BENEFITS WITH LIMITED OR FULL COVER; AND

(H) CONTRIBUTIONS WILL MATCH THE BENEFITS PROPOSED, WITH A MAXIMUM CONTRIBUTION OF 6.5% OF MEMBER'S SCHEME SALARY.

3.3.6 Summary of Scheme Provisions

The main features of the compulsory structure of contributions and benefits applicable to all eligible employees for the proposed Victorian State Employees Superannuation scheme are summarised in Table 3.1.

TABLE 3.1

VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME
BASIC COMPULSORY SCHEME

MEMBER'S CONTRIBUTION 2.5% of salary

RETIREMENT AGE Any age from 55 to 65.

RETIREMENT BENEFIT A lump sum of 7.5% of final salary for each year of membership.

Example Age 25 at entry. Retires at age 60.
35 years membership at retirement.
Benefit .075 x 35 = 2.625 times final salary.

DEATH BENEFIT

(1) A lump sum equal to prospective retirement benefit at age 60 assuming salary continues unaltered.

Example Age 25 at entry. Dies at age 40.
35 years membership at age 60.
Benefit .075 x 35 = 2.625 times current salary.

(2) A pension to each child (ceasing at age 18 or at maximum of 25 if undertaking tertiary education) of 5% of salary - (maximum 4 children).

DISABILITY BENEFIT An annual income until recovery or death of 40% of current salary or 2.5% of current salary for each year of potential total membership to age 55 whichever is less. This benefit would be indexed according to changes in CPI.

On death, balance (if any) of amount by which lump sum death benefit at date of disablement exceeds total disablement pension payments already made.

RESIGNATION BENEFIT

(1)(a) Return of 2.5% of current annual salary for each year of membership and part thereof; and

(b) If the member has completed at least 5 years of membership, the amount in (a) would be increased by 25% plus 5% of that amount for each year of membership in excess of 5, subject to a maximum total increase of 100%.

OR

(2) Retirement benefit accrued for membership to date, payable at age 55 or earlier death or disablement. This benefit would be indexed according to change in CPI to date of retirement

OR

(3) Portability by payment of a transfer value to any other Public Sector scheme.

Under the basic compulsory scheme, members contribute 2.5% of scheme salary with a retirement age of between 55 and 65 years. The retirement benefit will be a lump sum of 7.5% of final salary for each year of scheme membership. Thus, for a member with 35 years of membership this is equivalent to 2.625 times final salary. Death benefits and resignation benefits are also in the form of a lump sum. In the case of the former, the lump sum payable is equal to the prospective retirement benefit at age 60, while, in the case of the latter, the basic resignation benefit is a return of 2.5% of current annual salary for each year of membership.

In addition to the compulsory element of the proposed new scheme, voluntary supplements are available giving members additional benefits if they make additional contributions. There would be two levels of voluntary benefits, each providing either full scale cover on retirement, death or disability, or full scale cover on retirement and reduced scale benefits on death and disability.

Thus, there would be four options available overall, details of which are presented in Tables 3.2 to 3.5. The main features of these four options, which are in addition to the benefits and contributions of the compulsory scheme, are:

(a) Option I - Half Scale - Full Cover (Table 3.2)

A member's contribution of 2.0% of salary, yielding a lump sum of 6.0% of final salary for each year of membership on retirement (with an equivalent death benefit). The disability benefit is an indexed annual income of 10.0% of current salary, with a base return of 1.7% of current annual salary for each year of membership, plus any vesting on resignation.

(b) Option II - Half Scale - Limited Cover (Table 3.3)

As for Option I, but with a reduced member's contribution of 1.7% of salary yielding an unchanged retirement benefit, but a reduced death and disability benefit of a lump sum equal to accrued retirement benefit.

(c) Option III - Full Scale - Full Cover (Table 3.4)

A member's contribution of 4.0% of salary, yielding a retirement benefit of 12.0% of final salary for each year of membership (and an equivalent death benefit). The disability benefit is an indexed annual income of 20.0% of current salary, with a base return of 3.4% of current annual salary for each year of membership, plus any vesting on resignation.

(d) Option IV - Full Scale - Limited Cover (Table 3.5)

As for Option III, but with a reduced member's contribution of 3.4% of salary yielding an unchanged retirement benefit, and a reduced death and disability benefit of a lump sum equal to accrued retirement benefit.

The hallmark of this new scheme is its flexibility. Members of the scheme are granted access to a range of options which they can tailor to their own needs and which they can opt into or out of as their needs dictate.

It must be stressed that the contribution and benefit levels detailed in the four voluntary options are in addition to those provided by the basic compulsory scheme. For example, a member who opts for Option III (full scale - full cover) will contribute, in total, 6.5% of salary for a lump sum retirement benefit equal to 19.5% of salary for each year of membership. Thus, if this member retires at age 60, after 35 years' membership of the scheme, the benefit received will be equal to 6.825 times final salary. The death benefit will be an equal amount, with a disability benefit of 60.0% of current salary (indexed to changes in the CPI) and a base resignation lump sum benefit of 5.9% of current annual salary for each year of membership.

TABLE 3.2

VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

OPTION I:
VOLUNTARY SUPPLEMENT - HALF SCALE - FULL COVER

MEMBER'S CONTRIBUTION 2% of salary

RETIREMENT AGE Any age from 55 to 65.

RETIREMENT BENEFIT A lump sum of 6% of final salary for each year of membership.

Example Age 25 at entry. Retires at Age 60.
35 years membership at retirement.
Benefit .06 x 35 = 2.1 times final salary.

DEATH BENEFIT A lump sum equal to prospective retirement benefit assuming salary continues unaltered to age 60.

Example Age 25 at entry.
35 years membership at age 60.
Dies at age 40.
Benefit .06 x 35 = 2.1 times current salary.

DISABILITY BENEFIT An annual income of 10% of current salary until recovery or death (indexed as for basic benefit).

On death balance if any of amount by which total lump sum death benefit at date of disablement exceeds total disablement pension payments already made.

RESIGNATION BENEFIT

(1)(a) Return of 1.7% of current annual salary for each year of membership and proportionate part thereof; and

(b) If the member has made voluntary contributions for at least 5 years the amount in 1(a) would be increased by 25% plus 5% of that amount for each year of voluntary contribution in excess of 5, subject to a maximum total increase of 100%.

OR

(2) Retirement benefit accrued for membership to date, payable at age 55 or earlier death or disablement. This benefit would be indexed according to change in CPI to date of retirement

OR

(3) Portability by payment of a transfer value to any other Public Sector scheme.

NOTE: ALL ITEMS ARE ADDITIONAL TO THOSE PROVIDED IN BASIC COMPULSORY SCHEME.

TABLE 3.3

VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

OPTION II:
VOLUNTARY SUPPLEMENT - HALF SCALE - LIMITED COVER

MEMBER'S CONTRIBUTION 1.7% of salary

RETIREMENT AGE Any age from 55 to 65.

RETIREMENT BENEFIT A lump sum of 6% of final salary for each year of membership.

Example Age 25 at entry. Retires at age 60.
35 years membership at retirement.
Benefit .06 x 35 = 2.1 times final salary.

DEATH BENEFIT A lump sum equal to accrued retirement benefit assuming salary continues unaltered to age 60.

Example Age 25 at entry. Dies at age 40.
Benefit .06 x 15 = .9 times current salary.

DISABILITY BENEFIT A lump sum equal to the death benefit.

RESIGNATION BENEFIT

(1)(a) Return of 1.7% of current annual salary for each year of membership and proportionate part thereof; and

(b) If the member has made voluntary contributions for at least 5 years the amount in 1(a) would be increased by 25% plus 5% of that amount for each year of voluntary contribution in excess of 5, subject to a maximum total increase of 100%.

OR

(2) Retirement benefit accrued for membership to date, payable at age 55 or earlier death or disablement. This benefit would be indexed according to change in CPI to date of retirement

OR

(3) Portability by payment of a transfer value to any other Public Sector scheme.

NOTE: ALL ITEMS ARE ADDITIONAL TO THOSE PROVIDED IN BASIC COMPULSORY SCHEME.

TABLE 3.4

VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

OPTION III:
VOLUNTARY SUPPLEMENT - FULL SCALE - FULL COVER

MEMBER'S CONTRIBUTION 4% of salary

RETIREMENT AGE Any age from 55 to 65.

RETIREMENT BENEFIT A lump sum of 12% of final salary for each year of membership.

Example Age 25 at entry. Retires at age 60.
35 years membership at retirement.
Benefit .120 x 35 = 4.2 times final salary.

DEATH BENEFIT A lump sum equal to prospective retirement benefit assuming salary continues unaltered to age 60.

Example Age 25 at entry. Dies at age 40.
35 years membership at age 60.
Benefit .120 x 35 = 4.2 times current salary.

DISABILITY BENEFIT An annual income of 20% of current salary until recovery or death (indexed as for basic benefit).

On death balance if any of amount by which total lump sum death benefit at date of disablement exceeds total disablement pension payments already made.

RESIGNATION BENEFIT

(1)(a) Return of 3.4% of current annual salary for each year of membership and proportionate part thereof; and

(b) If the member has made voluntary contributions for at least 5 years the amount in 1(a) would be increased by 25% plus 5% of that amount for each year of voluntary contribution in excess of 5, subject to a maximum total increase of 100%.

OR

(2) Retirement benefit accrued for membership to date, payable at age 55 or earlier death or disablement. This benefit would be indexed according to change in CPI to date of retirement

OR

(3) Portability by payment of a transfer value to any other Public Sector scheme.

NOTE: ALL ITEMS ARE ADDITIONAL TO THOSE PROVIDED IN BASIC COMPULSORY SCHEME.

TABLE 3.5

VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

OPTION IV:
VOLUNTARY SUPPLEMENT - FULL SCALE - LIMITED COVER

MEMBER'S CONTRIBUTION 3.4% of salary

RETIREMENT AGE Any age from 55 to 65.

RETIREMENT BENEFIT A lump sum of 12% of final salary for each year of membership.

Example Age 25 at entry. Retires at age 60.
35 years membership at retirement.
Benefit .120 x 35 = 4.2 times final salary.

DEATH BENEFIT A lump sum equal to accrued retirement benefit assuming salary continues unaltered to age 60.

Example Age 25 at entry. Dies at age 40.
Benefit .120 x 15 = 1.8 times current salary.

DISABILITY BENEFIT A lump sum equal to the death benefit.

RESIGNATION BENEFIT

(1)(a) Return of 3.4% of current salary for each year of membership and proportionate part thereof; and

(b) If the member has made voluntary contributions for at least 5 years the amount in 1(a) would be increased by 25% plus 5% of that amount for each year of voluntary contribution in excess of 5, subject to a maximum total increase of 100%.

OR

(2) Retirement benefit accrued for membership to date, payable at age 55 or earlier death or disablement. This benefit would be indexed according to change in CPI to date of retirement

OR

(3) Portability by payment of a transfer value to any other Public Sector scheme.

NOTE: ALL ITEMS ARE ADDITIONAL TO THOSE PROVIDED IN BASIC COMPULSORY SCHEME.

3.3.7 Costs to Employers

Subject to reservations made elsewhere regarding cost recognition and funding, the Committee proposes that the employer's contributions to the new scheme be made either on a funded or pay-as-you-go (PAYG) basis. The actual level of contribution in the funded case cannot be predicted with accuracy because the proposed scheme breaks new ground in a number of ways. The impact of a number of new features is uncertain. These features raise the following questions:

(a) How will altered health requirements affect deaths and disabilities?

(b) What proportion of people take up voluntary benefits, which benefits do they choose and at what ages do they do so?

(c) How does the altered definition of disability and level of disability benefit influence claims for that benefit?

(d) How do the revised resignation benefits influence the level of resignations?

(e) What proportion of resigning members opt for cash, preservation or portability of benefits?

Estimates made for the Committee suggest that if the benefits are fully funded, the employer's contribution for the average new member's compulsory benefit would be likely to be about twice the member's contribution.

For voluntary benefits the employer's contribution for the average new member would be likely to be about 1.25 times the member's contributions. The difference in level between compulsory and voluntary employer contributions is mainly attributable to the proportionately higher level of disability benefits attaching to basic compulsory benefits. A few years' practical experience of the operation of the scheme would be needed to confirm the validity of these estimates.

3.3.8 Benefit Examples

The following pages give further examples of the retirement, death, disability and resignation benefits under the various options. The calculation process is indicated in each case.

BENEFIT EXAMPLE NO. 1

Member Detail

Joins scheme at age	33
Selects voluntary benefit	Nil
Contributes	$2\frac{1}{2}\%$ + - % = $2\frac{1}{2}\%$ of salary

Specimen Benefits

Expressed in terms of annual salary at termination of membership

		Basic	Voluntary	Total
Retires at age 59		1.95 times	- times	1.95 times
.075 (59-33)				
Dies at age 43		2.025 times	- times	2.025 times
.075 (60-33)				
Young children 2		10% p.a.	-	10% p.a.
.05 x 2				
Disabled at age 48		40% p.a.	- % p.a.	40% p.a.
Dies later at age (51)	say	.7 times	- times	.7 times
Resigns at age 45				
Selects Cash		.48 times	- times	.48 times
.025x(45-33)x(1 + .25 + .05 x 7)				
OR				
Selects Preserved Benefits		.9 times	- times	.9 times
.075x(45-33)				

BENEFIT EXAMPLE NO. 2

Member Detail

Joins scheme at age	47
Selects voluntary benefit	Option I - Half Scale, Full Cover
Contributes	$2\frac{1}{2}\%$ + 2% = $4\frac{1}{2}\%$ of salary

Specimen Benefits

Expressed in terms of annual salary at termination of membership

	Basic	Voluntary	Total
Retires at age 61	1.05 times	.84 times	1.89 times
.075(61-47)			
.06(61-47)			
Dies at age 52	.975 times	.780 times	1.755 times
.075(60-47)			
.06(60-47)			
Young children	--% p.a.	-	--% p.a.
Disabled at age 53	20% p.a.	10% p.a.	30% p.a.
.025(55-47)			
Dies later at age (62)	-- times	-- times	-- times
Resigns at age 50			
Selects Cash	.075 times	.051 times	.126 times
.025 x(50-47)			
.017 x(50-47)			
OR			
Selects Preserved Benefits	.225 times	.180 times	.405 times
.075(50-47)			
.06(50-47)			

BENEFIT EXAMPLE NO.3

Member Detail

Joins scheme at age	28
Selects voluntary benefit	Option II - Half Scale, Limited Cover
Contributes	$2\frac{1}{2}\%$ + 1.7% = 4.2% of salary

Specimen Benefits

Expressed in terms of annual salary at termination of membership

			Basic	Voluntary	Total
Retires at age	65		2.775 times	2.220 times	4.995 times
.075(65-28)					
.06(65-28)					
Dies at age	49		2.40 times	1.26 times	3.66 times
.075(60-28)					
.06(49-28)					
Young children	3		15% p.a.	-	15% p.a.
.05x3					
Disabled at age	44		40% p.a.	- % p.a.	40% p.a. plus
.06(44-28)				.96 times	.96 times
Dies later at age	48	say	.6 times	- times	.6 times
Resigns at age	39				
Selects Cash			.426 times	.290 times	.716 times
.025x(39-28)x(1+.25+.05x6)					
.017(39-28)x(1+.25+.05x6)					
OR					
Selects Preserved Benefits			.825 times	.660 times	1.485 times
.075(39-28)					
.06(39-28)					

BENEFIT EXAMPLE NO.4

Member Detail

Joins scheme at age	22
Selects voluntary benefit	Option III - Full Scale, Full Cover
Contributes	$2\frac{1}{2}\%$ + 4% = $6\frac{1}{2}\%$ of salary

Specimen Benefits

Expressed in terms of annual salary at termination of membership

			Basic	Voluntary	Total
Retires at age	55		2.475 times	3.960 times	6.435 times
.075(55-22)					
.120(55-22)					
Dies at age	39		2.85 times	4.56 times	7.41 times
.075(60-22)					
.120(60-22)					
Young children	1		5% p.a.	-	5% p.a.
.05x1					
Disabled at age	50		40% p.a.	20% p.a.	60% p.a.
Dies later at age	53	say	1.5 times	3.9 times	5.4 times
Resigns at age	44				
Selects Cash			1.1 times	1.496 times	2.596 times
.025(44-22)x2					
.034(44-22)x2					
OR					
Selects Preserved Benefits			1.65 times	2.64 times	4.29 times
.075x(44-22)					
.12x(44-22)					

BENEFIT EXAMPLE NO.5

Member Detail

Joins scheme at age	40
Selects voluntary benefit	Option IV - Full Scale, Limited Cover
Contributes	2½% + 3.4% = 5.9% of salary

Specimen Benefits

Expressed in terms of annual salary at termination of membership

	Basic	Voluntary	Total
Retires at age 62	1.65 times	2.64 times	4.29 times
.075(62-40)			
.120(62-40)			
Dies at age 48	1.5 times	.96 times	2.46 times
.075(60-40)			
.120(48-40)			
Young children --	--% p.a.	-	--% p.a.
Disabled at age 52	37½% p.a.	- % p.a.	37½% p.a. plus
.025(55-40)			
.12(52-40)		1.44 times	1.44 times
Dies later at age 60	-- times	- times	-- times
Resigns at age 45			
Selects Cash	.156 times	.213 times	.369 times
.025x(45-40)x1.25			
.034x(45-40)1.25			
OR			
Selects Preserved Benefits	.375 times	.600 times	.975 times
.075x(45-40)			
.120x(45-40)			

NOTES

(1) Submission, Australian Federated Union of Locomotive Enginemen and Australian Railways Union, 17 August 1984, p.5.

(2) Ibid, p.11.

CHAPTER 4

THE NEW SCHEME - COST, TRANSITION ARRANGEMENTS AND OPTIONS FOR EXISTING SCHEME MEMBERS

SECTION 4.1 MEMBERSHIP AND MANAGEMENT OPTIONS

4.1.1 General Principles

In Chapter 3 the Committee outlined and recommended the introduction of a new Victorian State Employees Superannuation Scheme (VICSESS). This scheme is intended to apply to all new permanent employees in the Victorian public sector from 1 January 1986.

Given the establishment of VICSESS, the question arises as to what action should be taken in respect of existing public sector schemes and their members. Most schemes are likely to continue in operation, at least in the short term. In view of the diversity that exists among the various schemes, the Committee sees it as inevitable that each scheme must be considered separately. There is, however, one preliminary step which should be taken for all schemes, and that is to look at whether any reforms are necessary in the light of the Committee's findings. These need to be announced promptly (see Section 4.1.2).

Otherwise, the schemes should be considered in two main groups:

(a) the unfunded and partly-funded schemes, such as State Superannuation, Local Authorities, Hospitals, SERB, Superannuation Lump Sum and other smaller schemes as listed in Table 4.2 of the Review Report; and

(b) the fully-funded and largely-funded schemes, such as Gas & Fuel Corporation, SEC, MMBW and other smaller schemes as listed in Table 4.1 of the Review Report.

4.1.1.1 Unfunded and Partly-funded Schemes

There is a significant constraint in considering the approach to existing members of these schemes. Most are pension schemes or have substantial pension elements. Any transfer of members to the new scheme is therefore likely to be substituting lump sum retirement and death benefits for pensions now expected. The transfer of full entitlements is therefore unlikely to be feasible for the State, because it would substitute lump sums for benefits which would otherwise be payable over many years. Such substitution is likely to increase the employer's PAYG obligations, perhaps dramatically in the short term, notwithstanding the longer term possibility for decreases. As a result the options which can realistically be offered to present members of PAYG schemes are more restricted than in the case of funded schemes.

As indicated earlier, each scheme has to be looked at separately in this respect and options developed from an individual actuarial report prepared for this purpose. However, the Committee believes it should be possible in most cases to offer existing members the choice between:

(a) continuing in the present scheme (as amended); or

(b) continuing in the present scheme (as amended) for benefits and contributions based on present salaries and transfering to the new scheme for benefits attributable to future salary increases.

Wider transfer options may be feasible in some instances, depending on the result of the relevant actuary's report. Further comment on this aspect as it relates to the State Superannuation scheme is made in Section 4.1.6.

4.1.1.2 Fully-funded and Largely Funded Schemes

Members of these schemes should be given the choice between:

(a) continuing the present scheme (as amended); or

(b) transferring to the new scheme.

Members who decide to transfer would be granted new scheme benefits on the standard basis for their future membership and entitlements for past membership would be translated into equivalent entitlements under the new scheme. The process involved is discussed in Section 4.1.5 below.

Membership of the compulsory basic scheme would be automatic for all transferring members, that is there would be no health requirement. Membership for the optional supplements would be based on the following considerations:

(a) a member who currently has unrestricted benefits and applies for transfer within six months after the first opportunity would be accepted automatically for full scale benefits; and

(b) in other cases, any optional benefit would be subject to provision of up-to-date evidence of good health.

4.1.2 Reforms to Existing Schemes

Whether any immediate reform of benefits or contributions is desirable or necessary for an existing scheme depends on the provisions of each scheme. For example, the Committee draws attention to:

(a) elimination of discriminatory provisions in eligibility, contributions and benefits;

(b) modernisation of contribution systems;

(c) re-definition of total disability;

(d) amending of disability benefit provisions in conjunction with the provision for optional early retirement at age 55; and

(e) closer monitoring of disability retirees.

The essential point is that any amendments to existing scheme provisions, both those to which the Committee has drawn attention and those which scheme management has been seeking to implement, should (given the Treasurer's approval) be in place, or at least announced, before scheme members exercise any options to continue in the present scheme or transfer in whole or in part to VICSESS.

4.1.3 Membership Choice

The decision whether to seek benefits under VICSESS will be influenced by a number of factors, including the reforms recommended in the previous sub-section, and will vary from scheme to scheme. Scheme members will have differing viewpoints depending on whether they are married or single, young or old, short service or long service, white collar or blue collar and on such other items as current job prospects and state of health. Members will be concerned in particular with:

(a) basic form of benefits available (i.e. lump sum or pension);

(b) contribution structure;

(c) form and level of resignation benefits; and

(d) level of retirement, death and disability benefits.

A brief appraisal of the impact of these factors in the present major schemes is given in Section 4.2, where comparisons are made between current scheme provisions and those available under the proposed scheme.

4.1.4 Administrative Aspects

The Committee appreciates that granting options, particularly those which require recording both old scheme and new scheme entitlements and contributions for each employee, adds to the burden and cost of scheme administration. This is considered unavoidable in the short term if the

substantial benefit of having one standard scheme for the whole of the Victorian public sector is to be achieved in the longer term.

Where possible the object would clearly be to terminate the original scheme at the earliest opportunity in order to simplify record keeping, accounting, reporting, etc. At the same time, the Committee accepts that an old scheme must be maintained while it has active members.

4.1.5 Transfer Arrangements

Translating entitlements to date under an existing scheme into equivalent entitlements under VICSESS is not completely straightforward. The considerations are the same as in the case of portability on change of employment - namely, that the object is to give full recognition for scheme membership to date. It is not, however, normally possible for the old scheme benefit amounts and conditions to be imported into the new scheme because of the significant differences between schemes. Ten years of past membership in scheme A may be equivalent to twelve years in scheme B or seven years in scheme C.

The practical solution is to ask the actuary to the existing scheme to provide a general formula for determining the transfer value of a member's entitlements for scheme membership to date. The transfer value will be the cash equivalent of a member's accrued benefits to date. Similarly, the actuary to the new scheme would be required to establish a general formula for converting transfer values to past membership credits in the new scheme. Calculations could then be made according to the two formulae for each transferring member. Legislative and/or other documentary support would be required for this process where it is not contemplated under present scheme conditions.

Transfers would also need to be supported by transfer of cash or securities from the existing to the new scheme. The amount for each member would be the calculated transfer value for fully-funded and largely funded schemes. For unfunded and partly-funded schemes the amount would be determined

according to a basis agreed between the Boards of the old and the new schemes.

RECOMMENDATION 4.1

THAT THE TREASURER DEVELOP GUIDELINES FOR ESTABLISHING TRANSFER VALUES FOR EXISTING SCHEME MEMBERS MOVING TO THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME.

4.1.6 Options for Members and Costs to Government in Introducing VICSESS for Members of the State Superannuation Scheme

Because of the financial effects for PAYG schemes mentioned in Section 4.1.1.1, the Committee sought detailed information regarding the cost to the State of possible options for transferring existing members of the State Superannuation scheme to VICSESS. Consultants William M. Mercer - Campbell and Cook Pty. Ltd. were approached for this purpose. They were requested to make various cost projections based on the same basic assumptions used in Mr. Cook's standard projection which was reported in Section 4.2.2.4 and Appendix G of the Review Report. The standard projection was considered by the Committee as the most suitable for comparative purposes.

The standard projection indicates that the cost of the State Superannuation scheme to the State Government will increase such that in 2030 it would represent 15.4% of contributors' salaries, or about $1,000 million in 1981 dollars. This compares with an actual cost of $140 million in 1981, which represented about 9.0% of contributors' salaries. The emerging costs predicted by the standard model are shown in the first two columns of Tables 4.2, 4.3 and 4.4. These figures are compared with the projected costs of the transfer options considered by the Committee.

It is important when interpreting the figures to remember that, although the absolute amounts are dependent on a great many assumptions, which may or may not be realised in future, the progression of the items from time to time

and their relativity to projections of the present scheme on the same set of assumptions should be fairly reliable.

In considering the projection figures it is also important to remember that retirement and death benefit payouts under VICSESS in any future year are final settlements, whereas benefit payments under the present scheme represent a year's payment of pensions which, in most cases, will continue for some years. This factor unavoidably brings forward the cost to the State of the new scheme. It is a natural consequence of PAYG financing of lump sums instead of pensions.

4.1.6.1 The Projections

Table 4.1 provides an overview of the membership assumptions upon which the various projections have been based.

TABLE 4.1

MEMBERSHIP ASSUMPTIONS FOR PROJECTIONS

Projection	Membership of State Superannuation Scheme	Membership of VICSESS
One	All present contributors continue unaltered	All new contributors join VICSESS
Two	Present contributors continue present contributions and benefits. No future change for salary increases	VICSESS for all salary increases for present contributors and all benefits for new contributors
Three	Benefits for past service of present contributors to continue. Such benefits would be updated with future salary increases	VICSESS benefits for future service of present contributors and all benefits for new contributors

4.1.6.2 Projection One

Existing contributors were assumed to continue unaltered in the present State Superannuation scheme. All new members were assumed to join VICSESS for either basic benefit or full scale benefits. Table 4.2 shows the results as a percentage of contributors' salaries from time to time and in 1981 dollars.

TABLE 4.2

FUTURE COSTS OF THE STATE SUPERANNUATION SCHEME UNDER PROJECTION ONE
(% of Contributors' Salaries)
($m of 1981 dollars)

Calendar Year	Scheme Unchanged for Current and Future Contributors		Scheme Unchanged for Present Contributors. VICSESS for New Contributors			
			Minimum Compulsory Scale		Maximum Scale	
	%	$m	%	$m	%	$m
1981	9.0	140	9.0	140	9.0	140
1990	11.0	232	11.0	232	11.6	245
2000	11.5	325	11.1	313	12.8	361
2010	12.7	475	11.3	423	14.1	528
2020	14.8	734	11.3	560	16.6	823
2030	15.4	1000	8.5	552	14.5	942

The extent to which new contributors will take up optional benefits is of course unknown. If the various assumptions regarding deaths, disablements, membership growth etc., are exactly realised, actual future costs should lie between the figures for minimum and maximum scale. This suggests that the future cost to the Consolidated Fund, under Projection One, would be marginally higher in the short term than the expected future cost of the present scheme. It is also likely that longer term costs would be lower than

now expected. On these results the Committee believes that the State could safely adopt VICSESS for all future contributors.

4.1.6.3 Projection Two

Existing contributors were assumed to continue their present benefits and contributions on the present dollar basis. Benefits for their future salary increases would be on the VICSESS basis, as would all benefits for future contributors. This process provides contributors of all ages with a smooth progression of benefits from the present scheme to VICSESS.

Table 4.3 shows the results for both basic compulsory and maximum scale benefits. The additional benefits for each increase in salary would fully recognise past membership. This feature can be illustrated for a contributor who joined the present scheme at age 30, transfers to VICSESS for salary increases at age 50, and retires at age 60. Assuming a salary increase of $1,000 per annum and basic compulsory benefits for the future, contributions for the increase would be $25 per annum (instead of $90 under the present scheme) and the additional lump sum retirement benefit would be based on 30 years total membership, i.e., 30 x .075 x 1000 = $2250 (instead of a pension of .6667 x 1000 = $667 per annum). If the maximum optional benefits are chosen, the contribution would be $65 per annum and the additional lump sum retirement benefit would be 30 x .195 x 1000 = $5850.

Assuming a salary at age 50 of $20,000 and a salary on retirement at age 60 of $35,000, the retirement benefit for the specimen contributor would be made up of two parts as follows:

(a) a pension for total membership to retirement based on salary at date of change equal to (.6667 x $20,000) or $13,334 per annum. This pension would be fully indexed. Up to 30% of the pension could be commuted for a lump sum; and

(b) a lump sum for total membership to retirement based on salary increases since date of change which

(i) on the compulsory basis (i.e., 2½% contribution on increases) would be equal to 30 x .075 ($35,000 - $20,000) or $33,750; or

(ii) on the maximum basis (i.e., 6½% contribution on increases) would be equal to 30 x .195 ($35,000 - $20,000) or $87,750.

TABLE 4.3

FUTURE COSTS OF THE STATE SUPERANNUATION SCHEME
UNDER PROJECTION TWO
(% of Contributors' Salaries)
($m of 1981 dollars)

Calendar Year	Scheme Unchanged for Current and Future Contributors		Scheme Unchanged for All Present Salaries. VICSESS for All Salary Increases and New Contributors			
			Minimum Compulsory Scale		Maximum Scale	
	%	$m	%	$m	%	$m
1981	9.0	140	9.0	140	9.0	140
1990	11.0	232	8.9	188	12.0	253
2000	11.5	325	7.0	198	11.9	336
2010	12.7	475	5.6	209	11.5	430
2020	14.8	734	5.5	273	11.5	570
2030	15.4	1000	5.5	357	11.4	740

The extent to which existing contributors would be interested in transferring to the new scheme for future salary increases is uncertain, as is the proportion who would choose minimum, maximum or intermediate benefits. It is clear, however, that present contributors exercising the option to move to VICSESS for future salary increases would not impose any significant burden on the Consolidated Fund in the short term, and would moderate that burden in the longer term.

4.1.6.4 Projection Three

Existing members were assumed to remain in the present State Superannuation scheme for the benefits which have accrued to date. Existing members were also assumed to join VICSESS for all benefits relating to their future service, as would all future new contributors.

As an example, the member illustrated in Projection Two, again at age 50, has now completed 20 years' membership of the State Superannuation scheme. His accrued benefit for membership to date, assuming retirement at age 60, would be 20/30ths of the full scale benefit. His retirement benefit would be made up of the following two parts:

(a) a pension for years of membership up to the date of change, based on final salary and equal to 20/30 x .6667 x $35,000 or $15,556 p.a. The pension would be fully indexed and up to 30% of the pension could be commuted for a lump sum; and

(b) a lump sum for years of membership after date of change, based on final salary which

(i) on the compulsory basis (i.e., 2½% contribution on whole salary) would be equal to 10 x .075 x $35,000 or $26,250; or

(ii) on the maximum basis (i.e., 6½% contribution on whole salary) would be equal to 10 x .195 x $35,000 or $68,250.

Table 4.4 shows the overall results for basic compulsory and maximum scale benefits.

TABLE 4.4

FUTURE COSTS OF THE STATE SUPERANNUATION SCHEME
UNDER PROJECTION THREE
(% of Contributors' Salaries)
($m of 1981 dollars)

Calendar Year	Scheme Unchanged for Current and Future Contributors		Scheme Unchanged for Accrued Benefits for Present Contributors. VICSESS for Future Accruals and New Contributors.			
			Minimum Compulsory Scale		Maximum Scale	
	%	$m	%	$m	%	$m
1981	9.0	140	9.0	140	9.0	140
1990	11.0	232	10.7	225	13.4	283
2000	11.5	325	9.2	260	13.7	387
2010	12.7	475	7.5	281	13.5	503
2020	14.8	734	6.1	302	12.4	615
2030	15.4	1000	5.8	376	11.9	772

Giving present contributors the option to contribute to VICSESS in future for their whole salaries, as distinct from merely their salary increases as in Projection Two, obviously gives rise to the probability of a significant increase in cost to the Consolidated Fund in the early years but a clear saving thereafter. The option costed in Projection Three would, therefore, only appear feasible if the Government is willing and able to finance the predicted cost increases.

It should be emphasised that Projections Two and Three assume that all present contributors move to the new bases to the extent indicated, i.e., the projection indicates future costs as if the change was compulsory. Under an option to be exercised by the contributors individually, the change in cost will apply only to a proportion of contributors. The actual impacts of the alternatives described will thus be less, perhaps materially less, than the projections indicate.

SECTION 4.2 COMPARISONS OF SCHEME PROVISIONS

4.2.1 The Basis of Evaluation

The problem of scheme comparison is compounded in Victoria by the number and diversity of public sector superannuation schemes and the absence of any agreed standard for inter-scheme comparisons. Attempts were made in the Review Report, for example, to assess the relative benefits of the different schemes by expressing the value to the member of the retirement benefits as a multiple of the member's salary at the date of retirement. While such a procedure is clearly simplifying, it concentrates attention on the most significant and valuable element in the benefit package. A similar procedure is followed here in making comparisons between the eleven largest public sector schemes and the proposed new Victorian State Employees Superannuation Scheme.

4.2.2 Assumptions

The assumptions adopted in the following scheme comparisons are similar to those in the Review Report (pp.76-78) for the inter-scheme comparison of retirement benefits. These assumptions are:

(a) retirement under the scheme is at age 60;

(b) members join at age 20, 25 or 30 years and over;

(c) long term interest earning for the scheme is 9% p.a.;

(d) salary increases are 8% p.a.;

(e) the typical member is a married male with a wife five years younger;

(f) investment earning of the fund is 3% greater than the CPI; and

(g) the member commutes the maximum possible pension for cash.

Given these assumptions, it is possible to demonstrate the present retirement benefits of the eleven largest schemes in terms which are directly comparable with those available under the Victorian State Employees Superannuation scheme. This is done in Tables 4.5 to 4.17. The format of each table is identical (with one or two minor exceptions). For the three entry ages, 20, 25 and 30 years and over, we show - as a percentage of final salary - the value at retirement of the retirement benefits accruing per year of membership as:

(a) a lump sum when the member commutes the maximum available;

(b) as pension; and

(c) as pension to a surviving spouse.

Thus, as an example, in the case of a male entering the State Superannuation scheme at 20 years of age (retiring at 60 years), the benefits accruing per year of membership as a percentage of final salary are:

(a) 5.2% of final salary as a lump sum;

(b) 15.0% of final salary as the value of the member's pension; and

(c) 6.6% of final salary as the value of the spouse benefit;

making a total of 26.8% of final salary per year of membership.

A feature of VICSESS is the uniform retirement benefit credit for each year of membership. This has been specified to facilitate a more flexible approach to retirement, which is to be offered at any time between age 55 and 65. A uniform credit also applies to a number of the present major schemes, but only for membership up to 30 years. Beyond that period, there may be no credit or alternatively a reduced credit. This difference must be taken into account in order to make fair comparisons. The method adopted in preparing the following graphs is to spread the total retirement benefit evenly over the whole period of membership.

Except where otherwise shown, the new scheme has been illustrated on the basis of compulsory plus full scale voluntary benefits (i.e., with a member contribution of 6.5% of salary).

4.2.3 Scheme Comparisons

4.2.3.1 State Superannuation Scheme

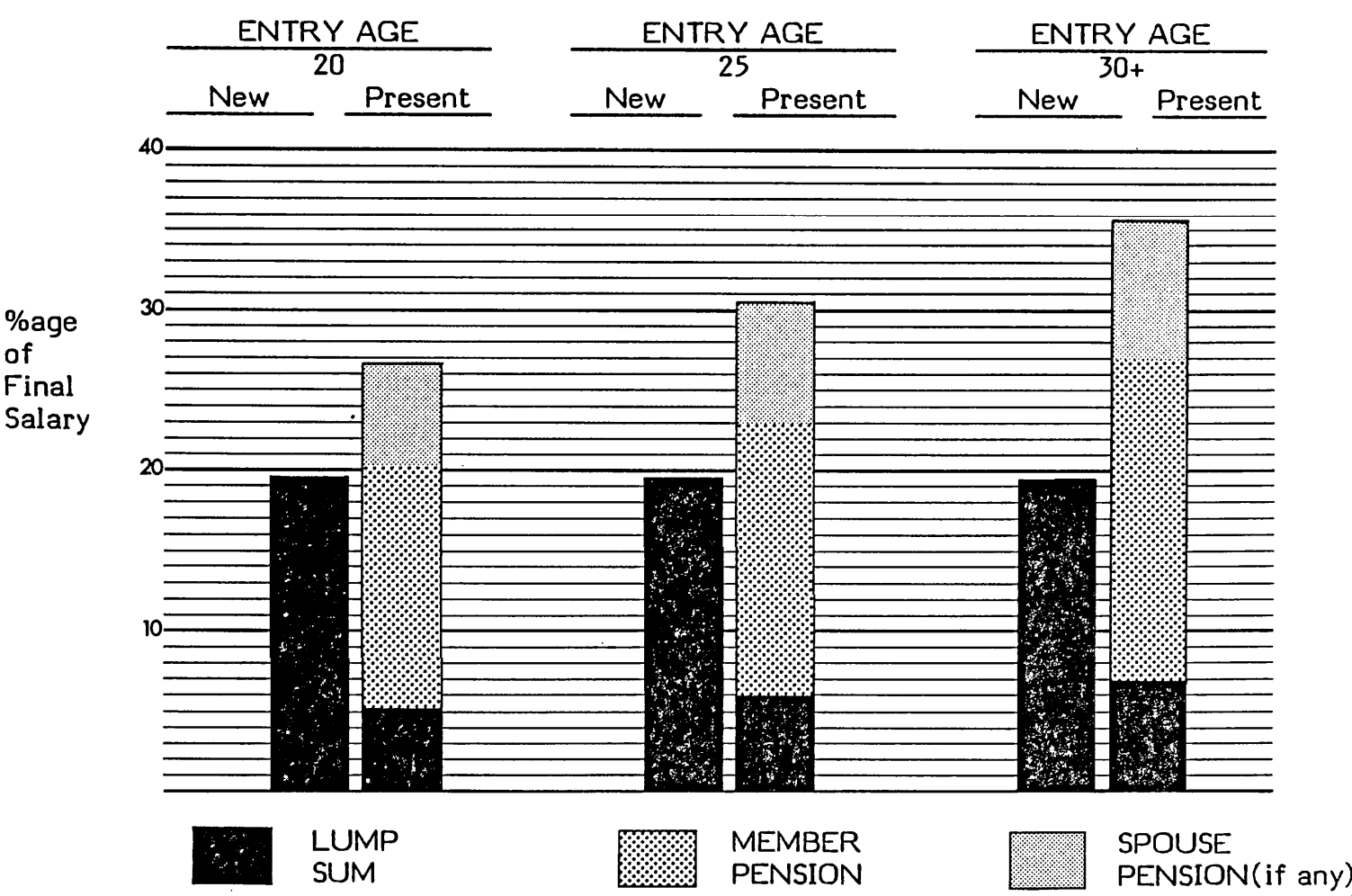
A summary comparison of the relevant retirement benefits of the present State Superannuation scheme and VICSESS is presented in Table 4.5. This is a PAYG scheme and the transfer of existing members is likely to be restricted accordingly (see 4.1.1.1).

TABLE 4.5

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH STATE SUPERANNUATION SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	3% to 9% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions.
Form of Retirement Benefit	Lump sum.	Pension plus spouse pension. 30% of member's pension can be commuted.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



Overall, there is no doubt that the retirement benefits under the new scheme, with a final salary percentage of 19.5 (which is common to all comparisons), are less in value than the existing benefits of the State Superannuation scheme, irrespective of membership duration. The difference, however, is greatly reduced if there is no spouse.

Members of the existing scheme are likely to be attracted to VICSESS by the format of retirement and death benefits - a cash lump sum of 100% compared with 30% under the State Superannuation scheme. Younger members may prefer the availability of cash vesting on resignation and the flexibility of being able to choose a higher or lower rate of contribution - with the State Superannuation scheme requiring up to a maximum of 9% of salary contrasted with a 2.5% compulsory, and up to a 4% voluntary, component under the new scheme.

A further point to be emphasised concerns the cash resignation benefits under the present scheme and the proposed new scheme. These benefits are of particular importance given the patterns of job separation that exist for the Victorian public service. As noted in the Review Report, of approximately 18,600 persons who separated from the Victorian public service sector between January 1978 and November 1983, 56% resigned with less than five years' service and 70% with less than ten years. An estimated 48% of those who separated were less than 30 years old.

The resignation benefit offered by VICSESS is superior to the present resignation benefit under the State Superannuation scheme in two ways. Firstly, instead of merely returning the amount of contributions paid, the new scheme effectively upgrades each contribution paid according to the increase in the member's salary since that contribution was paid. Secondly, instead of giving no benefit from the employer, VICSESS gives a graduated vesting of a proportion of the member's upgraded contributions, depending on the period of membership. This increases from a minimum of 25% after five years' membership to a maximum of 100% after 20 years' membership. For transferring members, membership would be determined from the date of joining the new scheme.

Older members of the State Superannuation scheme may, in some cases, prefer the security offered by the present pension and spouse pension arrangements. Equally, members (even in the older age groups) may want to reduce their present compulsory contribution levels by transferring to the new scheme to the maximum permissible extent.

Another group which could be attracted to VICSESS to the maximum extent permissible are those currently classified with less than full benefits. In the State Superannuation scheme around 30% of contributors are classified with less than full benefits. VICSESS not only offers a basic cover with no medical assessment except that required for employment; for voluntary contributors medical classification is on a fairer basis with five levels of classification. Over time, a contributor's classification can move up to full cover. In the State Superannuation scheme if a contributor is classified as limited, this classification remains until retirement unless the member is re-classified following medical examination.

4.2.3.2 Local Authorities, Hospitals and SERB Schemes

Summary comparisons of the final salary equivalent benefits of the present Local Authorities, Hospitals and SERB schemes and VICSESS are presented in Tables 4.6 to 4.8. As the effective retirement benefit for each of these schemes is the same they can be assessed together. All are partly-funded and transfer options may be restricted accordingly.

Effective retirement benefits under each of these schemes, for persons entering at age 20, are over two percentage points less than those accruing under the new scheme. For persons with an entry age of 25 years, the aggregate benefits - including spouse pension - are virtually identical. For persons entering at age 30 years or more, the benefits under the new scheme are marginally lower.

TABLE 4.6

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH LOCAL AUTHORITIES SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	Normally 6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Actuarial reserve for lump sum benefits plus return of employee contributions for pension benefits.
Form of Retirement Benefit	Lump sum.	Part lump sum, part pension plus spouse pension. Limited commutation.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)

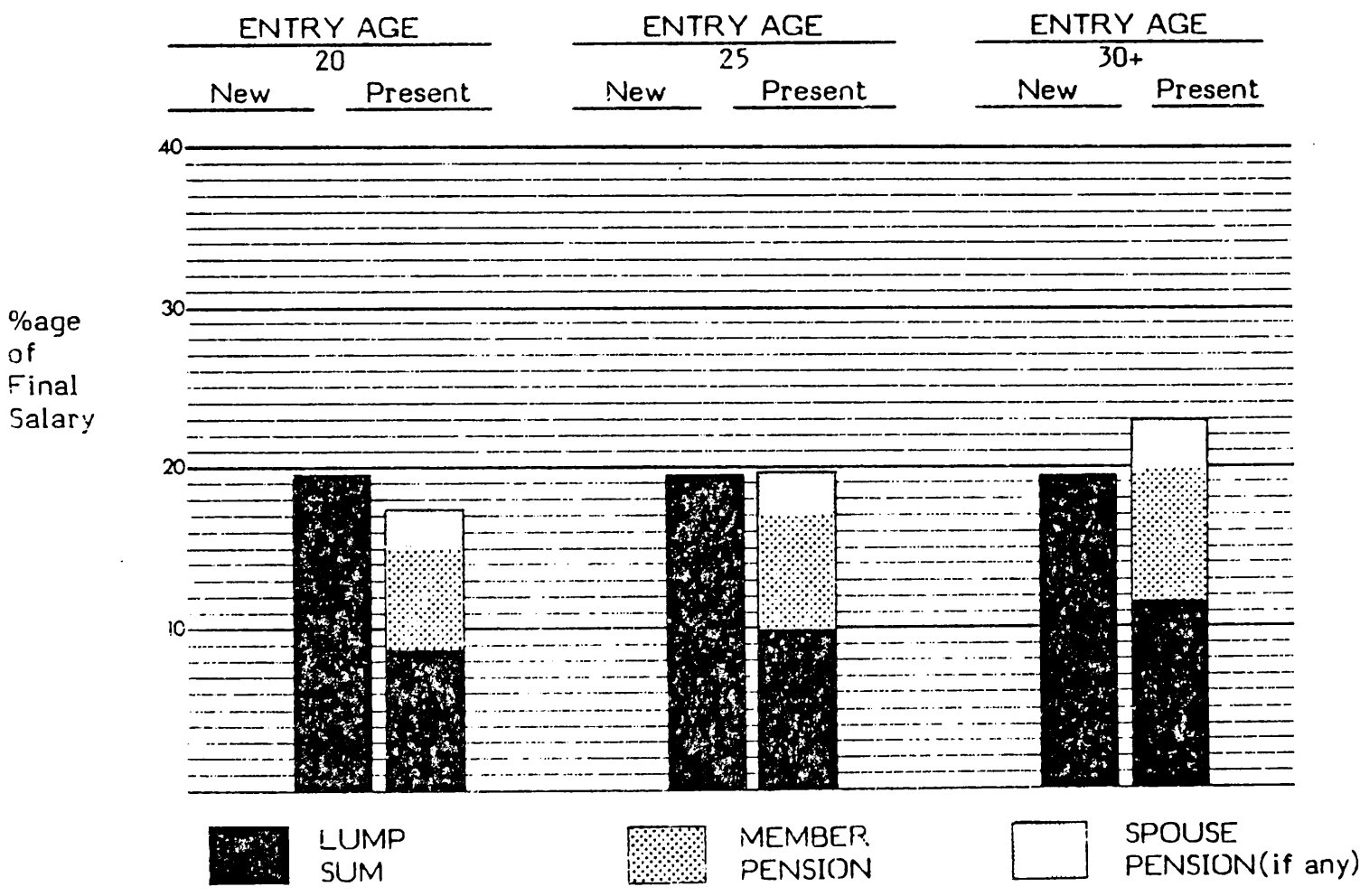


TABLE 4.7

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH HOSPITALS SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	Normally 6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions and interest.
Form of Retirement Benefit	Lump sum.	Part lump sum, part pension plus spouse pension. Limited commutation.

EFFECTIVE RETIREMENT BENEFIT PER YEAR OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)

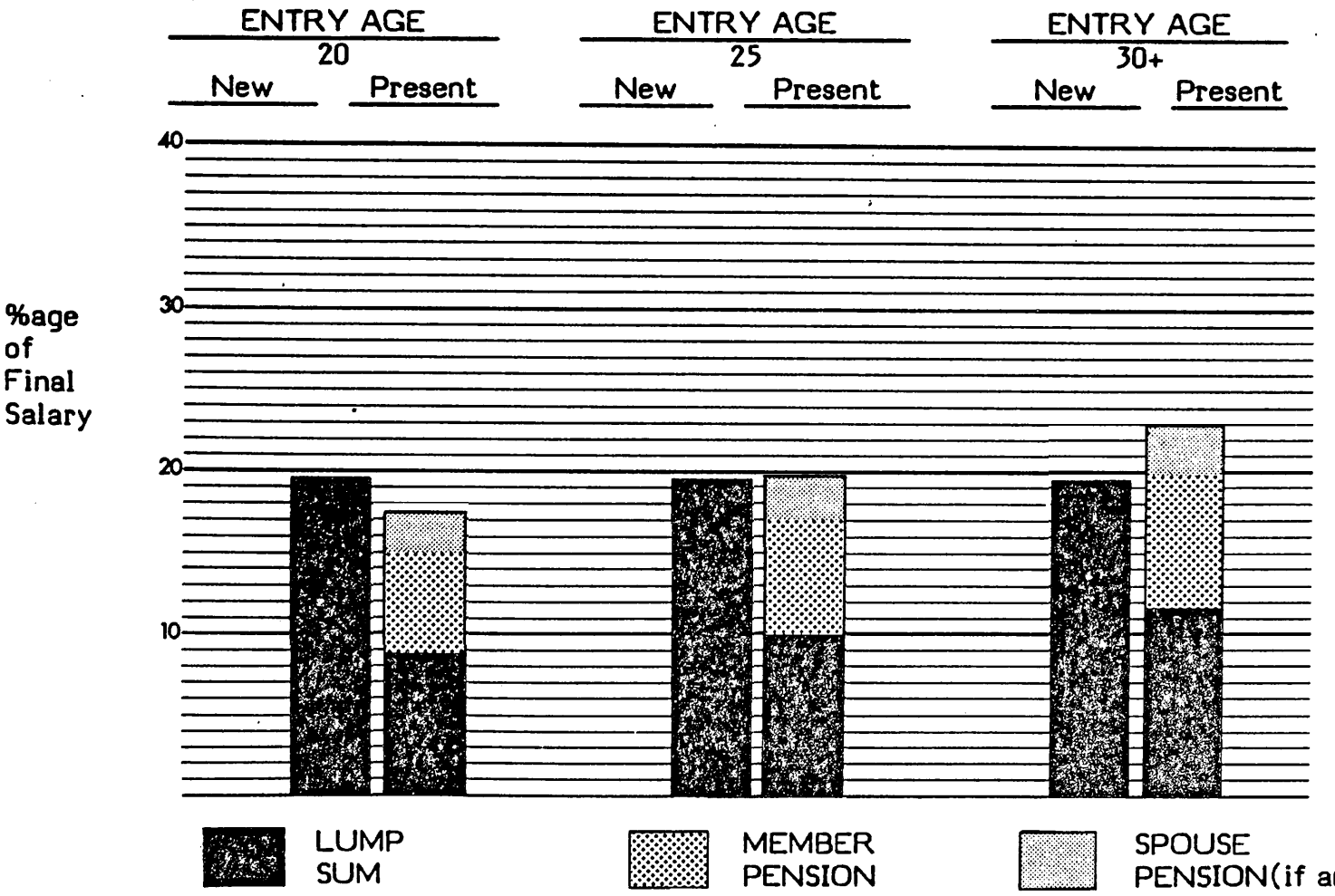
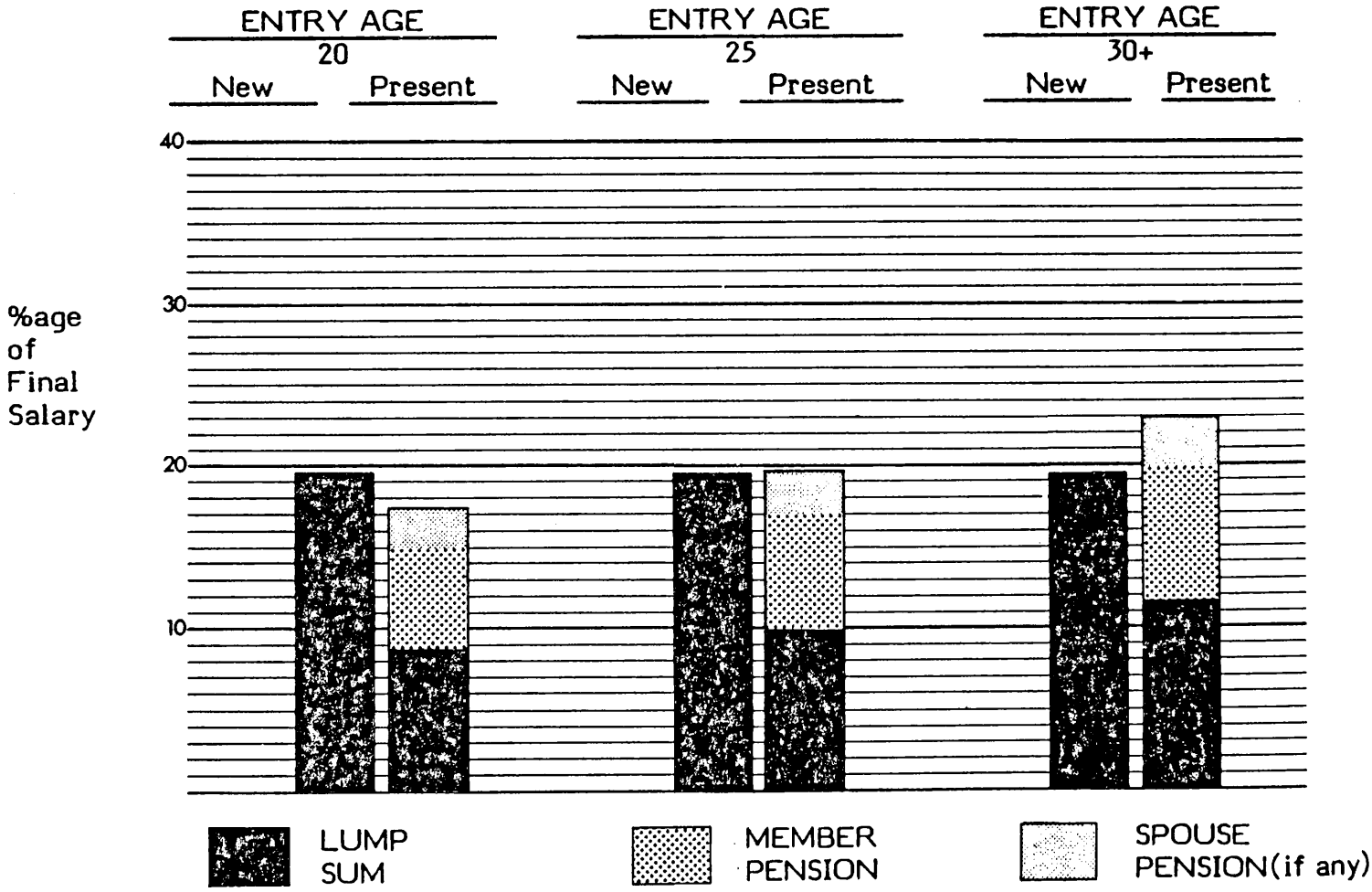


TABLE 4.8

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH SERB SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	Normally 6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions and interest less employee share of cost of death and disability benefits.
Form of Retirement Benefit	Lump sum.	Part lump sum, part pension plus spouse pension. Limited commutation.

EFFECTIVE RETIREMENT BENEFIT PER YEAR OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



It should be noted, however, that under the present schemes most members pay 6% of salary, compared with a possible maximum of 6.5% under the proposed scheme. Also, the whole of the new scheme benefit is payable in cash, rather than as a part pension. With the possibility of being able to reduce contributions to (as a minimum) 2.5% of salary, there is no doubt that a number of members would be interested in transferring to the new scheme if this is allowed. As the new scheme offers cash vesting and no medical classification for basic benefits except for employment, this will be attractive to younger members of the present schemes and those likely to be classified as 'limited' members.

A comparison of resignation benefits under these three schemes with the new scheme is more complex due to the differing nature of the schemes' resignation benefits. It is clear, however, that the cash resignation benefits under the new scheme are superior to both the SERB and Hospitals schemes; the situation with the Local Authorities scheme is less clear-cut and would have to be decided on an individual basis.

So far as the management choice of options to be offered to present members is concerned, the considerations are similar to those indicated above for the State Superannuation scheme. The proportion of the total retirement benefit under the present schemes which is payable in the form of pension is, however, much less than in the State Superannuation scheme. This suggests that, depending on the number of their present members choosing new scheme benefits for the future, the three schemes may be willing to offer conversion of entitlements for past membership, at least for younger members.

4.2.3.3 SEC Superannuation Scheme

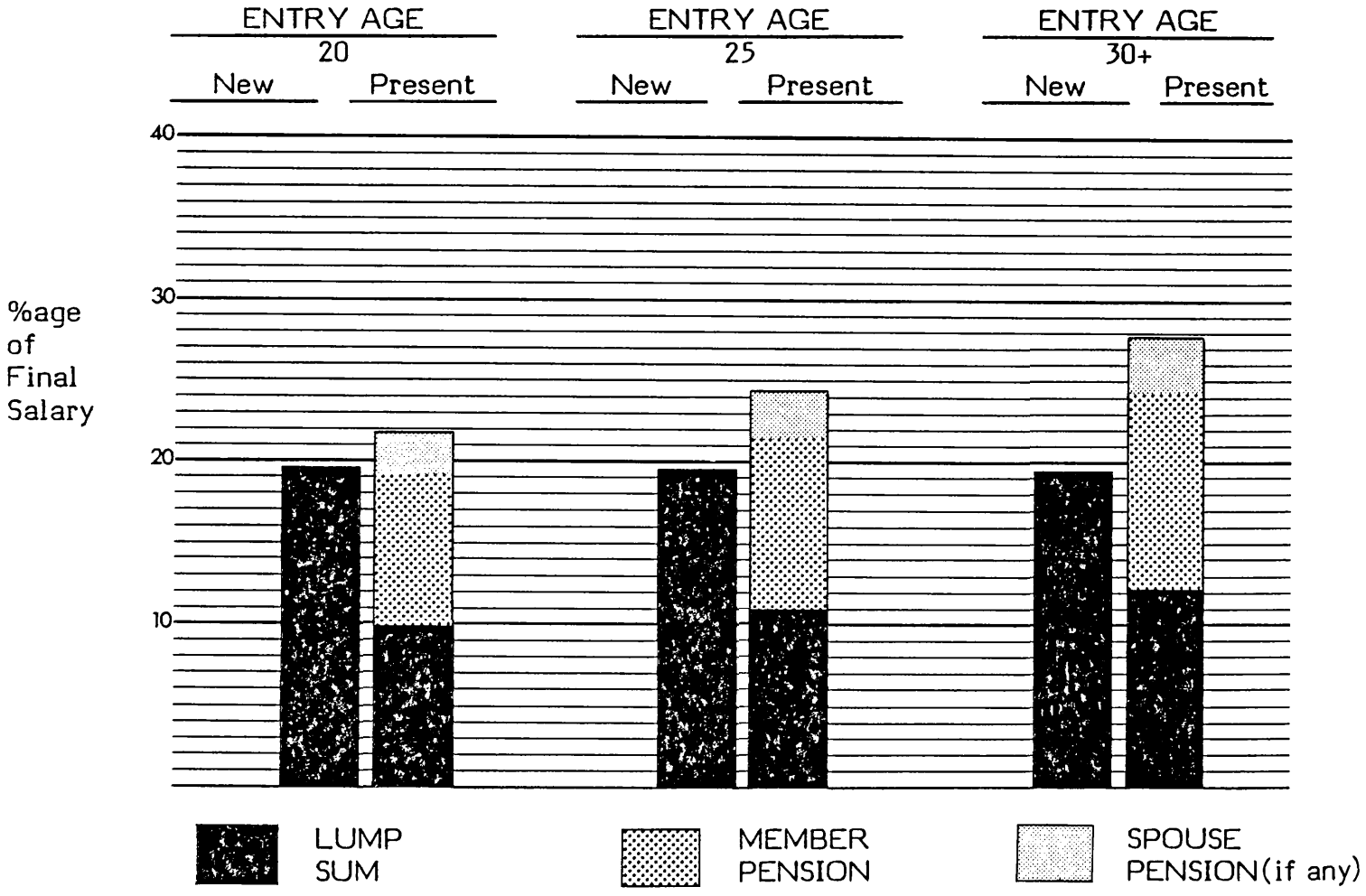
Irrespective of entry age, the SEC Superannuation (Staff) scheme yields an effective retirement benefit greater than that offered under the proposed new scheme (Table 4.9). The difference is relatively small for those entering at age 20 years (2.4% of final salary) to 8.3% for entry age of 30 years or more.

TABLE 4.9

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH SEC STAFF SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	6½% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions plus 4% p.a. interest plus 50% if more than 10 years' membership.
Form of Retirement Benefit	Lump sum.	Pension plus spouse pension. Maximum of 50% may be commuted.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



Member contributions under the SEC Superannuation scheme are at the rate of 6½% of salaries, which is the same as the maximum rate under the new scheme. Disregarding spouse pension entitlements, members can take no more than half their retirement benefits as a lump sum. The new scheme provides retirement benefits of slightly lower value, but entirely in lump sum form which should appeal to many members. Members would also have the choice under the new scheme of contributing at a lower rate for reduced benefits. This suggests that the scheme would be attractive to a number of present scheme members, especially those who have entered under, say, age 25 years.

Cash resignation benefits under both the SEC Superannuation and Employees schemes are markedly inferior to those available under VICSESS.

4.2.3.4 SEC Employees Scheme

A summary comparison of the final salary equivalent benefits of the present SEC Employees scheme with the proposed new scheme are presented in Table 4.10.

As noted in the Review Report, the effect of discrimination within the SEC is such that the final salary equivalent benefits of the SEC Employees ('blue collar') scheme are significantly less than those obtainable under the SEC Superannuation ('white collar') scheme.

The SEC Employees scheme is similar to the proposed scheme in offering only lump sum benefits. Under the present scheme members pay 3¼% of salary, and their retirement benefit at age 60 would be a lump sum of 4 times average salary for the last two years for 30 years' membership, or 4.1 times for 40 years' service. New scheme members would pay 2½% of salary for 2¼ times final salary after 30 years' membership, or 3 times final salary after 40 years. The advantage offered by VICSESS in this case is the opportunity for members to contribute at a lower or higher rate than the current 3¼% of salary.

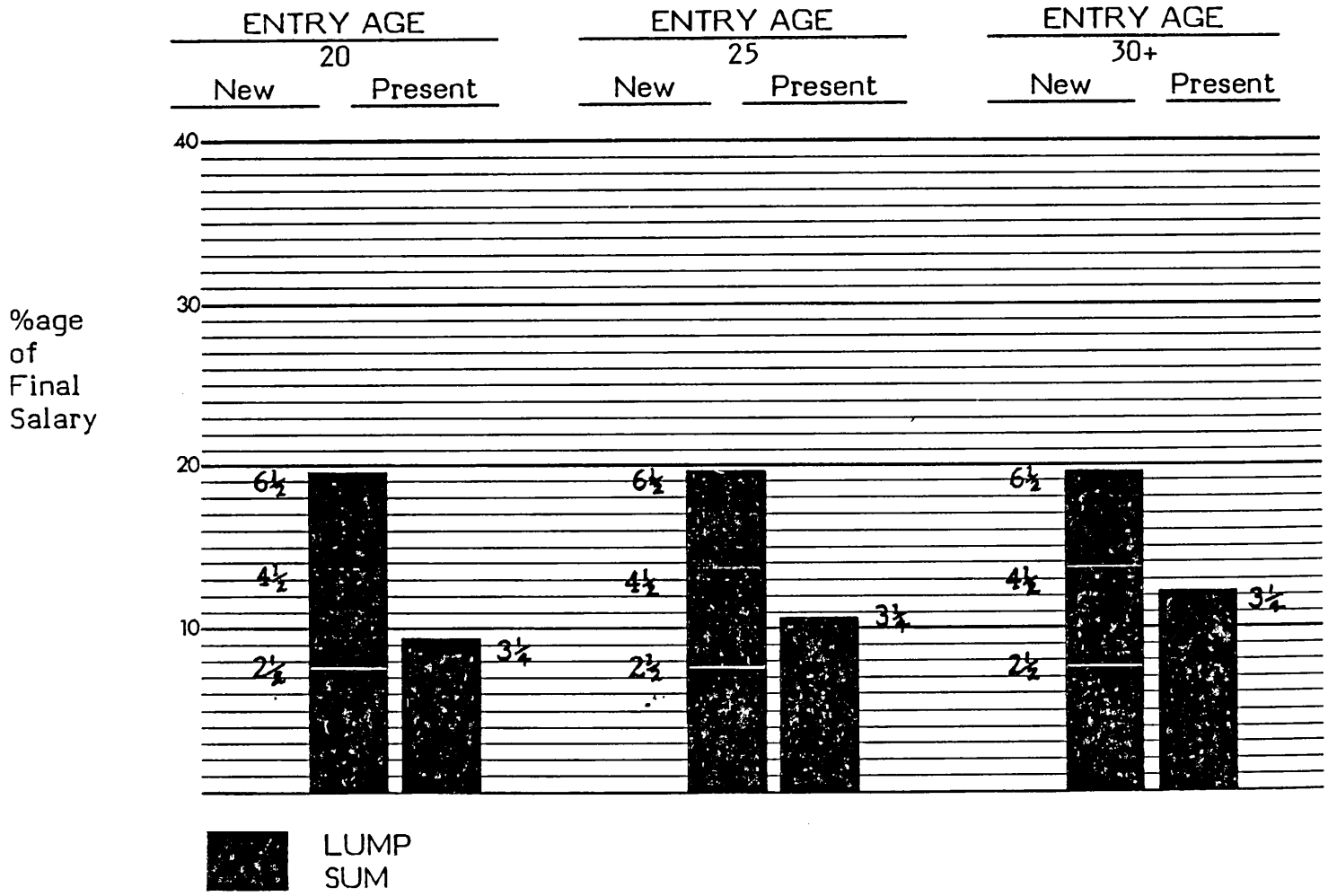
As in the case of the SEC Superannuation scheme, there would appear to be no financial impediment to the transfer of existing members' entitlements to the new scheme.

TABLE 4.10

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH SEC EMPLOYEES SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% OR 2½% OR 4½% of salary	3¼% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions plus 4% p.a. interest plus 50% if more than 10 years' membership.
Form of Retirement Benefit	Lump sum.	Lump sum.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



4.2.3.5 State Bank Scheme

In the case of the State Bank scheme, as noted in the Review Report (p.78), the assumption of a maximum commutation of pension is not altogether appropriate because the cash grants in lieu of pension are relatively unattractive, with the result that many members prefer pensions. Because of this, two effective retirement benefit comparisons are made for State Bank members. The first of these (Table 4.11) contrasts the State Bank and the new scheme in lump sum terms. The second comparison (Table 4.12) is in terms of benefits taken as a pension.

Under the present scheme, State Bank employees pay 6.0% of their salary as contributions compared with a maximum of 6.5% under the new scheme. On a lump sum basis, the new scheme is much more attractive to employees, with an effective retirement benefit 50% higher than under the present scheme. Employees who prefer cash will clearly prefer VICSESS, irrespective of entry age. In common with other major public sector schemes, cash resignation benefits under the State Bank scheme in only returning employee contributions and interest, are markedly inferior to those available under the new scheme. The benefits of the new scheme, however, are less attractive when it comes to the pension, with the present scheme showing higher effective retirement benefits as a percentage of final salary. For those employees considering the pension option, the present scheme, on the basis of this comparison, is to be preferred.

The new scheme is also likely to be attractive to younger members because it includes cash vesting and the option of variable contribution rates.

TABLE 4.11

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH STATE BANK SCHEME

(Benefits taken as lump sum)

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions and interest.
Form of Retirement Benefit	Lump sum.	Pension plus spouse pension. 100% may be commuted.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP

(Shown below as a percentage of final salary at age 60)

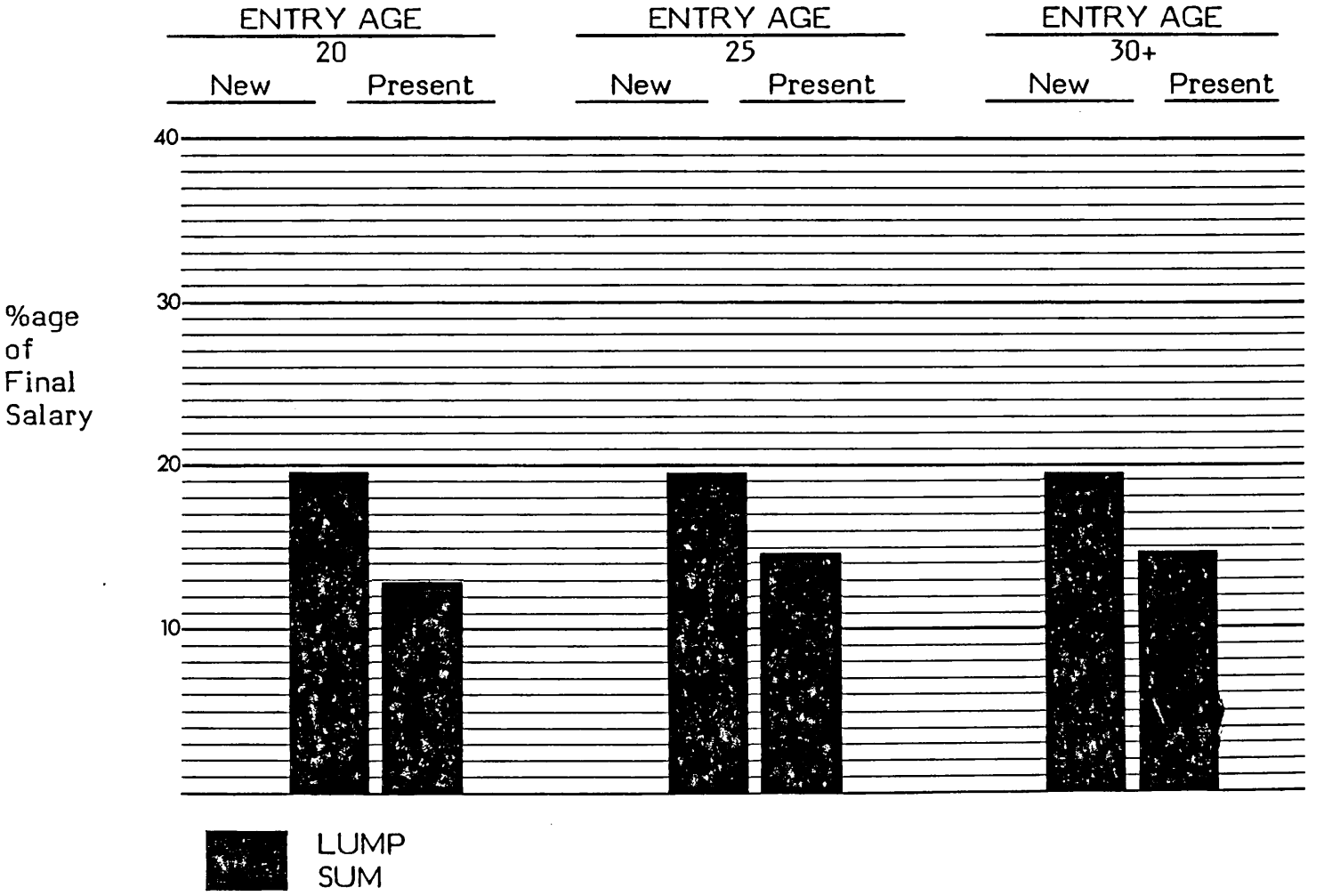


TABLE 4.12

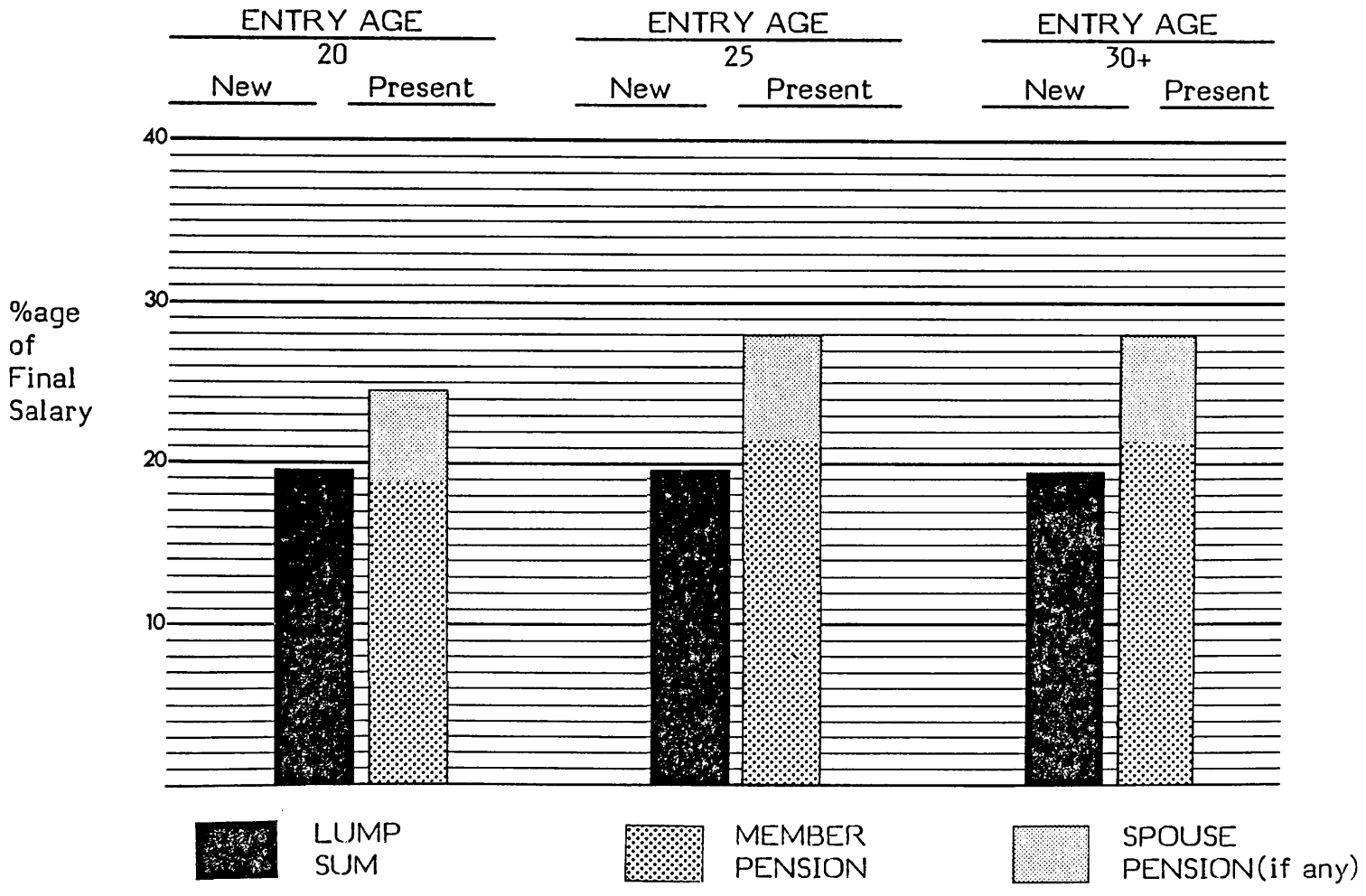
COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH STATE BANK SCHEME

(Benefits taken as pension)

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions and interest.
Form of Retirement Benefit	Lump sum.	Pension plus spouse pension. 100% may be commuted.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP

(Shown below as a percentage of final salary at age 60)



4.2.3.6 Gas & Fuel Corporation Scheme

Irrespective of age at entry, the present Gas and Fuel Corporation scheme provides less generous benefits than those offered under the proposed scheme (Table 4.14).

As the Gas and Fuel scheme offers a lump sum (pension 100% commutable) option, the comparison between the two schemes is clear-cut. Employees under the present scheme who commute their pensions for cash at age 60 receive marginally lower benefits than those offered on the maximum scale by the new scheme. The contrast is brought out by the following table (Table 4.13) which gives the retirement benefit at age 60 years as a multiple of final salary for contributors with 30 and 40 years' membership. The difference in favour of the new scheme is precisely proportional to the increased contribution payable under that scheme, $6\frac{1}{2}\%$ instead of 6% of salary.

TABLE 4.13

RETIREMENT BENEFITS UNDER PRESENT GAS & FUEL CORPORATION SCHEME AND PROPOSED VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME

Scheme	Retirement Benefit at Age 60 (times final salary)	
	30 years' m'ship	40 years' m'ship
Gas & Fuel	5.40	7.20
Proposed scheme (maximum scale)	5.85	7.80

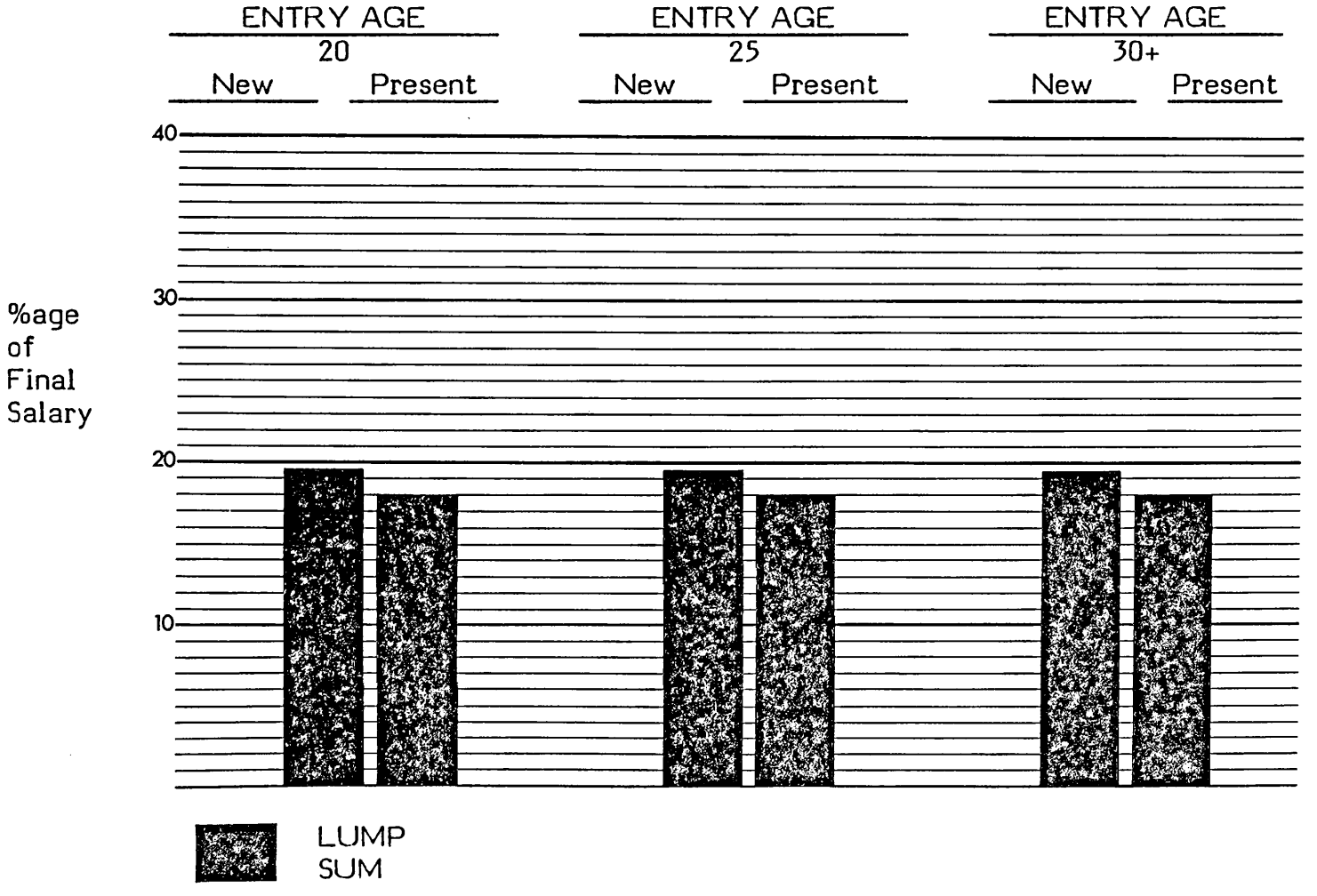
The present scheme gives a choice of taking pension at retirement instead of a lump sum. The new scheme offers a choice in the level of death and disability cover and a choice in the level of member contributions.

TABLE 4.14

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH GAS AND FUEL CORPORATION SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	6% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions plus 4% p.a. compound interest. After 5 years m/ship an additional graduated amount depending on members actuarial reserve.
Form of Retirement Benefit	Lump sum.	Pension 100% commutable.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



4.2.3.7 MMBW Superannuation Scheme

Table 4.15 contrasts the benefits possible under the MMBW Superannuation scheme and VICSESS. Under the present scheme, where the pension is 100% commutable to a lump sum, those contributors at entry ages 25 and 30 years clearly benefit at retirement in contrast to the new scheme - only lump sum comparisons are relevant here.

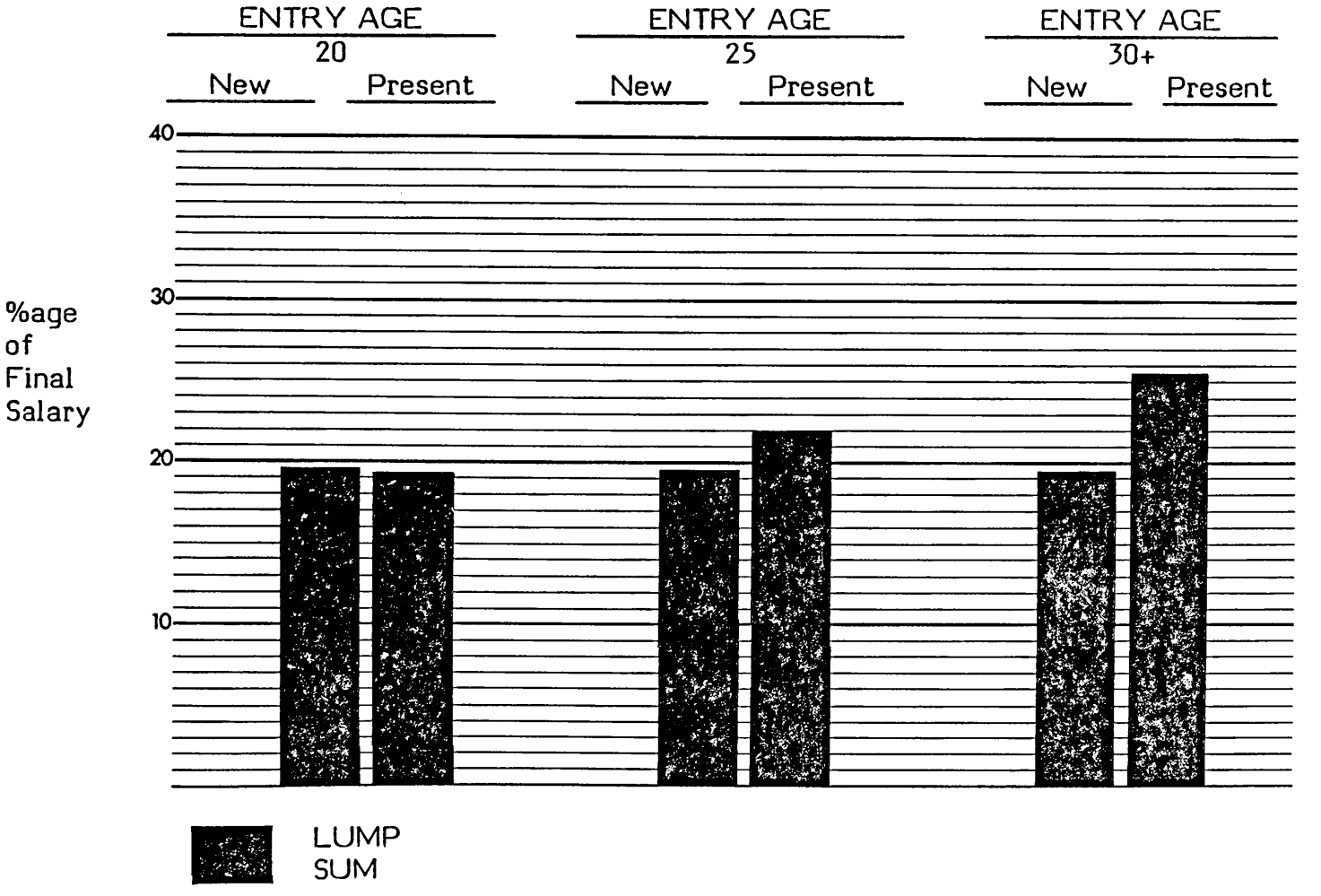
With the present scheme, a member who completes at least 30 years' service can retire at age 60 on a pension of 70% of final salary or a lump sum of 7.7 times final salary. Recent members contribute from 4% to 9% of salary depending on entry age. Earlier members contribute at varying rates ranging up to 9% of salary depending on salary history. These figures must be compared with 5.85 times final salary for 30 years' membership and 7.8 times for 40 years' membership under the new scheme in return for members' contributions on the maximum scale of $6\frac{1}{2}\%$ of salary. The resignation benefits are clearly superior under VICSESS which also offers the option of variable contribution levels.

TABLE 4.15

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH MMBW SUPERANNUATION SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	Varying up to 9% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions plus 5% p.a. compound interest.
Form of Retirement Benefit	Lump sum.	Pension 100% commutable.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



4.2.3.8 MMBW Provident Scheme

Under the MMBW Provident scheme, two levels of benefit are available, with member contributions of 2.5% and 5.0% of salary respectively. Table 4.16, therefore, gives comparisons between:

(a) effective retirement benefits under the new scheme for member contribution levels of 2.5%, 4.5% and 6.5% of salary; and

(b) effective retirement benefits under the present scheme for member contributions of 2.5% and 5.0% of salary.

Retirement benefits under the present MMBW Provident scheme are based on average salary over the last three years - not final salary as in the new scheme. This is a factor in favour of the new scheme.

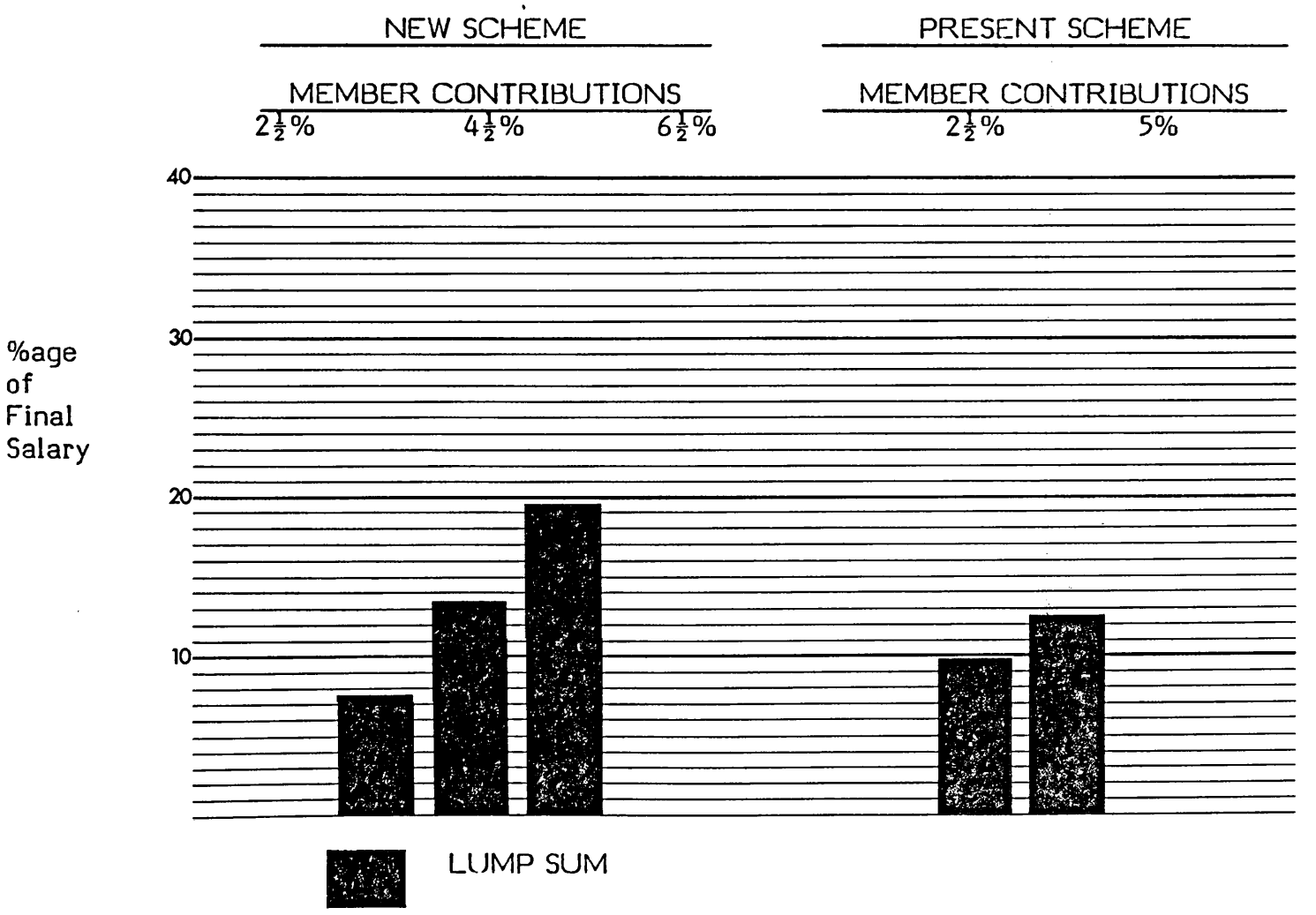
A comparison of the two schemes illustrates quite clearly that the present MMBW Provident scheme is superior for members who pay 2.5% of salary. At higher contribution levels, the new scheme is clearly to be preferred. Members presently contributing at the 5.0% level would, on this comparison, have a clear incentive to move to the new scheme. That is, VICSESS would provide a clear upgrading of benefits for those members who contribute to the MMBW Provident scheme at the 5% rate. Resignation benefits are also superior under VICSESS.

TABLE 4.16

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH MMBW PROVIDENT SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% OR 2½% OR 4½% of salary	2½% OR 5% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Return of employee contributions plus 2½% of that total for each complete year of service.
Form of Retirement Benefit	Lump sum.	Lump sum.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



4.2.3.9 Metropolitan Fire Brigades Scheme

This scheme is similar to the State Superannuation scheme with some important exceptions, such as early retirement at age 55, some vesting of employer money on resignation and a flat contribution rate of 7% instead of a variable rate. Apart from these differences, the considerations for members in comparing it with the new scheme are virtually the same as for the State Superannuation scheme (Table 4.17).

Although it has some assets, the MFB scheme would need to be considered in much the same way as the State Superannuation scheme in deciding what transfer options can be offered to existing members.

4.2.4 Scheme Comparison: A Postscript

The Committee believes that while it is difficult to make a detailed comparison between benefits under the new scheme and those offered by the current schemes in the Victorian public sector, there is no doubt that VICSESS will have considerable attraction for many existing scheme members. The combined influence of lump sums at retirement, flexible contribution rates and graduated vesting on resignation should have wide appeal, but the Committee recognises that some members will prefer to continue as members of their present schemes and that some members of PAYG schemes will, in any event, have limited choice.

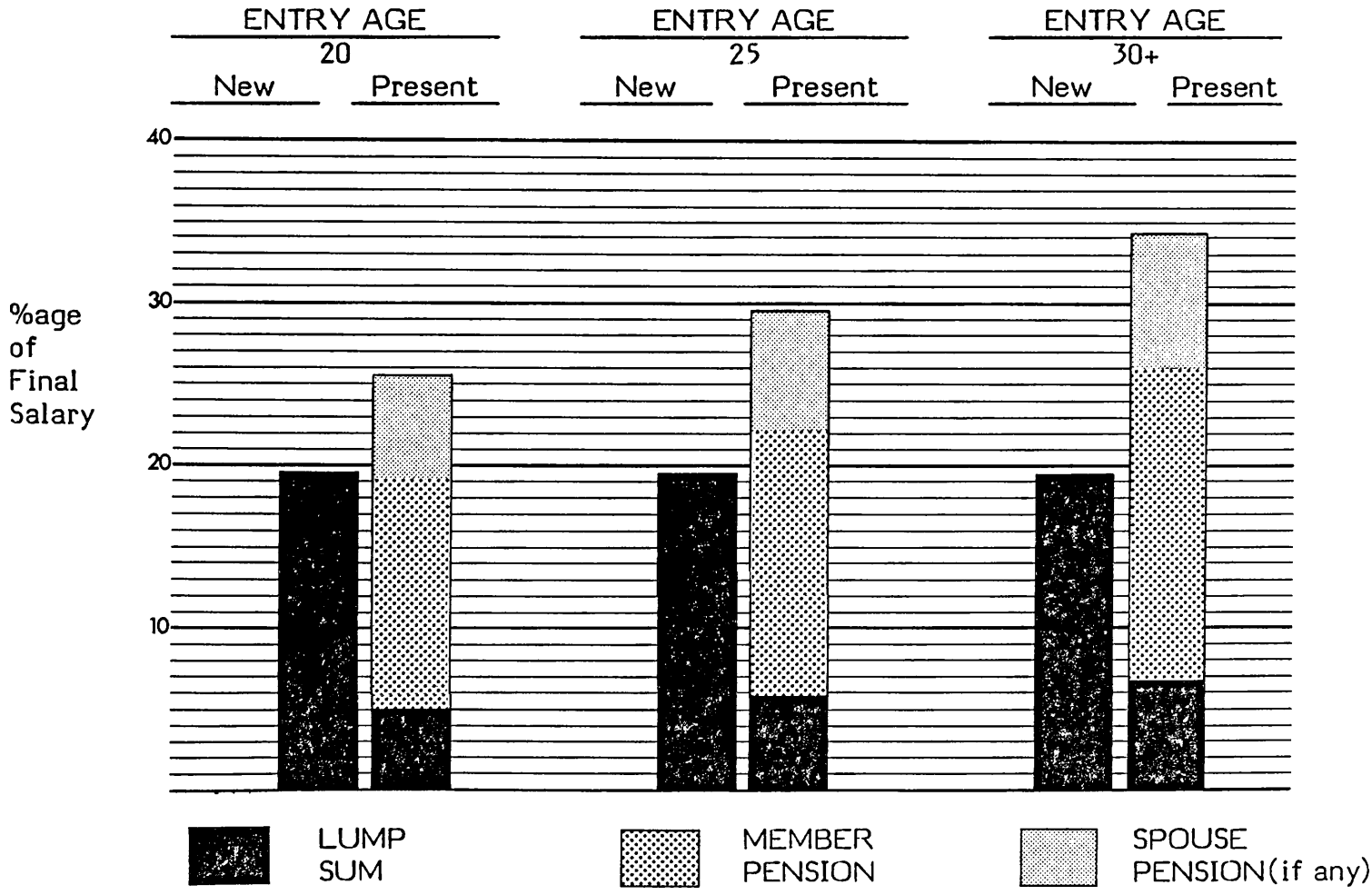
For the Government, there are substantial advantages in a scheme providing standardised benefits, and therefore equity, throughout the public sector. VICSESS does this on a basis which will give all Victorian public sector employees superannuation cover at reasonable cost. In association with complementary changes for continuing schemes, there would be immediate and complete portability throughout the Victorian public sector.

TABLE 4.17

COMPARISON OF VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME WITH MFB SCHEME

ITEM	NEW SCHEME	PRESENT SCHEME
Employee Contribution	6½% of salary	7% of salary
Cash Resignation Benefit	(a) Return of 5.9% of current annual salary per year of m/ship and part thereof; and (b) If the member has completed at least 5 years of m/ship, the amount in (a) increased by 25% plus 5% of that amount per year of m/ship in excess of 5, subject to max. of 100%.	Less than 5 yrs' service, return of employee contributions. For 5-20 yrs' service, as above plus 4% interest plus a further 1/12th of total per year of service.
Form of Retirement Benefit	Lump sum.	Pension plus spouse pension. 30% of member's pension can be commuted.

EFFECTIVE RETIREMENT BENEFIT **PER YEAR** OF SCHEME MEMBERSHIP
(Shown below as a percentage of final salary at age 60)



CHAPTER 5

CO-ORDINATION, ADMINISTRATION AND MANAGEMENT

SECTION 5.1 POLICY ISSUES AND PROPOSALS FOR REFORM

5.1.1 The Framework for Reform

The Committee's Review Report drew attention to a number of significant problem areas in the management and administration of the individual public sector superannuation schemes and also in the State Government's control and co-ordination of the various schemes. Problem areas identified for the individual schemes included such things as administrative structures and administrative processes, consultation and member participation in decision-making, computerisation, information requirements and financial and actuarial reporting.

Recommendations for managerial and administrative reform for individual public sector superannuation schemes are made all the more difficult by the number and diversity of such schemes. Schemes vary not only in their contribution and benefit structures, but also in their documentation and their management structures. In developing reform proposals the Committee seeks not to identify particular weaknesses in particular schemes, but rather to establish a set of criteria for acceptable managerial and administrative practice. In taking this approach, the Committee recognises that many existing schemes already have sound management and administrative practices.

Proposals for acceptable managerial and administrative standards in individual public sector superannuation schemes must be supported at the State Government level, by parallel reforms of mechanisms for their control and co-ordination. It is for this reason that the Committee welcomes the initiative of the State Government in establishing the position of Director of Superannuation within the Department of Management and Budget. The Committee believes that the Director's role is a key one in implementing its

proposals and in ensuring that existing schemes - and the proposed Victorian State Employees Superannuation Scheme (VICSESS) - meet required managerial and administrative standards as set out below (5.1.2).

The Committee's support for the position of Director of Superannuation is based on the understanding that the Treasurer has legislative powers to control and co-ordinate public sector superannuation schemes. If the Director of Superannuation is to operate effectively an essential requirement will be a small but strong technical support unit consisting of specialist officers whose combined practical experience would cover public superannuation and legislation, investment management, industrial relations, administration, computerisation and actuarial work.

5.1.2 Objectives for Managerial and Administrative Reform

The Committee believes that the following four management and administration objectives must be met if reformed managerial and administrative systems are to meet required standards:

(a) public sector superannuation schemes must be directly responsible to a central agency with powers of control and co-ordination;

(b) public sector superannuation schemes must be accountable to the Government and to contributors;

(c) public sector superannuation must improve efficiency in the delivery of services to membership through better management and reduced administrative costs; and

(d) public sector superannuation must provide for wide membership participation in decisions regarding scheme management.

Some of the public sector superannuation schemes have already satisfied some of the above criteria.

5.1.3 Practical Considerations

A substantial practical constraint must be recognised in seeking the foregoing aims. This arises from the nature of the superannuation contract. Whether documented by Act of Parliament, regulations, trust deed or rules, a superannuation scheme confers legal rights to benefits on its members. It is not therefore possible for the employer concerned to alter a scheme unilaterally. Members' rights, at least so far as they relate to scheme membership up to the date of alteration, must be scrupulously observed. Unless they involve unqualified improvements in benefits and/or conditions, scheme alterations are dependent upon the good will and consent of the members concerned, i.e., the current scheme members.

Chapters 3 and 4 explain that the only realistic approach to the reform of benefits and conditions, which are of course the major determinants of management and administration responsibilities, is

(a) to design a scheme which, in current and expected future conditions, adequately provides for future new members; and

(b) to compare existing arrangements with the new scheme and decide what options can sensibly be considered for existing members.

The object under (b) is clearly facilitated if the new scheme is attractive to existing members. Nevertheless it is likely, if not certain, that a number of members will prefer not to transfer to the new scheme. Therefore, discussion of proposals for management and administration must cover not only the new scheme but all existing schemes, which must be maintained for shorter or longer periods to cover non-transferring members. Most of the recommendations indicated below apply not only to any new scheme or schemes, but also to the existing schemes which continue for certain members.

Another practical need is to recognise that many of the existing schemes already have sound management and administrative arrangements. Indeed the Committee's consultants, Campbell & Cook, commented:

"The SEC, MMBW, Gas and Fuel and State Bank funds are distinguished by the relative simplicity of their benefit and contribution structures, and the efficiency and effectiveness of their administrative systems."(1)

More significantly, in relation to larger single employer schemes and amalgamation, the consultants noted:

"The efficiency gained by the close integration with personnel and payroll functions would be lost were the administration of any of these funds to be amalgamated."(2)

A further comment made by the consultants in relation to management and record keeping using computer systems should be highlighted:

"Unless benefit and contribution structures are rationalised and the rationalisation covers past benefits as well as future benefits, amalgamation of all but the simplest small funds would be counter-productive."(3)

Effective amalgamation of scheme administration could be achieved only by the benefits of new members being on a common basis and those of existing members, particularly past service benefits, also being rationalised. This confirms the need to continue existing arrangements for existing members whose entitlements cannot readily be covered by the new scheme conditions.

5.2.1 Central Control of Public Sector Superannuation Schemes

Present arrangements for the co-ordination and control of the 42 Victorian public sector superannuation schemes identified in the Review Report are, even with the establishment of the position of Director of Superannuation, less than adequate. The individual schemes still function as separate bodies under only the most tenuous and indirect controls operated by the State Government. Historically, as shown in the Committee's Review Report, there have been virtually no attempts by Government to standardise fund reporting procedures, to monitor investment activity, to evaluate the administrative costs and structures of fund management or to assess fund performance against external standards.

At the present time, three central agencies of the State Government are involved in (or are potentially concerned with) the management and administration of public sector superannuation. These agencies are

(a) the Public Service Board;

(b) the Department of Management and Budget; and

(c) the Office of Government Statist and Actuary.

The Committee, in presenting its Review Report, indicated its dissatisfaction with the degree of co-ordination and control by the State Government over both the management and administration of public sector schemes by public sector departments. These problems were reflected in the history of administrative arrangements surrounding the State Superannuation scheme. The Committee found there were poor management structures for administration of the State Superannuation scheme and poor relations between the Board and other central authorities.

The Treasurer has only informal control over proposals for changes to eligibility, benefits and contributions. Given the substantial liability the

Government must meet for superannuation provision in the public sector, the Committee feels this arrangement is unacceptable. Furthermore, without legislative power the Government has substantial difficulties in ensuring situations do not arise which lead to leapfrogging of provisions. In the Committee's view, a lack of effective control by State Governments has resulted in the past proliferation of schemes. Only if legislative control exists can the State Government ensure that co-ordination will be accepted and be successful.

In seeking effective central control and co-ordination, the Committee is faced with the dilemma of how to reconcile the legal responsibilities of Trustees in regard to the administration and management of superannuation schemes with the Government's need to ensure that the administration of the schemes is efficient and in line with other governmental policy. A classic example of this dilemma was the State Superannuation Board's purchase of a new computer in late 1983 where the Treasurer, despite serious reservations regarding the purchase, did not have, "... any specific power under legislation to affect directly the decision of superannuation fund managers concerning computer systems".(4)

To overcome these problems, the Committee recommends the introduction of legislation to give the Treasurer an overall direction of policy for public sector superannuation while leaving day-to-day management to the Boards of Management or Trustees and their scheme managers. The Committee feels that such legislation would ensure an effective programme of consultation and reporting. Its prime purpose is to ensure that all proposals regarding eligibility, benefits and contributions are approved by the Treasurer. It will also enable the Treasurer to intervene, where necessary, in matters of management and investment, including capital expenditure and staffing.

It should be noted that the Committee's recommendation 5.1 follows the precedent laid down by the State Electricity Commission (Amendment) Act 1982 and the Transport Act 1983. In the case of the State Electricity Commission (Amendment) Act 1982, Sections 9D(2) and 9D(3) respectively, state that:

9D.(2) **Notwithstanding anything in this or any other Act the Minister may at any time give a direction to the Commission concerning the policies it is to give effect to.**

9D.(3) **The Commission shall give effect to any direction given to it by the Minister as soon as possible and shall report to the Minister on the action taken by it to give effect to the direction.**

The Committee sees this as an appropriate requirement for control, by the Treasurer, of public sector superannuation schemes.

Furthermore, to ensure a complete community awareness of the role the Minister is taking within the Commission, the State Electricity Commission (Amendment) Act 1982 Sections 9D(4) and 9D(5) respectively, state that:

9D.(4) **Where the Commission has been given a direction by the Minister it-**

(a) **may publish that direction in the Government Gazette; and**

(b) **shall publish that direction in its annual report.**

9D.(5) **Failure to publish a direction under sub-section (4) shall not affect the validity of the direction.**

RECOMMENDATION 5.1

THAT LEGISLATION OF A SIMILAR NATURE TO THE SEC MODEL BE IMPLEMENTED IMMEDIATELY GIVING THE TREASURER POWER TO EXERCISE OVERALL DIRECTION OF PUBLIC SECTOR SUPERANNUATION SCHEMES AND THAT ANY DIRECTIVE FROM THE TREASURER SHOULD BE PUBLISHED BY THE BOARD OF MANAGEMENT OR TRUSTEES OF THE RELEVANT SCHEME IN ITS ANNUAL REPORT.

The Committee believes a series of further changes are required to ensure efficient management and standardised reporting across all public sector

superannuation schemes. As stated in the Committee's Review Report(5) and in Section 5.5 of this chapter, standards of reporting have not met minimum private sector standards. To ensure administrative standards are maintained within public sector superannuation schemes, the Committee believes the Treasurer should have the ability to undertake reviews where he considers this necessary.

RECOMMENDATION 5.2

THAT THE TREASURER ESTABLISH AND MONITOR MANAGERIAL AND ADMINISTRATIVE STANDARDS AND ANNUAL REPORTING PROCEDURES FOR ALL VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES.

RECOMMENDATION 5.3

THAT THE TREASURER UNDERTAKE REGULAR REVIEWS OF THE ADMINISTRATIVE FUNCTIONS OF ALL PUBLIC SECTOR SUPERANNUATION SCHEMES USING EITHER THE PUBLIC SERVICE BOARD OR INDEPENDENT PRIVATE CONSULTANTS.

RECOMMENDATION 5.4

THAT THE TREASURER SHALL REPORT TO PARLIAMENT ON AN ANNUAL BASIS IN RESPECT OF THE MANAGEMENT, ADMINISTRATION AND INVESTMENT PERFORMANCE OF ALL PUBLIC SECTOR SUPERANNUATION SCHEMES IN VICTORIA.

The Committee takes the view that recent history illustrates the clear need for effective central co-ordination on important issues of the management and administration of public sector superannuation schemes. It believes this is best achieved by positive involvement by the Treasurer, where necessary. The Committee feels that this would be only rarely required given the programme of consultation and reporting which would follow from the foregoing recommendations.

5.2.2 The Commonwealth Example and the New Victorian Model

In recommending wider powers for the Treasurer, together with the proposal to establish VICSESS, the Committee takes as an example the present Commonwealth Superannuation scheme structure where there is a Superannuation Fund Investment Trust and a Commissioner for Superannuation.

The detailed administration of the Superannuation scheme is the responsibility of the Commissioner of Superannuation. It is the Commissioner's task, amongst other things, to collect contributions and arrange the payments of pensions and other benefits together with refunds to contributors leaving the scheme. The Superannuation Fund Investment Trust is a statutory authority with the objective and responsibility of managing and investing the Commonwealth Superannuation Fund.

The basic question is whether the investments should be handled by the scheme management or by a separate external body. The State Superannuation scheme is an example of the former and the Zoo's scheme, where investments are managed by a merchant bank, is an example of the latter. The Commonwealth Superannuation scheme, as explained above, provides another example of the latter approach. The Committee details in Chapter 8 the need for separate administration of superannuation investment funds on grounds of efficiency and economies of scale.

However, the Committee believes that there should be two Boards of Management rather than a Commissioner and an Investment Board (see Chapter 8). The Commissioner system would not be suitable for the administration of the various continuing schemes which participate in the Investment Trust. Furthermore, that system does not allow for the member representation and participation which the Committee regards as essential.

RECOMMENDATION 5.5

THAT THERE BE ESTABLISHED A VICTORIAN SUPERANNUATION INVESTMENT TRUST (VICSIT).

The function of VICSIT will be to manage a pooled central fund established to offer investment services to all public sector schemes. In particular, VICSIT would be responsible for the investments of VICSESS together with the State Superannuation, Superannuation Lump Sum and SERB schemes, as well as a number of smaller schemes. Thus there would be a separation of responsibility for investment and administration for these schemes - detail is provided in Chapter 8, Section 8.3.2.

RECOMMENDATION 5.6

THAT A NEW BOARD BE ESTABLISHED TO ADMINISTER ALL ASPECTS OF THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS) OTHER THAN INVESTMENT.

This Board would be responsible for the administration of superannuation for new employees of all public sector employers which are not approved as administrators of the new scheme (see Section 5.7).

5.2.3 The State Superannuation Scheme

The State Superannuation scheme, as the largest single public sector scheme in Victoria, is not only significant in its own right but is also of particular importance in the transition to a new superannuation scheme. The State Superannuation scheme's managerial and administrative practices attracted considerable criticism in the Review Report.

The Committee noted the Government Statist and Actuary's role as Chairman of the State Superannuation Board, as well as of the Metropolitan Fire Brigades Superannuation Scheme and the Hospitals Superannuation Scheme. The Committee concluded that the Government Statist and Actuary should play an independent professional role advising Government, the Director of Superannuation and the individual schemes, but should not be involved in the direction or management of them.

RECOMMENDATION 5.7

THAT THE GOVERNMENT STATIST AND ACTUARY SHOULD PLAY AN INDEPENDENT PROFESSIONAL ROLE ADVISING GOVERNMENT AND THE DIRECTOR OF SUPERANNUATION AND SHOULD NOT BE INVOLVED IN THE MANAGEMENT OF ANY PARTICULAR SCHEME.

In its Review Report, the Committee also expressed concern over the concentration of actuarial advice in Victorian schemes.

RECOMMENDATION 5.8

THAT ACTUARIAL SERVICES REQUIRED BY VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES SHOULD BE MET BY INCREASED USE OF THE SERVICES OF THE GOVERNMENT STATIST AND ACTUARY AND BY COMPETITIVE TENDERING FROM CONSULTING FIRMS.

SECTION 5.3 CONSULTATION AND PARTICIPATION

5.3.1 Employee Representation

Superannuation, as the Review Report emphasised, is clearly an industrial relations issue. In the Victorian public sector, superannuation is the subject of industrial claims, and of negotiations and agreements between public sector management and trade unions. As such it is an issue of major concern to the Committee that employees be represented on the governing bodies of schemes. Representation will not only generate a wider understanding and appreciation of the scheme among members; it will also keep management informed of employee concerns and views on schemes and their benefits.

The Committee recognises that many public sector superannuation schemes involve employee members of the scheme on their governing body. Of those schemes established by legislation (most of the large schemes), 79% had an employee representative on the Board. Of those schemes constituted by trust deed, 33% had an employee representative.

In the current situation the Committee believes that there should be direct employee representation on Boards, as against advisory committees of management. In a larger scheme, such as VICSESS, advisory committees may be appropriate to allow for greater consultation with specific contributor representatives.

It is apparent that the principle of employee representation enjoys widespread support from the various parties who have an interest in Victorian public sector superannuation. The Victorian Treasurer, the Honourable R.A. Jolly, emphasised this when he addressed a seminar held to discuss the findings of the Committee's Review Report with interested unions and member representatives:

> "There is an agreement by all those involved in superannuation that there should be employee representation on the board. That is important so that the relevant trade unions have the opportunity of access to all the relevant information on the performance of the superannuation fund. In

addition, trade union representatives are important in the whole decision-making process of a superannuation board because they are able to reflect and bring forward the interests of their members. In those two areas a consensus has emerged."(6)

While there may be a consensus, in principle, on employee representation there are differing views on what the strength of representation and overall composition of the Boards should be. For example, the Municipal Officers Association, in a submission to the Committee, stressed that there should be:

> "... equal numbers of contributor/management representatives on Boards of Trustees of all public sector superannuation schemes; ..."(7)

This contrasts rather interestingly with the recently published views of a Joint Working Party set up to inquire into the operations of the Commonwealth Superannuation Fund Investment Trust (SFIT). The inquiry was pre-empted in one respect in that the Federal Government decided to expand the size of the trust from three to five members before the Joint Working Party had reported. Therefore, they concentrated on the composition of the Trust and recommended that two members be:

> "... contributor representatives nominated by registered organisations, the members, or a substantial proportion of the members, of which are contributors, through the ACTU; ..."(8)

The ACTU, which was represented on the Joint Working Party, reportedly also sought that the Chairman of the Trust only be appointed following their agreement. The fourth Trustee would be appointed by the Government and these four Trustees would then determine the appointment of the Chief Executive officer, who is also to be a Board member. As the Administrative and Clerical Officers' Association broadsheet, in which the selected extracts of the Joint Working Party's recommendations were published, explains:

> "Such an arrangement, whilst not giving total control of the Trust to contributor representatives, will ensure that four of the five members of the new Trust will only be appointed with the consent of contributor representatives."(9)

To the Committee's knowledge none of the Joint Working Party's recommendations have been implemented. Nevertheless, their views and those of the ACTU are an important reference for the Committee on the subject of Board composition - albeit for a Board which oversees only the investment operations of the Commonwealth Superannuation scheme.

Many submissions to the Committee indirectly sought increased employee representation by advocating that groups of employees not currently on the Board of Trustees should be represented. This will always be a problem in schemes covering many organisations or where there are a number of differing groups of employees in the one organisation, and where minority groups feel disadvantaged.

The Victorian Trades Hall Council is understandably supportive of employee representation, but in a submission to this Committee they were neutral on the question of the level of representation. Indeed, they only wished to:

> "... point out to the Government that any alteration to existing contributor representation on the various schemes would be strongly resisted."(10)

While the major schemes have contributor representation, the level of representation varies and some schemes have no contributor representation. The Port of Geelong scheme is an example. The Committee has considered the whole issue of contributor representation and made a number of recommendations.

5.3.1.1 Present Scheme Arrangements for Boards

Present scheme management arrangements fall into four distinct groups as follows:

(a) Those with no Board or Trustees. These are generally either small, e.g., Judges or Governor, or very simple, e.g., City of Melbourne Gratuities. There are normally no investments and no discretions to be exercised in the payment of benefits. As a result, a specific

management body is hardly necessary. While such schemes remain in their present form it seems unrealistic to propose any change so far as participation and representation is concerned.

(b) Board or Trustees including member representatives. The member participation is specified in the scheme documentation. The Review Report illustrated that member representation may be up to 50% of total board membership but does not exceed this figure for the schemes surveyed.

(c) Board or Trustees not including member representative but having an advisory board which includes such representatives. Examples are the State Bank and SEC schemes where the process appears to operate satisfactorily. The Committee would prefer to see the member representatives as members of the actual decision making body. This would of course require change in legislation and trust documentation to allow a separation of the superannuation scheme from the other activities of the authority.

(d) Board or Trustees not including member representatives and having no advisory board. The Committee regards member representation as a necessary reform in these cases.

The Committee believes that appropriate options for the composition of Boards of Management or of Trustees depend largely on the size of the scheme but that such Boards should not be too large. The Committee has recommended a split between the investment and administration functions so that investments for the State Superannuation, Superannuation Lump Sum and SERB schemes will be carried out by VICSIT. With the introduction of VICSESS, new investments will be undertaken by VICSIT.

5.3.1.2 Proposed Board Composition

Given that VICSESS will take some time to introduce and that there will be, after its introduction, members of current schemes, the Committee considers

that all Boards of Management and/or trusts should be reconstructed to reflect the following recommendations. The Committee also believes that training facilities should be available for all Boards, whether newly established or not. This will ensure both effective and useful representation on Boards.

RECOMMENDATION 5.9

THAT THE TREASURER INSTITUTE A TRAINING PROGRAM FOR REPRESENTATIVES ON PUBLIC SECTOR SUPERANNUATION GOVERNING BOARDS.

RECOMMENDATION 5.10

THAT FOR SMALL SCHEMES, THE BOARD SHOULD COMPRISE A GOVERNMENT-APPOINTED CHAIRMAN, AN EMPLOYER REPRESENTATIVE AND A MEMBER REPRESENTATIVE, PLUS AN EXTERNAL APPOINTEE SUCH AS AN INVESTMENT ADVISER OR AN ACTUARY.

For large schemes, with the exception of the State Superannuation scheme and the SERB scheme, the Committee believes that membership should be increased to allow for greater participation by contributors and personnel managers.

RECOMMENDATION 5.11

THAT FOR LARGE SCHEMES - THOSE WITH OVER 5,000 MEMBERS - THE BOARD SHOULD COMPRISE A GOVERNMENT-APPOINTED CHAIRMAN, TWO EMPLOYER REPRESENTATIVES AND TWO MEMBER REPRESENTATIVES, PLUS AN EXTERNAL APPOINTEE SUCH AS AN INVESTMENT ADVISER OR AN ACTUARY.

For the SERB and the State Superannuation schemes it is not appropriate to include an investment advisor on the Board of Management because the Committee has proposed that their investment funds be pooled in VICSIT. However, the Committee believes there would be advantages in increasing the

numbers on the SERB Board to allow greater member representation and involvement by relevant personnel representatives.

RECOMMENDATION 5.12

THAT FOR THE SERB SCHEME THE BOARD SHOULD COMPRISE A GOVERNMENT-APPOINTED CHAIRMAN, TWO EMPLOYER REPRESENTATIVES AND TWO MEMBER REPRESENTATIVES.

Currently, the State Superannuation Board consists of six members of which:

(a) one shall be an actuary;

(b) one shall be the Government Statist;

(c) one shall be a contributor in the railway service, elected by contributors who are in the railway service;

(d) one shall be a contributor who is a member of the teaching service elected by contributors who are members of the teaching service;

(e) one shall be a contributor who is not a member of the railway service or the teaching service elected by contributors who are not members of the railway or the teaching services; and

(f) one Government nominee.

The Committee believes the current arrangements are unnecessarily inflexible in regard to the government appointees and there should be a greater inclusion of representatives of the Public Service Board and personnel sections of the Education Department and Railways. The Public Service Board was quite adamant that membership of superannuation boards should extend beyond representation of contributors and fund management to include personnel representatives. In a submission to the Committee they argued that:

"Because of the impact which superannuation has on the contract of employment between employer and employees, the Public Service Board

believes that the composition of the Superannuation Boards should include personnel management representation."(11)

The Committee also believes that, as stated in Recommendation 5.7, the Government Statist and Actuary should be providing independent technical advice and should not be involved in the direct management of schemes. The Committee believes there should be a greater role for the General Manager of the State Superannuation scheme on the Board. This position is supported by the recommendation of the Joint Working Party Inquiry into the Commonwealth Superannuation Fund Investment Trust, that the Chief Executive Officer be one of the five trustees.

RECOMMENDATION 5.13

THAT FOR THE STATE SUPERANNUATION SCHEME THE BOARD SHOULD COMPRISE:

(A) A GOVERNMENT-APPOINTED CHAIRMAN;

(B) THREE MEMBERS ELECTED UNDER CURRENT ARRANGEMENTS IN THE SUPERANNUATION ACT 1958;

(C) THE GENERAL MANAGER OF THE STATE SUPERANNUATION SCHEME;

(D) A REPRESENTATIVE OF THE PUBLIC SERVICE BOARD; AND

(E) A REPRESENTATIVE OF THE DEPARTMENT OF MANAGEMENT AND BUDGET.

As regards VICSESS, which will ultimately be the largest public sector scheme in the state, there is a strong case for wider representation. Since the administration and investment functions of VICSESS will be split it will be necessary to establish two Boards of Management.

RECOMMENDATION 5.14

THAT THE ADMINISTRATION BOARD OF THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS) SHOULD COMPRISE:

(A) A GOVERNMENT-APPOINTED CHAIRMAN;

(B) THREE MEMBERS ELECTED BY SCHEME MEMBERS;

(C) THE SECRETARY OF THE VICTORIAN TRADES HALL COUNCIL OR HIS/HER NOMINEE REPRESENTING PUBLIC SECTOR CONTRIBUTORS;

(D) ONE MEMBER REPRESENTING THE DEPARTMENT OF MANAGEMENT AND BUDGET;

(E) ONE MEMBER REPRESENTING THE PUBLIC SERVICE BOARD;

(F) ONE MEMBER REPRESENTING THE LARGE STATUTORY AUTHORITIES; AND

(G) THE GENERAL MANAGER OF VICSESS.

For VICSIT the Committee recommends a substantially smaller Board to allow greater flexibility and speed in decision making.

RECOMMENDATION 5.15

THAT THE BOARD OF THE VICTORIAN SUPERANNUATION INVESTMENT TRUST (VICSIT) BE AS FOLLOWS:

(A) A GOVERNMENT-APPOINTED CHAIRMAN;

(B) TWO MEMBERS ELECTED BY SCHEME MEMBERS;

(C) THE GENERAL MANAGER OF VICSIT;

(D) ONE MEMBER REPRESENTING THE DEPARTMENT OF MANAGEMENT AND BUDGET; AND

(E) ONE PRIVATE SECTOR INVESTMENT SPECIALIST.

5.3.2 Election of Employee Representatives

Where employee representatives are appointed, present schemes demonstrate a number of selection procedures, such as open election, election from specific categories of membership, and nomination by a trade union. The choice depends, at least to some extent, on the overall size of the board. The options appear to be

(a) open election from current members;

(b) for the largest schemes, elections from specific sections of the membership;

(c) for the largest schemes, nominations from specific unions; or

(d) for the largest schemes, a combination of (a) and (c), e.g. one openly elected representative and one nominated representative.

For those schemes with employee representation (19 in total) only eight had any form of election of member representatives. In the other schemes, employee representatives were nominated. Not surprisingly, the prevailing view expressed in union submissions supported method (c), i.e., nomination from unions. However, the Committee's view is that, wherever practicable, member representation should be by open election.

RECOMMENDATION 5.16

THAT ALL VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES BE REQUIRED, BY OPEN AND DIRECT ELECTION, TO HAVE MEMBER REPRESENTATION ON THEIR GOVERNING BODIES.

RECOMMENDATION 5.17

THAT THE TREASURER REVIEW EMPLOYEE SELECTION PROCEDURES FOR TRUSTEE OR BOARD REPRESENTATION AND ENSURE THAT, WHEREVER PRACTICABLE, THE RECOMMENDATIONS ARE IMPLEMENTED AFTER APPROPRIATE CONSULTATION.

Finally, the Committee is concerned that Trustees and Board members do not become entrenched.

RECOMMENDATION 5.18

THAT ELECTIONS FOR CONTRIBUTOR REPRESENTATIVES BE HELD AT INTERVALS OF NOT MORE THAN FOUR YEARS, AND THAT NO BOARD OR TRUSTEE MEMBER BE ALLOWED TO SERVE MORE THAN TWO CONSECUTIVE TERMS.

5.3.3 Female Representation on Boards

Although no statistics are available, it appears that few women sit as member trustees or government representatives for public sector superannuation schemes. For example, in the largest scheme, the State Superannuation scheme, females represent 43% of the membership but have no representation at the Board level. The overall situation is probably due to past under-representation of women in occupational schemes and in unions and official union positions. The Committee believes that the Government, where relevant, should consider what institutional and other barriers there are to women becoming trustees or representatives, and what affirmative action can be taken to encourage them.

RECOMMENDATION 5.19

THAT AS A FIRST STEP TOWARDS INCREASING THE NUMBER OF FEMALE TRUSTEES THE GOVERNMENT SHOULD, WHERE POSSIBLE, ENSURE FEMALE REPRESENTATION ON THE BOARD OF THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS).

The Committee would also strongly support female representation on the State Superannuation Board - the largest State public sector scheme.

RECOMMENDATION 5.20

THAT WITH ANY RECONSTITUTION OF THE STATE SUPERANNUATION BOARD THE GOVERNMENT SHOULD, WHERE POSSIBLE, ENSURE ONE OF THE GOVERNMENT APPOINTEES IS FEMALE.

5.3.4 Information Access

An important element in the participation of employees in public sector superannuation is access to information on how their scheme operates and how particular changes, if they are proposed, are likely to affect them personally. It is also important that, if such information is provided, it be presented in such a way that it is intelligible to scheme members, and that such information (e.g., on scheme performance) be presented in a timely fashion.

RECOMMENDATION 5.21

THAT THE TREASURER, IN CONSULTATION WITH SCHEME MANAGEMENT, ESTABLISH REPORTING STANDARDS AND FORMATS FOR VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES. THESE SHOULD INCLUDE:

(A) STATEMENTS OF SCHEME BENEFITS, CONTRIBUTIONS AND CONDITIONS;

(B) A SUMMARY ACTUARIAL REVIEW OF SCHEME COSTS AND SCHEME PERFORMANCE;

(C) AN OUTLINE OF MANAGEMENT STRUCTURES AND LIST OF BOARD MEMBERS AND SENIOR ADMINISTRATIVE STAFF; AND

(D) PROPOSALS FOR RULE CHANGES.

5.3.5 Changing Superannuation Provisions

The wider issues of the procedures for changing superannuation provisions revolve around the industrial relations consequences of government-initiated changes to superannuation.

The Committee in its Review Report had substantial reservations about the appropriateness and efficiency of current processes for changing superannuation provisions either as a result of union-initiated claims or government decisions. The key feature of the current situation is that procedures are indeterminate. There appear to be several avenues for unions and/or the members to pursue changes to superannuation provisions, thus promoting ad hoc and inconsistent decision-making. This situation also leads to substantial pressure for the leapfrogging of superannuation claims.

The Review Report explained in detail the operations of the two consultative committees - the Treasurer's Consultative Committee (TCC) and the Superannuation Advisory Group (SAG) - which have been established by the Treasurer to deal with changes to superannuation schemes. The Committee indicated grave concern regarding the operations of these two bodies and, in particular, their inability to provide an effective procedure for dealing with government and union-initiated claims.

RECOMMENDATION 5.22

THAT THE PRESENTLY CONSTITUTED TREASURER'S CONSULTATIVE COMMITTEE ON SUPERANNUATION AND THE SUPERANNUATION ADVISORY GROUP BE WOUND UP, AND THAT THE FUNCTIONS OF THESE COMMITTEES BE TAKEN OVER BY A SPECIAL CONSULTATIVE COMMITTEE WHICH WOULD REPORT TO A NEW SUPERANNUATION TASK FORCE OR, WHERE RELEVANT, DIRECTLY TO THE TREASURER.

The Committee believes the new task force should be developed along the lines of the Industrial Relations Task Force. Currently, the Industrial Relations Task Force is chaired by the Minister for Industrial Relations, and consists of the Treasurer, Minister for Employment and Training, Minister for Consumer Affairs, Minister for Minerals and Energy and two Government

backbenchers. The Minister concerned or the Ministry of Industrial Affairs raises issues for decision, which then go to Cabinet.

The Committee believes a similar model should be adopted for government and member/union-initiated changes to public sector superannuation provisions. The Committee believes the Treasurer should chair the Task Force and membership should include the Minister of Industrial Affairs, one backbench Member and other relevant Ministers as deemed necessary.

The Committee is hopeful that this strategy will be acceptable to all parties involved in superannuation negotiations. In particular, the Committee is mindful of comments made by the Victorian Trades Hall Council in submissions to this Committee that they: "... support an overall co-ordinated approach to resolution of superannuation claims"(12) and that, "consultation with the Trade Union Movement and other interested organisations shall be through the Department of Management and Budget".(13)

Under the Superannuation Task Force, a Consultative Committee should be set up whose membership would vary depending on the issue under examination, but it would have permanent members from a number of areas including the Victorian Trades Hall Council (one member), the Chairpersons of the State Superannuation Board, the VICSESS Board, the SERB Board and a representative of the Ministry of Industrial Affairs; it would be chaired by an independent Government appointee. Depending on the issue, the permanent members would be joined by specialist members on the following basis:

(a) Scheme Membership Concerns

This would cover such items as benefits, contributions and scheme conditions and the extra participants would be elected representatives of the schemes.

(b) Administration Concerns

This would cover such questions as portability of benefits,

mechanisation of administration, etc. The extra members would be scheme managers and administrators.

(c) Cost Effectiveness Concerns

The extra members would be from employing bodies and authorities, the Department of Management and Budget and the Government Actuary.

RECOMMENDATION 5.23

THAT THE 'PERMANENT' MEMBERS OF THE CONSULTATIVE COMMITTEE SHOULD BE:

(A) A CHAIRPERSON NOMINATED BY THE GOVERNMENT;

(B) A REPRESENTATIVE OF PUBLIC SECTOR CONTRIBUTORS ELECTED UNDER THE AUSPICES OF THE TRADES HALL COUNCIL;

(C) CHAIRPERSONS OF THE STATE SUPERANNUATION SCHEME, SERB AND THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS), ONCE ESTABLISHED; AND

(D) A REPRESENTATIVE OF THE MINISTRY OF INDUSTRIAL AFFAIRS.

DEPENDING ON THE ISSUE UNDER DISCUSSION, SUCH AS SCHEME MEMBERSHIP, ADMINISTRATION, OR COST EFFECTIVENESS, OTHER REPRESENTATIVES WOULD JOIN WITH THE 'PERMANENT' MEMBERS.

The Consultative Committee would consider all matters concerning the introduction of VICSESS and any ongoing concerns of current public sector superannuation schemes.

Matters calling for consultation must, on occasion, involve more than one of these groups. This could be handled appropriately if all enquiries were

channelled through the Director of Superannuation. The Treasurer would determine the process by which the non-permanent members would be appointed. The Director of Superannuation would consider the questions raised at the meetings and add his own comments before referring any resulting reports to the Treasurer. The Task Force and the Consultative Committee would be serviced by the Director of Superannuation.

SECTION 5.4 ADMINISTRATIVE SYSTEMS AND INFORMATION REQUIREMENTS

5.4.1 Administration and Computerisation

The system of record maintenance and the process by which contributions and payments are made are significant elements in the administration of any superannuation system. The Committee therefore commissioned Campbell and Cook Computer Services to report on existing computerisation and to compare installations against those of a model scheme.

A major problem encountered by the Consultants was the absence of a centralised and co-ordinated approach to administration and computerisation within Victorian public sector superannuation schemes. As in so many other areas, successive State Governments have permitted schemes to develop their own systems - with varying levels of competence - and to purchase their own hardware. The Committee was also concerned, in the case of the State Superannuation Scheme, with the limited availability of middle management personnel with experience of large scale computer systems. The State Superannuation Board had failed to implement consultant advice on the need for additional managers with computer experience.

None of the computer systems reviewed by the consultants met all the criteria of the proposed model scheme. The Committee's opinion is, in view of the necessity to continually update and review data processing systems, plus the complex multi-employer nature of the proposed new scheme, that there is a clear need for Government to acquire system-specific expertise in the superannuation area.

RECOMMENDATION 5.24

THAT THE CONSULTATIVE COMMITTEE, WITH ITS ADMINISTRATIVE MEMBERSHIP, REVIEW THE CAMPBELL AND COOK COMPUTER SERVICES REPORT AND MAKE RECOMMENDATIONS. IT SHOULD ALSO ADVISE THE TREASURER ON THE MOST APPROPRIATE SYSTEM FOR THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS).

The Consultative Committee should advise the Treasurer on hardware and software choices and on management and support staff functions.

5.4.2 Benefit and Contribution Systems

The Committee's Review Report drew attention to a number of schemes in which the employee's contribution is determined on an age-related basis. The most important of these is the State Superannuation scheme but the Port of Melbourne has similar arrangements. The Committee concluded that the unit concept upon which these schemes are based is no longer appropriate and is overdue for reform.

The original unit basis of the State Superannuation scheme has been heavily diluted by a number of relatively drastic changes over the years. The scheme is now effectively a defined benefit scheme depending on final salary and service, rather than a unit scheme. Contribution rates originally fixed for males now apply to both sexes. The contribution rates for age 65 retirement give no recognition to the fact that many retire at age 60, and the upper limit of 9% on total member contributions finally eliminates the unit principle for older members. All that remains is an unwieldy basis for the determination of member contributions at the younger ages. An 'advantage' claimed for the system is that it produces very low contribution rates at young ages. On the other hand, the system adds considerably to the burden of administering the schemes; many of the problems of mechanisation, data capture, etc., are clearly attributable to these quite unnecessary complexities.

RECOMMENDATION 5.25

THAT, IN ASSOCIATION WITH OTHER REFORMS, THE COMMITTEE RECOMMENDS THE REPLACEMENT OF THE UNIT SYSTEM OF CONTRIBUTIONS IN THE STATE SUPERANNUATION AND PORT OF MELBOURNE SCHEMES.

Also mentioned in the Review Report is another obsolete feature of scheme design and administration - the dual basis of determination of lump sum retirement, death and disability benefits under the Local Authorities scheme.

Members receive either the proceeds of a notional endowment assurance with accrued bonuses or a formula benefit based on salary and service, whichever is greater. This unnecessarily complicates an otherwise straightforward scheme which, in most other respects, matches the Hospitals and SERB schemes. The system is difficult to explain to scheme members and requires much more elaborate record-keeping than would otherwise be necessary.

RECOMMENDATION 5.26

THAT THE LOCAL AUTHORITIES SCHEME BE BROUGHT MORE INTO LINE WITH THE HOSPITALS AND SERB SCHEMES BY PHASING OUT REFERENCE TO ENDOWMENT ASSURANCE. THIS SHOULD BE DONE IN SUCH A MANNER THAT EXISTING MEMBERS ARE NOT DISADVANTAGED.

5.4.3 Portability

The Committee's Review Report indicated the general concern of many parties at the lack of portability of superannuation benefits. Community-wide portability presents a number of problems and would require Commonwealth legislation to be fully effective. An obvious advantage of general portability throughout the State public sector is the freeing-up which would occur in the labour market, especially in respect of technical and managerial people. Such people could move more freely between departments, authorities and other bodies, which should lead to an overall improvement in the performance of the system. The immediate costs to employing bodies would be higher than at present, but the Committee believes that these costs would be far outweighed by the long term benefits of a happier and more effective workforce.

The Review Report suggested that a useful first step would be to provide automatic portability throughout the Victorian public sector. This would not be difficult and would represent a considerable improvement over the present situation.

RECOMMENDATION 5.27

THAT THE GOVERNMENT SHOULD INTRODUCE LEGISLATION MAKING SUPERANNUATION PORTABILITY AUTOMATICALLY AVAILABLE THROUGHOUT THE VICTORIAN PUBLIC SECTOR.

If the benefits, contribution rates and conditions of all superannuation schemes were the same, all that would be necessary under such legislation would be to transfer existing entitlements and supporting assets. Since schemes are not the same, it is not possible for a scheme member changing employment to retain existing entitlements completely unaltered. However, it is possible to have those entitlements fully recognised. The machinery would be the same as that outlined in Section 4.1.5. In other words:

(a) the members entitlement under the old scheme for membership to date would be calculated in the form of a transfer value on a basis approved by the Treasurer;

(b) the transfer value would be applied to purchase past membership entitlements under the new scheme, again on a basis approved by the Treasurer; and

(c) the transfer value would be passed from the old to the new scheme.

These arrangements would be needed while schemes continue in their present form. Introduction of the new standard scheme would gradually eliminate the process, as increasing numbers of people who are members of the scheme change their jobs.

SECTION 5.5 FINANCIAL ACCOUNTING AND ACTUARIAL STANDARDS

5.5.1 Accounting Standards

As a result of the examination of the twelve largest schemes, plus the Parliamentary scheme, by its accounting consultant Mr. G. Hubbard, the Committee concluded in its Review Report, "that not one of the 13 schemes reviewed is currently producing an acceptable set of useful information for those concerned with the schemes."(14) From the information supplied in connection with the Inquiry, the committee believes the same could be said of the remaining public sector schemes not considered by the consultant. As a result, the Committee concluded that, "uniform and comprehensive accounting and reporting procedures should be in place".(15)

The consultant indicated three possible formats for such accounting and reporting. These were

(a) the recommended standards of the Association of Superannuation Funds of Australia (ASFA) (December 1979);

(b) the consultant's own proposal, substituting for the ASFA accounting standards a special profit and loss statement, a balance sheet showing market values and including actuarial information, and a funds flow statement showing all sources of cash received and all payments made; and

(c) a compromise between (a) and (b) basically substituting a statement of net assets at market value for the possibly controversial balance sheet in (b).

The Committee believe that option (a) is to be preferred because this has the clear virtue of established acceptance in the private sector.

RECOMMENDATION 5.28

THAT THE TREASURER REQUIRE ALL VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES TO INTRODUCE, FOR THE 1985-86 FINANCIAL YEAR, ACCOUNTING AND REPORTING STANDARDS WHICH MEET THOSE RECOMMENDED BY THE ASSOCIATION OF SUPERANNUATION FUNDS OF AUSTRALIA.

Adoption of the ASFA standard would require production on an annual basis of the following elements:

(a) a full trustees' report;

(b) an abbreviated report for scheme members;

(c) personal advice to members giving a current statement of main benefit entitlements;

(d) a set of standard accounts;

(e) an auditor's report; and

(f) an actuary's report.

A detailed list of these requirements is given in Appendix A.

5.5.2 Auditing Procedures

Adoption of standard bases for accounting and reporting would obviously facilitate the auditing of public sector superannuation schemes. In the Review Report, the Committee also felt that public sector superannuation schemes should be declared as public bodies for the purposes of the Annual Reporting Act 1983. Quoting from the Auditor-General's submission to the Committee the impacts of this would be:

"(a) the Treasurer would be able to prescribe the form and content of financial statements and any other standards which are considered necessary to ensure uniformity and consistency of accounting and reporting practices;

(b) provided annual disbursements are in excess of $1 million, superannuation bodies would be required to table their reports in Parliament; and

(c) all declared bodies would be automatically subject to audit by the Auditor-General."(16)

RECOMMENDATION 5.29

THAT ALL VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES BE DECLARED AS PUBLIC BODIES UNDER THE ANNUAL REPORTING ACT 1983.

This recommendation must be seen in conjunction with Recommendations 5.28 and 5.30.

5.5.3 Actuarial Procedures

The Committee regards actuarial reporting as a fundamentally important element in the reports which should be produced regularly on the affairs of superannuation schemes and is pleased to note that this aspect is included in the ASFA standard outlined above.

In commenting on the feasibility of uniform provisions for this purpose, the Committee's actuarial consultant, Mr. R.W. Champion, felt that such provisions should include the requirements that:

"(a) the actuary deals with both funded and unfunded benefits;

(b) appropriate annual costs to be recognised by employers should be stated;

(c) reports should be made not less frequently than every 3 years; and

(d) reports should be submitted within 12 months (and perhaps, after a transition period, within 6 months)."(17)

The Consultant suggests that non-specific provisions, which would not therefore require uniform actuarial methods and assumptions, would best allow a flexible response to changing conditions.

RECOMMENDATION 5.30

THAT, IN IMPLEMENTING RECOMMENDATIONS 5.28 AND 5.29, THE TREASURER REQUIRE ACCOUNTING AND REPORTING STANDARDS WHERE:

(A) ACTUARIAL REVIEWS COVER BOTH FUNDED AND UNFUNDED BENEFITS;

(B) ANNUAL COSTS TO EMPLOYERS ARE DETAILED;

(C) ACTUARIAL REPORTS ARE SUBMITTED ON A THREE YEAR CYCLE; AND

(D) ACTUARIAL REPORTS SHOULD BE SUBMITTED WITHIN SIX MONTHS OF THE CLOSE OF THE REPORTING PERIOD.

SECTION 5.6 DEFINITIONS AND MINOR PROVISIONS.

5.6.1 Uniform Definitions and Provisions

Apart from the wide diversity of provisions for benefits and contributions in the Victorian public sector superannuation schemes, the Committee found great variation in the definitions and minor provisions on which the operation of these schemes depend. This situation is, once again, the result of unco-ordinated development over many years. Such variation is perhaps harmless enough within the context of each separate scheme, but from the Committee's perspective it seems absurd that comparatively minor differences in fundamental provisions and definitions should persist throughout the system.

In Appendices B and C are listed:

(a) items commonly defined in the documentation of schemes but defined in different ways; and

(b) scheme provisions which differ between schemes largely because of the independent establishment and evolution of each scheme.

There are innumerable instances of these differences in scheme documentation. Salary, for example, is defined in 29 lines in the Superannuation Act 1958. The corresponding definition in the State Employees' Retirement Benefits Act 1979 occupies eight lines. The schemes for Local Authorities, Hospitals and SERB are similar in many ways, but their resignation benefits differ materially.

The lists in the Appendices do not pretend to be complete. They are merely illustrative of the items which vary, sometimes considerably, between schemes and where the variation is difficult, if not impossible, to justify.

These differences would obviously disappear if a single scheme covered the whole of the public sector. While separate schemes persist, there would be advantages if these differences could be reduced or eliminated. The Committee appreciates that many of the items concerned may have a

fundamental influence on scheme members' entitlements. To the extent that standardisation improved members' benefits there would be few problems, but scheme members would have substantial cause for objection where the standard provision or language proved less 'liberal' than presently exists.

Apart from the impact on members' rights, the process of amending documents with a view to standardisation is difficult and costly. Consequently, the Committee believes it would be unreasonable to suggest a massive programme of standardisation, but it does recommend that the opportunity be taken - when other more fundamental changes are to be made in public sector schemes - for these to be based as far as possible on standard definitions and provisions.

RECOMMENDATION 5.31

THAT THE TREASURER PREPARE AN APPROVED SET OF PUBLIC SECTOR SUPERANNUATION SCHEME DEFINITIONS AND PROVISIONS AND THAT, WHERE FEASIBLE, EXISTING VICTORIAN PUBLIC SECTOR SCHEMES BE ENCOURAGED TO INTRODUCE THEM.

SECTION 5.7 TRANSITION ISSUES

5.7.1 Benefit and Contribution Administration

If, as the Committee proposes, VICSESS is introduced, there are a number of important transition issues to be considered.

The Committee has already indicated that it sees the Director of Superannuation as having a key role in the establishment, formation and monitoring of the new scheme. One important issue is the treatment of new scheme members, i.e., all new public sector scheme entrants. On the assumption that scheme members continuing under current arrangements will be looked after by the present scheme management, it needs to be decided whether future new members and members transferred from current schemes should be administered

(a) under present scheme administration; or

(b) under a new centralised scheme.

An important advantage of alternative (a) is that the natural tight link between the employer's payroll and superannuation records is fully maintained. This is especially significant in the case of large fully computerised groups. Other advantages are that the present funding system can be maintained without disturbance (if that is appropriate) and present arrangements for member representation and participation can continue with little if any disturbance. Disadvantages of alternative (a) are, firstly, that the scheme manager would have to maintain separate benefit contribution and accounting records for two schemes, and secondly, that separate documentation of new scheme benefits would be required for each public sector body.

The latter difficulty is avoided altogether under alternative (b), which also ensures a completely uniform approach throughout the State. In the longer term, alternative (b) has the obvious advantage of automatic portability between public sector employers. If all new scheme moneys are to be invested centrally in a single fund, alternative (b) would have the advantage of

establishing a tight link between the scheme accounts and investment operations. The obvious disadvantages of alternative (b) are, separation from each employer's payroll system, greater communication problems, and more remote representation and participation of members. Alternative (b) would also involve the operation of differing funding systems for particular employers. This would appear to require the apportionment of the central fund into several notional funds.

RECOMMENDATION 5.32

THAT VICSESS BE INTRODUCED BY WAY OF PRESENT ADMINISTRATION (ALTERNATIVE (A)) IN CASES APPROVED BY THE TREASURER. A NEW CENTRALISED ADMINISTRATION SHOULD BE ADOPTED IN ALL OTHER CASES. APPROVAL FOR USE OF ALTERNATIVE (A) WOULD BE CONDITIONAL ON SIZE AND EFFICIENCY OF PRESENT ADMINISTRATION.

NOTES

(1) Campbell & Cook Computer Services, A Study of Computer Administration Systems for Selected Victorian Public Sector Superannuation Schemes, A Report prepared for the Economic and Budget Review Committee, VGPS, Melbourne, April 1984, p.3.

(2) Ibid., p.3.

(3) Ibid., p.2.

(4) R.A. Jolly, Treasurer, A Letter to the Chairman, Economic and Budget Review Committee, 23 August 1984.

(5) Economic and Budget Review Committee, A Review of Superannuation in the Victorian Public Sector, VGPS, Melbourne, April 1984, p.207.

(6) Transcript of Seminar, 20 July 1984, p.38.

(7) Submission, Municipal Officers Association, 30 August 1983, p.7.

(8) Extracts of Recommendations of the Joint Working Party (inquiring into the Superannuation Fund Investment Trust), Super Fund Investment Trust Broadsheet, Authorised by Paul Munro, National Secretary, Administrative and Clerical Officers Association, 1984, p.4.

(9) Ibid., p.2.

(10) Submission, Victorian Trades Hall Council, June 1984, p.27.

(11) Submission, Victorian Public Service Board, 10 February 1984, p.6.

(12) Victorian Trades Hall Council, op.cit., p.26.

(13) Ibid., p.2.

(14) Economic and Budget Review Committee, op.cit., p.207.

(15) Ibid., p.209.

(16) Submission, B.J. Waldron, Auditor-General for Victoria, 18 October 1983, p.4.

(17) R.W. Champion, E.S. Knight & Co., Uniform Provisions for the Management of Public Sector Superannuation Schemes, A Report prepared for the Economic and Budget Review Committee, VGPS, Melbourne, April 1984, p.25.

CHAPTER 6

DISABILITY RETIREMENTS WITH SPECIAL REFERENCE TO THE STATE SUPERANNUATION SCHEME

SECTION 6.1 THE ISSUE OF DISABILITY RETIREMENTS

6.1.1 The Significance of the Problems

A major concern of the Committee's Review Report was that, under the State Superannuation scheme, rates of disability or ill health retirement were not only substantially higher than those reported for comparable private sector superannuation schemes but also higher than those reported for a number of major (and comparable) public sector schemes in other States.

There can be little doubt that the adverse experience of the State Superannuation scheme is largely attributable to the extremely favourable level of benefits payable on disability. Another factor is the absence of effective employee assessment and redeployment policies. On the former point, the Committee's consultants PTOW/TPF&C, quoted from an Australian Public Service Board report on the Commonwealth scheme in the following terms:

> "... the relative level of benefits paid on invalidity retirement increased with the introduction of the new superannuation scheme in July 1976 and, over the next two years, the numbers of invalidity retirees soared."(1)

The Paper concluded that:

> "The rapid acceleration in invalidity retirement rates in the APS over the period 1976 to 1978 has no community parallels and must be attributed to causes specific to the Service. In particular it appears that the introduction of the new superannuation scheme, with even greater relative benefits available to invalidity retirees compared with age

retirees, caused a great acceleration in the numbers of officers seeking invalidity retirement and a consequent acceleration in the numbers retiring in this manner."(2)

The Consultants added:

"The experience of the Commonwealth Fund is a most relevant example of the effect of the generous benefits in the public sector on disability experience."(3)

Claims for disability pensions under the State Superannuation scheme now account for about one in every three retirements. Over the period 1950 to 1980, claims have roughly trebled for males and increased by 50% for females. Almost half current claims are attributed to mental disorders. These figures are unreasonably high compared with any comparable schemes. The Committee believes that this should not be allowed to continue.

The adverse experience of disability occurs mainly at the older ages, among members who entered the scheme many years ago. In recent years, stringent medical conditions have been applied by the State Superannuation Board at the date of entry. About two-thirds of applicants are granted full benefits on death and disablement, about half the remainder are granted full benefits on death and reduced benefits on disability, and the other half are granted reduced benefits on both death and on disability. Relaxation of these requirements would be likely to lead to heavier disability claims in future. The Committee's Review Report explained that, if costs are to be kept within bounds, full scale benefits can be granted only to those who satisfy appropriate medical requirements.

Given the objectives of reducing current rates of disability retirement - particularly in the Police Force - the Committee believes that policy options must be considered in each of the following areas:

(a) definition of disability;

(b) disability benefit structures;

(c) selection and recruitment of contributors;

(d) monitoring of potential invalidity retirees;

(e) staff evaluation and redeployment; and

(f) invalidity retirement practices.

The Committee clearly sees the present situation as unacceptable. The status quo not only threatens the long term viability of the State Superannuation scheme, but also the effective management and redeployment of the Victorian public sector workforce. Although the Committee's concern, as demonstrated in the Review Report, was directed toward the major employing authorities within the State Superannuation scheme, these comments are likely to apply with similar force to a number of other public sector schemes.

6.1.2 Commonwealth Experience

The Committee, in reviewing alternative personnel practices and policies, focused particular attention upon Commonwealth experience under the Commonwealth Employees (Redeployment and Retirement) Act 1979. The CE(RR) Act is a unique body of legislation in the field of personnel practice. The Committee believes it has wide application to the Victorian situation, particularly in reducing the incidence of disability retirements.

The Committee recognises and appreciates the substantial industrial relations problems that were associated with the introduction of the CE(RR) Act at the Commonwealth level. However, the Committee also believes that it is imperative that a properly structured redeployment policy be developed in Victoria to reduce the cost of disability retirements in both financial and human terms. It is in this sense that the Committee believes the CE(RR) Act model provides a starting point for the development of this approach by the Government in consultation with the public sector trade unions.

6.1.3 Consultants' Reports

In view of the obvious importance of disability as an issue in public sector superannuation, the Committee sought independent expert assistance. As indicated above, Consulting Actuaries PTOW/TPF & C were asked to analyse the recent experience, to evaluate the impact of scheme terms and conditions on that experience of the State Superannuation scheme, and to indicate options which would moderate the experience in future.(4) Coopers and Lybrand Services, Management Consultants, were asked to examine the personnel practices of the major bodies participating in the State Superannuation scheme so far as these have a bearing on claims for disability pensions and on re-employment of former pensioners, and to provide options for change.(5) These two complementary studies have been published by the Committee.

SECTION 6.2 WORKER'S COMPENSATION AND ITS RELATION TO SUPERANNUATION PROVISIONS IN THE PUBLIC SECTOR

6.2.1 Worker's Compensation

Where disability is work-related, a scheme member is normally eligible for worker's compensation benefits during absence from employment. These are payable on a statutory basis which applies throughout the State and are independent of any superannuation disability provisions. The current amounts for adult workers range from a minimum of $180 per week single to a maximum of $267 per week married with three children. These amounts are indexed from time to time. In the event of permanent disablement leading to retirement, a person may become eligible for both a superannuation disability benefit and a worker's compensation benefit. When both benefits are added, the member's income after retirement is comparable with, and may even exceed, his/her income while at work. The availability of this dual payment must act as a disincentive to seek rehabilitation and return to work.

The Committee understands that the standard procedure for members of the State Superannuation scheme who suffer a work-related disability is as follows:

(a) At the onset of disability, the employees claim worker's compensation. Depending on the severity of the disability, leave on full pay is granted under the relevant award. This comes in part from the compensation benefit as above and the balance, by way of make up pay, from the employer.

(b) At the end of this period, usually 12 months, the member's accrued sick leave entitlement may be used to supplement the compensation benefit and to continue 'full pay' for such further period as the sick leave entitlement allows.

(c) When sick leave is exhausted and the disability continues, the member may apply for a disability benefit under the superannuation scheme. If granted, this supplements the

continuing compensation payment. The member's income may thus increase or decrease at this point.

(d) If disability persists the income from compensation benefits under (c) continues until the total compensation payments involved reach the statutory maximum, which is currently $63,336. This may take 5 to 7 years.

(e) When the maximum under (d) is reached, the claimant applies to the Worker's Compensation Board for extension. If the disability persists, the extension is normally granted. Under this process compensation payments can and do continue indefinitely. The Committee is aware that this statement is at variance with statements made in the recent Cooney Report.(6)

The Committee was unable to obtain statistical evidence of the number of people who are currently receiving a disability benefit and worker's compensation. The Committee believes that such statistics should be available.

The Committee has commented in the Review Report and this Report on the causes, as it sees, of the heavy disability claims in the State Superannuation scheme. The major causes identified were the relatively generous level of disability pension benefit, especially in comparison to the early retirement benefit, the definition of "own occupation" in the Superannuation Act 1958, and the lack of redeployment policies, amongst other factors. The difficulty caused by the payment of a generous disability benefit (especially relative to the early retirement benefit) is compounded when a worker's compensation benefit is also payable.

The Committee recognises there may be times, on humanitarian grounds, for the payment of both worker's compensation and superannuation benefits. Although it has not been able to investigate these issues, the Committee believes it important that the Government should address this matter, especially given the number of potential cases where dual benefits are likely

to be paid. Of particular concern to the Committee is the heavy incidence of disability claims for mental disorder, especially in the Education Department and Police Force, where dual benefits are potentially payable in the majority of these cases. The Committee believes the payment of these benefits without an accompanying rehabilitation programme could hinder the likelihood of recovery and, therefore later redeployment, because these disability pensioners could have a level of income equal to or in excess of that while at work. This would appear to be placing an unnecessary extra cost burden on the State.

RECOMMENDATION 6.1

THAT, IN VIEW OF THE INFORMATION RECEIVED BY THE COMMITTEE AND THE POTENTIAL COST TO THE STATE, THE GOVERNMENT SHOULD CONSIDER WHAT ACTION, IF ANY, SHOULD BE TAKEN IN CASES WHERE DISABILITY PENSIONS FROM THE STATE SUPERANNUATION SCHEME ARE BEING PAID IN CONJUNCTION WITH THE WORKER'S COMPENSATION BENEFIT.

Longer term moves by the Commonwealth Government towards a national no-fault compensation scheme, as recently announced, would need to be considered in any review of this area. It is worthwhile to note that a national no-fault compensation scheme would make the recognition of compensation benefits by superannuation schemes all the more desirable, since the no-fault concept would cover not merely work-related illness or injury, but any cause of injury.

SECTION 6.3 DEFINITION OF DISABILITY IN THE STATE SUPERANNUATION SCHEME

6.3.1 Definition of Disability

Disability pensions under the Superannuation Act, 1958, Section 29(1), are payable on the **'retirement of a contributor on the ground of ill-health or physical or mental incapacity to perform his duties'.** This is an 'own occupation' definition and would appear to be unduly restrictive in light of private sector practice and procedures in other public sector jurisdictions. Private sector practice is to use the more stringent 'any occupation', or 'any occupation for which the member is suited by training education or experience' definitions. The State Superannuation scheme definition means that claims are assessed without regard to the claimant's potential ability to resume alternative work.

Under the CE(RR) Act the medical officer, in conducting the examination of the potential retiree, is asked to report on whether or not the employee

(a) is fit to continue to perform his/her duties;

(b) is unfit to continue to perform those duties but is fit to perform other duties;

(c) is unfit to undertake any duties; or

(d) should be granted sick leave or further sick leave if available.

The Committee takes the view that the present criteria for retirement of 'incapacity to perform his duties' is far too liberal and that, in common with practice under the CE(RR) Act the ability to perform alternative duties should be assessed.

RECOMMENDATION 6.2

THAT THE DEFINITION OF DISABILITY BE ALTERED TO INCLUDE THE PHRASE, 'UNABLE TO PERFORM IN ANY OCCUPATION FOR WHICH THE MEMBER IS SUITED BY TRAINING, EDUCATION OR EXPERIENCE OR WOULD BE SUITED AS A RESULT OF RE-TRAINING'.

SECTION 6.4 DISABILITY BENEFIT STRUCTURES

6.4.1 Consultants' Options

In this area, PTWO/TPF & C have a number of suggested options.(7) These include :

(a) The disability pension should not exceed the amount available on early retirement. Early retirement is currently available only from age 60 under the State Superannuation scheme (except in the case of Police). At that age the pension is commonly 66.7% of salary instead of 70% at age 65. Such a reduction would obviously have little impact. The suggestion would have a much greater impact if current proposals for early retirement on reduced pension to be made available from age 55 are implemented; e.g., if the early retirement pension at age 55 were to be 50% of salary, in which case any disability pension before that age would also be 50%. At any age after age 55, the disability pension would be equal to the early retirement pension available at the date of disability.

(b) The disability pension could be reduced for short membership periods. An example of this is the NSW State Superannuation Scheme where benefits increase from 80% to 100% of full scale during the first 10 years of membership. This may in part account for the fact that male claim rates for disability pensions in NSW are much less than half the corresponding Victorian rates. The corresponding female rates are about two thirds of the Victorian figures. Another factor is that the NSW unit system of benefits gives generally lower pensions than the Victorian.

(c) Pension could be granted at a reduced rate (say 50% of salary) with the balance (i.e., 20% of salary) available to meet approved medical expenses.

(d) Lump sums could be offered in lieu of disability pension on a selective basis which is attractive to the member and favourable to

the State Superannuation scheme. The cases concerned would be those, especially at young ages, where disability is unquestionably permanent and early death is unlikely.

(e) The system of offsetting income earned while on pension could be refined. This presents some practical difficulty, since the object is to minimize the scheme's outlay and at the same time to encourage the pensioner to resume full-time work. Section 47(1)(c) of the Superannuation Act 1958 provides, in the case of a pensioner capable of gainful employment, for the reduction of the pension **'to not more than half the pension originally payable.'** It has been claimed that this provision is an error in drafting and that

(i) the intention was that the words should have been 'not less than half'; and

(ii) an early opportunity will be taken to alter the Act accordingly.

The current provisions of Section 47 (1) of the Superannuation Act 1958 appear to require amendment or correction in any event.

RECOMMENDATION 6.3

THAT, IN CONJUNCTION WITH THE CHANGE IN DEFINITION, THE COMMITTEE RECOMMENDS A COMBINATION OF OPTIONS (a) AND (c). THIS WOULD INVOLVE:

(A) ESTABLISHMENT OF SPECIFIC PROVISIONS FOR EARLY RETIREMENT FROM AGE 55;

(B) THE DISABILITY PENSION FOR MEMBERS OVER AGE 55 BEING EQUAL IN AMOUNT TO THE EARLY RETIREMENT PENSION AVAILABLE, BUT, FOR YOUNGER MEMBERS, THE DISABILITY PENSION WOULD BE EQUAL TO THE EARLY RETIREMENT BENEFIT WHICH WOULD APPLY TO THE MEMBER IF HE OR SHE HAD ATTAINED AGE 55; AND

(C) PROVISION FOR PAYMENT OF APPROVED MEDICAL EXPENSES UP TO A MAXIMUM, BEING THE DIFFERENCE BETWEEN THE NORMAL AND EARLY RETIREMENT PENSIONS.

THAT IS, THE DISABILITY PENSION SHOULD NOT EXCEED THE AMOUNT AVAILABLE ON EARLY RETIREMENT, BOTH IN RELATION TO THE STATE SUPERANNUATION SCHEME AND TO OTHER CONTINUING SCHEMES.

THE COMMITTEE ALSO RECOMMENDS THAT SECTION 47(1)(c) OF THE SUPERANNUATION ACT 1958 BE REDRAFTED, SO THAT THE PENSION PAYABLE CAN BE REDUCED TO ANY EXTENT THE BOARD SEES FIT.

ANY SUCH MEASURES SHOULD BE CO-ORDINATED WITH THE PROVISIONS FOR EARLY RETIREMENT BENEFITS AND WITH THE REVISED PERSONNEL PRACTICES MENTIONED BELOW.

SECTION 6.5 THE STATISTICAL BASE

6.5.1 Patterns of Disability Retirement

A major concern of the Committee was the absence of an adequate statistical base for the analysis of disability retirements. In the case of the State Superannuation scheme, the Committee's view was that available data were inadequate for a detailed and comprehensive review of the incidence and patterns of disability retirements. Even where data are available they are not being used effectively.

The Committee believes the Government will need to provide incentives to government departments to ensure the appropriate collection of data for monitoring disability retirements.

At the Commonwealth level the Australian Government Retirement Benefits Office is required to maintain sophisticated records of contributors and pensioners and provide relevant statistical analysis of appropriate trends. The Consultants indicated that, in contrast to the annual report of the Commonwealth Commissioner for Superannuation, the annual report of the State Superannuation Board did not provide readily accessible management information on disability experience.

RECOMMENDATION 6.4

THAT THE TREASURER ESTABLISH STANDARDS FOR DATA COLLECTION AND DATA REPORTING BY VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES, AND THAT A REVIEW OF DISABILITY EXPERIENCE BE AN INTEGRAL PART OF THE TREASURER'S ANNUAL REPORTING RESPONSIBILITIES. SUCH STANDARDS OF REPORTING MUST AT LEAST MATCH THOSE ESTABLISHED BY THE AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE.

6.5.2 Monitoring Requirements for Employing Authorities

If adequate personnel monitoring and reporting procedures are not in place in employing authorities, such organisations will be less able to manage their personnel functions or to evaluate the success of particular personnel practices and operations - particularly in recruitment and selection.

The Committee was concerned that the Education Department (as the single largest employing authority in the State Superannuation scheme) lacked an effective personnel reporting and monitoring system. Discussions held by Coopers and Lybrand Services with the Education Department indicated that their personnel system was incapable of generating anything more than the most rudimentary information on sick leave patterns. Such information would be invaluable as a predictor of possible disability or worker's compensation claims.

Although the situation is little different in the Police Force, the Chief Commissioner of Police, Mr. Miller:

> "... conceded that early identification of health problems will reduce the impact of ill-health retirements from the Force."(8)

However, he also stated that:

> "... At present there is no formal mechanism available for regular health checks on members of the Force...if provided with the necessary resources, the Force would see annual medical examination of all members as desirable and advantageous.
>
> The Police Medical Officer has requested that consideration be given to the establishment of an E.D.P. program which could identify problem areas within the Force by reference to sick leave records. At this time the request cannot be acceded to, but it is anticipated that when the Force's main-frame computer is operational, such a program will be developed."(9)

RECOMMENDATION 6.5

THAT THE TREASURER, WITH THE PUBLIC SERVICE BOARD AND OTHER EMPLOYING AUTHORITIES, ESTABLISH STANDARDS FOR PERSONNEL REPORTING PROCEDURES AND ENSURE THAT THESE ARE IN PLACE AS SOON AS POSSIBLE. THAT, IN PARTICULAR, THE EDUCATION DEPARTMENT SHOULD IMMEDIATELY REVIEW ITS PERSONNEL REPORTING AND MONITORING SYSTEMS TO ENSURE ADEQUATE TRACKING OF SICK LEAVE AND OTHER PERSONNEL DETAILS RELEVANT TO DISABILITY OR STRESS MANAGEMENT.

The Committee believes that its proposal to introduce notional funding, as described in Chapter 7, will assist in making departments recognise the cost of superannuation and therefore, indirectly, the cost of rising disability retirements. On this point the State Superannuation Board Annual Report 1983 stated:

> "... It is of significance that the Railways, which have an active personnel redeployment scheme and are required to reimburse Consolidated Revenue for five-sevenths of the cost of all pensions, has the highest average age and greatest length of service for contributors retired on pension on account of ill-health."(10)

SECTION 6.6 CONTRIBUTOR SELECTION PROCEDURES

6.6.1 Employing Authorities in Victoria : Recruitment and Selection Processes

The Committee was concerned to investigate all elements of recruitment and selection procedures to ensure that current arrangements did not contribute to earlier retirement due to disability. To provide a view of the situation the Committee commissioned Coopers and Lybrand Services, Management Consultants. The Committee also received submissions and held discussions with relevant organisations. From an assessment of these, the Committee found a few areas of concern which require a more detailed review. Two key areas were inadequate staff selection procedures (principally in the Education Department) and the fragmented and inadequate system of medical evaluation and reporting.

6.6.2 Staff Recruitment and Selection

The need for appropriate recruitment and selection procedures, beyond those undertaken for medical assessment for the State Superannuation scheme, is seen most clearly in occupations or career paths which are considered stressful. Among Victorian authorities whose members are contributors to the State Superannuation scheme, suitability for occupation criteria should be assessed for the Police, the teaching profession and certain sections of the railways.

The acceptance that stress is a feature of an occupation requires that organisations at least should have in operation selection and recruitment procedures which attempt to recognise such a situation and attempt to screen out those unsuited for the job. In potentially stressful career paths it is imperative that the individual be carefully matched with the job. The Committee appreciates that it is extremely difficult to develop completely effective screening devices, but would not regard that as a reason for having no form of initial screening nor a range of screening devices.

The Consultants were generally satisfied with entry recruitment and selection procedures within the employing authorities covered by the Public Service Board, State Transport Authority (V-Line) and the Police Force. The Committee believes some changes are required for the Police Force and the Education Department.

6.6.2.1 The Police Force - Selection Procedures

The Committee has undertaken a very broad review of selection procedures within the Police Force. The major problems appear to be the lack of a probationary period for Police recruits and possible under resourcing in the area of testing for potential psychological problems.

The Chief Commissioner made a number of relevant points on this issue:

> "Recruiting, selection and appointment of personnel are also bound by the Police Regulation Act and Regulations made under that Act. The physical and medical criteria for recruits are set by Regulation, and the requirements of the Government Medical Officer and State Superannuation Board. The Force has some doubt as to the validity of some of the physical criteria laid down, and the Assistant Commissioner (Personnel) has recently directed that some research be conducted to determine whether changes to the present criteria should be altered.
>
> There is no doubt that valid selection procedures, designed to ensure that only physically and mentally fit persons are accepted into the Force, must be attained. Indeed, the Secretary of the State Superannuation Board, recognises that the police selection procedures are "fairly stringent" (minutes of discussion 24th July, 1984, page 17), and yet appeared to be somewhat critical of the fact that some recruits in training were superannuated. It is agreed that superannuation of personnel with only days of service places an enormous burden on the superannuation system.
>
> It is of interest that Mr. Hastie recommends a change to the present system whereby recruits are sworn in on induction as a means of solving

the problem of superannuating members during training. The Force has identified problems associated with swearing in on induction and in September, 1982, forwarded a submission to the Minister for Police and Emergency Services recommending that recruits be placed on short term contract during the period of their Academy training and sworn in upon graduation. This matter is apparently still under consideration and a recent request has been sent to the Ministry seeking advice on the present situation with that submission."(11)

The Committee believes that in the Police Force there is a good case for placing police recruits on a short term contract during their period of training and swearing them in upon graduation. In evidence to the Committee, Mr. Hastie, Secretary of the State Superannuation Board indicated the problems of having no probation period for Police:

"THE CHAIRMAN: How could the procedures be improved? That is the aspect in which we are interested.

MR. HASTIE: Yes, I believe the selection processes could be, or alternatively, in some areas there should be probationary periods of appointment similar to the Public Service. I will go to the worst offender, the Police Department where there have been in the last two years to my knowledge, three people who have retired on the grounds of ill health in less than a week in the training area, two of them only the third or fourth night there. They have been able to get through the selection procedures and they got out to the college. They were fairly stringent selection procedures."(12)

Later in the discussion Mr. Hastie made additional comments on his view of the need for a probationary period.

"MR. HASTIE: The day they go to college they are sworn in as policemen. One of the cases I mentioned was an accident, but the others were psychiatric illnesses. It is rather disturbing to see them get to that situation. I have no argument with any traumatic injury situation where somebody, a lass, came off a bolting horse and injured a back. But where somebody goes berserk, in the mental area, on the fifth night at

Waverley and was taken off to hospital and was subsequently retired, everybody has to be horrified. This relates to selection procedures, but I am not sure who can devise them. We have had this in our mind for some time."(13)

Mr. Hastie indicated at a later hearing that the approximate individual cost of these trainees receiving a disability pension was of the order of $14,000 a year, updated by the CPI.(14) Given the Committee's review of the situation, it would appear to be a logical and cost saving device to reintroduce a probationary period for police undergoing initial training and for them not to be admitted to the State Superannuation scheme until after graduation.

RECOMMENDATION 6.6

THAT THE GOVERNMENT INVESTIGATES THE POSSIBILITY OF PLACING POLICE RECRUITS ON SHORT TERM CONTRACT DURING THE PERIOD OF THEIR ACADEMY TRAINING AND SWEARING THEM IN ON GRADUATION.

The Chief Commissioner also felt that improved psychological testing of recruits would assist the Force in recruitment and proper placement of personnel. The Committee has also received evidence from a number of psychiatrists who are involved with treating disabled policemen. A general view that was expressed by one consultant psychiatrist was that:

"... (there is) another group albeit a smaller one, where there has been a serious mis-match between the requirements of the police force in personality terms and the selection procedures adopted by the police force. This has resulted in some totally unsuited personalities attempting to act as policemen, in some cases to the discredit and disrepute of the force, in other cases resulting in ineffectual policemen."(15)

On this problem it is interesting to note the comments of the Public Service Board who felt that personality testing was not necessarily the best method to follow:

"MR. MORAN: In one of the consultant's report I read, there was mention of a psychometric testing as a means to get a better grasp of whether someone is likely to be an ill-health retiree. I was not sure that that was not linked to the problem of people going out for mental disorders and whether there was not a thought that personality based testing might be the way to go in relation to that. In the past year, that has been examined. The conclusion is that no reliability can be ascribed to personality testing."(16)

The Committee believes there is likely to be a diversity of views as to the most appropriate methods for selection of persons for particularly stressful occupations. Consequently, the Committee feels that there is a need for an overall review of the procedures for selection of persons for the Police Force, particularly in the area of psychological selection procedures.

RECOMMENDATION 6.7

THAT THE TREASURER AND THE MINISTER FOR POLICE AND EMERGENCY SERVICES INSTITUTE A REVIEW OF POLICE SELECTION PROCEDURES WITH A SPECIAL EMPHASIS ON THOSE PROCEDURES ADOPTED TO TEST FOR RESISTANCE TO STRESS.

6.6.2.2 Education Department - Selection Procedures

The Committee considers that a review of the Education Department's selection procedures should be undertaken. The Committee has found these procedures to be insufficiently resourced and inadequate. In this regard the Committee was particularly concerned that, from evidence from Coopers and Lybrand Services, it would appear that as an economy measure the Education Department was actively reducing resources in the selection area.

The Committee does note in evidence that the Education Department is now appointing people on a temporary basis so the employer has some experience with them before they become permanent and eligible for superannuation. However, it was also found that the Education Department has no special mechanisms to monitor these temporary appointees except sick leave records.

As Mr. Hastie, Secretary of the State Superannuation Board, said in evidence to the Committee on the temporary period of the appointee:

> "Basically, all that the Education Department can produce in that period are the sick leave records and nothing more."(17)

Given the high proportion of disabilities due to mental disorders in the teaching profession, the Committee believes that an overall policy, properly backed by resources, should exist on teacher selection.

RECOMMENDATION 6.8

THAT THE TREASURER AND THE MINISTER OF EDUCATION INSTITUTE A REVIEW INTO TEACHER SELECTION PROCEDURES TO ENSURE THEY DO NOT CONTRIBUTE TO INCREASED DISABILITY RETIREMENTS ESPECIALLY DUE TO MENTAL DISORDERS.

6.6.3 Medical Evaluation

The Coopers and Lybrand report expressed concern over the fragmented nature of medical services for superannuation purposes in the Victorian public sector. The Consultants made a general recommendation for more centralised and co-ordinated medical services in the Victorian public sector and one that allows for a clear evaluation of the effectiveness of selection procedures and entry standards.

The Committee certainly accepts the need for effective selection procedures and entry standards but has received conflicting evidence as to whether this would be improved by centralised medical services. Thus, Mr. Hastie, Secretary of the State Superannuation Board, when questioned whether all medical examinations should come under the Government Medical Officer, replied that:

> "They would have to have a tremendous increase in staff to handle the whole lot. It used to be done there. It was taken away and spread when we got the numbers. We find our results from both groups at present are

fairly much the same. We have access and we do have interchange. I know particularly between Dr. Heath and Dr. Ashton there are very few comments, and referrals even, in order to pick it up. In the long run whether we gain anything, I cannot see there is a tremendous gain there. Really they are working to the same set of forms and the same people are making the decisions for superannuation...Some (employers) will take, obviously, people on and put them up medically for permanent employment, as Mr. Craven mentioned earlier; the average sort of person would be horrified but they are still putting up for permanency because it is regarded if you are there for two years now is your time for permanency."(18)

However, representatives for the Government Medical Officer held a slightly different opinion. Mr. Craven of the Health Commission stated that:

"MR. CRAVEN: It would appear there have been some differences of opinion from time to time between various parties. I think the question of centralisation is probably one that we would address in a positive way. Speaking of our particular area I believe we have a good resource base and a good record base. We also have the expertise. The question of centralisation is one which certainly needs to be looked at.

CHAIRMAN: Do you believe it would have a positive impact on this process?

MR. CRAVEN: Yes.

CHAIRMAN: If, for example, the decision making remains where it is at the moment, how would centralising the medical service itself alter the picture?

MR. CRAVEN: I think when looking at our particular area we are not decision makers at this stage but we are recommendation makers. As far as the eventual decisions are concerned, obviously, we have a say in them but we do not have the final say and quite frequently we do not get a feed-back to say whether our decision making or recommendations have been right or wrong. I believe the flow-back or feed-back system

could be very valuable. I consider it is difficult to have a centralised system when one is geographically remote. I think the pure physical aspects of that inhibit good communication between areas."(19)

The Committee notes some conflict in what is considered the most appropriate structure for medical services. The Committee feels that there is a need for a greater role for the Public Service Board and other personnel departments in being directly involved in the classification of individuals for both employment and superannuation purposes.

RECOMMENDATION 6.9

THAT A COMMITTEE BE SET UP TO REVIEW THE PROVISION OF MEDICAL SERVICES FOR EMPLOYMENT AND SUPERANNUATION PURPOSES AND TO DETERMINE WHO SHOULD BE INVOLVED AND WHETHER SERVICES SHOULD BE CENTRALISED.

SECTION 6.7 WELFARE AND COUNSELLING

6.7.1 Employee Monitoring Options

Evidence presented to the Committee points quite clearly to the fact that, apart from the Railways (now V-Line) and, to a more limited extent the Police Force, welfare and counselling services are either not well developed or are ineffective. This apparent neglect in many employing authorities reflects both a failure to recognise that welfare and counselling can mitigate against poor selection and recruitment procedures, and a failure to recognise that such services are also important for the effective management of human resources.

The most obvious example of a neglect of welfare and counselling services is seen in the Education Department. Evidence presented to the Committee points to what may be described as neglect in failing to recognise the role of such services and procrastination in the face of continuing efforts by the major teacher unions to convince the Department of the cost effectiveness of such procedures.

The Consultants considered a proposal developed by the Teachers' unions for a centralised rehabilitation unit to deal with ill health retirement, and a restructuring of the Education Department to provide an efficient administrative system for dealing with worker's compensation and ill health retirement.(20) While the Committee does not see the teacher welfare proposals as the panacea for all departments, it does consider them as an important first step for the Education Department to provide a fully documented proposal for welfare and counselling services. Similarly, while the welfare and counselling procedures in place in V-Line are, from evidence available, highly effective, they may not be the most appropriate model for other departments.

Clearly, there is a wide range of options in the welfare and counselling area. The Committee believes that it is possible to develop common rules and procedures for the various employing authorities, while recognising that there may be special needs in so-called high stress occupations (e.g., teaching, police).

Options which could be considered are

(a) the applicability of the V-Line welfare and counselling model to other employing authorities;

(b) procedures for monitoring on a day-to-day basis the performance and accountability of officers who appear to be suffering under stress; and

(c) the development of management training programmes in welfare and counselling, specifically:

(i) training programmes which develop employee skill with regard to stress management; and

(ii) training programmes which develop manager/supervisor skill in effectively handling employees with welfare and stress problems.

RECOMMENDATION 6.10

THAT THE GOVERNMENT, THROUGH THE RELEVANT PERSONNEL AGENCIES, REVIEWS WELFARE AND COUNSELLING POLICIES AND PROGRAMMES TO ENSURE THEY ARE ADEQUATELY RESOURCED AND PROVIDE AN EFFECTIVE MECHANISM TO IDENTIFY AND ASSIST OFFICERS LIKELY TO APPLY FOR A DISABILITY RETIREMENT.

SECTION 6.8 REDEPLOYMENT VERSUS INVALIDITY RETIREMENT

6.8.1 Current Personnel Practice for Redeployment

The Committee believes that ineffective employee evaluation and redeployment policies are contributory factors to the unacceptably high rates of disability retirements observed in Victoria.

The Consultants' report and the Committee's own observations showed that management was by-and-large excluded from any responsibility for medical assessment and medical redeployment, either within disability claimants' departments or within the public sector as a whole. Management, if it wishes, can utilise disability retirements as a personnel tool (a 'soft' option), supporting applications for invalidity retirement as opposed to the more demanding task of assessment, retraining and/or redeployment.

It is clear that, in practice, redeployment is not an effective option open to management in the Victorian public service. The only exception is V-Line and, to a much more limited extent, ad hoc arrangements which have been developed between the State Superannuation Board and the Victorian Public Service Board. As the Review Report notes:

> "At the present time there is no mechanism in place within the Victorian public sector to allow employees declared eligible for redeployment (on medical or any other grounds), in one employing authority to be considered for employment in another".(21)

Further investigations by the Committee have only emphasised the Committee's initial findings. At a seminar on disability retirements in the State Superannuation scheme there were numerous references to the ad hoc nature of redeployment:

> "MR. HASTIE: Redeployment is only on an ad hoc basis where the matter is held over for discussion (by) the Superannuation Board officers with the relevant employment authority whether or not there is a vacancy."(22)

At the same seminar Dr. Stanbury clearly illustrated the situation during a discussion with the Chairman of the Committee in which the Government Medical Officer's mechanisms to redeploy officers were explained. Before recommending an ill health retirement, Dr. Stanbury claimed she:

"... would ring up the employing bodies to discuss alternative duties; to see if there was anything appropriate.

THE CHAIRMAN: Does the Government Medical Officer ring only the department through which the person was employed?

DR. STANBURY: Normally one would ring only that department.

THE CHAIRMAN: I do not understand how that works. Are you talking about looking for employment for the person, or are you talking to the employer about the capacity of the individual? You are looking for the type of work that may be available?

DR. STANBURY: Yes, in the department are there duties other than those for which the person has been considered to be unfit?

THE CHAIRMAN: Has data been collected of the success rates under this system?

MR. CRAVEN: No.

THE CHAIRMAN: Is there a procedure that each medical officer has to ring the department and check?

MR. CRAVEN: It is basically an ad hoc process where quite often during the investigation of a case information will emerge where a person may be placed in a department or in his own department where he can rehabilitate himself back to his previous duties. This does happen from time to time. We have built up various informal relationships in liaison with various departments and employing authorities."(23)

The Committee is concerned with this situation, which appears to have arisen firstly, because there are no formal mechanisms to ensure appropriate redeployment policies are brought into play, and secondly, because there are problems surrounding the definition of 'own occupation' under the Superannuation Act 1958. The Committee has dealt with the latter problem in Section 6.3. The Committee believes it is essential to develop an appropriate personnel response to the question of redeployment in the public sector, especially given the cost of disability retirements in both financial and human terms. It would appear ridiculous to maintain the current situation when Victorian Public Service Board evidence indicates that the cost of managing a redeployment programme is around $300 a head.(24) This is a trivial amount compared to the overall cost if redeployment is not undertaken in situations where it would be possible to do so.

In presenting its Review Report, the Committee noted the contrast between the apparent inactivity of the Victorian Public Service Board in promoting and implementing redeployment policies (and thus meeting its own management objectives) and the practices established under the Commonwealth Employees (Redeployment and Retirement) Act 1979.

The Public Service Board appeared to have partially accepted the Committee's view, as indicated by Mr. Moran's comment:

> "To the extent that those comments apply to invalidity, I say they are partly correct, but fear that the comment may suggest that the Board sits on its hands on this issue.
>
> The Board focuses on people who have been dislodged by an organisational change or who have some problems with efficiency. For example, if they are moved by the department or whatever because they may perform more adequately somewhere else."(25)

The current situation operates so that any real form of redeployment is re-employment back into the public service once a disability retiree is declared eligible for work. This is, of course, partially the problem of the current definition of 'own occupation' which effectively limits redeployment opportunites before a disability retirement occurs. However, there is also a

range of other difficulties which prevent redeployment, both before a disability retirement and on potential return to service, such as inadequate reporting and counselling, industrial relations difficulties and a lack of overall formal mechanism to deal with the issue.

The Public Service Board has experienced some difficulty in re-employing ex-police officers and teachers. Currently, there are 30 teachers and 35 other officers awaiting redeployment after being identified as being able to be re-employed by the State Superannuation Board.(26) In the case of police, the Public Service Board has faced difficulties because this group has tended to fail the extrance exams for entry into clerical positions in the Public Service. In the case of the teachers, Mr. Moran stated that:

> "... we have been negotiating with the Education Department about attempts being made to integrate them into both clerical and administrative areas.
>
> The Victorian Public Service Association particularly raised complaints on behalf of members claiming that the integration of teachers into administrative positions is reducing the career oppourtunities of VPSA members."(27)

In the current situation the Committee is not surprised at the views of the Consultants and other parties that disability retirements are being used as a 'soft' management option. The Committee takes the view that, in the case of disability retirements, there is a clear need for more structured management procedures at both departmental and board (authority) level. Such policies cannot, of course, be introduced in isolation from improved and consistent standards of medical assessment and welfare and counselling facilities. The Committee, in this context agrees with the Chief Commissioner of Police that:

> "Prevention is better than cure, but at the same time members of the Superannuation Fund with a genuine health problem should not be further disadvantaged because of that problem."(28)

The development of an effective redeployment policy pre-supposes improved procedures for mobility between the various public sector superannuation schemes, and also a less liberal definition of disability.

6.8.2 The CE(RR) Act

The Committee believes there is a need for a properly structured redeployment policy in the Victorian public sector. It is the Committee's opinion that the provisions for redeployment and retirement within the CE(RR) Act provide a starting model. It should be noted that, in the view of the Commonwealth Public Service Board, the reduction in the number of invalidity retirements over recent years can be ascribed in part to revised administration procedures having been co-ordinated and codified in the Act.

The objectives of the CE(RR) Act are to ensure the efficient and economical use of resources in the public sector, and to provide a mechanism for review and redeployment if staff members cannot be used economically and efficiently in their present positions. As far as disability retirements are concerned, the CE(RR) Act proposes a set of procedures relating to

(a) management of invalidity cases;

(b) conflicting or disputed medical evidence; and

(c) medical redeployment.

The importance of the CE(RR) Act is that it imposes a structure in these areas and establishes common requirements and procedures which all Permanent Heads (or their representatives) should follow for both redeployment and retirement (including disability retirement). The detail of these procedures stands in contrast to the somewhat sketchy procedures described above, which are also laid down in the personnel manuals of the various Victorian employing authorities.

It is significant that under the CE(RR) Act, public sector management - the Permanent Head and then the Public Service Board - has the key role in

determining the suitability of an individual for redeployment and, ultimately, retirement from the public service: once an individual becomes eligible for redeployment outside his/her own department, that is, becomes an unattached officer, he/she becomes the responsibility of the Public Service Board. If, after obtaining any necessary medical opinion, an individual is found to be unfit for any duty within the public sector, that person is declared eligible for disability retirement.

The Committee again reiterates its awareness of the industrial relations problems associated with the CE(RR) Act, but believes it is essential to have an effective redeployment policy. Consequently, the Committee believes it is important for contributor representatives to be involved in the whole development and implementation of any such redeployment policy and programme.

The Committee recognises that Commonwealth practice stands in sharp contrast to that exercised in Victoria, where public sector management plays no role in the final decision which is in the hands of the superannuation scheme's officers. This procedure, as it operates for example in the case of the State and SERB schemes, has the merit of consistent central decision making. Under the CE(RR) Act it is the prerogative of departmental or Public Service Board management, after reviewing the evidence, to declare whether or not the individual concerned is in consequence of physical or mental incapacity, incapable of performing his/her duties, and to then declare him/her eligible for redeployment, retraining or termination of employment. Once this is done, the only role for the Australian Government Retirements Benefits Office is to ascertain the retirement entitlement.

RECOMMENDATION 6.11

THAT THE TREASURER ESTABLISH A TASK FORCE, INCLUDING MEMBER REPRESENTATION, TO EXAMINE THE FEASIBILITY OF INTRODUCING LEGISLATION FOR DEALING WITH RETIREMENT AND REDEPLOYMENT IN THE VICTORIAN PUBLIC SECTOR TAKING THE CE(RR) ACT AS A STARTING MODEL.

SECTION 6.9 REVIEW OF INVALIDITY PENSIONERS

6.9.1 Surveillance and Monitoring

The issues considered above regarding recruitment and selection, welfare, counselling and redeployment are all directed toward minimising invalidity retirements. In many instances, however, a retirement on the grounds of invalidity or ill health is unavoidable and in the best interests of both the individual and the State Government.

Even so, the Committee takes the view that there must be a procedure in place which allows the superannuation authority to review the status of disability retirees, and enables it to recommend to the appropriate employing authority that certain individuals are eligible for re-engagement.

The Annual Report of the State Superannuation Board 1983 sets out the legislation and policy of the Board in regard to an ill health pensioner capable of gainful employment:

> "Under an amendment introduced by the Superannuation (Lump Sum Benefits) Act 1981, the Board was given the power on 1 January 1982 to review the question of whether an ill health pensioner still suffers from ill health or from physical or mental incapacity to perform his duties. Where it is determined that such person is capable of gainful employment the Board may continue the existing pension, reduce the pension to not more than half the pension originally payable, or increase the pension.
>
> The Board has adopted the policy that where it was considered that a pension should be reduced under this section, the salary from other employment together with the reduced pension would equate to 5/6 of the current equivalent salary of the position from which the pensioner retired."(29)

Since the commencement of the operation of the amendment it is worth noting that a total of only 13 pensioners have had their pensions reduced by up to 100%.

The Annual Report cited three case examples where a pension had been reduced:

"Case A

A 34 year old former single teacher retired in 1973 was found to be giving singing and acting lessons. He was earning $13,000 per annum from this source, which together with his pension of $11,940 per annum meant he had a total income of $24,940 per annum whereas if employed as a teacher his salary would have been $18,349. The Board reduced his pension by 80%.

Case B

A 49 year old former policeman retired in 1977 was found to be employed as a security officer earning $23,972 per annum compared to $22,059 had he continued as a police officer. His pension was reduced by 100%.

Case C

An administrative officer who was retired at the age of 30 in 1970 subsequently obtained a Degree and has established an accounting practice. Efforts were made to recall him to the Public Service but medical evidence was such that this was not possible notwithstanding that he subsequently was passed fit to participate in a jungle warfare course at Katunga. The Board agreed that his pension be reduced by 100%."(30)

The Consultants felt that change was required in two key areas. These were in invalidity surveillance and monitoring by the State Superannuation Board.

The Consultants found that the Board's investigative and recall functions were impaired by a lack of resources in the surveillance area and an inability to re-employ people. The Committee supports the Consultants' view that the State Superannuation Board should have access to adequate resources to ensure appropriate investigation, where necessary, of invalidity retirees. The problems of investigatory work were described in the following discussion with Mr. Hastie. In responding to a question about the number of investigators the State Superannuation Board hires, he said:

> "MR. HASTIE: We have no investigators ourselves.
>
> THE CHAIRMAN: Are those investigators subjected to any pressure in terms of carrying out their duties?
>
> MR. HASTIE: Quite a number, depending on the circumstances and where it is, in the country or the city. The principal fellow was recently threatened on his unlisted telephone line at night about laying off the retired police. He does insurance work and he does all sorts of other work and it is part of his life.
>
> MR. GAVIN: Was it over one particular case or police in general?
>
> MR. HASTIE: As he reported to me, it was police in general because that is where we have got the publicity about reducing pensions."(31)

The Committee is extremely concerned that private investigators working on behalf of the State Superannuation Board have been threatened. However, the Committee believes it is essential to maintain this investigatory work and that the State Superannuation Board should have adequate resources to continue this work. The Committee also notes that the State Superannuation Board has recognised it has insufficient staff resources in this area and that it has been attempting for some time to upgrade those that it has.

RECOMMENDATION 6.12

THAT THE STATE SUPERANNUATION SCHEME BE GIVEN ADDITIONAL SKILLED STAFF TO MONITOR INVALIDITY RETIREES.

Additional staff are not, in themselves, a totally adequate response to the requirement for monitoring. The Consultants reviewing the current system of monitoring by the State Superannuation Board felt it would be more appropriate to model its practices on those of the Commonwealth. In the Commonwealth, invalidity retirees are asked to complete an annual statutory declaration on employment experience and income.(32)

The State Superannuation Board also reviews the current employment experience of ill health retirees on a questionnaire basis. Mr. Hastie, Secretary of the Board, explained the questionnaire process as follows:

> "MR. HASTIE: We do not do it to everybody every year, but we use basically three methods of review of a pension; either have them medically examined by one of our own doctors or if they are interstate, we quite often use doctors approved by the State Board and we get them to give us a report as to the state of their health or we send them a questionnaire that relates to what they are doing, what their medical history is and things like that. This is done really by judgement.
>
> Immediately after a person has retired, when they are young, certainly it is done annually, but after they have been out for a long time, the period between looks gets longer - it is not much use looking around for somebody who is under psychiatric treatment who is 50 and is not working. That is a waste of time and money."(33)

The State Superannuation Board's questionnaires are not statutory declarations and do not focus entirely on employment experience and income as does the Commonwealth. The Commonwealth also sends questionnaires out to age 65, whereas the State Superannuation scheme has an age limit of 55. It would seem appropriate to raise the State Superannuation scheme's age limit to that available under early retirement which is currently 60 years.

RECOMMENDATION 6.13

THAT THE TREASURER REVIEW CURRENT PROCEDURES FOR AN ANNUAL MONITORING OF INVALIDITY PENSIONERS AND RECOMMEND CHANGES WHERE APPROPRIATE TO BRING VICTORIAN PRACTICE INTO

LINE WITH THAT EXERCISED BY THE AUSTRALIAN GOVERNMENT RETIREMENT BENEFITS OFFICE.

It should be stressed that there must be a regular surveillance of disability pensions in the course of payment.

The Committee regards it as most important that pensions should be granted and continue to be paid in cases of genuine and continuing disability. The Committee also considers it equally important that benefits should not continue at the full rate where the need is reduced and should not continue at all when the need ceases.

NOTES

PTOW/TPF & C and Coopers and Lybrand Services, Disability Experience and Practice in the Victorian State Superannuation Scheme, Reports prepared for the Economic and Budget Review Committee, VGPS, Melbourne, April 1984, p.19.

Ibid., p.19.

Ibid., p.19.

Ibid., p.17.

Ibid., p.1.

Report of the Committee of Enquiry into the Victorian Workers' Compensation System 1983-84, A Report to the Victorian Treasurer, Melbourne, VGPS, June 1984, para 11.12.3. (Also known as the Cooney Report).

PTOW/TPF & C and Coopers and Lybrand Services, op. cit., pp.19-21.

Submission, Victoria Police, August 1984, p.6.

Ibid., p.7.

State Superannuation Board Annual Report 1983, p.10.

Submission, Victoria Police, August 1984, p.8.

Minutes of Evidence, Seminar on Medical Aspects of Superannuation, 24 July 1984, p.16.

Ibid., p.17.

Minutes of Evidence, 9 August 1984, p.17.

Submission, Police Association, 17 August 1984, p.2.

Minutes of Evidence, 13 August 1984, p.57.

Minutes of Evidence, Seminar on Medical Aspects of Superannuation, 24 July 1984, p.17B.

Ibid., p.20.

Ibid., p.21.

PTOW/TPF & C and Coopers and Lybrand Services, op. cit., p.42 (discussion paper also reproduced in Appendix C of that report).

Economic and Budget Review Committee, A Review of Superannuation in the Victorian Public Sector, VGPS, Melbourne, April 1984, p.177.

(22) Minutes of Evidence, Seminar of Medical Aspects of Superannuation, 24 July 1984, p.22.

(23) Ibid., p.25-25A.

(24) Minutes of Evidence, 13 August 1984, p.54.

(25) Ibid., p.51.

(26) Minutes of Evidence, 9 August 1984, p.11.

(27) Minutes of Evidence, 13 August 1984, p.53.

(28) Submission, Victoria Police, August 1984, p.11.

(29) Annual Report of the State Superannuation Board 1983, p.8.

(30) Ibid., p.8.

(31) Minutes of Evidence, 9 August 1984, p.12-18.

(32) PTOW/TPF & C and Coopers and Lybrand Services, op. cit., p.49 (and Appendix B).

(33) Minutes of Evidence, 9 August 1984, p.13.

CHAPTER 7

FINANCING THE VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

SECTION 7.1 A BRIEF REVIEW OF CURRENT FINANCING ARRANGEMENTS

In the Committee's Review Report the diverse arrangements controlling Victorian public sector superannuation were outlined. Among the 42 schemes identified at that time, the arrangements for financing superannuation range from completely pay-as-you-go (PAYG) to fully funded. Several of the largest schemes are only partly funded, i.e., a portion of benefit and administrative expenses is met from an investment fund and the remainder is paid on a recurrent basis. The existence of a variety of arrangements is a reflection of the flexibility that Governments have in this matter. They can use their revenue raising powers either to set up investment funds or to pay benefits as they are due.

The largest scheme, the State Superannuation scheme, is mostly unfunded. Members' contributions are paid into an investment fund, but the employer's share of benefit payments is made from the Consolidated Fund on a PAYG basis. For the majority of State scheme members, employing authorities are not charged for the costs of superannuation in any way. Without recognition of cost at a departmental level there is no accountability. There are, however, a number of instances where organisations covered by the scheme are charged either for the employer's share of benefit payments as these are made, or for a contribution which absolves them from later payment of benefits. These arrangements cover few members of the scheme and appear to have evolved in a relatively ad hoc way. Some of the organisations which are billed for their share of actual benefit payments have attempted to finance their commitments by internal investment funds or by accounting provisions. With no guidelines to assist these organisations, a variety of arrangements have evolved.

The cost of the State Superannuation scheme to the government has increased substantially in the last decade. In 1974-75 it was $34.7 million and in 1983-84 it was $225.6 million, an increase of about 169% in real terms. The recently completed Cook-Ryder report on the projected emerging cost to the government shows that the cost is expected to continue to rise in real terms. Part of the rise will be due to the emerging effect of the benefit structure adopted in 1975, but much will depend on future salary growth and the rate of increase of the scheme's membership.

Other major schemes that are partly funded include the broadly similar SERB, Local Authorities and Hospitals schemes. In the case of the Local Authorities scheme, current ratepayers are not bearing the proper cost of services provided to them because superannuation contributions are not matched to accruing liabilities. This means that future ratepayers will be required to pay for some of the benefits accruing to current employees. Similarly, Hospitals are not bearing in their budgets the full cost of the services they are providing to current users.

As a general rule, the 'commercial' statutory authorities have fully funded superannuation schemes. A notable exception to this is the Port of Melbourne Authority which, effectively, has a PAYG system. This was argued to be inappropriate. Similarly, it was argued that the Metropolitan Fire Brigades scheme should be fully funded so that the accruing cost of superannuation liabilities is reflected in the levies on current fire insurance premiums. However, contribution rates have never been sufficient to finance benefit payments and a huge actuarial deficit has accrued ($200 million at June 1979 valuation and $364 million at June 1982 valuation).

SECTION 7.2 FINANCING PRINCIPLES

In the Committee's view, three principles are paramount in the financing of public sector superannuation schemes. These are that:

(a) there is proper recognition, in the accounts, whether the scheme is funded or not, of the full costs of superannuation. This is firstly, so that charges and/or budget subsidies are not understated, and secondly, so that management does not commit itself to greater future expenditure than it can reasonably bear;

(b) full funding is the desirable standard for commercial statutory authorities, those organisations dependent on outside sources for revenue, and other organisations which are not expected to continue indefinitely; and

(c) for the authorities in (b) investments should be outside the authority itself.

Application of these principles results in a clear prescription for change for many Victorian public sector schemes, and should apply to the financing of superannuation liabilities accruing under the new Victorian State Employees Superannuation Scheme (VICSESS) for each corresponding authority/department.

SECTION 7.3 A SUMMARY OF THE PROPOSED CHANGES

In the following sections of this chapter, the Committee proposes changes to the financing of many of the Victorian public sector superannuation schemes. A summary of changes to the major schemes is presented in Table 7.1. This shows the nature of the change, the effect that change is expected to have on the employer's contribution rate and the consequences for the parent body.

TABLE 7.1

AMENDMENTS TO FINANCING OF MAJOR VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

Scheme	Nature of Change	Effect on Employer Contribution Rates	Possible Consequences for Parent Body
COMMERCIAL STATUTORY AUTHORITIES			
SEC Superannuation	Funding of pension indexation	Increase	Extra cost may have minimal impact on electricity tariffs
Gas & Fuel Corporation	"	Small increase	Inconsequential
Port of Melbourne	Change to full funding	Large increase	Considerable extra cost to PMA. Likely impact on fees/charges considerable.
Grain Elevators Board (State and SERB)	Establish investment fund	Actuarially determined	Grain handling charges may be influenced
State Insurance Office (State)	Separate investment fund	Actuarially determined	Probable small increase in insurance premiums
MMBW Super-annuation	None	None	None
MMBW Provident	None	None	None
State Bank	None	None	None

TABLE 7.1 (cont.)

AMENDMENTS TO FINANCING OF MAJOR VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

Scheme	Nature of Change	Effect on Employer Contribution Rates	Possible Consequences for Parent Body
OTHER 'COMMERCIAL' STATUTORY AUTHORITIES			
Port of Geelong	None	None	None
TAB	"	"	"
Egg Board Staff	"	"	"
Port Phillip Pilots Sick and Superannuation	"	"	"
OTHER CURRENTLY FUNDED SCHEMES			
City of Melbourne Officers	None	None	None
Zoo	"	"	"
ORGANISATIONS DEPENDENT ON OUTSIDE SOURCES OF REVENUE			
Metropolitan Fire Brigades	Reduce actuarial deficit	Increase	Large cost increase if full funding. Likely increased levy on fire insurance premiums.
Country Fire Authority (State)	Actuarially determined contributions	Increase	Cost increase. Lesser influence on fire insurance levies than for MFB.
Local Authorities	Actuarially determined contributions to fund future benefits	Increase	Some increase in cost. Potentially higher rates.
Hospitals	"	"	Some increase in cost. Greater finance requirement.

TABLE 7.1 (cont.)

AMENDMENTS TO FINANCING OF MAJOR VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

Scheme	Nature of Change	Effect on Employer Contribution Rates	Possible Consequences for Parent Body
PUBLIC SERVICE SCHEMES			
State Superannuation Superannuation Lump Sum SERB	Notional funding	Departments charged an employer contribution.	None in first instance because offsetting budget contribution paid. Integrates with program budgeting. Improves accountability.

SECTION 7.4 RECOGNITION OF COSTS

In superannuation terminology, funding refers to putting aside money in an investment fund to provide for future benefits. Contribution payments are normally spread over the period of a member's employment, with the result that the build-up of assets is commensurate with accruing superannuation liabilities. Any change in benefits requires a corresponding change in contributions. Funding is therefore both a method for assuring that assets are available to meet benefit payments as required and an automatic way of fully recognising cost. Contribution rates, and thus recognised costs, are adjusted from time to time as a result of periodic actuarial assessment.

PAYG financing on the other hand, defers the cost of all benefits for present employees to the future. The only apparent cost for any year is that of meeting benefit payments, whether pension or lump sum, for that year. For most schemes, the cost of meeting current benefits is very much less than the contribution which would be required to fund benefits for current contributors, so that the real cost of superannuation is understated. The same feature raises the temptation to agree to costly benefit changes without immediate cost. This is because it will take some time before the emerging effects of the benefit improvement become apparent.

The PAYG method lacks the discipline of funding because there is no immediate recognition of cost. It is also less satisfactory than funding for scheme members, since there are no assets held to meet their benefit expectations. Its viability depends on the willingness of future governments, and of future generations of consumers and taxpayers, to provide the benefits promised to today's scheme members.

Cost recognition aside, funding of State financed schemes may also be preferred to PAYG financing if the interest on investments is likely to be greater than growth in the tax base. This would be because the investment yield on contributions made beforehand would give a greater income than could be harnessed from a constant tax.

Whilst this might be expected to be the normal state of affairs, in practice it is difficult to resolve whether one method or the other is optimal on financial grounds. Besides, once PAYG schemes are established, taxpayers and contributors would be likely to resist their conversion to fully funded schemes because of the extra cost in building up an investment fund to provide benefits for future members, whilst simultaneously having to continue paying benefits for current members, for whom no contributions have been made in the past.

Organisations participating in PAYG schemes, and dependent on the State budget for revenue, can in any event, fully recognise their superannuation costs without actual funding. This involves charging a department or authority for an amount equal to a funded contribution and increasing their budget accordingly. This procedure is consistent with the objectives of program budgeting and should improve resource allocation within departments/authorities. Further detail of such notional funding is given in a following section.

SECTION 7.5 FUNDING FOR COMMERCIAL STATUTORY AUTHORITIES

7.5.1 The Proposed Changes

RECOMMENDATION 7.1

THAT COMMERCIAL STATUTORY AUTHORITIES SHOULD HAVE FULLY FUNDED SUPERANNUATION SCHEMES AND THAT THEY FULLY FUND ACCRUING LIABILITIES FOR NEW EMPLOYEES WHO WILL COME UNDER THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS).

The rationale for this recommendation is that charges set by such authorities should reflect the full cost of supplying goods and/or services. Also, if for any reason an authority should cease to exist, be scaled down or sold, there are separately identifiable assets to support the superannuation benefits of employees which have accrued to date. Full funding would put the authorities on a similar basis to private sector schemes, and allow the proper determination of profits.

The recommendation for full funding for commercial statutory authorities is a fundamental principle that was recognised in the Committee's Review Report, and which has been subsequently endorsed by the Institute of Actuaries of Australia.

In a recent submission the Institute supported:

> "... the Committee in its conclusion that all benefits should be funded. In the private sector it is true that many plans do not fund pension increases. However, this is largely for reasons which do not apply in the public sector. In particular;
>
> (a) in the private sector, future increases (even to existing pensioners) are often granted on an ex-gratia basis and could be stopped at any time (unlike the public sector where pension increases are normally provided as an automatic right); and

(b) since November 1982, the Taxation Commissioner will not allow deductions for contributions which cover CPI increases in excess of 5% per annum.

It is, of course, true that the current cost is reduced if pension increases are not funded. However, this is only achieved at the expense of higher costs in the longer term."(1)

The Committee accepts that the definition of a 'commercial' authority is debatable, but in the first instance these authorities could include all of those required to pay a dividend to the State government, i.e., State Electricity Commission, Melbourne and Metropolitan Board of Works, Gas and Fuel Corporation, State Bank, Grain Elevators Board, Port of Melbourne Authority and the State Insurance Office.

7.5.1.1 SEC and Gas and Fuel Corporation

Full funding would mean that employer contribution rates would have to be raised to account fully for indexation adjustments in the SEC Superannuation scheme and the Gas and Fuel Corporation scheme.

The consequent increase in the employer's contribution for the Gas and Fuel Corporation scheme would be small because the number of pensioners is small, and the cost of pension indexation is therefore small. This is because most retiring members fully commute their pensions. However, the cost of funding pension indexation in the SEC Superannuation scheme could be expected to significantly increase the level of employer contributions. The greater cost is attributable to the fact that the scheme offers a fully indexed (to CPI) pension of which only 50% may be commuted. In the Committee's Review Report, the Secretary of the SEC Superannuation scheme, Mr. Harcourt, warned that the Commission's contribution could rise significantly if this happened(2). It is not possible to be any more precise than this at the moment because the actuary to the fund is not required to take pension indexation into account when advising on the appropriate employer's contribution.

RECOMMENDATION 7.2

THAT THE EXPECTED COST OF PENSION INDEXATION SHOULD BE INCLUDED IN THE ACTUARIAL CALCULATION OF THE EMPLOYER'S CONTRIBUTION RATE. THIS SHOULD APPLY TO ALL SCHEMES OFFERING INDEXED PENSIONS.

The effect that a move to full funding would have on the tariffs of these two public utilities would be influenced by the relativity between the incremental costs and the total operating costs of those organisations. It would appear that there could be some effect on electricity tariffs, but the effect on gas prices should be inconsequential. It should be kept in mind that the cost of funding pension indexation would be at least partially offset by the cost forgone in not having to meet this commitment on a PAYG basis. The overall cost of superannuation to these authorities would of course be affected by the number of members of the existing schemes who choose to switch to VICSESS and, because it is proposed that all future employees would become members of the new scheme, by the rate of staff turnover.

7.5.1.2 Port of Melbourne Authority

The application of the full funding principle to the Port of Melbourne Authority (PMA) would be a radical change. This is because the PMA Superannuation scheme is a completely PAYG scheme. Although members of the scheme make contributions, the funds are retained in the working finances of the PMA and only a notional credit is made to the PMA Superannuation Account.

In a submission to the Committee, the PMA explained that it is now making a provision in their accounts to allow for the accruing employer's liability for superannuation. In the PMA's words:

> "This will involve the crediting to the provision each month the cost to the PMA of superannuation for the period at a rate of 20% of members salaries. This is the value required to fully provide for active members

on an on-going basis based on the assumptions previously stated. Interest will also be credited to the provision." (3)

The Committee is encouraged by this development, but is still concerned over two important issues. These are that:

(a) the liability for past service seems to have been ignored; and

(b) there are no external investments to support the superannuation benefits of employees.

For reasons explained in parts 7.5.1 and 7.5.2 of this Report, the Committee believes that, for commercial statutory authorities, investment in the parent body is undesirable on anything but a minor scale. The Committee, therefore recommends:

RECOMMENDATION 7.3

THAT THE PORT OF MELBOURNE AUTHORITY SUPERANNUATION SCHEME SHOULD BE FULLY FUNDED AND OWN UNDERTAKING INVESTMENTS SHOULD BE KEPT TO A MINIMUM.

The Committee recognises that the cost of fully funding the scheme would be considerable and that the liability for past service will need to be amortized over a suitably long period of time. The State itself may need to help with the funding program in order to avoid imposing a very considerable burden on users of port facilities for the next two or three decades. Future employees of the PMA would come under VICSESS and the PMA would be charged an actuarially-determined amount sufficient to fund accruing liabilities.

7.5.1.3 Grain Elevators Board and State Insurance Office

Significant change would also be involved in funding the superannuation liabilities being incurred by the Grain Elevators Board (GEB) and the State Insurance Office (SIO). The GEB - a commercial statutory authority by the abovementioned criteria - has most of its employees in the mostly unfunded

SERB scheme. Some other employees are covered by the State Superannuation scheme, again a mostly unfunded scheme, but in this case the GEB attempts to make some allowance for the accruing superannuation liabilities of these employees by making a provision against revenue equal to six times employee contributions. This is an approximate method of recognising cost that covers only a part of the GEB's workforce.

RECOMMENDATION 7.4

THAT THE GRAIN ELEVATORS BOARD FULLY FUND ITS SHARE OF SUPERANNUATION LIABILITIES THAT ARE ACCRUING UNDER THE SERB AND STATE SUPERANNUATION SCHEMES, AND THAT WILL ACCRUE UNDER THE VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS). THIS COULD BE ACHIEVED BY THE GRAIN ELEVATORS BOARD ESTABLISHING A SEPARATE INVESTMENT FUND.

The effect that this change might have on grain handling charges is uncertain. It may well be that at six times employee's contributions, the current provision for employees covered by the State Superannuation scheme is greater than necessary. It may be less. This can only be resolved by actuarial determination of the employer contribution. No similar arrangements exist for employees covered by SERB, therefore, the establishment of an investment fund and the requirement to pay actuarially-determined employer contributions for the employees will mean an increased cost in the short term. As for the PMA, the liability for past service might need to be amortised over a suitably long period.

Employees of the SIO are covered by the mostly unfunded State Superannuation scheme. To make allowance for the employer's share of accruing superannuation liabilities under that scheme, a provision is made in the accounts at the rate of 2.5 times the employee's contributions. This means the liability is set against the SIO's overall assets.

RECOMMENDATION 7.5

THAT THE STATE INSURANCE OFFICE SET UP A SEPARATE SUPERANNUATION INVESTMENT FUND, WITH EMPLOYER CONTRIBUTIONS AS DETERMINED BY AN ACTUARY.

7.5.1.4 MMBW and State Bank

Other statutory commercial authorities that currently are required to pay a dividend to the State government are the MMBW and the State Bank. The two MMBW superannuation schemes and the State Bank superannuation scheme are funded, and no particular problems should arise in adapting these to the Committee's suggestions for funding benefits under VICSESS.

7.5.1.5 Other 'Commercial' Statutory Authorities

There are a number of other statutory authorities of significance that could be considered to be commercial or at least semi-commercial in nature and that were covered in the Committee's Review Report. These include:

(a) Port of Geelong Authority;

(b) Totalizator Agency Board;

(c) Victorian Egg Marketing Board; and

(d) Port Phillip Pilots.

RECOMMENDATION 7.6

THAT THE SUPERANNUATION SCHEMES COVERING THE PORT OF GEELONG AUTHORITY, TOTALIZATOR AGENCY BOARD, VICTORIAN EGG MARKETING BOARD AND PORT PHILLIP PILOTS REMAIN FULLY FUNDED.

7.5.2 Own Undertaking Investment

Own undertaking investment is an important issue for commercial statutory authorities. It has not been uncommon in the past for these authorities to invest a significant proportion of their superannuation assets in their own undertaking (see for example Tables 5.2 and 5.3 of the Review Report). While both the authority and the fund continue to grow, such investments - if they provide a market rate of return - may be reasonable. If, however, the authority contracts or terminates, and fund assets need to be sold to support benefit payments, own undertaking investments may either be impossible to realise, or difficult to realise for their intended value. This is virtually equivalent to PAYG financing, and hence is considered to be an unsuitable financing method for commercial statutory authorities on anything but a minor scale. In this respect the Committee understands that, although the SEC Superannuation Fund had 55.7% of its assets in the SEC at 30 June 1982, it has now reduced this percentage to zero.

Quite apart from the commercial statutory authorities dealt with above, there are a number of other Victorian public sector organisations that would be best served by funded superannuation schemes. These fall into three groups:

(a) other currently funded superannuation schemes not dealt with above;

(b) organisations dependent on sources of revenue other than the State budget; and

(c) organisations or individual arrangements of a temporary nature.

These will be dealt with separately, but one thing in common is that employees of the organisations who enter VICSESS should be covered by actuarially-determined employer contributions.

7.6.1 Other Currently Funded Schemes

This category includes all currently funded schemes that were discussed in the Committee's Review Report and that were not dealt with above as commercial statutory authorities. The Committee has stressed that the advantages of funding in securing benefits and in recognising costs are considerable.

RECOMMENDATION 7.7

THAT ALL FULLY FUNDED SCHEMES CONTINUE TO BE FULLY FUNDED.

Notable schemes falling into this category include the City of Melbourne Officers' and Zoo schemes. A further reason for maintaining the funded status in the case of the City of Melbourne Officers' scheme is that by doing so, current Melbourne City ratepayers are meeting the cost of the accruing superannuation liabilities which are part and parcel of the cost of services

provided by the City of Melbourne, instead of deferring the cost to future ratepayers.

7.6.2 Organisations Dependent on Sources of Revenue Other Than the State Budget

There are a number of organisations in the Victorian public sector that are either wholly or partly dependent on sources of revenue outside of the State budget, but which don't fall under the commercial statutory authority description. Nevertheless, the dependence on outside sources of finance creates an incentive for the State government to ensure that those organisations are being appropriately financed. Funding of their superannuation obligations would assure benefits for employees of these organisations and avoid complications in having to finance benefits at a later stage.

Schemes in this category include the Metropolitan Fire Brigades, Local Authorities and Hospitals schemes and the State Superannuation scheme, with respect to the Country Fire Authority, the Rural Finance Commission and to a very minor extent the Victorian Dairy Industry Authority.

7.6.2.1 The Metropolitan Fire Brigades Scheme

The details surrounding the Metropolitan Fire Brigades Scheme were outlined in the Committee's Review Report. In summary, that scheme has accrued a huge actuarial deficit ($200 million at the June 1979 evaluation and $364 million at the June 1982 valuation) largely because contribution rates have never been sufficient to finance expected benefit payments. Yet the scheme was, ostensibly, meant to be fully funded. The Committee argued that this was an unsatisfactory state of affairs for an organisation that, for two thirds of its budget, is dependent on the income derived from a levy on fire insurance premiums written for the Melbourne metropolitan area.

Deferral of liabilities will mean that future holders of fire insurance policies, and/or the State government, will be required to pay for part of the cost of fire protection provided in the past.

RECOMMENDATION 7.8

THAT THE METROPOLITAN FIRE BRIGADES SCHEME SHOULD BE FULLY FUNDED AND THAT THE GOVERNMENT SHOULD EXPLORE WAYS OF REDUCING ITS ACTUARIAL DEFICIT.

At the very least the government should consider the advice of the scheme's actuary, Mr. V.H. Arnold, made in the most recent actuarial report on the scheme, to the effect that contribution rates should be raised to a level sufficient to fund future benefits.(4) The Committee would also prefer to see the liability for past service amortised and the cost spread over a suitably long period even though it is accepted that this would still involve a very significant cost. The Committee declines to suggest who should bear the extra burden of this charge, but would point to the fact that successive governments have failed to take any action to contain the actuarial deficit, even when they were supposedly warned at the outset of the 'new' scheme in 1975 that this situation would result.

7.6.2.2 Country Fire Authority

The Country Fire Authority (CFA) is financed in an analogous manner to the Metropolitan Fire Brigades except that the levy is applied to fire insurance premiums written for areas outside the Melbourne metropolitan region.

RECOMMENDATION 7.9

THAT THE COUNTRY FIRE AUTHORITY'S SUPERANNUATION LIABILITIES UNDER THE STATE SUPERANNUATION SCHEME SHOULD BE FULLY FUNDED.

Indeed, the Committee is mindful that this is what the CFA has attempted to do by having a separate investment fund into which employer contributions are paid and from which the employer's share of benefit payments are withdrawn. However, according to an actuarial report submitted to the CFA in May 1981 by the consulting actuarial firm of PTOW, the employer's contribution should be raised from double to five times employee's contributions in order to ensure

that the CFA's participation in the State Superannuation scheme "will be a viable proposition".(5)

RECOMMENDATION 7.10

THAT THE ACTUARIAL POSITION OF THE COUNTRY FIRE AUTHORITY SHOULD BE REASSESSED AND THAT CONTRIBUTION RATES SHOULD BE SET TO FULLY FUND SUPERANNUATION LIABILITIES.

7.6.2.3 The Local Authorities and Hospitals Superannuation Schemes

Both of these schemes are multi-employer schemes. The Local Authorities scheme covers numerous small local authorities and the Hospitals scheme covers public and some private hospitals.

Local authorities are heavily dependent on rates and charges for their revenue and hospitals are heavily dependent on Commonwealth revenue. Therefore, the literal application of the Committee's funding principles would result in a recommendation for funding. Further reason for funding these schemes would be to minimise cross-subsidisation between employing authorities. Cross-subsidisation would occur now because PAYG contributions, paid by participating employers, may be at variance with the actual costs of superannuation, represented by benefit payments made to retiring employees of those particular authorities.

Only by funding their superannuation liabilities will the rates and charges and external finance requirements of local authorities and hospitals fully reflect the cost of services being provided to current ratepayers and hospital users. The City of Melbourne Officers' scheme is fully funded; it is, therefore, an appropriate standard for assessing the Local Authorities scheme.

However, whilst recognition of cost is an important principle, the Committee accepts that asking these two groups to fund their liabilities for past service will impose what many people may consider to be an unacceptable financial burden on current hospital users and ratepayers. This is because these groups would be asked to continue paying for pensions and lump sums for which

contributions have not been made in the past (i.e., PAYG financing), and at the same time pay contributions into an investment fund to meet future benefit payments, viz., they would have to pay twice.

Were these commercial statutory authorities the Committee would not hesitate to recommend full funding. In this the Committee would have had the support of the Municipal Officers' Association, who stated in a submission to the Committee that they believe:

> "Public sector superannuation schemes should be fully funded ..."(6)

Even so, the very significant, but as yet unknown, cost of fully funding these schemes could be expected to have widespread political ramifications. Therefore, the Committee believes that the decision lies with the Government.

RECOMMENDATION 7.11

THAT CONTRIBUTION RATES FOR THE HOSPITALS AND LOCAL AUTHORITIES SCHEMES SHOULD BE ACTUARIALLY-DETERMINED TO AT LEAST FINANCE BENEFITS ACCRUING IN THE FUTURE.

Initially, it would be expected that contributions on this limited basis would be greater than benefit payments, so that their funds would grow. However, because the liability for past service would not be funded, the investment funds built up on this basis would not be sufficient to fully discharge liabilities. It would therefore be necessary to supplement contribution payments at some future date. In the meantime, this compromise would provide for full recognition of currently accruing costs for superannuation. It does of course mean a higher level of funding than at present, and potentially a consequent rise in Local Authority rates and hospital charges.

New employees of hospitals and local authorities would enter the new scheme, VICSESS, and these people would be covered by actuarially-determined contributions.

7.6.3 Organisations or Arrangements of a Temporary Nature

There are some organisations in the Victorian Public Sector that are set up for a specific purpose and these may well be of a short term nature. There are also instances of secondment of public service officers to outside organisations. The Bingo Fund and Estate Agents Board are examples of the former, and secondment of teachers from the Education Department is an example of the latter. In the Committee's Review Report, it was noted that the arrangements for charging these organisations for the cost of their superannuation obligations (in the second instance this refers to the seconded officers) under the State Superannuation scheme were inconsistent.

RECOMMENDATION 7.12

THAT VICTORIAN PUBLIC SECTOR ORGANISATIONS OF A TEMPORARY NATURE SHOULD BE REQUIRED TO PAY ACTUARIALLY-DETERMINED EMPLOYER CONTRIBUTIONS. THIS SHOULD ALSO ENCOMPASS TEMPORARY SECONDMENTS OF OFFICERS TO OTHER ORGANISATIONS.

SECTION 7.7 NOTIONAL FUNDING - A METHOD FOR RECOGNISING THE COST OF PARTLY FUNDED SCHEMES COVERING THE PUBLIC SERVICE

7.7.1 Introduction

There are three schemes that cover employees of organisations dependent on budget appropriations for revenue and all are only partly-funded. These are the State Superannuation, Superannuation Lump Sum and SERB schemes. As explained above, dependence on PAYG financing for most of the benefit payments means there is not the proper recognition of cost that the Committee believes is essential. The dramatic increase in the government's share of the cost of the State Superannuation scheme over the past decade, and further real increases in the future as anticipated by the Cook-Ryder report, emphasise the need for some mechanism for recognising cost and assuring accountability.(7)

One way of achieving this goal would be to fully fund these schemes. However, the Committee believes that such a change would impose an excessive cost on the current generation of State taxpayers. It would do this because current taxpayers would have to continue paying for existing pensioners, and at the same time build up an investment fund to provide for the retirement of present State employees who will become pensioners in future. In effect they would have to pay twice.

What the Committee believes is required for these schemes is a method or methods of recognising current cost without actually funding.

This could be achieved by making public service employers bear a charge against revenue for accruing superannuation liabilities as proposed by one of the Consultants to the Committee, Mr. Ron Champion, then of E.S. Knight & Co. and now Director of Superannuation, Department of Management and Budget.(8)

RECOMMENDATION 7.13

THAT, IN ORDER TO ACHIEVE COST RECOGNITION FOR THE STATE SUPERANNUATION, SERB AND SUPERANNUATION LUMP SUM SCHEMES, NOTIONAL FUNDING BE ADOPTED. NOTIONAL FUNDING WOULD ALSO APPLY TO ALL ORGANISATIONS CURRENTLY COVERED BY THESE SCHEMES WHEN NEW EMPLOYEES ENTER THE NEW VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME (VICSESS).

7.7.2 The Notional Funding Procedure

Notional funding is a method of simulating the operations of a funded superannuation scheme. It involves charging departments/authorities for a funded contribution which is matched by an appropriately increased budget appropriation. It is, therefore, only suitable where there is a central financing agency, e.g., the Department of Management and Budget (DMB).

The technique of notional funding is used for most so-called 'approved authorities' covered by the Commonwealth Government Superannuation scheme and it is also scheduled for introduction in South Australia in the near future. Information supplied by the Commonwealth Department of Finance indicates that most of the cost associated with notional funding would be incurred in the development phase and that, once set up, administration costs should not be great.

The notional funding system could work in Victoria in the following way :

(a) a department/authority would pay notional employer superannuation contributions, determined by an actuary, to DMB, and the amounts involved would be credited to a notional account;

(b) employee contributions would be forwarded to the investment manager concerned and at the same time the amounts involved would be credited to the notional account;

(c) notional interest, based perhaps on the actual yield of the employee fund, would be added to the notional account each year;

(d) all benefit payments would be deducted; and

(e) employer contributions would be reviewed by the actuary from time to time having regard to the current amount of the notional fund.

In the case of the State Superannuation scheme, for instance, actual financing arrangements would not change. Employee contributions would continue to be paid into a separate investment fund and the employer's share of benefits would continue to be met on a PAYG basis by payment from the Consolidated Fund.

To counter the employer contribution, a matching budget supplement would be paid to the department or authority concerned so that its net cash flow is unchanged. However, if the organisation receives some revenue from user charges, the incremental rise in that revenue that would result from the recognition of superannuation costs could be used in part or whole to reduce the burden on the budget.

For major organisations it should be possible to operate a separate notional fund and to calculate individual employer contribution rates. For small and/or relatively homogeneous groups an average employer contribution rate would be practical. Regular actuarial reviews would be undertaken by the Government Statist and Actuary or by private actuaries using established guidelines.

One problem with this approach is how to establish the initial amount of the notional fund, covering membership up to the time of changeover. If this is not taken into account in some manner, either the notional fund will prove insufficient to (notionally) finance benefit payments over the longer term or the notional contributions will be larger than intended. The simplest method of overcoming this difficulty is to have the actuary determine an appropriate opening balance commensurate with their accrued liabilities. The alternative is to charge the notional fund only with that portion of benefits attributable to service from the date of introduction of the new arrangement. This is the practice in the Commonwealth scheme. However, for the sake of simplicity the Committee would prefer the prior system, i.e., the determination of an allowance for accrued liabilities.

The Chairman of the State Superannuation Board and Government Statist and Actuary, Mr. John Ryder, was asked at a recent public hearing whether notional funding could be introduced in Victoria. He replied:

> "We are putting ourselves in a position where we can do it. We should be able to do it in a year or so."(9)

The Committee is therefore encouraged that what it is proposing is not unrealistic.

7.7.3 Accountability

If the cost of any benefit improvement is to be faced at departmental level, there should be no increase to the budget supplement for that part of the notional contribution which is solely attributable to that benefit improvement. The benefit structure at the time of the change would become the benchmark for actuarial valuations thereafter in that case.

Notional funding would integrate well with program budgeting techniques. Departments/authorities would be made fully aware of the costs of changes to superannuation and they would be forced to reassess the least cost combinations of labour and other resources.

Notional funding could have a significant bearing on disability retirements. For any department or organisation which has a separate notional fund, the employer contribution rate determined from time to time depends heavily on the incidence of all benefit payments. Heavy disabilities will, therefore, be quickly reflected in higher notional contributions. Notional funding would create an incentive for departments/authorities to minimise disability costs by encouraging them to institute effective monitoring, counselling and re-deployment procedures.

NOTES

(1) Submission, Institute of Actuaries of Australia, 23 August 1984, p.2.

(2) Economic and Budget Review Committee, A Review of Superannuation in the Victorian Public Sector, VGPS, Melbourne, April 1984, p.242.

(3) Submission, Port of Melbourne Authority, 22 August 1984, p.4.

(4) V.H. Arnold, An Investigation into the State and Sufficiency of the Superannuation Fund as at 30 June 1982, A Report to the Metropolitan Fire Brigades Superannuation Board, 21 February 1984.

(5) Palmer, Trahair, Owen & Whittle, Report to the Country Fire Authority on its Participation in the Victorian State Superannuation Scheme, An Actuarial Investigation as at 30 June 1979, p.2.

(6) Submission, Municipal Officers' Association of Australia, 30 August 1983, p.2.

(7) Economic and Budget Review Committee, op.cit., Part 4.2.2, p.250.

(8) R.W. Champion, E.S. Knight & Co., "Uniform Provisions for the Management of Public Sector Superannuation Schemes", A Report Prepared for the Economic and Budget Review Committee, VGPS, Melbourne, April 1984, pp. 16-20.

(9) Minutes of Evidence, 9 August 1984, p.29.

CHAPTER 8

INVESTMENT POLICIES FOR PUBLIC SECTOR SCHEMES

SECTION 8.1 SUPERANNUATION INVESTMENT PRINCIPLES

8.1.1 Investment Objectives

A notional balance sheet for a superannuation scheme shows as liabilities the benefits of all kinds payable in the future. The corresponding assets are comprised of two items, the expected future contributions of employees (and employers also for fully funded schemes) and the investments of the scheme. The basic objective of superannuation investment strategy must be to optimise the market value of the fund's assets and income on a continuing basis. Due consideration must also be given to the security of investments and the timing of future benefit liabilities.

The pursuit of these objectives entails the establishment and maintenance of a portfolio with assets spread over the major sectors - public securities, other fixed interest, shares and property. The strategy choice involves varying the proportions of assets in each category according to changing market conditions. This technique of spreading the investments reduces the impact of a particular class of investment upon the overall results of the portfolio and hence reduces its risk element.

A large and secure body of assets serves two important purposes. Firstly, it provides support for the benefit entitlements which have already been built up. This gives scheme members security, which is of particular value when/if there is any question of scheme merger or termination. Secondly, a strong body of assets produces strong future growth of income and capital value, and thus moderates the amount of future contributions required to balance the scheme.

The Committee believes it important to stress the role investment performance can play in minimising the cost to Government and other

employing authorities of providing defined superannuation benefits. At present, employers finance the major portion of benefits; for example, in the State Superannuation scheme it was formerly intended that Government contribute 5/7ths of a benefit although in practice it finances a larger portion (see section 7.1). The cost to the Consolidated Fund exceeded $225 million in 1983-84.

With the rate of employee contributions essentially fixed in the short to medium term, variations in the investment income of public sector defined benefit schemes have traditionally been compensated by variations in the employing authorities' contributions. By increasing its contributions in response to depressed investment income, the employing authority - often the Government - is in effect subsidising poor investment performance. This can have significant cost implications in the Victorian context where even small reductions in the yield achieved on public sector superannuation assets can have a significant impact on the Government's financing costs. At 30 June 1983, these assets exceeded $2.3 billion.

Clearly, it is in the taxpayers' interest to minimise the cost to the Consolidated Fund of providing defined superannuation benefits. Similarly, public interest requires that the cost of superannuation to statutory authorities and other employing agencies is minimised. Optimising the investment income of public sector superannuation assets will assist in achieving such a reduction in superannuation cost pressures.

Because employing authorities provide balancing contributions, members and their benefits are effectively insulated from fluctuations in investment income. Employing authorities therefore have a greater financial stake than members in the structure and performance of superannuation investments.

RECOMMENDATION 8.1

THAT THE GOVERNMENT GIVES DUE RECOGNITION TO THE IMPACT OF INVESTMENT PERFORMANCE ON THE COST OF PROVIDING SUPERANNUATION BENEFITS, AND THEREFORE GIVES PRIORITY TO INCREASING THE EFFICIENCY OF PUBLIC SECTOR SUPERANNUATION INVESTMENT ARRANGEMENTS.

8.1.2 Constraints on Investment Performance

Investment opportunities occur in the context of change and uncertainty associated with key variables in the domestic and international economy including interest rates, exchange rates, share and property markets, monetary policy, etc. Within these parameters there are a number of constraints that may restrict a scheme's ability to achieve an optimum investment return.

The investment powers specified by legislation or by Trust Deed constituting the scheme define approved investment avenues. An investment manager is bound by such provisions. Unless frequently reviewed and revised, these powers may quickly become outdated by the development of new financial instruments and investment avenues. Investment performance can be significantly restricted unless investment powers allow managers a wide and representative range of investments from which to make a selection.

A scheme's net annual cash flow may be positive or negative. Growth in the body of assets generally signifies that current scheme inflow, i.e., contributions plus investment income, is greater than the current benefit and expense outflow. In this situation, liquidity is not important because benefits can be paid from current contributions and investment income. On the other hand, if the fund is contracting benefits normally exceed current cash inflow, so that part of the existing body of assets must be realised to pay benefits. In order to meet such a situation, portfolio structure should include sufficient liquid assets to avoid the risk of potentially costly capital loss by the need to convert less liquid investments.

The amount of funds available for investment can either add to or restrict investment flexibility. Some projects may require a large minimum investment, e.g. several million dollars for a property purchase. Other options impose a maximum, e.g. a parcel of shares at an attractive price.

The marketability of present holdings is an important area of decision in portfolio management. An inadequately structured portfolio in terms of maturity or marketability can severely restrict changes in investment strategy, especially when timing is of paramount importance.

Several other significant factors impinging on investment performance are worthy of mention:

(a) The vastly different characteristics of different types of investment, each of which calls for different skills and experience.

(b) Investment performance measurement and interpretation is far from an exact science. It is not always clear what steps should be taken as a result of a study of the figures for one's own and other schemes.

(c) Investment strategy decisions are formulated from an assessment of the relative movements of a number of key economic variables. Such choices must be based on up-to-date market information and an informed judgment of the future. Investment boards should include some members with considerable financial or business expertise and should be provided with an adequate flow of up-to-date information.

(d) Satisfactory investment performance depends heavily on skilled investment staff. Normal public service recruiting methods place the public sector at a disadvantage when it has to compete with the private sector in attracting personnel with appropriate portfolio management skills and investment experience. Alternatives open to public sector employers are to engage consultants or use contract employment.

(e) Above all, investment performance is likely to be inhibited by any decisions taken on the basis of non-market considerations. These include, in particular, own undertaking investments at non-market rates or investments classified in the Review Report as 'divergent' e.g., the provision of housing finance at concessional rates.

SECTION 8.2 CURRENT INVESTMENT ARRANGEMENTS

The Committee is concerned that the current arrangements governing the investment of Victorian public sector superannuation funds are not structured in the most efficient manner. There are some 26 separate administrations, each responsible for investing a portion of the $2.3 billion of investment funds, and each facing different or restrictive guidelines determining available investment avenues. The Committee feels that such institutional factors, both legislative and administrative, are having a detrimental effect on the overall investment performance of public sector schemes.

A similar opinion was expressed by the Treasurer when addressing a seminar for contributor and trade union representatives organised by the Committee:

> "The two major limitations, in my view, have been the size of particular funds, which in many cases make it impossible to carry out an effective investment policy and, more importantly, the Legislative requirements that have existed for some time. They have restrained the investment policy of various superannuation boards within the public sector."(1)

Particular investment constraints and practices, such as the inability to invest in shares, the existence of divergent investment policies and the fact that some schemes have held a high proportion of own undertaking investments, resulted in a number of schemes exhibiting poorly balanced and low performing portfolios. The passive trading policies of a number of schemes also restricted investment performance.

Several of these issues are raised in a submission from the Deputy Director-General of Transport:

> "In summary, I believe that as far as the investment side of their activities are concerned, the number of Superannuation Boards in Victoria is too diverse for a proper resourcing of those Boards to enable the investment earnings of those funds to be maximised."(2)

The quality of investment information and advice available to Boards of Management has in some cases been identified as a problem area, and there is limited investment expertise on many Boards of Management. Staff ceilings and restraints on remuneration packages have affected the availability of skilled investment managers to a number of schemes.

The Committee considers that the continued existence of some of these problems is an indication of the lack of priority given in the past to the investment performance of public sector superannuation funds. This opinion is reinforced by the fact that the Committee had to employ a consultant to obtain any quantitative comparisons or measures of the investment performance of Victorian schemes. The poor investment performances outlined in Chapter 5 of the Review Report can in many cases be associated with the various restrictions or specific investment arrangements identified above. The Committee found a clear need for reform in the investment arrangements of Victorian public sector superannuation schemes.

8.3.1 Combined Investment Activity

The investment of the $2.3 billion in assets held by public sector superannuation schemes in Victoria is a significant financial activity which takes place in an investment climate of increasing complexity. Investment managers typically face the difficult task of optimising yields over the range of available investment avenues, which can vary from shares to property to the more conventional fixed interest investments. Performance depends heavily on basic strategy decisions. This requires that the best possible strategic skills and experience be employed at Board level. In-house strategic skills and investment experience are likely to be economically feasible only for the largest of schemes.

Operational skills and knowledge are needed for optimum performance in the fixed interest, share and property sectors. For the largest funds, other skills are required to assess and manage, for example, a joint venture proposal in the resources area. Providing all public sector schemes with staff of suitable expertise to manage such wide areas of investment would inevitably involve much duplication and cost, especially when the availability of such managers is strictly limited.

The large number of schemes has implications not only for the provision of adequate expert staff but also for the size of the investment pool of each scheme. At June 1983, there were 17 schemes with assets of less than $10 million each. These small funds are restricted in their flexibility to switch between, and take advantage of, both large and smaller investment opportunities as they arise. Investment managers with sizable investment pools may have more leverage to negotiate on rates and conditions, and more scope to spread risk (while maintaining adequate return) by holding a diverse portfolio. However, schemes with a proven investment record - for example, some of the smaller schemes with externally managed portfolios - could lose from an amalgamation. There are also risks associated with a large fund if overall investment strategy is inappropriate.

The use of computer-based investment management and accounting systems has become an important factor in efficient investment practice and control. Campbell and Cook, the Committee's consultants on investment performance, noted that the lack of such facilities would prevent schemes "from effectively competing in the market with the professional managers who have sophisticated tools at their disposal"(3), but unnecessary duplication and incomplete utilisation would result in some instances if all existing schemes introduced such facilities. The Committee believes that these are areas in which increased efficiency and economies of scale may be exploited if investment activity is pooled.

8.3.2 A Victorian Superannuation Investment Trust

The Committee believes that a substantial pooling of the investment activity of public sector schemes is both feasible and desirable to facilitate better performance and greater efficiency in the investment of funds and would help to reduce the cost to government of providing superannuation benefits.

The Committee proposes a pooled central fund be established to offer investment services to all public sector superannuation schemes. It would be administered by a new statutory authority - the Victorian Superannuation Investment Trust (VICSIT). A split of investment responsibilities from other aspects of scheme management was also introduced by the Commonwealth Government when its superannuation arrangements were altered in 1976.

The proposed pooling of funds differs from amalgamation in that the schemes remain separate in legal terms (i.e., with separate trust deeds or legislation). The pooling of funds amounts to initiating the common management of 'trust' funds i.e., individual investments would be replaced by units in the investment authority's funds. Such pooling occurs in the management of trust estates by Trustee Companies and the Public Trustee.(4)

VICSIT would be charged with maximising the returns achieved on investment funds commensurate with prudent levels of security. It is essential that the Board of such an authority include members with considerable finance and investment expertise (this matter is dealt with further in Chapter 5).

Similarly, the staffing of the proposed investment authority will be crucial its success. This matter was addressed in a private submission from Mr. G. Ballard, a member of the State Superannuation Board, who stressed:

> "It is quite pointless to broaden investment powers unless appropriate skilled personnel are available to utilise these powers to the best of their ability. It is axiomatic that the best performers are in fact rewarded on a performance basis."(5)

Investment managers of suitable experience and skills are in high demand. As emphasis should be on performance, it may be appropriate to institute relatively short-term (but renewable) employment contracts of, say, three to five years for senior staff of the authority.

Currently, the State Superannuation scheme is subject to Public Service Board constraints on the numbers and remuneration levels of staff. Mr. G. Ballard, who is also Manager of the Cash Management Account of the Victorian Development Fund, commented:

> "... - the question of staffing. It is my contention that it is impossible to run a commercially oriented investment operation under rules and regulations applicable to a department."(6)

If VICSIT is to attract appropriately skilled staff, the Committee feels a more flexible approach to staffing is needed. Consideration should be given to providing VICSIT with the power to employ professional investment staff as it believes necessary.

In practice, the Board of VICSIT will need to delegate to its staff, responsibility for day to day investment management. As it may not be practical for VICSIT to recruit investment expertise in every area of its operation, there should be power to delegate to professional private sector investment managers. The Board's powers of delegation, both to its own staff and to private sector managers, should be clearly specified. This should allow VICSIT to employ experienced managers for all its investment activity.

VICSIT would be responsible for the investment and administration of:

(a) all the investment funds of schemes in which the employer's contribution to benefits is financed from the Consolidated Fund (e.g. State Superannuation scheme, SERB scheme);

(b) all the investment funds of schemes with assets of less than $10 million at June 1983;

(c) the discretionary investments of public sector schemes not included above (these schemes would retain their current investment responsibilities and also have the option of placing all or part of their funds with the proposed authority); and

(d) the discretionary investments of employing authorities who are currently, or will be required in the future, to finance their share of benefit payments under the State Superannuation scheme by maintaining an investment fund (see section 7.6.2.2).

This framework would ensure that VICSIT has a large asset base from its inception. The proposed asset base is mostly drawn from schemes in which a significant proportion of benefits is paid from the Consolidated Fund, so the Government has a considerable stake in improved investment performance. Funds would also come from schemes whose asset size is considered too small to warrant maintaining a separate administrative structure to manage investment. VICSIT would provide an investment service for the schemes in (c) above. Participation by these schemes would be on a discretionary basis. Table 8.1 gives an indication of how schemes would be affected by the proposed coverage of VICSIT.

TABLE 8.1

PROPOSED COVERAGE OF VICTORIAN
SUPERANNUATION INVESTMENT TRUST (VICSIT)

Schemes With Investments Managed By VICSIT (a)	Schemes Maintaining Investment Responsibility Plus Option Of Investing In VICSIT
Current Schemes	
County Court Associates	City of Melbourne Officers
Egg Board Staff	Gas and Fuel Corporation
Greyhound Racing Control Board	Hospitals
Harness Racing Board	Local Authorities
Legal Aid Committee	MMBW - Provident
MURLA	- Superannuation
Parliamentary	Metropolitan Fire Brigades
Pilot Service Staff	Port of Melbourne (b)
Port of Geelong	State Bank
Port Phillip Pilots Sick	SEC - Employees
and Superannuation	- Superannuation
SERB	TAB
Superannuation Lump Sum	
State Superannuation	
Supreme Court Associates	
Tobacco Leaf Marketing Board	
Victorian Dried Fruits Board	
Westgate (CML & NMLA)	
Zoo	
New Schemes	
Victorian State Employees' Superannuation Scheme	

(a) A number of listed schemes are run by life assurance policies. Practical prospects of pooling such funds to be considered on a case-by-case basis.

(b) Port of Melbourne would fit in this category if fully funded, as recommended by the Committee.

In order to ensure an equitable sharing of investment results, schemes with discretionary power to invest in VICSIT would be offered units in the main investment sectors and would be able from time to time to choose their own investment level in each sector. Alternatively, they may wish VICSIT to make this choice. Initially, the sectors from which units could be chosen would be public securities, other fixed interest, property, shares and a short term money market facility. Investment earnings would be re-invested in units according to the stated strategy of each scheme. The assets of each scheme would be determined according to the market value of units held by the scheme.

In the establishment of VICSIT, the objective is to delegate to a Board of Management the work and responsibility of investing the funds and optimising their performance. VICSIT would operate under relatively unrestricted investment powers, initially with assets in excess of $1 billion. With substantial income flows to invest on a regular basis, VICSIT would be an important presence in the State's capital markets. The Committee is concerned that the investment policies of VICSIT should not be contrary to the programs of the State Government of the day. As Government bears the responsibility for economic management at State level, the Committee considers that the broad investment strategies employed by VICSIT and the largest individual investments, should be subject to Government approval. The question then arises of what controls can sensibly be exercised by the Government without itself assuming the work and responsibility.

The Committee believes the following procedures could be developed to deal with this matter:

(a) The Treasurer would approve an annual strategy paper indicating in general terms VICSIT's plans for investing the coming year's cash flow. The confidentiality of this document must be ensured because it would contain market-sensitive information such as the expected amounts to be placed in public securities, shares, property and other fixed interest securities and reasons for the apportionment. The strategy paper would be accompanied by a brief survey of past performance figures and include comparisons with other managers.

(b) The Treasurer's approval would be required for any significant variation from the strategy.

(c) The Treasurer's approval would be required for any single investment which is greater than $2\frac{1}{2}\%$ of the current book value of VICSIT's assets.

(d) The Treasurer may decide at the beginning of any year that, say, up to 20% of the year's new investments be directed to State investments. These would be specified by the Treasurer and could include deposits at commercial rates with the Victorian Development Fund or investments meeting the investment guidelines and rate of return criterion now employed by public authorities.

The Committee believes that percentages such as those indicated in (c) and (d) above would give the Government a reasonable measure of control but would not hinder VICSIT's decision-making nor unduly impair its opportunity to achieve good investment performance.

Transitional requirements would include legislative provisions to ensure that the relevant schemes' investment funds are placed with VICSIT for management. This may entail making the proposed Investment Trust the only investment avenue available to such schemes. Accurate market valuations of these schemes' assets would be needed to ensure that they are given appropriate credit in the new fund.

Under the proposed structure, the estimated asset base would initially be in excess of $1 billion. By comparison, the Commonwealth Superannuation Fund Investment Trust has investments in excess of $2 billion (March 1984) and the N.S.W. State Superannuation scheme controlled assets of over $2.3 billion at June, 1983.

The Committee considers that the proposed arrangements would ensure that the VICSIT was of sufficient size to exploit efficiency advantages accruing to a central investment pool, and that there would be a marked rationalisation of existing investment management structures.

If VICSIT provided significant advantages in terms of measured and comparative investment performance, there may be a case for moving towards pooling all funds in the long term.

RECOMMENDATION 8.2

THAT THERE BE ESTABLISHED A VICTORIAN SUPERANNUATION INVESTMENT TRUST AS PROPOSED IN SECTION 8.3.2.
(See also recommendation 5.5)

SECTION 8.4 UNIFORM INVESTMENT POWERS

For those schemes established by an Act of Parliament investment powers are relatively restricted. In those established by trust deed the investment powers are usually wider, in fact several schemes have virtually no investment constraints. The implications of such differences in investment powers were examined in the Committee's Review Report. It was concluded that the poor investment performance was due in no small part to the influence of the restricted powers of the surveyed schemes.

The Committee can see no justification for the differences in investment powers given to Victorian public sector schemes, and considers that significant restraints on investment powers, such as the inability of many schemes to freely trade and invest in equities - particularly shares - should be relaxed. This matter was discussed by the Local Authorities Superannuation Board in a recent submission to the Committee:

> "The Board agrees that more opportunity to improve returns would be available with wider investment powers and, has in fact, sought legislation to have its powers extended to enable investment in the share market."(7)

Prudential considerations require the specification of parameters within which investment choices must be made. The Committee therefore recommends the introduction of uniform powers specifying the avenues available for the investment of all public sector superannuation monies. These would ideally provide a broad set of investment alternatives accommodating any reasonable superannuation investment strategies.

The design of an appropriate set of investment powers is a complex task. This has been illustrated by the recent problems with legislation specifying the powers of the Commonwealth Superannuation Fund Investment Trust (SFIT). Ernst & Whinney (Chartered Accountants), in their capacity as consultants to an inquiry into the management and operations of the SFIT commented that:

"The current investment powers of SFIT may, on the surface, appear to be reasonable but the fact is that, in view of all the legal advisings that have been required to interpret them, and, in view of the practical difficulties involved in having them changed, they are restrictive." (8)

and

"... new forms of investment occur from time to time and it is not possible to legislate for them all in advance."(9)

In particular, the SFIT received legal opinion that it was not entitled to actively trade in investments, which is a totally unreasonable and unacceptable constraint. The SFIT had also been advised by the Attorney-General's Department that it did not have the power to invest directly in a joint venture. This too is a severe constraint for a large fund operating in current conditions. Doubt had even been placed on the meaning of the word 'investment' as it appears in the Act. The Consultants were of the opinion that a complete review was needed of the SFIT's investment powers.

These problems demonstrate the need for an unambiguous specification of investment powers. The Committee is not in a position to draft the appropriate provisions but considers, as a minimum, the following avenues should be open to those responsible for investing public sector superannuation funds:

(a) public securities (loans to government, semi-government and municipal authorities);

(b) Government guaranteed loans;

(c) mortgage loans (secured on land in Australia);

(d) debentures;

(e) shares (in companies listed on Australian stock exchanges and building societies);

(f) property (estates or interest in land in Australia and improvements of such land);

(g) loans (including deposits) to a bank or building society;

(h) leverage lease transactions;

(i) unit trusts (or their equivalent operated by life offices, merchant banks, etc.);

(j) negotiable certificates of deposit issued by a bank;

(k) bills of exchange (endorsed or accepted by a bank or authorised dealer);

(l) buy-back transactions;

(m) joint ventures; and

(n) deposits with dealers in the short term money market.

The ad hoc development and proliferation of different investment powers in the Victorian public sector is testimony to the need for periodic review and updating of such powers. Financial markets are a dynamic environment where new instruments are continually being developed. The list above is similar to the investment powers of SFIT, but the advice of senior legal counsel should be employed to ensure that investment powers provide clear guidance to investment managers, and that efficient processes are provided to keep powers up to date with market developments.

The Committee welcomes the Treasurer's recent announcement of the Government's intention to legislate for uniform investment powers. The following comments thus apply both to VICSIT and to those existing funds whose investment operations continue in their present form.

RECOMMENDATION 8.3

THAT:

(A) IT IS BOTH DESIRABLE AND NECESSARY TO INTRODUCE UNIFORM POWERS SPECIFYING THE AVENUES AVAILABLE FOR THE INVESTMENT OF VICTORIAN PUBLIC SECTOR SUPERANNUATION MONEYS. THIS WOULD PROVIDE SUBSTANTIALLY WIDER POWERS THAN CURRENTLY AVAILABLE TO MANY SCHEMES;

(B) THE POWERS LISTED IN SECTION 8.4 PROVIDE A STARTING POINT FOR A SET OF UP-TO-DATE INVESTMENT POWERS;

(C) THAT THE TREASURER, WITH THE ASSISTANCE OF SENIOR LEGAL COUNSEL, BE RESPONSIBLE FOR DEVELOPING APPROPRIATE INVESTMENT POWERS AS A MATTER OF PRIORITY;

(D) PROVISION BE MADE FOR PROFESSIONAL PRIVATE SECTOR INVESTMENT MANAGERS TO BE DELEGATED THE RESPONSIBILITY OF INVESTING PART OF THE FUNDS CONCERNED; AND

(E) EFFICIENT MECHANISMS BE AVAILABLE FOR THE PERIODIC REVIEW AND PROMPT AMENDMENT OF INVESTMENT POWERS. FOR EXAMPLE, THE TREASURER SHOULD BE ABLE TO INITIATE CHANGES BY REGULATION.

SECTION 8.5 SPECIFIC INVESTMENT ISSUES

The following sections deal with particular investment topics raised in the Committee's Review Report.

8.5.1 Active Portfolio Management

The Committee's investment consultant commented that there is a noticeable lack of active investment management in Victorian public sector superannuation schemes. Securities, for example, are typically held to maturity.(10) This is understandable for those securities for which active secondary markets do not exist, but the lack of activity seems to extend further.

Active investment management is extremely important because market values change in response to changes in a number of key economic variables. A satisfactory fund purchase at one time may not be worth buying at a later time. If a particular security is no longer worth buying, consideration should be given to selling it. A decision to hold is not in fact readily distinguishable in principle from a decision to buy.

> "It is a fundamental tenet of proper investment management that the retention of any investment results from a conscious decision that such (lack of) action is in the best interest of the fund."(11)

Investment managers must be aware of the implications of their decisions to buy or sell, or equally importantly, not to buy or sell. Investment policy should be flexible and reflect an informed professional judgement of the future. In many instances, passive, static investment policies will not give the best results.

RECOMMENDATION 8.4

THAT POSITIVE INVESTMENT REVIEW POLICIES BE INSTITUTED BY

8.5.2 Equity Investment : Shares

The Committee's investment consultants, Campbell and Cook, surveyed the returns that would have accrued to different types of portfolios over the five years to June 1983. The two top performers were the share portfolios of a sample of Life Office funds and the share accumulation index which had average annual returns of 21.7% and 19.7%. This compares with the fixed interest portfolio of the sample of Life Office funds and the Bond accumulation index with average returns over the period of 11.5% and 8.5% respectively.

Figure 8.1 shows a five-year moving average of the sectoral returns of the portfolios of the sample of Life Office funds conducted by Campbell and Cook. The importance of shares in portfolio structure is highlighted by the results illustrated in the graph. Over the period, which is a reflection of 10 years' experience, the returns to the share sector of the portfolios was significantly and almost continually higher than the other three investment categories.

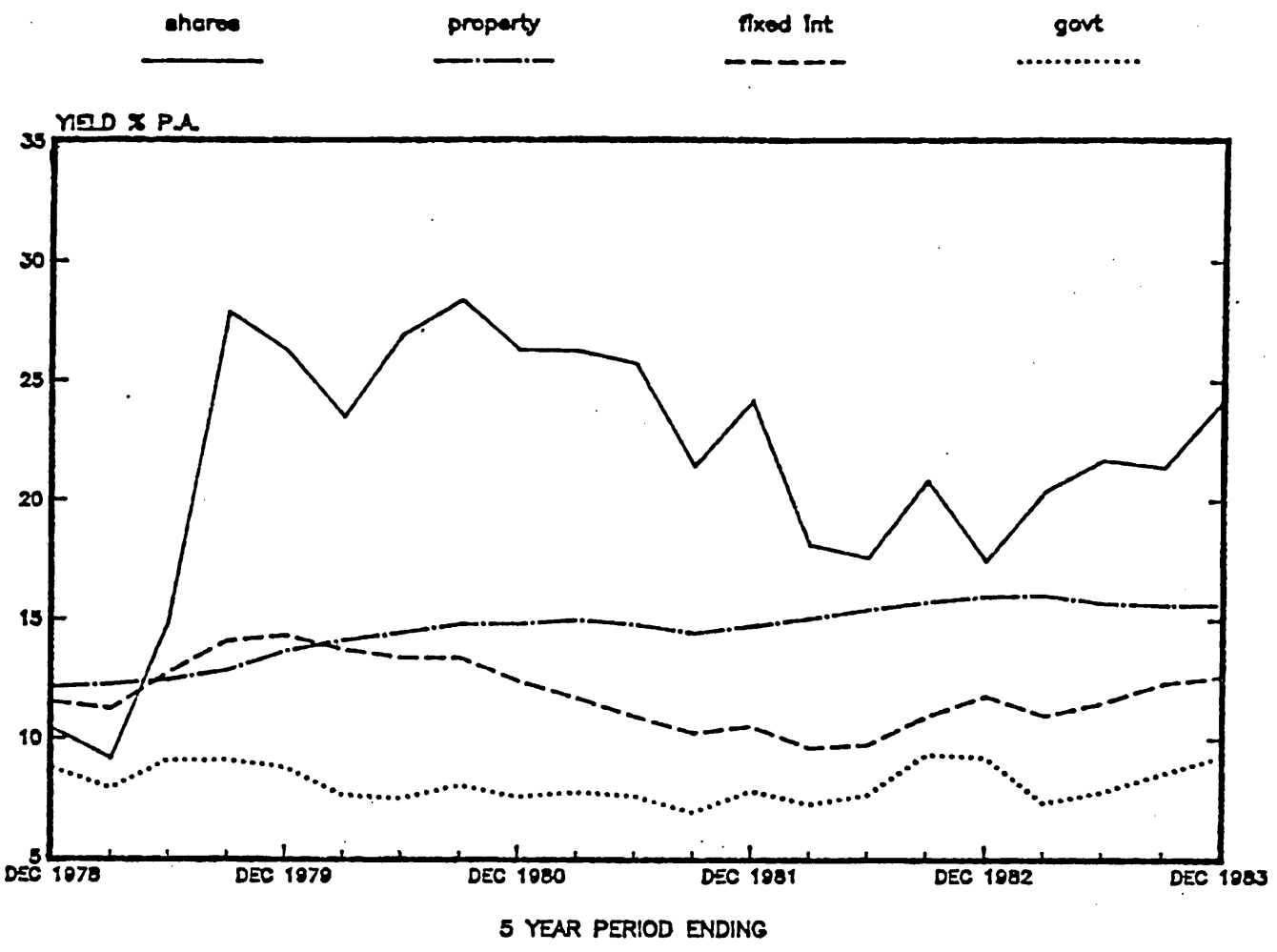
Campbell and Cook commented:

> "... the concentration towards fixed interest investment results in part from the belief that this constitutes the 'safest' investment policy and that the large scale purchase of ordinary shares would involve the fund in unacceptable risk. It is not at all clear that this is true. The appropriateness of any investment must be gauged in relation to the liabilities that must be met; i.e., in these cases they are essentially long term and linked to member's salaries at or near retirement. On this basis a 'matched' investment would include a substantial proportion of equity investments, ordinary shares and property; those that have some chance of increasing in value in line with salaries and/or inflation."(12)

A common guideline employed by investment managers is that holdings of any one company's shares do not involve the fund obtaining a controlling interest.

FIGURE 8.1

CAMPBELL AND COOK SAMPLE LIFE OFFICE FUNDS
EQUIVALENT ANNUAL YIELDS OVER 5 YEAR PERIODS



Individual equity holdings are usually part of a diverse portfolio split between sectors and among companies within each sector. Such holdings are designed to provide the fund with a satisfactory dividend income and a long term hedge against inflation, and not involve the fund in company management.

The Committee is aware of the uncertainties associated with share investment, but notes that risk is a factor in all investments and does not justify the exclusion of shares as an investment avenue. A properly managed share portfolio can add significantly to the investment performance of a fund. The Committee considers it to be unduly restrictive to maintain the current restraints on the power to invest in shares.

RECOMMENDATION 8.5

THAT:

(A) THE INVESTMENT POWERS APPLICABLE TO THE INVESTMENT OF PUBLIC SECTOR SUPERANNUATION FUNDS INCLUDE THE ABILITY TO INVEST AND TRADE IN SHARES OF COMPANIES WITH AUSTRALIAN STOCK EXCHANGE LISTING; AND

(B) FUNDS BE RESTRICTED FROM BECOMING THE CONTROLLING SHAREHOLDER OF A COMPANY.

8.5.3 Equity Investment: Property

In their investment performance survey of public sector schemes, Campbell and Cook commented on several aspects of the surveyed schemes' property investment. The Committee notes their conclusions:

> "Some funds are now investing significantly in property, but with relatively small numbers of individual investments. One must have some concern about the expertise available to the Funds in this area. There may therefore be scope for inexperienced staff to be exploited somewhat by outside advisers, and this point should at least be considered by the Committee.
>
> There would seem to be a strong case that all property investment should be done through the property pools of the professional superannuation fund investment managers or, alternatively, through one large property investment pool established for all public sector funds. It certainly seems wasteful for all of them to attempt to develop their own specialised expertise in this area ..."(13)

The Treasurer, in responding to the Committee's Review Report, foreshadowed improvements in property investment arrangements for public sector schemes. Joint property purchase proposals will be brought to the attention of investment management by approved institutions such as Morguard

Investments Ltd. This type of activity would be supervised by a special Property Advisory Committee comprising representatives from the Department of Management and Budget, the Valuer-General and the schemes themselves.

RECOMMENDATION 8.6

THAT COMPLEMENTARY ACTIVITIES OF THE PROPOSED PROPERTY ADVISORY COMMITTEE AND THE VICTORIAN SUPERANNUATION INVESTMENT TRUST (VICSIT), BE CO-ORDINATED TO PROVIDE PUBLIC SECTOR SUPERANNUATION INVESTMENT MANAGERS WITH ADVICE ON PROPERTY INVESTMENT AND, THROUGH THE TRUST, ACCESS TO A POOLED PROPERTY INVESTMENT SERVICE.

8.5.4 Divergent Investment Policy

Divergent investment policy relates to the selection of investments on the basis of criteria other than the traditional criteria of income maximisation within acceptable risk limits. A small number of submissions to the Committee supported a limited application of this investment criterion to allow investment in areas that would be of direct benefit to members during their working life.

The Committee has sympathy with the 'social' benefits attributed to divergent investment, but also recognises the potential detrimental impact of such investment on overall investment income. This factor can have important implications. For example, reduced investment income for the State Superannuation scheme (responsible for nearly half of the assets of Victorian public sector schemes) increases the call on the Consolidated Fund for benefit payments which are financed on a pay-as-you-go basis. Such inroads into the funds available for recurrent expenditure would reduce the ability of the Government to finance such 'social investment' from its budget - a more appropriate vehicle for such expenditure.

8.5.5 Own Undertaking Investment

Own undertaking investment refers to investment in the parent body. This form of investment is considered unwise in the private sector for prudential reasons i.e., the possible loss of members' benefits in the event of business failure. In the public sector, the schemes associated with the major semi-government authorities and local government are the main participants in this type of investment. The prospect of business failure is unlikely for such organisations whose borrowings, in any case, are government guaranteed or secured on municipal rates revenue in the case of local government borrowings.

Restriction on own undertaking investment has been supported by a number of recent reports. For example, the Final Report of the Commonwealth Task Force on Occupational Superannuation suggested that an appropriate form of restriction would be to require that:

> "... not more than 10 per cent of the assets (measured at cost) of an employer-sponsored fund should consist of equities in, or loans to, the employer's business, a related company or associated persons."(14)

In comparison, the Hancock Committee recommended 10% and the Campbell Committee 5% as the appropriate limit. While these reports were mainly focused on private sector superannuation, such prudential considerations have some relevance to public sector schemes.

The investment of superannuation assets in the employing authority is not in itself a reason for poor performance; performance depends on the return achieved by the fund on such assets. Rather than recommend the imposition of a rigid ceiling on own undertaking investment, the Committee considers that it would be preferable to emphasise the prudential importance of a balanced portfolio (not dominated by any one asset type), the need for full disclosure of such investments, and investment decisions being made according to rate of return criteria. If own undertaking investment opportunities are considered on this basis prudential considerations should be satisfied without recourse to regulation.

8.5.6 Monitoring Investment Performance

As a general premise, it is necessary to monitor performance to assess whether or not an objective is being achieved efficiently. Given the cost implications associated with higher or lower investment returns, there exists a strong motive to maximise returns and ensure that there are methods of scrutinising actual performance. The higher the yield from the investment fund, the lower is the cost to the employer of a given level of defined benefit. However, Victorian public sector schemes have placed little emphasis on consistent and comparative monitoring of their investment performance.

As mentioned in the Committee's Review Report, the majority of schemes surveyed by the Committee's investment consultants, Campbell and Cook, were unable to supply the Committee with any readily comparable investment performance indicators. The Victorian Trades Hall Council considers there is a need for action on investment matters:

> "... to improve the accountablity, in terms of performance, of fund managers to contributors."(15)

Appropriate investment monitoring techniques clearly have a role in achieving this goal.

The Committee recognises the importance of accurate investment monitoring and performance analysis.

RECOMMENDATION 8.7

THAT:

(A) CONSISTENT AND COMPARABLE INVESTMENT PERFORMANCE MEASUREMENT TECHNIQUES BE EMPLOYED BY VICTORIAN PUBLIC SECTOR SUPERANNUATION INVESTMENT FUNDS. REPORTS SHOULD BE AVAILABLE QUARTERLY.

(B) THE TREASURER OVERSEE THE IMPLEMENTATION OF INVESTMENT PERFORMANCE MEASUREMENT PROCEDURES. (See also Recommendation 5.2)

NOTES

(1) Transcript of Seminar, Melbourne, 20 July 1984, p.38.

(2) Submission, Deputy Director-General, Transport, December 1983, p.4.

(3) Campbell and Cook, Investment Performance Survey of Selected Victorian Public Sector Superannuation Schemes, A Report to the Economic and Budget Review Committee, VGPS, Melbourne, February 1984, p.18.

(4) Submission, Attorney-General, February 1984, p.9.

(5) Submission, Mr. G. Ballard, Member State Superannuation Board, August 1984, p.2.

(6) Ibid., p.4.

(7) Submission, Local Authorities Superannuation scheme, August 1984, p.8.

(8) J.V. Monaghan, Inquiry into the Superannuation Fund Investment Trust, Report to the Minister for Finance, AGPS, Canberra, March 1984, p.218.

(9) Ibid., p.218.

(10) Campbell and Cook, op. cit., p.17.

(11) Ibid, p.2.

(12) Ibid, p.2.

(13) Ibid, p.3.

(14) Commonwealth Task Force on Occupational Superannuation, A Report to the Australian Treasurer, May 1983, p.9.

(15) Submission, Victorian Trades Hall Council, June 1984, p.36.

COMMITTEE ROOM, 5 SEPTEMBER 1984

APPENDIX A

ITEMS TO BE INCLUDED IN STANDARD REPORTING AND ACCOUNTING

(a) A Full Trustees' Report

In this report the Trustees would disclose matters not directly relevant to the annual accounts and other attached reports, but important enough to be drawn to the attention of interested members. The full report for the period under review would be expected to include:

(i) details of the scope of operation of the scheme (e.g., participating employers);

(ii) names of the trustees and/or the committee of management and the basis of appointment;

(iii) the names of professional advisers and all persons to whom the trustees have substantially delegated their investment powers;

(iv) details of the membership covered by the scheme;

(v) a statement as to the basis of employer contributions;

(vi) details of any material indebtedness with, and/or investments in, the employer;

(vii) an outline of any rules, or other material, changes made and the reasons for the changes (e.g., whether made voluntarily or to comply with statutes);

(viii) a description of the investment policy (or at least the broad aims) and strategy followed and a statement of the investment returns obtained if not on individual types of investments, at least on the whole fund, calculated using a generally accepted formula; and

(ix) information about the financial operations and position of the scheme that complements the annual accounts.

(b) An Abbreviated Report

Scheme members should be issued with an abbreviated report designed to communicate to them in a simple and straightforward manner, the financial position of the scheme. The abbreviated report should comprise:

(i) an abbreviated version of the "Source and Application of Funds" (cash flow) table;

(ii) an abbreviated version of the table of investments showing the "market values" of the various types and investments held with the Government directed investments grouped separately;

(iii) a brief resume of the report of the trustees (covering important aspects of the trustees' stewardship, rule changes, membership and, if applicable, pensioners), and the reports of the actuary and the auditor; and

(iv) if considered appropriate, advice of the extent to which the employer meets directly any costs of administration.

(c) Personal Advice to Members

This gives a current statement of the main benefit entitlements.

(d) Accounts

A standard format is specified for the accounts. These comprise the following items, with corresponding items for the preceding year and all necessary explanatory notes:

(i) a Statement of Income and Expenditure;

(ii) a Statement of Net Assets (Details would be given of any investments in one organisation aggregating more than 5% of the total market value of the fund);

(iii) a Statement of Source and Application of Funds for the year; and

(iv) a Statement of Market Value of Net Assets at the end of the year.

(e) Auditor's Report

The auditor should seek to be satisfied that

(i) the benefits stated to have been paid have in fact been paid and to the correct beneficiary(ies) and that the benefits paid or which have become payable are correct in amount according to the rules of the scheme. Such checks will also embrace the exercise of discretions;

(ii) employees eligible to participate in the scheme have been notified of their joining rights or membership;

(iii) expenses shown as paid are expenses which are properly payable out of the fund;

(iv) member contributions deducted from salaries have been accounted for, whether or not they have been paid to the trustees;

(v) ernployer contributions due have been accounted for, whether or not they have been paid to the trustees;

(vi) all contributions are in accordance with the Trust Deed;

(vii) all investments were made at market yields and were in accordance with approvals; and

(viii) the annual accounts have been prepared in accordance with the Trust Deed.

(f) Actuary's Report

While a full report by the actuary would be made every three years, and made available to interested members, an abbreviated and simplified report would normally be produced each year covering at least the following elements :

(i) a full investigation and a valuation was carried out at .....;

(ii) the "funding method" assumed;

(iii) whether current rates of employer contributions, expressed as a percentage of salaries of scheme members, are likely to vary materially in future and if so in what way;

(iv) any contingent liability in the event of termination of the scheme; and

(v) the date the next full investigation and valuation is due.

APPENDIX B

ITEMS FOR STANDARD DEFINITION

ACTUARY GOVERNMENT ACTUARY

ANNUITY

AVERAGE WEEKLY EARNINGS

BENEFIT

BENEFICIARY

BOARD DIRECTORS TRUSTEES

CHILD

CONSUMER PRICE INDEX

CONTRIBUTOR

CONTRIBUTION

DEED TRUST DEED

DEPENDENT

DISABILITY PERMANENT DISABILITY DISABLEMENT

APPENDIX B (CONT'D)

ELIGIBILITY

EMPLOYEE PERMANENT EMPLOYEE TEMPORARY EMPLOYEE

FINAL SALARY FINAL AVERAGE SALARY

FUND

ILL-HEALTH PARTIAL DISABLEMENT

LIFE ASSURANCE LIFE ASSURANCE POLICY

MEMBER

NOMINEE

OFFICER

PENSION PENSIONER

RESIGN	RESIGNATION	
RETIRE	RETIREMENT	NORMAL RETIREMENT
RETRENCH	RETRENCHMENT	
RULES		
SALARY	SCHEME SALARY	ADJUSTED SALARY
SCHEME		
SERVICE	FULL TIME SERVICE PART TIME SERVICE	CONTINUOUS SERVICE INTERRUPTED SERVICE
SICKNESS		
SPOUSE		
TRUSTEE	TRUSTEES	
WAGE	MINIMUM WAGE	
YEAR	FINANCIAL YEAR	SCHEME YEAR

APPENDIX C

P R O V I S I O N S

AGE EVIDENCE OF PROOF OF

CHILDRENS' BENEFITS ORPHANS' BENEFITS

COMMUTATION MEMBER'S PENSION SPOUSE'S PENSION

CONTRIBUTION RATE DETERMINATION

DISABILITY PARTIAL DISABILITY ILL-HEALTH

EARLY RETIREMENT

INVESTMENT OPERATION ACCOUNTING POWERS MANAGEMENT MEASUREMENT

MEDICAL CLASSIFICATION

PORTABILITY

PRESERVATION

RETIRING AGE

SALARY FINAL AVERAGE SALARY

VESTING

APPENDIX D

LIST OF PERSONS & ORGANISATIONS MAKING SUBMISSIONS TO THE INQUIRY

1. Australian Federated Union of Locomotive Enginemen, Australian Railway Union.
2. Ballard, G.P. - Manager, Cash Management Account, Victorian Development Fund.
   - Member, State Superannuation Board of Victoria.
3. Begg, A.S.
4. Devine, B.
5. Doolan, B.J.
6. Dwyer, E.
7. E.S. Knight & Co.
8. Federation of Victorian School Administrators
9. Geschke, N. - The Ombudsman for Victoria
10. Hammet, P.J. (Miss)
11. Hospitals Superannuation Board
12. Institute of Actuaries of Australia (The)
13. Jamieson, D.
14. Local Authorities Superannuation Board
15. McAlpine, R.
16. McCaughan Dyson & Co.
17. McGinty, J.
18. McGregor, B.P. - Town Clerk, City of Broadmeadows
19. McIntosh, B.
20. Miller, S.I. - Chief Commissioner of Police, Victoria Police

Norton, A. (Ms.)

Penrose, R.W.H.
Police Association (The)

Port of Melbourne Authority

Riley, J. (Dr.)	-	Psychiatrist
Simmonds, J.L., MP	-	The Honourable Member of Parliament of Victoria.
	-	Minister for Employment and Training

Spurr, N.R. & M.E.

State Bank of Victoria

State Employees Retirement Benefits Board

Thompson, J.

Victorian Conference of Principles of Colleges of Advanced Education Ltd.

Victorian Trades Hall Council

Victorian Women's Advisory Council to the Premier

White, W. (Dr.)	-	Consultant Psychiatrist
Woods, G.N.	-	Rate Collector, City of Broadmeadows

APPENDIX E

LIST OF PERSONS AND ORGANISATIONS GIVING EVIDENCE TO THE INQUIRY

1.	Champion, R. (Mr.)	Director of Superannuation, Policy and Management, Dept. of Management & Budget.	13 August 1984
2.	Faulkner, P. (Ms.)	Manager, Public Sector Policy Branch, Public Service Board of Victoria.	13 August 1984
3.	Hastie, M. (Mr.)	Secretary, State Superannuation Board of Victoria.	9 August 1984
4.	Hemming, A. (Mr.)	Manager, Superannuation Policy, Dept. of Management & Budget.	13 August 1984
5.	Leonard-Kanevsky, P. (Mr.)	Elected Member, State Superannuation Board of Victoria.	9 August 1984
6.	McTaggart, G. (Mr.)	Manager, Superannuation Management, Dept. of Management & Budget.	13 August 1984
7.	Moran, T. (Mr.)	Acting General Manager, Services Delivery, Public Service Board of Victoria.	13 August 1984
8.	O'Neill, D. (Ms.)	Acting Manager, General Staffing, Public Service Board of Victoria.	13 August 1984
9.	Ryder, J.M. (Mr.)	Chairman, State Superannuation Board of Victoria.	9 August 1984
10.	Smith, D. (Mr.)	General Manager, Policy and Tribunal, Public Service Board of Victoria.	13 August 1984

APPENDIX F

SEMINAR FOR SUPERANNUATION SCHEMES AND DEPARTMENTAL REPRESENTATIVES HELD ON 16 JULY 1984

P R E S E N T

Mr. Norman Billing	Secretary, Victorian Parliamentary Former Members' Association
R.H. Burke	Manager, Planning Services, Department Industry Commerce & Technology
R.J. Brindley	Secretary, Melbourne and Metropolitan Board of Works Superannuation Scheme
Mr. W.F.G. Cannington	Secretary, Tobacco Leaf Marketing Board Vic.
Ms. Jill Carr	Equal Opportunity Board
Mr. Ron Champion	Director of Superannuation, Department of Management and Budget
Mr. J.G. Cooper	State Electricity Commission of Vic.
Mr. P.N. Cooper	Secretary, Gas and Fuel Corporation Superannuation Fund
Mr. Murray Coulthard	Department of Labour & Industry
Mr. Alan Cowen	Observer
Mr. A.W. Embury	Secretary, Zoological Board of Victoria Superannuation Fund
Ms. P. Faulkner	Public Service Board
Mr. Peter Fitzgerald	Ministerial Adviser, Law Department
Mr. R. Foo	Superannuation Officer, Totalizator Agency Board
Mr. Neil Forrest	Investment Officer Construction Industry Long Service Leave Board
Mr. G.M. Fry	Chairman, State Employees Retirement Board
Mr. C. Gordon	President, Retired State Employees Association
Mr. J.F. Grech	Workshop Engineer, Melbourne Transit Authority
Mr. B. Harding	Chairman's Representative, Police Superannuation Board
Mr. Paul Haskings	Health Commission

Mr. M. Hastie	Secretary, Trustees of the Parliamentary Contributory Superannuation Fund
J.A. Heffernan	Associate Director Legal Aid Commission
Mr. A. Hemming	Department of Management & Budget
Mr. G. Jeffcott	Ministry for the Arts
Mr. Charles Jefferson	Secretary The Victorian Egg Marketing Board Superannuation Fund
Ms. P. Kailis	Department of Management & Budget
Mr. G.L. Lampe	Assistant Director, Economic and Financial Division, Department of Premier and Cabinet
Mr. Maurice Langford	Manager, Personnel Services Safety&Welfare, Road Construction Authority
Mr. Peter Leonard-Kanevsky	Elected Member, State Superannuation Board
Mr. C. Lewis	V.H.S.P.A.
Mr. J. McAuley	Acting Director-General, Department of Property & Services
Mr. T.C. McCredden	State Electricity Commission of Victoria
J.D. Mason	Superintendent, Victorian Ambulance Services Association
Mr. D.W. Neville	Director of Corporate Services, Department of Youth Sport & Recreation
Mr. Phil Nicoll	Paymaster, Department Minerals & Energy
Mr. J. Norman	Director of Audit, Office of Auditor-General
Mr. Ian R. Pawsey	Secretary, Local Authorities Superannuation Board
Mr. Denis Quinn	Local Government Department
Mr. Alan Rackemann	Hospitals Superannuation Board
Mr. Colin S. Randall	Captain, Port Phillip Sea Pilots
Mr. L.M. Rodriquez	Manager, Local Authorities Superannuation Board
Mr. K. Russell	Officer in Charge, Special Accounts, Department Minerals & Energy
Mr. T.W. Russell	Ministry of Housing
Mr. J.A. Rutter	Chairman Totalizator Agency Board
Mr. J.M. Ryder	Chairman, Metropolitan Fire Brigades Superannuation Board
Ms. Liz Sagiakos	P.P.A.
Mr. John Sandlant	Payroll Accountant, Health Commission of Victoria
Mr. Robert Seamer	Investigation Officer, Ombudsman's Office

Mr. Ken Serong	Police Association
Mr. N. Spurr	Member, Consultative Council on Rehabilitation
Mr. Ralph Sutcliffe	Department of Agriculture
Mr. J.C. Trethowan	Chairman, State Electricity Commission of Victoria
Mr. B.J. Waldron	Auditor-General, Office of Auditor-General
Mr. G.J. Walker	Provident Fund Officer, State Bank of Victoria
A.E. Waller	Observer
Mr. R.G. Webster	Chairman, Pilot Superannuation Board
Mr. Bill Wilkinson	A.P.V.T.I.
Mr. M. Wright	Director, Policy Division Ministry of Industrial Affairs

SEMINAR FOR UNION REPRESENTATIVES HELD ON 20 JULY 1984

P R E S E N T

The Hon. R.A. Jolly, M.P., Treasurer

Dr. S. Anderson	Australian Medical Association
Mr. Kevin Berry	Senior Education Officer, Institute of Senior Officers of the Victorian Education Services
Mr. Tony Burke	Adviser, Mothercraft Nurses Association
Mr. Max Burr	Secretary (Vic. Branch) Federated Gas Employees' Industrial Union
Mr. Don Calderwood	A.M.F.S.U.
Mr. Ron Cameron	T.T.U.V.
Mr. Edwin Carter	Vice-President, C.A.S.A.
Mr. Ron Champion	Director of Superannuation, Department of Management and Budget
Mr. Ian Cole	Secretary, Gas Industry Salaried Officers Federation
Mr. Alan Connolly	United Firefighters Union
Ms. Veronica Cosgrove	Ministry of Employment and Training
Mr. Alec H. Dean	Secretary, Victorian Branch, The Association of Professional Engineers, Australia
Ms. Kathie Gleeson	Administration, Meat Industry Employees Provident Fund
Mr. Michael Hansen	Industrial Officer, Victorian Public Service Association
Mr. John Hart	A.P.S.A. C/o Road Construction Authority
Ms. Helena Higginbottom	Information Officer/Secretary Victorian Teachers Union Superannuation Committee
Mr. Dennis Hosken	Board of Works A.P.E.A. Group
Mr. Len Hubbard	United Firefighters Union
Mr. Paul Kriek	Association of Professional Engineers (MMBW Group)
Dr. Paul Langley	La Trobe University

Mr. Malcolm McDonald	State Secretary, F.E.D.F.A.
Mr. Jesse Malone	V.P.S.A.
Mr. Peter Marsh	Assistant Secretary Trades Hall Council
K.M. Matthews	Secretary, A.F.U.L.E.
Mr. John Neil	Assistant Secretary, F.M.W.U.
Ms. Jo Nolan	Victorian Teachers Federation
Mr. Max Owen	Regional Officer, Country Fire Authority Officers' Association
Ms. Marilyn Scott	Industrial Officer, C.A.S.A.
Mr. Ken Serong	Police Association
Mr. Paul Slape	General Secretary, Municipal Employees Union
Mr. Wally Spiess	State Secretary, Hospital Administrative Officers Association of Victoria
Ms. A.E. Waller	Observer
Mr. Russell Wicking	Victorian Secondary Teachers Association

SEMINAR ON MEDICAL ASPECTS OF SUPERANNUATION HELD ON 24 JULY 1984

PRESENT

Mr. J.M. Anderson	Consulting Actuary, State Superannuation Board
Mr. D. Craven	Health Commission of Victoria
Dr. J. Harrison	Health Commission of Victoria
Mr. M. Hastie	Secretary, State Superannuation Board
Dr. P. Langley	School of Economics, La Trobe University
Ms. D. O'Neill	Public Service Board
Ms. C. Smith	Public Service Board
Dr. P. Stanbury	Health Commission of Victoria

APPENDIX G

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

Friday, 2 July 1982

34. JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

(a) The Honourable P.D. Block, B.P. Dunn, G.A. Sgro, D.K. Hayward and A.J. Hunt be members of the Economic and Budget Review Committee;

Question-put and resolved in the affirmative.

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

Thursday, 20 October 1982

8. ECONOMIC AND BUDGET REVIEW COMMITTEE - The Honourable A.J. Hunt moved, by leave, That the Honourable P.D. Block be discharged from attendence upon the Economic and Budget Review Committee and that the Honourable J.V.C. Guest be added to such Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Thursday, 1 July 1982

36. COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982-

(a) Mr. Gavin, Mr. Harrowfield, Mr. McCutcheon, Mr. McNamara, Mr. Richardson, Mr. Rowe and Mr. Sheehan (Ivanhoe) be appointed members of the Economic and Budget Review Committee.

(Mr. Fordham)-put and agreed to.

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

Tuesday, 14 June 1983

14. ECONOMIC AND BUDGET REVIEW COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable A.J. Hunt be discharged from attendance upon the Economic and Budget Review Committee and that the Honourable G.P. Connard be added to such Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Tuesday, 6 March 1984.

5. ECONOMIC AND BUDGET REVIEW COMMITTEE - Motion made, by leave, and question - That Mr. Richardson be discharged from attendance on the Economic and Budget Review Committee and that Mr. Ramsay be appointed in his stead.

(Mr. Fordham)-put and agreed to.

F D Atkinson Government Printer Melbourne

ECONOMIC AND BUDGET REVIEW COMMITTEE

REVIEW AND RECOMMENDATIONS FOR THE VICTORIAN PARLIAMENTARY SUPERANNUATION SCHEME; THE JUDGES SUPERANNUATION SCHEMES; THE GOVERNOR'S PENSION; AND OTHER SPECIAL SUPERANNUATION SCHEMES

Ordered to be Printed

PREFACE

The Economic and Budget Review Committee is constituted under the Parliamentary Committees (Joint Investigatory Committees Act) 1982 to investigate and review matters referred to it under the following Terms of Reference:

- to inquire and report to the Parliament on any proposal, matter or thing connected with public sector or private sector finances or with the economic development of the State where the Committee is required or permitted to do so (by or under its Act).

- to inquire into, consider and report to the Parliament on any annual report or other document relevant to the functions of the Committee which is laid before either House of Parliament pursuant to a requirement imposed by or under an Act.

- to inquire into, consider and report to the Parliament on any matter arising out of the annual Estimates of Receipts and Payments of the Consolidated Fund or other Budget Papers.

TERMS OF REFERENCE OF THE INQUIRY INTO VICTORIAN PUBLIC SECTOR SUPERANNUATION SCHEMES

On 21 December 1982, the Governor-in-Council approved of the Terms of Reference of the Inquiry.

A. The adequacy of present provisions for the management of all Victorian public sector superannuation schemes, including:

(a) structure and management of schemes;
(b) representation of contributors;
(c) actuarial assessment and valuation;
(d) reporting to Government and contributors, and contributors' access to information; and
(e) auditing requirements.

in terms of the efficient operations of these funds and the protection of the interests of contributors and the Government.

B. Whether uniform provisions for the management of schemes are feasible and desirable, and if so what these might be.

C. Whether existing administration of schemes is efficient and administrative costs are reasonable.

D. Whether the current organisational structure of superannuation schemes in the Victorian public sector is the most suitable having regard to:

(a) differences in the financial independence of various agencies and authorities involved;
(b) possible benefits from reduction of duplication and economies of scale; and
(c) any disadvantages from competition between schemes,

and whether a reduction in the number of separate schemes is feasible and desirable.

E. Whether the terms and conditions governing eligibility for membership of various schemes are reasonable in comparison with other schemes in Australia and whether these terms and conditions are equitable between different employees.

F. The appropriateness of the current benefits, having regard to:

(a) the needs of contributors, superannuants and beneficiaries;
(b) comparable benefits for public sector employees in other States and in the Commonwealth Government and those prevailing in the private sector, also having regard to any differences in salary packages and to the role of the superannuation in the recruitment and retention of Victorian Government employees; and
(c) vesting,

and including the reasonableness of provisions governing breaks in service, resignation, early retirement, ill health retirement, retrenchment or redundancy.

G. The adequacy of portability and preservation arrangements between schemes, and between them and other Australian superannuation schemes.

H. The suitability of the present basis of Government funding of the various schemes including the funding of administrative costs, and the future financial implications for Government of existing basis of funding.

I. Whether the existing investment powers and pattern of investments of these schemes is optimal from the point of view of contributors and of the Government; and whether existing arrangements provide the most efficient mechanism for maximising the investment income of the schemes.

J. Future options for public sector superannuation, including new relationships between public sector and private sector superannuation schemes.

K. The adequacy of the existing legislative and regulatory framework for the operation of schemes and the appropriate legislative framework for any recommended changes in the structure and operation of schemes.

The Committee was required to report to Parliament by 31 December 1983 if Parliament was then sitting or if the Parliament was not then sitting within seven days after the next meeting of Parliament.

As this has not been possible, approval has been sought for an extension to 31 October 1984.

The Committee tabled its first reports, "A Review of Superannuation in the Victorian Public Sector" and "Summary of Victorian Public Sector Superannuation Schemes" on 18 April 1984 and its second report, "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation" on 13 September 1984.

COMMITTEE MEMBERS

Mr. B.J. Rowe, M.P. (Chairman)
Hon. D.K. Hayward, M.L.C. (Deputy Chairman)
Hon. G.P. Connard, M.L.C.
Hon. B.P. Dunn, M.L.C.
Mr. P.M. Gavin. M.P.
Hon. J.V.C. Guest, M.L.C.
Mr. J.D. Harrowfield. M.P.
Mr. A. McCutcheon, M.P.
Mr. P.J. McNamara, M.P.
Hon. J.H. Ramsay, M.P.
Hon. G.A. Sgro, M.L.C.
Mr. A.J. Sheehan, M.P.

Inquiry into Victorian Public Sector Superannuation Schemes

SUB-COMMITTEE MEMBERS

Mr. B.J. Rowe, M.P. (Chairman)
Hon. G.P. Connard, M.L.C.*
Mr. P.M. Gavin, M.P.
Hon. J.V.C. Guest, M.L.C.
Mr. J.D. Harrowfield, M.P.
Mr. A. McCutcheon, M.P.
Hon. J.H. Ramsay, M.P.
Hon. G.A. Sgro, M.L.C.

RESEARCH STAFF

Ms. H. Silver, Director of Research
Mr. Paul Belin
Mr. Ron McDonald
Mr. Gary Smith

ADMINISTRATION

Mr. Graeme George, Acting Secretary
Mr. Jacques Collard
Mrs. Muriel O'Gorman
Ms. Anne Ruck

* Alternative member from 9 August to 16 October 1984.

CONTENTS

TABLES

TABLES (cont'd)

APPENDICES

CHAIRMAN'S INTRODUCTION

This is the final report of the Economic and Budget Review Committee on Victorian public sector superannuation. The Committee has already released two reports on superannuation - "A Review of Superannuation in the Victorian Public Sector" and "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation".

This report provides a detailed study of the Victorian Parliamentary Contributory, Judges', Governor's Pension, and other special superannuation schemes. The report is divided into five major sections which consider:

(a) the different schemes' functions or roles;

(b) a detailed comparative study of these schemes' respective provisions;

(c) major recommendations for the review and reform of the Victorian Parliamentary Contributory Superannuation scheme, the Judges' Superannuation scheme and the Governor's Pension scheme;

(d) proposed changes for the removal of certain anomalies from the Victorian Parliamentary Contributory Superannuation scheme; and

(e) further recommendations for change to the Supreme Court and County Court Associates schemes and other special superannuation schemes.

Given the unique nature of parliamentarians', Judges' and the Governors' careers, the Committee has restricted the comparative analysis to similar schemes in other States and the Commonwealth. This study has illustrated a number of anomalies particularly within the Victorian Parliamentary Contributory Superannuation scheme.

The Committee believes that it is inappropriate for Parliament, and in particular a Parliamentary Committee, to recommend major changes to the

Parliamentary Contributory Superannuation scheme.

The Committee's major concern throughout the report relates to the lack of a formal non-parliamentary (independent) mechanism for reviewing parliamentarian's superannuation as part of total remuneration. Decisions to review and recommend changes to the Parliamentary Contributory and other special superannuation schemes have largely been ad hoc in nature. Furthermore, the Committee has been concerned that despite the obvious fact that superannuation is an important component of the total remuneration package of parliamentarians, changes to superannuation are treated separately from salaries and allowances. In keeping with the earlier reports on superannuation, the Committee believes that parties to the negotiation and collective agreements and awards should view superannuation provisions and benefits in the context of the employee's total remuneration package. Consequently, the Committee believes that such procedures should apply to the parliamentarians' remuneration package.

The Committee therefore has not sought to make recommendations for major changes to parliamentary superannuation in isolation. Although this report outlines principles for change, the Committee's major recommendation is that the responsibilities of the Commonwealth Remuneration Tribunal should be widened to include superannuation and that the tribunal should make determinations on an annual basis for all States and the Commonwealth on parliamentarians' total remuneration.

The Committee believes the tribunal would provide an objective forum to review superannuation in the context of the given level of salaries and allowances. Uniform methods for determining total remuneration of parliamentarians should prevent leapfrogging of benefits, achieve cost savings and encourage consistency between the various States and the Commonwealth.

The Committee as a secondary recommendation also proposes that, if agreement is not forthcoming for widening the role of the Commonwealth Remuneration Tribunal, there should be established in Victoria an independent remuneration tribunal.

The Committee has also made a number of minor recommendations for the Victorian Parliamentary Contributory Superannuation scheme to remove anamolies and to formalise some established practices by the Trustees.

For the other special superannuation schemes, the Committee has recommended, in the case of Judges' and Governor's Superannuation schemes, occasional reviews of total remuneration by the Parliament of Victoria, and, in the case of the County Court Associates' and the Supreme Court Associates' Superannuation schemes, that they should be closed and new employees be allowed to join the proposed Victorian State Employees Superannuation Scheme.

As Chairman of the Committee, I wish to express my thanks to sub-Committee members and the staff of the Committee for their work on this report.

B.J. ROWE, M.P.,
Chairman

COMMITTEE'S RECOMMENDATIONS

A full list of the Committee's recommendations follows. The recommendations are in the order they appear in the text and should be considered in light of the discussion in the relevant chapter. The list begins with the recommendations of Chapter 3 as there are no recommendations arising from Chapters 1 and 2.

Recommendations of Chapter 3
The Remuneration Review Process and the Victorian Parliamentary Contributory, Judges' and Governor's Superannuation Schemes

3.1 That the responsibilities of the Commonwealth Remuneration Tribunal be widened to include superannuation and that this tribunal should make determinations on parliamentarians' total remuneration on an annual basis. (p.45)

3.2 That, if agreements are not forthcoming to widen the role of the Commonwealth Remuneration Tribunal, there be established in Victoria an independent remuneration tribunal. (p.46)

3.3 That the total remuneration of the Governor be reviewed by the Parliament of Victoria at the beginning of the term of each incumbent. (p.49)

3.4 That the remuneration of Judges of the Supreme Court and County Court be reviewed by the Parliament of Victoria from time to time as recommended by the Attorney-General. (p.49)

Recommendations of Chapter 4
Recommendations for Change to the Victorian Parliamentary Contributory Superannuation Scheme

4.1 That the formula for calculating pensions be based on the basic Parliamentary salary current at the date of retirement and on adjustments to all increments received for higher duties according to the proportion which base salary at date of retirement bears to base salary during the tenure of higher office. (p.58)

4.2 That legislation be enacted to embody the scale of benefits recently adopted by the Trustees for dependent children. (p.59)

4.3 That calculations of notional credit for previous service in the State Superannuation scheme and other approved superannuation schemes be made uniformly and that the whole issue of the most appropriate portability arrangements be referred to the proposed remuneration tribunal. (p.61)

4.4 That the Parliamentary Salaries and Superannuation Act 1968 be amended so that a parliamentarian who has an aggregate period of at least eight years service and is not re-endorsed by his or her political party should be specifically considered as having met the minimum period of service to qualify for the pension benefit. (p.62)

4.5 That Paragraph 15(1)(c) of the Parliamentary Salaries and Superannuation Act 1968 be amended so that the number of Parliaments required is reduced from three to two and that the Paragraph should apply only to current parliamentarians. For new parliamentarians the appropriate form for Paragraph 15(1)(c) should be referred to the proposed remuneration tribunal. (p.62)

4.6 That there be six Trustees, of whom one must be the Treasurer as Chairperson, with others chosen to include representatives from each House of Parliament and from each Party. (p.64)

4.7 That the Trustees of the Parliamentary Contributory Superannuation scheme ensure that the scheme meets the standards of reporting as laid out in the Committee's Report entitled "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation". (p.65)

4.8 That the investment of funds of the Parliamentary Contributory Superannuation scheme be managed by the proposed Victorian Superannuation Investment Trust. (p.66)

4.9 That the Actuary should be required to assess the contribution rate required from the Consolidated Fund as the percentage of parliamentarians' salaries sufficient to fund benefit payments over the expected duration of parliamentarians' years of service. (p.66)

Recommendations of Chapter 5
Other Special Public Sector Superannuation Schemes

5.1 That the County Court Associates and the Supreme Court Associates Superannuation schemes be closed and that new associates should be allowed to join the proposed Victorian State Employees Superannuation Scheme. (p.69)

5.2 That no further special superannuation schemes be initiated without the express approval of the Treasurer. (p.71)

CHAPTER 1

THE ROLE OF SPECIAL SUPERANNUATION SCHEMES

SECTION 1.1 THE PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME

1.1.1 The Origin of the Scheme

The origins of the present superannuation legislation are to be found in the 1946 Parliamentary Contributory Retirement Fund Act. This Act established a Parliamentary Contributory Retirement Fund into which were paid contributions deducted fortnightly from members' salaries. The major criticism of this legislation was that the fund it established was not actuarially sound. Benefits bore no relation to contributions, the contribution from the Consolidated Revenue was significantly less than other public sector schemes and fund income was not invested.(1)

In consequence, legislative changes led to the Parliamentary Contributory Superannuation Act 1962 which established a Parliamentary Contributory Superannuation Fund. In turn this fund was succeeded by a fund of the same name established by the Parliamentary Salaries and Superannuation Act 1968. There have been a number of subsequent amendments to this Act, the most recent being those of the Parliamentary Superannuation Act 1982.

While it is not the intention of the Committee to review, in detail, the evolution of the present parliamentary scheme, it might be noted that the present scheme is very much the end product of a process of ad hoc review and legislative change. Even so, the Committee accepts the need for a separate parliamentary scheme in Victoria - a situation which is accepted by other Australian Parliaments.

1.1.2 The Need for a Parliamentary Superannuation Scheme

The existence of a special parliamentary superannuation scheme is not unusual. Indeed, such schemes exist for all other parliamentary jurisdictions in Australia as well as for the majority of developed countries which follow the Westminster parliamentary model. The arguments for such schemes are well established and widely accepted. Entry to a parliamentary career is a risky undertaking; even if a person enters via a 'safe' seat, performance, future electoral redistributions and even failure to retain pre-selection through intra-party disputes means tenure is uncertain.

The decision to embark upon a parliamentary career is not lightly undertaken. Apart from the political risks involved, other considerations include the loss of career continuity, job tenure and seniority, and the uncertainty of being able to re-enter the workforce at one's previous salary and job position. Difficulties involved in labour force re-entry are recognised in a number of countries. In Canada, for example, unsuccessful candidates continue to receive the basic parliamentary salary for five months after the election in recognition of the difficulties and delays many former parliamentarians have in resuming previous careers or re-establishing themselves in the workforce.

Conceptually, the parliamentary superannuation package is divided into a retrenchment component and a provision for retirement component. This division reflects the special requirements of a scheme for parliamentarians.

1.1.2.1 Parliamentary Remuneration and Superannuation

The Commonwealth Remuneration Tribunal has noted that parliamentarians' salaries are falling behind the general benchmark used in making its determinations, that being the general salary range between Level 1 and Level 2 officers of the Second Division of the Commonwealth Public Service.(2) At a base salary of $41,302 per annum, Victorian parliamentarians are paid $500 per annum less than their Commonwealth counterparts, and (in common with them) are expected to assume a heavy workload if they are to discharge adequately their parliamentary and electoral responsibilities. Unlike graduated or incremental salary scales common to many senior public and

private sector positions, parliamentarians are not rewarded for years of service by salary increments (and hence by increased superannuation contributions and benefits).

The Economic and Budget Review Committee's reports on superannuation have emphasised the wide acceptance of superannuation as an integral element of total remuneration. For senior private sector positions and for entry into, for example, the senior executive service of the Victorian public sector, superannuation (together with other allowances and benefits) is seen as an important and necessary part of any negotiated package. As job tenure is often expected to be of limited duration (a short-term contract) it is common practice for superannuation contributions and benefit provisions to be negotiated to reflect this.

As a corollary, in view of the unique nature of a parliamentary career, it is inappropriate to attempt to compare the superannuation provisions of a scheme such as the Victorian Parliamentary Contributory Superannuation scheme with standards established by public sector schemes.

Members of public sector schemes are typically in secure job positions and do not face the uncertainties attending a parliamentary career which result from elections and changes of government. Consequently, the criteria by which parliamentary schemes are to be judged are quite different to those commonly used to assess broad based public and private sector schemes.

Sir Henry Bolte, as Premier of Victoria, made clear the special needs of parliamentarians in introducing the second reading of the Parliamentary Salaries and Superannuation Bill 1968:

> "I have already made reference to the views of the committee of inquiry concerning the need for Parliamentary salaries and allowances to provide an adequate remuneration so that persons may enter Parliament without the need to rely on private means. It is of the utmost importance to arrange matters so as to preserve the integrity of members, and, in my view, it is essential that a superannuation scheme which has proper regard to the peculiarities and special features of Parliamentary service should be devised."(3)

1.1.2.2 Career Choices, Membership Characteristics and Job Tenure

The experience and characteristics of parliamentarians in any jurisdiction will reflect the varying political circumstances and historical developments in that jurisdiction (e.g., the dominance of one political party or the influence of minority parties), but it is important to consider some specific attributes to illustrate the basis for special superannuation provisions. These attributes include age at election, years of service and age at exit.

Table 1.1 shows the age distribution at the date of election of a sample of most current members of the Victorian Parliament and most members who retired since 1972. The most significant feature of this table is the dispersion of age at entry of current parliamentarians. Unlike the majority of superannuation schemes where members would be expected to enter at a relatively early age (as is the case for the Victorian public sector superannuation schemes) entry to the Victorian Parliamentary Contributory Superannuation scheme has occurred with roughly equal probability between the ages of thirty and fifty years. Indeed 57.7% of this sample of current and retired parliamentarians were over forty years of age at entry to the scheme, with only 9% entering at thirty years of age or less.

TABLE 1.1

VICTORIAN PARLIAMENTARY SUPERANNUATION SCHEME
AGE AT ELECTION

Years of Age	Current Parliamentarians		Retired Parliamentarians		Total	
	No.	%	No.	%	No.	%
25 or less	4	3.4	--	--	4	2.0
26-30	8	6.8	6	7.1	14	7.0
31-35	21	17.9	12	14.3	33	16.4
36-40	20	17.1	14	16.7	34	16.9
41-45	28	23.9	17	20.2	45	22.4
46-50	23	19.7	16	19.0	39	19.4
51-55	11	9.4	14	16.7	25	12.4
56-60	2	1.7	5	6.0	7	3.5
Over 60	--	--	--	--	--	--
	117	100.0	84	100.0	201	100.0

Election for the majority of Victorian parliamentarians therefore means a significant break in (or on the threshold of) a peak earning period. For those who must either cash in or preserve any existing superannuation cover, entry into a new scheme can be costly as they are unable to capitalise upon the period of scheme coverage in which returns accrue at the highest rate.

Moving on from age at entry, it is important to examine years of service, for both defeated parliamentarians and those retiring voluntarily. These distributions are given in Table 1.2. Average service for defeated parliamentarians is eleven years - significantly less than the nineteen years reported for other retired parliamentarians. Care should be taken however in emphasising unduly the estimates of average years of scheme membership.

TABLE 1.2

VICTORIAN PARLIAMENTARY SUPERANNUATION SCHEME
YEARS OF SERVICE - RETIRED PARLIAMENTARIANS

Years of Service	Defeated Parliamentarians		Other Retired Parliamentarians		Total	
	No.	%	No.	%	No.	%
0-3	1	2.3	--	--	1	1.2
4-6	9	20.9	1	2.4	10	11.9
7-9	7	16.3	1	2.4	8	9.5
10-12	11	25.6	3	7.3	14	16.7
13-15	4	9.3	3	7.3	7	8.3
16-18	7	16.3	10	24.4	17	20.2
19-21	1	2.3	10	24.4	11	13.1
Over 21	3	7.0	13	31.7	16	19.0
	43	100.0	41	100.0	84	100.0
Average:	11 years		19 years		15 years	

The most notable feature of this table is the wide variation in years of service for both defeated and retired parliamentarians. Indeed, in the case of defeated parliamentarians- the group which is most 'at risk' (and which

constitute more than 50% of the total retired parliamentarians' group) - a simple average of years of service is quite misleading. The distribution of years of service for this group is much more dispersed than for those retiring voluntarily, with almost one quarter reporting less than six years service and a further 41.9% serving 7 to 12 years. For both defeated and 'other retired' parliamentarians those in the more exposed (or marginal) seats will have a lower expectation of tenure than those in safer seats.

A final characteristic to consider is age at exit from the Parliamentary scheme. In the case of defeated parliamentarians (Table 1.3), 37.2% were fifty years or younger on leaving the scheme. The corresponding figure for retiring parliamentarians is 7.2%. It should also be noted that, unlike other public sector superannuation schemes the majority leave involuntarily (51.2%).

TABLE 1.3

VICTORIAN PARLIAMENTARY SUPERANNUATION SCHEME
AGE AT EXIT

Years of Age	Defeated Parliamentarians		Other Retired Parliamentarians		Total	
	No.	%	No.	%	No.	%
25 or less	--	--	--	--	--	--
26-30	--	--	--	--	--	--
31-35	1	2.3	--	--	1	1.2
36-40	--	--	1	2.4	1	1.2
41-45	6	14.0	1	2.4	7	8.3
46-50	9	20.9	1	2.4	10	11.9
51-55	7	16.3	5	12.2	12	14.3
56-60	7	16.3	6	14.6	13	15.5
Over 60	13	30.2	27	65.9	40	47.6
	43	100.0	41	100.0	84	100.0

The above tables are based on a specific period in the history of the Victorian Parliament - a period which was characterised by the uninterrupted

administration of one party - and is, therefore, one of relative stability. If, however, this period of stability were to be replaced by one of high volatility this would mean anticipated years of parliamentary tenure would be less, there would be greater uncertainty of maintaining one's seat (with an increased number of marginal seats) and average age of scheme exit would be less. In short, both current and prospective members of the Parliamentary Contributory Superannuation scheme would experience greater uncertainty of tenure, and the scheme itself would experience greater volatility or turnover in membership. Furthermore, there would be substantial changes in the total remuneration (including superannuation) accruing to individual members who remained in Parliament but who might change from being a Minister in one Parliament to a shadow spokesperson or backbencher in the next.

SECTION 1.2 SUPREME AND COUNTY COURT JUDGES' SUPERANNUATION SCHEMES

1.2.1 The Origins of the Schemes

The superannuation schemes for Victorian Supreme Court and County Court Judges are essentially identical and unlike those for the parliamentarians, are non-contributory and are financed on a pay-as-you-go basis.

The provision of a non-contributory pension as part of the total remuneration package for Judges has a long history. In Victoria, provision was made for Judges' pensions in the first Constitution Act 1854 establishing representative government. That Act allocated 4000 pounds per annum for the payment of pensions to retired Judges of the Supreme Court in accordance with regulations framed by the Governor in Council. An Order in Council of 12 February 1857 provided a pension for any Judge of the Supreme Court who had served for fifteen years or retired on account of ill-health. The amount was one half of his salary at the time of his retirement (free and clear of all taxes and deductions whatsoever). Judges received non-contributory superannuation prior to the establishment of the first public sector contributory superannuation scheme.

Following the recommendations of the 1980 Grimwade Board of Review, the Judges' Salaries and Pensions Act 1980 updated the legislation outlining the retirement provisions for Supreme Court and County Court Judges. The benefits were upgraded considerably by increasing the retirement benefits from a pension of 50% to 60% of salary, improving the spouse benefit and adding a benefit for the (eligible) children of a deceased Judge. The scheme remained non-contributory - as do schemes of the Commonwealth and other States except Tasmania.

1.2.2 Membership Characteristics, Career Choices and Forgone Earnings

Appointment as a Supreme Court or County Court Judge does not involve the uncertainty of job tenure characterising election to the Victorian Parliament.

The position of Judge is one of fundamental importance in the administration of the State as a Judge is charged with making all the decisions on disputed matters under existing legislation. As such, the position of Judge has the highest status in the legal profession. A Judge is required to decide between alternative arguments put up by barristers and it is from barristers that Judges are chosen.

As a consequence, the role that a Judge is expected to play in the community, both in activities and in expressed attitudes, implies a certain loss of personal freedom. There is also a considerable loss of financial earning power, from accepting the role after having been a barrister. While leading Queen's Counsel are understood to earn in the order of $200,000 p.a. or more, a Judge's salary is of the order of $70,000-$80,000 which, while generous by community standards, means that the individual who chooses to accept the invitiation to become a Judge incurs a considerable financial sacrifice for the status acquired.

The Victorian Solicitor-General, Mr. H.C. Berkeley, reinforced this opinion in giving evidence to the Committee:

> "I think judges have always been regarded in a special position so far as this type of benefit is concerned. One takes them from a very high earning group at a time of life when they are at their peak ... Most people who take on the job feel obligations of service to the community, but also they are entitled to be realistic so far as their families are concerned and in the past it has been thought appropriate in the special circumstances and in view of their special position in the community they should be offered non-contributory pensions."(4)

Judges are generally appointed in their mid-forties (see Table 1.4) and are not required to retire until seventy-two, although the schemes allow for full benefits after reaching the age of sixty with at least ten years of service. However, as Table 1.5 illustrates, a significant proportion of current Judges have already served more than ten years, and only occasionally is a Judge known to cease service before reaching the age of seventy-two.

TABLE 1.4

SUPREME AND COUNTY COURT JUDGES' SUPERANNUATION SCHEMES
AGE AT APPOINTMENT - CURRENT JUDGES

Age (yrs)	Supreme Court No.	County Court No.	Total No.	Total %
31-35	--	1	1	1.7
36-40	--	3	3	5.1
41-45	2	6	8	13.6
46-50	12	16	28	47.5
51-55	2	8	10	16.9
56-60	3	2	5	8.5
Not Known	2	2	4	6.8
	21	38	59	100.0
Average	50 years	47 years		
Range	42-60 years	32-60 years		

TABLE 1.5

SUPREME AND COUNTY COURT JUDGES' SUPERANNUATION SCHEMES
YEARS OF SERVICE TO DATE - CURRENT JUDGES

Years	Supreme Court No.	County Court No.	Total No.	Total %
1- 5	5	11	16	27.1
6-10	8	8	16	27.1
11-15	5	6	11	18.6
16-20	3	7	10	16.9
21-25	-	4	4	6.8
26-30	-	2	2	3.4
	21	38	59	100.0

Since the average age at appointment of the current Judges is forty-seven to fifty, this would imply some twenty years of service before retirement, coupled with a consequently shorter expectation of pension receipt, especially compared to a public servant who may, and generally does, retire at sixty or even take early retirement at fifty-five.

As at June 1983 in Victoria, there were fifty-seven Judges and thirty-nine former Judges receiving pensions. The total cost of the scheme for that year was $1.228 million, illustrating that the total cost of the scheme is relatively small.

1.2.3 The County Court Associates and the Supreme Court Associates Superannuation Schemes

These schemes are identical, the Supreme Court Associates' scheme having been established in 1957 and the County Court Associates' scheme in 1979. The schemes are voluntary, lump sum, funded schemes, and are administered by the Public Trustee. The lump sum benefit is payable after ten years service and being aged sixty, or on reaching the age of seventy-two. Funds are managed and invested by the Public Trustee through the Public Trustee's Common Fund A but individual benefit records are maintained.

A Judge's associate is to all intents and purposes a Judge's valet/secretary. People who become associates to Judges are usually either retired people aged in their fifties who may or may not have legal training, or young, newly qualified lawyers who see a year or so being associated with a Judge as being beneficial to their experience and career. In neither case is this job seen as a 'career'. Indeed, it is a one-to-one relationship which may carry on till the associate's Judge retires, in which case the associate may look to become attached to another Judge. However, this is not easy, as each Judge has only one associate, so the Judge's retirement may also be the end of the job for the associate. Recently, the number of Judges and associates has been increasing, but the number of associates in the schemes has declined. At June 1983, there were fifty-seven associates but only thirty-two were in the schemes, whereas in June 1980, there were fifty-three associates and forty-three were in the schemes. Total funds administered by the Public Trustee under the two

schemes in June 1983 was $0.227 million. These figures indicate that the schemes are very small and declining in popularity.

1.2.4 Governor's Pension

The Victorian Constitution Act 1854 established the role and position of Governor - the Queen's appointed representative in Victoria. The Act also describes the salary and employment conditions of the Governor. The most recent amendments to the Constitution Act in relation to the Governor's remuneration were made by the Judges' Salaries and Pensions Act 1980 which altered the annual pensions payable to former governors or their widows. The provisions are modelled on those of the Judges' schemes. The cost of the scheme in the year ended June 1983 was $64,000 and there were three pensioners.

NOTES

(1) Victoria, Legislative Assembly, Parliamentary Debates, 5 December 1962, p.2265.

(2) Remuneration Tribunal, 1982 Review, p.18-24 and 1984 Review. p.14-18, Commonwealth Government Publishing Service.

(3) Victoria, Legislative Assembly, Parliamentary Debates, 5 December 1968, p.1815

(4) Mr. H.C. Berkeley, Solicitor-General of Victoria, Transcript of Evidence, 29 July 1983, p.2,

CHAPTER 2

EXPERIENCE WITH PARLIAMENTARY AND OTHER SPECIAL SUPERANNUATION SCHEMES

SECTION 2.1 COMMONWEALTH AND STATE PARLIAMENTARY SUPERANNUATION SCHEMES - A COMPARATIVE ANALYSIS

Historically, Victoria has served as the model for parliamentary superannuation schemes in Australia, but this is less true now as the various schemes have been successively modified to reflect local views and needs. Even so, Victoria is not in an overall sense significantly out of line in its benefit provisions from those offered by the other States and the Commonwealth.

Table 2.1 summarises the major features of the various Commonwealth and State parliamentary superannuation scheme legislation.

2.1.1 Eligibility and Contributions

Elected members of Commonwealth and State parliaments are all required to join their respective schemes. The only exception is the Queensland scheme. Where significant changes to superannuation schemes occur as a result of legislation as in Victoria, 1962 and 1968 or Queensland, 1984, parliamentarians may opt to remain in the previous scheme.

Victoria's parliamentarians, as a member, Minister or office holder, contribute to the Victorian Parliamentary Contributory Superannuation scheme at a rate of 11.5% of gross salary. This contribution rate is standard for virtually all other parliamentary schemes in Australia, the exceptions being contribution rates of 12.0% in Tasmania and 12.5% in New South Wales.

TABLE 2.1

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES
COMPARATIVE SUMMARY OF PARLIAMENTARY SUPERANNUATION SCHEME LEGISLATION:
CONTRIBUTIONS, BENEFITS, MANAGEMENT, FINANCING & INVESTMENT

Scheme	Victoria	Commonwealth	N.S.W.	Queensland	S.A.	W.A.	Tasmania	N.T.
1. Contributions								
- employee (% of salary)	11.5%	11.5%	12.5%	11.5%	11.5%	11.5%	12.0%	11.5%
- employer (% of salary)	Actuary determines	-	Actuary determines	21.4% (i.e. $\frac{65}{35}$ ths of contributions) plus actuary's determination	11.5% plus actuary's determination	23.0% plus actuary's determination	Actuary determines	Actuary determines
2. Benefits								
(a) Full Benefits								
- unqualified service eligibility	15 years	12 years	7 years	11 years	15 years	15 years	15 years	15 years
- unqualified condition eligibility	8 years and non-election OR 6 years and 3 Parlmnts and over 60 years	8 years and 3 Parlmnts and non-election OR 8 years and over 60 OR 4 Parlmnts	-	8 years and non-election	13 years and 5 Parlmnts OR 6 years and non-election OR 6 years and aged 60 years	7 years and non-election OR 7 years and aged 55 years	8 years and non-election OR 8 years and aged 65 years	10 years/ 3 full terms and non-election
- Pension Benefits								
. minimum years & salary %	8 yrs - 50%	8 yrs - 50%	7 yrs - 48.8%	8 yrs - 41.2%	6 yrs - 41.2%	7 yrs - 38.8%	8 yrs - 41.2%	10 yrs - 46%
. maximum years & salary %	20½yrs - 75%	18 yrs - 75%	20 yrs - 80%	20 yrs - 70%	22 yrs 1 mth. - 75%	20 yrs - 70%	20 yrs - 70%	20 yrs - 70%
- indexation basis	MP's salaries	MP's salaries	MP's salaries	Brisbane CPI (annually)	Adelaide CPI (annually)	Perth CPI (annually)	MP's salaries	MP's salaries
- % commutable to lump sum	100%	50%	75% at 45 yrs reducing to 50% at 70 yrs	100%	75% at 45 yrs reducing to 30% at 60 yrs	100% at 45 yrs reducing to 50% at 65 yrs (40% if 20 yrs service)	Nil	100%
(b) Benefits if Service Less Than Minimum								
- Involuntary Resignation	Contributions + 233%	Contributions + 233%	Contributions + 233%	Contributions + 3½% (5% compound for new members from 10/83)	Contributions + 3% for each year of service, less one	Contributions + 100% plus interest	Contributions only	Contributions plus interest
- Voluntary Resignation	Contributions + 117%	Contributions + 117%	Contributions + 117%					

TABLE 2.1 (CONTINUED)

Scheme	Victoria	Commonwealth	N.S.W.	Queensland	S.A.	W.A.	Tasmania	N.T.
(c) Death Benefits								
. spouse (above min. service)	67% pension OR 40% current salary	82.5% pension	75% pension OR 45% current salary	62.5/67% pension OR 40% current salary	75% pension OR 40% current salary	67% pension	62.5% pension OR 40% current salary	62.5% pension OR 40% current salary
. spouse (below min. service)	40% current salary	82.5% pension	45% current salary	40% current salary	75% pension OR 40% current salary	67% pension	40% current salary	40% current salary
. does commutation to lump sum affect calculation of spouse benefit?	No	Yes	No	Yes	Yes	No	N.A.	No
. children (spouse alive)	Nil	Nil	5% current salary	Nil	See Appendix 1	3% current salary	5% member's pension	Nil
. children (no spouse alive)	As Trustees think fit	25% spouse's pension	10% current salary	As Trustees think fit	45% member's pension for first child, less for subsequent children	6% current salary	20% member's pension	25% spouse's pension
3. Management								
Administration								
. No. of Trustees	6	5	8	3	3	5	3	4
. Who are Trustees?	Treasurer President Speaker 1 Council 2 Assembly	Min. for Finance 2 Senate 2 House of Rep.	2 Council 5 Assembly Secretary & Comptroller of Accounts, Treasury	Premier Speaker Leader of Op.	President Speaker Under-Treasurer	Treasurer 2 Council 2 Assembly	President Speaker Under-Treasurer	Speaker 2 Assembly Head, Treasury Dept.
. Basis of selecting Trustees who are not office-holders	Appointed by Governor-in-Council	Elected by respective Houses	Elected by respective Houses	N.A.	N.A.	Elected by respective Houses	N.A.	Speaker appoints one each on recomm. of Chief Minister & Leader of Opp.
Actuary Responsible	Appointed by Trustees	No provision	Appointed by Trustees	Appointed by Trustees	Public Actuary	Government Actuary	Appointed by Trustees	Appointed by Trustees
Actuarial Investigation	3 years	No provision	3 years	3 years	3 years	3 years	3 years	3 years

TABLE 2.1 (CONTINUED)

Scheme	Victoria	Commonwealth	N.S.W.	Queensland	S.A.	W.A.	Tasmania	N.T.
4. Financing and Investment								
Scheme Type	Funded	Unfunded	Funded	Funded	Funded	Funded	Funded	Funded
Restrictions on Investment	None on Trustees but investment to be done & managed by State Super. Board	N.A.	C/wealth securities, local authority loans, N.S.W. mortgages, trustee invstmnts	At least 30% invested in C/wealth or State securities	None	Trustees investments	Trustee investments	None

Source: Table A1, Appendix A.

In all cases (except the unfunded Commonwealth Parliamentary Contributory Superannuation scheme), the employer's i.e., government's, contribution is determined by an actuary. Three States (Queensland, South Australia and Western Australia) stipulate an amount to be contributed by the government even before the actuary makes a recommendation.

The Commonwealth Parliamentary Contributory Superannuation scheme provides for a reduction in parliamentarians' contributions to 5.75% of salary after eighteen years' parliamentary service, and the Western Australian scheme to 5% after twenty years.

2.1.2 Benefits Structure

2.1.2.1 Benefits on Ceasing to be a Parliamentarian

In five States (including Victoria) a pension is available without qualification after fifteen years' service. The eligibility provisions of the New South Wales scheme are the most generous with unqualified benefits available after seven years, with corresponding figures of eleven years in Queensland and twelve years in the Commonwealth scheme.

While pensions are also available upon non-re-election after at least six years and up to ten years service, the actual conditions for benefit eligibility vary widely in terms of the number of parliaments served in and age of contributor. The Victorian Parliamentary Contribution Superannuation scheme is less generous than most other schemes. It requires parliamentarians to have served eight years before non-re-election or to have served six years in three parliaments and be over sixty years of age before a pension is payable.

In all Australian parliamentary schemes, pensions are expressed as a percentage of current parliamentary salaries, but again there is some variation in the percentage of salary and the number of years of service necessary to achieve it.

Victoria is in line with other schemes in providing a minimum pension of 50% of salary after eight years' membership. The maximum Victorian pension is

75% of salary after twenty years' membership. These provisions are similar to those provided by the Commonwealth scheme.

A comparison of pensions in terms of the percentage of salary payable by each of the parliamentary schemes at each year of service is given in Table 2.2. From this table it can be seen that the benefits payable in Victoria are, with minor exceptions, slightly inferior to those of the Commonwealth and New South Wales schemes where benefits are equal. The benefits payable in the other State schemes are inferior to those for Victoria.

TABLE 2.2

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

PENSION AS A PERCENTAGE OF BASIC SALARY

Years Service	Vic %	C/wlth %	NSW %	Qld %	SA %	WA %	Tas %	NT %
6	--	--	--	--	41.2	--	--	--
7	--	--	48.8	--	43.6	38.8	--	--
8	50.0	50.0	51.2	41.2	46.0	41.2	41.2	--
9	52.0	52.5	53.6	43.6	48.4	43.6	45.4	--
10	54.0	55.0	56.0	46.0	50.8	46.0	49.6	46.0
11	56.0	57.5	58.4	48.4	53.2	48.4	53.8	48.4
12	58.0	60.0	60.8	50.8	55.6	50.8	58.0	50.8
13	60.0	62.5	63.2	53.2	58.0	53.2	59.5	53.2
14	62.0	65.0	65.6	55.6	60.4	55.6	61.0	55.6
15	64.0	67.5	68.0	58.0	62.8	58.0	62.5	58.0
16	66.0	70.0	70.4	60.4	65.2	60.4	64.0	60.4
17	68.0	72.5	72.8	62.8	67.6	62.8	65.5	62.8
18	70.0	75.0	75.2	65.2	70.0	65.2	67.0	65.2
19	72.0	75.0	77.6	67.6	72.4	67.6	68.5	67.6
20	74.0	75.0	80.0	70.0	75.0	70.0	70.0	70.0
21	75.0*	75.0	80.0	70.0	75.0	70.0	70.0	70.0
22	75.0	75.0	80.0	70.0	75.0**	70.0	70.0	70.0

* Strictly the maximum of 75% is achieved at 20 years 6 months of service.

** Strictly the maximum of 75% is achieved at 22 years 1 month of service.

2.1.2.2 Pensions for Office Holders

Members of the various parliamentary schemes who have received a salary above the basic parliamentary salary receive a higher pension. In all States except South Australia, the pension for such persons is calculated by multiplying the pension based on years of service and basic parliamentary salary, by the ratio of total salary received during the period of total service, including additional salary as a minister or officer holder, over total salary he/she would have received as a parliamentarian without office in the same period.

The South Australian scheme differs mainly in the use of a ratio which is calculated by dividing the aggregate basic and additional salary earned during the six years of highest offices held by an amount of six times the salary applicable to the member on the date of her/his retirement. Other factors come into play in the calculations, but one of the most important features is that the calculation of basic and additional salary is at the rates applicable at the time of retirement.

This feature overcomes a problem inherent in the other parliamentary schemes, including the Victorian Parliamentary Contributory Superannuation scheme, whereby the effects of salary inflation (noted in the previous section) would mean that parliamentarians who leave office at the same time, and have the same length of service, may qualify for different pensions simply because they hold higher positions (for the same duration) at different times of their political career.

An example of this situation is presented in Table 2.3 which shows the various possible pension payouts for a Premier depending on years of service and when this service took place. The three cases all assume a parliamentary term of service of fifteen years and are as follows:

(a) CASE A compares the pension payable to a parliamentarian who was Premier for three years in years 4, 5 and 6 against that payable if the period as Premier was in years 10,11 and 12 of service;

(b) CASE B compares the pension payable to a parliamentarian who was Premier for three years in years 1, 2 and 3 against that payable if the period as Premier was in years 13, 14 and 15 of service; and

(c) CASE C compares the pension payable to a parliamentarian who was Premier for six years in years 1 to 6 against that payable if the period as Premier was in years 10 to 15 of service.

Table 2.3 also indicates in the last column the pension payable if current rates of remuneration (or inflation effects) are used in this calculation. The impact of this change would be to provide equity between parliamentarians whenever they served in an office, though it can be seen that parliamentarians who are office holders late in their career would receive lower pensions than they would under the current provisions. Conversely parliamentarians who are office holders early in their career would receive larger pensions.

TABLE 2.3

PENSION PAYABLE FOR A **PARLIAMENTARIAN WITH 15 YEARS OF SERVICE** INCLUDING VARIOUS YEARS AND TIMES AS PREMIER OF VICTORIA[1]

Type of Service	Backbencher Salary Plus Additional Salary for 15 Years Service $	Annual Pension Payable $	% of Basic Pension of Backbencher	Pension if Inflation is Accounted for in the Formula $
Backbencher for 15 years	334,669	25,600	100	25,600
CASE A:				
(i) Backbencher for 3 years, Premier for 3 years then backbencher for 9 years; and	381,075	29,150	114	30,720
(ii) Backbencher for 9 years, Premier for 3 years then backbencher for 3 years.	416,880	31,889	125	30,720
CASE B:				
(i) Premier for 3 years then backbencher for 12 years; and	369,534	28,267	110	30,720
(ii) Backbencher for 12 years then Premier for 3 years.	444,091	33,970	133	30,720
CASE C:				
(i) Premier for 6 years then backbencher for 9 years; and	415,940	31,817	124	35,840
(ii) Backbencher for 9 years then Premier for 6 years.	526,302	40,259	157	35,840

1. Assumes a current basic salary of $40,000 p.a. and salary inflation throughout of 10% p.a.

2.1.2.3 Benefits for Shorter Service

Benefits for shorter service are in effect the 'retrenchment' component of the Parliamentary schemes, and therefore they are an important element of the total remuneration of parliamentarians. If a parliamentarian's service is less than that required to qualify for a pension, the Victorian, New South Wales and the Commonwealth schemes specify identical lump sum benefits for the separate categories of voluntary and involuntary resignation. In the former category, the lump sum benefit is a return of contributions plus 117%; in the latter, contributions plus 233%. Of the other States, only Western Australia approaches this level of benefit, with contributions plus 100% plus interest. Benefits in the other States are much poorer, offering just contributions or contributions plus interest or contributions with a percentage for each year of office.

2.1.2.4 Indexation

Indexation of parliamentary pensions occurs in two ways. In most cases, including Victoria, pensions are indexed by parliamentary salaries. In Victoria basic parliamentary salaries are directly tied to Commonwealth Parliamentarian's salaries (i.e., Commonwealth less $500) which are determined by the Commonwealth Remuneration Tribunal. There is therefore a mechanism for regular adjustments. However, such a mechanism may be disrupted if the Commonwealth Government fails to introduce the recommendations of the Tribunal, or delays doing so. The other approach to indexation, adopted by Western Australia, South Australia and Queensland, is to adjust annually the pension for changes in the CPI in the particular State.

2.1.2.5 Returning Parliamentarians

If a former member of the Victorian Parliament is re-elected and had previously qualified for a pension, that pension ceases, but former service in Parliament is recognised for the purpose of determining future benefits. Thus if a person becomes a parliamentarian and after a period of service retires with a pension, that pension is payable up until they are re-elected. The

pension stops during the subsequent period of service, but it resumes upon leaving office for the second time at a rate which reflects total service.

However, if in the first instance the member had commuted part of his/her pension to a lump sum entitlement, upon his/her retirement next time round the annual pension is reduced according to Section 20 of the Parliamentary Salaries and Superannuation Act 1968. The reduction is equal to 10% of the amount by which the total amount of pension and lump sum commutation benefit paid in respect of the previous period of service exceeded the total amount of pension that would have been received had he/she not commuted. The Commonwealth Parliamentary Contributory Superannuation scheme includes the same provisions.

To illustrate the effect of this provision an example is presented in Table 2.4. In the example the parliamentarian serves eight years before losing office. This qualifies him/her for a pension of 50% of the basic salary which equals $20,000 p.a. (basic salary is $40,000 p.a.). However, the decision is made to commute half of the pension giving a lump sum payment at the start of year nine of $100,000 and a pension of $10,000 p.a. After six years, the person decides to re-enter political life and is successful at the polls for a further seven years before again losing office. Total parliamentary service is now used as the basis of benefit calculation. Fifteen years service would ordinarily qualify a person for a pension of 64% of basic salary which is $25,600, however in this case the Section 20 provision is exercised because of the break in service when part of the benefit was commuted.

In the previous period of 'retirement', the person received a total payout of $160,000 (i.e., lump sum of $100,000 plus a pension of $10,000 p.a. for six years). This benefit is $40,000 more than if that person had decided not to commute the pension in which case the total payout for the period would have been $120,000 (i.e. six years at $20,000 p.a.). Upon this person's subsequent retirement, the Act specifies that the pension shall be decreased by 10% of the extra amount received in the previous period(s) of 'retirement', i.e. 10% of $40,000 or $4,000 p.a. This would leave the person with a pension of $21,600 upon their retirement at the end of year twenty two. If capitalised by the commutation factor of 10 which is applicable for retiring members less than 66 years old, the pension reduction of $4,000 is equivalent to a lump sum of

$40,000. Thus if the person commuted the pension in full they would lose the same amount as the windfall gain that they had received in the first period of 'retirement'.

The provision is designed to prevent returning parliamentarians from benefiting excessively from the scheme by deducting from the ultimate benefits any extra payments members were paid as a result of their prior decision to commute part of the pension. However, the formula appears to cope poorly with both the time value of money (i.e. interest) and salary inflation.

TABLE 2.4

AN EXAMPLE OF THE ADJUSTMENT TO PENSION FOR RETURNING PARLIAMENTARIANS

Year	Salary ($)	Pension ($)		Lump Sum ($)
1	40,000			
2	"			
3	"			
4	"			
5	"			
6	"			
7	"			
8	40,000			
9		10,000		100,000
10		10,000		
11		10,000		
12		10,000		
13		10,000		
14		10,000		
15	40,000			
16	"			
17	"			
18	"			
19	"			
20	"			
21	40,000			
22		21,600	(25,600)	

Assumptions:

1) No inflation
2) First period of service 8 years, then 6 years out of office and then a further 7 years in service.
3) Basic Salary $40,000

2.1.2.6 Commutation

Pension benefits are commutable to a lump sum, in whole or in part, in all States except Tasmania. Four States, Victoria, Queensland, Western Australia and the Northern Territory, allow 100% commutation. Table 2.5 shows the range of existing commutation percentages by age of parliamentarians. It may be noted that the Commonwealth reduced the maximum commutation percentage from 100% to 50% in 1983.

TABLE 2.5

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES
MAXIMUM COMMUTABLE PERCENTAGE OF PENSION

Age	Scheme							
	Vic	C/wlth	NSW	Qld	SA	WA	Tas	NT
45	100.0	50.0	75.0	100.0	75.0	100.0	---	100.0
50	100.0	50.0	70.0	100.0	60.0	87.5	---	100.0
55	100.0	50.0	65.0	100.0	45.0	75.0	---	100.0
60	100.0	50.0	60.0	100.0	30.0*	62.5	---	100.0
65	100.0	50.0	55.0	100.0	30.0*	50.0	---	100.0

* 40% applicable if member has served for 20 years.

Commutation factors applying to pension entitlements at various ages are shown in Table 2.6. A commutation factor of 10 is common for all States allowing commutation to age sixty-six years, but some States and the Commonwealth reduce this factor fractionally for parliamentarian's retiring over this age. In Victoria the commutation factor of 10 to age sixty-six years is reduced by subtracting the ratio of X/24, where X is the number of months over age sixty-five years, for parliamentarians retiring over this age. However these provisions are subject to extensions allowed under Section 16(2A) of the Parliamentary Salaries and Superannuation Act 1968.

TABLE 2.6

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

PENSION COMMUTATION FACTORS

Scheme	Factor*
Victoria	To age sixty-six, 10 times. Over age sixty-six, 10 - X/24 where X is the number of months over age sixty-five.
Commonwealth	As for Victoria.
New South Wales	10 times.
Queensland	To age sixty-six, 10 times. Over age sixty-six, 10 - $\frac{1}{2}$ (Y - 65) where Y is age at retirement in years.**
South Australia	10 times.
Western Australia	As for Queensland.
Tasmania	No provision.
Northern Territory	As for Queensland.

* Lump sum benefit expressed as a number of times the annual pension benefit.

** Does not differ significantly from the Victorian provision in its effect.

In Victoria, of those retired parliamentarians eligible for a pension, 55.7% fully commuted to a lump sum benefit, 32.9% partly commuted to a lump sum and 11.4% took the full pension. The percentage fully commuting appears to be increasing and the percentages are not significantly affected by the reason for retirement. In the Parliamentary Salaries and Superannuation Act 1968, sub-section 16(2), paragraphs (a) and (b) specify the commutation arrangements.

2.1.2.7 Benefits on Death of a Parliamentarian or Former Parliamentarian

On the death of a parliamentarian or former parliamentarian, all schemes have some provisions for spouse and/or children. The Commonwealth Parliamentary Contributary Superannuation scheme's spouse benefit, on death of a parliamentarian in service, is well in excess of that offered by the States, in that a pension of 5/6ths of the parliamentarian's pension is granted irrespective of whether or not the minimum service requirement has been met. The Victorian Parliamentary Contributory Superannuation scheme fits into the middle of the range of benefits provided for spouses by the State schemes. It provides a spouse pension of 2/3rds of the pension that would have been payable to the parliamentarian or former parliamentarian but for his/her death, or 40% of the current parliamentary basic salary, whichever is the greater.

There are also differences in the payment of spouse benefits upon death of a former parliamentarian. Some schemes (Commonwealth, Queensland and South Australia) reduce the spouse benefit by the proportion which has been commuted to a lump sum. All others, including the Victorian Parliamentary Contributory Superannuation scheme, make no such adjustment to spouse benefit, though it is noted that a Bill to amend this situation is currently on the Legislative Assembly notice paper in the Victorian Parliament.

It is difficult to actuarially determine the costs of such spouse benefit provisions and the savings that might result from such amendments. This is because of the differing ages of parliamentarians and the uncertainty of their various marital situations and the numbers involved.

With regard to benefits for children, when there is no surviving spouse most schemes specify a benefit either as a percentage of the parliamentarian's salary or of the spouse's pension. The Victorian and Queensland schemes however, leave the decision to the Trustees, but the total amount of allowances paid to the child or children may not exceed the pension that would have been payable to the spouse.

Where the spouse is alive, four schemes have a separate benefit for children and four do not. No allowances are payable to a child if there is a surviving

spouse under the Victorian Parliamentary Contributory Superannuation scheme.

In the period since the latest Victorian scheme was introduced in 1968 there has been only one case where the Trustees of the scheme have had to excercise their discretion on the matter of the children's allowance. As a result the Trustees decided on a general benefit scale for different numbers of dependent children. They decided that, as a percentage of the spouse's pension, the benefit should be as follows:

(a)	for one child	45%;
(b)	for two children	45% each;
(c)	for three children	30% each; and
(d)	for four or more children	the spouse benefit divided by the number of children.

In the case under consideration, three dependent children were involved. These benefits are structured in a similar way to those offered by the South Australian scheme. Nevertheless, the Committee feels that the benefits should be defined in the Act.

2.1.2.8 Comparison of Contributions and Benefits

Table 2.7 indicates the returns available to members of the Victorian Parliamentary Contributory Superannuation scheme after various lengths of service up to the present based on the assumptions given. Although the assumed base salary is marginally less than that presently received by parliamentarians, the salary multiples computed are still relevant. Thus, for a retiring parliamentarian with five years service the lump sum benefit of $64,000 is equivalent to 2.37 times the contributions plus notional interest of $27,000 or 1.6 times the assumed current basic salary of $40,000. After 20 years service a pension of 75% of basic salary is payable ($30,000 per annum) or a lump sum of $300,000, equivalent to 2.7 times contributions plus notional interest or 7.5 times annual salary.

It should be emphasised, however, that the majority of scheme members (on present experience) spend considerably less than twenty years as a parliamentarian. Indeed, as Table 2.1 shows, of all retired parliamentarians, 67.8% spent eighteen years or less in service and 65.1% of defeated parliamentarians were less than twelve years in service.

TABLE 2.7

VICTORIAN PARLIAMENTARY SUPERANNUATION SCHEME

COMPARISON OF CONTRIBUTIONS AND BENEFITS

Years of Service	Contributions (1)	Contributions Plus Notional Interest (2)	Pension Benefit (p.a.)	Lump Sum Benefit	Lump Sum Benefits As a multiple of	
					Contributions Plus Interest	Final Salary
	$	$	$	$		
5	19,000	27,000	--	64,000	2.37	1.6
10	31,000	56,000	21,600	216,000	3.86	5.4
15	38,000	83,000	25,600	256,000	3.08	6.4
20	43,000	111,000	30,000	300,000	2.70	7.5

1. Assuming a current basic salary of $40,000, contributions of 11.5% of salary, no office held and 10% p.a. salary inflation throughout the last twenty years.

2. Assuming contributions could have been invested at 12% p.a. compound free of tax.

3. Calculations are to the nearest thousand dollars.

Table 2.7 illustrates that for longer service the proportion of the lump sum benefit financed by the parliamentarian's contributions and interest could be quite substantial.

2.1.3 Scheme Management

Table 2.1 shows that the number of Trustees for most parliamentary schemes varies from three to five, with Victoria (six) and New South Wales (eight) being out of line with the others. In each scheme, holders of certain positions are named as being Trustees. In Victoria, the Parliamentary Salaries and Superannuation Act 1968 specifies that the Treasurer, the President and the Speaker shall be trustees and that the Treasurer shall also be Chairman. Where there is provision for appointing ordinary parliamentarians as Trustees, in three cases (Commonwealth, New South Wales and Western Australia) these Trustees are elected by the Parliament. In the cases of Victoria and the Northern Territory, these Trustees are appointed outside the parliamentary process. In Victoria the custom is to appoint the Leader of the Opposition, the Leader of the Third Party and the Leader of the Government in the Upper House as the three other Trustees.

In Victoria, as in most schemes, the Trustees have the power to appoint an actuary of their choice and all schemes (except the Commonwealth) require a three-yearly actuarial report.

2.1.4 Investment

In most cases, Trustees have unrestricted the investment powers. New South Wales is the major exception here and there are minor restrictions in Queensland and Tasmania. In Victoria, parliamentarians' contributions are paid into (and benefits paid from) a Trust Fund called the Parliamentary Contributory Superannuation Fund. Section 11 (1A) of the Act requires the Fund to be invested by the State Superannuation Board in accordance with the determinations of the Trustees. The Trustees effectively have unrestricted investment powers although in 1968 they delegated authority for investment to the State Superannuation Board. Since then investments have been made by the Board and have been confined to those investments within the scope of the Board's investment powers. The Trustees' action in delegating investment responsibility restricted the investment avenues and possibly the earning potential of the Fund. The Committee's report 'A Review of Public Sector Superannuation' demonstrated that the restrictions on investment powers

explain much of the relatively poor investment performance of the State Superannuation Fund.

2.1.5 Financing

Table 2.1 indicates that all schemes apart from the Commonwealth are funded. However, in Victoria and some other states, the legislation requires the actuary to certify the flat dollar amount to be paid into the fund by the government each year, for a twenty-five year period, to enable the fund to meet its liabilities. This is at variance with the normal actuarial practice of calculating the employer's contributions as a percentage of contributors' salaries. Furthermore, the data presented in Table 1.2 indicates that twenty-five years is much longer than a parliamentarian's expected term in office, and it is therefore an inappropriate basis for actuarial calculations. This basis will become even more inappropriate if there is an increase in the number of parliamentarians leaving the scheme.

Contributions required from the Consolidated Fund have increased from $3.28 million in 1980-81 to $4.9 million in 1981-82, an increase of 49%, while the comparative increase in the dollar amount of member contributions was only 17% and the number of parliamentarians was constant.

2.1.6 Supplementary Retirement Account

The Victorian Parliamentary Contributory Superannuation scheme includes a Supplementary Retirement Account into which members may pay up to 10% of their gross fortnightly salaries. Interest as determined by the Trustees on the advice of an actuary is credited to the account.

Where a parliamentarians has made regular fortnightly contributions to the Account for a period of not less than five years, all or part of the balance in the Account may be withdrawn. Once a withdrawal has been made, no further monies may be withdrawn until regular fortnightly contributions have been made to the account for a further period of five years.

This facility is not all that different from a provision in the Commonwealth Superannuation scheme (as distinct from the Commonwealth Parliamentary Contributory Superannuation scheme) which enables members to make additional contributions of up to 5% (taking the total to a maximum of 10%) of salary. As with the basic contribution, these are accumulated with interest and usually taken as a lump sum payout. However, only about 3% of contributors under that scheme avail themselves of this opportunity.

In Victoria this style of facility is even less popular and at the moment there is no money deposited in the Supplementary Retirement Account.

SECTION 2.2 SUPREME AND COUNTY COURT JUDGES' SUPERANNUATION SCHEMES

2.2.1 Benefits Structure

In Victoria, the Supreme and County Court Judges' schemes provide for a non-contributory pension of 60% of the current salary of the position held immediately prior to retirement. There is no commutation of pension to a lump sum.

If permanent incapacity occurs while in office, a judge (appointed before age 60) is entitled to a pension of 60% of salary. The spouse benefit payable on the death of a judge or retired judge is a pension of 37.5% of current salary. The children's benefit is a pension determined by dividing the spouse benefit by four or the number of eligible children, whichever is the greater.

These benefit levels were introduced in 1980 following the Government's acceptance of a number of the recommendations of the Grimwade Board of Review (1980). Thus, the Judges Salaries and Pensions Act 1980, embodied some substantial changes - specifically an increase of 10% of salary (from 50% to 60%) in the pension level, an improved spouse pension and the introduction of a children's benefit. Table 2.8 illustrates the historical levels of the major benefits of the County Court Judges' scheme.

Judges' and Judges' widow's pensions are currently adjusted proportionately in accordance with statutory adjustments to the sum of the salary and allowances of a serving Judge. Movements in the allowances are indexed to the Consumer Price Index (All Groups, Melbourne) and salary movements are linked to those of other senior public servants.

TABLE 2.8

COUNTY COURT JUDGES' SUPERANNUATION SCHEME
VICTORIAN PENSION EXPERIENCE
(PENSIONS AS A PERCENTAGE OF SALARY)

Year	Judge's Salary $	Judge's Pension %	Spouse Pension %	Children's Pension %
1928	3,000	50.0(a)	--	--
1947	4,000	50.0	--	--
1954	6,700	40.0(b)	20.0	--
1960	9,600	40.0	20.0	--
1965	12,200	50.0(c)	25.0	--
1970	16,350	50.0	31.3	--
1975	34,400	50.0	31.3	--
1979	46,090	50.0	31.3	--
1983	64,500	60.0	37.5	16.6

As a result of legislative changes and applicable:

(a) At age seventy-two years
(b) After fifteen years' service
(c) After ten years' service and reaching sixty years of age

The comparison of the major provisions of the various Judges' schemes in Table 2.9 shows that the benefits of the schemes offered to Victorian Supreme and County Court Judges are similar to those offered by the Judges' schemes of the Commonwealth and the other major States.

TABLE 2.9

COMPARATIVE SUMMARY OF JUDGES' PENSION SCHEME LEGISLATION

	VICTORIA	COMMONWEALTH	N.S.W.	QLD.
1. Contributions (% of salary)				
- Employee	--	--	--	--
- Employer	--	--	--	--
2. Financing	PAYG	PAYG	PAYG	PAYG
3. Benefits				
(a) Full pension benefit				
- Minimum years & % of salary	10 yrs' service and attained age 60 - 60% of salary	10 yrs' service and attained age 60 - 60% of salary	10 yrs' service and attained age 60 - 60% of salary	10 yrs' service & attained age 60 - 60% of salary (for retirements after 1984)
- Indexation basis	Salary movements	Salary movements	Salary movements	Salary movements
- % commutable to lump sum	--	--	--	--
(b) Benefits if service less than minimum	--	Pension is the lesser of 0.5% of salary per month of service or 60% of salary	If less than 10 yrs' service, 25% of salary plus 5% for each yr of service in excess of 5 plus proportion of incomplete years of service	--
(c) Disability benefit	Pension of 60% of salary	Pension of 60% of salary	Pension of 60% of salary	Disability pension, 75% of retirement pension and for each yr in excess of 5 yrs' service an additional 5% of pension. Max. pension 60% of salary
(d) Death benefit				
- Spouse benefit	Pension of 3/8ths of salary	Pension of 62.5% of Judges' pension	If less than 10 yrs' service, 25% of salary. If more than 10 yrs' service, 30% of salary	50% of pension if death post-retirement, otherwise 50% of disability pension
- Children's benefit	Determined by dividing spouse pension by the greater of 4 or no. of eligible children	In addition to spouse benefit - for 1 eligible child 12.5% of pension; 2 children 25% of pension; 3 or more children 37.5% of pension. If no spouse benefit payable - 1 child 45% of salary; 2 children 80% of salary; 3 children 90% of salary; 4 or more children 100% of salary	In addition to spouse benefit - pension of $208 p.a. per child. If no spouse pension payable, children's pension is the greater of (a) $520 p.a. each or (b) $208 p.a. plus spouse pension divided by 4 or no. of children	$10 per week per eligible child

TABLE 2.9 (CONT)

COMPARATIVE SUMMARY OF JUDGES' PENSION SCHEME LEGISLATION

	SOUTH AUSTRALIA	WESTERN AUSTRALIA	TASMANIA	NTHN TERRITORY
1. Contributions (% of salary)				
- Employee	--	--	5%	--
- Employer	--	--	--	--
2. Financing	PAYG	PAYG	Contributions paid to Consolidated Revenue and credited to Judges' Pension Fund. Benefits then financed PAYG	PAYG
3. Benefits				
(a) Full pension benefit				
- Minimum years & % of salary	10 yrs' service and attained age 60 - 40% of salary plus 1% for each 6 mths service in excess of 5 yrs. Max. of 60% of salary	10 yrs' service and attained age 60 - 50% of salary	15 yrs' service - 50% of salary	10 yrs' service and attained age 60 - 60% of salary
- Indexation basis	CPI Adelaide	CPI Perth	Salary movements	Salary movements
- % commutable to lump sum	--	--	--	--
(b) Benefits if service less than minimum	If appointed within 5 yrs of retirement, previous pension arrangements are maintained	--	Resignation benefit - return of contributions	--
(c) Disability benefit	Disability pension same as retirement pension	Disability pension - If less than 6 yrs' service, 40% of salary; otherwise 40% of salary plus 2% for each yr in excess of 5, up to a max. of 50%	Pension of 50% of salary	Pension of 60% of salary
(d) Death benefit				
- Spouse benefit	Pension of 2/3rds of retirement pension	If died during service spouse pension 5/8ths of disability pension. If died during retirement spouse pension 5/8ths of existing pension	Pension of 1/3rd of salary	On death of retired judge pension of 5/8ths of pension. Otherwise, pension of 5/8ths of disability pension
- Children's benefit	In addition to spouse pension 1 or 2 children receive pension of 1/9th judge's pension; 3 or more children 1/3rd of pension divided by no. of children. If no spouse pension payable - 1 child 45% of pension; 2 children 40% of pension each; 3 children 30% of pension each; 4 or more children receive judge's pension divided by no. of children	In addition to spouse pension $8 per week per child. If no spouse pension then a pension which is the greater of (a) $10 per wk; or (b) $4 per wk plus spouse pension divided by the greater of 4 or no. of eligible children	No children's pension specified	In addition to spouse pension $208 p.a. per eligible child. If no spouse pension the greater of (a) $520 p.a. or (b) $208 p.a. plus spouse pension divided by the greater of 4 or the no. of children

The Victorian legislation specifying the Judges' schemes is the Constitution Act. This is in contrast to the situation in other states where separate legislation describes the Superannuation benefits available to Judges. New South Wales, South Australia, Queensland and the Commonwealth have enacted Judges' Pensions Acts, whereas Western Australia introduced a Judges' Salaries and Pensions Act and in Tasmania the Judges' Contributory Pensions Act sets the contribution and benefit levels for Tasmanian Judges.

The Tasmanian Judges' scheme differs most notably from the provisions of the other States and the Commonwealth. Their scheme is contributory - all others are non-contributory. Tasmanian Judges are required to contribute 5% of salary towards their superannuation benefit which is a pension of 50% of salary after a minimum fifteen years' service with no children's benefit. Like the Western Australian Judges' scheme, which also offers a pension of 50% of salary, the Tasmanian scheme is less attractive.

With the exception of the scheme characteristics noted above, there is broad conformity in the retirement provisions of the Judges of the various State and Federal jurisdictions that have been examined. The Victorian Judges' package falls within the range of other Judges' schemes.

2.2.2 Scheme Management, Financing and Investment

As mentioned, identical schemes exist for Supreme Court and County Court Judges. The schemes are non-contributory and are financed on a pay-as-you-go basis from the Consolidated Fund, so there are no investment funds to be managed, administered or reported on.

There is no legal trust to administer these schemes; instead the Law Department advises the Department of Management and Budget (DMB) of the retirement of Judges and the DMB then makes arrangements through the State Superannuation Board for the appropriate benefit payments.

SECTION 2.3 THE SUPREME COURT ASSOCIATES AND COUNTY COURT ASSOCIATES SUPERANNUATION SCHEMES

These schemes are identical, the Supreme Court Associates scheme having been established in 1957 and the County Court Associates scheme in 1979. They are voluntary, lump sum, accumulation schemes, administered by the Public Trustee. The lump sum is payable after ten years' service and being aged sixty, or on reaching the age of seventy-two. Investments are managed by the Public Trustee in the Public Trustee's Common Fund A, but individual benefit records are maintained.

Recently, the number of Judges and associates has been increasing, but the number of associates in the schemes has declined. At June 1983, there were fifty-seven associates but only thirty-two were in the schemes (56%), whereas in June 1980, there were fifty-three associates and forty-three were in the schemes (81%). Total funds administered by the Public Trustee under the two schemes in June 1983 was $227,000. These figures indicate that the schemes are very small and declining in popularity.

The schemes provide lump sum benefits which, in the cases of death, disability or retirement, are equal to accumulated employee and employer contributions, plus investment earnings. With small employee and employer contributions of 2.5% and 6.25% respectively, benefits are commensurately small.

In the case of resignation, the employer's contributions (with interest) are vested in the employee, but only after ten years' service and then only if he/she has attained sixty years of age.

Due to their simplicity, these schemes have low administrative costs. The trust deed specifies that the Public Trustee's administrative charges shall be set at 2.5% of each member's fund, to be payable by the member or his/her legal representative at the time the member's accumulated benefit is paid or transferred.

SECTION 2.4 GOVERNOR'S PENSION

The Victorian Governor, on retirement after five years service, is provided with a non-contributory pension of 60% of the Chief Justice's annual salary. This benefit and the other provisions of the Governor's scheme are modelled on the Judges' schemes. The Governor's scheme however, has no children's benefit.

While Victoria and the Commonwealth have directly tied the Governor's pension to the salary levels and movements of their respective Chief Justices, this is not the case in the other States. Table 2.10 compares the pension arrangements of the Governors throughout the States and Commonwealth. The Northern Territory's equivalent of Governor - the Administrator - is also included in the comparison. There is considerable diversity in the methods of determining a Governor's retirement entitlements. New South Wales and Western Australia have no legislative provisions to specify any of the Governor's benefit and they are therefore negotiated at the time of each appointment. The other States provide a pension that is a fixed proportion of the Governor's salary - this is either specified by legislation or in South Australia the proportion is determined by the Treasurer within bounds specified by legislation.

The disability retirement and spouse pension entitlements provided by each State are specified in an analogous manner to their retirement benefits. For example, in Victoria the disability pension is set at 60% of the Chief Justice's salary and the spouse's pension is 37.5% of the Chief Justice's salary. None of the States' schemes examined provided a children's benefit for their Governor.

Most commonly, Governor's pensions are adjusted according to movements in salary of either the relevant Governor or Chief Justice, the exceptions being Queensland and South Australia. Adjustments to Queensland Judges' pensions made according to the Salaries and Allowances Tribunal flow on to the Queensland Governor. In South Australia, the Treasurer has the responsibility for specifying the adjustments to be made to the Governor's pension for what the Act calls "movements in the cost of living".

TABLE 2.10

COMPARATIVE SUMMARY OF LEGISLATION FOR GOVERNOR'S PENSION ARRANGEMENTS(1)

	VIC.	C/WLTH	QLD	S.A.	TAS.	N.T. [2]
1. Contributions						
(a) Employee	--	--	--	--	--	--
(b) Employer	--	--	--	--	--	--
2. Financing	PAYG	PAYG	PAYG	PAYG	PAYG	PAYG
3. Benefits						
(a) Full benefits						
- Pension benefits minimum years & % of salary	5 yrs - Pension of 60% of salary of Chief Justice of Victoria	Pension of 60% of salary of Chief Justice of Australia	5 yrs-Pension of 50% of Governor's salary	4 yrs 6 mths (excluding furlough) - Pension specified by Treasurer's Order - max. of 50% of salary	5 yrs - Pension of 5/7ths of salary	5 yrs - Pension of 50% of base salary
- Indexation basis	Salary movements of Chief Justice of Victoria	Salary movements of Chief Justice of Australia	As per Judges Pension Act	Treasurer may adjust pension (by Order) for "movements in the cost of living"	Salary movements of Governor	Salary movements of Administrator
(b) Disability retirement benefit	Pension of 60% of salary of Chief Justice of Victoria	Pension of 60% of salary of Chief Justice of Australia	Pension of 50% of Governor's salary	Pension specified by Treasurer's Order - max. 50% of salary	Pension of 5/7ths of salary	Pension of 50% of base salary
(c) Death benefits						
- Spouse pension	Pension of 3/8ths of salary of Chief Justice of Victoria	Pension of 5/8ths of Governor's pension	Pension of 5/8ths Governor's pension or if dies while holding office a pension of 5/16ths Governor's salary at time of death	- If died pre-retirement, spouse pension 37.5% of salary. - If died post-retirement, spouse pension 75% of Governor's pension.	Pension of 3/7ths of salary	2/3rds of Administrator's pension
- Children's benefit	--	--	--	--	--	--

(1) There are no legislative provisions specifying the pension arrangements for the Governors of New South Wales and Western Australia.

(2) Northern Territory's equivalent to Governor is called Administrator.

Despite the considerable variation in the method of determination, the actual level of benefits derived are broadly comparable. The benefits of the Victorian Governor are consistent with this observed range.

CHAPTER 3

THE REMUNERATION REVIEW PROCESS AND THE VICTORIAN PARLIAMENTARY CONTRIBUTORY, JUDGES' AND GOVERNOR'S SUPERANNUATION SCHEMES

SECTION 3.1 REVIEW PROCEDURES FOR PARLIAMENTARY REMUNERATION

3.1.1 Superannuation and Salary Determination

Decisions to review and recommend change to the Parliamentary and other special superannuation schemes, as noted in this report, have been ad hoc in nature. Traditionally, in Victoria, the Government of the day has introduced legislation to deal with changes to the parliamentary superannuation scheme and these have been subsequently debated in both Houses of Parliament. For changes to salaries and allowances, the Victorian Government follows the recommendations of the Commonwealth Remuneration Tribunal. The Remuneration Tribunal's legislation, however, excludes specifically any consideration of superannuation as part of total remuneration. A separate Committee of selected parliamentarians chaired by the Minister of Finance, deals with Commonwealth parliamentarians' superannuation.

There is no formal non-parliamentary (or independent) review mechanism to deal with proposed changes to the Parliamentary Contributory Superannuation scheme, nor is there any procedure to consider the total remuneration package of parliamentarians. In other words, changes to superannuation are treated quite independently of salaries and allowances.

Superannuation is obviously an important component of the total remuneration of parliamentarians. As such, it might be expected that the determination of superannuation provisions would be seen as part of the procedures to determine salaries and allowances, but this is not the case. This situation mirrors practice in the public and private sector (other than the negotiation of

remuneration packages for relatively senior private sector executives), where superannuation has been separate from the normal processes of negotiation, conciliation and arbitration over wage and employment conditions. In the Committee's first report on superannuation, this separation was seen to reflect a variety of factors including the paternalistic origins of superannuation, High Court decisions regarding superannuation matters and, up until the 1970s, the concentration by unions on other, more immediate concerns such as wages and salaries and other employment conditions. In the case of the Parliamentary scheme, the ad hoc nature of the scheme's evolution has been the main factor militating against a full consideration of superannuation as an integral part of a parliamentary remuneration package.

Since the late 1970s in both public and private sectors, increasing attention has been directed towards superannuation provision as an element in employee remuneration and, as such, subject to traditional collective bargaining procedures. The Committee believes that this trend should be encouraged and that parties to the negotiation and resolution of collective agreements and awards should view superannuation provisions and benefits in the context of the employees' total remuneration package. Furthermore, such procedures should also apply to the parliamentarians' remuneration package.

3.1.2 A Parliamentary Remuneration Tribunal

The Committee is concerned about a range of matters dealing with parliamentary superannuation provisions. These cover the appropriate design of a parliamentary scheme, anomalies in the current scheme provisions, and the mechanisms for change which exist for the various parliamentary schemes in Australia (see Table 2.1).

It is also clear that the public has a poor opinion of parliamentary superannuation schemes stemming largely from inappropriate comparisons with other public and private sector schemes. A particular contributory factor is that parliamentarians are seen as having a free hand in the establishment of their own salaries, allowances and superannuation benefits.

The Committee believes that one way in which salary and superannuation reviews can be considered objectively is to move away from the system wherein superannuation is considered in isolation from salaries and allowances to one in which a tribunal exists to review and recommend, on an annual basis, changes deemed necessary to parliamentary remuneration. Rather than establishing a new tribunal, the Committee believes it more appropriate to expand the terms of reference of the Commonwealth Remuneration Tribunal to enable it to consider superannuation and, therefore, the total remuneration package of parliamentarians. The Commonwealth Remuneration Tribunal would thus be responsible for the determination of basic salary, additional salary, expense allowances, and the contribution and benefit provisions of the various parliamentary superannuation schemes. In its broader role, the tribunal should operate within the framework of the Conciliation and Arbitration Commission and should be established by Commonwealth and State legislation. The respective States and other interested parties should be able to make submissions to the tribunal.

RECOMMENDATION 3.1

THAT THE RESPONSIBILITIES OF THE COMMONWEALTH REMUNERATION TRIBUNAL BE WIDENED TO INCLUDE SUPERANNUATION AND THAT THIS TRIBUNAL SHOULD MAKE DETERMINATIONS ON PARLIAMENTARIANS' TOTAL REMUNERATION ON AN ANNUAL BASIS.

The Committee believes it is desirable to have a uniform method of determining the appropriate level of parliamentarians' total remuneration for the Commonwealth and across all States. This would assist in preventing leapfrogging of benefits. The Committee also believes that to minimise costs and to encourage consistency between the various States and the Commonwealth it is important not to duplicate efforts in this area. However, it is recognised that it may be difficult to gain the support of all governments and that it would be feasible, in the first instance, to simply involve Victoria and the Commonwealth in the proposed tribunal. This would still have the advantages of reducing duplication and encouraging a wider review of parliamentarians' total remuneration. If this is not feasible, the Committee proposes that the Victorian Government should establish a separate remuneration tribunal.

RECOMMENDATION 3.2

THAT, IF AGREEMENTS ARE NOT FORTHCOMING TO WIDEN THE ROLE OF THE COMMONWEALTH REMUNERATION TRIBUNAL, THERE BE ESTABLISHED IN VICTORIA AN INDEPENDENT REMUNERATION TRIBUNAL.

This recommendation is consistent with maintaining a stable relationship, such as that presently existing for salaries, between the total remuneration of Victorian parliamentarians and the total remuneration of Commonwealth parliamentarians.

SECTION 3.2 JUDGES' AND GOVERNOR'S REVIEW PROCEDURES

3.2.1 Superannuation and Salary Determination

Salary levels and allowances for the Judges of the Supreme and County Courts are described in the Constitution Act 1975 and the County Court Act 1958 respectively. The actual dollar amount or 'base' salary is specified, and both Acts use analogous procedures for indexation changes to this 'base' salary. Under these procedures, the Attorney-General is required to certify increases in Judges' salaries in line with movements in the salary of select senior public servants (those referred to in Part A of Schedule Two of the Public Service Act 1974). Judges' allowances are indexed annually by movements in the Consumer Price Index (CPI) for Melbourne.

The current salary levels of Judges have their origins with the 1980 Board of Review chaired by Sir Andrew Grimwade. This review was concerned with the terms and conditions of employment of Judges and provided the stimulus for the Judges Salaries and Pensions Act 1980. This Act specified an appropriate 'base' level of salary for the various Judges and provided for indexation according to National Wage Case decisions. Following the failure of the centralised wage fixation arrangements the Judges Salaries and Pensions Act 1982 introduced indexation linked to senior public servants' salaries and inserted new 'base' salaries which were based on the original Grimwade salaries updated by the CPI, i.e., the 'base' salaries were recalculated ignoring the previous indexation arrangements. Following this period of upheaval, the current procedures have gained general acceptance.

The retirement, disability and spouse pensions of the Judges' schemes are all specified as a percentage of salary so there is a direct link between the process that determines the level of Judges' salaries and the level of their pension benefits.

These procedures also impinge on the Governor's superannuation arrangements as the level of the Governor's pension is specified as a percentage of the salary of the Chief Justice of Victoria.

The Governor's salary is determined from time to time at the Government's initiative. Altering the Governor's salary requires an amendment to the Constitution Act 1975. The most recent change was initiated by the Constitution (Governor's Salary) Act 1982 which significantly increased the salary level. During the second reading speech, the Premier, the Hon. J. Cain, M.P., said that:

> "The new salary for the Governor of Victoria is set at a level intended to obviate the need for any further legislation during the first three years of his term. It allows for current tax rates and an expected inflation rate of 10 per cent for each of the next three years."(1)

Before this, the Governor's salary was last adjusted in 1968. Thus, the two major components of the Governor's remuneration are considered separately.

3.2.2 A Review Procedure for the Judges' and Governor's Pension Schemes

The pension benefits of the Judges of the Supreme and County Courts are linked to current judges' salaries. The Governor's pension is linked to the salary of the Chief Justice of Victoria. The Constitution Act 1975 and the County Court Act 1958 specify the salary levels for these Judges and include appropriate indexation arrangements. The effect of these indexation arrangements flows through to pensions.

It appears that while there is a link between salary movements and pensions there is no procedure to review the total remuneration package of either the Judges or the Governor. While it is considered appropriate for parliamentarians' remuneration to be considered annually, the indexation arrangements already in place for Judges' salaries and de facto for the Judges' and Governor's pension, imply that reviews would be needed less frequently. In the case of the Governor, it would be suitable for the total remuneration package to be reviewed by the Parliament of Victoria at the beginning of the term of each incumbent. This follows Commonwealth Government procedure, where the Governor-General's salary is fixed at the beginning of each term of office.

The Standing Committee of Commonwealth and State Attorneys-General currently monitor all aspects of the terms and conditions of employment of Judges of the various jurisdictions throughout Australia. Given that the current indexation arrangements are working satisfactorily, it is only over a period of time that relativities would change significantly. Therefore the issue of the overall level of Judges' remuneration could be considered by the Parliament of Victoria on the recommendation of the Victorian Attorney-General. In making such a recommendation, the Attorney-General should consider advice from the Chief Justice of Victoria.

RECOMMENDATION 3.3

THAT THE TOTAL REMUNERATION OF THE GOVERNOR BE REVIEWED BY THE PARLIAMENT OF VICTORIA AT THE BEGINNING OF THE TERM OF EACH INCUMBENT.

RECOMMENDATION 3.4

THAT THE REMUNERATION OF JUDGES OF THE SUPREME COURT AND COUNTY COURT BE REVIEWED BY THE PARLIAMENT OF VICTORIA FROM TIME TO TIME AS RECOMMENDED BY THE ATTORNEY-GENERAL.

NOTES

(1) Victoria, Legislative Assembly, Parliamentary Debates, 26 May 1982, p.387.

CHAPTER 4

RECOMMENDATIONS FOR CHANGE TO THE VICTORIAN PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME

SECTION 4.1 PRINCIPLES FOR CHANGE TO THE VICTORIAN PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME

4.1.1 Changes in Scheme Design for New Members

After examining the Victorian Parliamentary Contributory Superannuation scheme, the Committee feels that a number of changes are required to ensure the scheme best fulfills the requirements dictated by parliamentary service, at the same time minimising cost to the State. In the following section, the Committee outlines principles for change which should be referred to an independent tribunal as proposed in Chapter 3 (Recommendations 3.1 and 3.2). The tribunal would need to consider the proposed recommendations to determine their appropriateness with regard to cost and parliamentarians' overall remuneration package.

4.1.1.1 Lump Sum Scheme

In the Committee's recent report entitled "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation", the basis of the proposed Victorian State Employees Superannuation Scheme is a lump sum retirement benefit. In the context of the Victorian Parliamentary Contributory Superannuation scheme, this recommendation can be justified on the following basis:

(a) a lump sum scheme will retain for retiring parliamentarians freedom of choice in retirement decisions. Up to the present time, pensions have been taxed more severely than lump sums. Recent changes have been directed at reducing this differential

between the taxation of lump sums and pensions, but the new Commonwealth tax rates of 15% on the first $50,000 and 30% on the excess over $50,000 apply only to benefits accrued after 1st July 1983 and not to that part representing the return of the member's own contribution. These changes also removed the 'double taxation' which previously applied to purchased annuities. This proposal would improve the availability of annuities for those who require them;

(b) lump sums tend to be less costly for the employer to finance than indexed pensions which, in the case of parliamentary schemes, could be payable for many years. This is illustrated in Table 4.1 by some examples of parliamentarians who are expected to retire by the next session of Parliament. As at 30 June 1984, this group's potential lump sum payouts, pensions and present value of pensions given normal life expectation for persons of their age were as follows.

TABLE 4.1

COMPARISON OF THE COST OF LUMP SUM AND PENSION BENEFITS

Member of Parliament	Years of Service(a)	Lump Sum if Pension Commuted in Full $	Pension Per Annum $	Present Value of Pension(b) $
A	11	230,580	23,058	486,316
B	14	256,770	25,677	352,725
C	17	407,190	40,719	514,077
D	20	421,680	42,168	678,019
E	14	257,430	25,743	368,331
F	8	206,710	20,671	370,404
G	8	206,510	20,651	422,272
H	22	343,960	34,396	512,156
Total		2,330,830		3,704,300

(a) Rounded to nearest year
(b) Based on normal life expectancies and on the asumption that future interest rates will exceed the rate of pension increase, which itself is linked directly to the basic parliamentary salary movements, by a margin of 1%

The savings to the State Government if these eight members all fully commute their pension would be about $1,373,470, being the difference between the present value of the pensions and the lump sum if the pensions were commuted in full. Consequently, the Committee believes that substantial savings could be achieved by moving to a lump sum scheme in the longer term. The frequent early involuntary retirements from the parliamentary scheme reinforce this argument;

(c) lump sum benefits would normally be payable to a member's estate to be disposed of according to individual requirements as evidenced by the member's will. Since a lump sum would provide benefits independently of marital status it is therefore non-discriminatory; and

(d) the general popularity of this form of benefit. Most scheme members commute the full amount, that is, take the full benefit in the form of a lump sum.

Given these advantages, the Committee supports in principle the introduction of a lump sum only scheme for parliamentarians. This scheme would provide no option for indexed pensions but individuals could purchase annuities if they so desired. In addition, it may be appropriate to provide an optional spouse benefit.

4.1.2 Other Issues in the Redesign of the Scheme

In addition to the lump sum option, the Committee also considered a range of options for the redesign of the current parliamentary scheme which would not only reduce cost but also take account of parliamentary service experience. These issues included the possibility of increasing the value of the "retrenchment" component of the overall benefit, at least for those with less than eight years service, and reducing the overall value of the "superannuation" component. The Committee felt that actually or notionally dividing the benefit into these two components would give a more proper emphasis within the scheme to the risks associated with being elected to

Parliament, but would still provide a mechanism to ensure that those individuals who were longer serving received benefits in line with community standards.

The Committee did not consider the actual level of contributions and benefits that should flow from the introduction of a scheme along the above lines. It felt this was the responsibility of the tribunal. However, the Committee would emphasise the requirement that total remuneration be in line with community standards.

Other issues raised which could be considered by the tribunal include the following:

(a) Should a parliamentary superannuation scheme be wholly or partly voluntary?

(b) Should the periods of entitlement of fifteen years, eight years and six years provided in Sub-section 15(1), paragraphs (a), (b) and (c) of the Parliamentary Salaries and Superannuation Act 1968 be retained having regard to all relevant factors including the recently enacted four year terms for future Parliaments?

(c) Should the superannuation or retirement benefit component of the scheme, as opposed to the "retrenchment" element, be provided on a guaranteed benefits basis or depend on the accumulations of an invested fund?

(d) Does the present scheme structure provide the right balance of incentives and disincentives to parliamentary service by able and suitably experienced candidates and to the timely termination of such service?

(e) Should the scheme structure take more account of age at entry and/or age of retirement, e.g., should the special risks taken by candidates in mid-career be recognised?

(f) Should a new scheme be contributory or non-contributory (given a fixed level of total remuneration)?

SECTION 4.2 PROPOSED LEGISLATIVE CHANGES TO THE VICTORIAN PARLIAMENTARY SCHEME

Currently a Bill to amend Part II of the Parliamentary Salaries and Superannuation Act 1968 is before the Victorian Parliament. The Victorian Bill follows amendments recently made by the Commonwealth Government's Parliamentary Contributory Superannuation Amendment Act 1983. The issues covered by the Victorian Bill are considered below.

4.2.1 A Limit on the Proportion of Pension That May Be Commuted

Clause 2(a) of the Victorian Bill to amend the Parliamentary Salaries and Superannuation Act 1968 is an amendment to limit the amount of pension which may be converted to a lump sum to a maximum of 50% of the total pension for which a retiring member is eligible. This follows precisely the intention of the Commonwealth Government's Parliamentary Contributory Superannuation Amendment Act 1983 which was intended to reduce the amounts payable to former members (which have attracted adverse comment).

The explanation for this amendment was given by the Minister for Finance, the Hon. J.S. Dawkins, M.P., in introducing the corresponding Bill in the House of Representatives. He said that "the Government believes commutation of the whole retiring allowance conflicts with the basic purpose of the scheme which is to ensure income maintenance in retirement. Of course members who elect to commute in future will be affected by changes to the income tax arrangements..."(1)

Despite this, the Committee again wishes to express their support for the lump sum option and therefore the continuation of 100% commutation by parliamentarians (Section 4.1.1). This was argued on a range of factors including equity, cost, availability of annuities, and preferences of contributors. The Committee has already noted in Table 2.1 that, along with Victoria, the States of Queensland, Western Australia and the Northern Territory provide 100% commutation at age forty-five, while NSW and South Australia both provide 75% commutation at age forty-five. The

Commonwealth offers partial commutation (i.e. 50%) while Tasmania has no provision for commutation.

The Committee does not support the Commonwealth initiative or the Victorian Bill in this respect. In fact, the Committee believes the cost advantages in the longer term of providing lump sum benefits are such that the proposed Tribunal should be given a referral to consider the possibility of introducing a scheme for parliamentarians in which the retirement benefits are only in a lump sum (refer Section 4.1.1).

4.2.2 Reduction of Spouse Benefit

Clause 2(b) of the Victorian Bill to amend the Parliamentary Salaries and Superannuation Act 1968 provides that the spouse pension will be based on the pension which was actually payable to the deceased member and not, as at present, on the pension which would have been payable if no part of the member's pension had been converted to a lump sum. This clearly involves a significant reduction in the spouse's benefit. The explanation given by The Hon. J.S. Dawkins, M.P. in the corresponding Commonwealth situation was "... the Government considers that it is more appropriate to relate the spouse's annuity to the member's residual pension and not the pension that would have been payable had the member not commuted."(2)

There are however other issues to be considered. Mr. Dawkin's argument would be an adequate explanation if, when a member commuted a portion of his/her pension to a lump sum, the amount granted in commutation included full allowance for a corresponding portion of the benefit contingently payable to the member's spouse on his/her death. However, the Committee has received written advice from the Acting Government Statist and Actuary that states conclusively:

> "... The commutation factor of 10 is essentially arbitrary, chosen to reflect the factor common in private sector schemes, and meeting certain other objectives of fairness between members of differing lengths of service. There is no allowance intended for any reduction of widows' pensions."(2)

The Acting Government Statist and Actuary makes a further statement that:

> "... Given the arbitrary nature of the factor, a decision as to whether or not the factor should be deemed to allow for a reduction in widows' pensions must be made having regard to what an acceptable level of benefit is in the light of general community standards."(3)

The Committee would argue that there are no apparent reasons for reducing the spouse pension by the proportion commuted by the retired member except to reduce cost. The commutation factor however takes no explicit account of the widow's pension. The Committee also noted in Section 2.1.2.6 that a commutation factor of 10 is common to the Commonwealth and all States allowing commutation for persons up to age sixty-six years The fact that some parliamentary schemes do reduce the spouse's pension and some do not emphasises the arbitrary nature of this provision. Hence the assumptions underlying the decision to reduce the spouse's pension are not established. Furthermore, the Committee notes that the Victorian Bill takes no account of accrued rights of spouse benefits.

SECTION 4.3 ANOMALIES IN THE PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME THAT REQUIRE IMMEDIATE ACTION

As noted in Chapter 2, the Victorian Parliamentary Contributory Superannuation scheme is similar in most major respects to other parliamentary schemes in Australia. There are, however, a number of anomalies in scheme provisions which should be rectified.

4.3.1 Pension for Office Holders

It was explained in Section 2.1.2.2 that the pension for parliamentarians who held office and were therefore in receipt of a higher gross salary may be differently affected by salary inflation depending on just when they held office. For instance, a parliamentarian who held office early in his/her parliamentary career would receive a smaller pension than someone who held office later in their parliamentary career, all other things being equal. This situation is illustrated in Table 2.3, which indicates that under the present system the effect of inflation is to cause an additional cost to the Consolidated Fund.

The formula for determining the pension for office holders was conceived at a time when inflation was minimal and hence the treatment meted out was more or less equitable. The effects the formula have produced during more inflationary periods since is therefore unintended. The Committee believes that the current method of calculating the pension for office holders is not acceptable and that it should be based on current salary rates.

RECOMMENDATION 4.1

THAT THE FORMULA FOR CALCULATING PENSIONS BE BASED ON THE BASIC PARLIAMENTARY SALARY CURRENT AT THE DATE OF RETIREMENT AND ON ADJUSTMENTS TO ALL INCREMENTS RECEIVED FOR HIGHER DUTIES ACCORDING TO THE PROPORTION WHICH BASE

SALARY AT DATE OF RETIREMENT BEARS TO BASE SALARY DURING THE TENURE OF HIGHER OFFICE.

4.3.2 Children's Benefits

Under the existing provisions no children's allowances are payable if there is a surviving spouse, which the Committee thinks is appropriate. However, although an allowance or allowances are payable when there is no surviving spouse, the Victorian Parliamentary Contributory Superannuation scheme does not specify what the allowance(s) should be. In the only case where the Trustees have had to exercise their discretion on this matter they chose for the three children concerned allowances equal to 30% each of what the spouse's pension would have been. They also decided on a scale of allowances for different numbers of dependent children as was explained in Section 2.1.2.7.

This scale is virtually the same as that provided by the South Australian scheme, but because that scheme uses the member's pension as the basis, the Victorian allowances are somewhat inferior. Nonetheless, the benefit levels chosen by the Victorian Trustees are higher than most.

The Committee believes that members should have an explicit statement of the benefits available for children and this should not be left to the Trustees.

RECOMMENDATION 4.2

THAT LEGISLATION BE ENACTED TO EMBODY THE SCALE OF BENEFITS RECENTLY ADOPTED BY THE TRUSTEES FOR DEPENDENT CHILDREN.

4.3.3 Recognition of Previous Service in Another Scheme

Under section 19 of the Parliamentary Salaries and Superannuation Act 1968 recognition is given for previous service in the State Superannuation scheme and other superannuation schemes approved by the Trustees. This provision enables new parliamentarians to transfer amounts received from such schemes

to the Parliamentary Contributory Superannuation Fund on a voluntary basis and to receive a credit of a certain notional period of service as determined by the actuary. In the case of transfers from the State Superannuation scheme the actuary to the Parliamentary Contributory Superannuation scheme calculates a notional credit using as the basis an amount of $3\frac{1}{2}$ times the actual withdrawal benefit.

Advice from the Acting Government Statist and Actuary is that the amount of $3\frac{1}{2}$ times past contributions to the State Superannuation Fund is an approximation to the notional reserve comprising both employee and employer parts. In other words, some form of vesting occurs. From discussions with Fund representatives, it would appear that this provision was included in the Parliamentary Contributory Superannuation scheme to provide some form of security for persons transferring from the State Superannuation scheme.

In comparison to other individuals' rights of transfer to the Parliamentary Contributory Superannuation scheme, this is a generous and preferential arrangement. For other approved schemes, the basis is taken as an amount not exceeding the amount paid to that person from such approved superannuation schemes which, of course, may or may not include vesting.

The Committee has difficulty with the issue of transfer of superannuation rights to the Parliamentary Contributory Superannuation scheme. As stated previously, this scheme can be seen as having two elements: a retrenchment element and a superannuation element. For contributors with up to eight years service, a supplement on top of contributions is provided, reflecting the uncertainty of parliamentary service. The Committee feels it would be inappropriate for parliamentarians to be able to buy extra years of service and therefore receive greater benefits without serving those initial "risk" years. The Parliamentary Salaries and Superannuation Act 1968 currently prevents this. However, once a member has qualified for a pension benefit, a member who has been able to transfer previous superannuation entitlements is eligible to qualify for greater benefits depending on the years of service that the scheme's actuary credits them with. Given the high value of transfer benefits potentially available from the State Superannuation scheme, a member could be eligible for a substantial increase in final payout. Furthermore, members who do not become entitled to pensions may nevertheless become entitled to

tens of thousands of dollars extra after only a few months service following a by-election.

The Committee believes that the matter of the appropriate portability arrangements for entry into the Parliamentary Contributory Superannuation scheme should be considered by the tribunal in the light of the Committee's earlier recommendations (3.1 and 3.2) and the issues raised above, but considers continuation of the present arrangements to be unfair.

The Committee also notes that the rights of members either to portability or to a pension on transfer or attempted transfer to a different seat or a different Parliament need further consideration.

RECOMMENDATION 4.3

THAT CALCULATIONS OF NOTIONAL CREDIT FOR PREVIOUS SERVICE IN THE STATE SUPERANNUATION SCHEME AND OTHER APPROVED SUPERANNUATION SCHEMES BE MADE UNIFORMLY AND THAT THE WHOLE ISSUE OF THE MOST APPROPRIATE PORTABILITY ARRANGEMENTS BE REFERRED TO THE PROPOSED REMUNERATION TRIBUNAL.

The Committee notes also that the interaction between this provision and the formula for calculating the pension under Section 15(1) is capable, on a literal interpretation, of causing a reduction instead of an increase in the pension entitlement. There are difficulties concerning the Trustees or the scheme's actuary ignoring the literal meaning of the Parliamentary Salaries and Superannuation Act 1968 and in the Committee's view amendments should be made to remove the problem of interpretation.

4.3.4 Qualification for Benefits

There are two areas of the Parliamentary Salaries and Superannuation Act 1968 which deal with qualifications for benefits that the Committee thinks require amendment.

Under the current Victorian Act, it is not clear that a member having at least eight years of service and who is not re-endorsed by his or her own political party would be considered to have met the minimum qualifying period of service for the pension. While the member could seek to satisfy the Trustees that there were valid grounds for resignation or not seeking re-election, and while the precedent is that the Trustees would accept this reason, it is an explicit reason in the legislation in several states.

RECOMMENDATION 4.4

THAT THE PARLIAMENTARY SALARIES AND SUPERANNUATION ACT 1968 BE AMENDED SO THAT A PARLIAMENTARIAN WHO HAS AN AGGREGATE PERIOD OF AT LEAST EIGHT YEARS SERVICE AND IS NOT RE-ENDORSED BY HIS OR HER POLITICAL PARTY SHOULD BE SPECIFICALLY CONSIDERED AS HAVING MET THE MINIMUM PERIOD OF SERVICE TO QUALIFY FOR THE PENSION BENEFIT.

The second area of concern relates to recent legislative changes to the Constitution Act 1975 and The Constitution Act Amendment Act 1958 to introduce four year terms for the Legislative Assembly and hence eight-year terms for the Legislative Council. This change has a bearing on Section 15(1)(c) of the Parliamentary Salaries and Superannuation Act 1968 which entitles a member to a pension if he/she has received salary as a member for six years or more, has served in not less than three Parliaments, is over the age of 60 and ceases to be a member as a result of not seeking re-election at a general election.

The Committee is opposed to the unqualified retention of this section but so as not to disadvantage any current members who may be affected by it and to accommodate four yearly Parliaments, the Committee makes the following recommendation.

RECOMMENDATION 4.5

THAT PARAGRAPH 15(1)(c) OF THE PARLIAMENTARY SALARIES AND SUPERANNUATION ACT 1968 BE AMENDED SO THAT THE NUMBER OF PARLIAMENTS REQUIRED IS REDUCED FROM THREE TO TWO AND THAT THE SECTION SHOULD APPLY ONLY TO CURRENT PARLIAMENTARIANS.

FOR NEW PARLIAMENTARIANS THE APPROPRIATE FORM FOR PARAGRAPH 15(1)(c) SHOULD BE REFERRED TO THE PROPOSED REMUNERATION TRIBUNAL.

SECTION 4.4 MANAGEMENT, INVESTMENT AND FINANCING OF THE VICTORIAN PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME

4.4.1 Management

Currently none of the Trustees are elected by the members (i.e., Parliament, in this case) and three of the six are nominated office-holders. While in no way reflecting on the existing Trustees, the Committee considers that ordinary members ought to have a say in the appointment of Trustees (consistent with other parliamentary schemes and the recommendations for other public sector superannuation schemes). There is no reason why the Trustees should be office-holders apart from the Treasurer, whose departmental responsibility includes administration of the superannuation scheme and the payment of the major part of the cost.

RECOMMENDATION 4.6

THAT THERE BE SIX TRUSTEES, OF WHOM ONE MUST BE THE TREASURER AS CHAIRPERSON WITH OTHERS CHOSEN TO INCLUDE REPRESENTATIVES FROM EACH HOUSE OF PARLIAMENT AND FROM EACH PARTY.

4.4.2 Accounting and Reporting

The Committee's report, "A Review of Victorian Public Sector Superannuation", drew attention to the poor general state of reporting. In its final report on superannuation, "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation", the Committee has recommended that all public sector superannuation schemes be covered by the requirements of the Annual Reporting Act 1983. That recommendation is also appropriate for the Parliamentary Contributory Superannuation scheme.

The Committee notes that the 1982-83 report on the Parliamentary Contributory Superannuation scheme does not include all the desirable

characteristics which were covered by the Committee in its first report on superannuation and detailed in the consulting report of Mr. G. Hubbard, published separately by the Committee in "Management of Public Sector Superannuation Schemes", April 1984.

The initial findings covered the 1981-1982 annual report, however, the Committee noted that in 1982-1983 considerable improvements had been made but that further improvement was necessary. Mr. G. Hubbard's report for the Committee stated that the previous reports of the Parliamentary Contributory Superannuation scheme were the worst of those reviewed, producing only one report of the twelve "reports" required for "good" reporting practice.(4)

RECOMMENDATION 4.7

THAT THE TRUSTEES OF THE PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME ENSURE THAT THE SCHEME MEETS THE STANDARDS OF REPORTING AS LAID OUT IN THE COMMITTEE'S REPORT ENTITLED "FINAL RECOMMENDATIONS AND OPTIONS FOR THE FUTURE REFORM OF VICTORIAN PUBLIC SECTOR SUPERANNUATION".

4.4.3 Investment

The investment results being achieved for the scheme by investment through the State Superannuation Board are well below reasonable expectations. Poor investment performance means that increased contributions from the Consolidated Fund are required to finance a given level of benefits. Attention should be given to increasing the efficiency of investment management by allowing more use to be made of the broad investment powers of the Trustees of the scheme.

In its report entitled "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation", the Committee proposed that a separate investment trust called the Victorian Superannuation Investment Trust (VICSIT) be established and that it should have wider powers than currently exist for the State Superannuation Board. VICSIT's proposed area of responsibility includes the State Superannuation Fund; it would be

managed by staff, and have a staffing structure reflecting the expertise required to administer a large fund with broad investment powers. VICSIT would be an appropriate vehicle for investment of the Parliamentary Contributory Superannuation scheme's funds.

RECOMMENDATION 4.8

THAT THE INVESTMENT OF FUNDS OF THE PARLIAMENTARY CONTRIBUTORY SUPERANNUATION SCHEME BE MANAGED BY THE PROPOSED VICTORIAN SUPERANNUATION INVESTMENT TRUST.

4.4.4 Financing

Currently, the actuary is required to assess the scheme and recommend a flat dollar amount sufficient to finance the cost of benefits over a twenty-five year period. This method results in a flat dollar Government contribution for three years which is likely to increase substantially when the next actuarial investigation is carried out. Since the average parliamentarian is in office for less than twenty-five years, it is inappropriate that benefits should be funded over such a long period. Information on parliamentarians' years of service presented in Table 1.2 suggests that the average period of service is more like fifteen years than twenty-five years.

RECOMMENDATION 4.9

THAT THE ACTUARY SHOULD BE REQUIRED TO ASSESS THE CONTRIBUTION RATE REQUIRED FROM THE CONSOLIDATED FUND AS THE PERCENTAGE OF PARLIAMENTARIANS' SALARIES SUFFICIENT TO FUND BENEFIT PAYMENTS OVER THE EXPECTED DURATION OF PARLIAMENTARIANS' YEARS OF SERVICE.

NOTES

(1) Australia, House of Representatives, Parliamentary Debates 1983, 19 May 1983, p.816.

(2) A.L. Truslove, Acting Government Statist and Actuary, Letter to the Economic and Budget Review Committee, 8 October 1984, p.2.

(3) Ibid., p.2.

(4) G. Hubbard, Uniform Provisions for the Management of Public Sector Superannuation Schemes, A Report for the Economic and Budget Review Committee, VGPS, Melbourne, February 1984, p.11.

CHAPTER 5

OTHER SPECIAL PUBLIC SECTOR SUPERANNUATION SCHEMES

SECTION 5.1 SUPREME AND COUNTY COURT JUDGES' SUPERANNUATION SCHEMES

The 1980 review of Judges' pensions carried out by the Grimwade Board of Review resulted in increases in the pension percentage of salary, a doubling of the spouse's pension and introduction of a child benefit. Since there are special factors associated with Judge's pensions, it is difficult to conclude that one particular level of benefits is clearly any more appropriate than another. The existence of a non-contributory scheme for Judges, and the provision of a pension only, is seen to be appropriate, given the historical precedents and the particular situation of Judges. The Committee therefore recommends no immediate changes to the Judges' schemes. In the longer term, the Committee has recommended, as in Chapter 3, Section 3.2, the establishment of a review procedure.

SECTION 5.2 SUPREME COURT ASSOCIATES AND COUNTY COURT ASSOCIATES SUPERANNUATION SCHEMES

Since the Committee is concerned to provide equitable benefits for all public sector employees, and as the Associates' schemes are very small, voluntary, declining in popularity and inequitable with respect to other schemes, it is recommended that the schemes be closed to new members. New associates should be allowed to contribute to the proposed Victorian State Employees Superannuation Scheme. This scheme offers a basic contribution rate of $2\frac{1}{2}\%$ with the option to pay additional contributions for increased benefits. For a

full discussion of the new scheme refer to the Committee's report entitled "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation Schemes."

RECOMMENDATION 5.1

THAT THE COUNTY COURT ASSOCIATES AND THE SUPREME COURT ASSOCIATES SUPERANNUATION SCHEMES BE CLOSED AND THAT NEW ASSOCIATES SHOULD BE ALLOWED TO JOIN THE PROPOSED VICTORIAN STATE EMPLOYEES SUPERANNUATION SCHEME.

SECTION 5.3 GOVERNOR'S PENSION SCHEME

The Committee considers that the present arrangements for the Governor's pension scheme are satisfactory and therefore recommends no immediate changes. The Committee, however, recommends that a formal review of the total remuneration of the Governor's pension scheme should be instituted at the beginning of the term of each incumbent (Chapter 3, Section 3.2).

SECTION 5.4 OTHER SCHEMES

5.4.1 Chairman of General Sessions

In 1968, the Courts of General Sessions were abolished and their jurisdiction was vested in the County Court. The scheme for the Chairman of General Sessions was closed and is now incorporated in the County Court Judges' scheme. There remains one pensioner in the scheme and the cost in the year ended June 1983 was $23,000. As the scheme is closed, no recommendations for change are appropriate.

5.4.2 Other Special Public Sector Scheme Arrangements

The Committee wrote to all Ministers of the Victorian Government, seeking information on any special or separate superannuation arrangements that may exist for chairpersons of statutory authorities, authority members or other senior officers under their control. At the time of writing, replies had been received from the following Departments:

Premier and Cabinet
Education and Educational Services
Industrial Affairs
Agriculture
Arts
Health
Employment and Training
Property and Services
Consumer Affairs
Ethnic Affairs
Youth, Sport and Recreation
Conservation, Forests and Lands
Police and Emergency Services
Office of the Ombudsman
Water Resources
Minerals and Energy.

Labour and Industry
Community Welfare Services
Transport

Only four schemes have emerged from these replies, namely those for:

Director of Royal Exhibition Building (one person);
Hairdressers' Registration Board (seven people);
President of the Metropolitan Fire Brigades' Board (one person); and
Victorian Institute of Marine Sciences Superannuation Fund (two persons).

The Committee will forward details of the schemes to the Treasurer and the Review Committee on Salaries and Allowances for Statutory Appointees.

While the provisions of these schemes seem reasonable, the Committee is concerned that special public sector superannuation schemes should not be allowed to proliferate and that their formation should be subject to the approval of the Treasurer.

RECOMMENDATION 5.2

THAT NO FURTHER SPECIAL SUPERANNUATION SCHEMES BE INITIATED WITHOUT THE EXPRESS APPROVAL OF THE TREASURER.

COMMITTEE ROOM, 22 OCTOBER 1984

APPENDIX 1

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
CURRENT ACT AND LATEST AMENDMENTS	Parliamentary Salaries & Super'n Act, 1968, as amended by Acts Nos. 7800, 8047,8086, 8118, 8530,8663, 8687, 9117, 9432 and 9753 (Dec. 1982).	Parliamentary Contributory Super'n Act, 1948. Admin. Changes (Consequential Provisions) Act, 1978.Parl. Contributory Super'n Amend. Act, 1978 and 1979. Jurisidiction of Courts (Misc. Amends.) Act, 1979.Parl. Contributory Super'n Amend.Act,1981 and 1983.	Parliamentary Contributory Super'n Act, 1971 No. 53 , as amended by Acts Nos. 48, 1972(2); 71, 1972(3); 67,1975(4); 6, 1979(5); 132, 1979(6); 14, 1980(7); 18, 1980(8); 86, 1981(9); and 153, 1983.	Parliamentary Contributory Super'n Act, 1970 (No.1 of 1970);amended by No.47 of 1971 and No. 20 of 1974. Super'n Acts Amend. Act No.14 of 1984.	Parliamentary Super'n Act, 1974-1982.	Parliamentary Super'n Act, 1970, (No. 36) as amended by Acts No.22 of 1971, No.94 of 1975, No.115 of 1976 and No.54 of 1980.	Parliamentary Super'n Act, 1973, as amended by Acts No.70 of 1973, No.67 of 1974, No.41 of 1976, No.88 of 1979, No.15 of 1982, No. 92 of 1982, No.99 of 1982 and No.62 of 1983.	Legislative Ass'y Members Super'n Act, 1979, as amended by Statute Law Revision Acts No.6 of 1981 & No.58 of 1983.
MEMBERSHIP	Persons who have received a salary as a Member of Parliament (s.15).	Members of either House. Additional benefits to members who were statutorily defined as office holders (No.41 of 1978).	Members of either House or a person who has ceased to be a member but is in receipt of a salary (s.3).	Persons who have been a member of the Legis. Ass'y (s.17) (Unicameral Parliament).	A person who is a member of either House or has been a member and is still in receipt of a salary (s.5(1)).	Members of either House.	Members of either House.	Members of the Legislative Territory (Unicameral Parliament).

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
RATES OF CONTRIBUTION	(a) 11½% of the gross amount of each instalment of salary before any deduction (s.14). (b) Members may also contribute up to 10% of salary to 'Supplementary Retirement Account).	11½% of : (a) the mthly amount of parl. allowance, and (b) the mthly amount of additional salary in respect of any ministerial or other office held except that where - (c), in the case of (a), they have completed 18 yrs' service, or (d), in the case of (b), they have attained their max. additional retiring allowance, in which case members contribute 5¾% of the appropriate salary (s.13).	12½% of gross amount of each instalment of salary before deductions (s.18).	11½% of the gross amount of each instalment of salary before any deductions (s.15).	11½% of salary (s.14(2)). Members in receipt of "additional salary" also contribute to fund at rate of 11½% of their additional salary (s.14(3)).	11½% of gross amount of each instalment of salary (s.11(1)), reducing to 5.75% after 20 yrs' cont'n to Fund (s.11(1a)).	12% of annual parl. salary (s.13(2)).	11½% of basic salary. In the case of a member in receipt of additional salary, member may elect to contribute 11½% of aggregate of his basic salary and additional salary (s.16,17).

APPENDIX 1 (cont'd)

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
MINIMUM PARLIAMENTARY SERVICE TO QUALIFY	Aggregate period of 15 yrs or more; or for an aggregate period of 8 yrs or more if defeated at election or on resignation or not seeking re-election on grounds satisfying trustees; or 6 yrs & not less than 3 Parls. and being 60 yrs of age or over (s.15(1)).	Completed 12 or more yrs' service, or has on 4 occasions ceased to be a member on dissolution or expiration of the House of which he is a member or on expiration of his term of office; or, if retirement is involuntary (incl. where member is aged over 60), the member will be entitled to a retiring allowance if he has completed not less than 8 yrs' service or has on 3 occasions ceased to be a member on dissolution or expiration of the House of which he is a member or on expiration of his term of office (s.18).	Aggregate of 7 yrs & ceases to be a member for any reason. No min. service req'mt exists for members to qualify for a pension on grounds of ill health retirement (s.19(1)).	Aggregate period of 11 yrs or more; or for an aggregate period of 8 yrs if defeated at election, not re-endorsed by his political party or satisfies trustees (s.17).	If "voluntary retirement", not less than 15 yrs, or not less than 5 Parls. & not less than 13 yrs' service, or attained 60 yrs of age & not less than 6 yrs' service. If "involuntary retirement", not less than 6 yrs (s.16).	15 yrs or more; or not less than 7 yrs if the former member has attained 55 yrs of age, is defeated at election, is in ill health or satisfies trustees that his failure to seek re-election or resignation is justified (s.14(1).	15 yrs or more; or not less than 8 yrs if member is over 65 yrs or former member is not re-endorsed by his political party or is expelled therefrom, is defeated at an election, or is not a candidate for reasons satisfying the trustees (s.16).	15 yrs or more; or if service of 10 yrs, or 3 full terms of the Ass'y and member does not stand for re-election for reasons satisfying trustees, is defeated for election or pre-selection or resigns (s.19).

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
BENEFITS IF SERVICE QUALIFIC-ATIONS ARE MET	$\frac{AxB}{C}$ where A is 50% of basic salary plus 1/6% for each mth exceeding 8 yrs up to a max. of 75% of basic salary. B is total salary received during service. C is total basic salary for the same period (s.15(1)).	Min. of 50% of parl. allowance increasing by 2.5% for each yr in excess of 8 years to a max. of 75% for 18 years or more (s.18(6)). Additional retiring allowance is payable for service in a ministerial or other office for which additional salary is received. Additional retiring allowance is a %-age of salary of that office from time to time. The %-age is 6.25 times the no. of yrs & parts of a year served in that office. Additional retiring allowances are aggregated & there is an upper limit of 75% of salary paid from time to time for the highest paid office held by member (s.18(9), (10),(10A),(10B)).	Determined according to formula $\frac{AxB}{C}$ where A is 48.8% of current basic salary plus 0.2% for every mth after 7 yrs, or 80% of current basic salary, whichever is lesser. B is total salary rec'd. C is total basic salary in respect of that person (s.19(1)).	In accordance with formula $\frac{AxB}{C}$ where A is 41.2% of basic salary in force immediately prior to resignation plus 0.2% for each mth of service exceeding 8 yrs up to a max. of 70%. B is total salary actually rec'd. C is total basic salary in respect of member's period of service in Legis. Ass'y (s.17(1)).	(a) 41.2% of basic salary increasing thereafter by 0.2% for each mth in excess of 6 yrs but not exceeding 75% of salary. (b) For a member who has been in receipt of "additional salary" pension $= \frac{(BP-X)HS}{BS} + X$ B is 41.2% of basic salary plus 0.2% for each mth in excess of 6 yrs but not exceeding 75% of salary. HS is the sum of BS plus the highest aggregate of additional salary the member would have rec'd in his most remunerative 6-yr period, at the rates of salary payable at time of his retirement. BS is 6 times the basic salary. X is 4.8% of basic salary (s.17).	According to formula $\frac{AxB}{C}$ where A is 38.8% of basic salary plus a further 1.2% for each additional period of 6 mths of service in excess of 7 yrs up to a max. of 26 such periods. B is total salary paid. C is total basic salary (s.13(1), 14(4)).	According to formula $\frac{AxB}{C}$ where A is 41.2% of basic salary after 8 yrs but less than 9 yrs, increasing by 4.2% p.a. for 4 yrs, then 1.5% p.a. for 8 yrs to a max. of 70% after 20 yrs. B is total salary rec'd. C is total basic salary (s.16(3), (4) & Second Sched.).	Calculated by formula $\frac{AxB}{C}$ where A is an amount calculated at the rate equal to the aggregate of: (i) 46% of current basic salary; plus (ii) 2.4% in respect of each completed year of service in excess of an aggregate period of service of 10 yrs; or 70%, whichever is the lesser amount. B is total salary rec'd as a member. C is total basic salary in respect of that person (s.19(1c)).

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
BENEFITS IF SERVICE LESS THAN MINIMUM	Refund of contributions and of payments made to the fund of benefits transferred from other funds, less any amount previously refunded, together with 2-1/3 times the refunds in the case of involuntary resignation, or 1-1/6 times the refund in the case of voluntary resignation (s.15(2), (3A).	A member who does not qualify for a retiring allowance is entitled to a lump sum payment, which comprises a refund of contributions, a supplement from the C/wlth and refund of any contributions transferred from other super'n funds (s.18(2)). The supplement is 2-1/3 times the contributions (over the last 8 years) where retirement is involuntary, or 1-1/6 times where retirement is voluntary (s.18(2), (4)).	A member who is not entitled to an annual pension is entitled to a refund of contributions, together with a supplementary benefit of: (i) where he ceases to be a member involuntarily, 2-1/3 times the amount of that refund; or (ii) in any other case, 1-1/6 times the amount of that refund (s.22A(1) and 22A(2)). Involuntary retirement occurs where member: (a) becomes age 60; (b) resigns for good reasons; or (c) termination of Ass'y and is defeated, fails to gain preselection or does not stand for good reasons (s.22A(3)).	Refund of deductions, together with simple interest at 3½% less any amount previously refunded (s.17(2)). For new members after 22.10.83 and continuing members electing to be new members benefit as above, except with interest at 5% p.a. compound for amounts from 22.10.83 (s.17(2)). Where retirement is for reason of ill health, member qualifies for a pension in accordance with $A \times \frac{B}{C}$ as set out in this statement under "Benefits if Meet Service Qualifications" (s.19).	Refund of contributions increased by 3% for each year of service in excess of 1 year (s.22). If retirement due to ill health, annual pension is calculated normally but if service is less than 6 years, pension is as if 6 years had been completed (s.18).	Refund of twice amount of contributions, together with interest thereon at a rate determined by the trustees, less any amount previously refunded (s.14(3)).	Refund of contributions less any amount previously refunded(s.18(1)). If retirement due to ill health, entitled to an annual pension assessed as if he had attained 8 yrs' service (s.17).	Refund of contributions plus interest at rate determined by trustees (s.21). If retirement due to ill health, entitled to an annual pension assessed as if he had attained 10 yrs' service(s.22(2)).

APPENDIX 1 (cont'd)

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
BENEFIT TO SPOUSE	(a) 2/3rds of member's pension or 40% p.a. of basic salary, whichever is greater at date of member's death (s.18(1) & (3)). (b) Where member had served for less than 8 yrs, 40% p.a. of basic salary from time to time (s.18(3)). (c) Where former member had commuted whole or part, 2/3rds of pension that would have been payable if he had not converted, or 40% of basic salary, whichever is greater (s.18(1)(a)).	Pension of 5/6ths of pension that was payable to the deceased (s.19).	(a) ¾ of pension payable to former member at time of his death or 45% of current basic salary, whichever is greater. (b) On death of member, pension of 3/4 of the pension that would have been payable if member had retired at date of death, or 45% of basic salary, whichever is greater. (c) Where a member had served less than 7 years, rate is 45% of current basic salary. (d) Where former member had commuted part of pension, ¾ of pension as if had not converted, or 45% of basic salary, whichever is greater (s.23). "Qld. cont'd" (d) For 'new' members under (b) or (c) pension not granted unless spouse 'wholly financially dependent' on member. Lump sum determined by actuary granted in some cases (20(4), 20B). For female dependents (Subject to specific reqm'ts of Act, where member has no spouse) - as for widows (s.22).	On death of former member - spouse benefit is the greater of either 40% of members basic salary or 5/8 of members pension (2/3 if 'new' member). Pension adjusted for any previous conversion to lump sum (s.20(1),(1A), (1B)). (b) On death of member having served aggregate of 8 yrs - 5/8 (2/3rds in case of new member) of pension, that would have been payable had he/she retired, or 40% of basic salary which -ever is greater (s.20(2)). (c) On death of member before serving aggregate of 8 yrs - 40% of basic salary at time of member's death (s.20(3)).	(a) For surviving spouse of a member pensioner: (i) 75% of actual pension that was payable to member pensioner; or (ii) 40% of basic salary at time member became a pensioner plus allowance for any additional salary received as a member, updated by CPI; whichever is the greater. If part of pension had been commuted, spouse pension is proportionately reduced. (b) For surviving spouse of a deceased member: (i) 75% of the pension that member would have been entitled to as if retired; and (ii) 40% of basic salary plus allowance for additional salary; whichever is the greater (s.24 and 25).	2/3rds of member, or former member's pension, or 2/3rds of pension payable to member who had contributed to the fund for 16 yrs, whichever is greater (s.19). Where former member has commuted part or whole to lump sum, pension payable ignores any such conversion (s.19(1)).	(a) 5/8ths of a former member's pension or 40% of member's annual basic salary, whichever is greater (s.19(2) & (3)). (b) Where the former member had served for less than 8 yrs, 40% of his annual basic salary (s.19(4)).	Spouse of a former member (until death or re-marriage) shall be entitled to an annual pension at the rate of 5/8ths of the pension that would have been payable to the member, or 40% p.a. of basic salary, whichever is greater. The spouse of a member who has served 10 yrs or 3 full terms shall be entitled to 5/8ths of the pension that would have been payable but for his death or 40% of the basic salary, whichever is greatest. If a member dies before serving 10 yrs or 3 full terms, his spouse is entitled to a pension of 40% of basic salary. Any commutation to lump sum is ignored in the calculation of the pension (s.24).

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
BENEFIT TO CHILDREN	Where member or pensioner dies leaving no spouse, or where the spouse of a deceased pensioner dies leaving a child, an allowance to each child as the trustees think fit, but not to exceed amount payable to spouse (s.18(6)).	Orphaned children receive ¼ of the widow's pension, or if more than 4 children, the widow's pension divided by the no. of children (s.19AA).	Children under 18 or who are students under age of 25, are entitled to an annual pension at rate of 10% of current basic salary of members in the case of children where there is no surviving spouse, or 5% of that salary where deceased member or former member is survived by a spouse (s.23).	Trustees may in their absolute discretion pay (an allowance) to children under 16, or under 25 if full-time students of deceased member, but only at a rate not exceeding widow's pension and only if widow is deceased (s.21).	(a) Where a spouse is alive and there are 1 or 2 eligible children, 1/3rd of the difference between a deceased member's notional pension and the spouse's pension payable to each child. In the case of 3 or more eligible children, the difference is divided equally between the children (s.28). (b) Where spouse is not alive; for 1 child 45% of notional pension, for 2 children 40% each, for 3 children 30% each. For 4 or more children the notional pension divided by number of children (s.29). Definition of "child" as per Qld.	An annual allowance of 3% of member's basic salary to any child, provided member's widow survives. If widow does not survive him 6% of member's basic salary (s.23). Definition of "child" as per Qld (s.23).	A pension at rate of 5% of former member's pension, provided the spouse survives. If member's spouse does not survive, a pension at rate of 20% of member's pension (s.20). Definition of "child" as per Qld, except student pension ceases at 21 yrs or completion of full-time education, whichever is earlier.	Where no spouse survives, a dependent child shall be payable as the trustees think fit, an allowance of ¼ of pension payable to the deceased spouse or, if there are more dependent children than 4, the amount that would be payable in respect of 4 such children equally between all of them (s.24).
BENEFIT TO OTHERS	<u>To personal reps.</u> Where not survived by spouse or children, a refund of 3-1/3 times contributions and any amount paid to fund, less any previous refunds (s.15(3) and 15(3A)).	<u>To personal reps.</u> Where not survived by spouse or children, the excess of contributions plus C/wlth benefits over benefits already paid (s.19AB).	<u>To personal reps.</u> Where a member of Parl. dies without leaving a spouse or children, the amount payable to his legal personal rep. is the excess of contributions, together with a supplementary benefit of 2-1/3 times his/her contributions over benefits already paid (s.22A(4)).	<u>To personal reps.</u> Where not survived by widow, female dependent or child, amount payable had member ceased to be a member for reasons other than death on that date (s.17(3)).		<u>To other persons</u> Where contributions and interest greater than benefits paid, the difference to be paid to persons as directed by trustees (s.24).	<u>To personal reps.</u> Where no surviving spouse or child, a refund of contributions less any amount previously refunded (s.18(2)).	

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
COMMUTATION OF BENEFITS	A former member may, within 3 mths, convert all or part of the pension entitlement to a lump sum of: (a) If under age 66, 10 times the annual amount of pension converted; or (b) If over age 66, 10 less 1/24 of the excess number of mths by which age exceeds 65 yrs (s.16).	A former member entitled to a retiring allowance other than on grounds of ill health, may not earlier than 3 mths before and not later than 3 mths after his retirement, elect to convert not more than 50% of that retiring allowance to a lump sum payment of: (a) If under age 66 on retirement, or if member attained age 66 during his last term of office, 10 times the annual amount of pension converted; (b) In any other case the annual amount of pension converted multiplied by $10-\frac{X}{24}$ where X = the no. of mths by which the retired member's age at time of entitlement to retiring allowance exceeds 65 (s.18B(4).	(a) A former member entitled to pension may, within 3 mths after his retirement, elect to have portion of his pension entitlement converted to a lump sum benefit, which is 10 times the annual amount of the portion of the pension entitlement converted. The portion of the pension entitlement that may be converted is as follows: (i) On retirement under age 45, up to 75% of annual pension entitlement on retirement. (ii) On retirement over age 45, up to 75% of annual entitlement, reducing by 1% for each yr to a max. 50% at age 70 yrs or over (s.20). (b) Certain widows or widowers may also convert part of their pension to a lump sum (s.23A).	A former member under the age of 75 entitled to a pension may, within 3 mths after retiring, elect to convert all or part of his pension entitlement to a lump sum payment of: (a) If under age 66 on retirement, 10 times the annual amount of pension converted; or (b) If aged 66 or over on retirement, the annual amount of pension converted multiplied by 10 less half the difference between age on retirement and 65 (s.18). Spouses of "new members" can convert pension to lump sum within 6 mths. Lump sum determined by actuary (s.20A).	A former member entitled to a pension may, within 3 mths after his retirement, elect to have part of his pension entitlement converted to a lump sum benefit, which is 10 times the annual amount of the portion of the pension entitlement converted. The portion of the pension entitlement that can be converted varies from a max. 75% on retirement at age 45 or under, to a max. of 30% on retirement at age 60 or over. If a retiring member has more than 20 yrs' service but the max. commutation would otherwise be less than 40%, the max. is increased to 40% (s.21). The commutation provisions apply equally to a pension on retirement due to ill health (s.21).	A former member entitled to a pension may, within 3 mths after his retirement, elect to have pension converted to a lump sum benefit. A. <u>% commutation</u> (i) If under 45 yrs 6 mths - 100% of annual pension entitlements. (ii) Between $45\frac{1}{2}$ and 65 yrs - 100% - $1\frac{1}{4}$% for each period of 6 mths by which he exceeds 45 years. (iii) 65 or more yrs - no more than 50%. B. <u>Multiplying factor</u> (i) less than 66 years - amount in Part A multiplied by 10. (ii) 66 or more yrs - amount in Part A multiplied by 10 <u>less</u> half the no. by which the person's age in complete years exceeds 65 yrs (s.16(2)).	No provision. <u>W.A. (cont'd)</u> If a member retires on grounds of ill health with less than 15 yrs' service, commutation does not apply unless the member is 55 when he ceases to be a member (s.16(3)). Within 6 mths spouse can commute pension up to 50% max., as per commutation factors shown above (s.19B).	A former member entitled to a pension under s.19 may elect to convert all or part of his pension entitlement to a lump sum payment. If former member is under 66, the lump sum is equal to 10 times his annual pension. If over age 66, the annual pension is multiplied by the no. derived by deducting from 10 half the difference between age of member and 65. From the date of payment of the lump sum the annual pension is reduced by the amount of annual pension in respect of which the election was made (s.25). The commutation provisions do not apply to retirements due to ill health (s.25(4)).

AUSTRALIAN PARLIAMENTARY SUPERANNUATION SCHEMES

	Victoria	Commonwealth	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Nthn. Territory
SUSPENSION OF BENEFITS	Benefit ceases if former member again becomes a member(s.23(1)). Benefit suspended if former member becomes member of other Parliaments or accepts an office or place of profit under the Crown (s.23(2)).	Allowance cancelled if again becomes a member (s.20(3)).	Right to pension ceases if becomes a member again (s.25(1)). Right is suspended if person becomes a member of Parls. of other States or C/wlth (s.25(2)(a)). Pension of pensioners other than former members who become members are suspended (s.25(2)(b). If person receiving a pension from other parliamentary schemes (States or C/wlth), NSW pension may be suspended or modified (s.26).	Where former member (a) becomes a member of any Parl. or (b) holds any Crown office for profit, pension is reduced by amount of remuneration or salary rec'd (s.24).	(a) Benefit ceases if member pensioner again becomes a member (s.20(1)). (b) If member pensioner becomes holder of office under laws of C/wlth, State or Territory, payment is reduced by the amount of that salary received, unless member elects to receive refund of contributions plus 3% for each year of service in excess of 1 yr (s.19).	Right to pension ceases if former member again becomes a member (s.21). Where former member becomes member of other Parl. or holds Crown office for profit, pension reduces to max. of 2/3rds (s.22).	Where former member again becomes member pension ceases (s.24). Where becomes, or spouse becomes, member of other Parl., pension is suspended (s.25).	Where former member becomes a member, or member of other Parls., or accepts an offer of profit from the Crown, pension is suspended (s.28).
PROVISION FOR AUTOMATIC ADJUSTMENTS TO PENSIONS	Pensions are adjusted whenever Parliamentary basic salary is changed as pensions are defined in terms of "basic salary".	Because retiring allowance entitlements are expressed as a %-age of the parl. allowance or additional salaries of office payable from time to time, the amount of the retiring allowance will increase each time the parl. allowance or additional salaries payable to serving members are increased.	Pension rates are related to the current basic salary of private members from time to time and are increased proportionally each time the salary increases.	Subject to adjustment in August each yr in accordance with the movement in the Brisbane CPI for the 12 months ended on the previous 30 June (s.25A).	All pensions adjusted according to %-age changes between Adelaide CPI for the June qtr of one yr and the CPI for the June qtr of the next. Where the increase is less than 1%, adjustments are deferred (s.35).	Pensions adjusted according to the %-age changes between Perth CPI for the Dec. qtr of one year and the Perth CPI for Dec. qtr of the next year (s.15B(1), (2)). Where the CPI decreases, no such adjustment is made (s.15B(5)).	Parl. pensions adjusted automatically on 1st July each yr to bring them into line with movement in the Parl. basic salary as determined pursuant to Section 3 of Parl. Salaries & Allowances Act, 1973.	Pensions increased proportionally when there is an increase in the basic salary of a member of the Assembly.

APPENDIX 2

LIST OF ORGANISATIONS AND PERSONS MAKING SUBMISSIONS TO THE INQUIRY

1. Berkeley, H.C. (Mr.) Q.C., Solicitor-General for Victoria

2. Dixon, The Hon. Judith Lorraine, Member of the Legislative Council of Victoria for Boronia

3. E.S. Knight & Co.

4. Evans, Bruce James (Mr.), Member of Parliament of Victoria for East Gippsland

5. Halsall, Peter (Mr.)

6. Kent, The Hon. Daniel Eric, Minister of Agriculture

7. Richards, Larry (Mr.)

8. Shand, David A. (Mr.)

9. Thompson, James (Mr.)

10. Victorian Parliamentary Former Members Association

11. Waldron, B.J. (Mr.), Auditor-General for Victoria

12. Waldron, His Honour Glenn Royce Donald, Chief Judge of the County Court of Victoria

13. Warfe, Len (Mr.)

APPENDIX 3

LIST OF PERSONS GIVING EVIDENCE TO THE INQUIRY

1.	Armstrong, G.(Mr.)	Trust Office, Office of the Public Trustee	22 July 1983
2.	Berkeley, H.C.(Mr.) Q.C.	Solicitor-General for Victoria	29 July 1983
3.	Champion, Ron (Mr.)	Director of Superannuation, Policy and Management, Department of Management and Budget	13 August 1984
4.	Cullen, R.B.(Dr.)	Chairperson, Public Service Board of Victoria	24 June 1983
5.	Edmund, The Hon. Cyril Thomas (M.P.)	Trustee, Parliamentary Superannuation Fund	21 July 1983
6.	Faulkner, P.(Ms.)	Manager, Public Sector Policy Branch, Public Service Board of Victoria	13 August 1984
7.	Hastie, Mal (Mr.)	Secretary, Parliamentary Superannuation Fund	10 June 1983 21 July 1983
8.	Moran, T.(Mr.)	Acting General Manager, Services Delivery, Public Service Board of Victoria	13 August 1984
9.	O'Neill, D.(Ms.)	Acting Manager, General Staffing, Public Service Board of Victoria	13 August 1984
10.	Owen, David (Mr.)	Consulting Actuary	22 June 1983
11.	Phillips, A.(Mr.)	Secretary, Public Service Board of Victoria	24 June 1983

12.	Shaw, K.(Mr.)	Trust Officer, Office of the Public Trustee	22 July 1983
13.	Smith, D.(Mr.)	General Manager, Policy and Tribunal, Public Service Board of Victoria	13 August 1984
14.	Spencer, P.T.(Mr.)	Public Trustee, Office of the Public Trustee	22 July 1983
15.	Viney, R.T.(Mr.)	Principal Consultant, Legal, Public Service Board of Victoria	24 June 1983

APPENDIX 4

EXTRACTS OF THE MINUTES AND VOTES OF THE LEGISLATIVE COUNCIL AND THE LEGISLATIVE ASSEMBLY

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

Friday, 2 July 1982

34. JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

(a) The Honourable P.D. Block, B.P. Dunn, G.A. Sgro, D.K. Hayward and A.J. Hunt be members of the Economic and Budget Review Committee;

Question-put and resolved in the affirmative.

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

Thursday, 20 October 1982

8. ECONOMIC AND BUDGET REVIEW COMMITTEE - The Honourable A.J. Hunt moved, by leave, That the Honourable P.D. Block be discharged from attendence upon the Economic and Budget Review Committee and that the Honourable J.V.C. Guest be added to such Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS
OF THE LEGISLATIVE ASSEMBLY
Thursday, 1 July 1982

36. COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982-

(a) Mr. Gavin, Mr. Harrowfield, Mr. McCutcheon, Mr. McNamara, Mr. Richardson, Mr. Rowe and Mr. Sheehan (Ivanhoe) be appointed members of the Economic and Budget Review Committee.

(Mr. Fordham)-put and agreed to.

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS
OF THE LEGISLATIVE COUNCIL
Tuesday, 14 June 1983

14. ECONOMIC AND BUDGET REVIEW COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable A.J. Hunt be discharged from attendance upon the Economic and Budget Review Committee and that the Honourable G.P. Connard be added to such Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE
LEGISLATIVE ASSEMBLY
Tuesday, 6 March 1984.

5. ECONOMIC AND BUDGET REVIEW COMMITTEE - Motion made, by leave, and question - That Mr. Richardson be discharged from attendance on the Economic and Budget Review Committee and that Mr. Ramsay be appointed in his stead.

(Mr. Fordham)-put and agreed to.

APPENDIX 5

EXTRACTS FROM THE PROCEEDINGS OF THE COMMITTEE

The Minutes of the Proceedings of the Committee show Divisions which took place during the consideration of the Draft Report. A summary of those proceedings follows:

Monday, 22 October 1984

Division No. 1

RECOMMENDATION 3.2.

"THAT, IF AGREEMENTS ARE NOT FORTHCOMING TO WIDEN THE ROLE OF THE COMMONWEALTH REMUNERATION TRIBUNAL, THERE BE ESTABLISHED IN VICTORIA AN INDEPENDENT REMUNERATION TRIBUNAL"

Amendment proposed - That the words "REMUNERATION TRIBUNAL" (where second occuring) be omitted with the view of inserting in place thereof the words "SUPERANNUATION TRIBUNAL UNTIL SUCH TIME AS THE POWERS OF THE COMMONWEALTH REMUNERATION TRIBUNAL ARE BROADENED IN ACCORDANCE WITH RECOMMENDATION 3.1."

(Mr. Connard)

Question - That the words proposed to be omitted stand part of the recommendation - put.

Committee divided

AYES, 5	NOES, 3
Mr. P.M. Gavin, M.P.	Hon. G.P. Connard, M.L.C.
Hon. J.V.C. Guest, M.L.C.	Mr. P.J. McNamara, M.P.
Hon. D.K. Hayward, M.L.C.	Hon. J.H. Ramsay, M.P.
Mr. A. McCutcheon, M.P.	
Mr. B.J. Rowe, M.P.	

And so it was resolved in the affirmative.

A Minority Report on this issue is on page 96.

Division No. 2

3.1.2 A Parliamentary Remuneration Tribunal

The Committee is concerned about a range of matters dealing with parliamentary superannuation provisions. These cover the appropriate design of a parliamentary scheme, anomalies in the current scheme provisions, and the mechanisms for change which exist in the various parliamentary schemes in Australia (see Table 2.1).

It is also clear that the public has a poor opinion of parliamentary superannuation schemes stemming largely from inappropriate comparisons with other public and private sector schemes. A particular contributory factor is that parliamentarians are seen as having a free hand in the establishment of their own salaries, allowances and superannuation benefits.

The Committee believes that one way in which salary and superannuation reviews can be considered objectively is to move away from the system wherein superannuation is considered in isolation from salaries and allowances to one in which a tribunal exists to review and recommend, on an annual basis, changes deemed necessary to parliamentary remuneration. Rather than establishing a new tribunal, the Committee believes it more appropriate to expand the terms of reference of the Commonwealth Remuneration Tribunal to enable it to consider superannuation and, therefore, the total remuneration package of parliamentarians. The Commonwealth Remuneration Tribunal

would thus be responsible for the determination of basic salary, additional salary, expense allowances, and the contribution and benefit provisions of the various parliamentary superannuation schemes. In its broader role, the tribunal should operate within the framework of the Conciliation and Arbitration Commission and should be established by Commonwealth and State legislation. The respective States and other interested parties should be able to make submissions to the tribunal.

RECOMMENDATION 3.1

THAT THE RESPONSIBILITIES OF THE COMMONWEALTH REMUNERATION TRIBUNAL BE WIDENED TO INCLUDE SUPERANNUATION AND THAT THIS TRIBUNAL SHOULD MAKE DETERMINATIONS ON PARLIAMENTARIANS' TOTAL REMUNERATION ON AN ANNUAL BASIS.

The Committee believes it is desirable to have a uniform method of determining the appropriate level of parliamentarians' total remuneration for the Commonwealth and across all States. This would assist in preventing leapfrogging of benefits. The Committee also believes that to minimise costs and to encourage consistency between the various States and the Commonwealth it is important not to duplicate efforts in this area. However, it is recognised that it may be difficult to gain the support of all governments and that it would be feasible, in the first instance, to simply involve Victoria and the Commonwealth in the proposed tribunal. This would still have the advantages of reducing duplication and encouraging a wider review of parliamentarians' total remuneration. If this is not feasible, the Committee proposes that the Victorian Government should establish a separate remuneration tribunal.

RECOMMENDATION 3.2

THAT, IF AGREEMENTS ARE NOT FORTHCOMING TO WIDEN THE ROLE OF THE COMMONWEALTH REMUNERATION TRIBUNAL, THERE BE ESTABLISHED IN VICTORIA AN INDEPENDENT REMUNERATION TRIBUNAL.

This recommendation is consistent with maintaining a stable relationship, such as presently existing for schemes, between the total remuneration of Victorian parliamentarians and the total remuneration of Commonwealth parliamentarians.

Question - That paragraphs 3.1.2 stand part of the Report - put.

The Committee divided

AYES, 7	NOES, 1
Hon. G.P. Connard, M.L.C.	Mr. P.J. McNamara, M.P.
Mr. P.M. Gavin, M.P.	
Hon. J.V.C. Guest, M.L.C.	
Hon. D.K. Hayward, M.L.C.	
Mr. A. McCutcheon, M.P.	
Hon. J.H. Ramsay, M.P.	
Mr. B.J. Rowe, M.P.	

And so it was resolved in the affirmative.

Division No. 3

3.2.2 A Review Procedure for the Judges' and Governor's Pension Schemes

The pension benefits of the Judges of the Supreme and County Courts are linked to current judges' salaries. The Governor's pension is linked to the salary of the Chief Justice of Victoria. The Constitution Act 1975 and the County Court Act 1958 specify the salary levels for these Judges and include appropriate indexation arrangements. The effect of these indexation arrangements flows through to pensions.

It appears that while there is a link between salary movements and pensions there is no procedure to review the total remuneration package of either the

Judges or the Governor. The tribunal proposed under Recommendations 3.1 or 3.2 would provide an appropriate forum.

While it is considered appropriate for the parliamentarians' remuneration position to be considered annually, the indexation arrangements already in place for Judges' salaries and de facto for the Judges' and Governor's pension, imply that reviews would be needed less frequently. In the case of the Governor, it would be suitable for the total remuneration package to be reviewed at the beginning of the term of each incumbent. This follows Commonwealth Government procedure, where the Governor-General's salary is fixed at the beginning of each term of office.

The Standing Committee of Commonwealth and State Attorneys-General currently monitor all aspects of the terms and conditions of employment of Judges of the various jurisdictions throughout Australia. Given that the current indexation arrangements are working satisfactorily, it is only over a period of time that relativities would change significantly. Therefore the issue of the overall level of Judges' remuneration could be considered by the Remuneration Tribunal on the recommendation of the Victorian Attorney-General. In making such a recommendation, the Attorney-General should consider advice from the Chief Justice of Victoria.

RECOMMENDATION 3.3

THAT THE TOTAL REMUNERATION OF THE GOVERNOR BE REVIEWED BY THE REMUNERATION TRIBUNAL OF RECOMMENDATION 3.1 AT THE BEGINNING OF THE TERM OF EACH INCUMBENT.

RECOMMENDATION 3.4

THAT THE REMUNERATION OF JUDGES OF THE SUPREME COURT AND COUNTY COURT BE CONSIDERED BY THE REMUNERATION TRIBUNAL OF RECOMMENDATION 3.1 FROM TIME TO TIME AS RECOMMENDED BY THE ATTORNEY-GENERAL.

Amendment proposed - That the words "The tribunal proposed under Recommendation 3.1 or 3.2 would provide an appropriate framework." be omitted.

(Mr Ramsay)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 3	NOES, 4
Mr. P.M. Gavin, M.P.	Hon. D.K. Hayward, M.L.C.
Mr. A. McCutcheon, M.P.	Hon. J.V.C. Guest, M.L.C.
Mr. B.J. Rowe, M.P.	Mr. P.J. McNamara, M.P.
	Hon. J.H. Ramsay, M.P.

And so it was passed in the negative.

Division No. 4

Further amendment proposed - That the words "In the case of the Governor, it would be suitable for the total remuneration package to be reviewed at the beginning of the term of each incumbent" be omitted with the view of inserting in place thereof the words "...In the case of the Governor, it would be suitable for the total remuneration package to be reviewed at the beginning of the term of each incumbent by the Parliament of Victoria."

(Mr. Ramsay)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 3	NOES, 4
Mr. P.M. Gavin, M.P.	Hon. D.K. Hayward, M.L.C.
Mr. A. McCutcheon, M.P.	Hon. J.V.C. Guest, M.L.C.
Mr. B.J. Rowe, M.P.	Mr. P.J. McNamara, M.P.
	Hon. J.H. Ramsay, M.P.

And it was passed in the negative.

Question - That the words proposed to be inserted be so inserted - put and agreed to.

Division No. 5

Further amendment proposed - That the words "Therefore the issue of the overall level of Judges' remuneration could be considered by the Remuneration Tribunal on the recommendation of the Victorian Attorney-General. In making such a recommendation, the Attorney-General should consider advice from the Chief Justice of Victoria" be omitted with the view of inserting in place thereof the words "Therefore the issue of the overall level of Judges' remuneration could be considered by the Parliament of Victoria on the recommendation of the Victorian Attorney-General. In making such a recommendation, the Attorney-General should consider advice from the Chief Justice of Victoria."

(Mr. Ramsay)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 3	NOES, 4
Mr. P.M. Gavin, M.P.	Hon. D.K. Hayward, M.L.C.
Mr. A. McCutcheon, M.P.	Hon. J.V.C. Guest, M.L.C.
Mr. B.J. Rowe, M.P.	Mr. P.J. McNamara, M.P.
	Hon. J.H. Ramsay, M.P.

And so it was passed in the negative.

Question - That the words proposed to be inserted be so inserted - put and agreed to.

Division No. 6

Further amendment proposed - That in Recommendation 3.3 the words "Remuneration Tribunal of recommendation 3.1" be omitted with the view of inserting the words "Parliament of Victoria"

(Mr. Ramsay)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 3	NOES,4
Mr. P.M. Gavin, M.P.	Hon. D.K. Hayward, M.L.C.
Mr. A. McCutcheon, M.P.	Hon. J.V.C. Guest, M.L.C
Mr. B.J. Rowe, M.P.	Mr. P.J. McNamara, M.P.
	Hon. J.H. Ramsay, M.P.

And so it was passed in the negative.

Question - That the words proposed to be inserted be so inserted - put and agreed to.

Division No. 7

Further amendment proposed - That in Recommendation 3.4 the words "Remuneration Tribunal of Recommendation 3.1" be omitted with the view of inserting in place thereof the words "Parliament of Victoria".

(Mr. Ramsay)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 3	NOES,4
Mr. P.M. Gavin, M.P.	Hon. D.K. Hayward, M.L.C.
Mr. A. McCutcheon, M.P.	Hon. J.V.C. Guest, M.L.C
Mr. B.J. Rowe, M.P.	Mr. P.J. McNamara, M.P.
	Hon. J.H. Ramsay, M.P.

And so it was passed in the negative.

Question - That the words proposed to be inserted be so inserted - put and agreed to.

Division No. 8

Further amendment proposed - That the words "Given these advantages the Committee supports in principle the introduction of a lump sum only scheme for parliamentarians. This scheme would provide no option for indexed pensions but individuals could purchase annuities if they so desire. In addition, it may be appropriate to provide an optional spouse benefit." be omitted.

(Mr. McNamara)

Question - That the words proposed to be omitted stand part of the paragraph - put.

Committee divided

AYES, 1	NOES, 7
Mr. P.J. McNamara, M.P.	Hon. G.P. Connard, M.L.C. Mr. P.M. Gavin, M.P. Hon. J.V.C. Guest, M.L.C. Hon. D.K. Hayward, M.L.C. Mr. A. McCutcheon, M.P. Hon. J.H. Ramsay, M.P. Mr. B.J. Rowe, M.P.

And so it was passed in the negative.

WEDNESDAY 24 OCTOBER 1984

Division No. 1

Question - That the addendum prepared by the Hon. James Guest, M.L.C., be incorporated in the main report titled "A Personal View of Superannuation (see page 100).

Committee divided

AYES, 7	NOES, 3
Hon. G.P. Connard, M.L.C. Hon. B.P. Dunn, M.L.C. Mr. P.M. Gavin, M.P. Hon. J.V.C. Guest, M.L.C. Hon. D.K. Hayward, M.L.C. Mr. P.J. McNamara, M.P. Hon. J.H. Ramsay, M.P.	Mr. J.D. Harrowfield, M.P. Mr. B.J. Rowe, M.P. Hon. G.A. Sgro., M.L.C.

And so it was resolved in the affirmative.

MINORITY REPORT

by

The Honourable G.P. Connard, M.L.C.

and

The Honourable J.H. Ramsay, M.P.

Pursuant to S4N(4)

of the

Parliamentary Committees Act 1968

A STATE REMUNERATION TRIBUNAL VERSUS A STATE SUPERANNUATION TRIBUNAL FOR PARLIAMENTARIANS:

CHAPTER 3, SECTION 3.1.2, MAIN REPORT

1.0 This minority report is to present the arguments against the proposed Recommendation 3.2, a recommendation designed to create a Victorian Remuneration Tribunal to consider Parliamentary salaries and conditions, including superannuation, as a 'total employment package'.

Such a tribunal is recommended only as a second best alternative to Recommendation 3.1, which proposes that the present arrangement linking Victorian parliamentary salaries to the Commonwealth Remuneration Tribunal should be extended to include superannuation provisions as well, and, if possible, broadened to include all State Parliaments.

Full support is offered to Recommendation 3.1, but as it will require the agreement of the Commonwealth at least, and preferably one or more other States as well, its implementation may take time.

If that agreement is not forthcoming, Recommendation 3.2 suggests, as a fall back position, that Victoria should terminate the existing link with the Commonwealth Remuneration Tribunal and establish an independent Victorian Remuneration Tribunal as described above.

We do not support such a proposal, preferring that the existing link with the Commonwealth be retained and that a separate Victorian Superannuation Tribunal be established as an interim measure.

2.0 Our arguments against a State Remuneration Tribunal are that:

(a) it would mean withdrawing from the current arrangements for the determination of salaries and allowances which have operated in an effective manner through the Commonwealth Remuneration Tribunal; this is at least a part-way step to achieving sensible comparability

between Parliaments and reduces unnecessary political odium in relation to salary determination. To withdraw now would be a backward step;

(b) it could exacerbate leapfrogging unless tight government or parliamentary direction is exercised over the tribunal's proceedings. Such an imposition would be contrary to the principles of an independent review of total remuneration;

(c) this type of tribunal would be expected to make determinations and reviews on an annual or more frequent basis. This means the tribunal would be a continuous extra cost; and

(d) there is a potential for inequities to develop between Victorian and other States' and Commonwealth parliamentarians in terms of their total remuneration.

3.0 The arguments for a State Superannuation Tribunal are:

(a) it could work in conjunction with the existing arrangements as established with the Commonwealth Remuneration Tribunal without destroying the level of concord already established;

(b) as noted, above, the tribunal would be an interim measure pending the ultimate development of recommendation 3.1. It would, however, allow the development of a body of knowledge of parliamentary superannuation which could then be developed further when the expanded Commonwealth Remuneration Tribunal is established.

(c) it could be implemented immediately and provide a quick and acceptable counter to the problem of the public's poor perception of parliamentary superannuation. This situation arises from the parliamentarians determining directly the level and type of their own superannuation provisions; and

(d) the tribunal would not be an on-going body for review and would only be convened when necessary and therefore would result in lower operating costs.

4.0 In conclusion, the major recommendation of the Committee's report is for the expansion of the Commonwealth Remuneration Tribunal so that it can consider salaries, allowances and superannuation of Commonwealth and all States' parliamentarians. The importance of the need to consider total remuneration cannot be overstated but this does not mean the Victorian government should set up its own special remuneration tribunal. The setting up by the State Government of a parliamentary superannuation tribunal should only be seen as an interim measure, however, this tribunal would provide a discernably independent forum for the review and determination of Victorian parliamentarians' superannuation.

ADDENDUM

A PERSONAL VIEW OF SUPERANNUATION

by

The Honourable J.V.C. Guest, M.L.C.

1.1 The most important points made in this addendum to the main report relate to the whole area of public sector superannuation. They were not printed with the Committee's main report "Final Recommendations and Options for the Future Reform of Victorian Public Sector Superannuation" (September 1984) for a number of reasons, largely procedural.

1.2 The Committee's very competent staff, and the Committee itself, have done much to vindicate the development of a well-resourced Parliamentary Committee system.

1.3 There is no doubt that adoption by the Government of the Committee's recommendations, including the option for existing public sector employees to join the proposed new scheme for all increases in salary, would make a substantial contribution to Victoria's economic welfare. Furthermore, the report to which this minority report is attached should be recognised as a trail-blazing recommendation for the simultaneous determination of all major elements of remuneration.

1.4 It is however regrettable that the Government's offer of a new superannuation scheme for Melbourne Transit Authority tramways employees at a time when, as the Government knew, the Committee was on the point of making its final recommendations, has done much to undermine the value and credibility of Parliamentary Committees and could scarcely be better designed to discourage the kind of dedicated service by Committee members and staff which is required to produce a substantial, bipartisan report of real value.

The proposed tramways scheme differs substantially from the Committee's proposed new scheme in both the level and form of benefits. Its existence must inevitably constrain the Government in attempting to tackle the major problems of public sector superannuation dealt with by the Committee's reports. If the answer to this objection is that reform of public sector superannuation is a very long term project that answer would stand in

unfortunate contrast with the action of the N.S.W. Government in deciding last month to institute a scheme for new entrants from 1st January 1985 designed on the same principles as the Committee's scheme.

2.1 The design of a major superannuation scheme of any complexity is likely to involve compromises between competing interests and priorities. This will happen whether the design is produced by a team of professional consultants, a management team or a parliamentary committee. It is therefore not a valid criticism of the Committee's reports to note that they are not a purely logical development from a few clear principles and factual premises but are, rather, a careful pragmatic balancing of many important social, political and economic considerations within limits set by the current state of superannuation industry folk-lore.

2.2 Nonetheless, it is regrettable that all the resources of time and skill available to the Committee had to be devoted to the major task of detailing the proposed reforms. In nearly two years of work, the Committee's attention has been drawn to a great many suggested principles and options for change but practical considerations, including above all existing superannuation structures have been compelling. In consequence, questions of principle have been assumed in the Committee's reports rather than elucidated and resolved or explored, and it has proved impossible to pose and examine in detail the practicability of more radical alternatives.

This is unfortunate for the development of private as well as public sector superannuation arrangements, and, more generally, of total remuneration packages. For it is evident that superannuation is only the most important of a number of elements in remuneration packages (apart of course from salary) which have grown up over recent decades for reasons which are the antithesis of economic rationality and regardless of the public interest. Probably taxation advantages and surreptitious avoidance of restraints on straight salary or wage increases are the major reasons. (The recent building industry agreement is one example of the latter). To say that is not to deny that there were also good reasons. For example, offering and accepting security instead of cash in hand may sometimes be a very good bargain all round. But that cannot be presumed for a whole sector of the economy or even a whole

industry, and may not be true now where originally it was. Detailed consideration of radical alternatives would have made a greater challenge to time-honoured practices than was possible in the event.

3.1 Ideally the Committee would at least have devoted staff time to researching the detailed case for and against an alternative approach to public sector superannuation based on something like the following working principles:

(a) Superannuation provision should not be considered or granted apart from the total remuneration package;

(b) Equal pay for equal work;

(c) Freedom of choice for the employee rather than paternalism by employers or unions (or those interested in keeping the management of pension funds in their hands for as long as possible);

(d) Outside the area of insurance against death or disability the size of the ultimate benefit ought to be proportionate to the consumption expenditure (or income available for consumption) foregone during the earning years and the earning rate on savings. A corollary is that avoidance of risk should be bought at a price;

(e) Government and its quangos should meet the market for labour at minimum cost; and

(f) Public sector superannuation should foster an efficient and healthy capital market and its design should be such as to ensure strong interest by public sector employees in the health of the capital market.

Aspects of these principles have already been affirmed in the Committee's reports, some with considerable emphasis, but the alternative approach requires more rigorous adherence to these principles as a whole.

4.1 Amongst the more radical consequences of the alternative approach would be the detailed consideration of a different scheme of remuneration. After the value of an employee's total remuneration was determined as salaries are now he could opt from time to time for the whole to be paid as salary or for a proportion specified by himself to be paid as contribution to a superannuation fund. Such a non-contributory scheme has obvious advantages in any employment other than the service of the Commonwealth Government since it does not require contributions to be made by employees from after-tax income. In all fields of employment, it would maximise freedom of choice. It should be noted that such a scheme, unlike the new Melbourne Transit Authority scheme which has added substantially to the cost of employment, does not imply any necessary rise in the present **total remuneration** of individuals or the present labour costs of the public sector.

4.2.1 Amongst other implications of such a non-contributory scheme, it would tend to equalise the total remuneration of employees doing the same job. Under the present State Superannuation scheme, and any other conventional scheme, the differences between employees, both in terms of cost to the employer and of benefits received may be enormous. For example, a 30 year old on $20,000 a year might be effectually costing, and receiving the value of, $40,000 a year if he continues in service for 30 years and is promoted as might be expected. But if his career is frustrated and he finds his work environment so unsatisfying that he resigns after 5 years his $20,000 will prove to have been more like $19,000 because of interest lost on his superannuation contributions. The Committee's scheme (VICSESS) by providing some vesting of employer's contributions goes a small part of the way to providing a remedy for a feature of scheme design which is, on the face of it, most inequitable.

4.2.2 Another apparently inequitable feature of existing scheme design (and of VICSESS) is the relation of benefits to final salary. An alternative approach might not provide benefits related to final salary. The conventional approach has two effects which are prima facie inequitable. The examples given are only simple specimens. One is that officers of equal retiring rank and years of service will receive the same benefits despite one having paid a much greater sum of contributions because he has been in the highest office for

much longer. The other is that officers who have contributed roughly equally to the accumulated value of the fund may receive very different retirement benefits as a result of one receiving end of career promotions well beyond the other.

4.3.1 Another possible feature of an alternative approach which would have the subsidiary purpose of remedying the inequities referred to in Sections 4.2.1 and 4.2.2 is a system of benefits related to the earnings of the invested fund.

4.3.2 All actual contributions would be managed by professional investment managers chosen and regularly re-employed or replaced on a competitive basis to handle a part of the total fund. As far as possible the pay as you go (PAYG) employers would be made to conform, mutatis mutandis; e.g. notional contributions could be treated as loans back to the employer and charged with interest at a rate related to the average earning rate of the invested funds. (A major reason for this would be the added discipline for PAYG employers.)

4.3.3 The benefits payable would in the typical case be simply the accumulations on the contributions made on behalf of the particular employee. Those who served longest and gave up most in current salary to fund contributions would receive most in benefits. What is more they would share with the rest of the community in the long-term prosperity or failure of the economy as a whole more fully than public sector employees do at present.

4.3.4 Those who value certainty or security over the chance of additional gain should be able to buy their security at market prices. The scheme arrangements should help. For example, there is no reason why scheme members should not be able, within reason, to choose the form of investment they prefer for the funds contributed on their benefit: for greater certainty of outcome an endowment insurance policy might be bought; for those who prefer pensions, an annuity might be purchased with the accumulated lump sum at retirement. For department heads and other senior executives, benefits equivalent or greater than those now flowing from State Superannuation

scheme membership (or the proposed VICSESS benefits) would derive either from the contract arrangements which are likely to be increasingly common for senior executives, from achieving early promotion to high office (thereby facilitating the payment of high contributions), or by making the necessary sacrifice of current expenditure in the earlier stages of a career in order to provide the desired accumulation of contributions.

5.1 It may be that an adequate exploration of such an alternative approach would lead to fundamental reappraisal of a great deal of conventional wisdom in the area of Commonwealth taxation and in matters of industrial relations and personnel policy. Certainly the implications of the suggested alternative approach are great. It is quite possible that detailed appraisal would lead to pragmatic acceptance of the conventional wisdom in most areas. But the possible advantages to employees and employers, and to the working of the labour and capital markets, are so great that it would be extremely unfortunate if further exploration of reform based on the working principles stated in section 3 were neglected. Without neglecting the need for immediate action of Committee's reports, energetic and rigorous investigation of proposals for radical change is needed. Obvious and superficial objections about the apparent cost, or the supposed neglect in the alternative approach of one or another allegedly necessary aspect of the existing patchwork of customary superannuation features, must not prevent commitment of the necessary resources to this course.

F D Atkinson Government Printer Melbourne

LEGAL AND CONSTITUTIONAL COMMITTEE

R E P O R T

on the

STATUTE LAW REVISION (REPEALS) BILL

Ordered to be printed

D. No. 5/1982

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY, 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY, 15 SEPTEMBER 1982

11 STATUTE LAW REVISION (REPEALS) BILL - The Order of the Day was read for the consideration of the following Resolution of the Assembly:

That the proposals contained in the Statute Law Revision (Repeals) Bill be referred to the Legal and Constitutional Committee for inquiry, consideration and report.

The Honourable W.A. Landeryou moved, That the Council concur with the Resolution of the Assembly.

Question - put and resolved in the affirmative.

Ordered - That a Message be sent to the Assembly acquainting them therewith.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE

LEGISLATIVE ASSEMBLY

THURSDAY, 1 JULY 1982

36 COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * *

(b) Mr. Ebery, Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

* * * * * *

(Mr. Fordham) - put and agreed to.

WEDNESDAY, 8 SEPTEMBER 1982

16 STATUTE LAW REVISION (REPEALS) BILL - Motion made, by leave, and question - That the proposals contained in the Statute Law Revision (Repeals) Bill be referred to the Legal and Constitutional Committee for inquiry, consideration and report (Mr. Cain) - put and agreed to.

Ordered - That a Message be sent to the Legislative Council acquainting them of the resolution and seeking their concurrence therein.

REPORT

The Legal and Constitutional Committee has the honour to report as follows:

1 By joint resolution of the Legislative Assembly and the Legislative Council, agreed to on 8 and 15 September 1982, respectively, the proposals contained in the Statute Law Revision (Repeals) Bill were referred to the Legal and Constitutional Committee for inquiry, consideration and report.

2 The Committee heard evidence* from:

Mr. J.C. Finemore, O.B.E., Q.C., Chief Parliamentary Counsel; and

Mr. J. Butera, Parliamentary Counsel.

3 This Bill concerns legislation passed during the period from 1958 to the end of 1979 and repeals - (a) amending Acts which no longer have any effect; and (b) a number of Acts enacted for specific purposes which have now been completed.

Parliamentary Counsel informed the Committee that as soon as an amending Act of Parliament becomes operative it has its effect on the Principal Act and can then be repealed.

4 The Bill is only the first stage of removing spent legislation from the Statute Book.

5 Over the years there have been several consolidations made of the Acts of Parliament. As part of each consolidation there has been an Acts Enumeration and Revision Act which left out and thereby repealed all the spent provisions. The Statute Law Revision (Repeals) Bill will have the same effect in relation to Acts passed since the last consolidation which was carried out in 1958.

6 The present system of periodic reprints of Acts of Parliament greatly reduces the need for consolidation as a whole but, because different Parliamentary Counsel become involved and inconsistencies develop over a period of time, there is

**Minutes of evidence not printed.*

still a need for important and major legislation to be the subject of consolidation and amendment from time to time. This consolidation and amendment will remove some of the legislation no longer required. There will, however, be other spent Acts which need to be repealed.

7 The Committee raised the possibility of an amending Act having a section which repealed that Act after it had come into operation. Parliamentary Counsel advised the Committee that this was possible. There are dangers in adopting this practice, however, because there may be some saving provision in the amending Act that would have a life of its own.

8 Such a provision included in Acts which were solely amending or repealing other Acts and which did not have any saving provisions would greatly reduce the size of the schedule attached to any future "Repeals" Bill. The schedule attached to this Bill is in excess of 40 printed pages and it is unrealistic to expect the Committee to check every item.

The Committee has not attempted to do this. It did, however, receive evidence on the principles adopted by Parliamentary Counsel and departmental officers and has accepted those principles. In addition it has carried out a random check of ten Acts and is satisfied that the provisions contained therein are now spent and can be repealed.

9 If the current system of reprints continues, the Committee considers that there is no need for any general consolidation in the future. However, it believes that there is a need for periodic consolidation of particular Acts. Whilst these can be carried out within the existing legislative framework of re-enactments, there is a need to develop a systematic programme to do this in the case of major Acts which have been amended many times and are now becoming unmanageable, e.g. Health, Land and Local Government Acts.

10 To reduce the time consuming and laborious effort involved in compiling schedules for future "Repeals" Bills, the Committee recommends that Parliamentary Counsel be instructed to include self-repealing provisions in all future Bills which are solely amending or repealing other Acts and which do not contain any saving or transitional provisions.

11 The Committee further recommends that "Repeals" Bills be considered by the Parliament at regular intervals, thus ensuring that amending legislation which is no longer active and has no automatic repealing provisions be removed from the Statute Book.

12 The Committee accepts the principle contained in the Statute Law Revision (Repeals) Bill and commends the Bill to Honourable Members.

Committee Room

1 December 1982.

By Authority F D Atkinson Government Printer Melbourne

LEGAL AND CONSTITUTIONAL COMMITTEE

R E P O R T

on the

STATUTE LAW REVISION BILL

Ordered to be printed

D. No. 6 /1982 -83

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY, 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY, 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, that the Honourable B.W. Mier* be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY, 6 OCTOBER 1982

10 STATUTE LAW REVISION BILL - The Honourable W.A. Landeryou moved, by leave, that the proposals contained in the Statute Law Revision Bill be referred to the Legal and Constitutional Committee for inquiry, consideration and report.

Question - put and resolved in the affirmative.

Ordered - That a Message be sent to the Assembly acquainting them of the foregoing Resolution and desiring their concurrence therein.

* vice Mr. King deceased.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY, 1 JULY 1982

36 COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * *

(b) Mr. Ebery, Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

* * * * *

(Mr. Fordham) - put and agreed to.

THURSDAY, 7 OCTOBER 1982

10 STATUTE LAW REVISION BILL - RESOLUTION OF THE LEGISLATIVE COUNCIL - The Order of the Day for the consideration of the resolution of the Legislative Council was read.

Motion made and question - That this House concur with the Legislative Council and agree to the following resolution:

That the proposals contained in the Statute Law Revision Bill be referred to the Legal and Constitutional Committee for inquiry, consideration and report.

(Mr. Cain) - put and agreed to.

Ordered - That a Message be sent to the Legislative Council acquainting them accordingly.

* Mr. King died on 28 January 1983.

REPORT

The Legal and Constitutional Committee has the honour to report as follows:

1 By joint resolution of the Legislative Council and the Legislative Assembly, agreed to on 6 October 1982, the proposals contained in the Statute Law Revision Bill were referred to the Legal and Constitutional Committee for inquiry, consideration and report.

2 Explanatory memoranda dated 29 November and 7 December 1982 were received from Mr. Campbell Duncan, Legal Officer, Parliamentary Counsel's Office.

3 Items included in a Statute Law Revision Bill should be confined to matters such as the correction of references, spelling, printing, drafting and grammatical errors and amendments which should have been made as consequential amendments simultaneously with the passage of legislation.

4 With the exception of item 244, the Committee accepts that the matters included in this Bill are not of a substantive nature and can be classified as follows:

(a) Items which correct patent spelling or grammatical errors -

Items 2, 3, 4, 6, 11, 15, 16, 18, 20, 28(a), 29, 32, 45, 46, 47, 48, 49, 64, 77, 92, 93, 108, 110, 111, 112, 114, 115, 122, 124, 125, 126, 140, 142, 143, 149, 151, 154, 161, 164, 175, 176, 178, 184, 189, 211, 215, 218, 221, 242, 243, 254(a), 255, 256, 261, 266, 273, 277, 279.

(b) Items which make consequential amendments and references to Acts or provisions of an Act, bodies, persons or things which should have been made simultaneously with the passage of legislation -

Items 1, 9, 14, 17, 19, 24, 27, 30, 31, 34, 36 to 44, 52 to 55, 66, 67, 70, 71, 73, 74, 76, 78 to 80, 83 to 86, 88, 90, 91, 94, 101, 102, 104 to 107, 109, 113, 127, 129, 130, 132, 134, 137 to 139, 141, 148, 156, 160, 165, 167, 174, 177, 179 to 183, 200, 201, 203, 207, 209, 212 to 214, 216, 224 to 226, 233 to 238, 245 to 247, 250 to 253, 254(b), 258 to 260, 263 to 265, 268 to 271, 274 to 276.

(c) Items which correct or clarify incorrect or ambiguous references or numbering -

Items 5, 7, 10, 21, 23, 25, 26, 28(b),(c) & (d), 33, 35, 50, 57, 64, 68, 69, 72, 75, 81, 87, 89, 95 to 100, 103, 116, 117, 119, 120, 123, 131, 133, 136, 144 to 147, 150, 152, 153, 155, 158, 159, 162, 163, 166, 168 to 173, 185 to 188(a), 190, 191, 193, 195, 197, 198, 202, 204 to 206, 208, 210, 217, 219, 220, 222, 223, 227, 228, 230, 232, 239 to 241, 248, 257, 262, 272, 280.

(d) Items which correct patent printing or drafting errors resulting in the duplication or omission of words and expressions -

Items 8, 12, 13, 22, 51, 56, 65, 82, 121, 128, 157, 188(b), 249, 278, 281.

(e) Items which are of a non-substantive nature but do not fall precisely within any one of the four preceding categories -

Items 58 to 63, 118, 159, 192, 194, 196, 199, 229, 231, 267

5 After examining the items contained in the Bill, the Committee raised several queries which resulted in the explanatory memoranda referred to above being provided by Parliamentary Counsel. As a result of these queries, the Committee considers that certain amendments should be made to the Bill. The suggested amendments are appended to this report together with explanations.

6 In addition to those items which it is suggested should be either amended or omitted, the Committee considers that those items listed in category (e), together with item 244, require some comment or explanation by the Committee.

7 Item 244 provided for the repeal of sections 2 and 3 of the Superannuation (Amendment) Act 1977. In the Committee's opinion this amendment is of a substantive nature and should not have been included in the Schedule.

A similar item was included in the Statute Law Revision Bill 1979. When that Bill was considered by the former Statute Law Revision Committee, that Committee considered that the amendment was substantive and was not proper for a Statute Law Revision Bill.

8 The Committee accepts Parliamentary Counsel's assurance that the item was inadvertently included in the present Statute Law Revision Bill.

Accordingly, the Committee recommends that item 244 be omitted from the Bill.

9 Items 58 to 61 relate to the Schedule to the Crimes (Classification of Offences) Act 1981. The affected provisions of that schedule purport to amend various sections of the Crimes Act 1958. The purpose of those provisions was to insert the words "indictable offence" in place of "felony" or "misdemeanour" in those various sections of the Crimes Act 1958.

10 The purported amendments were, however, ineffective because the sections of the Crimes Act 1958 were previously repealed by the Crimes (Sexual Offences) Act 1980. The new sections inserted by the Crimes (Sexual Offences) Act 1980 use the new terminology "indictable offence" instead of the old "felony" or "misdemeanour".

Because these various purported amendments were ineffective, they are being repealed from the statute law to avoid possible ambiguity or confusion.

11 Item 62 removes from the Schedule to the Crimes (Classification of Offences) Act 1981 two purported amendments to the Crimes Act 1958.

The first purported amendment is to section 426 of the Crimes Act 1958. However, that section was repealed by a subsequent item in the Crimes (Classification of Offences) Act 1981. Consequently, the one Act purported to both amend and repeal the same provision.

As the subsequent amendment repealing section 426 renders the earlier attempt to amend the section ineffective, the earlier item is now being repealed to avoid possible ambiguity or confusion.

The second purported amendment is the removal of an obsolete reference from section 436 of the Crimes Act 1958. That amendment is ineffective as the expression referred to does not appear in the section. Accordingly the reference to section 436 is repealed. The apparent aim of the second purported amendment is instead achieved by item 54 of this Bill.

12 Item 63 also relates to the Schedule to the Crimes (Classification of Offences) Act 1981. It repeals the 27th item relating to the Crimes Act 1958. That item sought to repeal section 359A(2)(a) which was previously substituted by section 7 of the Crimes (Sexual Offences) Act 1980. The new section 359A did not contain a sub-section (2)(a). Accordingly the 27th item was ineffective and is now being repealed to avoid any ambiguity or confusion.

13 Item 118 relates to the Housing (Amendment) Act 1981. It repeals provisions which purported to amend the Housing Act 1958, but which were ineffective as the same amendments had been effected by the Urban Renewal (Amendment) Act 1981. The amendment is accordingly being repealed to avoid ambiguity or confusion.

14 Item 159 is intended to clarify the commencement provisions of the Lotteries Gaming and Betting (Amendment) Act 1981. The commencement provisions in section 1 refer to section 12(b) and (c) whereas in fact section 12 does not contain paragraphs (b) and (c).

This discrepancy arose as a result of the renumbering of that section consequent upon the deletion of clause 9 of the then Bill by the Legislative Assembly on 16 December 1981.

15 The amendment proposed to item 159 of the Statute Law Revision Bill 1982 is necessary to make clear that section 12 of the Lotteries Gaming and Betting (Amendment) Act 1981 did come into operation on the date of Royal Assent. Presently item 159 suffers a drafting error which, if uncorrected, would prevent the item from achieving this result.

16 The Committee notes that the deletion of clause 9 from the Bill also affected the commencement of what are now sections 9, 10 and 11(a) of the Lotteries Gaming and Betting (Amendment) Act 1981. However, as the entire Act is now in operation, subject to the ambiguity affecting section 12, the Committee is of the view that no useful purpose will be served by any other amendment to the commencement provisions.

17 Item 192 repeals another three purported amending provisions which are contained in Schedule Two to the Penalties and Sentences Act 1981. Items 130 and 131 of that Schedule were ineffective as the provisions they purported to amend, section 84(5)(b)(ii) and section 89(2)(a) of the Legal Profession Practice Act 1958, had previously been repealed by the Legal Profession Practice (Solicitors' Disciplinary Tribunal) Act 1978.

The third purported amendment - item 185 - tried to amend a section which did not then exist, namely section 25A of the Magistrates Courts Act 1971.

A section 25A was subsequently inserted but this was inserted in the desired form with the penalty expressed as "5 penalty units".

Accordingly these amendments are being repealed to avoid any ambiguity or confusion.

18 Item 194 repeals another ineffective provision of Schedule Two to the Penalties and Sentences Act 1981. The ineffective provision purported to amend section 180H(5) of the Police Offences Act 1958. However, with the prior commencement of the Police Offences (Offensive Publications) Act 1978, a new section 180H was substituted which did not have a sub-section (5).

The provision is being repealed to avoid any ambiguity or confusion.

19 Item 196 repeals an ineffective provision of Schedule Two of the Penalties and Sentences Act 1981. The ineffective provision purported to amend section 17(1) of the Summary Offences Act 1966 but failed to do so as the expression "$100" does not appear in that provision. It would appear that the expression "$1000" was intended to be substituted.

Failure of the purported amendment has resulted in section 17(1) of the Summary Offences Act 1966 having a penalty expressed in dollars rather than units. The Committee recommends that item 196 of the Bill be amended so that rather than repeal the purported amendment, the item removes the patent error contained in the purported amendment. In this way, the obvious intention of Parliament in the matter may be given effect to.

20 The Committee also draws attention to the fact that penalties for a second and third offence under section 17(1) of the Summary Offences Act 1966 are expressed in dollar terms rather than in unit terms. It would appear to be a patent error that amendments in respect of second

and third offences were not made together with the intended amendment in respect of a first offence in Schedule Two of the Penalties and Sentences Act 1981

Accordingly the Committee recommends that item 196 of the Bill be further amended to provide for direct conversion, based on the formula set out in the Penalties and Sentences Act 1981, of the penalties for the second and third offences from dollars to units.

Should the Parliament wish, as a matter of policy, to increase or decrease the penalty for a second or third offence under section 17(1) of the Summary Offences Act 1966 further substantive legislation would be required.

21 Item 199 repeals section 5(4)(c) of the Pensioners Rates Remission Act 1981. That section purports to amend section 100B(5)(i), (ii) and (iii) of the Sewerage Districts Act 1958 but in fact there are no such sub-paragraphs in section 100B(5). It may be that the amendment was intended to refer to section 100B(4), in which case it duplicates the amendment made by section 5(2)(c) of the Pensioners Rates Remission Act 1981.

Section 5(4)(c) of the Pensioners Rates Remission Act 1981 is being repealed to avoid any ambiguity or confusion.

22 Item 229 repeals item 167 in the Schedule to the Statute Law Revision Act 1981. Item 167 purported to amend section 34 of the Port of Melbourne Authority Act 1958. The words to be amended, however, did not appear in the section because the amendment had previously been made by the Port of Melbourne Authority Act 1978.

The item is being repealed to avoid any ambiguity or confusion.

23 Item 231 repeals item 223 in the Schedule to the Statute Law Revision Act 1981. Due to a drafting error, the same expression was being included in the Community Welfare Services Act 1970 as was being taken out.

Item 247 of this Bill makes the amendment that was probably intended by item 223 of the Statute Law Revision Act 1981.

24 Item 267 repeals section 10 of the Urban Renewal (Amendment) Act 1981. Section 10 caused a grammatical problem because the purported amendment had previously been made by the Statute Law Revision Act 1977.

25 In considering the items contained in the Schedule to the Bill, it is readily apparent that a number of amendments have been duplicated by different legislation, sometimes with one or two years intervening.

Where similar legislation is being drafted by different Parliamentary Counsel at the same time, the Committee sees the possibility for duplication. It expects, however, the system to be such that it would discover the duplication before the second piece of legislation was passed.

26 The problem of duplication would be obviated if statutes were placed on a computer data base. The Committee recommends that computerisation be introduced into this area as soon as possible.

In the interim, the Committee recommends that the occurrence of duplicated amendments be referred to the Chief Parliamentary Counsel for his attention.

27 The Committee recommends that the suggested amendments be made to the Bill. Subject to those amendments being made, the Committee recommends the Statute Law Revision Bill to Honourable Members.

28 The Committee wishes to record its appreciation of the valuable assistance given by its Secretary, Mr. Philip Mithen, and its Acting Secretary, Mrs. Tanya Costello, during the inquiry.

Committee Room
20 April 1983.

APPENDIX

AMENDMENTS SUGGESTED BY PARLIAMENTARY COUNSEL

1 Clause 2, sub-clause (2), after line 20 insert the following new paragraph -
"( ) Item 75 on 24 March 1982;".

2 Clause 2, sub-clause (2), page 2, paragraph (h), omit "115" and insert "114".

3 Clause 2, sub-clause (2), page 2, paragraph (i), omit "117" and insert "116".

4 Clause 2, sub-clause (2), page 2, paragraph (j), omit "119" and insert "118".

5 Clause 2, sub-clause (2), page 2, paragraph (k), omit "131" and insert "130".

6 Clause 2, sub-clause (2), page 2, paragraph (l), omit "145" and insert "143".

7 Clause 2, sub-clause (2), page 2, paragraph (m), omit "146" and insert "144".

8 Clause 2, sub-clause (2), page 2, paragraph (n), omit "155" and insert "153".

9 Clause 2, sub-clause (2), page 2, paragraph (o), omit "159" and insert "157".

10 Clause 2, sub-clause (2), page 2, paragraph (p), omit "162" and insert "160"

11 Clause 2, sub-clause (2), page 2, paragraph (q), omit "169, 170, 171, 172 and 173" and insert "167, 168, 169, 170 and 171".

12 Clause 2, sub-clause (2), page 2, paragraph (r), omit "185 and 186" and insert "183 and 184".

13 Clause 2, sub-clause (2), page 2, paragraph (s), omit "189" and insert "187".

14 Clause 2, sub-clause (2), page 2, paragraph (t), omit "190" and insert "188".

15 Clause 2, sub-clause (2), page 2, paragraph (u), omit "191, 193, 195 and 197" and insert "189, 191, 193, 194 and 195".

16 Clause 2, sub-clause (2), page 2, paragraph (v), omit "198" and insert "196".

17 Clause 2, sub-clause (2), page 2, paragraph (w), omit "205" and insert "203".

18 Clause 2, sub-clause (2), page 2, paragraph (x), omit "210" and insert "208".

19 Clause 2, sub-clause (2), page 2, paragraph (y), omit "215" and insert "213".

20 Clause 2, sub-clause (2), page 2, paragraph (z), omit "218" and insert "216".

21 Clause 2, sub-clause (2), page 2, paragraph (aa), omit "219 and 220" and insert "217 and 218".

22 Clause 2, sub-clause (2), page 2, paragraph (ab), omit "227, 228, 229, 230 and 232" and insert "225, 226, 227, 228 and 230".

23 Clause 2, sub-clause (2), page 2, paragraph (ac), omit "256" and insert "253".

24 Clause 2, sub-clause (2), page 2, paragraph (ad), omit "278" and insert "275".

25 Clause 2, sub-clause (2), page 2, paragraph (ae), omit "280" and insert "277".

26 Schedule, page 4, item 11, second column, omit "9277" and insert "9227".

27 Schedule, page 5, item 28, fourth column, paragraph (b), sub-paragraph (i), omit "(c)" and insert "(d)".

28 Schedule, page 6, item 41, fourth column, paragraph (b), before "said Act" insert "the".

29 Schedule, page 9, item 75, fourth column, omit "37(3)" and insert "9(2)".

30 Schedule, page 12, omit item 112.

31 Schedule, page 12, item 114, fourth column, after '"convenant"' insert "(where twice occurring)".

32 Schedule, page 14, omit item 135.

33 Schedule, page 15, item 153, fourth column, after "(2)" insert "(a)".

34 Schedule, page 16, item 163, second column, omit "8601 and insert "8061".

35 Schedule, page 18, item 186, fourth column, omit paragraph (a) and insert:

'(a) in sub-paragraph (iii) for the expression 'sub-paragraphs (viia) and (viii) after the words "motor cars" (where respectively occurring)' there shall be substituted the expression 'sub-paragraph (viia) after the words "motor cars"'.'

36 Schedule, page 18, item 186, fourth column, paragraph (b), omit "trailer of" and insert "trailer or".

37 Schedule, page 19, item 196, fourth column, omit all words and expressions and insert 'In Schedule Two in item 313 -

(a) for the expression '"$100"' there shall be substituted the expression '"$1000"'; and

(b) after the expression 'penalty units"' there shall be inserted the expression ', for the expression "$1500" there shall be substituted the expression "15 penalty units" and for the expression "$2500" there shall be substituted the expression 25 penalty units"'.

38 Schedule, page 20, item 221, second column, omit "8467" and insert "8407".

39 Schedule, page 21, item 234, fourth column, omit "bes" and insert "be".

40 Schedule, page 22, item 239, fourth column, omit "(1) and (7)," and insert "(1), 7,".

41 Schedule, page 22, omit item 244.

EXPLANATION OF SUGGESTED AMENDMENTS

Amendment No. 1

This amendment ensures that item 75 commences on the day on which the Act it amends came into operation. This was a drafting omission in the Bill.

Amendments Nos. 2-25

These amendments follow the re-numbering of the items in the Schedule consequent upon deletion of items 112, 135 and 244.

Amendment No. 26, item 11

This amendment corrects a typographical error in the Bill.

Amendment No. 27, item 28(b)

This amendment corrects a drafting error in the Bill.

Amendment No. 28, item 41(b)

This amendment prevents a grammatical error being created in the Act being amended.

Amendment No. 29, item 75

This amendment corrects an incorrect reference in the Bill.

Amendment No. 30, item 112

Item 112 is deleted as s.270L(5) of the Health Act 1958 does not in fact contain the purported error.

Amendment No. 31, item 114

This amendment ensures that a printer's error in s.41(7) of the Historic Buildings Act 1981 is corrected where twice occurring.

Amendment No. 32, item 135

Item 135 is no longer necessary as the grammatical error in s.107A(1) of the Landlord and Tenant Act 1958 was removed by the Residential Tenancies (Amendment) Act 1982.

Amendment No. 33, item 153

This amendment clarifies a reference in the Bill.

Amendment No. 34, item 163

This amendment corrects a typographical error in the Bill.

Amendment No. 35, item 186

This amendment prevents a grammatical error being created in the Act being amended.

Amendment No. 36, item 186

This amendment corrects a typographical error in the Bill.

Amendment No. 37, item 196

This amendment corrects an error in item 313 of Schedule Two to the Penalties and Sentences Act 1981 by providing that all penalties for offences committed under section 17(1) of the Summary Offences Act 1966 are expressed in penalty units.

Amendment No. 38, item 221

This amendment corrects a typographical error in the Bill.

Amendment No. 39, item 234

This amendment corrects a typographical error in the Bill.

Amendment No. 40, item 239

This amendment corrects an incorrect reference in the Bill.

Amendment No. 41, item 244

An item substantially similar to item 244 was included in the Statute Law Revision Bill 1979 considered by the Statute Law Revision Committee (Report on the Statute Law Revision Bill, Parliamentary Paper D-No.13 (1979-80)). In paragraph 12 of its report the Committee concluded, ".... the amendments are of a substantive nature and are therefore beyond the ambit of a Statute Law Revision Bill.".

In view of the findings of that Committee, this amendment deletes item 244.

F D Atkinson Government Printer Melbourne

LEGAL AND CONSTITUTIONAL COMMITTEE

A REPORT TO PARLIAMENT

ON

THE PROPOSALS CONTAINED IN

THE INTERPRETATION BILL 1982

Ordered to be Printed

D. No. 21/1982-83

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourable B.W. Mier be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

TUESDAY 13 SEPTEMBER 1983

4 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable J.H. Kennan be discharged from attendance upon the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY 12 OCTOBER 1983

2 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, that the Honourable W.A. Landeryou be appointed a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY 1 JULY 1982

36 COMMITTEE APPOINTMENTS - motion made, by leave, and question -

That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * * * *

(b) Mr. Ebery. Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

(Mr. Fordham) - put and agreed to.

---

* Mr. King deceased on 28 January 1983. Succeeded on Committee by the Honourable B.W. Mier.

LEGAL AND CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS

Mr. M.S. Whiting, M.P. (Chairman)
Mr. D.J.F. Gray, M.P. (Deputy Chairman)
The Honourable Joan Coxsedge, M.L.C.
Mr. W.T. Ebery, M.P.
Mr. A.T. Evans, M.P.
Mr. L.J. Hill, M.P.
Mr. G.S. Hockley, M.P.
Mr. K.S. Jasper, M.P.
The Honourable J.H. Kennan, M.L.C. (Discharged 13 September 1983)
The Honourable W.A. Landeryou, M.L.C. (Appointed 12 October 1983)
The Honourable B.W. Mier, M.L.C.
The Honourable N.B. Reid, M.L.C.
The Honourable Haddon Storey, Q.C., M.L.C.

COMMITTEE STAFF

Dr. J.A. Scutt, Director of Research
Mr. M.L. Bromley, Secretary
Mrs. M. Caraher, Stenographer

TABLE OF CONTENTS

SUMMARY OF RECOMMENDATIONS

7.2 RECOMMENDATION 1: CLAUSE 1(1) TITLE OF THE BILL

The Committee recommends that the short title of the presently named Interpretation Bill be amended to become the Interpretation of Legislation Bill.

7.5 RECOMMENDATION 2: CLAUSE 1(2) COMMENCEMENT

The Committee recommends that Clause 1(2) should be amended to read:

> *Clause 1(2) Commencement*
> *This Act shall come into operation on 1 July 1984, on proclamation of the Governor in Council published in the Government Gazette.*

7.9 RECOMMENDATION 3: CLAUSE 1(3) DIVISION INTO PARTS/INDEXES AND TABLES OF CONTENTS

The Committee recommends that Clause 1(3) be omitted from the Bill. All future Bills and, where appropriate, subordinate instruments should be accompanied by indexes and tables of contents. These should be produced in a detachable form so as to facilitate their updating when amendments to Acts and Regulations are made. In accordance with this recommendation an appropriate index and table of contents, in loose leaf form, should be compiled to accompany this Bill.

7.11 RECOMMENDATION 4: CLAUSE 1(1) AND (2) SHORT TITLE AND COMMENCEMENT

To facilitate compilation of a table of contents for the proposed Act, the Committee recommends that Clause 1(1) be renumbered Clause 1, and Clause 1(2) be renumbered Clause 1A.

8.3 RECOMMENDATION 5: CLAUSE 2 INTERPRETATION

The Committee recommends that Clause 2 should be amended to read:

"Subordinate instrument" means an instrument made or to be made under or pursuant to the provisions of an Act, being an instrument that -

(a) is a statutory rule; or

(b) is not a statutory rule but -

(i) contains regulations, rules, by-laws, proclamations, Orders-in-Council, orders or schemes; or

(ii) is of a legislative character.

9.8 RECOMMENDATION 6: CLAUSE 9(1)(b)(ii) TIME OF COMMENCEMENT AND DATE OF PASSING ACTS

The Committee recommends that the word "and" should be omitted where it appears at the end of clause 9(1)(b)(i), and Clause 9(1)(b)(ii) should be replaced with the following sub-clauses:

(ii) in the case of an Act that received the Royal Assent before the commencement of this Act and was not reserved by the Governor for the signification of Her Majesty's pleasure, at the beginning of the day on which the Act received the Royal Assent; and

(iii) in any other case, at the beginning of the twenty-eighth day after the day on which the Act receives the Royal Assent, unless the contrary intention appears in that Act.

Every effort should be made to ensure that every Act is published and available to the public from the Government Printer at the time that Act comes into force.

10.2 **RECOMMENDATION 7: CLAUSE 12**

PROVISIONS AS TO EFFECT OF REPEAL ETC. OF ACTS

The Committee recommends that the words "unless the contrary intention expressly appears" should replace the words "unless the contrary intention appears" in clause 12(1) and (2).

11.1 **RECOMMENDATION 8: CLAUSE 13(1)**

The Committee recommends that where the words "unless the contrary intention appears" appear in Clause 13(1), the words "unless the contrary intention expressly appears" be substituted.

12.1 **RECOMMENDATION 9: CLAUSE 14**

The Committee reiterates the position taken in relation to Clauses 12(1) and (2) and 13(1) and recommends that where the words "unless the contrary intention appears" appear in Clause 14, the words "unless the contrary intention expressly appears" be substituted.

12.4 **RECOMMENDATION 10: CLAUSE 14 (a) (iii) AND (iv)**

The Committee recommends that the interpretation of primary and subordinate legislation alone should be covered by the proposed Act, and consequently sub-clauses (iii) and (iv) of Clause 14(a) should be omitted from the Bill.

12.6 **RECOMMENDATION 11: CLAUSE 14 (a) (iv)**

The Committee recommends that, if Recommendation 10 (that private documents not be included in the terms of the Bill) is not accepted by the Parliament, sub-clause (iv) of Clause 14(a), being redundant, should be omitted from the proposed Act.

13.7 **RECOMMENDATION 12: CLAUSE 19**
SUBORDINATE INSTRUMENTS TO BE CONSTRUED
SUBJECT TO EMPOWERING ACT

The Committee recommends that Clause 19 be omitted from the Bill and be replaced by a new Clause 19 providing:

> *Clause 19. Subordinate Instruments to be construed subject to empowering Act*
>
> *(1) Every subordinate instrument shall be construed as operating to the full extent of, but so as not to exceed, the power to make the subordinate instrument conferred by the Act under or pursuant to which it is made.*
>
> *(2) Where a provision of a subordinate instrument, or the application of any such provision to any person, subject-matter or circumstance, is construed as being in excess of the power conferred by the Act under or pursuant to which it is made the whole of the subordinate instrument shall be rendered invalid.*
>
> *(3) The provisions of this section do not derogate from any provision of an Act under or pursuant to which a subordinate instrument is made relating to the construction or extent of the operation, of that subordinate instrument.*

14.2 **RECOMMENDATION 13: CLAUSE 20A**
TIME OF COMMENCEMENT OF
SUBORDINATE INSTRUMENT (NEW CLAUSE)

The Committee recommends the inclusion of a new Clause 20A, to follow Clause 20 in the Bill, providing:

20A. Time of commencement of subordinate instruments.

Where in respect of a subordinate instrument (not being a statutory rule) or a provision of such a subordinate instrument a particular day is fixed (whether in the subordinate instrument or in the Act under or pursuant to which the subordinate instrument is made) for it to come into operation, the subordinate instrument or the provision of the subordinate instrument comes into operation at the beginning of that day.

15.3 RECOMMENDATION 14: CLAUSE 24 (1) AND (2) PROVISION AS TO EFFECT OF REPEAL, ETC. OF SUBORDINATE INSTRUMENTS

The Committee recommends that Clause 24(1) and (2) be amended to incorporate the word "expressly" before the word "appears" where the phrase "unless the contrary intention appears" appears in each sub clause.

16.2 RECOMMENDATION 15: CLAUSE 25(1) EFFECT OF REPEAL, ETC. OF AMENDING SUBORDINATE INSTRUMENTS

The Committee recommends that the phrase "unless the contrary intention appears", where appearing in Clause 25(1) of the Bill, should be amended to read -

... unless the contrary intention expressly appears ...

17.2 **RECOMMENDATION 16: CLAUSE 26**
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that where the phrase "unless the contrary intention appears" appears in Clause 26 of the Bill, the word "expressly" should be inserted so as to read:

> ... *unless the contrary intention expressly appears* ...

17.5 **RECOMMENDATION 17: CLAUSE 26 (a) (iii) AND (iv)**
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that Clause 26(a) of the Bill should be amended by the deletion of sub-clauses (iii) and (iv).

17.7 **RECOMMENDATION 18: CLAUSE 26 (a) (iv)**
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that, should sub-clauses (iii) and (iv) of Clause 26(a) not be deleted from the proposed Act as recommended by paragraph 17.5 (supra), then sub-clause (iv) of that Clause should be deleted as being redundant.

18.5 **RECOMMENDATION 19: CLAUSE 28**
PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS
(NEW CLAUSES 28(1A) AND 28(1B)

The Committee recommends that new Clauses 28(1A) and 28(1B) be incorporated in the proposed Act, to provide:

> *Clause 28(1A)*
> *Where a subordinate instrument incorporates matter contained in a document other than an Act or statutory rule, a copy of the matter so incorporated -*

(a) must be kept available for members of the public at the offices of the body responsible for the administration of the subordinate instrument; and

(b) must be laid before Parliament where the subordinate instrument is itself required to be laid before Parliament.

Clause 28(1B)
Failure to comply with the provisions of section 28(1A) will render a subordinate instrument incorporating matter contained in a document other than an Act or statutory rule void and of no effect.

18.8 RECOMMENDATION 20: CLAUSE 28 PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS (NEW CLAUSE 28(1C)

The Committee recommends that a new Clause 28(1C) be inserted into the proposed Act, providing:

Clause 28(1C)
Material being any other writing as provided in section 28(1)(b) of this Act may be applied, adopted or incorporated into the provisions of any Act only where the relevant enabling Act so authorises.

19.2. RECOMMENDATION 21: CLAUSE 31 CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

The Committee recommends that in accordance with **RECOMMENDATION 12: CLAUSE 19. SUBORDINATE INSTRUMENTS TO BE CONSTRUED SUBJECT TO EMPOWERING ACT**, para. 13.7 at p. 24 supra, Clause 31 should be omitted from the proposed Act.

19.3 **RECOMMENDATION 22:**
CONSTRUCTION OF ACTS
NEW CLAUSE 4A

The Committee recommends that, in accordance with the acceptance of the foregoing recommendation, a new provision should be inserted into the Bill in Part III. Provisions Applicable to Acts, to provide:

Clause 4A. Construction of Acts

(1) Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.

(2) The provisions of this section are in addition to, and not in derogation of, any provision of any Act relating to the construction, or extent of the operation, of that Act.

19.5 **RECOMMENDATION 23: CLAUSE 31**
CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

The Committee recommends that if the Parliament does not accept **RECOMMENDATION 21: CLAUSE 31. CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS,** para. 19.2, at p. 39 supra, then where "additon" appears in Clause 31(2), it should be replaced with the word "addition".

20.13 **RECOMMENDATION 24: CLAUSE 32 (1) REGARD TO BE HAD TO THE PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT**

The Committee recommends that Clause 32(1) should remain as a provision of the Bill.

20.101 **RECOMMENDATION 25: CLAUSE 32(2) REGARD TO BE HAD TO PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT**

The Committee recommends that Clause 32(2) as presently drafted should be omitted from the Bill.

20.110 **RECOMMENDATION 26: CLAUSE 32(2) REGARD TO BE HAD TO PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT**

The Committee recommends that a new Clause 32(2) should be inserted into the Bill to provide:

> *Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.*
>
> *In the interpretation of a provision of an Act or subordinate instrument -*
>
> *(1) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object;* and*
>
> *(2) consideration may be given to any matter or document that is relevant including but not limited to -*

(a) *reports of proceedings in any House of Parliament;*

(b) *explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament;*

(c) *reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.*

---

*Accepted by the Committee, **RECOMMENDATION 24** at p. 51 supra.)

20.115 **RECOMMENDATION 27:**

PREAMBLES AND PURPOSE/OBJECTS CLAUSES

The Committee endorses the inclusion, where appropriate, of an "objects clause" as a preamble to certain Acts (or, where relevant, to subordinate instruments). The determination of whether such a clause is to be included in a particular Act should be left to the relevant Minister (or in the case of a private Member's Bill, to that Member).

20.123 **RECOMMENDATION 28:**

BURDEN OF PROOF IN CRIMINAL CASES

The Committee recommends that the Parliament should give consideration to referring to the Committee the whole question of burden of proof in criminal cases, with a view to placing before the Parliament recommendations as to whether the proposals of the Senate Standing Committee should be adopted in Victoria, or whether some other approach should be taken to the problem.

21.1 **RECOMMENDATION 29: CLAUSE 33**
HEADINGS, SCHEDULES
MARGINAL NOTES AND FOOTNOTES

The Committee recommends that Bills be formulated in the future with what are marginal (or side) notes today, presented as headings to each section in bold type; history of the legislation should appear as marginal notes produced in large, bold type. (This version appears as "C" in Appendix II of this Report, at p. 194 infra.)

21.9 **RECOMMENDATION 30: CLAUSE 33(3)**
MARGINAL NOTES, HEADINGS

The Committee recommends that a new sub-clause should be inserted into the Bill to provide

> *Clause 33(4)*
> *This section is to be read subject to section 32 of this Act.*

21.15 **RECOMMENDATION 31:**
PUNCTUATION AND INTERPRETATION OF LEGISLATION

The Committee believes that punctuation should be within the purview of the courts in determining the meaning of legislation, but recommends that any use of punctuation in interpreting legislation should be made subject to Clause 32 of the Bill.

22.17 **RECOMMENDATION 32: CLAUSE 34(a) AND (b)**
GENDER

The Committee approves of the inclusion of Clause 34(a) and (b). In order to make it clear beyond doubt that the Parliament no longer countenances the proposition that the masculine form is superior to the feminine and therefore should always precede it, the Committee recommends that sub-clause (a) should be transposed with sub-clause (b) in the Bill, Clause 34 (a) and (b) to read:

Clause 34. Gender and number.

In an Act or subordinate instrument, unless the contrary intention appears -

(a) words importing the feminine gender include the masculine gender;

(b) words importing the masculine gender include the feminine gender;

(c) ...

(d) ...

22.18 **RECOMMENDATION 33: CLAUSE 34 (a) AND (b) GENDER - UPDATING OF LEGISLATION**

The Committee recommends that in future drafters of legislation should make every endeavour to ensure that legislation is drafted in gender neutral terms. Updating and revision of existing legislation should be undertaken on a regular basis by Parliamentary Counsel to ensure that all Acts are cast in gender neutral form.

22.24 **RECOMMENDATION 34: CLAUSE 34 TITLES OF OFFICE-HOLDERS OF GOVERNMENT BOARDS, COUNCILS, TRIBUNALS, ETC.**

The Committee recommends that drafters of legislation should be required to include gender-neutral titles in all future statutes and subordinate instruments, where office-holders are referred to, and to omit the use of titles such as "chairman".

22.25 **RECOMMENDATION 35: CLAUSE 34 TITLES OF OFFICE-HOLDERS OF GOVERNMENT BOARDS, COUNCILS, TRIBUNALS, ETC. - UPDATING OF LEGISLATION**

The Committee recommends that general updating of existing present legislation should begin and continue on an ongoing basis, to replace masculine titles with gender neutral titles where they appear in Acts and subordinate legislation. For example, under the Equal Opportunity Act 1977 the head of the Equal Opportunity Board carries the title "Chairman". An amendment

should be included in the current Equal Opportunity (Amendment) Bill 1983 to replace "Chairman" with "Chairperson" (or "Convenor" or "President"). Similarly amendment should be made to the Planning Appeals Board Act 1980 to replace the title "chief chairman" with "chief chairperson", and "deputy chief chairman" with "deputy chief chairperson"; alternatively "president" could replace "chief chairman", "senior deputy president" could replace "deputy chief chairman"; "senior members" would become "deputy presidents" and "members" "deputy vice-presidents". Where under section 18 the chief chairman (chief chairperson) appoints a senior member as chairman of a division, that title should be changed to chairperson or president. (See ss. 6, 7, 18.) Alternatively there could be three categories, namely president, deputy president and member. (This accords with the practice under the Conciliation and Arbitration Act 1904 (Cth).

23.3 RECOMMENDATION 36: CLAUSE 35
INFAMOUS OFFENCE AND INFAMOUS CRIME

The Committee recommends that this definition should remain in the proposed Act as an interim measure, however the Law Department should locate all current Acts making reference to "infamous offence" and "infamous crime". An Act should then be drafted deleting all such references and replacing them with the appropriate terms. That Act should repeal the definition of "infamous offence" and "infamous crime" as contained in Clause 35 of this Bill.

23.7 RECOMMENDATION 37: CLAUSE 35
"LAND"

Consequently, the Committee recommends that the definition of "land" in Clause 35 of the Bill be drafted to read:

> *"Land" includes buildings and other structures being permanent fixtures on land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.*

23.13 **RECOMMENDATION 38: CLAUSE 35**

"WRITING"

The Committee believes that the definition of "writing" contained in the Bill should be accepted as representing a policy decision that technological forms of communication - for example, microfiche - are encompassed by that definition, and on that basis the definition should remain in the proposed Act.

24.2 **RECOMMENDATION 39: CLAUSE 37A (NEW CLAUSE)**

POWER TO APPOINT TO INCLUDE POWER TO REMOVE OR SUSPEND.

The Committee recommends that to cover the contingency of the need to appoint, remove or suspend a person in relation to an office or place, a new Clause 37A should be be introduced into the Bill to provide:

Clause 37A. Power to Appoint Includes Power to Remove or Suspend.

(1) Subject to sub-section (2), where an Act or subordinate instrument confers on a person or authority a power to make an appointment to an office or position, that person or authority has, unless the contrary intention appears, the power to remove or suspend a person appointed to the office or position and to appoint another person temporarily in the place of a person so removed or suspended or in the place of a sick or absent holder of the office or position.

(2) Where the power of a person or authority to make an appointment to an office or position is exercisable only upon the recommendation, or subject to the approval or consent, of some other person or authority, the power of removal or suspension conferred by sub-section (1) is, unless the contrary intention appears, exercisable only upon the recommendation, or subject to the approval or consent of that other person or authority.

25.2 **RECOMMENDATION 40: CLAUSE 40(6)**

TIME

The Committee recommends that clause 40(6) should be amended to read:

40(6) TIME

In an Act or subordinate instrument unless the contrary intention expressly appears -

(a) a reference to midnight, in relation to a particular day shall be construed as a reference to the point of time at which that day ends;

(b) a reference to a month shall be construed as a reference to a calendar month;

(c) a reference, without qualification, to a year shall be construed as a reference to a period of 12 months;

(d) unless the contrary intention appears, a reference to a financial year shall be construed as a reference to the period of 12 months ending at midnight on 30 June; and

(e) a reference to a calendar year shall be construed as a reference to the period of 12 months ending at midnight on 31 December.

26.17 **RECOMMENDATION 41: CLAUSE 41**

CONSTRUCTION OF "MAY" AND "SHALL"

The Committee recommends that Clause 41 remain a part of the proposed Act, and that a new sub-clause should be added to provide:

(3) *Any rule of law or of practice that "shall" and "may" need not be defined as in subsections (1) and (2) of this section is hereby abolished.*

27.2 **RECOMMENDATION 42: CLAUSE 47(1)**
PROVISIONS AS TO OFFENCES UNDER TWO OR MORE LAWS

The Committee recommends that the phrase "unless the contrary intention appears" appearing in Clause 47(1), should be amended to read:

unless the contrary intention expressly appears

27.4 **RECOMMENDATION 43: CLAUSE 47(1)**
PROVISIONS AS TO OFFENCES UNDER TWO OR MORE LAWS

The Committee recommends that Clause 47(1) should be redrafted to provide:

Where an act or omission constitutes an offence under two or more laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted under both, all, either or any of those laws but shall not be liable to be punished more than once for the same act or omission.

28.3 **RECOMMENDATION 44: CLAUSE 49**
CONSTRUCTION OF REFERENCES TO PROVISIONS THAT ARE NOT IN OPERATION

The Committee recommends that Clause 49 should be omitted from the proposed Act, on the basis of its superfluity.

28.5 **RECOMMENDATION 45: CLAUSE 49(B) AND (C)**
CONSTRUCTION OF REFERENCES TO PROVISIONS THAT ARE NOT IN OPERATION

The Committee recommends that, should it not be accepted that Clause 49 should be omitted, then sub-clauses (b) and (c) of that Clause, dealing as they do with private documents, should be omitted from the proposed Act.

28.7 RECOMMENDATION 46: CLAUSE 49(C)
CONSTRUCTION OF REFERENCE TO PROVISIONS
THAT ARE NOT IN OPERATION

The Committee recommends that if the Parliament does not accept that sub-clauses (b) and (c) should be omitted, then Clause 49(c) should be omitted from the proposed Act as being unnecessary.

29.3 RECOMMENDATION 47: CLAUSE 53(5)
APPLICATION OF LAWS OF VICTORIA IN CERTAIN OFFSHORE AREAS

The Committee recommends that the words "be deemed to have been proved", where they appear in Clause 53(5) of the Bill, should be omitted and replaced with the words "be evidence on its face of the fact averred."

30.3 RECOMMENDATION 48: SCHEDULE

The Committee recommends that substantive amendments to Acts should not, as a general rule, be contained in schedules to Acts. They should be drafted and entered into the Parliament as amending Acts. This practice should be adopted in the future.

REPORT

The Legal and Constitutional Committee has the honour to report as follows:

1 By joint resolution of the Legislative Assembly and the Legislative Council, agreed to on 8th December 1982, the proposals contained in the Interpretation Bill were referred to the Legal and Constitutional Committee for inquiry, consideration and report.

2 The Committee heard evidence from:

Mr. J.C. Finemore, O.B.E., Q.C., Chief Parliamentary Counsel;

Mr. E.P.A. Moran, Assistant Chief Parliamentary Counsel;

Dr. B. Creighton, Senior Lecturer in Law, Faculty of Law, University of Melbourne;

Dr. I. Elliott, Lecturer in Law, University of Melbourne;

Members of the Ad Hoc Committee of the Law Institute of Victoria:

Mr. R. Eager;

Ms. E. Grimm;

Mr. R. Hatch;

Mr. E. Kyrou;

Mr. R. Wright.

Professor Dennis Pearce, Dean of the Faculty of Law, Australian National University, Canberra; and

Members of the Victorian Bar:

Mr. E.W. Gillard, Q.C.,

Dr. Gavan Griffith, Q.C.,

Mr. G. Harris,

Mr. P. Heerey,
Mr. C. Hollis-Bee,
Mr. D. Ross,
Mr. B.J. Shaw, Q.C.

3 The Committee received written commentaries from:

Mr. G.C. Thornton, Parliamentary Counsel, Crown Law Department of Western Australia;
Law Institute of Victoria, Ad Hoc Committee;
Professor Dennis Pearce, Dean of the Faculty of Law, Australian National University, Canberra;
Professor J.G. Starke, Q.C., Editor, Australian Law Journal, Canberra;
Dr. B. Creighton, Senior Lecturer in Law, Faculty of Law, University of Melbourne;
Dr. I Elliott, Lecturer in Law, Faculty of Law, University of Melbourne;
Mr. G. Kolts, Federal Parliamentary Counsel;
The Honourable Justice Mervyn Everett, Supreme Court of Tasmania;
Mr. E.P.A. Moran, Assistant Chief Parliamentary Counsel;
Mr. W.F. Ormiston, Q.C., of the Victorian Bar;
Mr. E.W. Gillard, Q.C., of the Victorian Bar;
Mr. D. Ross, of the Victorian Bar.

4 The Interpretation Bill concerns the repeal of the Acts Interpretation Act 1958, and seeks to enact in its place a new and more comprehensive Interpretation Act. In accordance with the general purpose of interpretation legislation, the aim of the Bill is to shorten and simplify the language used in Acts of Parliament, containing definitions of expressions frequently used in Acts as well as provisions relating to the construction and application of laws generally.

5 A further purpose of the Bill is to make applicable to subordinate legislation many of the provisions contained in it. The majority of provisions contained in the Acts Interpretation Act 1958 do not apply to subordinate legislation.

6 The Committee approves of the main thrust of the Bill. In light of evidence given before it, evidence given in writing, and its own deliberations, the Committee considers the following amendments would increase the efficacy of the Bill.

7

CLAUSE 1(1)
TITLE OF BILL

The new Act is to be given the title Interpretation Act. Being designed to incorporate provisions relating to the interpretation of subordinate legislation in addition to primary legislation, it is appropriate that a new title should replace that of Acts Interpretation Act. The choice of Interpretation Act has the advantage of being short. This title is used in other Australian jurisdictions, including New South Wales, Western Australia and the Australian Capital Territory. However, the Acts in these jurisdictions deal only with statutes. In the case of the Victorian Bill, it may not be immediately clear that:

(a) the Act deals with interpretation of statutes; and

(b) the Act deals with interpretation of subordinate legislation.

The Law Institute of Victoria supports this view, expressing in its written submissions to the Committee doubts as to whether the proposed title Interpretation Act indicates sufficiently clearly to practitioners and others the full content of the draft Bill.

7.1 The Committee thinks it necessary to balance the need to abbreviate titles and content of legislation where possible, against the requirement that lawyers and others (including those from outside Victoria) should have greater ease of access to it. Accordingly, the Committee gave consideration to the title Acts and Subordinate Instruments Interpretation Act, and that of Interpretation (Acts and Subordinate Instruments) Act, both of which indicate clearly to lawyers the content of the Bill. Alternatively the Committee considered the title Interpretation of Legislation Act, which would be easily understood not only by practitioners, but also by laypersons. Noting that the Parliament has an obligation, as far as it is able, to ensure that the community as a whole has a real opportunity for understanding and gaining access to the law, the Committee favours the latter title.

7.2 RECOMMENDATION 1: CLAUSE 1(1)
TITLE OF THE BILL

The Committee recommends that the short title of the presently named Interpretation Bill be amended to become the Interpretation of Legislation Bill.

7.3 CLAUSE 1(2)
COMMENCEMENT

Clause 1(2) provides for the proposed Act to come into operation "on a day to be fixed by proclamation of the Governor in Council". The Committee is of the view that the Act should come into operation on 1 July 1984 or such earlier date as is practicable. The Act should be proclaimed to operate soon after its passage. That proclamation should take place at a time when Parliament is not sitting. The 1 July date is chosen on the basis that the Act, when passed, will be of considerable relevance to the drafting of all future Acts. Bills will be drafted mostly when Parliament is not sitting. The stipulated date would mean that Bills introduced into Parliament in the spring session 1984 would take the new provisions into account.That date will also provide ample opportunity for all seeking to obtain a copy of the legislation to do so before the Act commences.

7.4 The Committee also believes it would be of assistance to users if the date of proclamation was clearly stated on the face of the Act, and the Clause should be amended to provide for this.

7.5 RECOMMENDATION 2: CLAUSE 1(2)
COMMENCEMENT

The Committee recommends that Clause 1(2) should be amended to read:

> *Clause 1(2) Commencement*
> *This Act shall come into operation on 1 July 1984, on proclamation of the Governor in Council published in the Government Gazette.*

7.6 CLAUSE 1(3)
DIVISION INTO PARTS

Clause 1(3) outlines the parts of the proposed Act, noting that Part I contains preliminary sections, Part II provisions applicable to Acts, Part III provisions applicable to Subordinate Instruments, and Part IV provisions applicable both to Acts and to Subordinate Instruments. This clause is no doubt necessary because the Bill contains no index to contents nor table of contents. Until very recently Victorian Acts have not contained tables of contents; they do not currently contain indexes.

7.7 The argument has been put to the Committee that including indexes to contents and tables of contents in legislation would promote amongst practitioners and others an unfortunate tendency to rely too heavily upon these tools, so that they might well overlook provisions essential to their work, which are contained in the particular legislation, but are insufficiently clearly noted in the indexes or tables of contents. However the Committee believes that the advantages of providing such aids to lawyers, members of the judiciary and the magistracy, Members of Parliament and laypersons outweigh any disadvantages. The number of Acts passed by the Parliament has increased over the years, so that in 1982 141 Acts were passed. It is difficult for interested parties to acquaint themselves with the provisions of all legislation emitting from the Parliament. It is therefore essential that any facilities which can be provided to make this task easier, should be provided.

7.8 A decision of the Victorian Cabinet on 8 August 1983 confirmed the proposal that tables of contents should accompany legislation.The Committee further notes that the Australian Parliamentary Counsel provide indexes to contents and tables of contents to Acts passed by the Australian Parliament, and that these are produced in a detachable form, for ease of updating when legislation is amended. The Committee suggests that this method should be adopted in relation to all Acts passed by the Victorian Parliament, and where practicable in relation to all subordinate legislation constructed under an enabling instrument of the Victorian Parliament.

7.9 RECOMMENDATION 3: CLAUSE 1(3) DIVISION INTO PARTS/INDEXES AND TABLES OF CONTENTS

The Committee recommends that Clause 1(3) be omitted from the Bill. All future Bills and, where appropriate, subordinate instruments should be accompanied by indexes and tables of contents. These should be produced in a detachable form so as to facilitate their updating when amendments to Acts and Regulations are made. In accordance with this recommendation an appropriate index and table of contents, in loose leaf form, should be compiled to accompany this Bill.

7.10 CLAUSE 1(1) (2) SHORT TITLE AND COMMENCEMENT

In accordance with the recommendation that the Bill should be accompanied by an appropriate index and table of contents (Recommendation 3, para. 7.9 supra), the Committee recognises that this would be facilitated if the short title and commencement provisions were not separate sub-clauses of one clause, but were separate clauses. This would simply involve renumbering Clause 1(1) as Clause 1, and Clause 1(2) as Clause 1A.

7.11 RECOMMENDATION 4: CLAUSE 1(1) AND (2) SHORT TITLE AND COMMENCEMENT

To facilitate compilation of a table of contents for the proposed Act, the Committee recommends that Clause 1(1) be renumbered Clause 1, and Clause 1(2) be renumbered Clause 1A.

CLAUSE 2
INTERPRETATION

The clause defines "Subordinate instrument" as meaning:

> *an instrument made or to be made under or pursuant to the provisions of an instrument that -*
>
> *(a) is a statutory rule;*
>
> *(b) contains regulations, rules, by-laws, proclamations, Orders in Council, orders or schemes and is not a subordinate instrument by virtue of the operation of paragraph (a); or*
>
> *(c) is of a legislative character and is not a subordinate instrument by virtue of the operation of paragraph (a) or paragraph (b).*

8.1 In the past it has been considered more correct to describe a subordinate instrument as "being" (rather than "containing") regulations, rules, by-laws and the like. In its submission to the Committee the Law Institute suggested that the word "contains" in Clause 2(b) should be replaced with the word "comprises", in accordance with past usage. However it is understood that the approach taken in Clause 2(b) was adopted to highlight the distinction between the actual document and what is contained in the document. The Committee accepts that the approach taken in the Bill has merit: it accords with the practice as regards Acts, and also conforms to ordinary, everyday usage by the community.

8.2 However, the Committee considers that the phrases "subordinate instrument by virtue of the operation of paragraph (a)" contained in Clause 2(b), and "subordinate instrument by virtue of the operation of paragraph (a) or paragraph (b)" contained in Clause 2(c) are unnecessarily lengthy and confusing. One of the major aims of the proposed Act is to shorten and simplify legislation. The Committee considers that this aim should be followed through

in the terms and drafting of the Bill itself. The clauses referred to might be better expressed in the following way:

> *"Subordinate instrument" means an instrument made or to be made under or pursuant to the provisions of an Act, being an instrument that -*
>
> *(a) is a statutory rule; or*
>
> *(b) is not a statutory rule but -*
>
> *(i) contains regulations, rules, by-laws, proclamations, Orders-in-Council, orders or schemes; or*
>
> *(ii) is of a legislative character.*

This accords with the desire for brevity and clarity in the proposed Act.

8.3 RECOMMENDATION 5: CLAUSE 2 INTERPRETATION

The Committee recommends that Clause 2 should be amended to read:

> *"Subordinate instrument" means an instrument made or to be made under or pursuant to the provisions of an Act, being an instrument that -*
>
> *(a) is a statutory rule; or*
>
> *(b) is not a statutory rule but -*
>
> *(i) contains regulations, rules, by-laws, proclamations, Orders-in-Council, orders or schemes; or*
>
> *(ii) is of a legislative character.*

9 CLAUSE 9 (1)(b)(ii)

TIME OF COMMENCEMENT AND DATE OF PASSING OF ACTS.

By clause 9(1)(b)(ii) it is provided:

> *(1) Subject to sub-section (2) and to section 71 of the Constitution Act 1975, an Act or a provision of an Act comes into operation -*
>
> ...
>
> *(b) where no day is so fixed for it to come into operation -*
>
> *(i) in the case of an Act reserved by the Governor for the signification of Her Majesty's pleasure, at the beginning of the day on which a proclamation by the Governor that Her Majesty has been pleased to assent to the Act is published in the Government Gazette; and*
>
> *(ii) in any other case, at the beginning of the day on which the Act receives the Royal Assent.*

Sub-section (2) of clause 9 provides:

> *(2) Where an Act provides that the Act or provision of the Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the Government Gazette -*
>
> *(a) the publication of the proclamation in the Government Gazette shall be a condition precedent to the coming into operation of the Act or provision in question; but*
>
> *(b) if the proclamation is made on or before the day fixed by it for the coming into operation of the Act or provision in question and is not published until after that day, the proclamation shall not wholly fail but the Act or provision in question shall come into operation at the beginning of the day on which the proclamation is published in the Government Gazette.*

9.1 The Committee notes that in the past some practitioners have had difficulty in obtaining copies of Acts at the date they have come into force. This may have arisen from problems experienced by the Government Printer in producing Acts for purchase by the public and practitioners, to coincide with the date on which an Act receives Royal Assent.

9.2 With the advent of computerisation at the Government Printing Office, problems of this sort should not, except in extraordinary circumstances, now occur. However, in the advent of extraordinary circumstances, some contingency rule should be available. It is wrong in principle for citizens to have liabilities imposed on them whilst being unable to ascertain the extent of those liabilities because an Act, although already in force, has not yet been printed by the Government Printer and is therefore not readily available to members of the public.

9.3 In this regard, the Committee observes that section 5(1A) Acts Interpretation Act 1901 (Cth) makes allowance for this time lapse in providing that, unless otherwise specified, an Act does not come into operation until the passing of a fixed number of days (28) after the Royal Assent is given. Clause 4 of the Schedule to the Interpretation Bill amends the Subordinate Legislation Act 1962 to take account of the time lapse between the making and publishing of subordinate legislation. That clause provides:

> *(2) Notwithstanding the coming into operation of a statutory rule or of a provision of a statutory rule -*
>
> *(a) a person shall not be convicted of an offence consisting of a contravention of the statutory rule or provision in question where it is proved that at the time of the alleged contravention the statutory rule had not been printed and published by the Government Printer or notice of the making of the statutory rule had not been published in the Government Gazette unless it is proved that at that time*

reasonable steps had been taken for the purpose of bringing the purport of the statutory rule or provision in question to the notice of the public or of persons likely to be affected by it, or of the person charged; and

(b) a person shall not be prejudicially affected or made subject to any liability by the statutory rule or provision in question where it is proved that at the relevant time the statutory rule had not been printed or published by the Government Printer or notice of the making of the statutory rule had not been published in the Government Gazette unless it is proved that at that time reasonable steps had been taken for the purpose of bringing the purport of the statutory rule or provision in question to the notice of the public or of persons likely to be affected by it or of the person concerned.

9.4 The Committee understands that the reason for a distinction being drawn in the treatment accorded in the Bill to Acts and statutory rules arises in that Acts gain publicity through exposure and debate in the Parliament, whilst statutory rules do not. Noting this difference in the United Kingdom in Johnson v Sargant & Sons [1918] 1 K.B. 101, 103 it was stated:

While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders ...

Similarly in Canada it has been said:

... before a public Act can receive the Royal Assent and become law it must first, in the form of a Bill, be presented to and deliberated upon and conveyed or passed through its different stages at different times and on different days, by the action of the Members of the Legislative

Assembly in concourse duly assembled in the proper place designated for that purpose, at which the public, including representatives of the press, are generally permitted to be present. Therefore the proceedings necessary to enact and bring into force an Act as law binding upon the public give to it a certain measure of publicity, and it is not difficult to understand why it is a general rule of law that one cannot successfully plead ignorance of such an Act or law. But, on the other hand, an order made by a Minister ... is on a different footing than is an Act of the Legislature. The making of such an order is at the discretion of the Minister himself ... and is drawn up and signed in his private office or some other private place. (R. v Ross [1945] 1 W.W.R. 590, 592 (British Columbia.)

9.5 Nonetheless it would be ironic were the strictures obtaining to notice of and compliance with statutory rules or a provision of a statutory rule to be more exacting for Government than those relating to Acts. Every effort should be made for Acts to be printed and available to the public before they come into operation. Publication of Acts by the Government Printer prior to their coming into operation should be a standard legislative requirement. Persons should not be prosecuted or convicted unless it can be shown that at the time of coming into operation of the Act, reasonable steps had been taken to bring the purport of the legislation in question to the notice of the public.

9.6 Accordingly, one of two approaches might be adopted. Either a provision similar to the terms of the amendment to the Subordinate Legislation Act 1962 contained in Clause 4 of the schedule to the Interpretation Bill could be inserted into Clause 9 of the Bill; or a provision similar to section 5(1A) Acts Interpretation Act 1901 (Cth) could be inserted into Clause 9 of the Bill.

9.7 The latter approach is favoured by the Committee. This could be achieved by omitting the word "and" where it appears at the end of Clause

9(1)(b)(i) and replacing Clause 9(1)(b)(ii) with the following:

> *(ii) in the case of an Act that received the Royal Assent before the commencement of this Act and was not reserved by the Governor for the signification of Her Majesty's pleasure, at the beginning of the day on which the Act received the Royal Assent; and*
>
> *(iii) in any other case, at the beginning of the twenty-eighth day after the day on which the Act receives the Royal Assent, unless the contrary intention expressly appears in that Act.*

Thus there would be an extra period of one calendar month for the Government Printer to ensure supplies of relevant Acts were available to the public. Provision would also be available for the Parliament to extend that period in relation to a particular Act by indicating in that Act, if it was considered that the terms of the Act were so important as to require sufficient copies to be available to the public before its coming into force, and for some reason the Act could not be printed within the usual 28 days. Alternatively, if legislation in the way of emergency measures had to be passed, the section would provide for commencement of a particular Act after a shorter time lapse. In such a case, all reasonable steps should be taken to have the Act printed immediately, and substantial publicity should be given to it.

9.8 RECOMMENDATION 6: CLAUSE 9(1)(b)(ii) TIME OF COMMENCEMENT AND DATE OF PASSING ACTS

The Committee recommends that the word "and" should be omitted where it appears at the end of clause 9(1)(b)(i), and Clause 9(1)(b)(ii) should be replaced with the following sub-clauses:

> *(ii) in the case of an Act that received the Royal Assent before the commencement of this Act and was not reserved by the Governor for the signification of Her Majesty's pleasure, at the beginning of the day on which the Act received the Royal Assent; and*

(iii) *in any other case, at the beginning of the twenty-eighth day after the day on which the Act receives the Royal Assent, unless the contrary intention appears in that Act.*

Every effort should be made to ensure that every Act is published and available to the public from the Government Printer at the time that Act comes into force.

10 CLAUSE 12 (1) AND (2)

PROVISIONS AS TO EFFECT OF REPEAL &C. OF ACTS

Clause 12(1) provides that where an Act or a provision of an Act is repealed or expires, lapses or otherwise ceases to have effect, any Act or provision of an Act that had been repealed by the first-mentioned Act or provision -

> *shall not, unless the contrary intention appears, be construed as having been revived in consequence of the repeal, expiry, lapsing or ceasing to have effect of the first-mentioned Act or provision.* (Emphasis added.)

Subclause (2) provides that where an Act or a provision of an Act is repealed or amended or expires, lapses or otherwise ceases to have effect - the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision -

> *shall not, unless the contrary intention appears* -
>
> *(c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;*
>
> *(d) affect the previous operation of the Act or provision or anything duly done or suffered under that Act or provision;*
>
> *(e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;*
>
> *(f) affect any penalty, forfeiture or punishment incurred in respect of an offence committed against that Act or provision; or*
>
> *(g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f)* - (Emphasis added.)

10.1 If any Acts, provisions of Acts or laws are to be taken to have revived upon the repeal, expiry, lapsing or ceasing to have effect of another Act or provision, the Committee believes that this should hinge upon the express intention of Parliament, not upon an implied intent. Explicit, not implicit, revival should be required. To dispel any doubts as to the effect of the repeal, amendment, expiry, lapsing or ceasing to have effect of an Act or provision the Committee believes that rather than "unless the contrary intention appears" being the form of words used in this context, the words "unless the contrary intention expressly appears" should be substituted.

10.2 RECOMMENDATION 7: CLAUSE 12 PROVISIONS AS TO EFFECT OF REPEAL &C. OF ACTS

The Committee recommends that the words "unless the contrary intention expressly appears" should replace the words "unless the contrary intention appears" in clause 12(1) and (2).

11 CLAUSE 13(1)

EFFECT OF REPEAL ETC. OF AMENDING ACT

Clause 13(1) states that where an Act or provision of an Act, which is an Act or provision directly amending another Act or a subordinate instrument is repealed or expires, lapses or otherwise ceases to have effect, the repeal, expiry, lapsing or ceasing to have effect of that Act or provision -

> *shall not, unless the contrary intention appears, affect in any way the direct amendments made in the other Act or in the subordinate instrument or the operation or effect of those amendments.* (Emphasis added.)

As in relation to Clause 12(1) and (2), the Committee believes that any intention to affect direct amendments, where an Act or provision of an Act is repealed, expires, lapses or otherwise ceases to have effect, should be clearly spelled out. Thus the words "unless the contrary intention appears" should be replaced with the words "unless the contrary intention expressly appears".

11.1 RECOMMENDATION 8: CLAUSE 13(1)

The Committee recommends that where the words "unless the contrary intention appears" appear in Clause 13(1), the words "unless the contrary intention expressly appears" be substituted.

12 CLAUSE 14

REPEAL AND RE-ENACTMENT

Clause 14 states that where an Act or a provision of an Act is repealed and re-enacted (with or without modification) -

then, unless the contrary intention appears -

(a) any reference in -

(i) any Act;

(ii) a subordinate instrument;

(iii) a deed or other instrument; or

(iv) any other document whatsoever -

to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision; and

(b) insofar as any subordinate instrument made or other thing done under the repealed Act or provision, or having effect as if so made or done, could have been made or done under the re-enacted Act or provision, it shall have effect as if made or done under the re-enacted Act or provision.(Emphasis added.)

12.1 RECOMMENDATION 9: CLAUSE 14

The Committee reiterates the position taken in relation to Clauses 12(1) and (2) and 13(1) and recommends that where the words "unless the contrary intention appears" appear in Clause 14, the words "unless the contrary intention expressly appears" be substituted.

12.2 CLAUSE 14 (a) (iii) AND (iv)

These sub-clauses provide that where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary appears - inter alia, any reference in any Act, a subordinate instrument,

(iii) a deed or other instrument, or (iv) any other document whatsoever -

to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision.

12.3 The Committee questions the inclusion of these sub-clauses. They deal with the interpretation of private documents and instruments. The Committee believes that the interpretation of such instruments should be left to the courts in the usual way. (See for example Kell v Harris (1915) 15 S.R. (N.S.W.) 473; Lucke, "Illusory, Vague and Uncertain Contractual Terms" (1977) Adelaide Law Review 1.) Acts and subordinate legislation should be dealt with by the proposed Act. Its terms should not extend to the interpretation of private documents and instruments.

12.4 RECOMMENDATION 10: CLAUSE 14 (a) (iii) AND (iv)

The Committee recommends that the interpretation of primary and subordinate legislation alone should be covered by the proposed Act, and consequently sub-clauses (iii) and (iv) of Clause 14(a) should be omitted from the Bill.

12.5 CLAUSE 14 (a) (iv)

If Parliament takes the contrary view (that the interpretation of private documents should be covered by the proposed Act), then the Committee questions the need for reference to "any other document whatsoever": 14(a)(iv). The phrase "deed or other instrument": 14(a)(iii) is sufficiently broad to cover relevant documents - contracts and the like - to which the phrase might refer. In the Committee's view, the inclusion of "any other document whatsoever" in Clause 14 is calculated to cause confusion amongst those having recourse to the legislation and in the interpretation of the provision by the courts. Its deletion would not restrict the proper operation of the clause.

12.6 RECOMMENDATION 11: CLAUSE 14 (a) (iv)

The Committee recommends that, if Recommendation 10 (that private documents not be included in the terms of the Bill) is not accepted by the Parliament, sub-clause (iv) of Clause 14(a), being redundant, should be omitted from the proposed Act.

13 CLAUSE 19

SUBORDINATE INSTRUMENTS TO BE CONSTRUED SUBJECT TO EMPOWERING ACT

This clause provides that the "rule of severance" applicable to primary legislation should apply to subordinate legislation. That is, where any part of a subordinate instrument is struck down as being outside the power of the Act under or pursuant to which it is made, that part of the subordinate instrument which is within the power of that Act under or pursuant to which it is made should be construed as a valid provision, and the application of that provision to other persons, subject-matters or circumstances shall not be affected by the striking down of the part which is ultra vires.

13.1 The Committee observes that there has been some uncertainty about the application of the ultra vires rule to subordinate legislation. Some analyses hold that the severance rule applicable to primary legislation extends to subordinate legislation. Another approach has been that, where any part of a subordinate instrument is outside the power of the Act under or pursuant to which it is made, the whole of the subordinate instrument should be construed as failing; it will be struck down on the ground of the instrument being ultra vires. The reasoning behind this approach has been that those upon whom the power to frame subordinate legislation is conferred must be required to exercise all care in constructing such legislation; to ensure the requisite care is taken, the ultra vires doctrine should be applied strictly. The Committee is not convinced that it is wise to remove this strong incentive to have those exercising subordinate legislative power ensure, as far as possible, that in all respects that subordinate legislation is within power conferred by the enabling Act.

13.2 Furthermore, the doctrine of ultra vires and rules governing severance where primary legislation is in question are construed favourably by the courts so as to maintain the validity of legislation unless it is clear without doubt that the ultra vires doctrine has been breached. Severance is "the last resort". (See Deputy Federal Commissioner of Taxation (New South Wales) v W.R. Moran

Proprietary Limited (1939) 61 C.L.R. 735; R. v Commonwealth Court of Conciliation and Arbitration ex parte Whybrow & Co. and Others (1910) 11 C.L.R. 1, 36.)

13.3 Every Act is presumed valid. That presumption is not easily rebutted. As was stated by Mr. Justice Isaac in Federal Commissioner of Taxation v Munro (1926) 38 C.L.R. 153, 180:

> *Nullification of enactments and confusion of public business will not lightly be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down ... it must be allowed to stand ...*

Similarly, Mr. Justice Starke in Deputy Federal Commissioner of Taxation (New South Wales) v Moran Proprietary Limited (1939) 61 C.L.R. 735, 773 said:

> *One cannot but be impressed, as Higgins, J. said in Attorney-General for New South Wales (1908) 6 C.L.R. 469, 590, 'with the wisdom of the practice so well established ... never to decide against an Act as [ultra vires] except "in the last resort and as a necessity in the determination of real, earnest and vital controversy between individual ..."'*

(See also Wynes, Legislative Executive and Judicial Powers in Australia, 5th ed. 1976, Sydney at p.35; South Australia v Commonwealth (1942) 65 C.L.R. 373, 432; also Commonwealth of Australia and Another v State of Tasmania and Others (1983) 57 A.L.J.R. 450, at 502-504 for an extensive review of the authorities.)

13.4 The Committee firmly believes that subordinate legislation ought to be closely monitored to avoid abuse of delegated power. (See generally Eugene Forsey, Subordinate Legislation, the Rule of Law and the Constitution, 1982, unpublished paper.) It would be contrary to the interests of the public to extend the rules governing the validity and severability of primary legislation to

subordinate legislation, by way of the proposed Act. Therefore, Clause 19 should be omitted from the Bill.

13.5 A new Clause 19 should be drafted to provide:

Clause 19. Subordinate instruments to be construed subject to empowering Act.

(1) Every subordinate instrument shall be construed as operating to the full extent of, but so as not to exceed, the power to make the subordinate instrument conferred by the Act or pursuant to which it is made.

(2) Where a provision of a subordinate instrument, or the application of any such provision to any person, subject matter or circumstance, is construed as being in excess of the power conferred by the Act under or pursuant to which it is made, the whole of the subordinate instrument shall be rendered invalid.

(3) The provisions of this section do not derogate from any provision of an Act under or pursuant to which a subordinate instrument is made relating to the construction, or extent of the operation, of that subordinate instrument.

13.6 Parliamentary Counsel advised the Committee that only on rare occasions are provisions of subordinate instruments found to be outside the power of the enabling Act. It is therefore only on rare occasions that this provision would operate. Should the occasion arise, however, where the relevant subordinate instrument has been in effect for some time, and holding the entire instrument invalid might cause administrative problems of some magnitude, it would remain with Parliament to review the situation. That is, Parliament could pass an Act validating the remainder of the subordinate instrument, in effect

severing the provision found to be outside power. Alternatively, Parliament could pass an Act deeming the instrument to be valid in its entirety (that is, including the provisions held to be outside power). In either of these cases, Parliament would be exercising control over the subordinate instrument in accordance with the view of the Committee that the interests of the public should be safeguarded by close monitoring of such legislation to avoid the abuse of delegated power.

13.7 RECOMMENDATION 12: CLAUSE 19 SUBORDINATE INSTRUMENTS TO BE CONSTRUED SUBJECT TO EMPOWERING ACT

The Committee recommends that Clause 19 be omitted from the Bill and be replaced by a new Clause 19 providing:

> *Clause 19. Subordinate Instruments to be construed subject to empowering Act*
>
> *(1) Every subordinate instrument shall be construed as operating to the full extent of, but so as not to exceed, the power to make the subordinate instrument conferred by the Act under or pursuant to which it is made.*
>
> *(2) Where a provision of a subordinate instrument, or the application of any such provision to any person, subject-matter or circumstance, is construed as being in excess of the power conferred by the Act under or pursuant to which it is made the whole of the subordinate instrument shall be rendered invalid.*
>
> *(3) The provisions of this section do not derogate from any provision of an Act under or pursuant to which a subordinate instrument is made relating to the construction or extent of the operation, of that subordinate instrument.*

14 CLAUSE 20A

TIME OF COMMENCEMENT OF SUBORDINATE INSTRUMENTS (NEW CLAUSE)

Under section 4(2) the Acts Interpretation Act 1958 provides that where an Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws is or are expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

14.1 By section 3(1) of the Subordinate Legislation Act 1962 (as proposed to be inserted by Clause 4(a) of the Schedule to the Bill), the effect of that provision is preserved in relation to statutory rules. The Committee believes it is additionally desirable to preserve it in relation to subordinate instruments other than statutory rules. This could be effected by the inclusion of a new clause, Clause 20A, to follow Clause 20, providing:

> *20A. Time of commencement of subordinate instruments.*
>
> *Where in respect of a subordinate instrument (not being a statutory rule) or a provision of such a subordinate instrument a particular day is fixed (whether in the subordinate instrument or in the Act under or pursuant to which the subordinate instrument is made) for it to come into operation, the subordinate instrument comes into operation at the beginning of that day.*

14.2

RECOMMENDATION 13: CLAUSE 20A TIME OF COMMENCEMENT OF SUBORDINATE INSTRUMENT (NEW CLAUSE)

The Committee recommends the inclusion of a new Clause 20A, to follow Clause 20 in the Bill, providing:

20A. Time of commencement of subordinate instruments.

Where in respect of a subordinate instrument (not being a statutory rule) or a provision of such a subordinate instrument a particular day is fixed (whether in the subordinate instrument or in the Act under or pursuant to which the subordinate instrument is made) for it to come into operation, the subordinate instrument or the provision of the subordinate instrument comes into operation at the beginning of that day.

15 CLAUSE 24 (1) AND (2) PROVISIONS AS TO THE EFFECT OF REPEAL, ETC. OF SUBORDINATE INSTRUMENTS

Clause 24(1) provides that on the repeal, expiry, lapse or otherwise ceasing to have an effect of any subordinate instrument or provision thereof, any subordinate instrument or provision of a subordinate instrument that was repealed by the former "shall not, unless the contrary intention appears" be taken to have revived in consequence of the repeal, expiry, lapsing or otherwise ceasing to have effect of the former.

15.1 Clause 24(2) provides that where a subordinate instrument is repealed or amended, or expires, lapses or otherwise ceases to have effect, the repeal, amendment, expiry, lapsing or ceasing to have effect "shall not, unless the contrary intention appears":

> *(c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;*
>
> *(d) affect the previous operation of that subordinate instrument or provision or anything duly done or suffered under that subordinate instrument or provision;*
>
> *(e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;*
>
> *(f) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that subordinate instrument or provision; or*
>
> *(g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as mentioned in paragraphs (e) and (f) - ...* (Emphasis added)

15.2 The Committee's comments in relation to any revival of former Acts or provisions of an Act upon repeal, expiry, lapsing or ceasing to have effect of a later Act: Clause 12 (at pp. 16-17 supra) are applicable to subordinate legislation. Any revival of a subordinate instrument or provision of a subordinate instrument should be required to be explicitly, not implicitly, stated upon repeal, expiry, lapsing or ceasing to have effect of a later subordinate instrument or provision that affected the earlier instrument or provision thereof. In accordance with its recommendations in relation to Clause 12(1) and (2), Clause 13(1) and Clause 14 (at pp. 16-19 supra) dealing with repeal, expiry, lapsing or otherwise ceasing to have effect of Acts, and repeal and reenactment of Acts, the Committee believes that the word "expressly" should appear in Clause 24(1) and (2) relating as they do to subordinate instruments.

15.3 RECOMMENDATION 14: CLAUSE 24 (1) AND (2) PROVISION AS TO EFFECT OF REPEAL, ETC. OF SUBORDINATE INSTRUMENTS

The Committee recommends that Clause 24(1) and (2) be amended to incorporate the word "expressly" before the word "appears" where the phrase "unless the contrary intention appears" appears in each sub clause.

16 CLAUSE 25(1)

EFFECT OF REPEAL, ETC. OF AMENDING SUBORDINATE INSTRUMENT

Clause 25(1) provides that where a subordinate instrument or provision of a subordinate instrument, being a subordinate instrument or provision thereof that directly amended another subordinate instrument or an Act, is repealed or expires, lapses, or otherwise ceases to have effect, the repeal, expiry, lapsing or ceasing to have effect "shall not, unless the contrary intention appears, affect in any way the direct amendments made in the other subordinate instrument or in the Act or the operation or effect of those Amendments." (Emphasis added.)

16.1 In accordance with its comments and recommendations in relation to Clauses 12(1) and (2), 13(1), 14 and 24(1) and (2), (at pp. 16-19, 27-28 supra) the Committee believes that the Clause should be amended to include the word "expressly" in the relevant phrase.

16.2 RECOMMENDATION 15: CLAUSE 25(1)

EFFECT OF REPEAL, ETC. OF AMENDING SUBORDINATE INSTRUMENTS

The Committee recommends that the phrase "unless the contrary intention appears", where appearing in Clause 25(1) of the Bill, should be amended to read -

... unless the contrary intention expressly appears ...

17.

CLAUSE 26

REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

Clause 26 provides that where a subordinate instrument or a provision of a subordinate instrument is repealed and remade (with or without modification) then,

unless the contrary intention appears -

(a) any reference in -

(i) any subordinate instrument;

(ii) an Act;

(iii) a deed or other instrument; or

(iv) any other document whatsoever -

to the repealed subordinate instrument or provision shall be construed as a reference to the re-made subordinate instrument or provision; and

(b) insofar as any subordinate instrument made or other thing done under the repealed subordinate instrument or provision having effect as if so made or done, could have been made or done under the re-made subordinate instrument or provision, it shall have effect as if made or done under the re-made subordinate instrument or provision. (Emphasis added.)

17.1 In accordance with its recommendations on Clauses 12(1) and (2), 13(1), 14, 24(1) and (2) and 25(1), (at pp. 16-19, 27-29 supra), the Committee believes that this provision should be made explicit, by the inclusion of the word "expressly" before the word "appears" in the phrase "unless the contrary intention appears".

17.2 RECOMMENDATION 16: CLAUSE 26
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that where the phrase "unless the contrary intention appears" appears in Clause 26 of the Bill, the word "expressly" should be inserted so as to read:

> ... *unless the contrary intention expressly appears* ...

17.3 CLAUSE 26 (a) (iii) AND (iv)
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

Clause 26 relates to the repeal and remaking of subordinate instruments or provisions thereof, in relation to references to them in another subordinate instrument, an Act -

> *(iii) a deed or other instrument; or*
>
> *(iv) any other document whatsoever* ...

17.4 The Committee adheres to the view (stated in relation to Clause 14(a)(iii) and (iv) at pp. 19-20 supra) that the proposed Act should deal with the interpretation of Acts and subordinate instruments, and should not extend to the interpretation of private documents or instruments. Their interpretation should be left to the courts in the usual way.

17.5 RECOMMENDATION 17: CLAUSE 26 (a) (iii) AND (iv)
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that Clause 26(a) of the Bill should be amended by the deletion of sub-clauses (iii) and (iv).

17.6 The Committee reiterates its previously stated position (see Clause 14(a)(iv) at p. 20 supra) that the words "any other document whatsoever" do not add anything of substance to the words "a deed or other instrument": Clause 26(a)(iii). Their inclusion serves only to confuse. Therefore, if Parliament denies the force of the Committee's view that the interpretation of private documents should not be covered by the proposed Act, the Committee recommends that sub-clause (iv) should be deleted from Clause 26(a) of the Bill.

17.7 RECOMMENDATION 18: CLAUSE 26 (a) (iv)
REPEAL AND REMAKING (SUBORDINATE INSTRUMENTS)

The Committee recommends that, should sub-clauses (iii) and (iv) of Clause 26(a) not be deleted from the proposed Act as recommended by paragraph 17.5 (supra), then sub-clause (iv) of that Clause should be deleted as being redundant.

18 CLAUSE 28

PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS. NEW CLAUSES 28 (1A) AND 28 (1B)

At common law doubt exists as to the validity of subordinate legislation incorporating other material. Clause 28 is designed to overcome this problem by authorising the making of subordinate instruments applying, adopting or incorporating with or without modification "the provisions of any Act or of any statutory rule ... or any matter contained in any [other] instrument ... or ... writing as in force or existing ... before ... or at the time when the ... subordinate instrument is made ..."

The Clause states:

> *Where an Act authorizes or requires provision to be made for or in relation to a matter by a subordinate instrument, the subordinate instrument may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating with or without modification -*
>
> *(a) the provisions of any Act, or of any statutory rule, as in force at a particular time or as in force from time to time; or*
>
> *(b) Any matter contained in any subordinate instrument (not being a statutory rule) or in any other writing as in force or existing at any time before the first-mentioned subordinate instrument is made or at the time when the first-mentioned subordinate instrument is made -*
>
> *but, unless the contrary intention appears, a subordinate instrument shall not, except as provided by this section, make provision for or in relation to a matter by applying adopting or incorporating any matter contained in a subordinate instrument or other writing as in force or existing from time to time ...*

18.1 Members of the Law Institute appreciated the move to clarify this area of the law relative to incorporation of instruments by reference. However they expressed some reservations, giving as an example the Building Control Act 1981 which sets out a strict consultation process for amendment of regulations:

> *The Uniform Building Regulations (or the new Victoria Building Regulations) incorporate certain Australian Standards which are ... prepared by bodies over which Parliament does not necessarily have any control or right of scrutiny. These Standards are drawn up merely as recommendations for the industry, and are not drafted in language which is necessarily precise enough or suitable for incorporation in an instrument of legislative character.* (Law Institute of Victoria, Ad Hoc Committee, written submission, at p.4.)

The Law Institute submission went on to point out that while the Uniform Building Regulations may be amended only by following the strict process set out in the Act, the documents which are incorporated by reference in those Regulations are amended by a non-Parliamentary body without notice to Parliament. Consequently it was recommended to the Committee that, should the provision for incorporation by reference be adopted, then the material incorporated should be available for purchase at a reasonable price from the Government Printer, on the basis that the incorporated material thereby becomes a part of the laws of the State. Furthermore amendments to incorporated material should be subject to the scrutiny of Parliament, and be tabled in both Houses:

> *Otherwise Parliament is in effect delegating its lawmaking powers to bodies outside the system of government.* (Law Institute of Victoria, Ad Hoc Committee, written submission, at p.4.)

18.2 The Committee accepts that there are real problems in the nature of those raised by the Ad Hoc Committee. Additional problems exist for Parliamentary Counsel and others involved in looking at regulations for the purpose of advising whether or not they are within power: without all material - including incorporated material - before them, it is difficult to make a determination.

18.3 However, some difficulties arise with the suggested solution requiring the Government Printer to publish incorporated material, and the tabling of such material and any amendments. This would add to the already large burden now placed upon the publishing facilities of the State and on Parliamentary resources. Problems relating to the infringement of copyright might also exist. Yet not to make incorporated material readily available derogates from the duty of the state to enable the public to acquaint itself with the content of laws, regulations and the like. Furthermore, it derogates from the role of Parliament as overseer of legislation and matters pertaining thereto.

18.4 The Committee considers one way of overcoming the difficulty is to provide that where a subordinate instrument incorporates matter contained in a document other than an Act or statutory rule a copy of the matter so incorporated:

(a) *must be kept available for members of the public at the offices of the body responsible for the administration of the subordinate instrument; and*

(b) *must be laid before Parliament where the subordinate instrument is itself required to be laid before Parliament.*

The Bill should further provide that failure to comply with these provisions renders the subordinate instrument void and of no effect.

18.5 RECOMMENDATION 19: CLAUSE 28 PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS (NEW CLAUSES 28(1A) AND 28(1B)

The Committee recommends that new Clauses 28(1A) and 28(1B) be incorporated in the proposed Act, to provide:

Clause 28(1A)

Where a subordinate instrument incorporates matter contained in a document other than an Act or statutory rule, a copy of the matter so incorporated -

(a) must be kept available for members of the public at the offices of the body responsible for the administration of the subordinate instrument; and

(b) must be laid before Parliament where the subordinate instrument is itself required to be laid before Parliament.

Clause 28(1B)

Failure to comply with the provisions of section 28(1A) will render a subordinate instrument incorporating matter contained in a document other than an Act or statutory rule void and of no effect.

18.6 CLAUSE 28 PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS (NEW CLAUSE 28(1C)

Additionally, to avoid the incorporation of diverse materials into subordinate legislation being outside Parliamentary control, the Bill could provide that material should not be incorporated into regulations and the like, unless the Act empowers the maker of particular subordinate legislation to do so. Referring to incorporation, in his written submission to the Committee, Mr. J.C. Thornton, Parliamentary Counsel of Western Australia, stated:

There are occasions where as a matter of policy or practical necessity, the practice of incorporation is justifiable and necessary. These occasions can usually be anticipated at the time the Bill is being drafted. I favour a rule of practice under which powers of this kind are conferred on an ad hoc basis in specific cases where the need is foreseen. The use and the extent of the power can then be regulated and restricted and where possible, the power can identify the material that may be incorporated. As a corollary to that rule of practice, is the rule of practice that no material should be incorporated in subordinate legislation by reference without specific authority in the Act under which the subordinate legislation is made. (at pp.4-5.)

18.7 The Committee believes that the Act should contain a provision stating that material being "any other writing as in force or existing at any time before the [relevant] subordinate instrument is made or at a time when the [relevant] subordinate instrument is made" cannot be incorporated into a subordinate instrument unless authorised by the enabling Act.

18.8 RECOMMENDATION 20: CLAUSE 28 PRESCRIBING MATTERS BY REFERENCE TO OTHER INSTRUMENTS (NEW CLAUSE 28(1C)

The Committee recommends that a new Clause 28(1C) be inserted into the proposed Act, providing:

Clause 28(1C)

Material being any other writing as provided in section 28(1)(b) of this Act may be applied, adopted or incorporated into the provisions of any Act only where the relevant enabling Act so authorises.

19 CLAUSE 31

CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

The Clause provides:

> *(1) Every Act and every subordinate instrument shall be construed as operating to the full extent of, but so as not to exceed the legislative power of the State of Victoria, to the intent that where a provision of an Act or subordinate instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act or subordinate instrument and the application of that provision to other persons, subject-matters or circumstances shall not be affected.*
>
> *(2) The provisions of this section are in [addition] to, and not in derogation of, any provision of any Act or subordinate instrument relating to the construction, or extent of the operation of that Act or subordinate instrument.*

19.1 The provision is drafted to cover the case where part of an Act or subordinate instrument is found to be outside the power conferred on the Victorian Parliament in accordance with the Australian Constitution. (See North Eastern Dairy v Dairy Industry Authority of New South Wales (1977) 7 A.L.R. 433.) In accordance with the Committee's recommendation in relation to Clause 19 of the Bill (see para. 13.7, and pp. 21-24 supra) that the rule of severance in relation to parts of subordinate instruments being outside the power conferred by the enabling Act should not be extended from primary legislation to subordinate legislation, this provision should be omitted from the proposed Act. Its omission would in no way adversely affect the ordinary operation of the rule of severance in relation to Acts. However recognising that the Acts Interpretation Act 1958 contained a provision relating to ultra vires and the application of the severance rule to primary legislation:

s.3, a similar provision to that section should be inserted into the Bill in Part II. Provisions Applicable to Acts. That provision should be included as Clause 4A, providing:

Clause 4A. Construction of Acts.

(1) Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.

(2) The provisions of this section are in addition to, and not in derogation of, any provision of any Act relating to the construction, or extent of the operation, of that Act.

19.2. RECOMMENDATION 21: CLAUSE 31 CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

The Committee recommends that in accordance with **RECOMMENDATION 12: CLAUSE 19. SUBORDINATE INSTRUMENTS TO BE CONSTRUED SUBJECT TO EMPOWERING ACT**, para. 13.7 at p. 24 supra, Clause 31 should be omitted from the proposed Act.

19.3 RECOMMENDATION 22: CONSTRUCTION OF ACTS NEW CLAUSE 4A

The Committee recommends that, in accordance with the acceptance of the foregoing recommendation, a new provision should be inserted into the Bill in Part III. Provisions Applicable to Acts, to provide:

Clause 4A. Construction of Acts

(1) Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.

(2) The provisions of this section are in addition to, and not in derogation of, any provision of any Act relating to the construction, or extent of the operation, of that Act.

19.4 CLAUSE 31

CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

In the event that the Parliament does not accept the Committee's foregoing recommendation that Clause 31 be omitted from the Bill, the Committee notes that in the reproduction of Clause 31 a typographical error appears. That is, where the word "addition" should appear in Clause 31(2), "additon" appears. In the final Act, this error should stand corrected.

19.5 RECOMMENDATION 23: CLAUSE 31

CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS

The Committee recommends that if the Parliament does not accept **RECOMMENDATION 21: CLAUSE 31. CONSTRUCTION OF ACTS AND SUBORDINATE INSTRUMENTS,** para. 19.2, at p. 39 supra, then where "additon" appears in Clause 31(2), it should be replaced with the word "addition".

20 CLAUSE 32

REGARD TO BE HAD TO PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT

Clause 32 requires a purposive approach to be adopted in the interpretation of Acts and subordinate legislation. The Clause accordingly provides:

> *(1) In the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.*
>
> *(2) Nothing in sub-section (1) shall be construed as authorising, in the interpretation of an Act or subordinate instrument, the consideration of any matter or document not forming part of that Act or subordinate instrument for any purpose for which that matter or document could not be considered apart from that sub-section.*

Clause 32 is intended to assist the courts in their approach to construction of statutes.

20.1 In courts of the common law system, standard rules of interpretation have evolved. Courts are required to interpret legislation in accordance with the intention of Parliament. There are three basic principles. The original "mischief rule" was laid down in Heydon's Case (1584) Co. Rep. 7a, 76 E.R. 638:

> *... it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discussed and considered.*

1st, what was the common law before the making of the Act?

2nd, what was the mischief and defect for which the common law did not provide?

3rd, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and

4th, the true reason of the remedy;

and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy; and to suppress subtle inventions and evasions for continuance of the mischief, ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, [for the public good]. (See also Heath v Commonwealth (1982) 56 A.L.J.R. 893; Martinus v Kidd (1983) 57 A.L.J.R. 7, 9-10.)

Under the "golden rule":

In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless they would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further. (Grey v Pearson [1857] 6 H.L.C. 61, 106 per Lord Wensleydale; see also Cooper Brooks (Wollongong) Pty. Ltd. v Federal Commissioner of Taxation (1981) 35 A.L.R. 151.)

The "literal rule" provides:

If the words of an Act are clear, [the Court] must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. (R v City of London Court (1892) 1 Q.B. 273, 290, per Lord Esher M.R.; see also the Sussex Peerage Case (1884) 11 Cl & F 85, 143; Amalgamated

Society of Engineers v Adelaide Steamship Co. Ltd. ("the Engineer's Case") (1920) 20 C.L.R. 129, 161 per Justice Higgins.)

20.2 These rules are just that - rules of construction having no force of law, although some judges have appeared to consider otherwise. As Justices Mason and Wilson said in Cooper Brookes (Wollongong) Pty. Ltd. v Federal Commissioner of Taxation (1981) 35 A.L.R. 151, 169-170:

> *In some cases in the past these rules of construction have been applied too rigidly. The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.*
>
> *The rules ... are no more than rules of common sense, designed to achieve this object. They are not rules of law ... [T]he propriety of departing from the literal interpretation ... extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions. Quite obviously, questions of degree arise.* (See also Pearce, Statutory Interpretation, 1974, Melbourne, at p.14.)

20.3 The rules, presumptions and maxims of construction "are inconsistent, and often flatly contradict each other, but they are treated in the textbooks and judgments as having equal validity today, regardless of the differing social, political and constitutional conditions in which they arose." Ward states:

> *"The 'literal rule' cannot be reconciled with the 'mischief rule'. Many of the presumptions have become unreal in these days when legislation invades so many aspects of life with its administrative machinery ..., its taxes, its controls, and its innumerable minor offences ...*

The result is chaos. It is impossible to predict what approach any court will make to any case. The field of statutory interpretation has become a judicial jungle ... inherited [from the past] ... (Ward, "A Criticism of the Interpretation of Statutes in the New Zealand Courts" (1963) New Zealand Law Journal 293.)

It is unsatisfactory for courts to be left in a "judicial jungle" creating confusion and chaos. The Committee considers therefore that Clause 32(1) is a necessary inclusion in the proposed Act, directing attention to what should be the paramount aim of legislative interpretation - the intention of Parliament, and the purpose or object of the legislation.

20.4 There are additional good reasons for the inclusion of Clause 32(1). The provision is modelled on section 15AA of the Acts Interpretation Act 1901 (Cth), but in accordance with the thrust of the Interpretation Bill, extends its terms to subordinate legislation in addition to Acts. Section 15AA of the Commonwealth Act was included in that Act to draw attention to a problem that had arisen in the interpretation of the Income Tax Act (Cth) in certain judgments of the High Court. (See Griffith, "A Practitioner's Viewpoint" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 28; Harris, "A Parliamentary Viewpoint" in Symposium on Statutory Interpretation, op.cit., 45, quoting from the Federal Attorney-General's Second Reading Speech on Section 15AA.) The purpose was to make clear the legislature's intention that that Act should be construed (as should all legislation) by the courts in accordance with the intention of Parliament in framing and passing the law. Other jurisdictions have introduced similar or more explicit provisions. For example, section 5(j) of the Acts Interpretation Act 1924 (New Zealand) states:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and

interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

20.5. It is unfortunate that such exhortations may have a limited effectiveness: if a court or individual judge chooses to misconstrue the words of an Act and/or its clear meaning, or if a court or individual judge is unable to comprehend the clear words and/or intention of an Act, there is little Parliament can do to correct this problem, apart from attempting to amend the legislation in an effort to render Parliament's intention more clear. Such an exercise has limitations for, as Justice Stephen stated in In re Castioni [1891] 1 Q B 149, 167:

It is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand.

(See generally Ward, "A Criticism of the Interpretation of Statutes in the New Zealand Courts " (1963) New Zealand Law Journal 293; also Wilberforce, "A Judicial Viewpoint" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 5, at p.10.; Report on the Preparation of Legislation ("Renton Report") 1975, HMSO, London.)

20.6 A number of submissions were received by the Committee relating to Clause 32. The majority were favourable to the inclusion of Clause 32(1) in the Bill, however one member of the Victorian Bar stated:

I do not know of widespread complaint about interpretation of Victorian statutes. Nor have the legislators pointed to any. There is thus no demonstrable reason why the clause should become law ... If the Parliament has a real concern about the purpose of a particular Act or regulation, let that instrument speak for itself. Clear and precise

drafting is a cure to many legal ills. (Ross, written submission, 8.9.1983, at p.8.)

20.7 Several other members also thought such a provision unnecessary. Their ground was that from at least the sixteenth century, traditionally courts have been required to place a purposive interpretation on legislation, but that during the 19th century a certain narrowness crept in, with courts relinquishing the formerly flexible approach for one that was strictly literal or "legalistic". One member of the Bar said:

> *If one refers back to the way in which the courts used to treat statutes and used the example of the statute of frauds ... one finds that the courts felt able to treat that statute generously because they [could] say that although the statute provided that the contract of a particular kind was not to be enforced unless it was in writing, they felt able to say that the statute was meant to prevent fraud. If one goes to the literal effect of the words and permitted people to escape early, ... when contracts have been partly performed, that would have created terrible frauds. They wrote in a large exception to the words of the statute ...*
>
> *[The] approach that [former Chief Justice] Barwick had to statutes ... is new, not old. The courts were not wont to give such literal effect to the words of the statute, as was recently observed with taxing statutes.*
>
> *The question one must ask accordingly is why the approach of judges changed in that way. It seems that it changed for a reason that existed in many areas. One must remember that [the former Chief Justice] was a product of the nineteenth century. In the nineteenth century many people had optimistic views about the perfectability of [humankind] and developed stringent views about the respective roles of the courts and parliament. Parliament was meant to make the laws and the courts were meant to interpret them ...*
>
> *Parliament [was expected] to be able to express any words perfectly ...*

If that does not happen Parliament has failed in its job and it serves it right. That sort of view of the way society works has gone ... The views of judges in society have changed and the courts simply will not adopt any more the sort of approach which led to what seemed to everybody else, except the courts, the very extreme result in those tax cases in the High Court. I do not think that will happen again. (Shaw, oral submission, 27.9.1983, at pp.122-123)

20.8 In agreement with the foregoing, another said that Clause 32(1):

... is unnecessary and ... may create rigidity and create some problems as to what it may mean. (Gillard, oral submission, 27.9.1983, at p.124.)

Another commented that the trend in England:

... has been away from the legalistic interpretation, certainly since 1933 ... [T]he situation does not occur, or now no longer seems to arise, within the federal jurisdiction ... it would appear that the High Court is adopting a purposive approach ... (Hollis-Bee, oral submission, 27.9.1983, at p.121.)

20.9 However, the Committee considers that there are some problems with the advocated approach of leaving matters be. Even in England today it is acknowledged that the literal approach is not "dead". In the House of Lords' debate on the Interpretation of Legislation Bill 1982 Lord Scarman said:

The old habit of sticking to the literal meaning of the words used, and refusing to depart from them even when they produce a result which is clearly inconsistent with the intention of Parliament but no departure because the words are clear, is still lurking in the back corridors of the legal system and must be exterminated ... (Col. 279, cited Benion, "Another Reverse for the Law Commissions Interpretation Bill" (1981) New Law Journal (August 13, 1981) 840 at p.841.)

20.10 In Australia, three problems arise. First, that members of the present High Court are now perceived as taking a more purposive-orientated approach and repudiating the legalistic approach it formerly took does not mean that the first approach will always prevail, nor that the second remains forever buried. (That individual judges can and frequently do take varying approaches to interpretation is nowhere more evident than in the High Court, where joint judgments are comparatively rare; most often, each judge writes a single judgment which results in seven individualistic interpretations or rationales.) Secondly, that the High Court has adopted the purposive approach of late is not necessarily a ground for assuming that judges in other jurisdictions will follow. Cases in Victoria, at Supreme Court level, support this view. For example, in Gipp v Richardson [1981] V.R. 1031 a majority of the Full Court of the Supreme Court held that a breathalyser instrument bearing the imprint "U.S. Pat. No. 2824789" (punctuation not separating the numerals) did not comply with the gazetted requirement that it bear the imprint "U.S. Patent No. 2,824,789" (punctuation separating the numerals). (See comments Griffith, oral submission, 3.8.83, at p.80, and further at pp. 133-134 infra.) In Dare v Pulham (1982) 57 A.L.J.R. 80 the High Court in a joint judgment (Justices Murphy, Wilson, Brennan, Deane and Dawson) overruled a Full Court decision of the Supreme Court of Victoria, replacing a restrictive reading of O.19r.5A of the Rules of the Supreme Court with a more liberal construction. In Martinus v Kidd (1983) 57 A.L.J.R. 7 the High Court overruled a restrictive reading, by the Full Court of the Supreme Court of Victoria, of the Limitation of Actions Act 1958 as amended. The question was whether a person injured in a road accident had lost the right to sue in negligence as a consequence of section 23A of that Act. The court stated:

> *Having regard to the beneficial operation which the section is intended to have, it should not be read down to limit its application to the extension of the limitation periods provided by the Limitation of Actions Act itself, unless there appears some indication that the legislature so intended ... None of [the] arguments [put to the court] has convinced us that the general words of [the provision] should be given a restricted meaning ... Of course there are good reasons for strictly limiting the period within which proceedings may be brought against the estate of a*

deceased person. However the same reasons do not exist where the proceeding is in substance against an insurer and in any case the discretion conferred by [the section] enables the court to refuse to grant an extension of time if that course is necessary. (At pp. 9-10, per Chief Justice Gibbs, Justices Murphy and Wilson.)

The Committee believes these cases reveal an unduly rigid approach to the interpretation of statutes by the Full Court of the Victorian Supreme Court. Finally, it is encumbent upon the Parliament, in view of the predominance a too literal interpretation of statutes has had on at least some occasions, to the detriment of Parliament's object, to give clear direction as to the paramountcy of the objective of purposive construction.

20.11 The Committee recognises that clarity of drafting is vital, but as previously pointed out may not always be enough. Indeed, as was observed in Fothergill v Monarch Airlines [1981] A.C. 251, 280, if drafting is today "lamentable" or simply insufficiently clear, the approach of the courts in being too literal is to a great degree at fault:

> *... [an] Act of Parliament will be couched in language that accords with the traditional, and widely criticised, style of legislative draftmanship which has become familiar to English judges during the present century and for which their own narrowly semantic approach to statutory construction, until the last decade or so, may have been largely to blame. That approach for which parliamentary draftsmen had to cater can hardly be better illustrated than by the words of Lord Simonds in Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd. [1946] 1 All E.R. 637, 641:*
>
> > *'The section ..., section 31 of the Finance Act 1933, is clearly a remedial section, ... It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the*

language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.'

The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current English style of legislative draftsmanship. It is wary of laying down general principles to be applied by the courts to the varying facts of individual cases rather than trying to provide in express detail what is to be done in each of all foreseeable varieties of circumstances. In the attempt to do this the draftsman will have taken account of technical and competing canons of construction that are peculiar to English written law; and will have relied heavily on precedent in his use of words and grammatical constructions and general layout used in earlier Acts of Parliament that have been the subject of judicial exegesis. (Emphasis added.)

This style of drafting has also been lamented in Australia. Equally it can be attributed to the too literal approach of the courts, which led to drafters attempting to "second guess" every eventuality, so that judges could not impede the intention of Parliament. In Heath v Commonwealth (1982) 56 A.L.J.R. 893, 898, Justice Murphy stated:

The [Compensation (Commonwealth Government Employees) Act] is an example of the style of drafting which departs from the simplicity and clarity of earlier laws which (although occasionally criticised) were a model the departure from which has led to great confusion and much unnecessary litigation.

20.12 The Committee notes the views expressed by two eminent jurists, Scarman of the English House of Lords and Professor Julius Stone. The one pointed out that a purposive construction is to be preferred over the literal, as being in accordance with the requirement that the intention of Parliament is paramount. (Scarman, "Wilfred Fullagar Memorial Lecture" (1980) 7 Monash

University Law Review 1.) The other, in commenting on the Commonwealth provision, said:

> *Intelligent lay people will feel no outrage at ... a proposal [that courts should have regard to Parliament's intention in interpreting legislation]. I suspect that most of them think that this is what judges, in any case, are supposed to do.* (Stone, Sydney Morning Herald, 9.6.1981)

It is appropriate that the proposed Act should draw the attention of courts, practitioners, Members of Parliament and the public to the principle that legislation should be interpreted to give effect to Parliament's intention. Thus, whilst recognising the provision may have limitations, the Committee approves the inclusion of Clause 32(1) in the Bill.

20.13 RECOMMENDATION 24: CLAUSE 32 (1) REGARD TO BE HAD TO THE PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT

The Committee recommends that Clause 32(1) should remain as a provision of the Bill.

20.14 CLAUSE 32 (2) REGARD TO BE HAD TO THE PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT

Clause 32(2) restates the current position: the words of an Act or regulation should be interpreted in accordance with Parliament's intention as it appears from the legislation; for that purpose, courts may look to whatever material it is legally acceptable for them to look at. The question thus arises, what material can judges look to (in addition to the words of the relevant statute or subordinate legislation) to determine the intended effect of the law?

20.15 Before a determination can be made about the desirability of excluding, endorsing or amending Clause 32(2), the present position regarding extrinsic materials must be explored. The Committee considers it is important that there be greater clarity on this question. It is also necessary to consider the terms of debate surrounding reference by courts to extrinsic aids.

20.16 The type of extraneous material relevant and available to the courts for divining legislative intent has been debated extensively by the courts. Last century in Gorham's Case Lord Langdale said:

> *We must endeavour to attain for ourselves the true meaning of the language employed [in the Articles and Liturgy] assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate, and the meaning of the words employed.* (Moore, 1852 edition, 462.)

This proposition was adopted by Farwell L.J. in Rex v West Riding of Yorkshire County Council [1906] 2 K.B. 676, 716:

> *I think the true rule is expressed with accuracy by Lord Langdale ... It is clear that the language of a Minister of the Crown in proposing in Parliament a Measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.*

20.17 In Herron v Rathmines and Rathgar Improvement Commissioners [1892] A.C. (H.L.(I.)) 498, 502 Lord Halsbury, L.C. accepted that the history of the Act in question should rightly be ignored by courts in interpreting its provisions:

" ... all negotiations previous to the Act or the original form of the Bill must be dismissed ..." However his position has sometimes been taken as more restrictive than it was in fact. He contended that there was no ambiguity in the words of the particular statute, saying:

> ... *I think a great deal of the difficulty which has arisen in the construction of the Act has been due to an a priori presumption that the Act did not mean what it said, and that some explanation of its provisions is to be sought for other than the plain and obvious one arising from the grammatical construction of the words and sentences that it contains.* (At 502.)

20.18 A perusal of judgments from English courts shows that despite reiteration by some judges of the Langdale, Farwell and Halsbury position (interpreted strictly) as being correct (see for example Miller v Taylor (1769) 4 Burr 2303, 2332, per Justice Willes; R v Hertford College, Oxford (1878) 3 Q.B.D. 693, 707 per Justice Coleridge (no ambiguity in the statute); but see R v Bishop of Oxford (1879) 4 Q.B.D. 525, 550 per Bramwell, L.J. (Hansard may be consulted) when interpreting legislation, courts have not infrequently had recourse to the history of legislation including, amongst other materials, law reform reports, previous Bills and Acts, and Parliamentary speeches and proceedings as recorded in Hansard, in order to better appreciate the intention of Parliament. Lord Halsbury himself sometimes resorted to such aids in other cases. (See for example Eastman Photographic Material Company Limited v Comptroller-General of Patents, Designs and Trade Marks [1898] A.C. 571.)

20.19 In In re Mew and Thorne (1861) 31 L.J. Bk. 87 the court held "... It is necessary to recollect the state of the law at the time ... the Act of 1861 was passed, and the evil ... which was then complained of." The court went on to review the earlier 1849 Act, and the appointment by the Government of a commission "... to consider the whole subject, who made their report in the year 1854." After an examination of the commission's report, extensive reference was made to the speech read in the House of Commons by the Member

introducing the Bill in question, and then to the passage of the Bill, particularly in relation to exchanges and differences in the House of Commons and House of Lords and between the two Houses. The court concluded:

> *I have entered into the matter at [some] length, ... for the purpose of showing how carefully, as it appears to me, in the preparation and passing of this clause, the legislature was desirous of laying down a rule of conduct ... I believe [the view expressed by the Court below] to be that which tallies altogether with the intention ... the legislature ... adopted, because [as the history shows] it was the ground upon which application to the legislature was made, and, therefore, I have no hesitation in pronouncing it to be in my judicial opinion, the correct exposition of the statute* ... (At p.91.)

20.20 In Eastman Photographic Material Company Limited v Comptroller-General of Patents, Designs, and Trade Marks [1898] A.C. 571 the court had regard to the history of the Patents, Designs, and Trade Marks Act 1883, including the report of a commission appointed in 1887 to enquire into the administration of the Patents Office under that Act. Lord Halsbury said:

> *I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission ... it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils [dealt with in the commission's report] to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion.* (At pp.573-575.)

Other cases from the last century support the view that legislative history is relevant to statutory construction by courts. The context and circumstances surrounding the use of particular words in statutes are vital to their interpretation. (See for example R v Hall 1 B. & C. 123, 136 per Chief Justice

Abbott; Owners of the Steamship "Lion" v "Owners of Ship or Vessel "Yorktown" ("The Lion") (1869) L.R. 2 P.C. 525, 530, per Lord Romilly; R v Bishop of Oxford (1879) 4 Q.B.D. 525, 550 per Bramwell, L.J. - Lord Chancellor's speech on third reading of Church Discipline Act 1874 relevant.)

20.21 More recently the English House of Lords in Ealing London Borough Council v Race Relations Board [1972] A.C. 342 referred to the Race Relations Act (U.K.) of 1965 in seeking to determine the meaning of words in the 1968 Act. Lord Simon alluded to the cautious use that might be made of legislative history and to the explanatory memorandum which accompanies any complicated piece of proposed legislation: such an explanatory memorandum might "often be useful both in apprising legislators of the details for which they are assuming responsibility and in assisting courts in their task of interpretation." (At pp. 360-361.)

20.22 In Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenberg [1975] A.C. 591 various views were expressed about reference to extraneous materials and resort to legislative history. The majority concluded they could look at such aids for assistance where ambiguity lay in the words of a statute. Lord Simon referred to the Eastman Photographic Materials Case and Hawkins v Gathercole (1855) 6 De G.M. & G. 1, 21 (per Turner L.J.), saying: "I am ... of opinion that the Greer report [upon which the relevant legislation is based] is available to [the court] in construing the ... Act, by way of helping to show what facts were within the knowledge of Parliament and what was the defect in the pre-existing law which called for parliamentary remedy." (At 648.) Lord Reid said: "... we are fully entitled to look at those parts of the report which deal with those matters" relating to the mischief to be remedied, but not to the recommendations or draft Bill of the report, despite the draft Bill corresponding "in all material respects with the Act, so [that] it is clear that Parliament adopted the recommendations of the committee". (At 614.) Lord Diplock held there was "no need to look at the report of the committee" because there was no ambiguity on the face of the statute. He went on to look at the report, however, because "much of the argument ... has

been connected to a meticulous verbal analysis of everything that the committee said in it." He concluded that "this recourse to the report ... has only served to confirm me in the view that [the relevant] section ... should be construed as [in the court below]". (At 639.) His decision was in accordance with those of the other members of the court. Viscount Dilhorne referred extensively to earlier judgments including that of Lord Halsbury in the Eastman Photographic Materials case, and others where regard was had to reports of commissions or committees (see Shenton v Tyler [1939] Ch. 620 (Green M.R. citing a recommendation of the Common Law Commissioners of 1852 holding that recommendation was accepted by the legislature and embodied in the Evidence Amendment Act 1853 (U.K.)); Rookes v Barnard [1964] A.C. 1129; Heatons Transport (St. Albans) Ltd. v Transport and General Workers' Union [1973] A.C. 15 (both referring to the Report of the Royal Commission on Trade Unions and Employees' Associations); National Provincial Bank Ltd. v Hastings Car Mart Ltd. [1965] A.C. 1175 (referring to the Report of the Royal Commission on Marriage and Divorce); and Letang v Cooper [1965] 1 Q.B. 232 (referring to the Report of the Tucker Committee on the Limitation of Actions). He said:

> *Other instances could be cited and, despite the observations of Lord Wright with which Lord Tankerton agreed in Assam Railways and Trading Co. Ltd. v Inland Revenue Commissioners [1935] A.C. 445, it is now, I think, clearly established that regard can be had to such reports.*
>
> ...
>
> *That one can look at such reports ... is now ... established ... What weight is to be given to a committee's recommendation is another matter. That may depend on the particular circumstances ...* (At pp. 621-622.)

Nonetheless Lord Wilberforce stated:

> *It is not proper to refer to a report or to notes on clauses for a direct statement of what a proposed enactment is to mean. It is not permissible even if a Bill is enacted without variation to take the meaning of the Bill from the commentary. That would involve construing two documents instead of one.*

The Judge has since repudiated this position, however, saying "... that was in 1975, and I now believe it to be wrong and the supporting arguments invalid". (See Wilberforce, "A Judicial Viewpoint" in Symposium on Statutory Interpretation, Attorney-General's Department, Canberra, 1983, 5, at p.8.; see further Hyam's Case (referring to 1849 report of the Law Reform Commission); Knuller v Director of Public Prosecutions [1973] A.C. 435; Race Relations Board v Charter [1973] A.C. 868; Dockers' Labour Club and Institute Ltd. v Race Relations Board [1974] 3 W.L.R. 533; Davis v Johnson [1979] A.C. 264; contra Davis v Johnson [1979] A.C. 317; Hadmor Productions Ltd. v Hamilton [1982] 2 W.L.R. 322, 337 per Lord Diplock; also Cross, Statutory Interpretation, 1976, London, at Chapter VI; Craies on Statute Law, Edgar, editor, 6th edition, 1963, London; Maxwell on the Interpretation of Statutes. Lanyan, editor, 12th edition, 1969, London.)

20.23 Similarly in Australia, despite acceptance in the judgments of some courts and some judges, of the Halsbury statement in Herron's case as meaning recourse to extrinsic aids could be had under no circumstances, those same courts have had recourse to various extraneous materials, including materials relating to the history of legislation, reports of law reform committees and the like, earlier legislation and Bills dealing with the same subject matter, proceedings of Parliament and other materials, for the purpose of interpreting provisions; some judges have specifically stated that the history of legislation and various materials can assist the court in divining parliamentary intention, where provisions are ambiguous.

20.24 In particular, the High Court has accepted that various extraneous materials can be resorted to legitimately. For example, in Minnesota Mining and Manufacturing Co. v Beirsdorf (Australia) Ltd (1980) 144 C.L.R. 253, at pp. 289-292 Justice Aickin (in whose leading judgment a full Court consisting of Chief Justice Barwick, Justices Stephen, Mason and Wilson agreed) explored extensively the history of both the English and Australian Patents Acts in order to determine how s.100(1)(e) of the Patents Act 1952 (Cth) should be construed. He stated: "In order to examine [the question], a consideration of the history of

the English and Australian Patents Acts is necessary." He then traced the formulation of the English and Australian Acts from the Patents, Designs, and Trade Marks Act 1983 (Imp.), through the Patents Act 1903 (Cth), describing the process by which amendment to the English legislation in the appointment of and report from a number of committees came about including a 1930s committee which presented four reports upon the Patents Act and drew up a Bill to give effect to its recommendations; a 1944 committee "the Swan Committee"; and a subsequent Act. He delineated the process in Australia, where a committee was established in 1950 and reported in 1952 on possible changes to the Patents Act; that committee had available to it the Swan Committee's report and the 1949 United Kingdom Act. The Australian Committee recommended various amendments, but did not endorse a provision of the United Kingdom legislation which was relevant to the issue to be decided in Minnesota Mining and Manufacturing Co. Discussing the difference between the United Kingdom legislation and the Australian legislation, and their respective histories, Justice Aickin concluded "For those reasons I am satisfied that we should not regard the observations of Williams, J. in England ... as correctly stating the law in Australia ..." (At page 292.) Extraneous materials showed in this case that a construction based on a provision with a particular history in the United Kingdom was not relevant to the interpretation of a provision in Australian legislation, having its own history. Had recourse not been made to both histories, United Kingdom cases may have been taken as relevant, resulting in an interpretation which did not in fact conform to the intention of the Australian Parliament in passing its Act.

20.25 In Dillingham Constructions Pty. Ltd. v Steel Mains Pty. Ltd. (1975) 132 C.L.R. 323, 332-335 Justice Murphy in construing provisions of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) considered the history of that provision. He referred to an Interim Report of the Law Revision Committee set up by the Lord Chancellor in the United Kingdom, as a result of which the particular section of the N.S.W. Act was passed. That report was taken into account by the High Court (Chief Justice Dixon, Justices McTiernan, Webb, Fullagar and Taylor (joint judgment)) in relation to the construction of the same section in Bitumen and Oil Refineries (Australia) Ltd. v Commissioner for

Government Transport (1955) 92 C.L.R. 200, 212. Commenting on its use, Justice Murphy said:

> *In my view, the use of the report by this Committee is not only permissible but desirable in this case. There should be no need to engage in the semantic exercise of justifying such use as merely being for the purpose of ascertaining what was the mischief or defect in the common law ... Since ascertaining the mischief is part of the process of ascertaining the legislative intent ... it is pointless to draw a distinction between the two.*
>
> *The problem in the common law and the solution proposed are clear from the report and the recommendations of the Committee ...*
> *The proposals were then expressed formally in a summary of recommendations which were given legislative effect in the United Kingdom Law Reform (Married Women and Tortfeasors) Act 1935. That Act was copied in the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) ...*
> (At pp. 332-333.)

(See also Tasmania v Commonwealth (1904) 1 C.L.R. 329; Baxter v Commissioners of Taxation (N.S.W.) (1907) 4 C.L.R. 1087; Dugan v Mirror Newspapers (1978) 42 C.L.R. 583, where Justice Stephen resorted to legislative history and Parliamentary Debates, although he described the experience as "unrewarding"; Barker v The Queen (1983) 57 A.L.J.R. 426, where Chief Justice Gibbs, Justices Mason, Murphy, Wilson and Brennan each referred to the report of a U.K. Parliamentary Committee upon which the Theft Act 1968 (U.K.) was based, and from which a provision of the Crimes Act 1958 (Victoria), as amended, s. 76(1) which was under consideration, was ultimately derived; Wacando v Commonwealth (1981) 56 A.L.J.R. 6; Municipal Council of Sydney v Commonwealth (1904) I C.L.R. 208, at 213-214, per Chief Justice Griffith; Brazil, "Legislative History, and the Sure and True Interpretation of Statutes in General and Constitution in Particular" (1961) 4 Univ. Qld. Law Jrn 1; Pearce, Statutory Interpretation, 1974, Melbourne.))

20.26 Recently discussion on recourse to extraneous materials has intensified. (See for example Attorney-General's Department (Australia), Another Look at Statutory Interpretation, 1982, AGPS, Canberra; Attorney-General's Department (Australia), Extrinsic Aids to Statutory Interpretation, 1982, AGPS,Canberra; Attorney-General's Department, Symposium on Statutory Interpretation, 1983, AGPS Canberra; Editorial Note, "Statutory Guidelines for Interpreting Commonwealth Statutes" (1981) 55 A.L.J. 711; Kirby, "What does it all Mean?" (1983) New Zealand Law Journal 61; Scutt, "Federal Policy Discussion Paper on Extrinsic Aids to Statutory Interpretation" (1983) 57 (No.3) Australian Law Journal 129; Editorial Note, "Canberra Symposium on Extrinsic Aids to Statutory Interpretation, February 1983" (1983) 57 (No.4) Australian Law Journal 191.) Reference has been made, with approval, to the United States' and the Canadian positions. (See for example Daniel v Paul 395 U.S. 298 (1969); Dawson Chemical Co. v Pham & Hass Company 448 U.S. 176 (1980); Driedger, The Construction of Statutes, 1974, at pp. 130-131; Re Pearson and Ors.; ex parte Sipka (1983) 57 A.L.J.R. 225.)

20.27 The discussion has centred round four basic issues:

(a) what is the current state of play with regard to the use of extraneous materials by judges in interpreting legislation;

(b) should distinctions be drawn between the types of extraneous materials at which a judge has discretion to look;

(c) should distinctions be drawn between the types of legislation the subject of interpretation, so that judges may call for assistance from extraneous materials in relation to some legislation and not to other categories of legislation;

(d) what are the arguments for and against admissibility of extrinsic aids.

20.28 Present State of Play. As previously noted courts do have recourse to legislative history in determining Parliamentary intention, in cases of ambiguity, taking into account reports of Parliamentary Committees, Royal Commissions, Boards of Enquiry, Law Reform Commissions and Committees, ad hoc committees and the like, where these are considered relevant, in addition to earlier Acts and Bills. (See for example Dillingham Constructions Pty. Ltd. v Steel Mains Pty. Ltd. (1975) 132 C.L.R. 323; Dugan v Mirror Newspapers (1978) 42 C.L.R. 583; Barker v The Queen (1982) 57 A.L.J.R. 426; and pp. 53-59 supra.) It has long been acknowledged that legal writings in the way of academic treatises, textbooks and articles in learned journals can be used. (See for example Actors and Announcers Equity v Fontana Films (1982) 56 A.L.J.R.365, 383; Church of Scientology Inc. v Woodward and Others (1982) 57 A.L.J.R. 42; Moors v Burke (1919) 26 C.L.R. 265.) Other sources are referred to, particularly in cases involving social issues (see for example Gazzo v Comptroller for Stamps (Victoria) (1982) 56 A.L.J.R. 143 (anthropological and historical texts); Koowarta v Bjelke-Petersen (1982) 56 A.L.J.R. 625 (citing texts and other literature on racial discrimination and oppression); Onus v Alcoa of Australia Ltd. (1981) 55 A.L.J.R. 631 (texts relating to Aboriginal culture); Re Toohey (Aboriginal Land Commissioner); Ex Parte Meneling Station Pty. Ltd. (1983) 57 A.L.J.R. 59 (anthropological literature, including the 1968 Boyer Lectures); Church of Scientology Inc. v Woodward (1983) 57 A.L.J.R. 42, 53 (political, sociological and criminological texts on espionage). Explanatory memoranda and similar documents accompanying legislation when it is introduced into Parliament are sometimes used by the courts for elucidation. (See for example R v Murray [1981] 1 N.S.W.L.R. 740, 745; Ealing London Borough Council v Race Relations Board [1972] A.C. 342.) Reports of proceedings in Houses of Parliament have also been referred to by the courts. (See for example R v Murray [1981] 1 N.S.W.L.R. 740, 746-747; T.M. Burke Pty. Ltd. v City of Horsham [1958] V.R. 209, 216; Re Armstrong and State Rivers and Water Supply Commission (No. 2) [1954] V.L.R. 288; Eros Finance Pty. Ltd. v Attorney-General [1956] V.L.R. 320; Langhorne v Langhorne [1958] A.L.R. 989; Warnecke v Equitable Life Assurance Society of the United States [1906] V.L.R. 482; Greville v Williams (1906) 4 C.L.R. 699; Sillery v The Queen (1981) 35 A.L.R. 227, 232-235; TCN Channel 9 Pty. Ltd. v AMP Society (1982) 42 A.L.R. 496; Heath v Commonwealth (1982) 56 A.L.J.R. 893; Re Pearson; Ex

parte Sipka (1983) 57 A.L.J.R. 225, 331; Wacando v Commonwealth (1981) 56 A.L.J.R. 16; Wacal Developments Pty. Ltd. v Realty Developments Pty. Ltd. (1978) 140 C.L.R. 503; Commissioner of Taxation v Whitford's Beach Pty. Ltd. (1982) 56 A.L.J.R. 240; Commissioner for Prices and Consumer Affairs (S.A.) v Charles Moore (Aust.) Ltd. and Others (1977) 51 A.L.J.R. 715, 730-731 per Justice Murphy, contra Justice Gibbs, at 723, Justice Mason at 729, Justice Stephen at 726; Chief Justice Barwick could "see ... relevant profit in knowing the changes which take place in the Bill between its introduction and its passage ..."; O'Callaghan v Loder (unreported, Equal Opportunity Tribunal (N.S.W.), 21 June 1983), at pp. 14-15; Sydney Municipal Council v Commonwealth (1904) 1 C.L.R. 208, 213-214.) The opinions of Solicitors-General have been noted. (See, for example, Re Pearson and Ors; Ex parte Sipka (1983) 57 A.L.J.R. 225.)

20.29 Differential re Types of Material. Despite some statements to the contrary, authorities show it is not correct to say that, in the case of ambiguity in statutory provisions, a court can never have resort to various extraneous materials where the court considers them relevant. However attempts have been made to distinguish between categories of extraneous materials. The purpose here is to assert that some extraneous materials may be looked at, whilst others may not. Yet such distinctions may lead to absurdities. Suppose a distinction is drawn between legal treatises and other similar works, and law commission or committee reports. Legal scholars may sit on a commission and produce a report. They may then write a treatise, textbook or legal article utilising the same or very similar material, commenting on an area of law or legal interpretation in terms identical with their commission report. Is the one to be referred to, the other not? Say a distinction is sought to be made between legal articles and Second Reading Speeches. What is the case if a Minister subsequently has his Second Reading Speech published as an article in a learned journal, or the speech is slightly modified to appear as an article. Examples of Attorneys-General publishing in this way are not difficult to find. (See for example Enderby, "The Family Law Act 1975" (1975) 49 (No.8) Australian Law Journal 477; and Ellicott "The Exercise of Federal Court Jurisdiction - A Revision of the Federal Court Structure" (1977) 1 Criminal Law Journal 1; "Federal Court of Australia" (edited version of a paper prepared and

circulated by the Attorney-General of the Commonwealth) (1977) Law Institute Journal (March) 84; Ellicott, "New Federal Court Structure" (1977) Law Society Bulletin (February) 2; see also Ellicott, "The Need for a Single All-Australia Court System" (1978) 52 (No. 8) Australian Law Journal 431, at pp. 432, 433.) Should one be admitted into the court's deliberations when the other is not? Further, it is unsatisfactory for Second Reading Speeches and other Parliamentary deliberations to be considered irrelevant, whilst courts quote far more esoteric texts - such as Shakespeare. (See, for example, Commonwealth and Ors.v Tasmania and Anor (1983) 57 A.L.J.R. 450, 539.) In Black-Clawson [1975] A.C. 591, 614 Lord Reid alluded to this issue, stating:

> *Construction of the provisions of an Act is for the court and for no one else ... If we are to take account of Parliament's intention, the first thing we must do is to reverse our present practice with regard to consulting Hansard. If we do not refer to Hansard then a fortiori we should disregard expressions of intention by Committees or Royal Commissions.*

The statement was directed at keeping all material out. Yet it goes without saying that if recourse is had to reports of committees or royal commissions (as is frequently the case), then regard may also be had to Hansard. This would not remove from any court the task of interpreting provisions; it simply extends to it a context which may give the judges further enlightenment as to Parliament's intention.

20.30 In evidence before the Committee it was said that a distinction could be drawn between Committee reports and other materials, on the basis that the former might readily be available to members of the community, the latter not:

> *... the individual member of the community must have accessible to him the material upon which the statute is likely to be interpreted. Perhaps Parliamentary committee reports may be useful if they are a matter for the public record. However, notes between parliamentarians scrawled on the back of an envelope may not be used, for the reason that they lack*

the general circulation that is required to affect and effect decisions that every member of the community may make. (Transcript, 27.9.1983, at p.121.)

20.31 The Committee does not believe that "notes scrawled on the back of an envelope" would be suggested as legitimate aids to interpretation by the courts. The distinction between such materials and aids which can assist courts is clear. Should such materials be referred to by counsel, there is little doubt that the court would exercise discretion in excluding them. At the same time it is also true that some aids might be considered to be more reliable than others by the courts. In the United States it has been suggested that material can be categorised on a scale of reliability:

> *Since the 1930s, federal courts, when deciding questions of statutory interpretation, have looked to congressional legislative history to determine legislative intent. Over the years, a rough concensus has emerged regarding the relative reliability of types of federal legislative history. Recently [a review of] the extensive case law and treatises discussing legislative history [has] ... concluded that all legislative history can be divided into five categories of reliability. These five categories comprise the federal heirarchial approach to legislative history. [They] range from the most unreliable to the most reliable. First, testimony and evidence offered by nonlegislators at committee hearings usually should be rejected as persuasive legislative history. Second, legislators' statements made during floor debate or in committee hearings are generally unreliable. Third, statements that are persuasive on some occasions include statements made by bill sponsors, floor managers, and committee members in charge of legislation. Fourth, committee reports are generally reliable indicators of intent. Finally, of course, the most reliable indicator of intent is specific language in the enactment itself.* (Uno and Stapke, "Evaluating Oregon Legislative History: Tailoring an Approach to the Legislative Process" (1982) 61 Oregon Law Review 421, at pp. 431-432.)

(See also Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth' - How Long a Time is That?" (1975) 63 Calif. Law Review 601.)

20.32 Courts in Australia are equally capable of determining relevance of materials and reliability, going to weight. Factors relevant to the court have been identified as including:

* *the identity of the author of a particular aid;*
* *the reason for its creation;*
* *its public availability:*
* *more generally (although not exclusively), whether the material was such that it may fairly be taken to have been in the contemplation of the legislature at the time of enactment*

(Griffith,"A Practitioner's Viewpoint" in Symposium on Statutory Interpretation op. cit. 28, at p. 29.) (On availability of materials, see pp.81-85 infra; on weight, see pp. 90-92, 94-97 infra.)

20.33 Differential re Types of Legislation. Alternatively it has been suggested that a distinction should be drawn between types of legislation, extraneous materials being admissible in the case of ambiguity in provisions of some and not admissible with others. A member of the English House of Lords sought to make this differentiation in a paper presented to a Symposium on Statutory Interpretation held in Canberra in early 1983. (See Attorney-General's Department, Symposium on Statutory Interpretation 1983, AGPS, Canberra.) He alluded to seven categories of legislation and advanced arguments in favour of admissibility of particular materials for particular categories, with no such materials being available in the case of some.

* law reform Acts
* technical Acts
* fiscal legislation
* social legislation
* political legislation
* legislation passed to implement an international convention
* constitutional Acts

(See Wilberforce, "A Judicial Viewpoint" in Symposium on Statutory Interpretation, op. cit. 5. The following paragraphs summarise and critically analyse his views.)

20.34 "Law reform Acts" are defined as Acts passed "in order to introduce a specific and identifiable piece of law reform". (Wilberforce, op. cit., at p.8.) Frequently these result from a report of a law reform agency or body - of a permanent or ad hoc nature. Reports leading to the passage of legislation should be admissible for, as in Black-Clawson [1975] A.C. 591 it may be possible "to extract [from such a report] the vital point ... in relation to the very point at issue ... Without [the report's] indication, the decision [might] almost certainly be different ..." (Ibid at p.9.) The view was put at the Symposium that law reform reports could often be -

> *... enormously helpful to a judge, save hours of argument and cogitation and prevent a number of wrong or appealable decisions. At the very lowest it would make respectable what is likely to happen in any event, namely an unofficial reference to the report; it would put the report on top of the table instead of under it.*

The speaker went on, however, to state that some reports might not be allowed to courts for guidance:

> *The question whether permission to consult should be contained in each relevant Act or in a general statute appears to me a matter for ministerial choice.* (Wilberforce, op. cit.)

20.34.1 Yet Parliament's time should not be taken up with debate as to what report, or other aid, should or should not be relevant, when courts are quite capable of looking at reports (and Hansard, for that matter), without necessarily acknowledging they have done so, and determining their relevance and weight. Judges have often reiterated that Parliament cannot know in advance what "complex questions of interpretation" might present themselves to a court. If this argument is valid (but see to the contrary at p. 85-89 infra), and Parliament (including the Minister) does not know "the questions" in advance, how can Parliament (or the Minister) know in advance whether enabling courts to look at a particular report will be of any assistance to a court faced with a "complex question" involving interpretation of the Act?

20.34.2 Further, the Minister might in each case simply put into every Bill the provision that the Second Reading Speech would be relevant to give guidance on the Act's interpretation; or that any materials at all would be relevant. The Judge might not favour this. (Indeed, the remainder of his paper makes it clear he would not.) Yet if the Minister is to have the prerogative (however empty the reality might be), the Minister should not be limited to law reform reports. And as the judge had earlier conceded, courts look at reports anyway; the choice has already been taken out of the Minister's hands.

20.35 "Technical Acts" are defined as those "about patents, trade marks, scientific processes, drugs and medicines, consumer interests". (Ibid, at p.9.) Such legislation "may well be preceded by the report of an expert body" and "there would [not] or need [not] be much controversy about the use of these reports in order to understand not just the mischief [sought to be dealt with by the Act] but the field in which the legislature is operating and the objectives of the legislation." An example given is that of Eastman Photographic Materials [1898] A.C. 571, referred to earlier (at pp. 54-56 supra), where Lord Halsbury stated of a Patent's Office report:

I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission ...

He considered the report relevant in determining both the mischief the legislation was designed to correct, and the objective of the report.

20.35.1 What if the legislation is not preceded by an expert report: can old reports, preceding earlier versions of the legislation, be looked at. Further, reports of expert bodies about "consumer interests" may not be the subject of controversy in the United Kingdom, but controversy may arise about such a report in Australia (for example, in relation to Trade Practices legislation - see Creighton, "Secondary Boycotts Under Attack - The Australian Experience" (1981) 44 (No.5) Modern Law Review 489, at p.492, referring to the Report of The Trade Practices Act Review Committee ("The Swanson Committee"). If controversy does attach to a report, would this mean the report should be ignored by the courts - or by some courts, or by some judges. Who is to judge "controversiality"?

20.35.2 It is also predictable that counsel finding a report relevant to their side would advocate strongly that the legislation in question fell within the "technical Act" (or "law reform Act") category. The other side would argue strongly that the legislation did not fall into the category. Thus, rather than court time being spent on the real issue - the interpretation of legislation - it would be taken up in debate about the "type" of legislation confronting it and, as a result, the type of materials available as evidence. This would find little support from many sectors of the community, particularly judges and litigants.

20.36 "Fiscal legislation" - involving taxation - is acknowledged by "most judges [as] their most difficult task". The proposal is "that there is a good case for permitting a memorandum explaining the purpose of a tax, especially of a new tax, to be looked at." (Ibid, at p.10.)

20.36.1 The limitation to explanatory memoranda is questionable. A Second Reading Speech may allude to precisely the point before the court. If so, looking at it would eliminate recourse, by judges, to "a process of linguistic construction ... which may defeat [the] object". (Ibid at p.10.)

20.36.2 A report might precede the drafting and passage of the fiscal measure in question. In Australia, a number of reports on reform of the taxation system have been commissioned by governments. (See for example, Full Report ("The Asprey Committee Report") 1975, AGPS Canberra; Committee of Enquiry into Taxation and Inflation ("The Mathews Report") 1975, AGPS Canberra). Are these reports to be ignored, and explanatory memoranda specially drawn up, just because the legislation in question falls into the "fiscal" category and not the "technical" category (where such reports are under this scheme to be admissible)? This would mean a double expenditure of resources - first by the committee producing a report, then by those drafting the memorandum. The "problem" might be solved by the Minister labelling the relevant report as an "explanatory memorandum" and circulating it as such, together with the Bill. If so, the distinction is pointless.

20.37 "Social legislation" is said to cover "all legislation concerned with social and welfare services, education, health, housing, etc. ... there is an objective to be attained, and possibly one which is not politically controversial ... It is obvious that legislation of this kind is conspicuously purposive ... " (Ibid,at pp.10-11.) Here it is contended that the legislation should be accompanied by a "statement of purpose to be made by Parliament for judicial guidance".

20.37.1 Again, any rationale for drawing a distinction and applying a different method of seeking guidance and a different extrinsic material, is elusive. To determine that the particular legislation falls within the stipulated category - social and welfare services, education, health, housing, "etc." is time consuming. (And the "etc." category may be boundless.) Is not all legislation purposive - having a particular object to be attained? "Political non-

controversiality" is noted as a the guide. Yet if this is a guide, England differs radically from Australia, for at present health, housing, education and social and welfare services legislation are subject to political controversy.

20.37.2 Even if a particular Act can be slotted into the category without raising doubts about the correctness of its character, why should Parliament be required to make a statement about purpose for judicial guidance, when competent reports may be available; and when the Minister may have made a clear statement of purpose in a Second Reading Speech. Or contrarily, some would think it wrong that a legislative statement of purpose should be restricted to "social legislation" as defined by Lord Wilberforce. Certainly there is room for taking up the Elizabethan practice of prefacing the provisions of an Act with a statement of purpose in the form of a preamble, but it may be better left to the Minister to decide whether in a particular case such a preamble is warranted. (On preambles, see further at pp. 122-124 infra.) Even then, there is no good reason to restrict courts to the preamble for the purpose of interpretation; there is no good reason to presume that, because a preamble exists, courts should be denied the right to look at any report or other extraneous material that may provide guidance. On past experience some judges will continue to look beyond the preamble, anyway.

20.38 "Political legislation" is defined as "legislation passed by a party majority in order to implement party policy, legislation with which the other party does not agree." (Ibid, at p.12.) Here the suggestion is that nothing should be done in the way of providing extraneous materials to grant judges guidance about the intention of Parliament in passing the legislation:

> *The framing of an explanatory memorandum is likely to present difficulties. The only kind of memorandum which the majority is likely to support would be one which explicitly underlines the political purpose of the legislation ... Even if such a memorandum could be drafted and passed - and one's mind baulks at the parliamentary process of amendment and obstruction - I suspect it would leave the judges with the*

same dilemma: whether to align themselves with a purposive construction." (Ibid, at p.12.)

20.38.1 It is arguably difficult to see how "political legislation" can be distinguished from (some, at least), "social legislation" or "fiscal legislation". It is naive to suggest that taxation legislation, for example, is not (or never) political. (See for example Mathews, "The Structure of Taxation" in The Politics of Taxation, 1982, Sydney, Wilkes, editor, 82; Stillwell, "Sharing the Economic Cake: Inequality in Income and Wealth in Australia" in Who Gets What? The Distribution of Wealth and Power in Australia, van Dugteren, editor, 1976, Sydney, 82; Raskall, "Who's Got What in Australia: Distribution of Wealth" (1978) 2 Journal of Political Economy 3; Henderson, "Poverty in Britain and Australia" (1980) 52 (No.2) Australian Quarterly 221.)

20.38.2 The "distinction" could be construed as meaning that when legislation appears to have a purpose which is "political", a judge has a right to ignore Parliament's intention and doggedly stick to a literal construction which defeats Parliament's purpose. If courts are supposed to interpret legislation in accordance with the intention of Parliament, it is legitimate to ask why they should seek a right to determine when they will do so, and when they will not. Far from enabling courts to escape involvement in political controversy, such a proposal serves more to embroil them in an approach that can be viewed only as political.

20.38.3 The philosophy underlying the idea that legislation passed along party lines does not carry with it the requirement that courts should look to its purpose or Parliament's intention must be questioned. Some legislation is passed in this way, at least in Australian Parliaments. Many Acts are passed unanimously, after compromises have been reached between the parties. However the nature of Parliament is that legislation may be passed by a majority, with members of one of the major parties on one side and those of opposition parties on the other. Political parties fight elections on the basis of

their policies, and one or other of the parties takes its place as a government with an agenda of policies it seeks to implement, often through legislation. When referring to the intention of Parliament as what courts should look at in interpreting legislation, there is no rider that the intention should be looked to "only when all political parties agree" or "only when there is a free vote in Parliament" or "never when legislation is passed along party lines or in accordance with party policy" or "never when the political views of the party ferrying the legislation do not coincide with those of the court (or individual judge)". In those very cases where a judge has difficulty understanding the ideology underlying an Act, and is not attuned to the intention of Parliament in passing it, extraneous materials may be particularly useful. Second Reading Speeches would, no doubt, be one exceptionally good source, as may well be Parliamentary committee reports, reports of commissions and committees, legal articles and the like. It seems shortsighted to deprive the courts of such assistance in relation to any legislation - "political" or "apolitical".

20.39 Legislation passed to implement an international convention - here it is accepted that materials relating to the preparation of the legislation, reports, conventions, earlier Acts and the like and, where appropriate, foreign versions of the legislation may be looked to by the courts for guidance in interpreting such legislation. (Ibid, at p.12.) (Citing Fothergill v Monarch Airlines Ltd. [1981] A.C. 251 H.L.(E.); James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd. [1978] A.C. 141 H.L.(E.); see also Commonwealth and Ors. v Tasmania and Anor. (1983) 57 A.L.J.R. 450; Koowarta v Bjelke-Petersen (1982) 56 A.L.J.R. 625; R v Bush 5 A.L.R. 387, 399-400; Merrills, "Two Approaches to Treaty Interpretation" in The Australian Year Book of International Law 1968-1969, 1971, Sydney, 55; Fawcett, "The Legal Character of International Agreements" in The British Year Book of International Law 1953, 1954, London, 381.)

20.39.1 Yet, it may well be that "political" or "social" legislation is based on international conventions (for example World Heritage Properties Conservation Act 1983 (Cth), National Parks and Wildlife Conservation Act

1975 (Cth), Race Discrimination Act 1975 (Cth), Sex Discrimination Bill 1983 (Cth). "Technical legislation" may also be based on international treaties or conventions (for example, patents legislation, copyright). Either the alleged distinction is no distinction at all; or the precious time of Parliament (and Ministers) would be taken up in endeavouring to determine into which category a particular Act falls, and consequently which type of extraneous materials should be manufactured to accompany it, or be made available in the normal course to the courts. Again, the time of the courts would be needlessly encroached upon by counsel seeking to have an Act placed within a particular category so that certain materials would or would not be available.

20.40 Constitutional Acts - the proposal is that a seventh category of legislation should be defined "which admit[s] of a different degree of use of extraneous materials". Proceedings of Constitutional Conventions should be relevant, as should proceedings in the nature of United Nations deliberations or task forces, if these have preceded or involved themselves with the passing of the particular constitutional Act. (Ibid, at p.18.) (See for example, Re Pearson and Ors.; Ex parte Sipka (1983) 57 A.L.J.R. 225, 227, 232 (reference to Australian Convention Debates); also Attorney-General v Saipa'ia Olomalu, Court of Appeal of Western Samoa, 26 August 1982, unpublished judgment (reference to United Nations' and similar debates.)

20.40.1 Again, why draw a distinction? Certainly if the materials are relevant and may be helpful to a court, it is common sense that judges may have regard to them. If similar documents or other extraneous materials are relevant and helpful in relation to other types of legislation, it is equally in keeping with common sense for them to be available to courts grappling with ambiguous provisions.

20.41 To adopt the Wilberforce proposals would render the position confused and confusing to Parliament, Ministers, courts, counsel, and others seeking to determine how legislation might be interpreted. Parliament (and Ministers)

would stand rightly bewildered about whether, in terms of these proposals, a particular Act should be accompanied by an explanatory memorandum, a purposive clause, a "memorandum explaining purpose" (if it is a tax measure), a legislative statement that a specific law reform report may be looked at by courts for interpretation purposes, or that nothing specific need be said because "technical reports" may be looked at by the courts without Parliament having to give any direction. Distinctions should not be made between types of legislation to make some extraneous materials available to the courts for interpretation of some Acts, other extraneous materials available for interpreting other Acts, and no extraneous materials available to assist the courts in constructing yet a "different" category of legislation. The proposal is inappropriate for Australia.

20.42 Arguments For and Against Reference to Materials. Arguments have been put forward in cases, discussion papers and speeches, and in submissions to the Committee for restricting reference to the admissibility of extrinsic materials where questions of interpretation arise, or "leaving matters as they are". These include -

* traditional rule of non-admissibility of extrinsic materials

* judges are looking at materials anyway, and Parliament should not interfere

* distinction between ascertaining "mischief" from extrinsic materials and ascertaining "solution"

* lack of availability of materials, particularly to local solicitors dealing with "everyday" problems

* general public should know what the law is from reading the legislation, and should not be required to seek out other materials

* no assistance to be gained from extrinsic materials

* issues not raised in Parliamentary debates that would give answers to questions arising before the courts

* conflicting purposes/intentions stated by Members of Parliament in debate

* foolishness of debate in Parliament and in Members "playing to the gallery"

* few Members present during debates

* increase in complexity of interpretation process

* increase in time and consequent delay, as well as costs

* difference in capability of High Court and Supreme Court judges, and judges of the lower courts and magistrates, in making use of extrinsic materials

* proceedings in lower courts do not require the expertise and degree of research, in the determination of cases, which is necessary at higher court levels

* lawyers may be open to action for negligence

* usurpation of the role of the court as interpreter (encroachment on independence of the courts)

20.43 The Committee has considered these arguments fully, but concludes that, on balance, they do not support the proposition that judges should be restricted in their access to materials that may assist them in interpreting legislation. If there were ever a "traditional rule" that judges could not have access to extrinsic materials they considered relevant, including Parliamentary Proceedings, and this can be doubted (see Extrinsic Aids to Statutory

Interpretation, op. cit.; also pp. 52-59, 60-61 supra) today that "rule" is subject to strong challenge. As far back as 1961 the then Attorney-General of Australia adverted to the Interpretation Act 1960 (Ghana), in commenting on the question of recourse to Parliamentary materials. Section 19 of the Ghana Act excludes reference, by the courts, to "debates of the Assembly" (whilst allowing reference to many diverse materials). The Attorney-General stated: "this restricts the material which we [in Australia] should presently regard as available". He described as "... possibly ... more conservative than our law" the denial of access to the Parliamentary Debates. (See Barwick, "Divining the Legislative Intent" (1961) 35 A.L.J. 197, at pp. 199, 203.)

20.44 Numerous cases have been cited where frequent recourse to equally numerous extrinsic materials has been had by judges at various levels. As well, judges have acknowledged at conferences and in submissions to the Committee that this is so. For example, at the Australian Law Reform Agencies Conference held in Brisbane in July 1983 Justice McPherson of the Queensland Supreme Court referred to judicial scrutiny of extraneous materials, saying: "There seem to be two questions. One is whether you look at extraneous matter, and judges often do. The next question, which is the difficult one, is what you do with it when you have looked at it; what weight you give to it." (Transcript, at p. 2-61, emphasis added.) Commenting on this, a second participant at the Conference said:

> *What Justice McPherson has just said - that is, that judges do take into account extraneous materials - is extremely important ... If judges are doing this, it is wrong that they should do so without counsel having a real opportunity to either refute what is put in the extraneous material taken into account by judges, or to accede that it is correct. As long as there is a situation where judges simply take extraneous materials into account, and counsel have no real authority for bringing such matters before the court, the position is that justice cannot be seen to be done because there is no clear opportunity for counsel to argue about the issues taken into account by the judges.* (Transcript, at pp. 2-62, 2-63, emphasis added.)

In reply, Justice McPherson stated: "I think that is perfectly correct. May I say that I ... have looked once at a parliamentary debate since I have been a judge ..." (Id, emphasis added.)

20.45 In a submission to the Committee, Justice Everett of the Tasmanian Supreme Court wrote "I confess that it is my own practice to consult any material that I consider will help in the task of statutory construction, but I do not [always] publicly acknowledge this ..." (Everett, written submission, 21.7.1983, at p.1, emphasis added.)

20.46 Mr. I. Turnbull, federal Parliamentary Counsel, has said:

> *I think that some extraneous materials may be of great assistance to the courts. For example, where an Act is to give effect to a convention, I think even now the courts do take into account the terms of the convention when interpreting the Act. I understand Mr. Justice Murphy is prepared to have regard to Parliamentary debate. In Sillery Mr. Justice Murphy mentioned the second reading speeches in his interpretation of that provision, and I think that the trend is definitely going in that direction.* (Australian Law Reform Agencies Conference, Transcript, op. cit., at p. 2-57, emphasis added.)

(See also Wilberforce, "A Judicial Viewpoint", op. cit., at p.9.)

20.47 The Committee believes that there is force in the proposition that any rule that judges could not look to materials including Hansard is obsolete. Indeed, members of the legal profession and academics who appeared before the Committee agreed that this is so. One said:

> *The court still applies the basic rule in statutes ... to seek to ascertain the intention of the maker by looking at the words that have been used ... When the provision is applied to the facts and the result becomes*

ambiguous, the court is not sure of which way to go ... [and] in those circumstances ... judges sometimes go wider. Some of the High Court judges have frankly admitted that they have a peep at Hansard. They have said that outside the court. Recently Mr. Justice Mason has said that judges of the High Court have done so. I do not know whether that is necessarily law at present; that may be debatable ... When ambiguity arises one uses material from a wider field." (Gillard, oral evidence, 27.9.1983, at p.137.)

If the courts are to be restricted in materials they can look to, it is appropriate that arguments other than that of adherence to "tradition" must be found.

20.48 Six members of the Victorian Bar who appeared in person before the Committee each concluded that as judges are already looking at extrinsic materials, there is no need for any legislative intervention on the matter. For example, it was said:

It is my personal submission to the Committee that common law, as it exists, ought to be allowed to prevail and that proposed Clause 32 is merely surplusage. (Hollis-Bee, oral evidence, 27.9.1983, at p.121.)

20.49 A second barrister commented:

If one does look at what has happened [recently on the High Court] one can see there is a good deal of sense in [saying] that when the seminar in Canberra examined the problem, it was examining a problem which no longer existed. It is for that sort of reason that I think it is unnecessary to make any alteration to the law. (Shaw, oral evidence, 27.9.1983, at p.123.)

However, later in the discussion it was conceded that confusion exists amongst judges and amongst courts as to the position (see Transcript 27.9.1983, at pp. 120-140).

20.50 Another member of the Bar earlier raised this issue, and the problems it engendered, with the Committee. He pointed out that when appearing before the Administrative Appeals Tribunal he had been refused, initially, the right to put matters from Hansard which were relevant to the provision before the court. When he cited the TCN Channel Nine case, where the Federal Court held that Hansard reports of the second reading speeches of the relevant Ministers and explanatory memoranda were admissible as evidence, the Tribunal adjourned until the report of that case could be brought before the Tribunal for reference. The material was then ruled admissible. (Griffith, oral submission, 3.8.1983, at pp. 79-80.)

20.51 The Committee considers that the position of confusion which now exists on the question is unacceptable, and notes the comments of Justice Mason of the High Court on the matter. He said:

> *Evaluation of ... proposals ... contemplat[ing] resort by the courts to extrinsic materials as an aid to construction involves something in the nature of a costs-benefit analysis ... [D]iscussion [at the Canberra Symposium on Statutory Interpretation] suggests that despite Mr. Justice Murphy's conservatism on this issue, his optimism and his confidence that his brothers share his view [that materials should be looked at], certainty in the existing law is not a solid ground of opposition to legislative proposals designed to set the courts free from the old restrictive rule generally denying resort to extrinsic materials. In a sense the rule is a self-inflicted wound.*
>
> *The law as it presently stands is neither clear nor convincing. It seems that it is permissible to resort to the reports of Law Commissions and expert committees on which legislation is based to show the mischief which the statute is designed to remedy, but not to ascertain what directly the statute was intended to mean ... and now there is growing support for the view that it is or should be legitimate to resort at least to the Minister's Second Reading speech and perhaps to the explanatory memorandum to identify the mischief aimed at, if not for the remedy which was intended, in case of ambiguity ... To that growing support*

should be added the comments of Lord Wilberforce in the paper which he has presented [at the Symposium], notably his reflections on the part of the decision in Black-Clawson which denied resort to the parliamentary debates, the paper presented by Dr. Griffiths, Q.C., and the Attorney-General's Department's Discussion Paper on statutory interpretation. That there are anomalies in the present law is beyond question. It is incongruous that it is legitimate to have limited regard to the report of a Law Commission or an expert committee but not to parliamentary consideration of the Bill itself ...

All this indicates that there is now doubt and uncertainty as to the status of the old rule. It is generally felt that this doubt and uncertainty should be set at rest ... (Mason, "Summing Up" in Symposium on Statutory Interpretation, op. cit. 81, at pp. 81-82, emphasis added.)

It was "preferably for the Parliament" to do this.

20.52 It has sometimes been suggested that extrinsic aids may be resorted to to determine the mischief Parliament sought to overcome in passing a particular Act or provision, but the courts must stop there; they cannot go on to discover from those aids the remedy Parliament intended. The Committee is not persuaded that this argument has substance. In Black-Clawson [1975] A.C. 591 the distinction was discussed. The Act in question, the Foreign Judgments (Reciprocal Enforcement) Act 1933, was enacted following the report of a Committee chaired by the then Lord Chancellor. That Report contained a draft Bill, the provision before the court in Black-Clawson being identical with a provision in that draft Bill. The court held that the Report was relevant to assist in construction, but two judges (one of whom has since repudiated his position - see Wilberforce, "A Judicial Viewpoint" in Symposium on Statutory Interpretation, op. cit. and p. 56 supra) said it was permissible only to ascertain the "mischief", not the "remedy". Two judges said it was permissible to look further. (The fifth considered there was no ambiguity so no need to look at the report for either or both purposes.) Of these two, one said:

The contrary view [of restricting admissibility to the issue of mischief] seems to impose on judges the task of being selective in their reading of such reports. What part may they look at and what not? Have they to stop reading when they come to a recommendation? Have they to ignore the fact, if it be the fact, that the draft Bill was enacted without alteration? To ignore what the Committee intended the draft Bill to do and what the Committee thought it would do? I think so to hold would be to draw a very artificial line which serves no useful purpose. (Black-Clawson [1975] A.C. 591, 622 per Dilhorne.)

20.53 The Committee endorses this view. If material is allowed in as being relevant, it should be available to assist in determining both mischief and remedy. As was stated earlier in Smith v Central Asbestos Co. Ltd. [1973] A.C. 518, 529 it would require "superhuman powers of detachment to avoid noting what was recommended as the remedy." (Per Reid; also Justice Bright in Hayes v Commissioner of Succession Duties (1970) S.A.S.R. 479; and see Dillingham Constructions Pty. Ltd. v Steel Mains Pty. Ltd. (1975) 132 C.L.R. 323, 332-335; also Greenwell "Statutory Interpretation and the Mischief Rule" in Another Look at Statutory Interpretation 1982, AGPS, Canberra 2.) The Committee does not accede to a position where judges are expected to develop superhuman powers.

20.54 A number of submissions referred to the possible lack of availability of materials, particularly Hansard; the proposition was that local solicitors dealing with "everyday problems" should not be required to purchase sets of Hansard, and that such materials would not be readily available to judges and magistrates, as well as practitioners, particularly in country areas. A member of the Victorian Bar stated: "At present practitioners would not commonly see almost any Hansards. If they have some particular reason they may get hold of a particular Hansard and examine what the Parliament said in debate. However, that is most unlikely." (Harris, oral evidence, 27. 9.1983 at p.126.) Another said:

One has to bear in mind that a greater degree of interpretation of statutes occurs in the lower courts and, in particular, the Magistrates' Courts. To invite a magistrate to look at anything that he may be able to get his hands on to interpret a statute will create enormous problems ...

In a matter before a magistrate, it is unlikely in that situation that there would be a Hansard readily accessible ...

If one thinks it is a good thing that one ought to be able to look at extrinsic aids, it should be aids which are authentic and can be very easily got; in other words there must be ready access to them. (Gillard, oral evidence, 27.9.1983, at p.125.)

20.55 Members of the Law Institute also referred to this problem. (See Transcript, 11.7.1983, at pp. 43, 47, 50-51, 53.) However after giving the entire question of extrinsic aids further considered attention, the members of the Ad Hoc Committee of the Law Institute of Victoria in a written submission once more alluded to the problem of accessibility, stating:

This was not regarded as being a real problem as no doubt appropriate extrinsic materials would be analysed in text books and legal articles dealing with legislation. Practitioners now operate with the existing common law approach to the interpretation of case law, and the ad hoc committee believes that they will be able to adapt to a more expansive approach to the interpretation of legislation.

It was noted that already in many areas of the law a number of legislative services available to practitioners distribute explanatory memoranda and other materials. (Ad Hoc Committee, Law Institute of Victoria, written submission, 18.8.1983, paras. 6.1, 6.2, at p.4.)

20.56 The Committee accepts that at present Hansard may not be readily available in lawyers offices, nor in country areas. However many materials wholly accepted by all jurisdictions and all levels of courts as relevant to judicial decision making are not necessarily available to all practitioners and judges. In Victoria, no doubt most (or all) practitioners, and all country and city courts, would have access to Victorian Reports and Commonwealth Law Reports. However they may not have ready access to reports of other State jurisdictions, of the United Kingdom (for example, All England Law Reports, Weekly Reports, Appeal Cases, Chancery, English Reports), or Canada, the United States, New Zealand, India, Ireland, African jurisdictions, Papua-New Guinea, and so on. Yet cases from these jurisdictions are referred to by the courts and are used by counsel in their research. (See for example Bradley v Commonwealth (1973) 128 C.L.R. 557, 590-591 where Canadian and United States' cases were cited in relation to the Post and Telegraph Act 1901-1971 (Cth), ss. 54, 57, 91, 96 and 158.) Until a short time ago, judgments of the English Court of Appeal were generally accepted as having more standing than those of our own courts. That meant that however inaccessible English reports might be, and despite their being that they might be less accessible than Victorian Reports or Commonwealth Law Reports, counsel and courts were expected to consider them and give them preference. (See Day & Dent Constructions Pty. Ltd. v North Australian Properties Pty. Ltd. (1982) 56 A.L.J.R. 347 per Justice Murphy.)

20.57 Furthermore, whether or not materials are readily available, courts and judges acknowledge they use them. It is therefore necessary that counsel should be alerted to the use of the materials, so that they can obtain them and refer to them, rather than judges using the materials without counsel having any opportunity to refute or endorse their contents. This is particularly important from the public point of view, as the Australian Ombudsman made clear at the Symposium on Extrinsic Aids held in Canberra:

> *The important thing, ... from the consumer's point of view is that if the High Court and other courts are going to use extrinsic materials in interpreting Acts of Parliament then it's not sufficient for the High*

Court alone to have the message as to which materials they will use. Officials are called upon to administer Acts in departments, solicitors to advise clients on the same question. They ought to know too what classes or what particular types of extrinsic materials the court would rely on in the particular cases they are called upon to advise. It's not sufficient to say the court has a discretion as to the extrinsic materials to be invoked. The court needs to go further, so that in future persons outside the courts required to apply legislation are confident as to extrinsic materials which may be used in the instances before them. (Richardson, in Symposium on Statutory Interpretation, op. cit., at p. 26; also Weigall, loc. cit.,at p. 24.)

20.58 It further should be recognised that counsel themselves seek out extrinsic aids, including Hansard, anyway. A member of the Victorian Bar acknowledged the value of such research in submissions to the Committee. (Griffith, oral evidence, 3.8.1983, at p. 79; see also, Griffith, "A Practitioner's Viewpoint", op. cit. at pp. 32-33.) Elsewhere it has been said:

If they really think the court's practitioners do not read blue books in order to find out what statutes mean, they are living in a complete fool's paradise. (Hailsham, L.C. in Debate on Interpretation of Legislation Bill, Hansard (H.L.) 26.3.1981, at p. 1345.

See also Bennion, "Another Reverse for the Law Commission's Interpretation Bill" (1981) New Law Jrn (13.8.1981), at p. 841. See also Zelling, Law Reform Agencies Conference Transcript, Brisbane, July, 1983 at p. 2-66, and see at pp. 86-89 infra.)

20.59 At the Canberra Symposium Justice Mason drew attention to this, saying:

In the debate on the 1981 United Kingdom Bill, the Lord Chancellor dismissed the unavailability of Hansard as having a theoretical rather than a practical importance. He said that competent judges and counsel

always look at Hansard. Only naive solicitors could think otherwise. Like Mr. Justice Murphy, I often look at Second Reading Speeches ... Of course, judges are infinitely curious. It is better that their curiosity should be satisfied publicly rather than privately. Despite this, I can see there is some problem of accessibility ... But I am not inclined to think it is a serious problem. And it can be diminished by making copies of Second Reading Speeches freely available. (Mason, "Summing Up" in Symposium on Statutory Interpretation, op. cit. 81, at p.83; see also Pearce, "Comments", ibid, 66.)

20.60 The Committee agrees with the Ad Hoc Committee of the Law Institute that if acknowledgment were made of the use of various extrinsic materials, services to lawyers would quickly incorporate information about relevant materials. (The Australian Institute of Criminology in its quarterly Bulletin produced an index to Hansard noting instances where issues of a criminological and forensic science nature were raised; unfortunately due to budgetary constraints the Bulletin was discontinued in 1982, but currently there is some indication it may be revived. This is just one example of what has been and can be done.) Annotations of Acts are common. In the future, annotations would also incorporate information from Second Reading Speeches where appropriate. It is also true that legal articles refer, today, more frequently to such material, and are more often noted in annotations of Acts. This process could easily be extended to subordinate legislation where appropriate.

20.61 The Committee notes, and endorses, the further comment of the Law Institute Committee that as there is already a rule of practice that barristers may not cite unreported decisions without first giving reasonable notice to counsel for the other side: "No doubt a similar rule could be adopted in relation to reliance upon extrinsic materials and these could be mentioned either in the formal list of cases to be cited or in some other way." (Ad Hoc Committee, Law Institute of Victoria, written submission, 26.8.1983, para 9.1, at p.6.)

20.62 The Committee observes that Parliamentary Hansard are available at the Victorian Supreme Court Library. (See Ross, oral submission, 27.9.1983, at p.126.)

20.63 The contention has also been put that no assistance is to be gained from extrinsic materials. In Assam Railways and Trading Co. v Commissioner of Inland Revenue [1935] A.C. 445, 458 Lord Wright said "... the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted." (See contra, Viscount Dilhorne in Black-Clawson.) Other judges have argued that issues raised in Parliament during debates, for example, would not be germane to the questions arising before the courts. Yet this is not always true; assistance can be gained from such extrinsic materials. In the Assam Railways Case, Lord Wright went on to refer to the Eastman Photographics Materials Case, where a report had been used to assist the court, as being an "accurate and unmatched source of information" about the purpose of the particular Act. (At pp. 458-459, and see pp. 54, 67 supra.) Obviously, if it does follow from the legislative history and other aspects of the Act in question that recommendations of a report were accepted, then such a report can be of assistance; there may be "no more accurate source of information": Eastman Photographic Materials Co. v Comptroller-General of Patents, Designs, and Trade Marks [1898] A.C. 571, 575. The previously cited cases, where use has been made of such materials, bear this out. (See pp. 53-59, 60-61 supra.)

20.64 That assistance can be gained has also been pointed out in other contexts. At the Canberra Symposium it was said:

> *[In the] Vestey case ... there was a preamble to the section itself, and ... the House of Lords in 1949 gave one interpretation to the preamble and in 1970 or so gave another interpretation to the preamble ... After this case was over I looked up the debate in Hansard on the Finance Bill*

which passed this session, and ... Finance Bill legislation in [England] is always debated on the floor of the House, therefore there is very public and very considerable discussion on it. I found that not merely on one occasion but on two separate occasions the Minister in charge of the Bill ... in response to a question from an M.P. had said in explicit terms, 'It is not the intention of the Bill to tax anybody but the transferees. It is not our intention to follow the tax through into the children or the grandchildren of the transferees'. He gave that positive assurance. Nevertheless, twenty years or so later on, up comes the Inland Revenue, completely disregarding what their Minister had said, and tries to tax the subject contrary to what the Minister had said. Well it is a very strong case, you see, and I think it does at any rate make a very strong argument in favour of giving some special category - some special status - to explicit ministerial statements. (Wilberforce, ibid, at p.17, emphasis added.)

20.65 At the Australian Law Reform Agencies Conference in Brisbane Justice Zelling of the South Australian Supreme Court stated:

> *[Excluding materials] can raise one problem which I remember as counsel. In order to get through the blackmarketing legislation during World War II, the Attorney-General of the day gave a specific undertaking that it would not apply to certain cases and it would be administered in a certain way, but it was only on that undertaking that the bill went through. Thereafter my client was charged with black-marketing. I could not prove, because the magistrate quite correctly refused to look at Hansard, that in fact my client was doing what the Attorney of the day had said was perfectly permissible and perfectly legitimate. When it comes to that, it is very difficult to say that you should never be able to look at Hansard.* (Transcript, at p. 2-66.)

As counsel, Justice Zelling had sought to tender Hansard, but was refused that right. Commenting upon this, Justice Kirby of the Federal Court and the Australian Law Reform Commission pointed out: "That shows ... how the sense

of justice as affecting your client moved you to do it. We are talking here about [legislation] and what the laity think, but ... if the [community] listened to our debate they would be astonished that we close off so many sources of information." (Id.)

20.66 If extrinsic materials are of no assistance, then they need not take up the time of courts. Certainly if a provision is ambiguous, this may mean that courts feel compelled to go to extrinsic materials, which will take up more time. Going to such materials may sometimes be of no assistance, so that time has been taken up which could be better spent in other ways. However, this consideration must be balanced against the right of litigants to gain a just result.

20.67 Thus in Sillery v The Queen (1981) A.L.R. 227, 232-235, had resort not been had to Hansard, the finding of the Queensland Supreme Court may have remained, with an offender being sentenced to life imprisonment as a mandatory punishment, when the intention of Parliament in passing the particular legislation was that life imprisonment should be a maximum punishment only, at the discretion of the court. As Justice Murphy has said:

> *The Act was a curious one. A penalty provision was not in the usual form. The Queensland Supreme Court and Court of Criminal Appeal took the view that it was a mandatory provision for life imprisonment. It seemed to a majority of the High Court that the penalty applied to trivial as well as serious offences, and one could take the view that it was most unlikely that Parliament would intend such a result. The debates on the Bill had been referred to before in Queensland courts as well as in the High Court. In those debates, the Attorney-General, Senator Greenwood said that the penalty was a maximum. Sir Nigel Bowen in the House of Representatives said the same. Yet the Supreme Court of Queensland at two levels said it was mandatory. ... [T]he circumstances facing the court justified resort to the parliamentary*

materials. (Murphy, "Comments" in Symposium on Statutory Interpretation, op. cit., 39, at p.40.)

20.68 Similarly in Heath v Commonwealth (1982) 56 A.L.J.R. 893, had Hansard not been looked to, a person entitled to compensation under the Compensation (Commonwealth Government Employees) Act 1971 (Cth) may have been refused that right, as he had been in the court below. In the course of debate on the Second Reading Speech when the relevant legislation was passed through the Senate, the Attorney-General of the day had been asked a question on the specific point arising before the High Court, and had given an assurance that the questioner's reading of the legislative provision was correct. This assurance ran directly counter to the interpretation which had been placed upon the section by the lower court. The interpretation was reversed to accord with that assurance when the matter came before the High Court.

20.69 In Credit Tribunal (S.A.) v Charles Moore (Aust.) Ltd. and Ors. (1977) 139 C.L.R. 449 a result directly opposing that which Parliament intended came from the High Court, because the majority (Justice Murphy dissenting) refused to look at Hansard. There, a disagreement arose between the two Houses of Parliament when the legislation was before the Legislative Council. The purpose of the Bill was to impose credit controls over various organisations. The Upper House sought to remove major stores like David Jones and Myer's from the ambit of the Legislation. After negotiation, an agreement to this effect was reached and an amendment introduced accordingly. This was noted in the Parliamentary Debates on the Bill. When the issue came before the High Court, it was held by majority that the Act extends to include all major organisations like Myer's and David Jones. Justice Murphy, dissenting, looked at Parliamentary Debates and determined they showed clearly that the intention of Parliament was to exclude the major organisations. The majority refused to look at the Debates, and accordingly found against the stated intention of Parliament as revealed both in the Debates and in the Bills. The Committee believes it is unsatisfactory for a result contrary to that intended by Parliament to be embraced by the courts, when extrinsic material is available which can show explicitly that intention.

20.70 Some submissions to the Committee expressed fear about the standard of Parliamentary debate and the lack of intelligible assistance that might issue from both Houses. It was said:

> ... *The debates would not always lend themselves to certainty of the law. The Minister's second-reading speech in introducing the Bill should identify the mischief the Government wishes to deal with but if one goes beyond that in Parliamentary debates one may well find a variety of matters being put forward which do not necessarily aid in identifying what Parliament is seeking to do. Speakers may have just one particular point they wish to speak about and it is not unknown for speakers on the same side in a debate to not entirely have the same view as to the mischief they are seeking to deal with.*
>
> *Therefore it will not necessarily add to the clarity of the interpretation if it is necessary to look at all those matters. The Minister's second-reading speech may be of assistance* ... (Harris, oral evidence, 27.9.1983, at pp. 127-128.)

20.71 A second barrister said that when considering a Minister's Second Reading Speech "... when all is said and done, it is an expression of one Member's view. The Members of Parliament, or the majority that vote for the legislation, may have all sorts of ideas as to why they wish the Bill to be passed ..." (Heerey, oral evidence, 27.9.1983, at p. 128.)

20.72 A third view was that by "considering individual intentions, one creates enormous problems":

> *"One side could say, 'Let us have a look at the Minister's speech', then the other side may say, 'Look, the Parliament did not really intend that interpretation'.*
>
> *They may use for example one of his colleagues and his colleague on the same side of the House may express it one way and say that this was his*

intention which was different from the intention of the Minister. Once one starts considering the intentions of people, one gets into enormous problems. (Gillard, oral evidence, 27.9.1983, at p. 133.)

20.73 The Committee acknowledges that conflicting purposes and intentions may be stated by Members of Parliament in debate on various Bills, and that therefore it may be difficult to determine which statement is the correct statement of Parliamentary intention. (However, generally it could be properly assumed that the Second Reading Speech would give greatest clarity.) The Committee observes that courts deal daily with the problem of determining the value of material coming before them, the value of judgments made in earlier cases, and the like. (It has been lamented that the High Court often speaks with seven voices, not the one voice: see Mason, "Summing Up", op. cit., at p.82. The pronouncements of the seven judges are not necessarily given equal weight; choices are made by courts and judges using High Court and other precedents. See also Day & Dent Constructions Pty. Ltd. v North Australian Properties Pty. Ltd. (1982) 56 A.L.J.R. 347, per Justice Murphy.) It is the job of the judge or magistrate to determine the relevance of all material coming before a court, and once relevance has been determined, to decide what weight might be given to it. There is no reason for judges to be less able to assess the relevance and weight of statements made in Parliament than they are able to assess relevance and weight of other extrinsic materials. Judges are generally highly skilled in this art, and those skills would be put to good use in determining relevance and weight of all materials brought before them.

20.74 This applies also to the proposition that debates in Parliament are sometimes "foolish", and that Members may "play to the gallery" in delivering their speeches. Judges could be counted upon to be aware of this possibility. It would also apply to whether the House was full at the time of the particular debate, and who was delivering the speech - for example, if the evidence proffered was that of the Second Reading Speech of the relevant Minister, no doubt this would carry more weight than if it were a throwaway line from a backbencher. (Although as to the numbers, it should also be noted that the House might

not be "full" during the passage of a particular Bill - but that would not render the subsequent Act any less of a statement of the intention of the Parliament.) (See also pp. 63-64 supra.)

20.75 In South Australia the need to enable courts to take cognisance of Ministerial statements was recognised as long ago as 1970. The South Australian Law Reform Committee stated in Law Relating to Construction of Statutes:

> ... *where an undertaking is given in Parliament by a Minister that a Statute will be administered in a certain way in order to have that statute passed, it should be possible to prove that undertaking in the Courts on any prosecution for an infringement ... If the Minister wants to change his mind after giving such an undertaking the only honest thing to do is to amend the Act and bring the point before Parliament for consideration.* (Report, 1970 Govt. Printer, Adelaide.)

20.76 The point has also been made that reference to extrinsic aids "will better enable a court to protect itself from criticism that its decision is inconsistent with the intention of Parliament as expressed by the Minister in a Second Reading speech. The court will be entitled to refer to the speech in case of ambiguity and express its reasons for concluding, if need be, that the statute cannot bear the interpretation which it is claimed is supported by the Minister's speech. [A] second point is that governments will be deterred from submitting interpretations to courts which do not conform to the basis on which Parliament has considered the Bill." (Mason, "Summing Up", op. cit., at p.82.)

20.77 In Canberra, Justice Mason made a final comment:

> *Lawyers may overlook the circumstances that Members of Parliament are, generally speaking, prevented by limitations of time and other*

considerations from mastering the technical language of the Bill. They tend to rely on the Second Reading Speech and the explanatory memorandum as a sufficient statement of the effect and of the objects of the proposed legislation ...

Members of the legal profession are perhaps disinclined to venture beyond the terra firma of the statute to what they see as the swampy waters of parliamentary debate. (Id.)

20.78 The Committee is aware that allowing reference to extrinsic aids may increase the complexity of the interpretation process. The decision to be made must take into account a question of justice: litigants are entitled to be dealt with justly through the court process; "justice" may be thwarted by the too great expenditure of court time on irrelevancies (although judges are not averse to refusing argument on what they consider irrelevancies); however it is also thwarted by a refusal of courts to look at relevant material that can give the just answer. Complexity abounds, and justice is also not served if judges are left to "grope about in the darkness". In Winchester Court Ltd. v Miller [1944] K.B. 734, 744, Lord Justice Mackinnon said:

Having once more groped my way about that chaos of verbal darkness [the Rent and Mortgage Restriction Acts 1920-1939 (U.K.)], I have come to the conclusion, with all becoming diffidence, that the county court judge was wrong in this case. My diffidence is increased by finding that my brother Luxmoore has groped his way to the contrary conclusion.

20.79 Lord Simon commented, somewhat similarly, in Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591, 646:

I can see no reason why a court of construction of a statute should limit itself in ascertaining the matrix of facts more than a court of construction of any other written material. A public report to

Parliament is an important part of the matrix of a statute founded on it. Where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in darkness or half-light. I conclude therefore that such a report should be available to a court of construction, so the latter can put itself in the shoes of the draftsman and place itself on the parliamentary benches - in much the same way as a court of construction puts itself (as the saying goes) in the armchair of a testator. The object is the same in each case - namely, to ascertain the meaning of the words used, that meaning only being ascertainable if the court is in possession of the knowledge possessed by the promulgator of the instrument. (Emphasis added.)

20.80 As has been shown, recourse to extrinsic materials has sometimes short circuited the process, enabling courts to come to a quick and just solution because particular points were raised, for example, in Parliamentary debates; if that recourse had been denied, "groping in the darkness" and lengthy proceedings might well have ensued, together with a wrong result.This view was endorsed by Lord Wilberforce, at the Canberra Symposium. He said "... to know [what had occurred during Parliamentary debate on an Act before the court] would be enormously helpful to a judge, save hours of argument and cogitation and prevent a number of wrong or appealable decisions." (Wilberforce, "A Judicial Viewpoint", op. cit., at p. 9.)

20.81 The Committee is only too aware of the possibility of an increase in time and consequent delay, as well as in costs, because extrinsic aids are used. It is a matter of concern that legal proceedings are often lengthy and costly, and the Committee does not favour any increase in either length or cost of proceedings. Every effort must be made to guard against such increases. Prolonged argument about the relevance of extrinsic aids should not become the rule. The Committee believes courts will be ready to rule out reference to materials where they do not consider them to be relevant.

20.82 At the same time, the Committee is aware that other interpretative methods having strong currency in the courts today are time consuming and consequently costly, and may have less value in determining questions before the courts than does recourse to extrinsic aids. For example, it is standard practice for assistance to be sought from comparison of words in one statute with similar words appearing in other diverse statutes. In such a case Justice Aickin stated:

> *There are a great many cases in which the terms 'use' and 'occupy' have been discussed in relation to land and premises as used in a variety of Acts, in particular in rating Acts and land tax Acts. The context in which the words have been used has varied greatly and cases decided on one piece of legislation must be examined with great care before being applied to other legislation."* (Ryde Municipal Council v Macquarie University (1978) 139 C.L.R. 633, 658.) (Emphasis added.)

Examination "with great care" would take time, and not necessarily be productive.

20.83 In Hanlon v The Law Society [1981] A.C. 124 (C.A.) the use of words in other statutes was referred to, two judges considering them useful, the other considering them irrelevant to the case in point:

> *In this case everything depends on the true interpretation of those few words in the statute 'recovered or preserved for him'. They go back to the Solicitors Act 1860 and have been interpreted in many cases since that time. All in different contexts. Now we have to consider them in relation to a context about a matrimonial home ... we have to consider whether, in [a marital property] distribution, the words 'property recovered or preserved' can properly be applied. Those words are intelligible enough when used in connection with ordinary legal proceedings which determine legal rights and obligations. They are difficult to apply to modern family transfers made to fit the future. But however difficult the application, I think it must be done ... So I turn to*

the task of applying words to a property adjustment order ... (At 146-147, per Denning, M.R.)

We have been referred to numerous cases under the corresponding section in successive Solicitors Acts and it is necessary to examine those of them in which the order was made. (At 133, per Sir John Arnold, P., referring to some 10 or 11 cases from pages 153-157 of his judgment.)

This seems to me to be a wholly different exercise [from] that upon which the courts were engaged in any of the reported cases on the effect of the Solicitors Acts. Accordingly, I find those cases of no assistance. (At 160, per Donaldson., L.J.)

(See also, for example, R v Bush (1975) 5 A.L.R. 387, 401-402; Towers & Co. Ltd. v Gray [1961] 2 Q.B. 351, 361, per Lord Parker C.J.; United States of America & Republic of France v Dallfus Mies et Cie SA & Bank of England [1952] A.C. 582, 605; Moors v Burke (1919) 26 C.L.R. 265, 268-269, 270, 271.)

Whether these old, more readily accepted methods should be clung to, adding costs without necessarily granting assistance to litigants, and "new" methods at the same time rejected which might (or might not) be helpful, sometimes cutting costs, should be questioned.

20.84 The Committee accepts that a "settling-in process" may lead to an initial effect on time and costs of counsel and members of the judiciary accepting the validity of looking to extrinsic aids; however it also recognises that in some instances costs of looking at extrinsic aids are already built in to the process, because as acknowledged, judges and counsel already look at them. Further, the Committee believes that any increase in costs must be balanced against the possibility of decrease in time, delay and costs in certain cases, through recourse to extrinsic sources. The Committee endorses the remarks of Justice Mason at the Canberra Symposium that "the cost and volume of litigation is a matter of growing concern in this country", yet notes that he too was cognisant of the positive aspects of courts having recourse to extrinsic

aids. (See also Hailsham, L.C. in Debate on Interpretation Bill, Hansard (H.L.), 26.3.1981, at p. 1346.)

20.85 Apprehension was expressed that, even if they could gain access to materials, lower courts would have difficulty in dealing with them where put in evidence. One practitioner said:

> *In the Magistrates' Courts, simply because of pressure of business and because of the relative size and importance of the matters involved, things have to happen quickly.*
>
> *The highest court in the land should not be placed in a position of saying, 'Well, that magistrate was wrong about whatever it is because he did not look at A, B or C and all the one hundred and other extrinsic things he might have looked at.* (Shaw, oral evidence, 27.9.1983, at p.124.)

20.86 The Committee appreciates that pressure of time in Magistrates' Courts may hinder use of extrinsic aids to good effect. However it it does not agree that if it were accepted that courts could look at relevant extrinsic materials, an appeal would go against a magistrate's decision simply on the basis that certain extrinsic aids were not looked at. The proposal that legislation might grant courts a clear discretion to have regard to such materials has only been considered on the basis that it will be discretionary. In that case if an appeal were lodged, it should be on the basis that the interpretation of the relevant statute was incorrect. This would be no different from what is currently the case, where counsel may consider a magistrate to have wrongly interpreted a provision - perhaps because the words on their face impart a different meaning from that given by the magistrate, or because a decision of another court supports a contrary interpretation, or for some other reason. Indeed, as the law currently stands, in view of current conflicting opinions on the question amongst various courts and judges, it would be open to counsel to appeal on the basis that the magistrate's interpretation was wrong, because some relevant extrinsic aid (for example, the relevant Second Reading

Speech) imparts another construction. Clarification of the law would solve, not create the problem. (See further at p. 79 supra.)

20.87 The Committee also believes that occasions when the use of extrinsic materials could be necessary, would not be frequent. This view was endorsed by those giving evidence before the Committee. (See, for example, Shaw, oral evidence, 27.9.83, at p.136.) Further the courts have firmly adhered to the view that materials outside the particular Act in question should not be referred to unless ambiguity in the provisions of the Act is noted. Thus where legislation is clear on its face, there would be no room for recourse to extrinsic aids. This was acknowledged by those appearing before the Committee, and in written submissions. (See, for example, Shaw, oral evidence, 27.9.1983, at pp. 131, 135; Hollis-Bee, ibid, at p.132; Gillard, ibid, at pp. 136, 138; also Hampel, "Comments" in Symposium on Statutory Interpretation, op. cit., at p.41; McGarvie, "Comments", ibid, 23, at p.24; Dugan v Mirror Newspapers Pty. Ltd. (1979) 142 C.L.R. 583. On ambiguity, see further at pp. 118-120 infra.) It has been acknowledged that "In most cases the intent of Parliament is written down and there is no doubt. One reads the words quite plainly." (Shaw, oral evidence 27.9.1983, at p.135.) It would be rare for local practitioners and magistrates to be required to deal with extrinsic materials. As was stated at the Canberra Symposium:

> *When ... considering extraneous aids, ... the difference of nature of the potential recipients [must be born in mind]... Higher courts, particularly the highest, have time to look at whatever may assist ... [O]ne does not begin to think about the mischief of an Act until, at least, one has got to the Court of Appeal ...* (Wilberforce, "A Judicial Viewpoint", op. cit., at p.7.)

20.88 The Committee considered that there is no room for a different rule for higher courts from that subsisting for lower courts. If a question of ambiguity arises at lower court level, then every endeavour should be made, and every relevant aid made available, to settle the matter. It would be

unconscionable for litigants to have to make their way from the lower courts to the higher, in order to gain justice, because lower courts were precluded from having access to materials which might assist them in reaching the "right" decision. As has been said:

> *It is difficult to imagine a different rule being applied as regards supreme courts, on the one hand and trial courts on the other. This has been suggested as regards Hansard, on the footing that a supreme court, or at least our supreme court which is itself a part of the legislature, would know how to evaluate statements there reported. But this rests in the realm of theory ...* (Wilberforce, id.)

20.89 Further, the Committee is not minded to support the view that those in the lower courts are lacking in ability to determine relevance and weight of aids, any more so than they are lacking in ability to determine relevance and weight of evidence. They are required to do this with regard to evidence tendered in the normal course of proceedings. In those cases where the question arose, the skills utilised by lower courts everyday would come into play. If those skills are, as suggested, in some way not sufficiently developed, then there is a case for upgrading initial training and in-service courses of the magistracy, not denying them recourse to useful and relevant aids to construction.

20.90 Every practitioner, whether practising mainly in lower courts or in higher courts, whether located in the city or in the suburbs or in the country, should be in a position to offer informed advice and, when involved in litigation, to proffer material which may support the construction contended for. One member of the Victorian Bar has said on this issue:

> *Whether or not they refer to them in judgments, it is unsatisfactory that the judges themselves may read debates as they feel they may be assisted by them. The court also should be assisted by argument as to their use. It is surely better that there be an opportunity for arguments*

directed to the materiality of references to Hansard, Second Reading speeches, explanatory memoranda and the like in the manner accepted by the Federal Court ... (Griffith, "A Practitioner's Viewpoint", op. cit., at p. 32.)

20.91 It is here that the problem of professional negligence becomes relevant. This issue was raised before the Committee both by members of the Law Institute and Members of the Victorian Bar. The Committee is not unmindful of problems that might occur in this area. However it is difficult to see that the situation would be any more hazardous for the lawyer if it were provided by legislation that courts may have recourse to extrinsic materials in case of ambiguity. Indeed, it may well be that lawyers are assisted by legislative clarity. As one practitioner has said, the present position is unsatisfactory:

One cannot say with certainty in a particular case whether any and what reference to extrinsic historical material will be permitted in argument or relied upon in judgment. This uncertainty compounds the difficulty in advising a client as to what meaning prevails. One asks whether it is the legal adviser or the process which is at fault. (Griffith, "A Practitioner's Viewpoint", op. cit., at p.32.)

20.92 The fact is that some practitioners are more diligent than others. The problem for them would be no different, vis a vis negligence, from that presently pertaining where arcane law reports are in question or reported cases from other jurisdictions - for example, Canada or the United States. In the exceedingly rare case of action for negligence, the court would have to weigh matters of professionalism, due diligence, accessibility of materials and the like. Clients have a right to be afforded as good advice as possible, and this should not be denied to them because professionals fear legal action if that advice is incompetently given. (See New South Wales Law Reform Commission, Second Report on the Legal Profession, 1982, Government Printer, Sydney, N.S.W. L.R.C., Complaints, Discipline and Professional Standards, Background

Papers Nos. I and III 1979, 1980; N.S.W. L.R.C. Complaints, Discipline and Professional Standards - Part I. (Discussion Paper No. 2) 1979, Government Printer, Sydney.) As one former practitioner, now a judge of the Supreme Court of Victoria, has said, "... from the practitioner's point of view, both in advising the client and arguing his case before the courts, it is better if we enable the judges to use all that may be relevant and useful and allow the judiciary to give such meaning to such material as it sees relevant and appropriate." (Hampel, "Comments" in Symposium on Statutory Interpretation op. cit., at p.41.)

20.93 Some submissions to the Committee raised the question of community understanding of legislation and the right of the public to know what the law is, without recourse to extrinsic aids. It was said:

> *When it comes to interpret the statute, the court should be faced with the same problem as a citizen when he comes to read a statute in which he is meant to regulate what he is doing. One should not put the courts in a situation that is different from the position of the primary audience of the statute.* (Shaw, oral evidence, 27.9.1983, at p. 123; see also Hollis-Bee, ibid, at p. 134.)

20.94 One practitioner adverted to a statement made in Fothergill v Monarch Airlines Ltd. [1981] A.C. 251 (H.L.(E.)):

> *Elementary justice of ... the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are words which Parliament has itself approved as accurately expressing its intentions. If the meaning of these words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely on*

that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted. (Per Lord Diplock; see Hollis-Bee, oral evidence, 27.9.1973, at p.132.)

The Committee is in full agreement that every endeavour must be made by Parliamentary Counsel to make legislation intelligible to the community; Parliament has a responsibility to ensure that that endeavour is made. However as numerous Parliamentary Counsel, members of the judiciary, and practitioners have conceded, the ideal is not always capable of achievement.

20.95 Yet, where the law is clear on its face, again as previously stated, there is no problem: full endorsement is given to the comments cited from Fothergill v Monarch Airlines Ltd. The Committee reiterates, however, it is preferable for the law to be certain because it has been interpreted in accordance with the intention of Parliament, and thus right, than that it be "certain" though interpreted without regard to the intention of Parliament, and wrong. In a perfect world, every citizen would understand legislation and would have no need for recourse to lawyers, nor to case law, nor to extrinsic aids. In the present world, as Lord Diplock acknowledges, where citizens have legal problems they are mostly in the position of having to seek legal help. This is so whether or not extrinsic aids are relevant to interpretation. It is unrealistic to suggest that law reports are any more accessible to members of the public than Hansard. (Indeed, the opposite is the case: every citizen may approach her or his local Member of Parliament to request placement on the Member's list of Hansard recipients.) Sadly, it is also too likely that few citizens actually know how to go about obtaining copies of statutes or, once obtaining them, how to read them with ease.

20.96 Rather than refuse the courts access to extrinsic aids, those concerned about citizens rights of access to the law would be better advised to

support community legal centres and their legal resource books, and schemes for publishing easily obtainable leaflets outlining citizens rights, such as the series produced by the Law Department of Victoria and published in several different languages, The Law and You; and that produced by the Law Institute of Victoria. Support could also be given to the revival of the Australian Legislative Drafting Institute, established in 1973 and abolished in 1981. As has been said:

> *Perhaps it is time, for the sake of the community, counsel and judges, for the Institute to be re-established to provide for the training of drafters who can take their place in our overworked Parliamentary Counsel's section[s], in order to lighten the load and thus provide for working conditions where statutes and regulations can be drafted in the most concise and intelligible way possible.* (Current Comment (1983) 57 Australian Law Journal 129, at p.131.)

20.97 It is also important to recognise that the legislative process is significant, in its relation to interpretation, to the rights of the public. This was recognised in Black-Clawson where Lord Simon of Glaisdale pointed out:

> *In essence, drafting, enactment and interpetation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves. If it comes about that the declared meaning of a statutory provision is not what Parliament meant, the system is at fault. Sometimes the fault is merely a reflection of human fallibility. But where the fault arises from a technical refusal to consider relevant material, such refusal requires justification. The commentary on a draft Bill in a report to Parliament is not merely an expression of opinion - even if it were only that, it would be an expression of expert opinion, and I can see no more reason for excluding it than any other relevant matter of expert opinion. But actually it is more: that experts publicly expressed the view that a certain draft would have such-and-such effect is one of the facts within the shared knowledge of the Parliament and the citizenry. To refuse to consider such a commentary, when*

Parliament has legislated on the basis and faith of it, is for the interpreter to fail to put himself in the real position of the promulgator of the instrument before essaying its interpretation. It is refusing to follow what is perhaps the most important clue to meaning. It is perversely neglecting the reality, while chasing shadows. As Aneurin Bevan said: 'Why read the crystal when you can read the book?' Here the book is already open: it is merely a matter of reading on. Certainly a court of construction cannot be precluded from saying that what the committee thought as to the meaning of its draft was incorrect. But that is one thing: to dismiss, out of hand and for all purposes, an authoritative opinion in the light of which Parliament has legislated is quite another. (At 511-652.) (Emphasis added.)

20.98 Finally the question of the independence of the courts in their role as interpreters of legislation has been raised. Yet the High Court judges using Parliamentary Debates and other materials have in no way suggested they are turning over their judicial power to the Parliament; nor have they expressed fears of waning independence as a result. Nor have other courts and judges who have utilised extrinsic materials. The Committee reiterates that it is the role of the courts to interpret legislation in accordance with the intention of Parliament. In order to do so, a court may have regard to various materials. It is for the court to decide whether ambiguity arises on the face of a statute. If ambiguity arises, it is up to the court to determine what materials are relevant. It is then for the court to decide what weight those materials have in assisting them in reaching a determination as to Parliament's intention as expressed in the particular legislation in question. The Committee is unable to see how this can encroach upon the independence of the courts.

20.99 It is against this background of present case law and debate, and submissions received by the Committee, that the presence of Clause 32(2) in the Bill has been considered. (See also Pearce, Statutory Interpretation in Australia, 1974 at Chapter 12; Goss, Statutory Interpretation, 1976, London, at Chapter 4; Craies on Statute Law, Edgar, editor, 6th edition, 1963, London, at

p. 128 et. seq.; Maxwell on Interpretation of Statutes, Langan, editor, 12th edition, 1969, London, at p. 50 et. seq.) Of the submissions received by the Committee, all were in agreement with the Committee's view that Clause 32(2) as drafted adds nothing to the present law. One member of the Victorian Bar "doubt[ed] that such a section is as radical as has been sometimes suggested." (Ormiston, written submission, 27.7.1983, at p.2.) A second member of the Bar wrote "No demonstrable purpose is served" by the provision; further, "it will create mischief. In my view it should not be passed." (See Ross, written submission, 31.8.1983, at p.8; Ross, oral submission, 27.9.1983, at p. 126; and see p. 71 supra.) Justice Everett of the Tasmanian Supreme Court, had a another view:

> *With regard to section 15AA of the Commonwealth Acts Interpretation Act 1901 [the basis for Clause 32], although it was a start along the road to a logical and sensible approach to statutory interpretation, I do not think it went nearly far enough and that its obvious limitations may inhibit legislative reforms in the States. However, I suppose it can be said that to some small extent it was a break from rigid conservatism.* (Everett, written submission, 21.7.1983, at p.2.)

20.100 The Committee agrees that the sub-clause as presently framed should be omitted from the proposed Act. Adding nothing, it presages a possibility that courts may feel constrained not to bring flexibility to the question of admissibility of extraneous materials. That is, as revealed by the cases outlined and the accompanying discussion (at pp. 47-56, 69-74, 78-81 supra), judges and courts are beginning to acknowledge the value of using various extraneous materials. If Clause 32(2) were passed in its present form, other judges or courts might not be as ready to adopt that broad view and may consider themselves bound by Clause 32(2) to follow what has been put as the traditional, restricted position. This fear was expressed at the Canberra Symposium on Statutory Interpretation. (See for example Murphy, "Commentary" in Symposium on Statutory Interpretation, op. cit. at p.39; also Ad Hoc Committee of the Law Institute of Victoria, written submission, 26.8.1983, para. 5.1, at p.3; also members of the Bar, oral submissions,

27.9.1983, at pp. 120 et seq.) The Committee believes that no possible impediment should be placed in the way of courts seeking access to materials which may assist them in reaching a just conclusion. The Committee therefore believes that Clause 32(2) as presently drafted should be omitted from the Bill.

20.101 **RECOMMENDATION 25: CLAUSE 32(2) REGARD TO BE HAD TO PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT**

The Committee recommends that Clause 32(2) as presently drafted should be omitted from the Bill.

20.102 However, the Committee is not convinced that the Bill should omit to refer to extrinsic materials. There is little to be gained from supporting or perpetuating a position where some courts are unable or unwilling to have recourse to Parliamentary debates, reports, academic treatises or other materials which may assist them in interpreting Acts and subordinate legislation; where some admit using varied materials; where some use, but do not necessarily admit that use; and where practitioners are not properly alerted to possible use of materials. Those whom the law was designed to assist are not assisted if the law is not interpreted to effect the intention or object of the legislation, or if rules of construction are not clear. If provisions seem ambiguous, courts should not be precluded (nor should they preclude themselves) from going to the Second Reading Speeches to clear up that ambiguity, nor to any other materials they may consider relevant.

20.103 As the High Court, the Federal Court and State courts have already taken the approach of resorting to Second Reading Speeches and other extrinsic materials in interpreting legislation, the position may follow that where any court now says it cannot take extrinsic materials into consideration in interpreting legislation, because it legally cannot, this could be challenged by interested parties. However, if a court says it will not take materials into consideration in interpreting legislation because those materials are not

relevant, this would not give rise to a challenge. Yet there is disagreement amongst lawyers as to this position. (See Creighton, written submission, 28.6.1983, p. 2.) This adds to current confusion and to possible creation of delay through argument in the courts. As Justice Mason has said the Parliament is in a position to alleviate what is a real problem:

> *... There is now doubt and uncertainty as to the status of the old rule. It is generally felt that this doubt and uncertainty should be set at rest by the Parliament or by the High Court, preferably by the Parliament. This is because the Parliament is not afflicted by the accumulated overburden of past judicial decisions and because Parliament, through its statute, speaks with a single voice - even if it be an ambiguous voice - and not seven voices which, though always clear, are sometimes clearly inconsistent.* (Mason, "Summing Up", op cit., at p. 82.)

20.104 To overcome current problems, positive steps should be taken to ensure that it is clear to Victorian courts that they **may** take a range of extrinsic materials into consideration when interpreting legislation. The range should be limited only by the court's view of what is relevant in a particular case where ambiguity in legislative provisions arises. This would be done by excluding the present clause 32(2) and substituting a new clause 32(2). The Committee has considered various alternatives to Clause 32(2) and has received submissions on them. The alternatives suggested are as follows. (In some cases the draft includes Clause 32(1) already accepted by the Committee.)

20.104.1 **ALTERNATIVE 1**

(1) In ascertaining the meaning of any provisions of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say:

(a) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;

(b) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament of either House before the time when any Act was passed;

(c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by Command of Her Majesty before that time;

(d) any other document bearing upon the subject matter of legislation which had been presented to Parliament by Command of Her Majesty before that time;

(e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.

(2) The weight to be given for the purpose of this section to any such matter as is mentioned in sub-section (1) shall be no more than is appropriate in the circumstances.

(Scarman Report into the Interpretation of Statutes, 1969, HMSO, London.)

20.104.2 **ALTERNATIVE 2**

Clause 32. Regard to be had to purpose or object of Act or Subordinate Instrument.

(1) In the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.*

(2) In accordance with sub-section (1), in the interpretation of a provision of an Act or subordinate instrument, the matters which may be considered shall, in addition to all matters which may be considered for that purpose apart from this section, include the contents of any document which is declared by the Act or subordinate instrument to be a relevant document for the purposes of this section.

(3) The weight to be given for the purposes of this section to such document shall be such as is appropriate in the circumstances.

(J.G. Starke, Q.C., Editor, Australian Law Journal, written submission, 8.6.1983, at p.1; adapted from proposal drafted by Syndicate No. 2, Canberra Symposium on Statutory Interpretation (see Attorney-General's Department, Symposium on Statutary Interpretation, op. cit., at p.76).

---

*Accepted by the Committee; see para 20.13 **RECOMMENDATION** 24 at p.51 supra.

20.104.3 **ALTERNATIVE 3**

Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.

(1) In the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.*

(2) In accordance with sub-section (1), in the interpretation of a provision of an Act or subordinate instrument, regard may be had to -

(a) any matter or document forming part of that Act or subordinate instrument;

(b) any explanatory memoranda;

(c) any special document constituting an aid to interpretation;

(d) any relevant reports of Royal Commissions, Law Reform Commissioners and Commissions or Committees, boards of inquiry and similar bodies;

(e) any academic treatise, texts, or similar works; and

(f) Parliamentary Hansard, in particular to Second Reading Speeches.

(Drafted by the Committee to promote discussion.)

---

*Accepted by the Committee; see para 20.13 **RECOMMENDATION** 24 at p.51 supra.

20.104.4 **ALTERNATIVE 4**

Clause 32. Regard to be had to purpose or object of Act or Subordinate Instrument.

(1) In the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.*

(2) In accordance with sub-section (1), in the interpretation of a provision of an Act or subordinate instrument, regard may be had to -

(a) any matter or document forming part of that Act or subordinate instrument;

(b) any other material that is considered relevant to that purpose.

(Drafted by the Committee to promote discussion.)

---

*Accepted by the Committee; see para 20.13 **RECOMMENDATION** 24 at p.51 supra.

20.104.5 **ALTERNATIVE 5**

Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.

(1) In the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.*

(2) In accordance with sub-section (1), in the interpretation of a provision of an Act or subordinate instrument, regard may be had to -

(a) any matter or document forming part of that Act or subordinate instrument;

(b) any explanatory memoranda;

(c) any special document constituting an aid to interpretation;

(d) any relevant reports of Royal Commissions, Law Reform Commissioners and Commissions or Committees, boards of inquiry and similar bodies;

(e) any academic treatises, texts, or similar works;

(f) Parliamentary Hansard, in particular to Second Reading Speeches; and

(g) any other material that is considered relevant to that purpose.

---

*Accepted by the Committee; see para 20.13 **RECOMMENDATION** 24 at p. 51 supra.

(Composite of 3 and 4suggested by D.C. Pearce, Dean and Professor of Law, Australian National University, Canberra, written submission, 16.6.1983, at p.1; oral evidence before the Committee 3.8.1983, at p. 70; see also Elliot, written submission, 6.6.1983, at p.1; Creighton, written submission, 28.6.1983, at p.1; Kolts, written submission, 22.6.1983, at p.1; Everett, written submission, 21.7.1983, at p.2.)

20.104.6 **ALTERNATIVE 6**

Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.

In the interpretation of a provision of an Act or subordinate instrument -

(1) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.

(2) consideration may be given to any matter or document that is relevant including but not limited to -

(a) reports of proceedings in any House of the Parliament;

(b) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament;

(c) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies; and

(d) academic treatises, text-books or other works of reference.

(Composite, redraft of 3 and 4, suggested by E.P.A. Moran, Assistant Chief Parliamentary Counsel, Victoria, written submission, 29.8.1983, at p.4; oral evidence before the Committee, 30.8.1983, at p. 105.)

---

*Accepted by the Committee, see para 20.13 **RECOMMENDATION** 24 at p.51 supra.

20.105 COMMENTS ON ALTERNATIVE I

This provision was considered by the Committee to be unnecessarily prolix, and not in accordance with its view that legislation should be made intelligible to as wide an audience as possible. A member of the Victorian Bar criticised it further for its restrictive approach. (See Griffith, "A Practitioner's Viewpoint", op. cit., at p. 33.) Its terms are also open to those criticisms made, of a somewhat similar Ghana provision, by the then Federal Attorney-General Garfield Barwick, at the 1961 Australian Legal Convention. (See Barwick, "Divining The Legislative Intent" (1961) 35 A.L.J. 197, at pp. 204 et seq.) The Committee accepts these criticisms and does not endorse the introduction of such a provision into the proposed Act.

20.106 COMMENTS ON ALTERNATIVE 2

This provision was drafted with the major consideration in mind being the introduction of an explanatory memorandum together with a Bill, for passage through Parliament. (The Canberra Symposium was styled with the explanatory memorandum question as a top priority.)

20.106.1 The Committee is of the opinion that such an approach should not be adopted. The idea that an explanatory memorandum should accompany a Bill, setting out the Bill's meaning and purposes, with courts having the authority to use the memorandum as an aid, has been reiterated over time. It was proposed in 1932 by Professor Harold Laski. (See Report of the Committee on Ministers' Powers, 1932, HMSO (Cmnd 4060), London, Annex V; (1932) 5 A.L.J. 712). Since Laski's time academics, British Parliamentary Counsel, legislatures of other nations (for example, Ghana Interpretation Act 1961) and the Federal Department of Attorney General have addressed the question. In 1961 at the Australian Legal Convention the then Federal Attorney-General surveyed the proposal. (See Barwick, op. cit., at pp. 202, 204.) There are good reasons for not creating a system where:

(a) elaborate explanatory memoranda are specially drafted as extrinsic aids to accompany legislation; and

(b) courts are limited to such explanatory memoranda as the only extrinsic aids to be looked at in seeking Parliament's intention.

20.106.2 To place yet another burden on Parliamentary Counsel when indications are that there is some difficulty in keeping abreast of governments' legislative programmes is unwise. The unwisdom of such an approach is more evident when it is acknowledged that this would often be a "repeat performance": Law Reform Commissions, Committees, Parliamentary bodies and the like already draft reports containing information that would be of value to courts (and that is being used by courts). For example, the Australian Law Reform Commission had the role of the court as interpreter in mind when it proposed that its Report No. 4, Alcohol, Drugs and Driving, 1976, AGPS, Canberra should be read together with the draft Bill contained in the Report, if that draft became law. Why duplicate the effort? There is also the question of the status of any explanatory memorandum drafted along lines proposed by the Federal Attorney-General's Department (see Extrinsic Aids to Statutory Interpretation, 1982, AGPS Canberra). To be a competent Parliamentary document, presumably it would have to go through the Parliamentary process - which would mean debates in both Houses, with possible amendments and subsequent debates on those. This would not be a profitable use of Parliamentary time. Many other negative aspects of the proposal, often from practitioners as well as those versed in Parliamentary procedure, have been raised. (See for example Hampel, "Comments" in Symposium on Statutory Interpretation op.cit., at p. 41; Cumming Thom, "Comments", ibid, at p.44; Harris, "A Parliamentary Viewpoint", ibid, 46, at pp 48-50; Grimm, oral evidence 11.7.1983, p. 43.)

20.107 COMMENTS ON ALTERNATIVES 3 AND 4

In commenting on proposals 20.104.3 and 20.104.4 drafted by the Committee to promote discussion, Professor Dennis Pearce wrote:

> ... *the danger with the first draft might be that it fixes the range of matters that might be taken into account. Conversely, with the second draft it left it up in the air for a reluctant court to conclude that certain matters, for example parliamentary debates, were not relevant. ... you would be best off with a combination of the two drafts, that is by adding at the end of draft No. 1 the words 'and to any other material that is considered relevant to that purpose'.* (Pearce, written submission, 16.6.1983, at p.1.)

The Committee agrees that if a particularisation of materials to which a court may make reference is to be made then, so not to inhibit the court in this process, there should be a general provision regarding "any other materials the court considers relevant". (See also Elliot, written submission, 6.6.1983 at p.1.; Creighton, written submission, 28.6.1983, at p.1; Kolts, written submission, 22.6.1983, at p.1; Everett, written submission, 21.7.1983, at p.2.)

20.108 COMMENTS ON ALTERNATIVE 5

Alternative 5 is a composite of Alternatives 3 and 4, suggested by Professor Dennis Pearce and endorsed by written submissions to the Committee. (See also Elliot, written submission, 6.6.1983 at p.1.; Creighton, written submission, 28.6.1983, at p.1; Kolts, written submission, 22.6.1983; at p.1; Everett, written submission, 21.7.1983, at p.2.) Assistant Chief Parliamentary Counsel E.P.A. Moran redrafted this Alternative, which appears as Alternative 6. The Committee's views in relation to Alternative 6 (see para 20.104.6, supra) are applicable to it.

20.109 COMMENTS ON ALTERNATIVE 6

Having regard to the foregoing discussion of the use of extrinsic aids for the purpose of interpretation of legislation by the courts (see pp. 51-107 supra), the Committee believes it is necessary to list possible and legitimate aids to construction, and to provide at the same time that courts may have recourse to whatever other materials falling outside that list are considered relevant in the particular case. Thus courts will not be constrained to rule as unavailable, by

any so-called traditional law, rule or practice to the contrary, any extrinsic materials they consider will assist them in their task. As previously pointed out, unless the position is made clear, some judges and courts may consider themselves restricted to materials "traditionally" looked at.

20.109.1 However, the Committee believes it is preferable to omit sub-clause (d) from Clause 32(2). The Committee considers that the importance of Clause 32 is to draw the attention of the courts to the necessity of interpreting legislation in accordance with the stated intention of the Parliament. Sub-clauses (a), (b) and (c) cover materials which are most likely to contain information of assistance to courts, about Parliament's intention, and which may go directly to that intention. This does not mean that those materials contained in (d) - treatises, texts and other similar reference works -would not be able to be looked at by the courts. It has for long been the practice of the judiciary to refer to such materials for guidance, or for an indication as to the meaning of legislation, and the Committee expects that it shall continue to be so. The words "without limiting the generality of ..." clearly impute that courts may continue to have access to these and other materials, as they think relevant, for enlightenment.

20.109.2 The question was raised before the Committee whether the newly proposed Clause 32(2) would operate only in the case of ambiguity. It was suggested that it would be preferable to indicate explicitly within the Clause that ambiguity was the trigger enabling courts to go wider than the Act itself. (Transcript, 27.9.1983, at pp. 119-140.) To give proper consideration to this proposition, for its own use the Committee redrafted Clause 32(2) to include the words "where a judge or court considers the words of a provision of an Act or subordinate instrument to be ambiguous" before "consideration may be given to any matter or document ..." With that inclusion, Clause 32(2) would read:

> *Where a judge or court considers the words of a provision of an Act or subordinate instrument to be ambiguous consideration may be given to any matter or document that is relevant including but not limited to -*

(a) *reports of proceedings in any House of Parliament;*

(b) *explanatory memoranda or other documents laid before or otherwise presented to any House of Parliament;*

(c) *reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.*

The Committee decided against the inclusion of the phrase on three basic grounds.

20.109.3 The Committee believes that in terms of ordinary, accepted construction of Acts, the ordinary accepted course of courts resorting to extrinsic aids where words are not clear on their face and in the context of the particular Act, should be followed. This is the general rule: Acts are read against the appropriate common law background. (See American Dairy Queen (Qld.) Pty. Ltd. v Blue Rio Pty. Ltd. and Ors. (1981) 56 A.L.J.R. 47.) The proposed Interpretation Bill is not a codification of principles of interpretation. Accordingly it should be unnecessary to insert into the Clause any reference to ambiguity. Secondly, "ambiguous" means that an expression has a double meaning, or is capable of more than one meaning. It does not necessarily encompass the idea that an expression has no meaning at all. Some courts may therefore be more hindered than helped by the inclusion of the words, if the statute under consideration is meaningless rather than ambiguous in the generally accepted sense of that word. Third, it was considered whether "uncertain" should be substituted for "ambiguous", but the Committee believes that, on balance, it is preferable to leave out any reference to "ambiguity" or "uncertainty". To insert the phrase implies that as an everyday matter a court or judge may find words of a provision of an Act or subordinate instrument to be ambiguous or uncertain. The Committee believes that it is important for the assumption to continue unassailed that legislation emitting from the Parliament is certain and unambiguous, and that it is only in the rare case that uncertainty or ambiguity arise. (This assumption concurs with the reality.) The Committee

believes it is preferable for the present position to be maintained without being expressly spelled out; namely, that where in the rare case ambiguity or uncertainty arise in the opinion of a judge or a court, then in accordance with ordinary principles of common law, resort may be had to extrinsic aids to assist in clearing up the ambiguity or uncertainty. The additional words, "where a judge or court considers the words of a provision of an Act or subordinate instrument to be ambiguous" should not, therefore, be included in Clause 32(2). The Committee considers no reference to ambiguity need appear in the provision.

20.110 **RECOMMENDATION 26: CLAUSE 32(2)**
REGARD TO BE HAD TO PURPOSE
OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT

The Committee recommends that a new Clause 32(2) should be inserted into the Bill to provide:

Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.

In the interpretation of a provision of an Act or subordinate instrument -

(1) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and*

(2) consideration may be given to any matter or document that is relevant including but not limited to -

(a) reports of proceedings in any House of Parliament;
(b) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament;
(c) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

---

*Accepted by the Committee, **RECOMMENDATION 24** at p. 51 supra.)

20.111 CLAUSE 32 REGARD TO BE HAD TO PURPOSE OR OBJECT OF ACT OR SUBORDINATE INSTRUMENT PREAMBLES AND PURPOSE/OBJECTS CLAUSES

During the course of debate on Clause 32, the question arose of including in all Acts a preamble setting out aims and objects. Endorsing the Committee's proposed Clause 32(1) and (2), Justice Everett of the Tasmanian Supreme Court went on to say:

> *Finally, [the] Committee may wish to adopt an even more fundamental approach, additional to new Clause 32(2), by making it a positive requirement that every Act of Parliament should contain a statement of the objects of the legislation. In this respect a consideration of American precedents would no doubt be helpful.* (Everett, written submission, 21.7.1983, at p.3.)

(See also Ad Hoc Committee, Law Institute of Victoria, written submission, 18.8.1983, at p.5; Hatch, oral submission 11.7.1983, at p. 45.)

20.112 The Committee believes that the suggestion has merit, and notes that it has been followed in some instances. (See for example Conciliation and Arbitration Act 1904 (Cth); Freedom of Information Act 1981 (Cth); see also Appendix I infra.) In the past there may have been some difficulties in adopting this approach. During Tudor times preambles to Acts were a matter of form, however the courts of England adopted a political approach and began to ignore what was the preamble. In the court's view preambles were being used for political reasons, to push a particular "line" which the judges objected to. At about this time, even the long title of an Act was ignored by the courts, as "not being part of" the statute. Today, however, long titles and preambles are accepted as intrinsic to the legislation. (See for example Fielding v Morley Corporation [1899] Ch. 1, 3 per Lindley M.R.; Fenton v Thorley & Co. Ltd. [1903] A.C. 443, 447 per Lord Macnaghton; Vacher & Sons Ltd. v London Society of Compositors [1913] A.C. 107, 128-9 per Moulton; James v Cowan (1943) 43 C.L.R. 386, 408 per Justice Isaacs; Bowtell v Goldsborough Mort & Co. Ltd.

(1903) C.L.R. 444; Australian Communist Party v Commonwealth (1954) 83 C.L.R. 1; South Australia v Commonwealth (1942) 65 C.L.R. 373, 432; also Dreidger, The Composition of Legislation, 1957, Ottawa, at pp. 93-95; Barwick, "Divining the Legislative Intent" (1961) 35 A.L.J. 197, at pp. 200-202.) In the constitutional context it has been said that although a court should "treat this expression of the view of Parliament with respect", a declaration in a preamble that an Act is within power "cannot be regarded as conclusive": South Australia v Commonwealth (1942) 65 C.L.R., 432 per Chief Justice Latham. It has also been said that an ambiguity must be found in words in the body of an Act before a preamble can be resorted to to limit or extend the meaning of the enactment: Bowtell v Goldsborough Mort & Co. Ltd. (1903) C.L.R. 444. (See generally Neaves, "Objects Clauses in Acts" in Another Look at Statutory Interpretation, op. cit. 9.)

20.113 One view has been put that to adopt a general approach of including "objects clauses" as a preamble to every Act of Parliament would be time consuming and unproductive. If all objects were placed in the preamble, runs the argument, this would simply mean a reiteration of the contents of the body of the statute, recast as a preamble. (See, for example, Kolts, in Symposium on Statutory Interpretation, op. cit, 68, at p.70.) For the other side, the understanding of some legislation may be enhanced by a recitation, at the outset, of its basic aims or purposes.

20.114 The Committee believes that in those cases where an Act particularly lends itself to a preamble in the form of an objects clause the proposal should be adopted. In such cases reason should prevail, with a well drafted preamble helpful to readers of the legislation, and to courts interpreting it, being included. The Committee believes that it should be left to the Minister in charge of the particular Act to decide whether or not a preamble is to be included.

20.115 RECOMMENDATION 27:

PREAMBLES AND PURPOSE/OBJECTS CLAUSES

The Committee endorses the inclusion, where appropriate, of an "objects clause" as a preamble to certain Acts (or, where relevant, to subordinate instruments). The determination of whether such a clause is to be included in a particular Act should be left to the relevant Minister (or in the case of a private Member's Bill, to that Member).

20.116 CLAUSE 32

BURDEN OF PROOF IN CRIMINAL CASES

In one submission to the Committee, the writer favoured the adoption of Clause 32(1) and (2) in the terms recommended by the Committee, yet adverted to "an area of potential application for such a provision which seems to me wholly undesirable":

> *I refer to the scrutiny of extrinsic materials for the purpose of determining the burden of proof and more particularly, the burden of persuasion, in criminal prohibitions. The need to refer to explanatory memoranda, parliamentary debates, etc. can be justified in the case of provisions which must be applied to states of fact which were not within the express terms of a statutory provision. Such a provision is most needed when it comes to the peripheral case, where an informed consideration of extrinsic material can reveal the 'purpose' of the provision. These considerations do not apply in the same fashion when it comes to allocating the burden of proof.* (Elliot, written submission, 6.6.1983, at pp. 1-2.)

20.117 The Committee's attention was directed to the following points:

* the allocation of burdens of proof is a recurring and familiar issue which arises whenever a new offence is created;

* to shift the burden of proof in a criminal matter always involves a compromise of principle. There are cases where it is justifiable to do so, however it should be done explicitly;

* a provision allowing recourse to extrinsic materials - particularly those emanating from government - can tend to encourage a reliance on implication where nothing short of express statement should be required;

* reliance on purposive interpretation, especially when coupled with a practice of referring to extrinsic materials, may have the effect of weakening the rule of strict construction ordinarily followed by the courts;

* it would be unfortunate if the delicate balance between legislature and courts were to be affected as an oblique and unintended consequence of interpretation provisions which are intended to serve an entirely different purpose.

The suggestion was made that an addition to the Bill should be incorporated, stating that all criminal prohibitions enacted after the passage of the Bill shall be presumed to cast the evidential and persuasive burdens on the prosecution unless there is express provision to the contrary in the relevant Act.

20.118 The Committee is not unmindful of problems surrounding questions of strict liability and burdens of proof. The Committee notes, however, that in Victoria strict rules of construction are applied to them. Provisions of the Poisons Act 1962 were considered by the Court of Criminal Appeal in Elem (1979) 4 A. Crim. R. 331 to reverse the onus of proof with respect to knowledge of a particular substance (a prohibited drug) in control of the accused. Commenting on the reverse-onus, the court adhered to a strict and limited approach:

The combination of ss.28 and 32 [of the Poisons Act 1962] can ... be seen to be Draconian legislation. They have introduced into the ... Act in order to attempt to deal with a particularly dangerous type of offence and one which it is no doubt felt demands Draconian treatment. It behoves the courts, however, to be astute to see that provisions of this kind are strictly construed and fairly applied. It is contrary to the traditional concepts of our criminal law that a person should upon his trial be required to answer a charge proved by deeming provisions such as are found in s.28. But the deeming provisions should be allowed no greater operation or effect than Parliament has expressed. (At 337.)

20.119 The Committee does not believe that the inclusion of Clause 32 should affect the approach of the courts to these questions of proof and liability. A recent case before the Supreme Court of Tasmania in the exercise of federal jurisdiction is relevant. In R v Sender (Nos. 1, 2 and 3) (1982) 44 A.L.R. 139, construction of provisions of the Health Insurance Act 1973 (Cth) was necessary. The court held that section 129 of the Act casts on the accused an onus, on a balance of probabilities, to bring facts exculpating her or him in terms of sub-section (3) of that section; the prosecution retains the burden of proving beyond reasonable doubt the matters which the section expressly proscribes. This determination was made by "the application of accepted principles of construction, in particular the requirement that a statute should be construed in its entirety". (At 152.) The court held:

The purpose of the Health Insurance Act 1973, in conjunction with the National Health Act 1953, is to provide for payments 'by way of medical benefits and payments for hospital services and for other purposes'. It is notorious that large public funds are expended under its provisions. The inclusion in the Act of penal provisions ... is a normal precaution to protect public revenue. If the common law doctrine of mens rea were engrafted on to the provisions ... and the prosecution bore the burden of proving beyond reasonable doubt the presence of a 'dishonest intention' ... I consider its task would often be insuperable, to the detriment of the public interest. It seems clear that Parliament adopted the familiar

alternative of enacting s.129(3) to ensure that injustice would not result from the strict provisions of s.129(1). (At 152.)

It was also said that it could not be doubted that "Parliament envisaged that the exercise of a sound administrative judgment would obviate oppression in respect of the initiation of prosecutions under s.129(1), so that it certainly would not be every case of apparent contravention of s.129(1) which would attract penal proceedings without at least an opportunity being given to a person, before that stage, to give any relevant explanation." (Id.)

20.120 Section 15AA of the Acts Interpretation Act (Cth) was adverted to in Sender, the court considering that the interpretation given to the provisions would be "consistent with the letter and the spirit" of that section, and went on to say that "If it were necessary ... there is scope for the application of s.15AA(1) of the ... Act in the determination of the proper construction of s.129", but that provision did not require application, because the intention of Parliament was clear and unambiguous from the wording of the provisions.

20.121 Whatever the application of section 15AA (or the proposed Clause 32 in this Report), the courts could be expected to continue to apply the "accepted principles of construction", as laid down in many cases both here and in England. (See for example Cameron v Holt (1978) 142 C.L.R. 348; Sweet v Parsley [1970] A.C. 132; Iannella v French (1968) 119 C.L.R. 84; Proudman v Dayman (1941) 67 C.L.R. 536 and discussion of these cases in R v Bush (1975) 5 A.L.R. 387; Lim Chin Aik v The Queen [1963] A.C. 160; also Sherras v De Rutzen [1895] 1 Q.B. 918; Warner v Metropolitan Police Commissioner (H.L. (E.)) [1969] 2 A.C. 256; Howard, "Strict Responsibility in the High Court of Australia" (1960) 76 Law Quarterly Review 547.)

20.122 The Committee observes further on this issue that the Senate Standing Committee on Constitutional and Legal Affairs has extensively dealt with the question of burden of proof in criminal cases and the encroachment in law upon the old standard that burden of proof should be with the prosecution

except in explicitly defined instances. (See Senate Standing Committee on Constitutional and Legal Affairs, The Burden of Proof in Criminal Proceedings, 1982, AGPS, Canberra.) The issues arising are complex and to deal with the matter as suggested by the Senate Standing Committee would require separate legislation. A number of cases have arisen where this question is relevant. The Committee believes that the Parliament should address itself to this question, but that it is not appropriate that the matter should be dealt with further in this Report.

20.123 **RECOMMENDATION 28:**

BURDEN OF PROOF IN CRIMINAL CASES

The Committee recommends that the Parliament should give consideration to referring to the Committee the whole question of burden of proof in criminal cases, with a view to placing before the Parliament recommendations as to whether the proposals of the Senate Standing Committee should be adopted in Victoria, or whether some other approach should be taken to the problem.

21

CLAUSE 33
HEADINGS, SCHEDULES, MARGINAL NOTES AND FOOTNOTES

Some dissatisfaction has been expressed about the practice of utilising marginal notes as a short indication of the content of a particular clause or section of a Bill or an Act. These notes are often a convenient guide to the contents of a particular provision, however they currently appear in small type which is not always helpful to readers. Computerisation of statutes in some jurisdictions has led to the replacement of marginal notes with short headings placed immediately above the relevant clause or section. (For example Commonwealth Acts; see Appendix II infra.) This sets off the sections from each other and means that readers can more easily locate particular provisions. The larger type also facilitates reading. Various versions of sample legislation produced by the Government Printer have been considered by the Committee. In one version, marginal notes, increased in size and reproduced in bold type, increase the ease with which legislation can be read by both practitioners and laypeople; marginal notes in the larger size and in bold type would assist practitioners and laypeople to locate specific provisions with greater facility. (Version "A".) A second version, the Commonwealth approach of headings above the relevant clause or section, to replace marginal notes, could be adopted because headings equate more closely to everyday reading matter; this gives an efficient look to legislation and may be preferable to the traditional side-notes. (Version "B".) Another method would be to combine headings above relevant clauses or sections in place of marginal notes, with the history of legislation (notes relating to dates of amendments, etc.) remaining as side-notes in bold type. (Version "C".) This combines a businesslike appearance with ready access to content of paragraphs by way of heading, and ease in locating the history of a section required. Alternatively, headings could be reproduced in bold type, with history of legislation remaining as marginal notes in ordinary type. (Version "D".) (Each of these options appears at Appendix II, infra.) The Committee believes that the decision should be based upon what facilitates, with greatest ease, location of particular sections by laypeople, practitioners, members of the judiciary and others dealing with legislation. In accordance with these criteria, the Committee favours version "C", appearing in Appendix II of this Report.

21.1 RECOMMENDATION 29: CLAUSE 33
HEADINGS, SCHEDULES
MARGINAL NOTES AND FOOTNOTES

The Committee recommends that Bills be formulated in the future with what are marginal (or side) notes today, presented as headings to each section in bold type; history of the legislation should appear as marginal notes produced in large, bold type. (This version appears as "C" in Appendix II of this Report, at p. 194 infra.)

21.2 CLAUSE 33(3)
MARGINAL NOTES, HEADINGS

Clause 33(3) provides that no marginal note or footnote in an Act or subordinate instrument and no heading to a provision of an Act or subordinate instrument "shall be taken to form part of the Act or subordinate instrument".

21.3 This is a technical provision recognising that the contents of marginal notes and footnotes are not generally debated during the passage of legislation through the Parliament. However, the Committee believes that this provision should not be read as precluding courts from having regard to marginal notes, headings or footnotes, punctuation and the like in interpreting provisions of a statute or subordinate instrument.

21.4 Differing views have been put in the cases over the years on the question of whether headings of provisions of an Act, marginal notes or footnotes should be relevant to construction. In Indis v Robertson and Baxter [1898] A.C. 616, 630 Lord Herschell considered that headings in the Act under scrutiny were "not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them." It was not necessary to find any ambiguity in the particular provision before looking for guidance to the headings. However other courts held the contrary view. (See, for example, Rex v Surrey (North-East Area) Assessment Committee [1948] 1 K.B. 28; Rex v Hare [1934] 1 K.B. 354; Martin v Fowler

[1926] A.C. 746; Fletcher v Birkenhead Corporation [1907] 1 K.B. 205, 214, 218; Hammersmith & City Railway Co. v Brand [1869] L.R. 4 H.L. 171.) In Rex v Surrey (North-East Area) Assessment Committee [1948] 1 K.B. 28, 32 Lord Goddard C.J. assumed a clear principle that cross-headings "cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to their ordinary meaning."

21.5 In more recent times the courts have reacted favourably to the use of cross-headings as aids to construction, together with preambles to Acts. (See for example R v Hanover [1957] A.C. 436; Qualter, Hall & Co. Ltd. v Board of Trade [1962] Ch. 273; Beswick v Beswick [1968] A.C. 58, 77, 81.) Commenting on the "fluctuating state of the authorities", in Rex v Schildkamp [1969] A.C. 1 Lord Upjohn said:

> *In my opinion it is wrong to confine [the] role [of cross-headings] to the resolution of ambiguities in the body of [a] statute.*
>
> *When the court construing the statute is reading it through to understand it, it must read the cross-headings as well as the body of the statute and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or a label or is helpful in assisting to construe, or even in some cases to control, the meaning or ambit of those sections must necessarily depend on the circumstances of the case, and I do not think it possible to lay down any rules.*

21.6 Viscount Dilhorne in that same case considered that a court could look at the title given to a Part of an Act and to cross-headings, although "the weight to be attached to them is ... very slight and less than that which should be given to a preamble ... " (At 20.)

21.7 Lord Reid looked at punctuation, cross-headings and side-notes to sections in Acts. Taking a strict view, he thought a court could say "that these should be disregarded because they are not the product of anything done in Parliament." He went on:

> *I have never heard of an attempt to move that any of them should be altered or amended...*

However he then adopted the view that it would be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act:

> *I say more realistic because in very many cases the provision before the court was never mentioned in debate in either House and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross-headings and side-notes do not.*
>
> *So, if the authorities are equivocal and one is free to deal with the whole matter, I would not object to taking all these matters into account, provided that we realise that they cannot have equal weight with the words of the Act. Punctuation can be of some assistance in construction. A cross-heading ought to indicate the scope of the sections which follow it but there is always a possibility that the scope of one of these sections may have been widened by amendment. But a side-note is a poor guide to the scope of a section for it can do no more than indicate the main subject with which the section deals.* (At 10.)
> (This offsets Lord Reid's more restrictive view in Inland Revenue Commissioners v Hickey [1960] A.C. 748, 763.)

(See also Debate on Interpretation of Legislation Bill, Hansard (H.L.) 9.3.1981, 64, at pp. 66-67 and 78, per Lords Scarman and Simon of Glaisdale.)

21.8 The Committee believes that the English House of Lords position should be followed, and that cross headings, side headings, marginal notes and the like should be able to be taken into account by courts in the interpretation of statutes, as they consider them relevant. To facilitate this, Clause 33(3) should be read subject to Clause 32 of the proposed Act.

21.9 RECOMMENDATION 30: CLAUSE 33(3) MARGINAL NOTES, HEADINGS

The Committee recommends that a new sub-clause should be inserted into the Bill to provide

> *Clause 33(4)*
> *This section is to be read subject to section 32 of this Act.*

21.10 PUNCTUATION AND INTERPRETATION OF LEGISLATION

Just as there have been debates on the relevance of subheadings, headings, marginal notes and the like to construction of legislation, questions have been raised about the relevance of punctuation. In Hanlon v The Law Society [1980] 2 All E.R. 199, 221, [1981] A.C. 124, 197-198, the court held it was right to have regard to punctuation. That before 1850 Acts of Parliament were not punctuated, and that for some years afterward punctuation was left to the drafters and not scrutinised by Parliament, was alluded to. The court adopted Alexander v Mackenzie [1947] J.C. 155, 166, where Lord Jamieson said:

> *I am not prepared to hold that in construing a modern Act of Parliament a court may not have regard to punctuation. Bills when introduced in Parliament have punctuation, and without such would be unintelligible to the legislators, who pass them into law as punctuated. There appears to me no valid reason why regard should be denied to punctuation in construing a statute so passed, when effect may be given to it in a punctuated writing under the hand of a testator, as was held in Houston v Burns [1918] A.C. 337. While notice may, therefore, in my view be taken of punctuation in construing a statute, a comma, or the absence of a comma must, I think, be disregarded if to give effect to it would so alter the sense as to be contrary to the plain intention of the statute.*

21.11 Lord Lowry went on to say that not to take account of punctuation "disregards the reality that literate people such as Parliamentary [drafters], punctuate what they write, if not identically, at least in accordance with grammatical principles." He then asked:

> *Why should not other literate people, such as judges, look at the punctuation in order to interpret the meaning of the legislation as accepted by Parliament?*

21.12 Similarly in Rex v Schildkamp [1969] A.C. 1 Lord Reid, repudiating his earlier, more restrictive view (see Inland Revenue Commissioners v Hickey [1960] A.C. 748, 763) considered that despite punctuation not generally being the subject of Parliamentary debate, the court should not ignore it. Due weight

should be given to punctuation, although it would not have equal weight with the words of an Act. (See also Attorney-General v Prince Ernest Augustus of Hanover [1957] A.C. 436; Tuby v Newcastle-Under-Lyme Corporation [1965] 1 Q.B. 214, 229; Marshall v Cottingham [1981] 3 All E.R. 8, 12. Also Re Steel (deceased), Public Trustee v Christian Aid Society [1978] 2 All E.R. 1026, [1979] Ch. 218; James Burrow, Essay on Punctuation, 1772, London, at p.11; recommendations of Scarman Report into the Interpretation of Statutes, 1969, HMSO, England; Bennion, "Another Reverse for the Law Commission's Interpretation Bill", op. cit.)

21.13 The Committee believes that there is no adequate reason for hesitating to follow the English House of Lords approach in relation to punctuation. It may give assistance to a court in determining the meaning of an Act or provision. The courts should not be precluded from that assistance. Indeed the High Court has already adopted this approach. In Ryde Municipal Council v Macquarie University (1978) 139 C.L.R. 633, 636 Acting Chief Justice Gibbs took into consideration the interposition of commas between phrases in the relevant section of the Act before the Court for interpretation. This assisted the court in determining the intention of Parliament.

21.14 The Committee's firm view is that any use of punctuation in construction of statutes should give effect to the intention of Parliament. Thus in stating that punctuation is relevant to construction, the Committee does not favour the result occurring in Gipp v Richardson [1982] V.R. 1031 where lack of punctuation between numerals describing a breathalyser machine was taken as showing that the particular machine was not that referred to in the relevant legislation. Rather, a court should give to such aids whatever weight it thinks appropriate in the particular case, so as to conform to a purposive reading of the legislation. Any reference to punctuation should be made in accordance with Clause 32 of the proposed Act.

21.15 **RECOMMENDATION 31:**

PUNCTUATION AND INTERPRETATION OF LEGISLATION

The Committee believes that punctuation should be within the purview of the courts in determining the meaning of legislation, but recommends that any use of punctuation in interpreting legislation should be made subject to Clause 32 of the Bill.

22 CLAUSE 34(a) and (b)

GENDER

Clause 34(a) and (b) provide that where words importing the masculine gender appear in an Act or subordinate instrument, then unless the contrary intention appears, those words include the feminine gender; and where words importing the feminine gender appear in an Act or subordinate instrument, then unless the contrary intention appears, those words include the masculine gender.

22.1 In view of the practice which came into being in 1850 with the passage of the Acts Interpretation Act (U.K.), of using "he" and "man" and derivations thereof to include "she" and "woman" and their derivations, it is necessary to include Clause 34(a) to ensure that existing legislation is interpreted to cover male and female. As legislation is sometimes drafted in the feminine (for example, the Nurses Act), but may equally apply to women and men, it is appropriate also that provision should be made for feminine nouns and pronouns to include male nouns and pronouns as in the new Clause 34 (b).

22.2 However, the Committee strongly believes that attention must be paid by legislators and drafters to contemporary requirements in relation to the use of language. Today a significant part of the community is concerned about the use of masculine terms referring to both male and female. This concern cannot be ignored, particularly as it is based upon valid grounds.

22.3 Before the mid 19th century it was not accepted in law, that the masculine included the feminine. However, from at least the 16th century in England grammarians pursued a path of promoting the masculine form above the feminine form. The rationale was that the masculine form was "superior" to the feminine. In 1553 Wilson asserted:

> *Some will set the Carte before the horse, as thus. My mother and my father are both at home, even as thoughe the good man of the house ware no breaches, or that the graye Mare were the better Horse. And*

what thoughe it often so happenneth (God wotte the more pite) yet in speaking at leaste, let us kepe a natural order, and set the man before the woman for maners Sake. (Wilson, Arte of Rhetorique, 1560 ed., London, at p. 189.)

According to Wilson, linguistic ordering of female and male should give the male priority, for "the worthier is preferred and set before. As a man is sette before a woman." (Wilson, op. cit., at p.234.)

22.4 Some writers followed this principle in the 17th century, in accordance with the same sentiments. Thus Poole, another grammarian, in referring to the agreement of relative pronoun and antecedent stated:

The Relative agrees with the Antecedent in gender, number, and person ... The Relative shall agree in gender with the Antecedent of the more worthy gender: as, the King and the Queen whom I honor. The Masculine is more worthy than the Feminine. (Poole, The English Accidence, 1646, London, at p.21.)

22.5 Bodine's extensive review of the sources establishes that the first advocacy of the "rule" that not only was the masculine more "worthy" than the feminine, but that it should subsume the feminine in grammatical discourse, came about in 1746. (See generally Bodine, "Androcentrism in prescriptive grammar: singular 'they', sex-indefinite 'he', and 'he or she'" (1975), 4(2) Language in Society 129.) Rule 21 of Kirby's syntactic rules provided:

The masculine Person answers to the general Name, which comprehends both Male and Female; as Any Person who knows what he says. (Kirby, A New English Grammar, 1746, London, at p. 117.)

22.6 Yet by no means was this accepted generally in the 18th century. Ward explicitly ruled out any need for adopting the "masculine includes the feminine" approach:

"... he must represent a male; she a female; and it, an object of no sex ... But the plural they equally represents objects of all the three genders; for a plural object may consist of singular objects, some of which are masculine, others feminine and others neuter; as, a man and a woman and some iron were in the waggon, and they were all overturned ...

This frees English, in a great measure, from the perplexity of such rules, as, 'the masculine gender is more worthy than the feminine...' neither the English adjectives, nor the plural personal, nor the plural possessive pronouns, have a distinction of gender. (Ward, An Essay on Grammar, 1765, London, at pp. 459-60.)

Other scholars protested in more broad-ranging terms. (See for example Macaulay, Letters on Education, 1790, London; Murray, "On the Equality of the Sexes" (1790) Massachussetts Magazine (March, April) 132-5, 223-6; the writings of Charlotte Perkins Gilman; and also Spender, Women of Ideas, 1982, London, at pp.3-118.)

22.7 A century elapsed before the law gave its imprimatur to the man-made rule:

... In all acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender and number is expressly provided. (Acts Interpretation Act 1850 (U.K.) (Lord Brougham's Act, 13 & 14 Vict. C.21), s.5.)

22.8 This legal backing did not have full community support. Women (and some men) questioned the rule. (See for example R v Hutchins; ex parte Chapman and Cockington [1959] S.A.S.R. 189; Re Kitson [1920] S.A.L.R. 230; Bebb v Law Society [1914] 1 Ch. 286; Nairn v University of St. Andrews [1909] A.C. 147; In re Edith Haynes (1904) 6 W.A.L.R. 209; Bertha Cave's Case, The

Times 3.12.1903; Ex parte Ogden (1893) 14 L.R. (NSW) 86; The Queen v Harrald (1872) L.R. 7 Q.B. 361; Declaration of Sentiments ("Seneca Falls Declaration"), New York, 1848; Stanton, The Woman's Bible, 1898, New York; also Spender, Women of Ideas, op. cit. at pp.181-491; Scutt, Legislating for the Right to be Equal: Women, the Law and Social Policy in Australia, unpublished paper (shortened version in Women, Social Welfare and the State, Baldock and Cass, editors, 1983, Sydney; Campbell, "Women and the Exercise of Public Functions" (1960-1962) 1 Adelaide Law Review 190.) Dissatisfaction continued to be expressed during the early and mid 20th century. Fowler's Dictionary of Modern English Usage stated in 1926 that "Archbishop Whately used to say that women were more liable than men to [use singular 'they'] ..., as they objected to identifying 'everybody' with 'him'". (At p. 635.) In the 1930s and 1940s the Oxford Scholar Mary ¯eard, and Sophie Drinker, the musicologist, published books on the problem. In 1948 Ruth Herschberger added her treatise on patriarchal semantics and physiology. In the 1950s Lynn White, the male principal of Mill's College, wrote of the negative effects on girls of the practice of using masculine pronouns as generics:

> *"The [assimilation] of this habit of language into the minds of little girls as they grow up to be women is more profound than most people, including most women, have recognized, for it implies that personality is really a male attribute, and that women are a human subspecies.*
> (Quoted Miller and Swift, Words and Women, 1977, New York, at p.x.)

(See also Strainchamps, "Our Sexist Language" in Woman in Sexist Society, Gornick and Moran, editors, 1971, New York, 247.)

22.9 In the United States, recognition of the problem came about in a constructive way in 1972, when the large publishing firm McGraw-Hill produced "Guidelines for Equal Treatment of the Sexes" to ensure that non-sexist language was used in all their future publications, and that others concerned about the issue would have comprehensive guidance on the non-sexist use of language. (See generally Miller and Swift, op. cit.) In England, a learned work was written on the subject in 1980. (˜pender, Man Made Language, 1980, London.) In Australia today some judgments pay attention to the need for non-

sexist language to be adopted. (See for example Re Mannequins and Models Guild of Australia and Ors; Ex parte Actors and Announcers Equity Association of Australia (1982) 39 A.L.R. 179, 184 ("entertainer, ... showperson, ... actor"); Groves v Commonwealth (1982) 40 A.L.R. 193, 210 ("serviceperson"); Barker v The Queen (1983) 57 A.L.J.R. 426, 431, 432 ("he or she"); Livesey v New South Wales Bar Association (1983) 47 A.L.J.R. 420 (use of "Ms." as title throughout joint judgment of Justices Mason, Murphy, Brennan, Deane and Dawson; Re Pearson; ex parte Sipka (1983) 57 A.L.J.R. 225 ("Ms." as title in judgments of Justice Murphy and Justices Brennan, Deane and Dawson (joint).)

22.10 The Committee considers that in light of contemporary usage, wherever possible, legislation should be drafted in such a way as to render superfluous any reference to gender; that is, legislation should conform to the practice of using gender neutral language. Other legislatures have adopted this approach in particular instances - for example, the Michigan Criminal Sexual Conduct Act 1974 contains provisions drafted in "he or she" form:

> *Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:*
>
> *(a) That other person is under 13 years of age.*
>
> *(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.*
>
> ...

(The Act is contained in full in Appendix II to Rape Law Reform, Scutt, editor, Australian Institute of Criminology, 1980, Canberra, at pp.256-263.)

22.11 In Australia, Macquarie University has redrafted all Regulations, eliminating the use of personal pronouns. For example, Bachelor Degree Regulation 3(2)(a) provides:

> *A candidate shall in each year pursue a programme of study (selected from the schedule of courses) which the candidate shall propose after consultation with an academic adviser in the School in which the candidate is registered for that year and which shall be subject to the approval of the Head of such School.*

These Regulations have been approved by the University Council and are now in force. The University By Laws are in the process of being redrafted and are soon to come before the Council, thence to the Governor-in-Council, for approval. It is then intended to move on to the Macquarie University Act, redrafting of which will be approved by the Council for resubmission to the Parliament. These moves pre-date the recently accepted policy of F.A.U.S.A (the Federation of Australian University Staff Associations) that non-sexist language should be used throughout Australian universities. (See F.A.U.S.A., Towards Non-Sexist Language, 1983, Sydney.)

22.12 The Women's Electoral Lobby Draft Bill on Sexual Offences, produced in 1977, provides another guide to genderless statutory language:

> *s. 5 Aggravated sexual assault, grade one*
>
> *(a) A person who subjects another person to an act of unlawful sexual intercourse causing grievous bodily harm to that other person will be guilty of aggravated sexual assault, grade one.*
>
> *(b) A person who subjects another person to an act of unlawful sexual intercourse causing grievous mental harm to that other person will be guilty of aggravated sexual assault, grade one.*
>
> *(c) A person who subjects another person to an act of unlawful sexual intercourse and who threatens to injure that person with a*

dangerous weapon will be guilty of aggravated sexual assault, grade one.

PENALTY: The penalty for aggravated sexual assault, grade one, will be a maximum of fourteen years' imprisonment ...

(The Draft Bill is contained in full in Appendix II to Rape Law Reform, op. cit., at pp. 265-277.)

22.13 Some provisions of Victorian statutes are already drafted in gender neutral terms. For example, the Crimes Act 1958 section 399(3) provides:

The failure of any person charged with an offence to give evidence shall not be made the subject of comment to the jury by either the prosecution, or unless the accused person elects to make a statement not on oath, by the presiding judge.

The Crimes Act 1958 section 399(2) provides:

(2) Subject to this section, where a person is charged with an offence, the wife or former wife or husband or former husband (as the case may be) of that person shall at every stage of the proceedings against that person be a competent and, unless he or she is also charged in those proceedings, compellable witness for the defence of that person or of any other person charged in those proceedings as if the marriage had never taken place.

Alternatively, the provision could be framed :

(2) Subject to this section, where a person is charged with an offence, the spouse or former spouse (as the case may be) of that person shall at every stage of the proceedings against that person be a competent and, unless also charged in those proceedings, compellable witness for the defence of that person or of any other person charged in those proceedings as if the marrriage had never taken place.

(This also shortens the provision.) (Note: where "spouse" has a broader meaning than husband or wife (legally wed) the nouns "husband" and/or "wife" could be retained.)

22.14 Many provisions of the Crimes Act 1958 are already drafted to take into account gender differences, by the use of "person" and/or "whosoever", as well as "he or she". Redrafting of gender specific provisions is not difficult. For example, section 87 of the Crimes Act 1958 provides:

> *(1) A person is guilty of blackmail if, with a view to gain for himself or another, or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief -*
>
> *(a) that he has reasonable grounds for making the demand; and*
>
> *(b) that the use of the menaces is a proper means of reinforcing the demand.*
>
> *(2) The nature of the act or omission demanded is immaterial and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.*
>
> *(3) A person guilty of blackmail is guilty of felony and liable to imprisonment for a term not exceeding fourteen years.*

The provision could be reframed:

> *(1) A person is guilty of blackmail if, with a view to gain for oneself or another or with intent to cause loss to another, that person makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief -*
>
> *(a) that that person has reasonable grounds for making the demand; and*
>
> ...

Alternatively:

> *(1) A person is guilty of blackmail if, with a view to gain for self or another or with intent to cause loss to another, that person makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief -*
> *(a) that the person ...*

22.15 Where it is considered necessary to retain pronouns, "they" as a singular pronoun has a long and respected history. Before the 19th century singular "they" was widely used in written and spoken English. Jane Austen, Walter Scott, Shakespeare, Addison, Swift and Ruskin each used the form as did numerous other writers: "... John Ruskin has written such a sentence as this: 'But if a customer wishes you to injure their foot or to disfigure it, you are to refuse their pleasure'." (White, Everyday English, 1880, Boston, at p.416; see also Leonard, The Doctrine of Correctness in English Usage 1700-1800, 1929, Madison; Leonard, Current English Usage, 1932, Chicago; Baron, "A Reanalysis of English Grammatical Gender" (1971) Lingua (August) 113; Furfey, "Men's and Women's Language" (1944) American Catholic Sociological Review 218.) Redrafting in this form is equally simple. The Crimes Act 1958 (Victoria) provides:

> *39. Whosoever assaults and strikes or wounds any magistrate officer or other person lawfully authorized in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress or of any vessel goods or effects wrecked stranded or cast on shore or lying under water, shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years.*

Using "they" singular, a redraft would read:

39. Whosoever assaults and strikes or wounds any magistrate officer or other person lawfully authorized in or on account of the exercise of their duty in or concerning the preservation of any vessel in distress or of any vessel goods or effects wrecked stranded or cast on shore or lying under water, shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years.

22.16 Common usage in speech embraces the singular "they" form more often than the supposedly "grammatically correct" everyone/everybody/he/him/his form. Where legislation is drafted in gender specific terms, the Committee can see no reason for continuing the practice. It is unnecessary, is the subject of controversy amongst significant sectors of the community, and is not readily understood by laypeople.

22.17 RECOMMENDATION 32: CLAUSE 34(a) AND (b) GENDER

The Committee approves of the inclusion of Clause 34(a) and (b). In order to make it clear beyond doubt that the Parliament no longer countenances the proposition that the masculine form is superior to the feminine and therefore should always precede it, the Committee recommends that sub-clause (a) should be transposed with sub-clause (b) in the Bill, Clause 34 (a) and (b) to read:

Clause 34. Gender and number.

In an Act or subordinate instrument, unless the contrary intention appears -

(a) words importing the feminine gender include the masculine gender;

(b) words importing the masculine gender include the feminine gender;

(c) ...

(d) ...

22.18 RECOMMENDATION 33: CLAUSE 34 (a) AND (b) GENDER - UPDATING OF LEGISLATION

The Committee recommends that in future drafters of legislation should make every endeavour to ensure that legislation is drafted in gender neutral terms. Updating and revision of existing legislation should be undertaken on a regular basis by Parliamentary Counsel to ensure that all Acts are cast in gender neutral form.

22.19

CLAUSE 34

GENDER - TITLES OF OFFICE-HOLDERS OF GOVERNMENT BOARDS, COUNCILS, TRIBUNALS, ETC.

The debate on legislative language being cast in masculine terms has gone beyond the use of male nouns and pronouns artificially including the female. Objections to titles of office holders being almost invariably in the masculine form have been raised. Some members of the community approve of the title "chairman" appearing in legislation, asserting it is used in the generic sense. Some object to "chairman" being the form when a woman holds the office and would prefer "chairwoman". Others consider "chairperson" is a title having no sex-specific connotations, and that therefore legislation covering all government authorities and bodies should be amended to substitute "chairperson" for "chairman", so that it is clear that governmental offices, advisory boards and the like are not in contravention of the stated policy of equal opportunity: that is, so that the public is made aware that male or female persons may be appointed to the chair of boards, committees, councils and the like. Yet again, some members of the community have difficulty with the word "chairperson", that difficulty arising from their belief that the term is "ugly", "clumsy", "too long", or "unnecessary".

22.20 Recognising that strong opinions currently exist on the matter, the Committee believes it is timely for consideration to be given to it. Three questions arise:

i. Does "chairman" have generic origins justifying its use;

ii. If discontent with the use of the term exists within a significant sector of society, is it appropriate to eliminate the title, or is the matter "so trivial" as not to warrant a change;

iii If a change is to be made, should "chairperson" replace "chairman", or is some other title - for example, "convenor" or "president" - more or equally appropriate.

22.21 "Chairman" as generic. The title "chairman" came into use in 1654. "Chairwoman" has been traced back to 1699. There was a perceived need at that time to have an appropriate title for women who performed chairing functions. "Chairman" was not taken as a neutral title covering males and females in the chair. More recently, the Oxford Dictionary does not accede to a generic meaning for the term. It states:

> *Chairperson, chairman or chairwoman ... v.t install in chair, esp. of authority ... preside over (meeting).*
> *Chairman n. (pl. chairmen; fem. chairlady, chairwoman). Person chosen to preside over meeting; permanent president of committee, board of directors, firm, country, etc.; master of ceremonies at entertainment ...*
> (Oxford Dictionary of Current Concise English, 7th ed., 1982.)

22.21.1 As in the case of "he" and "him" taking precedence over "she" and "her", and the former subsuming the latter, agitation against the all-encompassing use of male titles like chairman is not of contemporary origin. Its roots go back several centuries. (See Miller and Swift, The Handbook of Non-Sexist Writing, 1981, New York; also generally Lakoff, Language and Woman's Place, 1975, New York; Nilsen, et. al. editors, Sexism and Language, 1977, Urbana, Ill.; Shortand and Favvel, "Sexist Language" (1983) Radical Philosophy (Summer Issue) 29; Vetterling-Braggin, Sexist Language - a Modern Philosophical Analysis, 1981, U.S.A.) The argument that the word is used generally in the generic sense is not warranted.

22.22 A Question of Concern. As for the alleged triviality of the matter, comprehensive research shows that far from being of little moment, the use of language is basic to the way in which individuals perceive themselves. The use of masculine terms has led to loss of self-esteem on the part of women and girls. Miller and Swift state:

It is not really known at what point children begin to come to terms with the dual role the word man has acquired or with the ... use of he *to mean 'either he or she'. Certainly the experience is different for boys and girls - ego-enhancing for the former and ego-deflating for the latter. The four-year-old girl who hides her father's pipe and waits for a cue line from him to go find it is* not *expecting to hear 'If somebody will find my pipe, I'll give him a big hug.' Yet the same child will sooner or later be taught that in such a sentence him can also mean her.* (Miller and Swift, op. cit., at p.26.)

22.22.1 As Miller and Swift point out, many respected scholars, pediatricians and child psychologists have commented on the negative effects on girls of male orientated language. Dr. Benjamin Spock has said:

Like everyone else writing in the child-care field I have always referred to the baby and child with the pronouns 'he' and 'him'. There is a grammatical excuse, since these pronouns can be used correctly to refer to a girl or woman ..., just as the word 'man' may cover women too in certain contexts. But I now agree ... that this is not enough of an excuse. The fact remains that this use of the male pronoun is one of many examples of discrimination, each of which may seem of small consequence in itself but which, when added up, help to keep woman at an enormous disadvantage - in employment, in the courts, in the universities and in conventional social life. (Redbook, November 1973; quoted in Today's Education, September-October 1974, at p.110.)

22.22.2 With similar concern, child psychologist Dr. Lee Salk states:

An author interested in eliminating sexism from his or her work is immediately confronted with the masculine tradition of the English language. I ... reject the practice of using masculine pronouns to refer to human beings. Accordingly I have freely alternated my references, sometimes using the female gender and sometimes using the male gender. (Preparing for Parenthood, 1974, Preface.)

22.22.3 It is difficult to sustain the proposition that the use of language is trivial when the harm done by exclusionary language is so clearly recognised by experts on child development. However, if despite the evidence some wish to continue to assert that the issue is not one of any importance, then there is no problem: the views of those who do care should take precedence without any difficulty arising - those thinking it trivial do not care. Therefore they should remain satisfied notwithstanding a change, whilst those who desire a change become satisfied as their views are given credence and take effect.

22.23 "Chairperson" as Title. On the final question, of whether "chairman" should be replaced by "chairperson", as the latter title is accepted by authorities such as the Oxford Dictionary there should be little dissent. The Committee believes that this is an appropriate term in view of contemporary attitudes. That some individuals have some difficulty with "chairperson" is attributable to its relatively recent appearance in the language, and the fact that change is not always seen as positive. However change is not unusual in a living language. Many new words enter into the language each year, as any perusal of early and recent editions of dictionaries will confirm. If "chairman" were replaced in legislation by "chairperson", everyday use would soon render the word innocuous. It would be accepted as a part of the language.

22.23.1 However, should objections to the introduction of a relatively recent term be held to be of such force as to cause certain sections of the community to experience extraordinary discomfort, other neutral terms such as "president" or "convenor" could equally easily be substituted . Objections that these terms do not "mean the same thing" as "chairman" are not well founded. The Oxford Dictionary definitions of "chairman", "chairwoman" and "chairperson" acknowledge "president" as a synonym. To "chair" a meeting is to "preside" - which has an obvious connection with the term "president". "Convenor" traditionally means the person who calls meetings, arranges meetings of committees, or assembles persons for the purpose of a meeting, etcetera. If "convenor" were substituted generally for "chairman" its meaning would become somewhat more specific in the sense of denoting the person

presiding at a meeting, assembly or committee. Many organisations in fact already use the term "convenor" in this way.

22.24 RECOMMENDATION 34: CLAUSE 34
TITLES OF OFFICE-HOLDERS OF GOVERNMENT BOARDS, COUNCILS, TRIBUNALS, ETC.

The Committee recommends that drafters of legislation should be required to include gender-neutral titles in all future statutes and subordinate instruments, where office-holders are referred to, and to omit the use of titles such as "chairman".

22.25 RECOMMENDATION 35: CLAUSE 34
TITLES OF OFFICE-HOLDERS OF GOVERNMENT BOARDS, COUNCILS, TRIBUNALS, ETC. - UPDATING OF LEGISLATION

The Committee recommends that general updating of existing present legislation should begin and continue on an ongoing basis, to replace masculine titles with gender neutral titles where they appear in Acts and subordinate legislation. For example, under the Equal Opportunity Act 1977 the head of the Equal Opportunity Board carries the title "Chairman". An amendment should be included in the current Equal Opportunity (Amendment) Bill 1983 to replace "Chairman" with "Chairperson" (or "Convenor" or "President"). Similarly amendment should be made to the Planning Appeals Board Act 1980 to replace the title "chief chairman" with "chief chairperson", and "deputy chief chairman" with "deputy chief chairperson"; alternatively "president" could replace "chief chairman", "senior deputy president" could replace "deputy chief chairman"; "senior members" would become "deputy presidents" and "members" "deputy vice-presidents". Where under section 18 the chief chairman (chief chairperson) appoints a senior member as chairman of a division, that title should be changed to chairperson or president. (See ss. 6, 7, 18.) Alternatively there could be three categories, namely president, deputy president and member. (This accords with the practice under the Conciliation and Arbitration Act 1904 (Cth).

23 CLAUSE 35

"INFAMOUS OFFENCE" AND "INFAMOUS CRIME"

Amongst other definitions, clause 35 provides that the terms "infamous offence" and "infamous crime", where they appear in all Acts and subordinate instruments shall, unless contrary intention appears, include (a) perjury; and (b) the commission of an act of bestiality. The Committee is of the opinion that the use of euphemisms in legislation should, as far as possible, be avoided. This is particularly so where the matter being legislated involves criminal acts for which offenders may be severely penalised. The Committee believes that in accordance with principles of criminal justice, those acts for which citizens can be prosecuted and punished should be clearly enunciated in the relevant Acts and/or subordinate legislation. In the case of perjury, where legislation provides for its penalisation or in any other way refers to it, rather than using the term "infamous offence" or "infamous crime", the legislation should use the term "perjury". In the case of bestiality or attempted bestiality, where legislation provides for its penalisation or in any other way refers to the issue, rather than using the term "infamous offence" or "infamous crime", the legislation should use the term "sexual penetration of an animal" or "attempted sexual penetration of an animal": s.2A Crimes Act 1958.

23.1 A number of current Acts make reference to the expression "infamous offence" or "infamous crime". Therefore it is necessary to include the definition in the proposed Act.

23.2 However, in accordance with the Committee's view that Acts of Parliament should not contain euphemistic and anachronistic terms, the Committee believes that all provisions in all current Acts using the term "infamous offence" or "infamous crime" should be located by the Law Department. When they have been located, an amending Act should be drafted which deletes all such references from existing legislation and replaces them with the appropriate terms. That Act should repeal the definition of "infamous offence" and "infamous crime" from the proposed Act, that definition being an interim measure only.

23.3 RECOMMENDATION 36: CLAUSE 35
INFAMOUS OFFENCE AND INFAMOUS CRIME

The Committee recommends that this definition should remain in the proposed Act as an interim measure, however the Law Department should locate all current Acts making reference to "infamous offence" and "infamous crime". An Act should then be drafted deleting all such references and replacing them with the appropriate terms. That Act should repeal the definition of "infamous offence" and "infamous crime" as contained in Clause 35 of this Bill.

23.4

CLAUSE 35

"LAND"

Clause 35 defines "land" as including -

> *buildings and other structures, land covered with water, and any vestage, interest, easement, servitude, privilege or right in or over land.*

23.5 A number of witnesses expressed misgivings about this definition. Does the definition include topography and natural conditions on the land? (See Logan v Miller (unreported, Supreme Court of Victoria, 3.6.1982.) Would "buildings and other structures" include, say, a houseboat or mobile home? It was suggested that the words "buildings and other structures" should be limited to those on land, and permanently affixed to it, the definition thus reading -

> *buildings and other structures being permanent fixtures on land, land covered with water ...*

Alternatively, the words "buildings and other structures" should be omitted. This would be appropriate in that at common law buildings and other structures permanently on land are a part of the land.

23.6 The Committee considers that the latter option would have the positive effect of abbreviating the definition without derogating from its content. However the former option, although lengthening the definition, would ensure that both practitioners and laypersons would be made aware of the meaning of "land" in law, whether or not acquainted with the common law definition.

23.7 RECOMMENDATION 37: CLAUSE 35 "LAND"

Consequently, the Committee recommends that the definition of "land" in Clause 35 of the Bill be drafted to read:

> *"Land" includes buildings and other structures being permanent fixtures on land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.*

23.8 CLAUSE 35
"WRITING"

Writing is defined as including "all modes of representing or reproducing words, figures or symbols in a visible form." Any expressions referring to writing are to be construed accordingly.

23.9 The Law Institute expressed the view that any writing "should be in a permanent form":

> *For example, microfiche that fades in direct light is not permanent, although it represents or reproduces words or symbols in a visible form.* (Law Institute of Victoria, written submission 1.6.1983, at p.4.)

23.10 The Committee believes that, as was so with the definition of "land", the inclusion of a definition of "writing" in Clause 35 goes beyond the adoption of simple, straightforward terms as substitutes for longer, more complex terms, to deeper questions touching on policy. In addition to the question of permanency of writing alluded to by the Law Institute, the definition raises the issue of technological awareness. That is, should "writing" be restricted to that which can be read or understood without specialised equipment?

23.11 The Committee believes that the value of including a definition of "writing" in the proposed Act lies in facing this problem head on. In view of rapid technological progress, "writing" should be defined broadly to include michrofiche, computer tape, punch tape and like forms of communication. Communication through these mediums is an everyday occurrence. Many journals, books, theses and other works are now produced in microfiche. Although recourse to modern technology may be necessary to decipher writing, the problem of access arises in relation to other types of writing. For example, written statements decipherable only by use of a magnifying glass would be "writing" according to current legal precepts. Written statements in a foreign language are "writing", although not all persons can gain access to meaning, as not all persons are schooled in foreign languages. Not all persons are literate,

yet this does not interfere with the definition of "writing". Although technology needed for deciphering some forms of "writing" may be expensive, learning a foreign language or obtaining translator services may be equally (or more) costly.

23.12 The problem of permanency is accepted by the Committee as having merit. However this problem is not confined to michrofiche. All forms of writing have a limited life. Pen and ink, pencil, carving in stone, and modern modes do not "last forever". Nonetheless communication in ink, for example, is accepted traditionally as "writing". There is no reason for distinguishing between the various forms of writing on this ground. The lifetime of some modern forms may in fact exceed that of more traditional forms. One manufacturer and distributor of microfiche has calculated that, kept in normal conditions and at normal room temperature, microfiche has a lifespan of at least 100 years. (Kodak Representative, oral communication, 29.9.1983.)

23.13 RECOMMENDATION 38: CLAUSE 35 "WRITING"

The Committee believes that the definition of "writing" contained in the Bill should be accepted as representing a policy decision that technological forms of communication - for example, microfiche - are encompassed by that definition, and on that basis the definition should remain in the proposed Act.

24 CLAUSE 37A

POWER TO APPOINT INCLUDES POWER TO REMOVE OR SUSPEND (NEW CLAUSE)

The Committee's attention has been drawn to the absence in the Acts Interpretation Act 1958 and in the Interpretation Bill of a general provision implying power to remove or suspend a person appointed to an office or place (Moran, oral evidence, 30.8.1983, at p.113.) All other Australian jurisdictions include in their Interpretation Acts provisions implying this power, and the power to appoint another person temporarily in the place of a person so removed or suspended or in the place of an ill or absent holder of the office or place. Such a provision may be overridden in any particular case by way of a contrary intention appearing in the relevant Act appointing a person to an Office or place.

24.1 To include such a generalised provision in the proposed Act would obviate the need for placing a particular provision in every Act appointing a person to an office or place.The Committee considers the matter should be dealt with by the inclusion, in the proposed Act, of a new Clause 37A. Such Clause would read:

Clause 37A. Power to Appoint Includes Power to Remove or Suspend.

(1) Subject to sub-section (2), where an Act or subordinate instrument confers on a person or authority a power to make an appointment to an office or position, that person or authority has, unless the contrary intention appears, the power to remove or suspend a person appointed to the office or position and to appoint another person temporarily in the place of a person so removed or suspended or in the place of a sick or absent holder of the office or position.

(2) Where the power of a person or authority to make an appointment to an office or position is exercisable only upon the recommendation, or subject to the approval or consent, of some other person or authority, the power of removal or suspension

conferred by sub-section (1) is, unless the contrary intention appears, exercisable only upon the recommendation, or subject to the approval or consent of that other person or authority.

24.2 RECOMMENDATION 39: CLAUSE 37A (NEW CLAUSE) POWER TO APPOINT TO INCLUDE POWER TO REMOVE OR SUSPEND.

The Committee recommends that to cover the contingency of the need to appoint, remove or suspend a person in relation to an office or place, a new Clause 37A should be be introduced into the Bill to provide:

Clause 37A. Power to Appoint Includes Power to Remove or Suspend.

(1) Subject to sub-section (2), where an Act or subordinate instrument confers on a person or authority a power to make an appointment to an office or position, that person or authority has, unless the contrary intention appears, the power to remove or suspend a person appointed to the office or position and to appoint another person temporarily in the place of a person so removed or suspended or in the place of a sick or absent holder of the office or position.

(2) Where the power of a person or authority to make an appointment to an office or position is exercisable only upon the recommendation, or subject to the approval or consent, of some other person or authority, the power of removal or suspension conferred by sub-section (1) is, unless the contrary intention appears, exercisable only upon the recommendation, or subject to the approval or consent of that other person or authority.

25 CLAUSE 40 (6)

TIME

Clause 40(6) provides that in an Act or subordinate instrument -

(a) *a reference to midnight, in relation to a particular day, shall be construed as a reference to the point of time at which that day ends;*

(b) *a reference to a month shall be construed as a reference to a calendar month;*

(c) *a reference, without qualification, to a year shall be construed as a reference to a period of 12 months;*

(d) *a reference to a financial year shall be construed as a reference to the period of 12 months ending at midnight on 30 June; and*

(e) *a reference to a calendar year shall be construed as a reference to the period of 12 months ending at midnight on 31 December.*

25.1 However, the Law Institute pointed out that for the purpose of certain Acts - for example, the Local Government Act 1958, the Companies (Victoria) Code and the Associations Incorporation Act 1981 - a financial year may not coincide with the period set out in sub-clause 6(d) of that Clause.(Ad Hoc Committee, Law Institute of Victoria, written submission, 1.6.1983, at p.4.) The Committee accepts that it would be preferable to include the words "unless the contrary intention expressly appears" in sub-clause (d).

25.2 **RECOMMENDATION 40: CLAUSE 40(6)**

TIME

The Committee recommends that clause 40(6) should be amended to read:

40(6) TIME

In an Act or subordinate instrument unless the contrary intention expressly appears -

(a) *a reference to midnight, in relation to a particular day shall be construed as a reference to the point of time at which that day ends;*

(b) *a reference to a month shall be construed as a reference to a calendar month;*

(c) *a reference, without qualification, to a year shall be construed as a reference to a period of 12 months;*

(d) *unless the contrary intention appears, a reference to a financial year shall be construed as a reference to the period of 12 months ending at midnight on 30 June; and*

(e) *a reference to a calendar year shall be construed as a reference to the period of 12 months ending at midnight on 31 December.*

26

CLAUSE 41
CONSTRUCTION OF "MAY" AND "SHALL"

Clause 41 provides:

> *(1) Where in an Act passed or subordinate instrument made on or after the commencement of this Act the word 'may' is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not at discretion.*
>
> *(2) Where in an Act passed or subordinate instrument made on or after the commencement of this Act the word 'shall' is used in conferring a power, that word shall be construed as meaning that the power so conferred must be exercised.*

26.1 Several submissions to the Committee criticised the inclusion of this clause. One member of the Victorian Bar recommended that the Clause "should not be enacted". The grounds put to the Committee were:

> *The authorities at present recognise that the word 'shall' prima facie requires a mandatory interpretation whereas the word 'may' prima facie requires a discretionary interpretation. Although these are the prima facie meanings of the words nevertheless the courts have on occasions for good cause construed the words differently. This permits a degree of flexibility which is given to a court to interpret a statute to arrive at a just result.* (Gillard, written submission, 7.9.1983, at p. 1.)

The submission said that although "in principle Clause 41 is a good idea, ... it will remove the flexibility which is given to a court to interpret a statute to give a just result." As well, not all Parliamentary drafters, nor all Parliamentarians, will "always have in mind the rigid distinction envisaged by Clause 41." Further, subordinate legislation might be drafted by a body "which may not realise the rigid distinction drawn by the Interpretation Act." (Id.)

26.2 A second submission from a member of the Bar stated that the Clause would be "of little value", citing the similar New South Wales provision: s.23 Acts Interpretation Act 1897 which "has led to some confusion and in most cases has been taken as merely declaratory." (Ormiston, written submission, 27.7.1983, at p.4.) Contrarily, a third submission to the Committee put the view:

> *A ... provision [similar to Clause 41] has been in [the Western Australian] Act since it was enacted and is considered valuable. There is no intention to introduce any change in this area.* (Thornton, written submission, 3.6.1983, at p.6.)

The Western Australian Interpretation Act was passed in 1918.

26.3 The New South Wales' provision has been the subject of argument in Re Fettell (1952) 52 S.R. (N.S.W.) 221; Re Jackson (1951) 52 S.R. (N.S.W.) 42 and Re Davis (1947) 75 C.L.R. 409. These cases support the view that there is some confusion about the meaning of "shall" and "may". However, this does not mean that the introduction of a definition of those words leads to confusion; rather, the confusion may well exist because no statutory definition previously existed, or because, for some reason, courts or judges wish to interpret "shall" as "may" and "may" as "shall" in a particular case. (See Rodd v Taylor [1979) V.R. 228; R v Milk Board [1961] V.R. 196; Tilbury and Lewis Pty. Ltd. v Marzorini (1940] V.R. 245; Re Gleeson [1907] V.L.R. 368; Byrne v Armstrong (1899) 25 V.L.R. 126; also Pearce, Statutory Interpretation, 1974, Melbourne, at Chapter 11.)

26.4 In Re Davis (1947) 75 C.L.R. 409 the relevant provisions under the Legal Practitioners Act 1898 (N.S.W.) stated:

> *s. 9 No candidate, however qualified in other respects, shall be admitted as a barrister unless the Board is satisfied that he is a person of good fame and character.*

s.10 Every candidate whom the Board shall approve as a fit and proper person to be made a barrister shall be admitted as a barrister by the Court on any day appointed for that purpose.

26.5 A candidate satisfied the Board that he was a person of good fame and character. In accordance with section 10, the Board approved him as a "fit and proper person". After he had been admitted it was discovered by the Prothonotary of the Supreme Court that the candidate had been convicted of an offence prior to his admission, and that this information had not been before the Barristers' Admission Board when it had approved his candidature. The Supreme Court then disbarred him, removing his name from the rolls. On appeal against disbarment, the High Court considered that the Supreme Court had the power to disbar: "A power to admit advocates in a colonial court carries with it, as an incidental power, a power of suspending from practice ... in a proper case." (At 414, citing In re the Justices of the Court of Common Pleas at Antigua (1830) 1 Knapp 267, 12 E.R. 321; In re White (unreported decision, Supreme Court of New South Wales, August 1930).)

26.6 It is difficult to see how the High Court could consider it necessary, in the circumstances, to hold that the word "shall" appearing in section 10 of the Legal Practitioners Act should be construed to mean "may". Nonetheless, that is what one judge did. He stated:

... the word 'shall' does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power ... Apart from the word 'shall' there is nothing in the Legal Practitioners Act which suggests an imperative and absolute duty upon the Court to exercise its authority to admit persons as barristers. Indeed the interposition of the Court would be merely ministerial if it were under an absolute duty to admit a person as a barrister upon approval of the Board. And the Court would be without jurisdiction to refuse admission to any person approved by the Board though information was before it that such person, though unknown to the Board, was a

lunatic or a thief or otherwise disreputable or unfit to belong to the profession of a barrister ... [The Court] must have the approval of the Board but upon the Court is placed, in the end, the duty and the responsibility of admitting persons as barristers. The Court has power in reserve, seldom required, having regard to the function of the Board, but still necessary, as this case well illustrates. (At 418, per Justice Starke.)

26.7 Section 23 of the Interpretation Act 1897 (N.S.W.), provides that "may" infers discretion to exercise power, "shall" a duty to exercise power. Justice Starke considered that provision to be irrelevant to the meaning of "shall" in the Legal Practitioners Act.

26.8 Yet if the Parliament inserted the word "shall" into the provision, it is reasonable to suggest that it meant "shall" in the ordinarily accepted sense of a mandatory requirement. Indeed, to suggest otherwise is to subvert the power of Parliament and to render judicial power supreme: in any case where a court wished to ignore the provision, asserting that "shall" inferred a discretionary power, then the court could do so, despite Parliament's intent. In the particular case, there was no need for the court to assert that the word used by Parliament meant exactly the opposite of what it said. The power relevant was that of disbarring an already admitted barrister, not that of admitting a barrister who has not yet been admitted. If it happened that between being found by the Board to be a "fit and proper person" to be mandatorily admitted by the Supreme Court, and that admission, the Court discovered that the candidate had committed some offence or hidden some characteristic which would likely render him, in the eyes of the Board, not of good fame and character, then the proper procedure would be to inform the Board of this. Then reconsideration could be given, by the Board, to the question under section 9 of the Act. If, notwithstanding the newly received information, the Board held to the original determination, then the Court would, under the Act, have no choice but to admit the candidate. However, under the circumstances, had the history of the candidate been made known to the Board prior to admission, there is little doubt but that the Board would have withdrawn

certification for admission. (It should be noted that Supreme Court judges are entitled to sit as members of the Board.) Indeed, this is the proposition put by Chief Justice Latham in Re Davis. (At pp. 414-415.)

26.9 The Committee believes that it is appropriate for a provision to be inserted into Victorian legislation to affirm that when the Parliament adopts the use of the word "shall" in legislation, it intends that whoever is vested with the power in question is mandatorily required to exercise that power, or carry out that duty.

26.10 As to the question of "may", the Committee has looked at Re Fettell (1952) 52 S.R. (N.S.W.) 221; Re Jackson and the Conveyancing Act (1951) 52 S.R. (N.S.W.) 42; Re Cordingly (1948) S.R. (N.S.W.) 248; In re Buchanan-Wollaston's Conveyance; Curtis v Buchanan-Wollaston [1939] 1 Ch. 738, and Smith v Watson (1906) 4 C.L.R. 802. In Re Jackson and the Conveyancing Act (1951) 52 S.R. (N.S.W.) 42 it was accepted that the definition of "may" in the Interpretation Act 1897 (N.S.W.) was relevant, and that it meant what it said. The court stated:

> *Counsel for the applicant has strongly pressed on me the submission that, notwithstanding the provisions of s.23 of the Interpretation Act 1897 I have no discretion to refuse an order. A similar argument was put forward in Re Cordingly (1948) 48 S.R. (N.S.W.) 248, 65 W.N. (N.S.W.) 119; but it was unnecessary for the court in that case to decide the point. In my view, the word 'may', as used in the section, has its ordinary meaning, that is, it is used in the facultative or permissive sense. I accordingly hold that I have a discretion as to whether or not I should make an order.* (At 44; see also Re Buchanan-Wollaston's Conveyance; Curtis v Buchanan-Wollaston [1939] Ch. 738.)

26.11 In Re Fettell (1952) 52 S.R. (N.S.W.) 221, however, the Court considered that section 23 "does not determine the matter"; the existence of the section

does not mean that "may" when used by the Parliament always confers a discretion to exercise power.

26.12 It has been said that in some circumstances it may be that it is right, "in the public interest", or "for the public good", for a discretion to be exercised in favour of the litigant applying for exercise of that discretion. (See R v Bishop of Oxford (1879) 6 Q.B.D. 525, 558.) However the Committee believes it is unnecessary for this purpose to devise any "rule" that despite having said "may", the Parliament in fact meant "shall". Rather, the question of circumstances, public interest and public good go to the issue of upon what grounds a discretion is to be exercised. It may be that the case coming before the court involves a set of facts which weigh in the minds of the judges the need to exercise discretion positively because it would be unconscionable (or against the weight of the evidence upon which discretion is or is not to be exercised) not to do so. The word "may" does not mean that the discretion to do a thing, or to exercise a power, can be effected at whim. Rather, it means that, should certain matters be found by a court to support the exercise of discretion in a particular way, then in the absence of matters outweighing the former, discretion should be exercised.

26.13 As was said in Buchanan-Wollaston's Conveyance [1939] 1 Ch. 738, 747:

> *... the court ... must look into all the circumstances of the case and consider whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made. In considering a question of that kind, in circumstances such as these, the Court is bound to look at the contract into which the parties have entered and to ask itself the question whether or not the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail. In the present case, Farwell J. approached the matter from that angle and gave a perfectly definite and unhesitating answer to it, with which I entirely agree. He said in effect 'here is a person who has contracted with others*

for a particular purpose, and the effect of the contract is to impose upon the power of the trustees to sell this land, certain restrictions'. [H]e said: 'It is not right that the court of equity should in those circumstances, on the invitation of a person who has not acted in accordance with the contract, and is opposed by other persons interested, exercise the power of the Court and make an order for sale.' That does not mean that in other circumstances, at some future time, the Court will not lend its aid. Circumstances may change ... Questions of [whatever] kind can be decided if and when they arise. In the present circumstances (and it is sufficient to confine my reasons to present circumstances) it seems to me that the appellant cannot ask the Court to help him in the way which he desires.

26.14 The Committee believes it is appropriate for a provision to be inserted into Victorian legislation to affirm that when the Parliament adopts the use of the word "may" in legislation, it intends that whoever is vested with the power in question has a discretion to exercise it, that discretion to be exercised in accordance with the requirements of the case, including the public interest. if that is a relevant consideration. (See for example R v Australian Broadcasting Tribunal; Ex parte 2HD Pty. Ltd. (1979) 144 C.L.R. 43.)

26.15 The Committee is not convinced by the argument that Acts might be passed without Parliament being aware that "may" and "shall" have particular meanings, as defined in the proposed Interpretation Bill, or that those making subordinate legislation might similarly be unknowing. Rather, the introduction of these definitions into the legislation means that Members of Parliament, Ministers under whose aegis Bills are drafted, Parliamentary counsel having the onerous task of putting policies into clear legislative language, and members of the public who are affected by the legislation, have clarity and certainty as to what is meant by any particular provision. This is preferable to a position where, despite making it clear by way of the word "may" that a power is to be exercised according to discretion, and that "shall" means the power must be exercised, the words are found by a court to mean their precise opposites.

26.16 The Committee believes that there should be no doubt as to Parliament's intention that "shall" has a mandatory meaning, "may" a discretionary meaning in accordance with the proposed section 41. It believes that both the courts and the public should be clear as to that intention. To ensure that in all Acts and subordinate instruments passed after this Act comes into force, where "shall" or "may" is used, and the definitions in proposed section 41 are followed by the courts, Clause 41 should contain a new sub-clause (3) providing:

> *(3) Any rule of law or of practice that "shall" and "may" need not be defined as in subsections (1) and (2) of this section is hereby abolished.*

This new sub-clause is designed to ensure that the confusion arising in New South Wales' courts in conjunction with their similar provision, is not replicated in Victoria.

26.17 **RECOMMENDATION 41: CLAUSE 41**
CONSTRUCTION OF "MAY" AND "SHALL"

The Committee recommends that Clause 41 remain a part of the proposed Act, and that a new sub-clause should be added to provide:

> (3) Any rule of law or of practice that "shall" and "may" need not be defined as in subsections (1) and (2) of this section is hereby abolished.

27 CLAUSE 47(1)
PROVISIONS AS TO OFFENCES UNDER TWO OR MORE LAWS

Under Clause 47(1) it is provided:

> *Where an act or omission constitutes an offence under two or more laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws but shall not be liable to be punished more than once for the same act or omission.* (Emphasis added.)

27.1 The Committee believes that if any person is to be punished more than once for the same act or omission, because it constitutes an offence under two or more laws and that person has been prosecuted under those laws, this should explicitly rather than implicitly be provided for in the relevant Act, subordinate instrument or provision of subordinate instrument, or at common law. Therefore Clause 47(1) should be amended to include the word "expressly" before the word "appears" in the phrase "unless the contrary intention appears".

27.2 RECOMMENDATION 42: CLAUSE 47(1)
PROVISIONS AS TO OFFENCES UNDER TWO OR MORE LAWS

The Committee recommends that the phrase "unless the contrary intention appears" appearing in Clause 47(1), should be amended to read:

> *unless the contrary intention expressly appears*

27.3 The Committee further considers that the provision does not make it sufficiently clear that, although a person cannot be punished more than once for the same act or omission, that person can nevertheless be prosecuted simultaneously for more than one offence based on the same act or omission. So this is made clear (with the situation not arising where the prosecuting arm has to proceed on one charge, then if that fails proceed on a second, rather than proceeding on both at once), Clause 47(1) should be redrafted to provide that

the offender shall be liable to be prosecuted under "both, all, either or any" of the relevant laws, but not be liable for punishment more than once in respect of the prosecution.

27.4 RECOMMENDATION 43: CLAUSE 47(1) PROVISIONS AS TO OFFENCES UNDER TWO OR MORE LAWS

The Committee recommends that Clause 47(1) should be redrafted to provide:

> *Where an act or omission constitutes an offence under two or more laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted under both, all, either or any of those laws but shall not be liable to be punished more than once for the same act or omission.*

28 CLAUSE 49

CONSTRUCTION OF REFERENCES TO PROVISIONS THAT ARE NOT IN OPERATION

Under Clause 49 it is provided that where in:

(a) *An Act or subordinate instrument;*

(b) *a deed or other instrument;*

(c) *or any other document whatsoever -*

a reference is made to an Act or subordinate instrument (or a provision of either) that has not come into operation, the reference shall, unless the contrary intention appears, be given full effect in the same circumstances and to the same extent as it would be given if that Act or subordinate instrument or provision had come into operation.

28.1 The Committee believes that the whole of Clause 49 should be omitted from the proposed Act. The clause is based on section 5(2) of the Acts Interpretation Act 1958 which was itself derived from section 3(1) of the Acts Interpretation Act 1919. The original section was drafted to overcome a problem perceived to arise from the 1915 consolidation of statutes: Acts passed in 1915 purporting to amend consolidated Acts received the Royal Assent before the relevant consolidated Act came into force. (See Parliamentary Debates - Legislative Assembly (Victoria) 27 November 1919, at p. 2740.) The issue has subsequently arisen in New South Wales, where the question of whether an amending Act may effectively amend an Act that has not yet come into operation came before the Supreme Court in Re Fogg [1971] 1 N.S.W. L.R. 416. In that case the Court held:

> *The procedure of bringing an Act into operation by its assent and by its later proclamation is well known in our law. Acts often contain provisions within them for their own commencement, and the effectiveness of this has been upheld in the courts (see Fagan v Dominitz (1958) 58 S.R. (N.S.W.) 122; 75 W.N. (N.S.W.) 38), and indeed it is a well known procedure adopted in relation to Acts. This procedure, to me, is not to be interfered with by the fact of an amending Act. It is not, to my mind, impossible to amend an Act which has not yet commenced so*

that it will commence in its amended form and to do that it is, of course, necessary that the Amending Act should operate on the amended Act immediately. It does not seem to me that because the amending Act must commence for these purposes it turns on as it were, the prior Act as a result. (At 420, per Justice Helsham.)

28.2 It seems therefore that Clause 49 is unnecessary. The Committee observes that no other Australian jurisdiction has such a provision . The Committee believes that in accordance with the principle that legislation should be as short and as clear as possible, and that superfluous provisions should not be allowed to stand, the Clause should be removed from the Bill.

28.3 RECOMMENDATION 44: CLAUSE 49
CONSTRUCTION OF REFERENCES TO PROVISIONS
THAT ARE NOT IN OPERATION

The Committee recommends that Clause 49 should be omitted from the proposed Act, on the basis of its superfluity.

28.4 CLAUSE 49(B) AND (C)
CONSTRUCTION OF REFERENCES TO PROVISIONS
THAT ARE NOT IN OPERATION

If the Parliament does not accept that Clause 49 should be omitted from the Bill as being unnecessary, then, in accordance with the Committee's view as stated in relation to Clauses 14 and 26 (at pp. 19 and 32 supra), the Committee believes that sub-clauses (b) and (c) of Clause 49 should be omitted, on the basis that the proposed Act should deal with the interpretation of primary and subordinate legislation only and not with the interpretation of private documents.

28.5 RECOMMENDATION 45: CLAUSE 49(B) AND (C) CONSTRUCTION OF REFERENCES TO PROVISIONS THAT ARE NOT IN OPERATION

The Committee recommends that, should it not be accepted that Clause 49 should be omitted, then sub-clauses (b) and (c) of that Clause, dealing as they do with private documents, should be omitted from the proposed Act.

28.6 CLAUSE 49(C) CONSTRUCTION OF REFERENCES TO PROVISIONS THAT ARE NOT IN OPERATION

Should the Parliament be of the view that the proposed Act should deal with the interpretation of private documents, then in accordance with its earlier stated view in relation to Clauses 14 and 26 (at pp. 19 and 32 supra), the Committee believes that sub-clause (c) of Clause 49 should be omitted from the Bill. That sub-clause adds no substance, all private documents being included in the phrase "a deed or other instrument": Clause 49(b).

28.7 RECOMMENDATION 46: CLAUSE 49(C) CONSTRUCTION OF REFERENCE TO PROVISIONS THAT ARE NOT IN OPERATION

The Committee recommends that if the Parliament does not accept that sub-clauses (b) and (c) should be omitted, then Clause 49(c) should be omitted from the proposed Act as being unnecessary.

29 CLAUSE 53(5)

APPLICATION OF LAWS OF VICTORIA IN CERTAIN OFFSHORE AREAS

Clause 53(5) provides that for the purposes of proceedings for an offence against the law of Victoria an averment in a presentment, information or complaint that:

> *(a) a person was at a specified time or in respect of a specified period a person connected with Victoria;*
>
> *(b) a place is a place within the adjacent area and within the outer limits of the coastal waters of Victoria; or*
>
> *(c) a place is a place within the adjacent area -*
>
> *shall, in the absence of proof to the contrary, be deemed to have been proved.* (Emphasis added.)

29.1 The Committee does not look favourably upon the use of the phrase "deemed to have been proved", particularly in relation to (a) of that sub-clause. In Actors and Announcers Equity v Fontana Films Pty. Ltd. (1982) 56 A.L.J.R. 366, 384 Justice Murphy commented upon the device of "deeming", saying:

> *Presumptions are a useful and common device for facilitating proof. Judges have recognized, that is adopted, a myriad of presumptions. These make the legal system operable. Statutory presumptions are a way of correcting the recent tendency to abandon the common law method of adapting the law (including evidence and proof) to the changing society. The justification for all presumptions is human experience of the association between the known and the presumed facts or circumstances.*
>
> ...
>
> *Where there is no rational basis for [a] presumption, then in my opinion Parliament has no power to require a court to act upon the presumption. To do so would be to undermine the judicial power ... Sometimes deemed*

may only mean presumed. Also "deeming" may be used merely as a shorthand method of legislating so that when the provisions as a whole are considered the vice is only in the form, not the substance.

29.2 Unlike the specific provisions to which Justice Murphy referred (s.45D Trade Practices Act 1974 (Cth), as amended), Clause 53(5) makes provision for proof to the contrary of the fact averred to be brought before a court. However it is wise to heed the Judge's imprecation about "form". (See also Redland Shire Council v Stradbroke Rutile Pty. Ltd. (1974) 48 A.L.J.R. 184, 189 per Justice Gibbs; St. Aubyn v Attorney-General [1952] A.C. 15, 53 per Lord Radcliffe.) The Committee therefore proposes that to overcome this, the words "be deemed to have been proved" should be replaced with the words "be evidence on its face of the fact averred".

29.3 RECOMMENDATION 47: CLAUSE 53(5)

APPLICATION OF LAWS OF VICTORIA IN CERTAIN OFFSHORE AREAS

The Committee recommends that the words "be deemed to have been proved", where they appear in Clause 53(5) of the Bill, should be omitted and replaced with the words "be evidence on its face of the fact averred."

30 SCHEDULE

Amendments to various Acts are contained in the Schedule to the Bill. These include the Supreme Court Act 1958, the Amendments Incorporation Act 1958, the Subordinate Legislation Act 1962, the Constitution Act 1975, the Penalties and Sentences Act 1981 and the Petroleum (Submerged Lands) Act 1982. Some of these amendments are minor; others are more extensive.

30.1 Members of the Law Institute expressed concern at the practice of including substantive amendments in a schedule to an Act. They alluded to the incorporation of section 15AA of the Acts Interpretation Act 1901 (Cth) in a schedule to an omnibus Bill containing amendments to a large number of Acts. This makes it difficult to locate. (Ad Hoc Committee, Law Institute of Victoria, written submission, 1.6.1983, at pp. 4-5.)

30.2 The Committee believes any trend toward effecting substantive amendments to Acts by way of their inclusion in Schedules to other Acts should not be fostered. The public, practitioners and judges should be able to ascertain quickly and easily amendments to legislation. It is difficult to do so where they are contained in schedules to other Acts.

30.3 RECOMMENDATION 48: SCHEDULE

The Committee recommends that substantive amendments to Acts should not, as a general rule, be contained in schedules to Acts. They should be drafted and entered into the Parliament as amending Acts. This practice should be adopted in the future.

Committee Room,
19 October 1983

APPENDIX I

This appendix contains examples of purposive or objects clauses in Acts and subordinate instruments. (For discussion of the use of purposive or objects clauses, see pp. 122-124 supra.)

Contents

Freedom of Information Act 1982

No. 3 of 1982

An Act to give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies

[*Assented to 9 March 1982*]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Freedom of Information Act* 1982.

Commencement

2. The several Parts of this Act shall come into operation on such respective dates as are fixed by Proclamation.

Object

3. (1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by—

(a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that

rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities.

(2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Interpretation

4. (1) In this Act, unless the contrary intention appears—

"agency" means a Department or a prescribed authority;

"applicant" means a person who has made a request;

"Department" means a Department of the Australian Public Service other than the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff and the Joint House Department;

"document" includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes;

"document of an agency" or "document of the agency" means a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency;

"Document Review Tribunal" means the Tribunal of that name established under Part VII;

"enactment" means—

(a) an Act;

(b) an Ordinance of the Australian Capital Territory; or

(c) an instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance;

CONCILIATION AND ARBITRATION ACT 1904

An Act relating to the Prevention and Settlement of certain Industrial Disputes, and for other purposes

Title substituted by No. 101, 1967, s. 3

PART I—INTRODUCTORY

1. This Act may be cited as the *Conciliation and Arbitration Act* 1904.[1]

Short title

2. The chief objects of this Act are—

Objects of Act

Substituted by No. 44, 1956, s. 5; amended by No. 138, 1973, s. 3

(a) to promote goodwill in industry;

(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;

(d) to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes;

(e) to encourage the organization of representative bodies of employers and employees and their registration under this Act; and

(f) to encourage the democratic control of organizations so registered and the full participation by members of such an organization in the affairs of the Organization.

* * * * * * * *

Section 3 repealed by No. 89, 1974, s. 3

APPENDIX I - EXAMPLE 3

EXTRACT FROM ILLINOIS CODE OF CRIMINAL PROCEDURE*

TITLE I. GENERAL PROVISIONS

ARTICLE 36. TITLE AND SCOPE

No. 36-1. Short Title

This Act shall be known and may be cited as the "Illinois Code of Criminal Procedure".

No. 36-2. Scope

These provisions shall govern the procedure in the courts of Illinois in all criminal proceedings except where provisions for a different procedure is specifically provided by law.

ARTICLE 37. GENERAL PURPOSES

No. 37-1. General Purposes

The provisions of this Code shall be construed in accordance with the general purposes hereof, to :

(a) Secure simplicity in procedure;

(b) Ensure fairness of administration including the elimination of unjustifiable delay;

(c) Ensure the effective apprehension and trial of persons accused of crime;

(d) Provide for the just determination of every criminal proceeding by a fair and impartial trial and an adequate review; and

(e) Preserve the public welfare and secure the fundamental human rights of individuals.

---

* Drawn to the attention of the Committee by Justice M. Everett of the Supreme Court of Tasmania.

APPENDIX I - EXAMPLE 4

EXTRACT FROM UNITED STATES CODE, 1976 EDITION, SUPPLEMENT IV*
TITLE 41 - PUBLIC CONTRACTS

Chapter 7 - Office of Federal Procurement Policy.

Sec. 405a Uniform Federal procurement regulations and procedures (New).

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 601, 607 of this title; title 40 sections 481, 487.

No. 401 Congressional declaration of policy

It is declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the executive branch of the Federal Government by -

(1) promoting the use of full and open competition in the procurement of products and services;

(2) establishing policies, procedures, and practices which will require the Government to acquire property and services of the requisite quality and within the time needed at the lowest reasonable cost;

(3) improving the quality, efficiency, economy, and performance of Government procurement organisations and personnel, and eliminating fraud and waste in the procurement process;

---

* Drawn to the attention of the Committee by Justice M. Everett of the Supreme Court of Tasmania.

(4) avoiding or eliminating unnecessary overlapping or duplication of procurement and related activities:

(5) avoiding or eliminating unnecessary or redundant requirements placed on contractor and Federal procurement officials;

(6) identifying gaps, omissions, or inconsistencies in procurement laws, regulations, and directives and in other laws, regulations and directives, relating to or affecting procurement;

(7) achieving greater uniformity and simplicity, whenever appropriate, in procurement procedures;

(8) otherwise promoting economy, efficiency, and effectiveness in Government procurement organisations and operation;

(9) co-ordinating procurement policies and programs of the several departments and agencies;

(10) minimising possible disruptive effects of Government procurement on particular industries, areas or occupations;

(11) improving understanding of Government procurement laws and policies within the Government and by organisations and individuals doing business with the Government; and

(12) promoting fair dealing and equitable relationships among the parties in Government contracting.

APPENDIX II

This appendix contains examples of Acts or Bills with marginal notes in ordinary and bold type and marginal notes adapted to section headings, etc. (For discussion of preferences of the Committee in setting out marginal notes and/or headings in future legislation, see pp. 129-132 supra; for discussion of the value of marginal notes and section headings for interpretation purposes, see pp. 134-136 supra.)

Contents

LEGISLATIVE ASSEMBLY

Read 1° 1 December 1982

(*Brought in by Mr Cain and Mr Roper*)

A BILL

To make fresh provision with respect to the Construction and Operation of, and the Shortening of the Language used in, Acts of Parliament and Subordinate Instruments, to repeal the *Acts Interpretation Act* 1958, to amend the *Supreme Court Act* 1958, the *Amendments Incorporation Act* 1958, the *Subordinate Legislation Act* 1962, the *Constitution Act* 1975, the *Penalties and Sentences Act* 1981 and the *Petroleum* (*Submerged Lands*) *Act* 1982 and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

PART I.—PRELIMINARY

Short title.

1. (1) This Act may be cited as the *Interpretation Act* 1982.

Commencement.

(2) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette.*

4—[186]—512/2.8.1983—57066/82

Division into Parts.

(3) This Act is divided into Parts as follows:

Part I.—Preliminary ss. 1–4.

Provisions Applicable to Acts ss. 5–18.

Provisions Applicable to Subordinate Instruments ss. 19–30.

Provisions Applicable to Acts and Subordinate Instruments ss. 31–53.

Interpretation.

2. In this Act, unless inconsistent with the context or subject-matter—

"Amended." "Amended", in relation to a subordinate instrument, includes altered or varied.

"Made." "Made", in relation to a subordinate instrument, includes issued or granted.

"Repealed." "Repealed", in relation to a subordinate instrument, includes revoked or rescinded.

"Statutory rule." "Statutory rule" has the same meaning as in section 2 (1) of the *Subordinate Legislation Act* 1962.

"Subordinate instrument." "Subordinate instrument" means an instrument made or to be made under or pursuant to the provisions of an Act, being an instrument that—

(*a*) is a statutory rule;

(*b*) contains regulations, rules, by-laws, proclamations, Orders in Council, orders or schemes and is not a subordinate instrument by virtue of the operation of paragraph (*a*); or

(*c*) is of a legislative character and is not a subordinate instrument by virtue of the operation of paragraph (*a*) or paragraph (*b*).

Application, construction, repeal and transitional provisions.

3. (1) The provisions of this Act—

(*a*) unless a contrary intention appears in this Act or in the Act or subordinate instrument concerned, extend and apply to all Acts, whether passed before or after the commencement of this Act, and to all subordinate instruments, whether made before or after that commencement; and

(*b*) apply to the interpretation of this Act.

(2) Nothing in this Act excludes the application to an Act or subordinate instrument of a rule of construction applicable thereto and not inconsistent with this Act.

(3) The provisions of this Act which are expressed to apply to acts passed or subordinate instruments made on or after the commencement of this Act shall not affect the construction of any Act passed or subordinate instrument made before that commencement although

that Act or subordinate instrument is continued in force or amended by an Act passed or subordinate instrument made on or after that commencement.

(4) The Acts mentioned in the Schedule to the extent to which they are in the Schedule expressed to be amended or repealed are hereby amended or repealed accordingly. **Schedule.**

(5) Notwithstanding the repeal by this Act of the *Acts Interpretation Act* 1958—

(*a*) the provisions of section 15 of that Act shall continue to apply to and with respect to Imperial Acts and Acts of the Governor and Legislative Council of the colony of New South Wales in force in Victoria on 1 July 1851 in all respects as if that Act had not been repealed;

(*b*) the provisions of section 16 of that Act shall continue to apply to and with respect to all Acts (by whatever Parliament passed) in force in Victoria on 21 November 1856 in all respects as if that Act had not been repealed;

(*c*) the provisions of section 26 of that Act shall continue to apply to and with respect to all Acts passed on or after 4 August 1914 in all respects as if that Act had not been repealed; and

(*d*) the provisions of section 38 of that Act shall continue to apply to and with respect to all Acts in force on 29 January 1949 in all respects as if that Act had not been repealed.

4. This Act binds the Crown, not only in right of the State of Victoria, but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities. **Act to bind Crown.**

PART II.—PROVISIONS APPLICABLE TO ACTS

5. Every section of an Act has effect as a substantive enactment without introductory words. **Sections to be substantive enactments.**

6. An Act may be amended or repealed in the session of Parliament in which it is passed. **Amendment or repeal in same session.**

7. (1) All Acts passed by Parliament shall continue to be numbered in regular arithmetical series in the order in which they receive or, for the purposes of section 69 of the *Constitution Act* 1975, are deemed to have received the Royal Assent. **Citation of Acts by number.**

(2) It shall be sufficient to refer to an Act in—

(*a*) any other Act;

(*b*) a subordinate instrument;

(*c*) a deed or other instrument; or

(*d*) any other document whatsoever—

by the number of that Act only.

Citation of Acts by short titles.

8. An Act may be cited in—

(*a*) that Act or any other Act;

(*b*) a subordinate instrument;

(*c*) a deed or other instrument; or

(*d*) any other document whatsoever—

by the short title authorized by that Act notwithstanding that that Act or the provision of that Act authorizing that mode of citation has not come into operation or has been repealed.

Time of commencement and date of passing of Acts.

9. (1) Subject to sub-section (2) and to section 71 of the *Constitution Act* 1975, an Act or a provision of an Act comes into operation—

(*a*) where a particular day is fixed (whether in the Act or in a proclamation made under the Act) for it to come into operation, at the beginning of that day; and

(*b*) where no day is so fixed for it to come into operation—

(i) in the case of an Act reserved by the Governor for the signification of Her Majesty's pleasure, at the beginning of the day on which a proclamation by the Governor that Her Majesty has been pleased to assent to the Act is published in the *Government Gazette*; and

(ii) in any other case, at the beginning of the day on which the Act receives the Royal Assent.

(2) Where an Act provides that the Act or a provision of the Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*—

(*a*) the publication of the proclamation in the *Government Gazette* shall be a condition precedent to the coming into operation of the Act or provision in question;

but—

(*b*) if the proclamation is made on or before the day fixed by it for the coming into operation of the Act or provision in question and is not published until after that day, the proclamation shall not wholly fail but the Act or provision in question shall come into operation at the beginning of the day on which the proclamation is published in the *Government Gazette*.

PART III—INVESTIGATIONS AND INQUIRIES

Division 1—Investigation and Conciliation of Complaints by Director of Conciliation

Interpretation

30. In this Part—

"complainant", in relation to a complaint, means the person or each of the persons by whom that complaint is lodged;

"complaint" means—

(a) a complaint, not being a representative complaint, lodged under sub-section 32 (1) or (2); and

(b) a matter referred to the Commission for inquiry as a complaint pursuant to section 43,

and includes a representative complaint;

"Director" means the Director of Conciliation;

"representative complaint" means a complaint lodged under sub-section 39 (1) by a person on behalf of that person and other persons, or two or more persons on behalf of themselves and other persons, and which is treated by the Commission as a representative complaint;

"respondent", in relation to a complaint, means the person or each of the persons against whom that complaint is lodged.

Director of Conciliation

31. For the purposes of this Act there shall be a Director of Conciliation.

Making of complaints

32. (1) A person on that person's own behalf or on behalf of that person and other persons, or 2 or more persons on their own behalf or on behalf of themselves and other persons, may lodge a complaint in writing with the Director in respect of any contravention of this Act or the regulations which is alleged to have been committed by any other person or persons, other than a contravention in respect of which a specific penalty is imposed.

(2) A person may lodge a complaint in writing with the Director in respect of any refusal, neglect or failure to obey or comply with a determination or interim determination of the Commission.

(3) A complaint shall be lodged within 6 months after the date on which the contravention of this Act or the regulations which is the subject of that complaint is alleged to have been committed.

(4) Notwithstanding sub-section (3), the Director on good cause being shown, may accept a complaint which is lodged more than 6 months after the date referred to in that sub-section.

Investigation of complaints by the Director

33. The Director shall investigate each complaint lodged under section 32.

Application for interim determination under section 63

34. (1) The Director, at any time after a complaint is lodged and before the Director declines to entertain the complaint, resolves the complaint by conciliation or refers the complaint to the Commission under sub-section 39 (1), as the case may be, may apply to the Commission for the making of an interim determination under section 63 or for the variation or revocation of any such determination.

(2) In relation to a matter under section 40, the Director may apply to the Commission for the making of an interim determination under section 63 or for the variation or revocation of any such determination at any time.

Director may decline to entertain complaint

35. (1) Where, at any stage of the investigation of a complaint, the Director is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, the Director may, by notification in writing addressed to the complainant, decline to entertain the complaint.

(2) The Director shall, in a notification under sub-section (1), advise the complainant of—

(a) the reason for declining to entertain the complaint; and

(b) the rights of the complainant under sub-section 36 (1).

(3) Where the Director is satisfied that the complaint is not within Part II of the Act, then the Director may decline to entertain the complaint.

Reference of complaint to Commission, at requirement of complainant

36. (1) Where the Director has given a complainant a notification under sub-section 35 (1), the complainant may, within 21 days after the date of that notification, by notice in writing served on the Director, require the Director to refer the complaint to the Commission.

(2) On receipt of a notice under sub-section (1), the Director shall refer the complaint to the Commission together with a report relating to any inquiries made by the Director into the complaint.

Resolution of complaint by conciliation

37. (1) Where the Director is of the opinion that a complaint, other than a complaint that the Director has declined to entertain under sub-section 35 (1) or (3), may be resolved by conciliation, the Director shall endeavour to resolve the complaint by conciliation.

(2) The Director may, by notice in writing, require the complainant and the respondent, or either of them, to appear before the Director, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.

(3) A person shall not fail to comply with the terms of a notice under sub-section (2).

Penalty: $1,000.

No right to representation

38. A complainant or respondent in conciliation proceedings before the Director shall not be represented by any other person except by leave of the Director.

Reference of complaints to the Commission

39. (1) Where the Director—

(a) is of the opinion that a complaint cannot be resolved by conciliation;

(b) has endeavoured to resolve a complaint by conciliation but has not been successful in these endeavours; or

(c) is of the opinion that the nature of a complaint is such that it should be referred to the Commission,

the Director shall refer the complaint to the Commission together with a report relating to any inquiries made by the Director into the complaint.

(2) Evidence of anything said or done in the course of conciliation proceedings under section 37 shall not be admissible in subsequent proceedings under this Part relating to the complaint.

Investigation of matters by the Director

40. The Director may investigate a matter where it appears to the Director that a person has done an act that is unlawful by reason of a provision of Part II of this Act.

Functions under Division 2

41. For the purposes of Division 2 of this Part, the Director shall be deemed to be a "complainant" and the person who is alleged by the Director to have committed an unlawful act or acts of discrimination shall be deemed to be a "respondent".

Powers of the Director

42. In the investigation and conciliation of a matter under section 40, the Director may exercise all the powers, functions and duties under sections 33, 36, 37 and 38.

Division 2—Inquiries by the Human Rights Commission

Reference of matter to the Commission by the Minister

43. The Minister may refer any matter to the Commission for inquiry as a complaint under this Part.

Inquiries into complaints

44. The Commission shall hold an inquiry into each complaint or matter referred to it under sub-section 36 (2), 39 (1) or section 43.

(152/81—4)

CONFIDENTIAL] [PROOF

LEGISLATIVE ASSEMBLY

(As sent to the Legislative Council)

A BILL

for

An Act to amend the *Fisheries Act* 1968 to provide for the Payment of Moneys into the Victorian Fishing Industry Trust Fund, the Payment of a Surcharge on Licences issued under that Act and for the Issue of Fish Traders' Licences and to amend Section 72 of the said Act.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

Short Title

1. (1) This Act may be cited as the *Fisheries (Amendment) Act* 1983.

(2) The *Fisheries Act* 1968 is in this Act referred to as the Principal Act.

Principal Act No. 7780—Reprinted to No. 9501 and subsequently amended by Nos. 9518, 9693, 9845, 9881.

Commencement

(3) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette.*

2—[287]—150/16.8.1983—61467/83

Fish Trader's Licence

Amendment of No. 7780 s. 13.

2. (1) In section 13 (1) of the Principal Act after paragraph (*f*) there shall be inserted the following paragraph:

"(*g*) to sell raw fish for human consumption.".

(2) After section 13 (12) of the Principal Act there shall be inserted the following sub-section:

"(13) A licence to sell raw fish for human consumption (hereafter in this Act called a "fish trader's licence") shall entitle the holder to sell from the premises, vessel or vehicle specified in his licence, to have in possession for sale or to send or deliver for or on sale raw fish for human consumption but nothing in this sub-section shall in any way limit or derogate from any entitlement to sell fish under any licence issued under any of the other provisions of this Part."

Fees for Fish Trader's Licence

Amendment of No. 7780 s. 15.

3. (1) In section 15 of the Principal Act after paragraph (*k*) there shall be inserted the following paragraph:

"(*l*) for a fish trader's licence—

(i) to a body corporate—$400 or such greater amount not exceeding $1000 as is prescribed from time to time; and

(ii) to any individual person—$100 or such greater amount not exceeding $300 as is prescribed from time to time.".

Moneys to be paid to Victorian Fishing Industry Trust Fund

(2) After section 15 (3) (*b*) of the Principal Act there shall be inserted the following sub-sections:

"(4) For use in promoting the sale of raw fish for human consumption there shall from time to time as determined by the reasurer of Victoria be paid into the Victorian Fishing Industry Trust Fund established under section 15 of the *Victorian Fishing Industry Council Act* 1979 from moneys appropriated by Parliament for the purpose an amount equivalent to seventy per centum of the total fees paid for fish traders' licences under this Act together with an amount equivalent to the total amount of the surcharges paid under sub-section (5).

Surcharge on Licence Fees

(5) In addition to the fees required to be paid for the issue or renewal of licences under this Part and Part V. there shall be paid by each applicant for the issue or renewal of a licence under this Part (except a bait licence and a marine harvesting licence) and Part V. a surcharge of fifteen per centum of the fee required under sub-section (1) to be paid in respect of the issue or renewal of that licence.".

Exemptions

4. (1) In section 17 (1) of the Principal Act after the words "taking fish" (where first occurring) there shall be inserted the words "or who sells raw fish for human consumption". Amendment of No. 7780 s. 17.

(2) At the end of section 17 (4) of the Principal Act there shall be added the words "or to any person who for profit or reward supplies oysters as a meal or part of a meal".

Evidentiary

5. In section 72 of the Principal Act at the end of sub-section (2) there shall be inserted the words "or that any place is a recognized shell-fish habitat shall be *prima facie* evidence that the place is a recognized shell-fish habitat". Amendment of No. 7780 s. 72.

By Authority F D Atkinson Government Printer Melbourne

CONFIDENTIAL] [PROOF

LEGISLATIVE ASSEMBLY

(As sent to the Legislative Council)

A BILL

for

An Act to amend the *Fisheries Act* 1968 to provide for the Payment of Moneys into the Victorian Fishing Industry Trust Fund, the Payment of a Surcharge on Licences issued under that Act and for the Issue of Fish Traders' Licences and to amend Section 72 of the said Act.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

Short Title

1. (1) This Act may be cited as the *Fisheries (Amendment) Act* 1983.

(2) The *Fisheries Act* 1968 is in this Act referred to as the Principal Act.

Principal Act No. 7780—Reprinted to No. 9501 and subsequently amended by Nos. 9518, 9693, 9845, 9861.

Commencement

(3) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*.

2—[287]—150/16.8.1983—61467/83

Fish Trader's Licence

Amendment of No. 7780 s. 13.

2. (1) In section 13 (1) of the Principal Act after paragraph (*f*) there shall be inserted the following paragraph:

"(*g*) to sell raw fish for human consumption.".

(2) After section 13 (12) of the Principal Act there shall be inserted the following sub-section:

"(13) A licence to sell raw fish for human consumption (hereafter in this Act called a "fish trader's licence") shall entitle the holder to sell from the premises, vessel or vehicle specified in his licence, to have in possession for sale or to send or deliver for or on sale raw fish for human consumption but nothing in this sub-section shall in any way limit or derogate from any entitlement to sell fish under any licence issued under any of the other provisions of this Part."

Fees for Fish Trader's Licence

Amendment of No. 7780 s. 15.

3. (1) In section 15 of the Principal Act after paragraph (*k*) there shall be inserted the following paragraph:

"(*l*) for a fish trader's licence—

(i) to a body corporate—$400 or such greater amount not exceeding $1000 as is prescribed from time to time; and

(ii) to any individual person—$100 or such greater amount not exceeding $300 as is prescribed from time to time.".

Moneys to be paid to Victorian Fishing Industry Trust Fund

(2) After section 15 (3) (*b*) of the Principal Act there shall be inserted the following sub-sections:

"(4) For use in promoting the sale of raw fish for human consumption there shall from time to time as determined by the reasurer of Victoria be paid into the Victorian Fishing Industry Trust Fund established under section 15 of the *Victorian Fishing Industry Council Act* 1979 from moneys appropriated by Parliament for the purpose an amount equivalent to seventy per centum of the total fees paid for fish traders' licences under this Act together with an amount equivalent to the total amount of the surcharges paid under sub-section (5).

Surcharge on Licence Fees

(5) In addition to the fees required to be paid for the issue or renewal of licences under this Part and Part V. there shall be paid by each applicant for the issue or renewal of a licence under this Part (except a bait licence and a marine harvesting licence) and Part V. a surcharge of fifteen per centum of the fee required under sub-section (1) to be paid in respect of the issue or renewal of that licence.".

Exemptions

4. (1) In section 17 (1) of the Principal Act after the words "taking fish" (where first occurring) there shall be inserted the words "or who sells raw fish for human consumption". Amendment of No. 7780 s. 17.

(2) At the end of section 17 (4) of the Principal Act there shall be added the words "or to any person who for profit or reward supplies oysters as a meal or part of a meal".

Evidentiary

5. In section 72 of the Principal Act at the end of sub-section (2) there shall be inserted the words "or that any place is a recognized shell-fish habitat shall be *prima facie* evidence that the place is a recognized shell-fish habitat". Amendment of No. 7780 s. 72.

By Authority F D Atkinson Government Printer Melbourne

APPENDIX III

This appendix contains guidelines for non-sexist language, excerpted and adapted from F.A.U.S.A., Towards Non-Sexist Language, May 1983, Sydney; adapted from Katz, Her and His : Language of Equal Value, A Report of the Status of Women Committee of the Nova Scotia Confederation of University Faculty Associations on Sexist Language and the University with Guidelines, 1981, N.S.C.U.F.A.C.A.P.U.N.E., Halifax, at pp. 38-45.

Generic man

The word "man" is ambiguous; it can mean either human being or male human being. As a generic term, it has led to the misrepresentation and exclusion of women. There are numerous alternatives acceptable to all.

Examples	Alternatives
man	people humankind women and men men and women individual/s human being/s person/s individual human being/s
mankind	people humanity humankind human beings
primitive man	primitive people/s primitive men and women primitive women and men primitive human beings
man the desk	staff the desk
man the barricades	hold the barricades
man-made	synthetic
man hours	hours/working hours

the common man man in the street	the average person ordinary people woman or man in the street person in the street everyperson
reasonable man	reasonable person reasonable woman or man average person
man's achievements	human achievements our achievements
the best man for the job	the best person for the job the best woman or man for the job the best man or woman for the job the best applicant for the job the best suited to the job the most suited to the job
manpower	staff labour human resources
manpower planning	human resources planning labour market planning staff planning staff allocation labour force planning
the Archaeology of early man	the Archaeology of Early Human Origins the Archaeology of Early Peoples

Occupational Terms

Examples	Alternatives
chairman	chairperson chair convenor president co-ordinator moderator
workman	worker
foreman	supervisor
postman	postal worker letter carrier
policeman	police officer constable sergeant detective inspector, et. al.

Generic He, His, and Him

Examples	Alternatives
he	she or he she/he s/he he or she

him

her/him
her or him
him or her

his

hers/his
hers or his
his or hers

OR

(a) substitute "they" for "he"

whenever a person says he is innocent

whenever a person says they are innocent

(b) Indefinite pronouns -

anybody
somebody
nobody
anyone, et. al.

Anyone who wants his admission moved should submit two affidavits

Anyone who wants their admission moved should submit two affidavits

(c) Recast into plural

When a law graduate applies for admission he must

When law graduates apply for admission they must

(d) Eliminate unnecessary problems by rewording

Each applicant must submit his affidavit by March	Each applicant must submit an affidavit by March

(e) Substitute his or her, etc. for the masculine pronoun

The person must exercise his right	The person must exercise his or her right

---

Offensive and Demeaning Language

Words that theoretically are semantically free of bias, such as barrister, judge, lawyer, et. al., are not contextually free of it. They are automatically assumed to be masculine, as shown by the practice of referring to women barristers, women judges, women lawyers. This practice indicates that the particular person in question is deviant.

The word "lady" is sometimes used in a condescending or insulting manner - particularly in such cases as lady barrister, lady judge, lady lawyer. Consciously or not, the word "lady" is often used to trivialise the person being spoken about, as in the expression lady artist. The implication is that the real artist (or judge, or barrister, or lawyer) is a man.

(a) Avoid describing women in the following stereotypical terms:

feminine	scatterbrained	fragile
goddess	gossip	fussbudget
shrew	frustrated spinster	fair sex
weaker sex	delicate sex	better half

(b) Avoid derivative terms for women:

Examples	Alternatives
sculptress	sculptor
authoress	author
poetess	poet
stewardess	flight attendant

(c) Avoid patronising expressions:

Examples	Alternatives
my gal will take care of that immediately	my assistant will take care of that immediately
please make an appointment with my girl on your way out	please make an appointment with the secretary on your way out
career girl	lawyer doctor teacher secretary solicitor hairdresser judge barrister academic
ladies	women

("ladies" may pass when used in the context of "ladies and gentlemen" or "gentlemen and ladies", but in many circles today both would be looked upon as archaic expressions.)

Sex Role Stereotyping

Farmers, accountants, judges, barristers, painters, solicitors, lawyers are not always male. Avoid expressions that are implicitly sexist.

Examples	Alternatives
judges have wives and children to support	judges have families to support
we are looking for a lawyer who is his own man	we are looking for a lawyer with a sense of independence and integrity
a barrister and his wife may attend all bar dinners free of charge	barristers and their spouses may attend ...

"Male" or "female" characteristics are often assumed to be innate. Such stereo-typical views should be avoided - for example:

> He is independent-minded, she is contrary
> He is confident, she is aggressive
> His research is original, her research is delightfully fresh
> His argument is logical and complete, her argument is pedantic and pedestrian

Title of Address

The conventional titles for women - Miss and Mrs. - are linked solely to marital status. That is, women are identified in terms of their relationship to men. Ms. is the only female title that is not linked to marital status. Mr. is not linked to marital status. Ms. is recommended for all women when the parallel Mr. is applicable.

Examples	Alternatives
Mr. Benjamin Masters and Miss Judith Trewern are invited to the annual bar dinner	Mr. Benjamin Masters and Ms. Judith Trewern are invited ... OR Judith Trewern and Benjamin Masters are invited ...
Mr. Justice Smith and Mrs. Smith are invited ...	Mr. Justice Smith and Ms. Smith are invited OR Justice Smith and Ms. Smith are invited ...
Mr. Justice James Smith and Judith Browne are invited ...	Justice Judith Browne and Justice James Smith are invited

Use titles that are parallel for women and men where they are entitled to them, but always ask - is a title necessary?

EXTRACTS FROM THE PROCEEDINGS

The following extracts from the Minutes of the Committee show Divisions which took place during the consideration of the Report:

WEDNESDAY 12 OCTOBER 1983

1 Paragraph 20.109

Having regard to the foregoing discussion of the use of extrinsic aids for the purpose of interpretation of legislation by the courts (see pp. 51 - 107 supra), the Committee believes it is necessary to list possible and legitimate aids to construction, and to provide at the same time that courts may have recourse to whatever other materials falling outside that list are considered relevant in the particular case. Thus courts will not be constrained to rule as unavailable, by any so-called traditional law, rule or practice to the contrary, any extrinsic materials they consider will assist them in their task. As previously pointed out, unless the position is made clear, some judges and courts may consider themselves restricted to materials "traditionally" looked at.

Question - That paragraph 20.109 stand part of the Report - put.

The Committee divided.

Ayes, 7	Noes, 3
The Hon. Joan Coxsedge	Mr. Ebery
Mr. Gray	Mr. Evans
Mr. Hill	The Hon. N.B. Reid
Mr. Hockley	
Mr. Jasper	
The Hon. B.W. Mier	
Mr. Whiting	

And so it was resolved in the affirmative.

2 Paragraph 20.110

The Committee recommends that a new Clause 32(2) should be inserted into the Bill to provide:

Clause 32. Regard to be had to Purpose or Object of Act or Subordinate Instrument.

In the interpretation of a provision of an Act or subordinate instrument -

(1) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(2) consideration may be given to any matter or document that is relevant including but not limited to -

(a) reports of proceedings in any House of Parliament;

(b) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament;

(c) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

Amendment proposed - That sub-paragraph (2)(c) of the proposed new Clause 32 be omitted.

(Mr. Evans)

Question - That the sub-paragraph proposed to be omitted stand part of the paragraph - put.

The Committee divided.

Ayes, 7	Noes, 3
The Hon. Joan Coxsedge	Mr. Ebery
Mr. Gray	Mr. Evans
Mr. Hill	The Hon. N.B. Reid
Mr. Hockley	
The Hon. W.A. Landeryou	
The Hon. B.W. Mier	
The Hon. Haddon Storey	

And so it was resolved in the affirmative.

Question - That paragraph 20.110 stand part of the Report - put.

The Committee divided.

Ayes, 7	Noes, 3
The Hon. Joan Coxsedge	Mr. Ebery
Mr. Gray	Mr. Evans
Mr. Hill	The Hon. N.B. Reid
Mr. Hockley	
The Hon. W.A. Landeryou	
The Hon. B.W. Mier	
The Hon. Haddon Storey	

And so it was resolved in the affirmative.

3 Paragraph 21

Some dissatisfaction has been expressed about the practice of utilising marginal notes as a short indication of the content of a particular clause or section of a Bill or an Act. These notes are often a convenient guide to the contents of a particular provision, however they currently appear in small type which is not always helpful to readers. Computerisation of statutes in some jurisdictions has led to the replacement of marginal notes with short headings placed immediately above the relevant clause or section. (For example Commonwealth Acts; see Appendix II infra.) This sets off the

sections from each other and means that readers can more easily locate particular provisions. The larger type also facilitates reading. Various versions of sample legislation produced by the Government Printer have been considered by the Committee. In one version, marginal notes, increased in size and reproduced in bold type, increase the ease with which legislation can be read by both practitioners and laypeople; marginal notes in the larger size and in bold type would assist practitioners and laypeople to locate specific provisions with greater facility. (Version "A") A second version, the Commonwealth approach of headings above the relevant clause or section, to replace marginal notes, could be adopted because headings equate more closely to everyday reading matter; this gives an efficient look to legislation and may be preferable to the traditional side-notes. (Version "B") Another method would be to combine headings above relevant clauses or sections in place of marginal notes, with the history of legislation (notes relating to dates of amendments, etc.) remaining as side-notes in bold type. (Version "C") This combines a business-like appearance with ready access to content of paragraphs by way of heading, and ease in locating the history of a section required. Alternatively, headings could be reproduced in bold type, with history of legislation remaining as marginal notes in ordinary type. (Version "D") (Each of these options appears at Appendix II, infra.) The Committee believes that the decision should be based upon what facilitates, with greatest ease, location of particular sections by laypeople, practitioners, members of the judiciary and others dealing with legislation. In accordance with these criteria, the Committee favours version "C", appearing in Appendix II of this Report.

Amendment proposed - That the words "in bold type" be inserted after the word "side-notes" (where second occurring).

(The Hon. N.B. Reid)

Question - That the words proposed to be inserted be so inserted - put.

The Committee divided.

Ayes, 7	Noes, 3
The Hon. Joan Coxsedge	Mr. Hill
Mr. Ebery	The Hon. W.A. Landeryou
Mr. Evans	The Hon. Haddon Storey
Mr. Gray	
Mr. Hockley	
The Hon. B.W. Mier	
The Hon. N.B. Reid	

And so it was resolved in the affirmative.

Amendment proposed - That all the words and expressions after "favours" be omitted with the view of inserting in place thereof the words "having marginal notes in bold with no headings".

(The Hon. Haddon Storey)

Question - That the words proposed to be omitted stand part of the paragraph - put.

The Committee divided.

Ayes, 6	Noes, 4
The Hon. Joan Coxsedge	Mr. Ebery
Mr. Evans	Mr. Hockley
Mr. Gray	The Hon. W.A. Landeryou
Mr. Hill	The Hon. Haddon Storey
The Hon. B.W. Mier	
The Hon. N.B. Reid	

And so it was resolved in the affirmative.

4 Adoption of the Report -

Mr. Hill moved that the Report, as amended, be the Report of the Committee.

Question - put.

The Committee divided.

Ayes, 7	Noes, 2
The Hon. Joan Coxsedge	Mr. Ebery
Mr. Gray	Mr. Evans
Mr. Hill	
Mr. Hockley,	
The Hon. W.A. Landeryou	
The Hon. B.W. Mier	
The Hon. Haddon Storey	

And so it was resolved in the affirmative.

LIST OF CASES

BIBLIOGRAPHY

All England Law Reports

Appeal Cases

Australian Institute of Criminology, Bulletin (quarterly journal 1974-1982)

Australian Law Reform Commission, Report No. 4, Alcohol, Drugs and Driving, 1976, AGPS

Australian Law Reform Agencies' Conference, Transcript, July 1980, Queensland Law Reform Commission, Brisbane

Cora Baldock and Bettina Cass, editors, Women, Social Welfare and the State, 1983, Sydney

Naomi Baron, "A Reanalysis of English Grammatical Gender" (1971) 27 Lingua (August) 113

Garfield Barwick, "Divining the Legislative Intent" (1961) 35 Australian Law Journal 197

Mary Ritter Beard, A Changing Political Economy as It Affects Women, National Headquarters, American Association of University Women, reprinted (in part) in Mary Ritter Beard : A Source Book, Ann J. Lane, editor, 1977, N.Y.

Mary Ritter Beard, editor, America Through Women's Eyes, 1933, N.Y.

Mary Ritter Beard, On Understanding Women, 1931, N.Y.

Mary Ritter Beard, Women as Force in History : A Study in Traditions and Realities, 1946, N.Y.

Francis Bennion, "Another Reverse for the Law Commission's Interpretation Bill" (1981) New Law Journal (August 13) 840

Anne Bodine, "Androcentrism in Prescriptive Grammar : Singular 'They' Sex-Indefinite 'He', and 'He or She'" (1975) 4(2) Language in Society 129

Nigel Bowen, "The Federal Court of Australia" (1977) 8 Sydney Law Review 285

Patrick Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1961) 4 University of Queensland Law Journal 1

James Burrow, Essay on Punctuation, 1772, London

G. Cain, "Interpretation of Statutes - Reference to Parliamentary Debates" (1962) New Zealand Law Journal 207

Enid Campbell, "Women and the Exercise of Public Functions" (1960-1962) 1 Adelaide Law Review 190

Case and Comment, "Trees and Views" (1969) New Zealand Law Journal 54

Chancery Reports

Commonwealth Law Reports

Craies on Statute Law, Edgar, editor, 6th edition, 1963, London

Breen Creighton, "Secondary Boycotts under Attack - The Australian Experience" (1981) 44 (No. 5) Modern Law Review 489

Cross, Rupert, Statutory Interpretation, 1976, London

Current Comment, "Federal Policy Discussion Paper on Extrinsic Aids to Statutory Interpretation" (1983) 57 Australian Law Journal 129

Department of Attorney-General (Australia), Another Look at Statutory Interpretation, 1982, AGPS, Canberra

Department of Attorney-General (Australia), Extrinsic Aids to Statutory Interpretation, 1982, AGPS, Canberra

Department of Attorney-General (Australia), Symposium on Statutory Interpretation, 1983, AGPS, Canberra

Elmer A. Driedger, The Construction of Statutes, 1974, Ottowa

Sophie Drinker, Music and Women : The Story of Women in Their Relation to Music, 1948, N.Y.

Theo Van Dugteren, Who Gets What? The Distribution of Wealth and Power in Australia, 1976, Sydney

Editorial Note, "Canberra Symposium on Extrinsic Aids to Statutory Interpretation, February, 1983" (1983) 57 (No. 4) Australian Law Journal 191

Editorial Note, "Statutory Guidelines for Interpreting Commonwealth Statutes" (1981) 55 Australian Law Journal 711

J.B. Elkind, "The House of Lords - A New Departure in Statutory Interpretation" (1975) New Zealand Law Journal 234

R.J. Ellicott, "New Federal Court Structure" (1977) Law Society Bulletin (February) 2

R.J. Ellicott, "The Exercise of Federal Jurisdiction - A Revision of the Federal Court Structure" (1977) 1 Criminal Law Journal 1

R.J. Ellicott, "The Need for a Single All-Australia Court System" (1978) 52 (No. 8) Australian Law Journal 431

Kep Enderby, "The Family Law Act 1975" (1975) 49 (No. 8) Australian Law Journal 477

English Reports

J.E.S. Fawcett, "The Legal Character of International Agreements" in The British Year Book of International Law 1953, 1954, London

"Federal Court of Australia" (edited version of a paper prepared and circulated by the Attorney-General of the Commonwealth) (1977) Law Institute Journal (March) 84

Federation of Australian Universities Staff Associations (F.A.U.S.A.), Towards Non-Sexist Language, 1983, Sydney

Fitzroy Legal Service, Legal Resources Book, Melbourne, 1976 (with annual updates)

Eugene Forsey, "Subordinate Legislation, the Rule of Law, and the Constitution", unpublished paper, 1982

H.W. Fowler, Dictionary of Modern Usage, 1926, Oxford; second revised edition, 1965

Full Report ("The Asprey Committee Report"), 1975, AGPS, Canberra

Paul Hanly Furfey, "Men's and Women's Language" (1944) American Catholic Sociological Review 218

Charlotte Perkins Gilman, Human Work, 1903, N.Y.

Charlotte Perkins Gilman, The Man Made World of Our Androcentric Culture, 1911, N.Y.

John Greenwell, "Statutory Interpretation and the Mischief Rule" in Another Look at Statutory Interpretation, 1982, AGPS, Canberra, 2

Gavin Griffith, "A Practitioner's Viewpoint" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 5

Gutteridge's Comparative Law, 1946, Cambridge Studies in International and Comparative Law, U.K.

George Hampel, "Comments" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 41

Graham Harris, "A Parliamentary Viewpoint" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra

R.F. Henderson, "Poverty in Britain and Australia: Reflections on Poverty in the United Kingdom by Peter Townsend" (1981) 52 (No. 2) Australian Quarterly 221

Ruth Herschberger, Adam's Rib, 1948, N.Y.; reprinted 1970, N.Y.

J. Kirby, A New English Grammar, 1746, Menston, England

M.D. Kirby, "What Does It All Mean?" (1983) New Zealand Law Journal 61

Robin Lakoff, Language and Woman's Place, 1975, N.Y.

Ann J. Lane, editor, Mary Ritter Beard : A Source Book, 1977, N.Y.

Law Department (Victoria), The Law and You (pamphlet series in various languages)

Law Institute of Victoria, Injured at Work, 1983, Melbourne

Law Institute of Victoria, Injured on the Road, 1983, Melbourne

Law Institute of Victoria, What are Legal Costs, 1983, Melbourne

Law Institute of Victoria, What Happens When People Divorce, 1983, Melbourne

Law Institute of Victoria, What is a Will, 1983, Melbourne

Law Institute of Victoria, Who Can Arrest Me, 1983, Melbourne

H.K. Lucke, "Illusory, Vague and Uncertain Contractural Terms" (1977) Adelaide Law Review 1

Catherine Macaulay, Letters on Education, 1790, London

McGraw-Hill Book Company, Guidelines for Equal Treatment of the Sexes in McGraw-Hill Book Company Publications, 1972, N.Y.

A. Mason, "Summing Up" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra

Russell Mathews, "The Structure of Taxation" in The Politics of Taxation, John Wilkes, editor, 1980, Sydney, 82

Maxwell on The Interpretation of Statutes, Langan, editor, 12th edition, 1969, London

J.G. Merrills, "Two Approaches to Treaty Interpretation" in The Australian Year Book of International Law 1968-1969, 1971, Sydney

Casey Miller and Kate Swift, The Handbook of Non-Sexist Writing, 1981, London

Casey Miller and Kate Swift, Words and Women - New Language in New Times, 1977, New York

L.K. Murphy, "Comments" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra

Judith Sargent Murray, "On Equality of the Sexes" (1790) Massachusetts Magazine (March, April) 132, 223

A.R. Neaves, "Objects Clauses in Acts" in Another Look at Statutory Interpretation, 1982, AGPS, Canberra

New South Wales' Law Reform Commission, Complaints, Discipline and Professional Standards (Background Paper No. I), 1979, Government Printer, Sydney

New South Wales' Law Reform Commission, Complaints, Discipline and Professional Standards (Background Paper No. III), 1980, Government Printer, Sydney

New South Wales Law Reform Commission, Complaints, Discipline and Professional Standards - Part I (Discussion Paper No. 2), 1979, Government Printer, Sydney

New South Wales Law Reform Commission, Second Report on the Legal Profession, 1982, Government Printer, Sydney

Aileen Pace Nilsen, H. Bosmajian, H.L. Gershuny, J.P. Stanley, editors, Sexism and Language, 1977, Urbana, Ill.

Open University, Language in Education - A Source Book, 1972, London

Oxford Dictionary of Current Concise English, 7th edition, 1982, Oxford

Parliamentary Debates - House of Representatives, 21 October 1976

Parliamentary Debates - House of Representatives, 3 November 1976

Parliamentary Debates - House of Representatives, 10 November 1976

Parliamentary Debates - House of Representatives, 10 June 1981

Parliamentary Debates - Legislative Assembly (Victoria) 27 November 1919

Parliamentary Debates - Senate, 27 May 1981

Parliamentary Hansard - House of Lords (U.K.) 9 March 1981

Parliamentary Hansard - House of Lords (U.K.) 26 March 1981

Dennis Pearce, "Comments" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 66

Dennis Pearce, Statutory Interpretation, 1974, Sydney

Dennis Pearce, "The Use of Explanatory Memoranda" in Another Look at Statutory Interpretation, 1982, AGPS, Canberra, 22

J. Poole, The English Accidence, 1646, Menston, England

Phil Raskall, "Who's Got What in Australia : Distribution of Wealth" (1978) 2 Journal of Political Economy 3

Report into the Interpretation of Statutes, ("Scarman Report"), 1969, H.M.S.O., London

Report of the Committee of Enquiry into Taxation and Inflation, ("Mathews Report")1975, AGPS,Canberra

Report of the Committee on Ministers' Powers, 1932, H.M.S.O., London

Report of the Trade Practices Act Review Committee ("The Swanson Committee"), 1978, AGPS, Canberra

Report on the Preparation of Legislation ("Renton Report"), 1975, H.M.S.O., London

Lee Salk, Preparing for Parenthood, 1974, N.Y.

L. Scarman, "Ninth Wilfred Fullagar Memorial Lecture - The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown?" (1980) 7 Monash University Law Review 1

Jocelynne A. Scutt, "Federal Policy Discussion Paper on Extrinsic Aids to Statutory Interpretation" (1983) 57 (No. 3) Australian Law Journal 191

Jocelynne A. Scutt, "In Pursuit of Equality : Women and the Law in Public and Private" in Women and the Social Sciences : New Modes of Thought, Academy of the Social Sciences in Australia, 1983, Canberra

Jocelynne A. Scutt, Legislating for the Right to be Equal : Women, the Law and Social Policy in Australia, unpublished paper (shortened version in Women, Social Welfare and the State, Baldock and Cass, editors, 1983, Sydney)

Jocelynne A. Scutt, editor, Rape Law Reform, 1980, Canberra

Senate Standing Committee on Constitutional and Legal Affairs, The Burden of Proof in Criminal Proceedings, 1982, AGPS, Canberra

Mike Shortland and John Favvel, "Sexist Language" (1983) Radical Philosophy (Summer Issue) 29

South Australian Law Reform Committee, Report : Law Relating to Construction of Statutes, Government Printer, Adelaide

Dale Spender, Man Made Language, 1980, London

Dale Spender, Women of Ideas - And What Men Have Done to Them, 1982, London

Elizabeth Cady Stanton, et. al., Declaration of Sentiments ("Seneca Falls Declaration"), 1848, N.Y.

Elizabeth Cady Stanton, editor, The Woman's Bible, 1898, N.Y.

Frank Stillwell, "Sharing the Economic Cake : Inequality in Income and Wealth in Australia" in Who Gets What? The Distribution of Wealth and Power in Australia, Theo van Dugteren, editor, 1976, 82

Ethel Strainchamps, "Our Sexist Language" in Woman in Sexist Society, Vivian Gornick and Barbara K. Moran, editors, 1971, N.Y., 247

G.C. Thornton, A Model Interpretation Bill, 1983, Commonwealth Secretariat, London

Today's Education, 1974 (September-October)

Karen L. Uno and Mark Stapke, "Evaluating Oregon Legislative History : Tailoring and Approach to the Legislative Process" (1982) 61 Oregon Law Review 421

Mary Vetterling-Braggin, Sexist Language - A Modern Philosophical Analysis, 1981, U.S.A.

Victorian Reports

D.A.S. Ward, "A Criticism of the Interpretation of Statutes in the New Zealand Courts" (1963) New Zealand Law Journal 293

W. Ward, An Essay on Grammar, 1765, Menston, England

Weekly Law Reports

Women's Electoral Lobby, Draft Bill on Sexual Offences, 1978, Sydney

R.G. White, Everyday English, 1880, Boston

Lynn T. White, Frontiers of Knowledge, 1956, N.Y.

Lord Wilberforce, "A Judicial Viewpoint" in Symposium on Statutory Interpretation, 1983, AGPS, Canberra, 5

John Wilkes, editor, The Politics of Taxation, 1982 Sydney

E. Wilkinson and F. Volkman, "Judicial Review of Indian Treaty Abrogation : 'As Long as Water Flows, or Grass Grows Upon the Earth' - How Long a Time is That?" (1975) 63 California Law Review 601

T. Wilson, Arte of Rhetorique, 1560 edition; reprint 1909, Oxford; reprint 1962, Gainsville

G. Wynes, Legislative Executive and Judicial Powers in Australia, 5th edition, 1976, Sydney

No. D21—

Price $9.30

F D Atkinson Government Printer Melbourne

LEGAL AND CONSTITUTIONAL COMMITTEE

PRELIMINARY REPORT TO PARLIAMENT

ON

DELAYS IN COURTS

Ordered to be printed

No. D.26—77377/84—5661(F1) Price $14.30

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourable B.W. Mier be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

TUESDAY 13 SEPTEMBER 1983

4 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable J.H. Kennan be discharged from attendance upon the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY 12 OCTOBER 1983

2 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, that the Honourable W.A. Landeryou be appointed a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY 1 JULY 1982

36 COMMITTEE APPOINTMENTS - motion made, by leave, and question - That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * * *

(b) Mr. Ebery. Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

(Mr. Fordham) - put and agreed to.

---

* Mr. King deceased on 28 January 1983. Succeeded on Committee by the Honourable B.W. Mier.

LEGAL AND CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS

Mr. M.S. Whiting, M.P. (Chairman)

Mr. D.J.F. Gray, M.P. (Deputy Chairman)

The Honourable Joan Coxsedge, M.L.C.

Mr. W.T. Ebery, M.P.

Mr. A.T. Evans, M.P.

Mr. L.J. Hill, M.P.

Mr. G.S. Hockley, M.P.

Mr. K.S. Jasper, M.P.

The Honourable W.A. Landeryou, M.L.C.

The Honourable B.W. Mier, M.L.C.

The Honourable N.B. Reid, M.L.C.

The Honourable Haddon Storey, Q.C., M.L.C.

COMMITTEE STAFF

Dr. Jocelynne A. Scutt, Director of Research

Mr. Marcus Bromley, Secretary

Lisa O'Bryan, Research Officer

Mrs. Marion Caraher, Stenographer

TABLE OF CONTENTS

GLOSSARY

AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
Beach Report	Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force, Volume 1 (1978) Addenda to the Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force (1976)
CIB	Criminal Investigation Bureau
Civil Justice Project	Review of civil jurisdiction in Victoria currently being carried out under the auspices of the Law Foundation of Victoria
Committal Proceedings (or Preliminary Examination)	Preliminary examinations held in the Magistrates' Court into indictable offences to determine whether there is evidence sufficient to warrant placing an accused person on trial before a judge and jury, either for the offence charged or for any other indictable offence - s. 59(7) Magistrates' (Summary Proceedings) Act 1975 The expression "preliminary examination" is used in the legislation: s. 43 Magistrates (Summary Proceedings Act) 1975
Coroner	Person who holds an inquest (see below). Section 4 of the Coroners Act 1958 provides that any person who is a stipendiary magistrate (see below) is by virtue of holding that office a coroner

Coroner's Court Review Committee	Committee comprising - Mr. W.N. Thompson, Chairperson Dr. V.D. Plueckhahn Dr. J.D. Hicks established to review Coroner's Court procedures in 1975, reporting in 1977 to the Attorney-General
County Court	The intermediate level of the court hierarchy; the county court has an original and appellate jurisdiction in criminal matters. Judges are addressed as "Your Honour". For a criminal trial a County Court Judge sits with a jury and all indictable offences except those in the County Court Act 1958 s. 36A (treason, murder etc.) may be heard in this way. Some offences may be dealt with summarily - Crimes (Procedure) Act 1983 s. 4
Criminal Law Branch (of the Law Department of Victoria)	Now the Office of the Director of Public Prosecutions (see below)
Crown Prosecutor	Barrister in private practice employed by the Crown on a "one off" basis to run prosecutions where a permanent prosecutor (Prosecutor for the Queen) (see below) is unavailable
Depositions	Written documents recording the oral evidence of witnesses for the prosecution at a preliminary examination or committal proceeding in the Magistrates' Court
DPP	The Director of Public Prosecutions. (See Director of Public Prosecutions Act 1982, Appendix IV, at p. 288)

Flanagan Committee	Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne
FSL	Forensic Science Laboratory
Hand-up Brief	Brief containing statements from witnesses and informant/s in written form, used as an alternative to calling witnesses to give evidence and be cross-examined at a preliminary hearing ("committal proceeding") (see above) In some cases a preliminary hearing proceeds by way of hand-up brief, except that some witnesses are called to give evidence and be cross-examined by defence counsel. See Magistrates (Summary Proceedings) Act 1975 ss. 45 and 46 Before 1972, all preliminary hearings required the attendance of all witnesses supporting the police case to give evidence in person at the Magistrates' Court
Indictable Offence	An offence prosecuted upon indictment or presentment before a judge and jury. The Crimes (Classification of Offences) Act 1981 abolished the historical classification of offences so that "felonies" and "misdemeanours" are now indictable offences. The distinction now is between summary and indictable offences and between indictable and serious indictable offences. "Serious indictable offences " are offences for which a first conviction attracts imprisonment of five years or more - Crimes Act 1958 s. 325(6)

Information	Written document containing an allegation of an offence. One of the ways by which criminal proceedings are commenced is by the "laying of an information" before a Magistrates' Court. Upon receipt of an information a justice can issue a summons to the alleged offender or, if she or he thinks fit, a warrant of apprehension and/or a search warrant - Magistrates Courts Act 1971 s. 22A
Inquest	Inquiry held by a coroner (see above). Under the Coroners Act 1958 a coroner has jurisdiction to hold an inquest into - (a) the manner of death of a person killed, drowned, who dies suddenly or in prison, in a mental hospital or in a treatment or assessment centre under the Alcoholics and Drug Dependent Persons Act 1968; and (b) the cause and origin of various types of fire Coroners Act 1958 s. 6(1) (a) and (b) With respect to cause of death, the finding of the coroner is not binding on any other court. The Coroner's Inquisition (finding) sets forth so far as proven, among other matters, whether the deceased came to her or his death by murder or manslaughter, and operates as a committal proceeding Coroners Act 1958 s. 16(1)
Law Foundation of Victoria	Body chaired by the Chief Justice of Victoria and funded by bank interest paid on solicitors' trust funds. The Law Foundation carries out various research projects under the immediate direction of its Executive Director

Lusher Report	Report of the Commission to Inquire into New South Wales' Police Administration April 1981, Government Printer, New South Wales
McNiff Commentary	Commentary Upon the Recommendations Contained in The Coroners Act 1958 - A General Review (The Norris Report 1980), researched and written by Francine McNiff, then Legal Officer with the Law Department of Victoria (now Children's Court Magistrate), 15 June 1983
Magistrates' Courts	The courts at the base of the court hierarchy which can hear all summary offences - Summary Offences Act 1966 s.59; Magistrates' Courts Act 1971 s. 55 - and any indictable offence which is triable summarily with the consent of the accused - Magistrates' Courts Act ss. 50(1)(a) and 70
Neesham Inquiry	Committee of Inquiry - Victoria Police Force
Nolle prosequi	"No bill" - denotes a determination that criminal proceedings against a particular accused should be discontinued. In Victoria this power is exercised by the Director of Public Prosecutions - Director of Public Prosecutions Act 1982 s.14. Prior to the passage of the Director of Public Prosecutions Act, the power to discontinue criminal proceedings was exercised by the Attorney-General
Norris Report (1978-1980)	Report of the Committee Appointed to Examine and Advise in Relation to the Recommendations Made in Chapter 8 of Volume I of the Report of the Board of Inquiry Appointed for the Purpose of Inquiring into and Reporting upon Certain Allegations Against Members of the Victoria Police Force -

	Part I - "Police Prosecuted Relating to the Investigation of Crime", 10 May 1978 Part II - "Investigation of Complaints Against Police", 1979-1980
Norris Report (1980)	The Coroners Act 1958 - A General Review, 9 September 1980, conducted by - The Hon. J.G. Norris, Q.C., Chairperson R. Glenister R.L. King R. Jackson
Police Brief	List of witnesses and exhibits compiled by investigating police for the purpose of determining whether a prosecution will be undertaken in respect of a particular person, and used as the basis for conducting a prosecution or committal proceedings
Presentment	Document filed with the trial court at the commencement of proceedings for the trial of an indictable offence. A presentment can be filed only by the DPP. It is prepared and signed by a Prosecutor for the Queen in most cases, and less frequently by the DPP, and sets out in accordance with the Presentment Rules in the Crimes Act 1958 Sixth Schedule the particulars of the charge against the accused. If there are more than one offences charged then the particulars of each must be set out in separate paragraphs numbered consecutively, called "counts"
Pre-Trial Hearing	Hearing on matters relating to evidence (including any question of law) held prior to the impanelling of a jury in respect of a trial of any person on

	indictment or presentment - Crimes (Procedure) Act 1983 s. 5; Crimes Act 1958 s. 391A
Prosecutor for the Queen	Permanent prosecutor employed to undertake prosecution work on behalf of the Crown
Shorter Trials Committee	Committee appointed in 1982 by the Victorian Bar Council to consider and make recommendations on methods of shortening the length of committals and trials, and lessening the cost of these proceedings. With the consent of the Bar Council this Committee was later constituted a committee of the AIJA Justice R.E. McGarvie of the Supreme Court of Victoria chairs the Committee
Street Report	Report of the Royal Commission Inquiring into Certain Committal Proceedings Against K.E. Humphries, July 1983, Government Printer, New South Wales
Summary Offences	Offences which may be dealt with by a magistrate or justices of the peace without a jury. Section 55 (2) Magistrates Courts Act 1971 provides that where an Act sets out circumstances in which a person is liable to a punishment by fine, penalty, forfeiture or imprisonment, but does not specify what court or person may impose the fine etc. then the matter is to be heard before a Magistrates Court which can impose the prescribed punishment. Under the Crimes (Procedure) Act 1983 s.4 the County Court is now empowered to hear and determine summary offences in certain circumstances

Supreme Court	Superior Court of record in the State - Constitution Act 1975 Part III, ss. 75-87. The Supreme Court has exclusive jurisdiction for some serious indictable offences but for most indictable offences the jurisdiction is shared with the County Court. A single judge of the Supreme Court sitting with a jury comprises the trial court. The Supreme Court also has appellate jurisdiction. Three or five judges (a Full Court) sit to hear appeals against conviction or sentence by persons convicted in either the County or the Supreme Court. The Full Court also has jurisdiction to hear appeals by the DPP against sentence and to give an opinion on a point of law arising upon an acquittal if the point is referred by the DPP
Victorian Law Reform Commissioner	Commissioner appointed by the Attorney-General to undertake research and inquiry on references directed to the Commissioner by the Attorney-General
Voire Dire	"Trial within a trial" - in the absence of the jury in which questions relating to the admissibility of evidence are dealt with.

NOTE:

For an amplification of terms contained in this Glossary, see Richard J. Fox, Victorian Criminal Procedure, 4th edition 1983, Monash Law Book Cooperative Limited, Victoria

195A. For the purpose of taking down the depositions of witnesses to be used in a higher court, we recommend that in the metropolitan court, in the first instance, the clerks be instructed to take down the evidence by type-writing, and to qualify themselves to use type-writing machines. The experience of the courts in Sydney shows that by this mechanical aid much time and labour are saved. At present the written depositions are copied by type-writers in the Crown Law Offices for the use of the Crown prosecutors. Under our proposal the necessary copies could all be obtained at once. It is admitted that the type-writing machine produces a noise which irritates ears not accustomed to it; and probably it would be well to give the magistrates power to forbid the type-writer in such cases as they think fit. We have no doubt of the ultimate result.

Report of Royal Commission for Inquiring as to the Means of Avoiding Unnecessary Delay and Expense, and of Making Improvements in the Administration of Justice and in the Working of the Law, 1899 (Victoria)

PREFACE

This Preliminary Report is based upon evidence given to the Legal and Constitutional Committee by witnesses appearing before it. Written submissions and reports of committees or other bodies currently or previously working in the area have supplied background information.

The Committee puts the Report forward to inform the Parliament, the legal profession and the public of issues relevant to delays in the courts, as perceived by witnesses, committees and bodies noted above. The Report is also designed to inform the Parliament, the legal profession and the public of steps already taken, or currently being taken, to alleviate delays.

The Committee expects that this Preliminary Report will promote discussion in the community and in the legal profession, and as a result will ensure that during the next phase of its inquiry - the Committee receives further information and evidence from interested parties, which may assist in making further recommendations to deal with the problem of delays in Victorian courts.

SUMMARY OF PRELIMINARY RECOMMENDATIONS

THE POLICE ROLE:

RECOMMENDATION 1

71 The Committee recommends that the matters raised in this preliminary report in relation to police training and recruitment should be referred to the Minister for Police and Emergency Services, to be taken into account in the Neesham Inquiry into the Victoria Police Force.

RECOMMENDATION 2:

72 The Committee recommends that a review of support staff in the Victoria Police - clerical, stenographic, and typing - should be undertaken by the Minister for Police and Emergency Services, and if lack of staff is creating delays in the compilation of briefs for trial work, steps should be undertaken to rectify this.

THE ROLE OF THE FORENSIC SCIENCE LABORATORY:

RECOMMENDATION 3

107 The Committee recommends that the Government should ensure that the new Forensic Science Laboratory at Macleod is completed in as short a time as possible.

RECOMMENDATION 4

108 The Committee recommends that staffing levels at the Forensic Science Laboratory should be increased, taking into account current and projected

workloads, and accommodation, so that ultimately when the Macleod building is completed, numbers of staff for each section of the Laboratory transferring to Macleod will be increased to the level required to properly undertake Forensic Science Laboratory Work.

RECOMMENDATION 5

109 The Committee notes that various factors are relevant to the staffing levels of the Forensic Science Laboratory, including the number of CIB officers, police numbers generally, law enforcement policies, and growth projections of various types of crime and the need for related forensic services. The Committee therefore recommends that the evidence in this Preliminary Report relating to this issue should be referred to the Minister of Police to be taken into account by the Neesham Committee in its current review of police.

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS/CRIMINAL LAW BRANCH:

RECOMMENDATION 6

139 The Committee commends the Director of Public Prosecutions in reorganising the preparations work in the Criminal Law Branch, and recommends that the Attorney-General should continue to give the Office of the DPP full support in current efforts to streamline the process and to decrease delays.

RECOMMENDATION 7

140 The Committee notes that the Flanagan Committee is continuing to monitor the preparation of trials to ensure that previous delays no longer occur and recommends that the Committee should continue to be supported in its work by the Attorney-General.

THE ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS:

RECOMMENDATION 8

182 As a general principle, the Committee believes that there is a need to make continuing legal education generally available to the practising profession. The Committee recommends that continuing legal education should be made available to persons practising in the criminal area, to ensure that expertise in the field cuts down delays. The Bar Council and the Criminal Bar Association should encourage junior members to make full use of existing facilities.

RECOMMENDATION 9

183 The Committee recommends that the procedures outlined by the Flanagan Committee in its First Report should be followed at all relevant times, namely that:

(i) whenever an accused's solicitor or accused's representative from the Legal Aid Commission desires to enter into preliminary discussions about the course a trial should take, the solicitor or representative should contact the preparation section leader in charge of the particular trial in the Office of the Director of Public Prosecutions and indicate the desire to discuss the matter with a Prosecutor for the Crown.

(ii) it be the duty of that section leader of the preparation team to ensure that the Chambers Prosecutor (for the time being) is briefed in adequate time to enable the Chambers Prosecutor to be able to exercise discretion as to whether to accept or reject the plea offered in full satisfaction of a proposed presentment at the time that such discussions take place.

(iii) the instructing solicitor or the representative on each side, will then make the necessary appointment with the Prosecutor for the Crown to enable the matter to be considered. (A representative of the solicitors should attend at each such conference to more readily facilitate expedition.)

(iv) the Chambers Prosecutor should set aside fixed times in each week for the purposes of such conferences taking place.

(v) if the Chambers Prosecutor for the Crown decides that the matter is one in which it is appropriate for the Crown to accept a plea of guilty to some lesser number of counts in satisfaction of a proposed presentment, or to a less serious offence than that originally charged, the Prosecutor should then and there by telephone seek the approval of the Solicitor-General, or in the absence of the Solicitor General, the Crown Counsel, to the adoption of such a course. (Both being available at fixed times for the purpose of entertaining such applications.)

(vi) the same procedure should be followed even when a case has already had a date fixed for trial, but solicitors representing accused persons should be educated to the view that it is desirable that all such discussions take place at least seven days prior to the listed date.

Further the Committee recommends that steps should be taken to ensure that the profession is aware of these new procedures: the Legal Aid Commission should be made aware and play a role in disseminating information about the new procedures; the Law Institute and the Bar Council should make their members aware of the new procedures, by way of information published in their respective journals and any other means they deem appropriate.

RECOMMENDATION 10

184 The Committee believes that it is also necessary to overcome a general lack of communication between those bodies involved in the criminal justice process. The Committee recommends that a committee should be established under the aegis of the Attorney-General, comprising representatives from the Criminal Bar Association, the Director of Public Prosecutions, Prosecutors for the Crown, the Criminal Listing Directorate, Victoria Police and the community to ensure that as far as possible, good lines of communication are established and maintained, so that issues demanding attention may come properly to the attention of the parties and/or agencies concerned, and a pattern of co-operation is developed between the parties and/or agencies, in relation to matters concerning the good administration of criminal justice.

THE ROLE OF THE CRIMINAL LISTING DIRECTORATE:

RECOMMENDATION 11

217 The Committee recommends that the Criminal Listing Directorate should be provided with a statutory base, along the lines of the proposals contained in the Flanagan Report. In making this Recommendation, the Committee emphasises that the Criminal Listing Directorate should be independent, and should not come under the control of the County Court or the Supreme Court.

RECOMMENDATION 12

218 The Committee recommends that in providing the Criminal Listings Directorate with a statutory base the Directorate should be given the responsibility of listing criminal cases not only in Melbourne County Court, but also in the Supreme Court (both in the city and the country), and in the County Court in its country jurisdiction.

THE ROLE OF THE COURTS:

RECOMMENDATION 13

324 A formal mechanism should be established whereby all courts - Magistrates', Coronial, County and Supreme - can inform Parliament and the public about their workload, staffing and administration, including statistics on cases awaiting trial, adjournment, and the like. Annual reports from each jurisdiction should be tabled in the Parliament for public information.

RECOMMENDATION 14

325 The current monthly schedule followed by the County Court and the Supreme Court for criminal trials should be replaced by a two monthly schedule, so that the trials can be heard despite their extending into the second month.

RECOMMENDATION 15

326 An information booklet should be produced by the Law Department, to alert jurors to their rights and responsibilities, and to give them any other information necessary to fulfill their duties.

AREAS IDENTIFIED FOR FURTHER RESEARCH AND STUDY

THE POLICE ROLE:

73 From evidence taken so far, the following areas have been identified by the Committee for research and inquiry without in any way limiting the Committee's Terms of Reference.

74 Tape Recorded Evidence. The Committee endorses in principle the introduction of tape recording of police interrogations and accused's confessions. This question should be the subject of further research and inquiry, taking into account the investigations and recommendations of the Beach Report; the Norris Report; and the Australian Law Reform Commission, Report - Interim Criminal Investigation, 1975, AGPS. *

75 Police Prosecuting. The Committee believes that further investigation should be undertaken into the practice of police prosecuting in Victoria, taking note of Reports and practices in other jurisdictions, including the Lusher Report; the Annual Report of the N.S.W. Ombudsman, 1983; the Street Royal Commission Report; and current ACT practice. The Committee will conduct this review in the course of its further investigation into court delays, and will make it the subject of a Committee Report.

ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS:

185 In the course of evidence, the following matters have been raised. The Committee believes they should be subjected to further research, enquiry, public hearings and debate. Identification of these areas by the Committee does not limit the Terms of Reference of the Committee.

* The Government has established a Committee under the convenorship of the Director of Public Prosecutions to consider this issue.

186 Permanent Prosecutors. The Committee believes that, due to inadequate information and incomplete research, it is impossible at this time to recommend upon the expansion, maintenance or reduction of the permanent prosecuting system in Victoria. However the Committee believes that this should be an area for review, in accordance with the terms of its Reference on delays.

187 Combining Prosecution and Defence Work. In conjunction with the foregoing, the Committee believes that it is impossible at this time to recommend upon the introduction of a system whereby those undertaking criminal prosecutions should also be required to undertake defence counsel work. However the Committee believes that this is a matter for review, with particular reference to the Treasury Counsel system operating in England and to similar systems operating elsewhere.

THE ROLE OF THE COURTS:

327 The following issues have been identified by the Committee for further inquiry and research. However this is not to limit the Committee's Terms of Reference.

328 Trial by Jury. The right to trial by jury, optional trial by jury in certain cases, and the value or otherwise of retaining jury trial in cases of a complex nature - particularly those involving complicated fraud matters or highly specialised forensic evidence - require further inquiry. Trials by jury in complex fraud and other corporate crime cases is the subject of inquiry by the Law Reform Commissioner. The Committee awaits the results of the Commissioner's researches with interest. The Committee will make the other matters pertaining to jury trial a subject of further inquiry and research, with a view to formulating recommendations.

329 Hand-up Brief. The hand-up brief procedure requires further inquiry and research, particularly the question of who should retain the right to determine whether that procedure will be followed, as an alternative to calling witnesses,

and the extent of the information to be made available through the hand-up brief. The Committee will make this a subject of further inquiry and research, with a view to formulating recommendations.

330 Committal Proceedings. There are divergent views on the role of committals in the criminal justice system. The Committee believes the restriction, abolition, or retention of committal proceedings requires further inquiry and research, to be undertaken by the Committee with a view to formulating recommendations.

331 Overlap in Jurisdiction/Central Criminal Court. The question of overlap in jurisdiction between the County and Supreme Courts, and that of whether there should be a Central Criminal Court along the lines of the Old Bailey in England, require further inquiry and research, which will be undertaken by the Committee with a view to formulating recommendations.

332 Accommodation and Facilities. The Committee believes it is important that a review and possible rationalisation of court facilities and accommodation, particularly those of the City Court, take place. To this end, the Committee will visit and inspect court facilities in 1984, with a view to making further recommendations.

PRELIMINARY REPORT

The Legal and Constitutional Committee appointed pursuant to the provisions of the Parliamentary Committees Act 1968 (No. 7727) has the honour to report as follows:

TERMS OF REFERENCE

1 On 21 September 1982 the Committee was directed by His Excellency the Governor in Council:

> *To investigate, ascertain and make recommendations for the reduction of delays in the hearings of cases in all jurisdictions of the Supreme Court of Victoria, the County Court of Victoria and the Workers Compensation Board of Victoria, and Magistrates Courts and the Coroners and Children's Courts, including investigation of:*
>
> *(a) the nature and extent of the delays in each jurisdiction;*
>
> *(b) the existing system of judicial administration in Victoria;*
>
> *(c) whether any and if so what changes need to be made to procedure and procedural law in each jurisdiction to reduce delay;*
>
> *(d) whether any and if so what changes ought to be made to the substantive law to reduce delays in each jurisdiction;*

(e) *whether any and if so what changes are desirable in judicial administration in Victoria;*

(f) *the role of the legal profession in the reduction of delays in the courts;*

(g) *whether the staffing and other facilities of the courts need expansion in order to reduce delays;*

(h) *any other matter pertaining to delays in the courts.*

2 The Committee heard evidence from:

Professor I. Scott, Executive Director, Law Foundation of Victoria;

Justice McGarvie, Supreme Court of Victoria; Deputy Chair, Australian Institute of Judicial Administration and Chair, Shorter Trials Committee

His Honour Chief Judge Waldron, County Court of Victoria

Mr. J.H. Phillips, Q.C., Director of Public Prosecutions

Mr. J. Buckley, Criminal Law Branch, Law Department of Victoria (now Solicitor to the Office of the Director of Public Prosecutions)

Mr. B. Bateman, Director, Court Listing Directorate

Sergeant P. Hester, Police Prosecuting Branch

Mr. K. O'Connor, Director of Policy and Research, Law Department of Victoria

Mr. W.U. Johnston, Law Department of Victoria

Mr. M. O'Brien, Legal Aid Commission

Chief Inspector E.L. Page, Homicide Squad, Victoria Police

Prosecutors for the Queen:

Mr. J.Hassett

Mr. C. Hollis-Bee

Mr. R. Read

Mr. J. Barnett, of the Victorian Bar

Mr. C. Lovitt, of the Victorian Bar and

Mr. R. Maidment, of the Victorian Bar

3 The Committee received written commentaries from:

Justice McGarvie, Supreme Court of Victoria; Deputy Chair, Australian Institute of Judicial Administration and Chair, Shorter Trials Committee

Mr. M. O'Brien, Legal Aid Commission

Mr. B. Bateman, Director, Court Listing Directorate

Sergeant Peter Hester, Police Proscuting Branch

Chief Justice R. Blackburn of the Supreme Court of the Australian Capital Territory.

4 At the outset, the Committee was aware that various reports had been drawn up by other committees working in the area. Recommendations from these reports might be usefully looked at and implemented. Other bodies are currently working on the problem of court delays at various levels. Being concerned not to duplicate these operations needlessly, the Committee determined first to call before it representatives of those bodies which have already proceeded to work in the area. The Committee considered this would identify issues upon which it might best concentrate its efforts.

LAW FOUNDATION OF VICTORIA

5 Professor Ian Scott, Executive Director of the Law Foundation of Victoria, gave evidence before the Committee on two occasions. An expert in the field of judicial administration (also being Director of Judicial Administration in the University of Birmingham, England, and having spent many years investigating court systems in the United Kingdom and the United States of America), Professor Scott was appointed Executive Director of the the Foundation in order to, in his words, "do something about the administration of justice in this State". His task since his appointment in 1982 has been restricted to the administration of civil justice. The Criminal Justice Project has brought together all available statistical information on courts and tribunals in Victoria.

6 Professor Scott pinpointed problems he has identified in the Victorian justice system as a result of the Law Foundation project. These include:

* inadequate statistics
* lack of resources
* lack of an integrated approach to the administration of justice
* the need for a strong legislative interest in the administration of justice, to be conducted on a continuing basis
* pre-trial delays in indictable criminal cases.

7 Statistical Information. On the collection of statistics relating to both criminal and civil justice in Victoria, Professor Scott stated:

> *The statistical information that is available about the Supreme Court is poor. On the other hand, the information becoming available about the County Court is very good. That is largely as a result of the efforts of Mr. Johnston ... research officer in the Research Division of the Law Department who is very skilled in his work.*

One of the problems in courts is that a management system which would give [the courts] continuing information, from week to week and month to month, does not exist. It would be [preferable] if there were a system that could produce detailed information on a regular basis, which would provide some guidance as to the causes of the delays. The way in which they should be tackled, and what one should do. At present, everyone has hunches, but no one really knows the position. I have my hunches too. (Oral evidence, 6.10.1982, at p. 3.)

(See Appendix I for an overview of statistical information relating to the Higher Criminal Courts in their jurisdiction, at p. 182.)

8 Resources. In relation to the lack of resources, Professor Scott said:

... in Victoria, the court system is under-resourced. When an institution is under pressure, resources are the first to go. Nobody is to blame ... It is probably a combination of reasons and the resources available for courts are probably the same as any other resources available to the State. The problem, in my view is that resources are not rationed according to any coherent policy. No stocktaking has been done and the questions that would be asked in attempting to undertake that process have not been asked. (Oral evidence, 6.10.1982, at p. 3.) (Emphasis added.)

He put the view that such questions should be asked, and ultimately answered, by politicians. It was noted that the Legal and Constitutional Committee, in accordance with its Reference on delays in the courts, is in a position to ensure that this requirement is fulfilled. Professor Scott added, "... some sort of stocktaking should be done", and politicians "should be able to determine and decide what the resources are, how they will be deployed, what is the need, and whether the resources are meeting it ..." These are tasks for the Legal and Constitutional Committee. (At p. 3; see also pp. 5-6.)

9 Administration. Professor Scott considered that the lack of an integrated approach to the administration of justice is complicated by a failure to clarify the relationship between the executive branch of government (which is responsible for the courts) and the courts themselves. He pointed out that in England the Lord Chancellor's branch of government administers the higher courts and "there is a type of executive pyramid and judicial pyramid, which does not exist in systems like those of Victoria and of Canada". This leads to difficulty in determining the relationship between the executive back-up of the courts and the courts themselves. Generally under a system such as that existing in Victoria, Magistrates' and County Courts deal with the volume of work and the Law Department takes considerable administrative responsibility for their operation, but in superior courts, "executive interference is kept to a minimum". According to Professor Scott, as the proper role of the executive is "difficult to 'get right' ... in some jurisdictions courts 'declare home rule' ... they claim they want to administer their own affairs". (Oral evidence, 6.10.1982, at pp. 3-4.) It is necessary to determine the relationship of the executive to the courts in order to integrate the system. This would result in a more efficient use of court time and space, and other resources:

> *An integrated approach makes better use of available court space; the backlog in the administration of justice is often just that, courtroom space. A proper survey should be conducted in this State by the Public Works Department of the available courtroom space and its prospects and likely life cycle. The sticking point is physical resources.* (At pp. 9-10.)

10 Parliamentary Concern. Professor Scott again alluded to the need for a strong legislative interest in the administration of justice. He applauded the existence of the Legal and Constitutional Committee, affirming that "It gives the courts someone to talk to". In his view, frequently courts believe there is no legislative interest in their activities and problems, unless "trouble strikes and something must be done". A continuing legislative interest in the problems of courts is vital, not the least because "It means that one does not work up proposals [for improving the system] which have no chance of legislative success". (At pp. 5-6.)

11 Delays in Criminal Matters. Professor Scott suggested that the Committee might concentrate upon the criminal jurisdiction as a starting point, particularly in relation to delays occurring at the pre-trial stage of indictable offences. He stated that the criminal jurisdiction of the Supreme Court should be abolished, as two criminal courts are unnecessary. Where a case requires a Supreme Court Judge, that Judge should sit in the County Court. This would mean that the Supreme Court could concentrate its time, space and other resources in the civil jurisdiction. He further emphasised that in looking at the criminal jurisdiction, it is necessary to see the system as a whole, rather than isolate activity in the Magistrates' Courts, then in the County Court. He suggested that problems often arise from a lack of control exerted by either court over the progress of cases. Thus delay may be compounded where cases must pass from one jurisdiction to another.

12 It is also necessary for decisions to be made about the type of prosecution in Victoria. What is the system? Should it be retained? "Is it a system of State prosecution, of private prosecution, or ex-officio prosecution? [I]s it a combination of all three?" Prosecution management problems underlie the pre-trial procedure in Victoria, said Professor Scott. Consequently these problems should be overcome in order to gain accountability for pre-trial procedures. He concluded: "Accountability brings with it the authority to keep delays to a minimum." Accountability is the key to tackling the problem of delays.

13 Professor Scott said delays in indictable cases are "caused by the Police Force and the Magistrates' Court". Accordingly he stated:

> *Perhaps the cheapest way to reduce delays is to build more courts and appoint more judges. The problems at Russell Street [Police Station] in preparing papers could also cause delays. [It needs to be determined] whether it would be cheaper to improve the pre-trial part of the criminal process or the trial part of the proceedings."* (Oral evidence, 6.10.1983, at pp. 14-15.)

As well, problems arise because barristers are aware they must prepare cases for trial, yet may not appear in court at the scheduled time because of a delay caused in another part of the system, or because the matter is settled, or a plea is taken. "These factors encourage delays" and it is necessary to "protect lawyers from being short-changed for work done." This is "one of the crucial questions in designing procedures that will eliminate court-house-door settlements, when such settlements could have been secured far in advance of preparation for trial." (Scott, oral evidence, 6.10.1983, at p. 15.)

14 Ultimately, however, Professor Scott's view was that increasing resources cannot alone reduce delays. Court annexed arbitration systems, such as proposed in New South Wales could assist and would be worth contemplating for Victoria. (See Arbitration (Civil Actions) Act 1983 (N.S.W.); District Court (Amendment) Act 1983 (N.S.W.); Courts of Petty Sessions (Civil Claims) Amendment Act 1983 (N.S.W.) "Judge power" and physical resources should be used "in a manner that achieves flexibility and effectiveness. Maximum flexibility is needed all round and that could mean the use of part-time judges". (At p. 10.) In this regard, the English recorder system might be introduced, using Queen's Counsel rather than acting or temporary judges.

AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION/ SHORTER TRIALS COMMITTEE

15 Australian Institute of Judicial Administration. Justice McGarvie appeared before the Committee to outline the activities of the Australian Institute of Judicial Administration and the Committee on Shorter Trials in relation to their projects on delays in courts, and to comment generally on delays. The Australian Institute of Judicial Administration (AIJA) has established a project looking into causes of delays in the Supreme Courts of New South Wales and Victoria (the two largest Supreme Courts in Australia), and the Supreme Court of the Australian Capital Territory (the smallest Supreme Court in Australia). The records of those courts are to be surveyed to determine the length of time accorded to each case; to collect statistics on the use of court time; and determine how delays in the courts may be measured and assessed. In addition to the committee studying court delays, other Institute committees are working on:

* ways of ensuring the maintenance of reasonable independence and reasonable autonomy of judges

* ways of ensuring the maintenance of reasonable independence and reasonable autonomy of magistrates

* ways to improve listing systems in courts

* criteria for selecting jurisdictional limits as between courts - that is, Magistrates' Courts, County or District Courts, and Supreme Courts

16 Shorter Trials Committee. The Shorter Trials Committee was constituted by the Victorian Bar, on the initiative of the Criminal Bar Association. Justice McGarvie commented:

> *The Bar, like other institutions, had become aware of the fact that in modern conditions, with crime being committed in a more sophisticated*

manner by much more intelligent people than was the case ... 100 years ... or perhaps even 50 years ago, with police forces using [far] more sophisticated methods of detection, proof involving [much] scientific evidence and circumstantial evidence, and with the growth of organised crime, the criminal justice system [finds] it hard to cope ... properly and carefully, with due responsibility for the need for a very high standard in the conduct of court trials ... The Bar, like the ... community, was concerned that the system [was] facing difficulties ... [It] was realised that it was necessary to look carefully at what might be done. (Oral evidence, 16.3.1983, at p. 21.)

The Committee constitutes ten members, including Justice McGarvie as Chair; Judge Kelly of the County Court as Deputy Chair; Mr. L. Flanagan, Crown Counsel; Mr. J. Hassett, Prosecutor for the Queen; Mr. P. Cummins, Q.C., and Mr. F. Vincent, Q.C., who are in private practice; Mr. J. Gardner, Director of the Legal Aid Commission; Mr. B. Flynn, nominated by the Law Institute of Victoria; and two junior barristers, Mr. M. Rozenes and Mr. T. Ginnane. The latter two barristers are proceeding with a survey of members of the courts to ascertain their views as to the reasons for delays in criminal trials.

17 The Shorter Trials Committee commenced work by looking initially at every aspect that may shorten criminal trials. Justice McGarvie outlined a number of issues which that Committee is now investigating:

* inducing persons who are and consider they are guilty to plead guilty, by way of a reduction in penalty

* an investigation of the area between committal and commencement of trial

* prosecution policy on charges to be brought

* improvements to drawing and serving the presentment

* providing of particulars of a presentment

18 In relation to inducing those who are guilty to plead guilty, Justice McGarvie stressed that the Shorter Trials Committee was investigating this area always keeping in mind the need to preserve fairness of trials, the onus of proof, and the fact that rules have been developed over generations to ensure that accused persons receive fair trials. A survey of judges includes questions on the inducement of accused persons to plead guilty. (See Appendix IIA at p. 232.)

19 Justice McGarvie pointed out to the Committee that criminal procedure covers so large an area and the potential for delays arises at so many points in the process, that it was deemed necessary by the Shorter Trials Committee to concentrate upon a particular sector. Thus it chose the sector between committal and commencement of trial. Issues to be reviewed include:

* making available depositions to the prosecution

* making available depositions to the defence

* prosecution policy on charges to be brought

* drawing and serving the presentment

* providing the defence with statements or notice of evidence of additional witnesses

* providing the defence with copies of documentary evidence

* provision by the defence of required information, such as notice of alibi

* pre-trial directions for hearing

* determining (with or without the hearing of witnesses) the admissibility of evidence

* directions as to evidence and procedure at the trial

* other directions and hearings

* the desirability of written submissions

* facilitating pleas of guilty

* the extent to which individual matters are dealt with by more than one Crown prosecutor

* involving at an early stage the defence solicitors who would instruct at the trial

* involving at an early stage the defence counsel who would conduct the defence at the trial

* the time currently elapsing between committal and trial

* various matters raised in the Report of the Criminal Bar Association of the English Bar (December, 1980)

* such other subjects as the Committee may from time to time decide

20 Cooperation with other Agencies. The work of the Shorter Trials Committee continues in close cooperation with the Law Foundation of Victoria and the Commonwealth Legal Aid Council. Justice McGarvie expressed a desire that there should also be close co-operation with the Legal and

Constitutional Committee, amongst other matters to guard against overlap and duplication of work. His views coincided with those of Professor Scott, in that he stated it was important to observe that "the criminal law and the community are changing so much that [it is to be hoped that] never again does the situation arise where high powered committees [are not] actively contemplating and investigating ... the criminal justice system" in Victoria. (Oral evidence, 16.3.1983, at p. 24.) (See Appendix IIB for a preliminary report of the activities of the Shorter Trials Committee, at p. 256.)

THE COMMITTEE'S APPROACH

21 After hearing initial evidence, and having familiarised itself with the work already done and work which is proceeding, the Committee considered that it should immediately concentrate upon a particular area of court delays, where a gap in work done or currently under way reveals a need for investigation. The Committee determined that at a later date it would be feasible to broaden its approach, and thus to systematically work through the various levels of the justice system, pinpointing delays at each level and devising upon policies conducive to eliminating or alleviating delays in the civil and criminal jurisdictions.

22 The Committee has also decided that as a matter of course its role should include keeping alert to the activities of other committees working in the area, to ensure that duplication of effort does not occur.

23 Delays Generally. At this time the Committee determined that it should initially concentrate upon delays in the criminal jurisdiction. Delays in civil courts should be left for the time being to the Law Foundation of Victoria and the Institute of Judicial Administration, so as to avoid unnecessary overlap and duplication of effort. However, the Committee holds a "watching brief" in the civil area, being in continuing contact with Professor Ian Scott and Justice McGarvie. Reports and other documentation produced by the Law Foundation and the Institute of Judicial Administration are received by the Committee as they are produced.

24 Recognising the broad terms in which the reference is couched, the Committee is concerned to focus initially on problems of delay in such a way as to make positive recommendations capable of relatively speedy implementation, if this is possible. The Committee considers that some problems in both the civil and the criminal jurisdictions might necessitate long

term study and implementation of changes. However some problems might arise out of lack of resources or inefficient use of resources; these would be susceptible to a short term approach.

25 Delays in Criminal Cases. In looking at delays in the criminal jurisdiction, it is necessary first to outline the criminal process to pinpoint possible stages at which delays are occurring, or might occur. Following this the Committee considered it appropriate to call evidence from professionals involved at each level of the process. The purpose in calling witnesses was to receive expert opinion from those familiar with the system. The Committee sought witnesses' views as to the operation of the system as a whole; their experience at various levels of the system; their misgivings about the system and possible causes of delays; and their views as to methods or mechanisms which might be introduced to overcome those delays.

26 The Committee believes two approaches may be taken to the problem of delay in the criminal courts. These approaches are not necessarily exclusive of each other. Indeed, both should be adopted. At the outset, there is a strong possibility that particular factors may be readily isolated, which point to obvious reforms. These reforms could be introduced relatively rapidly. However some reasons for delay may be more deep seated. These will require more extensive research and discussion before measures can be introduced to eliminate them.

27 Because pressing problems exist, the Committee considers it is preferable to isolate those factors susceptible to rapid reform, and thus to present a Preliminary Report to the Parliament outlining those issues and related reform proposals. Those areas requiring a more sustained approach will be dealt with in subsequent Reports of the Committee.

OUTLINE OF THE CRIMINAL JUSTICE PROCESS

28 Initial Report and Investigation. The criminal justice process commences with the report of a victim or witnesses to police of an alleged offence; alternatively, the process may commence when a member of the police force observes the commission of a crime, or comes upon circumstances giving rise to a belief that a crime has occurred. Where a victim or witness reports to a uniformed member of the force, that member of the force takes the details. Then a report of the information is completed. In all serious crimes the Criminal Investigation Bureau ("the CIB") is immediately advised and assumes responsibility for the investigation. Since 1 July 1983 a procedure known as "Crime Screening" has been introduced, whereby investigation of certain minor property offences is assigned to uniformed members, enabling members of the CIB to concentrate upon more serious matters. (On police investigation generally, see Hester, Police Procedures from Report of Offence to Committal, 1983, Police Prosecuting Branch, Victoria Police, Melbourne; also Australian Law Reform Commission, Interim Report - Criminal Investigation, 1975 AGPS, Canberra.)

29 Upon obtaining details and completing a report, an investigation is undertaken to determine whether or not a crime has been committed. For example, police may be alerted to a fire in a city building. The CIB Arson Squad will be called to investigate whether the fire arises out of deliberate or accidental causes, such as an electrical fault. The extent of investigation following an initial report depends to a large extent upon the type of incident reported and the circumstances surrounding that report.

30 If the investigating police form an honest and reasonable belief that a crime has in fact occurred, they then seek to establish the offender's identity and the relationship between the offender and the crime. Two procedures may be followed, the first coming into operation if the offender is apprehended at the scene of the crime, the second operating where the identity of the offender

is not immediately known and it is necessary to undertake further investigation to establish identity and whereabouts of the offender. (See Table I at p.18.)

31 Apprehension at Scene of Crime. In the case of an arrest at the scene or shortly afterwards, the offender may not necessarily be interviewed immediately, pending interviews of witnesses and a search of the scene of the crime. An interview takes place after the basic facts have been established. Additional to the interview, the officer investigating will complete forms relating to fingerprinting of the alleged offender, an antecedent report, and (where applicable) an alien report form. The offender is then either charged on information or released pending further investigation and possible issue of summons.

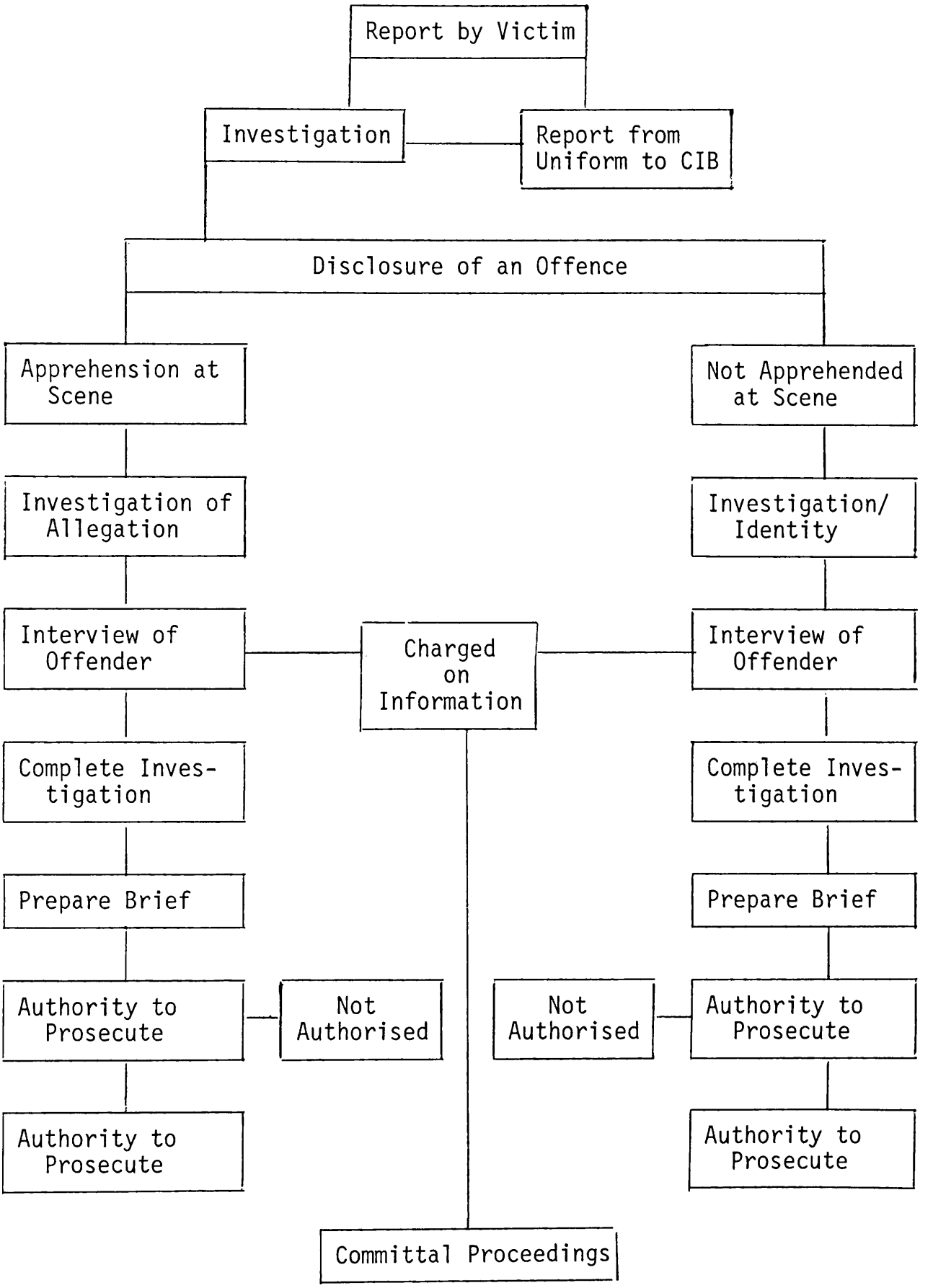
32 The investigating officer is then required to undertake further investigation - for example, obtaining statements from all prospective witnesses, conveying exhibits to the Forensic Science Laboratory for analysis, and any other investigations appropriate to the particular offence.

33 No Immediate Apprehension of Offender. Where an offender is not apprehended at the scene of the crime, once it is established that a crime has been committed an investigation is commenced in order to determine who might be responsible. Statements are obtained from witnesses at the earliest possible time. The scene of the crime is searched, exhibits are collected and where applicable identikit procedures are initiated.

34 Once the identity of the alleged offender has been ascertained and a nexus established between the offender and the crime, the alleged offender is apprehended and interviewed. An "interview of offender" form is completed and the offender is then either charged on information or released pending further investigation and possible issue of a summons.

TABLE 1

POLICE PROCEDURES FROM REPORT OF OFFENCE TO COMMITTAL



Flow Chart prepared by Sgt. Peter Hester of Prosecuting Division, Victoria Police

35 In these cases, further investigation may be necessary after the interview of the alleged offender. This may involve investigation of an alibi put forward during the course of the interview, or the corroboration of any admission made by the offender during the interview. The extent and type of investigation depends on the nature of the charge.

36 Preparation of Police Brief. Both where an offender is apprehended at the scene, and where more extensive investigation must be undertaken in order to locate an offender, it is necessary to prepare a brief. This preparation is also dependent upon the receipt of the results of any scientific tests which have been called for. The investigating officer prepares witness lists, exhibit lists and other material for the brief, arranging the evidence and witness list in the necessary chronological order.

37 Where an offender is charged on information at the time of interview, the brief is forwarded to the Prosecutions Division (Committals) of the Melbourne Magistrates Court.

38 Decision to Prosecute. It is necessary to obtain an authority to prosecute. (The Police Manual sets out the officer authorised to grant the right to prosecute for a particular type of offence.) In the case of indictable matters investigated by members of the CIB, the brief is forwarded to the Divisional Detective Inspector ("the DDI"), in the normal course, for authority to prosecute. Where the matter is unusual or complex, the brief may be forwarded to the Police Legal Assistant or the Officer in Charge, Prosecutions Division, for an opinion or direction. In some cases (for example, incest) the authorisation for prosecution must be sought from the Director of Public Prosecutions or Attorney-General, or other "authorised legal officer". (On this issue, see further The Role of Office of the Director of Public Prosecutions, at p. 56.) Where a prosecution is not authorised, the brief is filed.

39 Hearing Date. Where prosecution is authorised in a committal matter, the investigating officer contacts the court co-ordinator and obtains a date for hearing. Summonses and witness subpoenas are then issued and served. The completed brief is forwarded to the Prosecutions Division (Committals) at Melbourne Magistrates Court. That is, once the informations or charges against an accused person by the police or another authorised prosecuting agency are laid, the informations are initially returnable in a Magistrates' Court. Where informations relate to an offence or offences which are required by law to be tried on indictment, and thus by a jury at County Court or Supreme Court level, a magistrate holds a preliminary hearing (a "committal proceeding"). This preliminary enquiry is held at a date subsequent to the informations being filed in court, in order to determine whether there is sufficient evidence to put the accused on trial.

40 Hand-up Brief. In certain cases, rather than a committal proceeding being held, a handup brief procedure is followed. All evidence is given in writing and no witnesses are called to give evidence or to be cross-examined. (See ss. 45 and 46 Magistrates (Summary Proceedings) Act 1975; also The Role of the Magistrates Court at p.130.)

41 Committal for Trial. In the case of committal proceedings, if the magistrate is satisfied, following the hearing, that there is a case to be heard, the magistrate directs the accused to be tried at a later date in one of the superior courts (the County or Supreme Court). (In the case of a hand-up brief, if the Magistrate is satisfied on the written evidence that there is a case to be heard, the accused will be committed for trial in the same way.)

42 With homicides, the procedure is basically similar. However, the preliminary hearing ("committal proceeding") takes the form of an inquest. At the inquest the Coroner has the same power as that of a magistrate in a preliminary hearing: to direct that a person before the court should stand trial for an indictable offence. Once this determination is made by the Coroner, the depositions are prepared and the case goes forward in the ordinary way.

43 In recent years it has become the practice for the Crown Solicitor to instruct counsel to appear in difficult preliminary inquiries and inquests. Counsel have been instructed to prosecute in difficult or complex preliminary inquiries and counsel have appeared to assist the Coroner in serious inquests.

44 Presentment. The proceedings, including evidence before the magistrate, are recorded in the form of depositions. (In the hand-up brief case, depositions are not, of course, included.) They are later typed and made available to the prosecution, to the superior court in which the trial is to be held, and to the defence. When the depositions are made available, they are examined together with the police brief by officers of the Criminal Law Branch of the Crown Solicitor's Office. Following examination of the file, a draft presentment or formal charge sheet of the superior court is prepared for signature by a Prosecutor for the Queen.

45 Upon signing by the Prosecutor, the draft presentment becomes a presentment in settled form. It is then ready to be filed in the superior court. A prerequisite for a criminal trial in a superior court is that the presentment must be filed in that court. Judges of the superior courts do not have jurisdiction to make binding orders in pending criminal proceedings unless and until a presentment is filed in that court.

46 Offences Triable Summarily. Where an accused is charged with a non-indictable offence, the case is handled in the Magistrates' Courts throughout: that is, the Magistrates' Court hearing is not a preliminary hearing or committal, but a fully fledged trial. In such cases, the Police Prosecuting Branch is responsible for taking the case through from the laying of informations or charges, to the finding of guilt by the magistrate, or alternatively the magistrate's dismissing the case.

47 If an accused is convicted and wishes to appeal, and there are grounds for an appeal, then that appeal goes forward when the depositions are transcribed and delivered to counsel for the defence and the Crown Prosecutor.

THE POLICE ROLE

48 The Committee heard evidence from two members of the Victorian Police Force, Chief Inspector Page of the Homicide Squad, and Sergeant Hester, Police Prosecuting Branch. Both officers informed the Committee that delays may occur in initial investigations by the police. One stated that such delays may arise through "the inability of the police officer, due to ... inexperience, or lack of facilities, to get the brief completed in time to get it to the court". (Hester, oral evidence 8.6.1983, at p. 131.)

49 Investigation of Offence. The Committee was advised that in putting together a brief, problems may arise in the investigation of an offence. Chief Inspector Page pointed out to the Committee that "one particular murder enquiry may require 100 witnesses or 200 witnesses to be interviewed". Not necessarily all witnesses will appear in court; their evidence may be insignificant, irrelevant, or may duplicate needlessly the evidence of other witnesses. However, the police "cannot afford not to interview them" because until they are interviewed, it is impossible to know whether or not their evidence will be vital to the case.

50 The Chief Inspector informed the Committee further that there are insufficient police to carry out the interviewing role. An interview may take "from one hour to four or five hours, at home or in the workplace". It is difficult to set out a programme for interviewing a certain number of witnesses each day, and to abide by that program. (Page, oral evidence, 27.7.1983, at pp. 181-182.) Sergeant Hester stated that problems in collection of evidence may arise where witnesses have gone interstate. In such cases, it is often necessary (as a result of budgetary constraints) to have interviews carried out by police in the State wherein the witnesses are living. This means that witnesses evidence may sometimes be overlooked, because the police conducting the interview are not as fully cognisant of the facts of the case as are the police dealing with the matter in Victoria. In some cases, points may not be followed up, however carefully police in charge in Victoria have explained the

issues to the interstate police conducting the interview on their behalf. (Notes of interview, 20.5.1983, at p. 7.)

51 On the other hand, in relation to fraud investigations, Mr. Hollis-Bee, a Prosecutor for the Queen, informed the Committee that it is often necessary to send police officers interstate, and this is done. He pointed out that "for many years there has been a fruitful enterprise called the 'Darwin shuttle' which is designed to avoid State stamp duty on share transfers. Amenable accountants in Darwin have opened up an office ... and documents are obtained from other States. They are signed ... under power of attorney and are duly returned to offices in Victoria." (Oral evidence, 23.8.1983, at p. 221.) He continued:

> *The State loses on stamp duty and in terms of commercial investigations, we have to send police officers to Darwin to find out what the documentation discloses. ... [There is a] need, certainly, in commercial crimes to travel far and wide, and occasionally internationally, to obtain evidence. These are not matters which can be handled in a day or a week.* (At p.222.)

52 The problem of expertise in fraud cases was also mentioned. The Committee was told that in some instances, particularly in relation to computer and other white collar crimes, it is necessary for the police to seek outside expertise. Mr. Hollis-Bee said:

> *In terms of physical constraints, one has to bear in mind in the modern electronic age the difficulty of obtaining the documentation. A recent example was the Southern Cross Commodities case which hit the press last year in South Australia. The State and Federal police seized a complete computer installation to obtain the documentation, because it was an integral system.*
>
> *The problem then arose, of course, that the police had to find somebody sufficiently expert on that type of computer to get the material from that computer. Again, that causes a time lag.* (At p. 222.)

53 On problems arising specifically in the conduct of homicide investigations, Chief Inspector Page stated:

> *The area in which we find the biggest delay is in the administrative function of the particular squad ... [That is] in the system currently operating for the investigation of murder or similar types of offences. The Squad currently operates on a shift system. There are five shifts of four [officers]: senior sergeant, one sergeant, and two detectives, for all six shifts. [The] system [is one] of oncall 24 hours, seven days a week. It means that each shift is required to work a late shift on a particular day and on a particular weekend. It is a rotating system.*
>
> *It may - and frequently does - happen that on Saturday when [the squad] is working day shift, it must work right through until Sunday, then work through that Sunday until Monday morning. [Frequently] I have a job or two jobs starting at night. When there are two jobs, I split the team. The teams work right through and if they finish sufficiently early - although that is unlikely - they are still there on the Sunday and can get another job. It has happened that they get two jobs on those two days - Saturday and Sunday.*
>
> *The job coming to attention on the Sunday must be worked on, so [they concentrate on it]. That means the job the squad had previously on the Saturday night has barely sufficient work done on it to enable [the squad] to interview the persons concerned, and no follow up work is done. [The squad has two jobs now, and [the officers] have to work out priorities: ... jobs are seen in terms of difficulty or simplicity. If, ... then, on the following Wednesday they work late shift and pick up another job, ... the situation is magnified again ...* (Oral evidence, 27.7.1983, at p. 181.)

54 Other witnesses appearing before the Committee commented on delays which may occur at the police stage of the criminal justice process. Chief Judge Waldron of the County Court stated that in his view tape recording of police interview proceedings should be undertaken at all police stations, and

should be admissible as evidence. He instanced the problems arising where such evidence was not available:

> *I presided at a trial this month which took eleven days ... Ultimately the accused was acquitted. She was a 60-year-old woman, charged with selling and trafficking in heroin. The police said she freely admitted the offence in a lead-up conversation to a record of interview, but she declined to sign [the record of interview].*
>
> *The police said not only did that occur, but another officer at the station who was not involved in the investigation came in and read it back to her when it was discovered that she did not have her reading glasses ... Despite all that, there was an acquittal. She simply said: "I did not say any of those things". There was no tape recording of the readback so ... it simply became a dispute between the police on one side and the accused on the other, and I am sure that happens ... regularly.*
>
> *... It has been one of the contentious matters for many years, and for my own part, if the police come to court and say the confession was voluntarily obtained, I do not see why there should not be a tape recording of the voluntary readback of the record of interview. There are technical problems to having [an interview] taped throughout, but certainly in that case - let us assume for the moment that what the police said was true - eleven days would have been saved. In all probability a conviction would have been achieved - maybe simply a plea [of guilty] ... A very real area of dispute would have ... been eliminated.*
>
> *There remains a potential for someone to say that a tape is not accurate, and it has been doctored, but I would have felt that the potential for accused people saying that confessions have not been made would be significantly reduced ... Tapes should be used ..."* (Waldron, oral evidence, 23.3.1983, at p.48.)

(On the tape recording of police interrogation and confessions, also Australian Law Reform Commission, Interim Report: Criminal Investigation, 1975, AGPS; Report of the Committee appointed to Examine and Advise in relation to the Recommendations made in Chapter 8 of Volume I of the Report of the Board of Inquiry Appointed for the Purpose of Inquiring into and Reporting upon Certain Allegations Against Members of the Victoria Police Force ("The Norris Report"), Part I, 1978, Government Printer; Part II, 1979, Government Printer; Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force, ("The Beach Report"), Vol. I, 1978, Government Printer; Addenda to the Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force, 1976, Government Printer.)

55 Lack of Stenographic Staff. Another reason for delay in the conduct of cases under police control, and in relation to the compilation of briefs, is that of insufficient stenographic staff to type up briefs so that the matter may go forward as soon as possible. Both officers stated that if typing staff are over-extended, as is often the case, proceedings may be held up because a brief is incomplete. Once the completed brief is in the hands of the police prosecutor, with witnesses lined up, and a conference held with the informant, Sergeant Hester stated that there is no justification for any delay on the part of police. He informed the Committee that in fact there would be no delay, unless problems arose from circumstances beyond the control of the police prosecutors.

56 Uncertainty of Listing Date. Chief Inspector Page noted a further problem area: lack of certainty in dates of listing of cases in the Supreme Court and consequent problems, especially in relation to witnesses. He said:

> *Often we find that a trial is listed [for a specific date]... but at 4 o'clock on the Friday afternoon, or 3 o'clock, or Monday afternoon, any time at all, we will receive a phone call from the Crown Law Department saying that the trial will be starting at 10.30 ... the following day of sitting. You may have anything up to 50, 60, or 70*

civilian witnesses, some of whom are interstate, and it is really a very trying time for the next three or four or five hours, getting witnesses available for the next morning, or even from Friday to Monday morning. (Oral evidence, 27.7.1983, at p. 186.)

57 This problem was also alluded to during the Committee's discussions with Prosecutors for the Queen. Difficulties arise for police, barristers on both sides, witnesses and others:

There is a hidden cost [within the system] as a consequence of the problems of listing of trials. This relates to duplication. If a trial is listed for a particular day, everybody organises for it. Police contact witnesses. Witnesses make arrangements to be available. Considerable time is involved ...

The barrister on each side prepares for the trial. Solicitors issue subpoenas, arrange conferences, and do what is necessary for trial. If the trial does not go on because of overlisting or for any other reason, the bulk of the work has to be duplicated.

It would not matter so much if the trial due on today could be brought on next week, because it would mean relatively simple arrangements. However, if the trial is due on today and does not get on for another two months, the business of organising for trial must begin once again ... (Hassett, oral evidence, 23.8.1983, p. 198.)

58 From the police viewpoint, the problem is often compounded where leave clearance has been obtained by a member of the force, who is required to return because a trial has been brought on unexpectedly. Chief Inspector Page added:

I would say in this last fortnight I have had at least four men back from leave, although leave has been approved. The Crown has said their cases will not be on [during leave time]; then the cases have been listed. (At pp. 185-186.)

59 Responsibility for Contacting Witnesses. The Chief Inspector considered that one way of overcoming some of the problems experienced by the police in locating witnesses at short notice would be to transfer the responsibility for doing so to the Crown. This might make the Crown more aware of the difficulties faced in attempting to inform witnesses for cases which are listed to come on with insufficient notice. However Mr. Buckley, of the Criminal Law Branch (now Solicitor to the DPP), in commenting on the preparation of cases for trial, referred to the need for resources to enable witnesses to be contacted. In his view, those resources are available to police, making it appropriate for police to advise witnesses. He said:

In the course of the preparation of the trial it is the duty of the preparation officer to prepare the prosecution's case. The material he has to work on in that regard is the depositions from the committal court, the police brief of evidence which the police informant compiled in the first instance. Having examined all those things and made up his mind whether they support any indictable offence and what offence it ought to be and whether that appears to be sufficient or that further evidence should be obtained, he then directs any inquiry he has to be cleared up to the police officer. That is generally done in writing, so to that extent the police are still involved.

In the case of subpoenas having to be served or any further inquiries at all, this is done by the police, not by the solicitor. That is done purely because the police have the resources to do it, and they are familiar with the witnesses from the investigation they have conducted already. They are also required at the time a case is fixed for trial to notify all the witnesses they require at the court as well as those who have been subpoenaed. They also have charge of any bulky, non-documentary

exhibits such as a revolver or a motor car which we cannot store, and they bring exhibits to court. (Oral evidence, 18.3.1983, at p. 88.)

(See further The Role of the Office of the Director of Public Prosecutions/Criminal Law Branch, at p. 56. For the view of Prosecutors for the Crown on this issue, see Transcript, 23.8.1983, at pp. 190-250. See generally, Buckley, oral evidence, 18.5.1983, at pp. 87-88; Phillips, oral evidence, 30.3.1983, at pp. 49-66; Phillips, oral evidence, 1.6.1983, at pp. 96-114.)

60 Police Prosecution System. Sergeant Hester also alluded to proposals which were drawn up in 1981 for a revision of the police prosecuting system. (Glare, Formation of Prosecuting Division "O" District, July 1981, Victoria Police.) This included a proposition that all metropolitan prosecutions should be handled by personnel attached to the Police Prosecutions Division. This would streamline the process, and ensure that all prosecutors handling metropolitan matters were well versed in procedure. Currently the court system is divided into regions. The proposal is to establish a prosecution office for each court region, with a nucleus of prosecution and support staff for each court. That prosecution office would be responsible, to committal stage, for prosecutions - summary and indictable - within that region. He conceded that this would require an increase in staff:

> *[It would require] about 120 prosecutors for the whole of the metropolitan area. At present we have 70-odd personnel who cover the Melbourne court region, which includes the district court, city court, committals court, Preston, Box Hill, Prahran, and a nucleus of two persons at Sandringham, the Children's Court, the Coroner's Court, and the Liquor Control Commission."* (Oral evidence, 8.6.1983, at p. 129.)

In accordance with the Glare recommendations, a Police Prosecuting Branch was established on 1 July 1983 by Executive Instruction 129, 5 June 1983. A stage-by-stage implementation of the proposals is proceeding.

61 The number of police undergoing training as prosecutors was said by Sergeant Hester to be insufficient. Trainees are sought through publication of a notice in the Police Government Gazette, but the maximum intake at any time is 18. There are fifty applications for each course and a matter to be taken into consideration is the availability of an applicant to be seconded to the prosecution division. No senior sergeants or sergeants are seconded, due to departmental rules. (Secondment would interfere with the strength of the force in relation to other duties.) Senior constables and constables are the officers who attend the prosecuting courses: "they are inexperienced in police work, but ... can be trained to become prosecutors, even with the minimum amount of police work they have had". (At p. 130.) It is impossible, due to staffing constraints, to run refresher courses for police prosecutors. Despite these disadvantages, Sergeant Hester stated that delays in the system are not caused at the police prosecuting end. Rather, they occur prior to the brief being handed to the prosecutor, or further up the line.

62 Cooperation between Police and Office of DPP. The Director of Public Prosecutions, John Phillips, Q.C., drew the Committee's attention to changes affecting police procedures, as introduced by the Director of Public Prosecutions Act 1982. Before the creation of the Office of the DPP, the Crimes Act 1958 provided that prosecution should not commence in relation to particular crimes - including, for example, the crime of incest - without the consent of the Attorney-General. The Director of Public Prosecutions Act 1982 provides that the DPP is an "appropriate law officer" from whom authority or consent to prosecution can be sought by the police. Mr. Phillips said provision is thus made for cooperation between the Chief Commissioner of Police and individual police officers, with the Director of Public Prosecutions, both in relation to seeking consent for prosecution of certain offences and in respect to matters which the DPP has decided to take over and prosecute. The DPP is also empowered under the Act to furnish guidelines to Prosecutors for the Queen, to members of the police force, and to any other persons, for the prosecution of offences, these guidelines to be published in the Government Gazette. (Further on the duties of the Office of the Director of Public Prosecutions and the changes introduced into the

criminal justice system by the advent of this office, see The Role of the Office of the Director of Public Prosecutions/Criminal Law Branch at p. 56.)

63 The Executive Director of the Law Foundation of Victoria also alluded to the need for good cooperation between the Office of the Director of Public Prosecutions and the police. When he gave evidence in March 1983 it was his view that the cooperation between the two might, at that time, be "very superficial". (Understandably, due to the DPP not having taken up the office full time.) He warned of the necessity of paying good attention to the impact on police behaviour of changes in case preparation methods. (Scott, oral evidence, 18.3.1983, at p. 87.)

THE POLICE ROLE: SUMMARY OF ISSUES RAISED BY WITNESSES

64 In summary, witnesses before the Committee raised the following issues:

* insufficient police to carry out interviews and related investigatory tasks

* problems in collection of evidence where witnesses have gone interstate

* insufficient support staff - in particular, a lack of adequate numbers of stenographers and typists - to complete typing of briefs without delay

* lack of certainty in dates of listing of cases for hearing

* difficulties in ascertaining witness availability as a result of cases being listed at short notice

* need for streamlining the police prosecutions process by way of establishment of a centralised system

* need for increase in numbers of police prosecuting staff

* need for increased training programmes for police prosecutors, both to train new prosecutors and to provide refresher courses

* desirability of introducing tape recording of police interrogations and confessions

* need for good liaison and cooperation between police and DPP

THE POLICE ROLE: PRELIMINARY CONCLUSIONS

65 The recommendations which the Committee is able to make at this stage of the reference are subject to the limitations of the investigatory process to date. However, the Committee is aware of moves already in the offing which may improve the police investigatory area. For example, the Minister for Police and Emergency Services, the Honourable Race Mathews, has appointed the Committee of Inquiry - Victoria Police Force ("the Neesham Inquiry") which is currently engaged in reviewing police training and recruitment. The Legal and Constitutional Committee believes that the matters raised in this Preliminary Report should be taken into account in that review.

66 In addition to a review of police training and staffing, a review of support staff - clerical, stenographic and typing - appears to be necessary: if conduct of cases is being delayed because staff shortages mean briefs are unduly delayed merely through lack of typing facilities, this should be capable of immediate rectification.

67 A number of reports (the Beach Report, 1976, 1978; the Norris Report, 1978, 1979; ALRC, Interim Report - Criminal Investigation, 1975) have already recommended the taping of police interrogation and confessions. The Committee considers it appropriate to endorse in principle their recommendations and believes they should form the basis for specific recommendations to Government.

68 On the question of increased training for police prosecutors, increased numbers of police prosecutors and reorganisation of police prosecuting to make it more effective, the Committee notes that in the Australian Capital Territory the prosecuting role has been removed from the police force. (By administrative direction, in July 1973 police prosecutors were transferred to the Deputy Crown Solicitors Office. Police no longer have the task of prosecuting (although on occasion an officer transferred to the Deputy Crown Solicitors Office may appear in court as prosecutor in relation to a minor charge), nor the right to determine whether or not a prosecution should go ahead.) In New South Wales recommendations for the removal of the prosecuting role from the police force have been made in the Report of the Commission to Inquire into New South Wales Police Administration ("The Lusher Report") April 1981, Government Printer, New South Wales; the Annual Report 1983 of the New South Wales Ombudsman, Government Printer, New South Wales; and the Report of the Royal Commission Inquiring into Certain Committal Proceedings Against K.E. Humphries ("The Street Royal Commission"), July 1983, Government Printer, New South Wales. The Committee believes that further consideration and investigation is necessary.

69 In relation to listing of criminal cases generally and the problem of lack of certainty in listing times, the Committee notes the work of the Criminal Listing Directorate, which is dealt with subsequently in this Preliminary Report. (See The Role of the Criminal Listing Directorate, at p. 104.)

70 Similarly the question of police liaison with the Director of Public Prosecutions is raised subsequently in this Preliminary Report. (See The Role of the Director of Public Prosecutions/Criminal Law Branch, at p. 56.)

THE POLICE ROLE: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 1

71 The Committee recommends that the matters raised in this preliminary report in relation to police training and recruitment should be referred to the Minister for Police and Emergency Services, to be taken into account in the Neesham Inquiry into the Victoria Police Force.

RECOMMENDATION 2:

72 The Committee recommends that a review of support staff in the Victoria Police - clerical, stenographic, and typing - should be undertaken by the Minister for Police and Emergency Services, and if lack of staff is creating delays in the compilation of briefs for trial work, steps should be undertaken to rectify this.

THE POLICE ROLE: AREAS FOR FURTHER RESEARCH

73 From evidence taken so far, the following areas have been identified by the Committee for research and inquiry without in any way limiting the Committee's Terms of Reference.

74 Tape Recorded Evidence. The Committee endorses in principle the introduction of tape recording of police interrogations and accused's confessions. This question should be the subject of further research and inquiry, taking into account the investigations and recommendations of the Beach

Report; the Norris Report; and the Australian Law Reform Commission, Report - Interim Criminal Investigation, 1975, AGPS. *

75 Police Prosecuting. The Committee believes that further investigation should be undertaken into the practice of police prosecuting in Victoria, taking note of Reports and practices in other jurisdictions, including the Lusher Report; the Annual Report of the N.S.W. Ombudsman, 1983; the Street Royal Commission Report; and current ACT practice. The Committee will conduct this review in the course of its further investigation into court delays, and will make it the subject of a Committee Report.

* The Government has established a Committee under the convenorship of the Director of Public Prosecutions to consider this issue.

THE ROLE OF THE FORENSIC SCIENCE LABORATORY

76 Many of the witnesses giving evidence to the Committee alluded to backlogs in the work of the Forensic Science Laboratory, leading to delays in the preparation of briefs for committal proceedings and for trials. Additionally, overload in the work of the Laboratory leads to delays in the initial criminal investigation process, which in turn may cause delays along the line.

77 Staffing Requirements. As long ago as November 1980 the former Premier of Victoria commissioned an officer of the Department of Treasury to report upon a stated need on the part of the Forensic Science Laboratory for additional scientific staff to maintain or overcome backlogs. Some sections of the Laboratory were noted as suffering particularly from staff shortages - namely, the arson, illicit drugs, documents and rape investigation sections. Following investigation, an immediate increase of eight scientific officers and support staff for these areas was recommended. In the result, only two new permanent positions for scientific officers were created.

78 Shortly thereafter, the Coordinator of State Laboratories negotiated for three scientific officers to be employed for six months on the analysis of drug (cannabis) samples. The drug backlog was reduced in 1981 from 427 to 107, as a direct result of the employment of these officers. Despite this reduction, in early 1982 there was a backlog of 656 cases relating to arson, rape, and questioned documents. At the end of September 1982 that backlog had grown to 1342 cases.

79 In a Report dated November 1982, produced by the Directorate of the Forensic Science Laboratory, it was pointed out that not only was staffing inadequate; as well:

On several occasions in recent years Treasury officers have suggested that as the Laboratory is overcrowded it would be unwise to increase the Public Service staff until more accommodation is available ... (Report, November 1982, at p. 2.)

At the same time, police strength at the Laboratory has been allowed to increase by 17 since 1980.

80 The Report of the Directorate pointed out that the underlying problem in the forensic science area is that the amount and type of work "submitted in relation to ... criminal investigations and for Court prosecutions cannot be controlled by the Laboratory". Various factors underlie the changing need - sometimes expanding, sometimes decreasing - for scientific analysis of evidence in diverse areas. Relevant external factors include:

* the introduction of new legislation or the amendment of old legislation - for example, the Crimes (Sexual Offences) Act 1980 , introduced specifically with a view to improving the investigation and prosecution of rape offences

* court procedures - as for example under the Evidence Act 1958

* policies followed by the Police Department - for example, special efforts to combat the drinking driver, drug use, white collar crime, clandestine laboratories and the like

* changing spectrum of crime

* complexity of investigations involving large scale crime - for example, the meat scandal

* campaigns aimed at increasing cooperation between police and public, and therefore leading to more reporting of crimes

* increase or decrease in police numbers

* increase or decrease in Criminal Investigation Bureau (CIB) numbers

* the formation or disbanding of specialist squads, increases in their number, and changes in the nature of their requirements as regards evidence - for example, Arson Squad, Fraud Squad, Drug Squad, Rape Squad

* increases or decreases in population

* increases or decreases in particular age groups of the population

* social attitudes

* economic climate

81 In the course of the Committee's discussions with representatives of the Forensic Science Laboratory, it was said that a nexus should exist between numbers staffing the Laboratory, particularly in a scientific capacity, and numbers of police: where police numbers rise, it is inevitable that detection of crime will increase, with subsequently increased calls upon the Laboratory for analysis of evidence at three stages. Those stages are:

* police investigatory stage

* committal stage

* trial stage

Calls for analysis of evidence may also arise at the appeal stage of a particular case.

82 Staff increases at the Laboratory have not, however, been calculated upon this basis. It was noted that from 1976-1982 the percentage increase in police recruitment was 84.6; the increase in science graduates was 61.9 per cent; that in scientific staff was 39.1 per cent. The total "operator" increase was 55.6 per cent. Commenting on these figures, it was stated in the Report of the Forensic Science Laboratory:

> *To some, an increase in 'operators' of 55.6 per cent in the period 1976-1982 may appear to be bountiful but such an opinion would neglect considerations that, in the same period, the C.I.B. strength has risen by 75.8 percent and the number of cases submitted to the Laboratory will have increased by approximately 74.9 per cent at the end of 1982.* (At p. 11.)

The Report continued:

> *These calculations provide a tangible reason for staffing the Laboratory according to a formula based on the strength of the C.I.B. and a total complement of 63 'operators' would currently apply if such a simple formula (that is, 75.8 per cent C.I.B. increase) were to be used ... It is felt that a formula based on [Police] Force or C.I.B. numbers would provide a better means of depicting future staff needs for the Laboratory than a case based formula.* (At p. 11.)

83 Collection and Analysis of Evidence. It is clear from the evidence presented by witnesses coming before the Committee that delays of considerable magnitude are occuring in the forensic science area. Sergeant Peter Hester of Police Prosecuting Branch of the Victorian Police commented upon the lack of facilities and delays arising in the analysis of drugs:

> *The recent fire at the Government Printing Office destroyed an annexe to the Forensic Science Laboratory where marijuana [was] tested. All the equipment was lost and the operations at Spring Street [where the major Forensic Science Laboratory is located] have had to be revamped*

with a view to doing some analysis of the more important cases.

However, by the end of the year there will be a twelve month delay between the substance arriving at the building and the report coming out. Obviously with Magistrate Court work and committals in particular, that will cause endless delay. A similar situation occurred two years ago when cases were being adjourned for nine months so that an analysis could be done of drug material. [The problem will be increased] if there is a blitz on marijuana [at any time]. (Hester, oral evidence, 8.6.1983, at p. 133)

84 The Committee was informed that delays in finger printing do not occur because the work is done solely by police officers who are experts in the field. With blood alcohol analysis "there is still considerable delay". With ballistics testing, "the delays there are not as great as delays in the general scientific analysis, because two ballistics experts from the Police Force are involved in ballistics testing and do their own paper work." However, there is a delay of twelve months at present in the examination of documents, and this "has been causing problems for the Fraud Squad". Sergeant Hester reported that the Arson Squad has a good liaison with the Forensic Science Laboratory "and they get their stuff through more quickly ... due ... to good management". With photographs, "... the Homicide Squad [sometimes] waits approximately twelve to eighteen months" for delivery. (Hester, oral evidence, 8.6.1983, at p. 134.)

85 In a Report submitted to the Committee by Sergeant Hester, it was stated:

Considerable delay is being experienced by [the Homicide Squad] in obtaining from the Forensic Science Laboratory results of scientific tests and also photographs required before a brief can be completed. ... [With the Fraud Squad], Forensic Science Laboratory examination and in particular, document examination again contributes to the delays. The current delay for document examination is nine months. [Where Arson

Squad investigations are concerned], Forensic Science Laboratory delays are again common, but not to the same extent as that experienced by the squads previously referred to ... Other squads involved in the investigation of the more serious indictable offences were contacted and the causes for delay were similar in each squad. The common denominator is the problems with Forensic Science Laboratory examinations and shortage of public service support staff.

It was not practicable within the time available to take the inquiries any further but it follows that in any investigation in which the services of the Forensic Science Laboratory are used, again the delay will be similar to that experienced by the squads referred to. (Hester, Police Procedures from Report of Offence to Committal, June, 1983, at pp. 4-5.)

86 These problems in relation to the Homicide Squad were referred to by Chief Inspector E.L. Page in his evidence to the Committee. He said:

There are two areas of great delay and they are in the forensic science area. One is the photographic area which seems to crop up time and time again. The other is in the scientists' area. Both play a very important part in the production of evidence and it is not uncommon for a brief to be completed without that evidence in the sense that it is typed and prepared ready for the Coroner and the brief goes to the Coroner with an insert indicating 'Mr. Smith will give certain evidence'. That is a delay factor. Probably it is the most serious. (Oral evidence, 27.7.1983, at p. 182.)

87 The Chief Inspector stated that there were dual reasons for problems in the obtaining of photographic evidence. First, the inadequacy of equipment at the Forensic Science Laboratory and problems with staffing. Secondly, he noted that "there has been a tendency over the last two or three years for trials and courts to require more and more photographs". He continued:

There has been a very strong tendency recently to produce larger booklets of photographs at trials. We select our photographs in accordance with the basis which we think is most suitable for the court proceedings. [Police photographers] from the Forensic Science Laboratory might take, say, 50 photographs of a scene and the officers in charge of the case may say 'We want those photographs because they are part of the evidence; we want others because they depict some other necessary aspect.' Thus they select the photographs which they think will be ultimately required by the Crown Prosecutor.

Having done that, a number of booklets of photographs must be produced. A large amount of duplication is required. It is not just a question of one photograph, but a large number. There may be ten booklets of the same material required. (Page, oral evidence, 27.7.1983, at p. 184.)

Asked what delay occurred, on average, in the obtaining of necessary photographs from the Forensic Science Laboratory, Chief Inspector Page stated "Often three or four months". (At p. 184.)

88 Members of the Victorian Bar appearing before the Committee also expressed concern about problems experienced with obtaining exhibits from the Forensic Science Laboratory. One member said:

... there are a lot of problems with forensic science and obtaining exhibits. I had a trial the other month which required listening to tapes. We asked the Crown to provide copies of tapes which it was thought could be run off for defence purposes on a fast reel to reel recorder. It took forensic science days to deal with it, and eventually they said they could not do it. Presumably they wanted to listen to every word of it. We just wanted to hear what was said and it was not meant as a sure test of the original. It was impossible to do. (Barnett, oral evidence, 16.11.1983, at p. 253.)

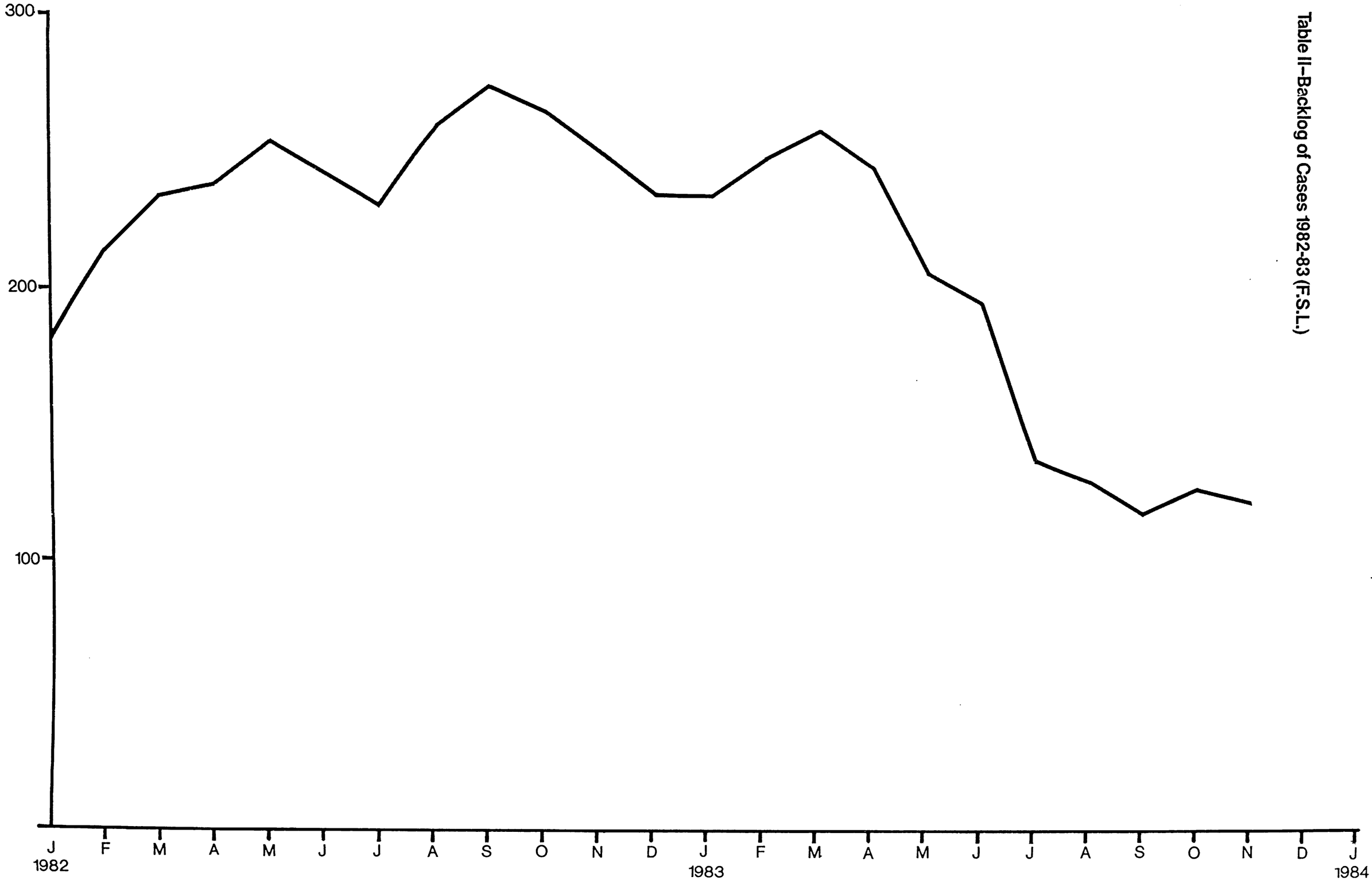
Difficulties with analysis were also noted:

> *There are problems with blood tests and photographs coming in at the last moment as exhibits. Sometimes they arrive during the trial and a day is lost while they are checked out. Sometimes adjournments are required because the blood test, say in a rape case, shows up some evidence requiring further sorting out. This has the effect ... of either compromising the defence because the defence decides to let the trial go on, or alternatively counsel calls for an adjournment, so time is lost.* (Barnett, at p. 253.)

(See Table II at p.44 for backlog of cases 1982-1983.)

89 Committee's Inspection - Staffing. The Committee conducted an inspection, at the invitation of the Director of the Forensic Science Laboratory, of the Laboratory on 21 November 1983, and discussed extensively with him and with representatives of the various divisions of the organisation the problem of lack of staffing and inadequacy of accommodation leading to delays in preparation of exhibits for criminal investigations, committals and trials. It was explained to the Committee that despite three reviews of the position - the first in December 1980, the second conducted by the Public Service Board in 1981, and the third in June 1983 carried out under the aegis of the Director of Public Prosecutions - delays in the processing of work continued to be severe, and little relief of the staffing situation had occurred. Currently there are 118 staff at the Laboratory, including police, public servants as administrative officers, and scientists. 58 of the 118 are police officers who have a limited range of duties. The scientists number approximately 42, of these, 32-33 are operational scientists; the remainder fill managerial positions and therefore are unavailable to undertake the necessary work of analysis. It was pointed out that the Forensic Science Laboratory covers the whole of Victoria (population approximately 4 million), whereas in England the Metropolitan Forensic Science Laboratory has some 271 staff - scientists, technical and administrative - to cover the London area only (population approximately ten million). Unlike Victoria, although police officers are involved at certain levels in the forensic

Table II–Backlog of Cases 1982-83 (F.S.L.)



science field, no senior crime officers are attached to the centrally located London Forensic Science Laboratory, and no senior crime officers are included in the 271 staff number. Comparing the two, Victoria has one scientific/technical/administrative forensic staff member for every 66,666 Victorians, whilst London has one scientific/technical/administrative forensic staff member for every 36,900 Londoners. Accepting that the metropolitan London area may require forensic services more frequently than all country and city areas of Victoria, and that, for example, more drug crimes requiring analysis may be on the agenda of the London laboratory, it appears that the contrast between staffing in London and that in Victoria is unfavourable to this State.

90 It was put to the Committee that the keynote issue for the Laboratory is lack of staff. In the past two years, there has been a 35 per cent increase in work, 25 per cent of the increase occurring in the year 1981-1982, eight per cent in 1982-1983. Figures available for August showed a backlog of 132 cases.

91 Problems have arisen due to the increased complexity of policing and the degree of expertise and expert evidence required in present day investigations, committal proceedings, and trials. Those areas where increased work could be readily observed include the area of sexual offences; the introduction of amendments to the Crimes Act 1958 by way of the Crimes (Sexual Offences) Act 1980 has led to an increase in reporting of rape and allied offences, and a greater readiness for victims to go ahead with cases. In the area of drugs, present day attitudes have led to periodic "crackdowns" on crimes relating to possession and trafficking in drugs; this has led to a corresponding need for the facilities of the Laboratory to analyse substances found in the possession of the alleged offender, or growing on the property of an accused person. As well, cases of suspected arson are becoming more common, and the increasing expertise of scientists at the Laboratory means an increase in the call by police and prosecutors for assistance in analysing materials from fires. Although the breathalyser area has been the subject of increases in the output of the Laboratory, analysis is under the control of computers, and therefore does not increase the work of the Laboratory.

92 The Committee was informed that delays can cause problems in analysis due to deterioration of substances and other evidence. The biology section creates major difficulties, as biological substances deteriorate, sometimes rapidly, over time.

93 As a comparison of delays, it was noted that in the United Kingdom, delays in processing are on average about three to six weeks, with one month's delay being "pretty normal". (Here it was pointed out that it is impossible to have instantaneous analysis of evidence; some methods take time in the ordinary course, and this cannot be avoided if work is to be done thoroughly.) In Victoria, non-offender cases carry a current delay of approximately six months.

94 Staff turnover is high, due to pressure arising from the workload and the inadequate conditions of work; turnover also arises because of lack of a career structure, particularly as regards police personnel. Six members of staff were lost in 1980-1981, four due to illness. With police, there is a problem in that once promoted to the position of sergeant, it is necessary for an officer to leave the Laboratory. A number of officers have foregone promotion in order to remain in the job.

95 Training for the work is extensive. For example, handwriting experts develop their expertise over a five year period. Often police may be four-fifths trained, are then promoted, and leave. The training begins once more, with new officers.

96 It was further pointed out that adding to the problems in analysis of evidence was the factor of staff having to appear in court. This problem can be exacerbated if dates for trials or committals are not certain, and time can be wasted waiting for a case to come on.

97 Committee's Inspection - Work Flows. In certain sections of the Laboratory, the Committee learnt that the alteration of work flows had led to a decrease in delays, however the reorganisation is now at its optimum, and no further alteration of work to bring down delays is possible. (See Tables II and III showing decrease in delays due to alteration of work flows, at pp. 44 and 48.)

98 In the chemistry division, there are currently six month delays in drug analysis. It is anticipated that the delay will increase to seven months over the Christmas period, particularly in relation to cannabis. Accommodation is inadequate in the division. Two more scientists would make a difference to workflow but the accommodation problem would continue to be felt. The major portion of the work of the division in the drugs area involves analysis of cannabis, which sometimes rises to 70 per cent of the work; for the year 1981-1982 marijuana analysis constituted 50 to 60 percent of the work.

99 In the chemistry division, one month is a proper amount of time to be spent on analysis and writing of reports. The information has to be detailed first for the officers investigating an apparent offence, in order to continue investigation and to charge a suspect. Priorities are often drawn up in accordance with court dates, however, for material must be ready if the date of committal or trial has been fixed. This means that analysis of materials at the investigatory stage may be overridden by the more pressing need to have materials ready for set trials. On the other hand, if the police have a suspect, it is important that samples be analysed as soon as possible, so that police may be alerted to the probable guilt of a suspect, or informed of an analysis which rules out a particular suspect. This means that priorities may alter, according to cases. If no priorities of this nature arise, analysis is carried out on a chronological basis.

TABLE III

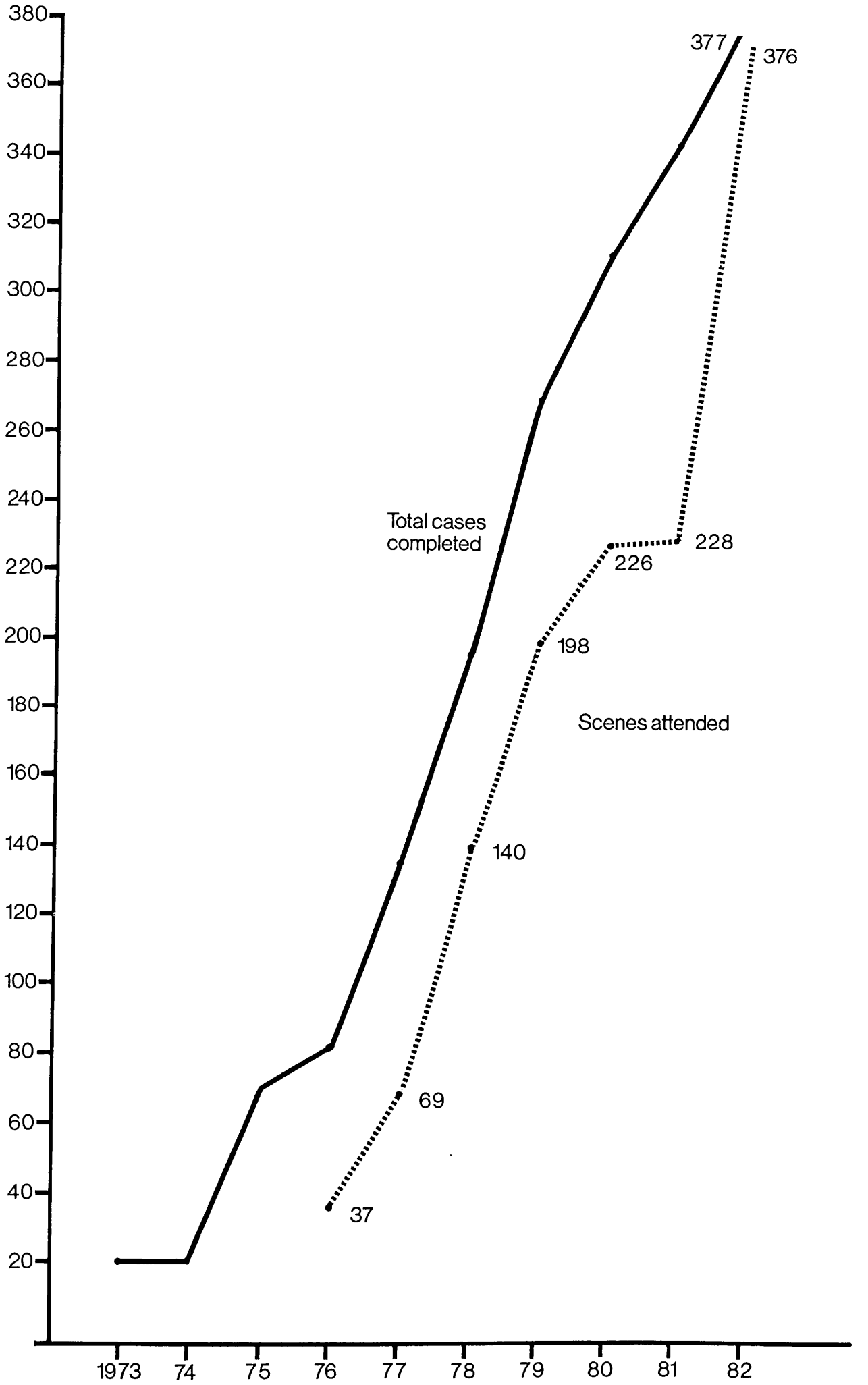
CASEWORK - BIOLOGY DIVISION

	Starting Backlog		Case Input		Case Output		Terminal Backlog	
	1982	1983	1982	1983	1982	1983	1982	1983
JANUARY	183	234	41	44	11	30	213	248
FEBRUARY	213	248	42	45	22	34	233	259
MARCH	233	259	47	46	42	59	238	246
APRIL	238	246	44	39	28	79	254	206
MAY	254	206	35	56	46	66	243	196
JUNE	243	196	46	44	58	104	231	136
JULY	231	136	60	28	31	34	260	129
AUGUST	260	129	51	49	37	61	274	117
SEPTEMBER	274	117	47	43	55	33	266	127
OCTOBER	266	127	54	42	69	47	251	122
NOVEMBER	251		44		60		235	
DECEMBER	235		53		54		234	

100 In the arson section of the Laboratory, the delay is of approximately one year. (See Table IV at page 50.) The Laboratory is 255 cases behind. In some instances, analysis is incomplete but some answers to questions raised in relation to evidence are available. Two full-time and one part-time scientists work in the section, and the demand for analysis by the Police Department has risen noticeably in recent years. This increase in demand is due to a considerable extent to the success of analysis: the section has a 90 per cent success rate in determining the cause of a fire; the Committee was informed that analysis and expertise have developed in this area to place it above other sections in degree of positive analysis. The amount of evidence which can be collected at the scene of the crime (as a result of improved methods) enhances analysis and identification of causes of fires. An element of speed is required in this area, and the Committee was told that it is expected that the demand will increase in this section. One reason for this increase is that the Fire Brigade is to do preliminary investigations in the future, and to be trained for this work. That means that it is more likely that suspicious elements may be observed, which will mean more cases to be passed on to the Laboratory for further investigation and analysis. It is important that no more than 24 to 48 hours elapse before the initial investigation takes place. A full scientific report is necessary in order that a follow-up investigation can be undertaken. In 90 per cent of cases, fires are deliberately lit. The Laboratory informed the Committee that five to six years ago, only 10 per cent of fires investigated went to court. Today, 40 per cent of cases end in court. Insurance companies are also able to call upon the police for information about suspected arson cases for the purposes of civil action.

101 In the applied science section, analysis of fibres, paint flakes, glue sniffing and poison is undertaken. This analysis takes considerable time and expertise. The equipment at the Laboratory is inadequate and scientists are forced to travel to outside locations in order to gain access to equipment. (For example, the equipment at the Pharmacy College may be used.) This means time is taken not only for travel, but appointments to use equipment must be made.

Table IV–Fire Investigation Section (F.S.L.)



102 The Committee learnt that the document identification section had 14 to 16 month delays in analysis in 1981. One case involved more than 21,000 exhibits, adding to the problems experienced in terms of staff and time.

103 FSL Report. The Forensic Science Laboratory Report of November 1982 made four recommendations:

* That attention be given to the fact that changing crime patterns and the total police and CIB strengths directly affect the Forensic Science Laboratory workload, and that high priority be given to the employment of additional Public Service scientists whenever there is a significant increase in police [staffing], as a matter of policy

* That the Government be asked to provide the following new Public Service staff before the end of the 1982-1983 financial year -
  6 scientific officers, Class SO-1
  2 technical assistants, Grade 1
  1 computer programmer
  in addition to the staff (that is, 1 technical assistant and 1 scientific officer) provided in the 1982-1983 Budget for the immediate replacement of police personnel

* That future staffing of the Laboratory with Public Service scientific officers be determined by one of the formulae suggested in this report, until such time as another formula is derived. (See Appendix III, at p. 262.)

* That all 5 year staffing plans for the Police Force prescribe top priority to the staffing of the Laboratory with Public Service scientific officers and support staff, where these staff additions are recommended by the Assistant Commissioner (Crime)

THE ROLE OF THE FORENSIC SCIENCE LABORATORY: SUMMARY OF ISSUES RAISED BY WITNESSES

104 Arising from discussions with the Director and staff of the Forensic Science Laboratory, witnesses appearing before the Committee, and available reports, the following issues associated with delays in the Courts were noted as arising at the Forensic Science Laboratory:

* inadequate scientific staff, causing delays in analysis at the police investigation stage, the committal stage, and the trial stage

* inadequate accommodation

* inadequate equipment, requiring staff to use equipment elsewhere, with consequent delay

* lack of any relationship in staffing and other facilities to factors increasing or decreasing calls for analysis of evidence, particularly with regard to:
  - increase in police numbers
  - the operation of new legislation designed to increase the efficiency of the criminal justice process in relation to prosecution of particular types of offender
  - changes in policy toward the prosecution of particular types of offence
  - increase in particular types of offence for political, social and economic reasons

* high staff turnover due to inadequacy of conditions, workload, and (for police staff) lack of a promotional structure within the Laboratory system

* high level of continuous retraining required, due to police staff leaving the Laboratory when promoted to sergeant level

* problems for staff in relation to court appearances, when date of committal, trial or appeal is not certain, or when adjournments occur

* reports and recommendations on conditions at the Forensic Science Laboratory have not been acted upon so as to radically improve the situation

THE ROLE OF THE FORENSIC SCIENCE LABORATORY: PRELIMINARY CONCLUSIONS

105 In relation to the evidence given before it, its own observations of the Forensic Science Laboratory, and discussions with members of staff of the Laboratory, the Committee believes that the problems raised pertaining to the work and accommodation of the Laboratory are well founded. The Committee understands that, in relation to accommodation, the present premises of the Laboratory have been ruled a fire hazard by the Metropolitan Fire Brigade. A new building at Macleod to house the Laboratory is under way. In mid-1983 the Crime Scene Section of the Laboratory (comprising some 14 police officers) was transferred to Macleod. A vehicle examination facility and accompanying laboratories were established. This freed two rooms in the existing FSL Building in Spring Street, Melbourne. The Director of the Laboratory estimates that an increase of some ten staff would be possible due to this freeing of accommodation. As for transfer of all Laboratory staff to Macleod, this will not be possible until the final phase of the building is completed. Building is scheduled to commence in June 1984 and completion date is set at April 1986. In the short term, apart from an increase in staff to take up the space left by the phase one departure of officers to the completed portion of the Macleod complex, it is difficult to determine what can be done to effctively overcome the staffing shortage and accommodation problem at the FSL other than to urge the Government to give all support to the Macleod building project, so that it can be completed as soon as possible.

106 As there is already a problem with accommodating present staff levels, it is impossible to recommend that staff should be increased to a number which can appropriately deal with analysis and other work of the Laboratory. However, the Committee believes that staffing shortages must be overcome in order that the work of the Laboratory may be effectively carried out, so as to ease delays. The only approach the Committee sees open to it is to recommend that an increase in staff should be budgetted for, in terms of the requirements noted in the FSL Report, that increase to take place in stages, with an initial increase as can be accommodated at Spring Street, and optimum increase when the Laboratory building at Macleod is completed. Staffing levels should take into account:

* CIB numbers, as the work done by individual CIB officers affects the amount of analytical work necessary to be done by the Laboratory
* current work loads at the Laboratory
* growth projections of various types of crime and the need for related forensic services

Consideration should be given to the effect on work load and staffing in relation to police numbers as a whole, due to the recent introduction of "Crime Screening". This practice means that police officers carry out investigations into minor crimes, leaving the major offences to be dealt with by the CIB officers. Therefore not only is the Laboratory at present dealing with analysis of evidence collected by CIB officers, but also that collected by police officers investigating minor crimes.

THE ROLE OF THE FORENSIC SCIENCE LABORATORY: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 3

107 The Committee recommends that the Government should ensure that the new Forensic Science Laboratory at Macleod is completed in as short a time as possible.

RECOMMENDATION 4

108 The Committee recommends that staffing levels at the Forensic Science Laboratory should be increased, taking into account current and projected workloads, and accommodation, so that ultimately when the Macleod building is completed, numbers of staff for each section of the Laboratory transferring to Macleod will be increased to the level required to properly undertake Forensic Science Laboratory Work.

RECOMMENDATION 5

109 The Committee notes that various factors are relevant to the staffing levels of the Forensic Science Laboratory, including the number of CIB officers, police numbers generally, law enforcement policies, and growth projections of various types of crime and the need for related forensic services. The Committee therefore recommends that the evidence in this Preliminary Report relating to this issue should be referred to the Minister of Police to be taken into account by the Neesham Committee in its current review of police.

THE ROLE OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS/CRIMINAL LAW BRANCH

110 In 1982 the Director of Public Prosecutions Act established the Office of the Director of Prosecutions in this State. There were two aims in establishing the Office. One was to appoint an officer with the statutory responsibility for conducting prosecutions in indictable matters, that officer having statutory independence (with like status of a Supreme Court Justice), and who would be free from day to day political control. The second aim was to reorganise the administration of the preparation of indictable cases in Victoria. Until the establishment of the Director of Public Prosecutions Office, responsibility for preparation of indictable cases had rested with the Preparations Section of the Crown Law Department. Reorganisation was essential in that delays had already been identified as occurring in the work of the Section. In 1982 there were in excess of 900 cases awaiting trial, and there was no adequate over-all supervision of the work being carried out. (See generally Speech made by the Attorney-General, the Honourable J.H. Kennan, MLC, 4 November 1983.)

111 The Director of Public Prosecutions gave evidence to the Committee on two occasions. The Director of Public Prosecutions Act 1982 charges the Director of Public Prosecutions with the general responsibility to prepare, institute and conduct on behalf of the Crown, criminal proceedings in the superior courts - the County Court, the Supreme Court and the High Court. The DPP has the power to enter a nolle prosequi (that is, a formal indication to a court that an accused person who has been committed for trial will not in fact be prosecuted). That power formerly lay with the Attorney-General alone. The Attorney-General retains that power, together with the DPP, under the Act. When the authority or consent of a law officer is required for the commencement of proceedings by police or other prosecuting authorities (as in the case of incest charges) the Director of Public Prosecutions is deemed an appropriate law officer under the Act. Additionally, the DPP is empowered to prepare, institute and conduct any preliminary enquiry into criminal proceedings before a magistrate or to take over and conduct any proceedings for a summary offence or for an indictable offence tried summarily. On behalf of the Crown, the DPP may assist a coroner or instruct counsel assisting a

coroner at any inquest. Other powers of the D.P.P. are outlined in the Director of Public Prosecutions Act 1982, (See Appendix IV at p. 289; and also The Role of Prosecutors for the Queen/Crown Prosecutors, at pp. 73.)

112 When Mr. Phillips appeared before the Committee in March 1983 some two months after his appointment to the position of D.P.P. had been announced but prior to officially taking up that appointment in June 1983, he spoke of the delays occurring in case preparation in the Preparations Branch. He said:

> *I have found, in the past two months, that the preparation of cases for the Supreme Court and the Full Court of Appeal, and for the appeals that are heard in the County Court from the decisions of magistrates is reasonably satisfactory. But I cannot say the same for the preparation of criminal cases for the County Court in Melbourne.*
>
> *When I was appointed at the end of January some 796 people were awaiting trial in the County Court of Melbourne. This is utterly unacceptable and the backlog of cases which are not ready for trial has existed for as long as I can remember. The problem is that there are insufficient prepared cases to be tried by the judges of the County Court.* (Phillips, oral evidence, 30.3.1983, at p. 51.)

He went on to inform the Committee that during 1982 the Chief Judge of the County Court provided twelve courts for the major part of the year, to be available for the hearing of criminal cases. However, due to the lack of prepared cases the disposal rate of the court during that period was only six per cent better than the input of cases committed for trial. As a consequence, the backlog which stood at 878 at the end of December 1981 was reduced only to 790 over the twelve month period:

> *Furthermore, my enquiries have shown that during the year, to keep the work up to the judges, a large number of the easier cases were prepared and put before the court, leaving a solid residue of the more difficult and complex cases untouched.* (Phillips, at p. 52.)

113 Receipt of Depositions. Delays arising generally in the system, and in particular in relation to the work of the Preparations Section of the Criminal Law Branch, were the subject of reports produced by the Flanagan Committee (appointed by the then Attorney-General, the Hon. John Cain, M.P., to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne). In its First Report that Committee commented upon one aspect of the process which lay outside the control of the Preparations Section, but which caused delay in the work of that Section. It said:

> *The first major delay which occurs in the presentation of an accused for trial results from the unacceptable time which is currently taken to record the committal proceedings. When a person is committed for trial there is an average delay of six weeks to three months before the depositions in respect of such person reaches the Crown Law Department. Indeed, in some cases of complexity and length the delay may even amount to five or six months.* (First Report, at p.3.)

(See also Flanagan First Report, Appendix VA, at p. 301.)

114 It was pointed out that priority in the listing of trials must be given to cases where an accused is in custody and, by way of section 47A of the Magistrates (Summary Proceedings) Act 1975 to prosecutions for rape and allied offences. The Report continued: "We are aware of one case where an accused has had to remain in custody for a period of three months because the depositions of his committal had not been brought into existence ... such situations are absolutely unacceptable". (First Report, at p. 3.)

115 In Victoria the determination of whether a matter is to proceed to trial or not is made by a Prosecutor for the Queen, subject to review by the Solicitor-General and the Attorney-General (now by the DPP under the Director of Public Prosecutions Act 1982). As a result of long delays occurring before depositions are available, " ... the decision to prosecute is in fact occurring far too late in the procedures adopted with respect to accused persons". Consequently that Committee recommended that the Court

Reporting Branch should no longer be responsible for recording and typing up of all depositions; rather, independent contractors should be engaged to record evidence in all committal proceedings, with the requirement that such contractors should produce depositions within fourteen days of the committal: "... any further period of time [would be] unreasonable". (First Report, at pp. 3-4.)

116 The Second Report of that Committee pointed out that the position "has now been rectified":

> *The Court Reporting Branch no longer bears the responsibility for the typing of all depositions. Independent contractors are now engaged to record the evidence in committal proceedings and are required to produce those depositions within fourteen days of the committal. Our enquiries reveal that they are generally delivered within ten days.* (Second Report, 27 June 1983, at p. 3.)

Implementation of the new procedure has, according to that Committee, "eliminated an average delay of six weeks to three months" hitherto existing prior to depositions reaching the Crown Law Department. It was noted that in cases of complexity, the delay in the past "amounted to five or six months". (See also Flanagan Second Report, Appendix VB, at p. 315 .)

117 When he appeared before the Committee in March 1983 the DPP said that depositions and statements were received "about two or three weeks after the defendant ha[d] been committed for trial". At his subsequent appearance in June 1983, Mr. Phillips agreed that "generally speaking" there was no problem with receiving typed depositions within a reasonable time from committal proceedings. Mr. Phillips reported, however, that he had received a complaint where "in a recent case it had taken six weeks [for typed depositions to be received], but it is generally two weeks or so". (Oral evidence, 1.6.1983, at p. 110.)

118 Stenographic Officers. The task of preparation officers in the Criminal Law Branch is to read the depositions and other statements of prosecution witnesses when these are received by the Branch. The officer dealing with a particular case then studies the charges already laid by the police, sends out in written form a list of queries to the police officer in charge of the case in order to obtain any further information considered necessary, and then writes out in longhand a draft presentment or formal charge sheet. On this procedure the DPP stated:

> *Because there is a typing pool at the Criminal Law Branch, all correspondence is initially written out in longhand by the officer in charge and then given to a messenger who takes it to the pool where it is typed. If it comes back with errors, the whole process is undergone again. Having written out a draft presentment, this is typed together with a short resume of the case and delivered by way of a brief to one of the Prosecutors for the Queen. If the prosecutor is satisfied with the presentment, it is signed and then becomes a document capable of being filed in the court.* (Phillips, oral evidence, 30.3.1983, at p. 52.)

119 Preparation Officers. Within the Preparations Section itself, before the introduction of the Office of the Director of Public Prosecutions, problems leading to delays arose for a multiplicity of reasons. Prior to takeover of the Criminal Law Branch by the Director of Public Prosecutions, staffing shortages in the Branch were severe. (See for example Buckley, oral evidence, 18.3.1983, at pp. 85-87; Phillips, oral evidence 30.3.1983, at pp. 49-66; Phillips, oral evidence. 1.6.1983, at pp. 96-114; Waldron, 23.3.1983, at p. 47.) Witnesses before the Committee said an overview of administration and staffing was undertaken by a three member review Committee. (See Appendix VI, at p. 324 .) Inexperience of officers was an issue, compounded by the difficulty of retaining those officers who had built up some expertise. Additionally, a promotions system was non-existent, prompting those who wished to advance to leave. Mr. Buckley, now Solicitor to the DPP, told the Committee:

One of the problems we have experienced in the [Criminal Law Branch] has been that of holding on to good experienced people. The criminal jurisdiction is not one which is ....favoured by good lawyers to stay in for too long, particularly with .... and solicitors for the Crown. Our experience has been that after gaining some experience the better ones have sought to go to the Bar. It is a very good training ground for the Bar. Alternatively, they go into private practice or to broaden their experience in other legal offices or other areas of the Public Service.

The result of that has been that whilst we have what appears to be a number of lawyers - 40 [as at 18 March 1983] - there are very few with any real experience. That was demonstrated only several weeks ago when for an organised crime case I was required to supply one experienced, reliable person of integrity for the case, and it took me three days to extricate that one person. These demands are being made almost weekly. (Oral evidence, 18.3.1983, at p. 86.)

At this time, the average length of stay in the Department was noted to be less than two years, whilst "... it takes at least 12 months for them to become efficient enough" for the Branch to make good use of them. The salary for a recruit lawyer is $18,000 to $23,500. The minimum is paid to those with virtually no experience. Having been appointed, there is automatic progression after one year in the Public Service together with four years' experience of work of a legal nature. A person entering with three years' experience outside the service who adds another one year's experience in the Public Service doing legal work will automatically progress to the higher level of $25,000. Thereafter any increase is by promotion. For many, the Branch is used as a training ground. (At p. 87.)

120 In giving evidence to the Committee in June 1983, the Director of Public Prosecutions agreed that the severe problems experienced in relation to preparation of cases for trial had arisen out of lack of staff and the lack of experience on the part of staff in the Criminal Law Branch. He indicated to the Committee that steps had been taken to overcome the staffing problem.

Further, measures were in train to ensure that experience could be accumulated by officers, by reorganising the Branch so that incentives exist in the way of a promotions system. That system should operate to hold experienced lawyers and make better use of their expertise.

121 Prior to June 1983, the date upon which Mr. Phillips officially took up his position as Director of Public Prosecutions, a review of Criminal Law Branch staffing and administration was undertaken in anticipation of its becoming the Office of the Director of Public Prosecutions. Various requirements - including increased staffing - were approved by the Attorney-General. Ten positions for legal officers were approved and persons appointed to those positions. On 1 June the Committee was informed that an additional 37 positions were created and advertised. These positions were for legal officers, administration officers, clerical assistants and stenographers. Including the earlier 10 legal officer positions, the new complement of the Office is a total addition of 47 above the original complement. (Phillips, oral evidence, 1.6.1983, at p. 97.)

122 The Committee appointed by the Attorney-General also drew attention in its First Report to what it termed a tendency which had developed "whereby at committal proceedings the prosecution only tendered before the Court so much material as it believed would be necessary to obtain the committal of the accused". That Committee commented on this issue in its Second Report:

> ... *whilst this had the undoubted advantage of shortening the time taken upon committal, it caused considerable delay in the ultimate presentation of the accused for trial.* (Second Report, at p. 3.)

This delay resulted because the preparation necessary for the trial was more difficult. However, consultations were held with the Chief Commissioner of Police and as a result a Police Standing Order was drawn up requiring the Informant in any prosecution for an indictable offence "to ensure that all relevant material in the possession of the police which was not led at the committal proceedings to be in the hands of the Office of the Director of

Public Prosecutions within fourteen days of the date of committal. Following the introduction of this practice, which is working well, ... a further delay in the trial process" has been eliminated. (Second Report, at p. 3.)

123 Reorganization: Personnel and Specialist Teams. Organisational changes within the Office were also in train at that time. The DPP told the Committee:

> *[Under the old system work was organised with officers] making up four teams of approximately ten staff. I reached the view they were not working properly as teams. [The teams] were too large, lacked cohesion, and were not achieving the sort of results to be expected from a team system.*
>
> *Taking into account the additions ... I have decided there will be nine teams, eight of five persons and one of six. My reasons for this alteration are those already adverted to - that previous teams were too large and unwieldy. Secondly, the need to provide promotional opportunities within the Branch [to] hold staff ... [Previously] they were going to other departments [or leaving the Public Service] because the Branch lacked promotional opportunities. There were four jobs being competed for by forty people.* (Phillips, oral evidence, 1.6.1983, at p. 98.)

Under the new system, each of the teams has a leader, with promotional opportunities also being created below that position. Teams now comprise a mixture of legal officers at Grades 1, 2, 3, and 4. Positions of team supervisors now exist at legal officer Grade 4 level, with more senior positions - approximately four in all - of legal officers appointed at Grades 5 and 6. Additionally, a senior administrative officer is appointed at the level of SES Grade 1, the lowest grade in the new executive classification in the administrative section of the Public Service.

124 The Director informed the Committee:

> *A small personnel section of four people is to be created within the Directorate. I am satisfied ... that things run much more effectively if a personnel section exists within an operation. A position exists there for a legal officer Grade 6. The incumbent should be a research and ideas person, someone who can look ahead to possible areas of difficulty and alert me to them. A consultative committee has also been established as an 'ideas resource'.* (At p. 98.)

125 During his evidence the Director indicated to the Committee his plans for organising specialist teams. He described the specialist work to be undertaken by teams.

> *One team will obviously [handle] rape cases. That is a specialist area. The people in the team in the main put themselves forward, and work up an affinity for the work. They have close professional relationships with the particular police squads involved. As to the other teams, there seems to be no bridge between particular police squads and my Directorate. For example, the Homicide Squad have their own methods of preparation. The Fraud Squad have their own methods, and the Arson Squad have their own methods of preparation or their own way of doing things. At the moment the people in my office do not necessarily understand the specialist way each of these squads operates. One option open to me is to relate particular teams to particular squads or to relate particular teams to particular classifications of offences.*
>
> *The question also arises of whether people remain constantly in the same teams, or whether the system should rotate the members [to give each individual broader experience in the varied work of the Office].* (Phillips, oral evidence, 1.6.1983, at p. 104.)

The DPP also stated that each of the nine teams will have a clerical assistant attached to undertake photostating and filing and a stenographer, "making them

a complete unit in themselves". All staff have been consulted and "are quite happy" about the restructuring. (At p. 106.)

126 Training of Preparation Officers. The issue of training of preparations officers was also acknowledged by the DPP to be a problem of some magnitude. Some officers had stated to him that they were "simply brought into an office in the past [on joining the Section] and told, 'Here are your files, start preparing them'." A set of instructions existed, which Mr. Phillips rewrote, but he added that "there just seemed to be no logical method taught to the preparation officers about preparation". He continued:

> *I was always taught it was necessary to identify the ingredients of the offence contemplated as going to trial, then write them down, and on another page write down those pieces of evidence available in proof of each ingredient. Then it would be immediately obvious whether or not there is a case. Yet when I spoke with different people in the Preparations Section about this method, they had never heard of it.* (Phillips, oral evidence, 1.6.1983, at p. 111.)

The DPP then assigned Mr. I. Heath and Mr. J. Hassett, Prosecutors for the Queen, to write a pro-forma of every offence, to be published in a book for prosecutors and others, entitled Indictable Offences in Victoria.* The forms would have the ingredients of each crime and their source, either statute or common law. A small section containing associated offences would be produced as a part of the book to cover the contingency, which occurs reasonably frequently, where the evidence is stronger or alternatively, weaker, after committal and it might be necessary to look at similar offences which could be used instead of the original offence charged. Additionally, the book would contain a presentment for the various offences with annotations. Every officer in the Preparations Branch (or Office of the Director of Public Prosecutions) would receive a copy. Thus, immediately upon receipt of a brief each officer

*This book is now available from the Government Printer.

would be equipped to select the relevant pro-forma and proceed with preparation. Mr. Phillips described the book as a "self-starting mechanism". He said: "It is not to be regarded as a substitute for proper scholarship and research, but it is a start." (Oral evidence, 1.6.1983, at p. 111.) (The book was published in October 1983.)

127 In addition to the handbook for prosecutors, the DPP informed the Committee that he intended to introduce in-house training for all members of the Preparations Section. Classes would be scheduled from 8.00 a.m. to 9.00 a.m. and all officers had signified a willingness to participate in the training programme. (At p. 112.)

128 Case Monitoring. In its First Report, the Flanagan Committee raised the problem of monitoring of criminal cases passing through the preparations stage at the Criminal Law Branch. They considered it necessary to introduce an improved system for checking the whereabouts and state of preparedness of every case at any time. That Committee said:

> *Good office management indicates that there should be a central checking system. We have in mind a system whereby one person is responsible for auditing the entire caseload on hand on at least a weekly basis. We therefore recommend that ... one legal officer of suitable seniority and expertise be appointed to fulfill the function of supervisor of progress of cases.* (First Report, at p. 8.)

129 The lack of a monitoring system in the Preparations Branch was commented on by a number of witnesses. The Director of Public Prosecutions agreed that lack of a monitoring system causes delays and requires rectification. When he was appointed to the position, he told the Committee, he "sent for the 50 oldest files in the Branch". He was "surprised to find that they were by no means all 'too hard basket' cases. Many of them were perfectly simple, straightforward cases which had been lying in the Criminal Law Branch

for years. Some of them concerned offences allegedly committed in 1975 and 1976". He continued:

> *I further found to my even greater dismay that there was no system of monitoring cases in the branch. There was not even a card index which indicated the state of any particular file. I was told that supervision took place but often on enquiry this amounted to no more than the noting - and I presume by inference - the condoning of inactivity. I found other cases where a brief had been delivered to a barrister in Owen Dixon Chambers years ago and had never been completed. The work had thus remained undone for years, and I found other cases where two files existed with respect to the same group of offences. In other words, there were perhaps four offenders, the cases against two were being prepared by one officer in the branch in complete ignorance of the fact that another officer was preparing a case against the other two.* (Phillips, oral evidence, 30.3. 1983, at p. 52.)

Mr. Phillips concluded that, in short, the Branch was "grossly deficient" in administrative procedures and lacked an administrative component. He stated that the officer in charge "... is primarily a solicitor and he has had an enormous amount of legal work to do. He has just not had the time to attend satisfactorily to the substantial administrative work that should be undertaken". (At p. 52.)

130 Without a monitoring system, the DPP considered there existed within the Criminal Law Branch "a pervading lack of urgency, ... both from the prosecution and defence, and apart from some very small areas where there are time frames in which things have to be done, there are just no other time frames in the system at all". This is the cause of the sense of lack of urgency. To overcome the problem, Mr. Phillips introduced a monitoring system within the Branch. At his meeting with the Committee on 1 June 1983 he reported that a card index was being assembled, a card representing each case coming into the Branch. Where necessary a memorandum requiring action would go to the relevant officer dealing with the case. At that date, the Attorney-General

had approved in principle the purchase of a micro-computer and a word processor to be assigned to the Branch to maintain the filing and monitoring system. Mr. Phillips envisaged the system would operate in the same way as the incoming filing system operated by the Public Service Board:

> *[The first information would be] the date the papers come into the Branch. At the Public Service Board, as soon as a file comes in it is registered in the computer and allotted to a particular sub-department head. That person then puts a time frame on the work to be done on that file. In the event that the time frame is not adhered to, a printout comes automatically to the departmental head. In that way the departmental head is alerted to what has not happened.*
>
> *I anticipate a system whereby the Court and my Office use the computer so that the Court knows immediately a person is committed for trial and knows that the Crown has to make presentment in that case, say within three months. The Court would send out a notice a fortnight before the three months is up, reminding (if it is necessary) that the case must come on before a certain date or an application for extension of time must be made.* (Oral evidence, 1.6.1983, at p. 106.)

131 Instruction in Court. The Flanagan Committee noted a final problem area in the preparation of cases at the Criminal Law Branch stage. This related to the procedure whereby the preparation officer having charge of a particular case followed the case to court, instructing in the matter. In its First Report that Committee recommended that the procedure be discontinued. The Report commented:

> *Many of the cases heard in court do not require the attendance of the preparation officer, and a more junior official to act as the instructor would be quite adequate. The preparation officers should generally spend their time in preparing cases. There must of course be exceptions to the general rule for the purposes of long or complicated cases. However, allowing for such special circumstances, we believe that the*

time of the preparation officer should be spent basically in preparing the case for trial. (First Report, at p. 9.)

As the Flanagan Committee pointed out, many of the cases prepared for trial take a lengthy time upon hearing, and that time "would be much better utilised by experienced preparations officers in the preparation of other cases". (See also Hollis-Bee, oral evidence, 23.8.1983, at pp. 233a-234; Read, oral evidence, 23.8.1983, at p. 234.)

132 In his evidence to the Legal and Constitutional Committee the Director of Public Prosecutions also referred to this practice and foreshadowed it would cease upon the restructuring of the Preparations Branch and its becoming the Office of the Director of Public Prosecutions.

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS/CRIMINAL LAW BRANCH: SUMMARY OF ISSUES RAISED BY WITNESSES

133 To summarise, the problems witnesses indicated to the Committee as occurring at the preparations stage included:

* unacceptable lapse of time between the conclusion of a committal proceeding and the production of depositions to the Criminal Law Branch

* staffing shortages in the Criminal Law Branch

* inexperience of staff in the Criminal Law Branch

* no career structure in the Criminal Law Branch, leading to high turn-over of officers

* an insufficient amount of material tendered at committal proceedings, so that delay was caused in preparation officers having to chase up further information from police before preparation could continue

* delay in transcription of long-hand materials prepared by preparation officers and typed at the Criminal Law Branch

* inappropriate organisation of teams in the Branch, so that team-work was not carried out to the optimum advantage

* lack of a personnel section in the Branch

* lack of any defined mechanism for taking into account and utilising the ideas of the various sections, and their expertise in relation to organisation and operations

* lack of liaison between teams of preparation officers and support staff with police operating in various investigatory divisions of the Victoria Police.

* lack of a system of monitoring cases coming into and passing through the Preparations Branch

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS/CRIMINAL LAW BRANCH: PRELIMINARY CONCLUSIONS

134 The Committee notes that in drawing up its Second Report, the Flanagan Committee alluded to the previous problems creating delay in the Preparations Branch, and the encouraging changes taking place with the creation of the Office of the Director of Public Prosecutions. The Report said:

> *... the creation of the Directorate of Public Prosecutions and the expansion of staff will greatly improve existing procedures relating to prosecution. ... We have little doubt that the new Directorate with its greatly increased [staffing] will greatly increase the reservoir of prepared cases ready for trial at any given time. We also anticipate that those ... trials will be prepared in a much shorter time than hitherto ...*
> (Second Report, at p. 4.)

135 The Legal and Constitutional Committee endorses these comments, and notes that the evidence given to it by the Director of Public Prosecutions confirms that administration and work within the Preparations Section (now the Office of the Director of Public Prosecutions) has been reorganised so that delays previously occurring should not continue. The court statistics have improved since the Director of Public Prosecutions was appointed and began this reorganisation in March 1983. In 1982 the statistics showed 920 cases awaiting trial. In mid-1983 the backlog of cases had fallen to 700 cases, and to 620 in August 1983. In early 1984 the number had dropped to 600.

136 The Committee commends the efforts of the DPP to upgrade the training of personnel in the Office of the Director of Public Prosecutions. It notes the publication of the book Indictable Offences in Victoria by Mr. John Hassett and Mr. Ian Heath, and believes that this will prove to be an invaluable tool for all working in the prosecutions area.

137 The Committee sees as fundamental to any reduction in delays the increase that has occurred of staff in the Office of the Director of Public Prosecutions and the concept of liaison between teams of officers and relevant police squads, as suggested by the DPP (Further on this issue, see comments on the Commercial Crime Group, Hollis-Bee, oral evidence, 23.8.1983, at p. 224; also The Role of Prosecutors for the Queen/Crown Prosecutors, at p. 73.)

138 The Committee notes that the Flanagan Committee has undertaken to continue to monitor the preparation of trials and make recommendations as deemed necessary.

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS/CRIMINAL LAW BRANCH: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 6

139 The Committee commends the Director of Public Prosecutions in reorganising the preparations work in the Criminal Law Branch, and recommends that the Attorney-General should continue to give the Office of the DPP full support in current efforts to streamline the process and to decrease delays.

RECOMMENDATION 7

140 The Committee notes that the Flanagan Committee is continuing to monitor the preparation of trials to ensure that previous delays no longer occur and recommends that the Committee should continue to be supported in its work by the Attorney-General.

THE ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS

141 Prosecutors for the Queen in Victoria exercise powers akin to those of the grand jury as it existed in England at the time of colonisation of Australia. Their role (amongst other functions) is to determine the charges upon which accused persons should be presented for trial, and if indeed accused persons should be presented for trial or whether a nolle prosequi should be entered. The term "Prosecutors for the Queen" denotes salaried counsel who are appointed to the position by the Crown. "Crown Prosecutors" are counsel of the independent Bar who are briefed by the Prosecutors Office (now coming under the direction of the Director of Public Prosecutions) to appear as prosecutors in individual cases.

142 The role of prosecutors is not to "press for conviction" of an accused. Rather they should regard themselves as "ministers of justice" assisting in the administration of justice, not as advocates: Reg. v Puddick 4 F. & F. 497, 499, per Justice Compton; R v Banks [1916] 2 K.B. 621, 623; also Kenny's Outlines of Criminal Law, 17th edition, at p. 569; Kidston, "The Office of Crown Prosecutor" (1958) 32 ALJ 148; Read, oral evidence, 23.8.1983, at pp. 203-204.)

143 Duties of Prosecutors for the Queen. In evidence before the Committee, a Prosecutor for the Queen outlined the functions of the office under three headings:

(a) *Indicting Authority - including the following activities:*

- *determination as to whether an accused should be presented for trial at all*
- *determination of the appropriate charges to be laid against a particular accused*
- *advice to the Director of Public Prosecutions in relation to the possible entry of a nolle prosequi*

- *acceptance of offers to plead to a lesser charge than that which might properly be laid*
- *provisions of advice to barristers briefed to prosecute particular trials*

(b) *Prosecution of Trials*

Prosecutors for the Queen perform work of the kind performed by barristers in private practice who are briefed to prosecute ...

(c) *Appellate Work*

Prosecutors for the Queen have the responsibility of preparing and conducting, on behalf of the Crown, appeals in the Full Court and in the High Court. This ... involves ... perusal of the transcript of the trial and/or plea and the settling of a summary to be provided to the Court. It also involves ... preparation of argument and in that regard ... it is usually necessary for the Prosecutor to be ready to deal with a number of arguments which in the event are not pursued by the appellant. It also involves the actual appearance to conduct the appeal." (Hassett, oral evidence, 23.8.1983, at pp. 192-193.)

The role of indicting authority can be filled only by a Prosecutor for the Queen (or the DPP) not by a barrister in private practice appointed to conduct a particular case.

144 Within the Office of the Director of Public Prosecutions, permanent prosecutors (Prosecutors for the Queen) are assigned to work on a monthly basis. Permanent prosecutors are allocated to chamber work to handle indictments, trials, or appeal matters. Where complex committal proceedings are in question, a Prosecutor for the Queen may be assigned to deal with the case. Similarly in the instance of Coroner's Court, permanent prosecutors may be assigned to assist in a particularly complex or important inquest. There are currently 13 permanent prosecutors.

145 The Committee was informed that in practice Prosecutors for the Queen conduct all appellate work and all work in the Supreme Court. Mr. Hassett, a Prosecutor for the Queen, added:

> *The appellate work performed by Prosecutors for the Queen serves to ensure that they are kept fully abreast of the law. In addition, the experience and knowledge acquired and practised in fulfilling the function as an indicting authority and in dealing with appellate work, is of very substantial assistance in efficiently conducting the prosecution of a trial.* (At p. 193.)

146 Mr. Hassett suggested that in order to reduce delays in the courts, essentially what must be done is to shorten the length of trials. He stated that this could be effected by using a permanent prosecutor in the majority of, or all, indictable cases, because their "comparatively greater expertise ... as compared to counsel who is briefed to prosecute" means that they are better able to deal expeditiously with preparation and trial. Furthermore, as a result of expertise, a Prosecutor for the Queen has a "greater degree of confidence ... in exercising judgment as to the conduct of the trial." Consequently, there is likely to be a lesser number of witnesses called, with less time spent in leading evidence from each witness. He continued:

> *[With] legal arguments arising during a trial, the permanent Prosecutor has an advantage arising from ... greater familiarity with legal principles and this generally reduces the time spent on such arguments. Furthermore, as a result of [the] combination of both ... confidence and ... expertise, the permanent prosecutor is more likely to accept a realistic offer of settlement."* (At p. 193.)

The value of employing permanent prosecutors was described in cost benefit terms: assuming that the daily cost of a barrister engaged in preparation is $500 and the daily cost of a trial is $5,000, if by spending a week in preparation a prosecuting barrister is able to shorten the trial by as little as one day, "the community will be well served in economic terms". As an example:

I spent about a month last year preparing a trial which was expected to take about 5 weeks. On the day preceding the commencement of the trial, the accused decided to plead guilty, no doubt as a consequence of the strength of the Crown case, disclosed as a result of the preparation. The cost to the community of my preparation (about $7,000) may be compared with the envisaged cost of the trial (approximately $125,000). (Hassett, oral evidence, 23.8.1983, at p. 194.)

The cost of $5,000 a day for a trial is "a conservative estimate". (At p. 198.)

147 Chamber Work. The Committee heard evidence on the work undertaken in chambers by permanent prosecutors. Three permanent prosecutors are allocated to chamber work each month and approximately ten briefs arrive each working day. Under section 353 of the Crimes Act 1958 the Director of Public Prosecutions or a Prosecutor for the Queen is empowered to present a person for trial on any indictable offence. The determination of whether or not a trial should take place is made after work in chambers. It was explained:

That means that, before [a permanent prosecutor] can sign a presentment for murder, for instance, it is necessary to read all the papers (these consist of the police brief, the depositions from the inquest - which could be voluminous) and obtain any other necessary material from the police. Having obtained all material, it is necessary to assess whether the facts amount to the crime of murder. If the [Prosecutor for the Queen) determines they do, that prosecutor signs the document known as a presentment. The accused is then presented for trial for murder. (Read, oral evidence, 23.8.1983, at p. 231.)

With Supreme Court trials (such as murder trials), a permanent prosecutor does the chamber work and appears in the trial. With cases in the County Court, a permanent prosecutor does the chamber work. That prosecutor does not necessarily appear at the trial. Indeed, the Committee was told that County Court work is frequently "farmed out" to members of the private Bar, due to permanent prosecutors being engaged in Supreme Court and appellate work. (See generally Read, oral evidence, 23.8.1983.)

148 The entire burden of preparation does not, however, fall upon the permanent prosecutors. The Office of the Director of Public Prosecutions is involved in initial preparation of briefs. An officer from the DPP obtains the depositions, police brief, witness' statements, and drafts a presentment. The presentment ordinarily includes a short memorandum of problems arising in the case. Mr. Read commented on the process followed by a permanent prosecutor undertaking chamber work, and working on such a brief:

> *Preparation [is then carried out by the Prosecutor for the Queen]. That may [entail] not only a signed presentment, but also a two page written advice on evidence relating to matters done that perhaps the younger and less experienced preparation officer has forgotten. Perhaps a witness has been overlooked, or perhaps technical proofs and handwriting have not been attended to. I advise on that. That takes a lot of time and that can be done only by a Prosecutor for the Queen. This involves making decisions and applying knowledge gained through experience as a barrister, as distinct from someone who is a barrister in private practice who perhaps would not have all that information available, ... or the necessary experience to allow [that prosecutor] to make the correct decision as to the charge to be laid, or whether a person should or should not be presented.*
>
> *The work is time consuming, but it cannot be rubber-stamped by any officer of the Director of Public Prosecutions.* (At p. 232.)

149 Organisation of Specialist Prosecuting Teams: Commercial Crime Group. In explaining how delays may be reduced in courts, with the best use being made of resources and greatest advantage being taken of the expertise of permanent prosecutors, Mr. Hollis-Bee, also a Prosecutor for the Queen, described to the Committee the work and organisation of the Commercial Crime Group. He outlined the activities of the Group in the following way:

> *1 Interdepartmental Liaison and Co-operation to investigate complex commercial cases, a team approach is adopted. The team consists of police investigators, solicitor instructing and a Prosecutor for the Queen.*

The over-all benefits of this approach include:

i *the sharing of technical innovations;*

ii *the conversion of the linear sequence of investigation to prosecution to a parallel mode, in which the work of the prosecution is being carried out simultaneously with that of the investigators, thereby saving much time;*

iii *the availability of advice during the investigation enables the investigators to direct their activities in the most economical direction and be able to respond rapidly to the legal requirements of proof, without having to return at a later stage to rectify deficiencies in proof;*

iv *the interchange that occurs during the course of the investigation allows for the early formulation of appropriate charges and consequent crystallization of issues.*

2 Continuity of Personnel gives rise to both a familiarity with styles of crime and allows for the formulation of effective strategies to deal with investigation and prosecution; without the necessity for basic retraining at the start of each investigation. There is a resultant saving in lead time. The developing expertise also allows for the early recognition of types of offences as the raw data is analysed.

3 Technical Innovations - The mass of material requiring to be analysed and catalogued in a commercial investigation involves a significant amount of [staffing] over long hours.

In order to attempt to keep up with the sophisticated methods adopted by the modern commercial criminal, the three Prosecutors for the Queen attached to the Group have recently pooled their own funds and, without cost to the Government, have purchased four microcomputers for use in connection with the operation of the Group.

This event may be seen as both an indication of the perceived magnitude of the problem of commercial crime presently facing the community as well as a demonstration of the urgent need for the law-enforcement arms of the State to provide modern facilities to try and combat it.

4 Delays Attacked

(a) *Structural Delay: The use of a team approach coupled with the introduction of data processing facilities will make significant inroads into this area of delay from the Crown side.*

(b) *Systemic Delay: The rapid production of indexes collation of the case for the prosecution - both at the committal and the trial stage will obviate some of the normal temporal requirements. In addition, the resource material so generated will tend to speed up formal court proceedings.*

(c) *Physical Delay: Not all delays in this area are amenable to intervention - there remains the ... hard work involved in tracking down material and witnesses. However, there are some areas where significant inroads may be made. A clearer identification of the issues at an early stage, together with more precise presentation of the prosecution case due to more comprehensive preparation will result in a reduction of court time. The cost-saving in this area alone is significant.*

Beyond the trial phase ... a precise presentation of a well-defined case reduces the likelihood of delays occurring by way of trials being aborted or successful appeals being made on the facts.

(d) Tactical Delay: It may properly be said that these areas are generally the weapons of the defence. With a promptly prepared prosecution case, it is more difficult to satisfy a tribunal [that] successive delays [are tolerable]. (Hollis-Bee, oral evidence, 23.8.1983, at pp. 227-228.)

150 Flanagan Committee Recommendations. In its deliberations, the Committee also had available to it the successive Reports of the Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne (the "Flanagan Committee"). In its First Report the Flanagan Committee commented broadly upon the work of Prosecutors for the Queen in Victoria, noting that it is "well recognised that the caseload of the County Court moves more efficiently and with greater expertise when permanent Prosecutors for the Queen are engaged to prosecute". (At p. 9.) The Report went on to remark that the reason for expedition is "no doubt due to the expertise [of permanent prosecutors] in this particular field, and their ability to readily ascertain the issues involved." Comment was made upon the number of permanent prosecutors, and a recommendation made that those numbers should be increased:

> *Prosecutors for the Queen indicate that because of inadequate numbers they are unable to regularly supply prosecutors for prosecution in the County Court. Usually their numbers permit of the allocation of only two of them, or perhaps three, in a given month. This is ... by reason of their commitments in other Courts and jurisdictions. At the present time the number of prosecutors is reduced by three by reason of two resignations and the illness of one. This seriously hampers their capacity to [staff] lists in the County Court. Quite apart from these three, we regard it as desirable that there should be an increase in their numbers. Having regard to the fact that the aim is to have fourteen judges sitting in crime in the County Court at any given time, we recommend the appointment of three additional prosecutors.* (First Report, at p. 9.)

(See also Flanagan First Report, Appendix VA, at p. 301.)

151 The Report also suggested that permanent prosecutors should be in a position to give further guidance to preparation officers instructing them when they sign a presentment: "Preparation officers are not nearly as experienced ...

and it is thought that matters could be greatly expedited in the Crown Solicitor's Office [now the Office of the Director of Public Prosecutions] if at the time a Prosecutor for the Queen signs a presentment ... in addition any advice on evidence regarded as desirable for the proper presentation of that case [is also tendered]." Such advice need not be lengthy, but should be adequate to direct a preparation officer as to what other evidence might be necessary.

152 In its Second Report the Committee Appointed by the Attorney-General commented that since their First Report "the position has worsened. It is now rare for a Prosecutor for the Queen to be allocated to the County Court except in circumstances which might properly be regarded as exceptional." It was noted that "generally those briefed to prosecute on behalf of the Crown in the County Court are too inexperienced". (At p. 5; see also Buckley, oral evidence, 18.5.1983, at pp. 90-91; Flanagan Second Report. Appendix VB, at p. 315.)

153 Having been presented with the foregoing evidence, the Committee notes there are competing assessments of court operations and causes of delay, in relation to the establishment of the practice of appointing permanent prosecutors. Some witnesses favour the system, advocating appointment of greater numbers of Prosecutors for the Queen. Other witnesses appearing before the Committee had alternative views.

154 Role of Crown Prosecutors. Several witnesses favoured the phasing out of the Prosecutors for the Queen system, at least to a large extent, to be replaced by more extensive use of the independent Bar. Professor Scott of the Law Foundation of Victoria described to the Committee the system of Treasury Counsel operating in England. Under this system, a small number of permanent prosecutors (Prosecutors for the Queen) is retained - "only about seven or eight in the whole country" - whilst the remainder of cases is handled by the private Bar (that is by "Crown Prosecutors"). He commented: "Treasury Counsel are more potent than here. The support they get from the Director of Public

Prosecutions is stronger than the [permanent prosecutors have had from the Criminal Law Branch] here." (Oral evidence, 18.3.1983, at p.92) Professor Scott added that the work done by the DPP in England in briefing Treasury Counsel "makes it possible for counsel to be [up before the court] tomorrow morning on a case [counsel] has never heard of before today". He noted also that the establishment of a DPP for Victoria could be calculated to improve the preparation and briefing process here.

155 Comment was also made on the English system by a member of the Victorian Bar, having had ten years previous experience at the Bar in the United Kingdom. He said that "by and large [Treasury Counsel] appear almost exclusively for the Crown, but in between they can appear or work for the defence on a private basis and appear on Legal Aid cases. They remain members of the Bar, are not salaried, but are paid a brief or fee with refreshers for the work they do". (Maidment, oral evidence, 16.11.1983, at p. 262.) Mr. Maidment told the Committee that it is his view:

> ... *there is some benefit ... in counsel appearing both for the prosecution and for the defence and swapping on a regular basis because ... it improves their performance and also cuts down the one-sided approach which may arise. [A one-sided approach] may have arisen through the salaried permanent prosecutor system. [The dual experience would] increase the chances of useful liaison between the two sides ... [I]t generally brings a fairer-minded approach to the prosecution of cases and perhaps provides for a better balanced case.* (At p. 262.)

Mr. O'Brien, Associate Director (Criminal Law Division), Legal Aid Commission, favoured counsel appearing for defence and prosecution, rather than being paid on a brief fee basis, "the better thing would be to have a panel of salaried counsel who would prosecute one day and defend the next ...". (Oral evidence, 27.7.1983, at p. 175.)

156 Opposing this view, two permanent prosecutors appearing before the Committee considered working at times for the prosecution and at other times for the defence would have its drawbacks. One said:

> *Prosecutors for the Queen ought to continue in their role as Prosecutors for the Queen. However, that does not preclude people at the Bar being briefed to specialise in criminal trials and doing defence work.*
>
> *There is good reason for not involving Prosecutors for the Queen in defence. I am involved in work which [relates to] gathering intelligence information concerning Royal Commissions and so on. If I were defending one of those people next week, I could use that against the State. This would be highly undesirable because one needs a body of people who can have access to intelligence information with no fear that it will be turned against them in defence.*
>
> *Most of those ... appointed Prosecutors for the Queen have had ten years at the Bar. They have done their share of defence work ... [A] specialist body of prosecutors is vital.* (Read, oral evidence, 23.8.1983, at p. 237.)

The second commented:

> *I [agree], with the further addition ... that in my experience of seventeen years as a defence barrister, if [an accused] were told by the instructing solicitor that a Crown Prosecutor was to appear in defence the following day, the rate of sackings would go up immeasurably.* (Hollis-Bee, oral evidence, 23.8.1983, at p. 238.)

157 For the other side, a third permanent prosecutor put a more favourable complexion on the proposition:

> *It would be desirable that there be some ... in-house defence counsel in the Legal Aid Commission [as well as permanent prosecutors]. It is also desirable for some cross-fertilization. A strong argument ... against the*

appointment of more Crown Prosecutors is that it limits cross-fertilization at the Bar. It would be an unfortunate situation if all prosecution work was done by permanent prosecutors. (Hassett, oral evidence, 23.8.1983, at p. 237.)

158 Time for Preparation. Three members of the Bar appearing before the Committee said they and other barristers consider that briefs should be delivered "up to a month or two or three weeks early":

The problem is, who will pay for the preparation ... The brief is delivered the night before. The prosecutor [from the private Bar] looking at it can say "I need this witness or that witness", which no one has considered. The tendency is because someone is not available, an adjournment occurs. Preparation is important and it is linked with the early delivery of briefs.

That is dependent also on certainty for a date of start of trial. It is difficult to have a situation where a member of the Bar prepares a brief and then sits around for days or weeks at a time waiting for a trial to get on. They lose a third or a quarter of each month when that happens. So preparation is important, briefing counsel early is important and getting the appropriate advice initially from the Crown, then listing with certainty are important factors ... (Barnett, oral evidence, 16.11.1983, at pp. 252-253.)

159 This was reiterated by a second barrister, who confirmed members of the Bar report that there is a policy of briefing at the "last minute, thereby avoiding large preparations fees to counsel". Mr. Maidment continued:

Clearly early briefing of competent counsel ... is the ... crux of the matter ...

[The] permanent prosecutors ... sign presentments. If the counsel is briefed to prosecute the trial at an early stage, in looking at the case ... on first glance [counsel] may think "That presentment looks all right". But when it comes to analysing the purpose of counsel's opening, what each witness says and how the various elements of the various charges are to be proved, that is when the mind is sufficiently focused on those issues for proper decisions to be made.

If counsel is briefed early enough, then it is possible to return to the permanent prosecutor who signed the brief and say, "Quite frankly, at first glance I would have agreed with [the charge] but have you thought about this, this and this which were not perhaps obvious to you when you read the brief, and in any event I think I need extra evidence." Then the [permanent] prosecutor might reply, "Well, having heard what has been said, I tend to agree with you. We will cut out some of those charges" ... From my own experience, until counsel has been briefed to be up front running that case, the ... issues [are] not sufficiently focussed for proper decisions as to whether further evidence is required and whether the proper charges are laid ... (Oral evidence, 16.11.1983, at p. 265.)

160 Delays in preparation were raised in another context by the Director of Public Prosecutions, who said:

The system fails to identify at an early stage cases where there is to be plea of guilty. This month 45 cases prepared as trials have resulted in pleas of guilty at the County Court. The reason for that is that presentments have only recently become available so that people have not known what they are charged with and consequently have not been able to make an informed decision as to whether to plead guilty or not guilty. (Phillips, oral evidence, 30.3.1983, at p. 57.)

161 The Committee heard further that a number of delays are caused where a plea is accepted "at the door of the court". Several witnesses stated that individuals were being prosecuted for very serious crimes, where defence counsel believed it would be more appropriate for a plea of guilty to be accepted by the Crown, in relation to a lesser charge which equated more closely to the crime committed and to the strength of the Crown's case.

162 Three members of the Bar, speaking in their personal capacity but stating that their views "cover the great majority of views of the Criminal Bar Association" (an Association of some 200 members), referred to this problem. One said:

> *We believe a lot of the problems are caused by trials getting to the door of the court where the indication is that there will be a plea which the Listing Director [has not been alerted to]. A judge puts aside time for a trial; the Listing Director is saying, "Here is a trial which will last a week", and the case finishes up as a plea or an adjournment. One answer is to deliver a brief early, have it prepared early, with everyone knowing what is to happen when the final decision is made.* (Barnett, oral evidence, 16.11.1983, at p. 252.)

163 Speaking of their own experiences, these members of the Bar alluded to the practice of the Crown briefing-out criminal matters to the private Bar. In their view, late delivery of briefs means a change of plea may be made at the last moment, thus creating uncertainty in the listing system and interfering with fixed times. This leaves vacant the particular court which has been scheduled to take the case; unless a good store of well-prepared cases is at hand, the gap may not be readily filled. This leads to waste of judicial time and delays which could have been avoided, had the plea of guilty been made known prior to the listing of the case and alternative cases been prepared and listed.

164 "Overcharging" by Prosecutors for the Queen. That permanent prosecutors charge accused with more serious offences than are warranted was said to be a problem by a number of witnesses. A member of the Bar said that "there is a tendency in more recent years for the Crown to aim at the top, hoping to land in the middle". That is, serious crimes are charged in the presentment in the hope that accused persons will be found guilty not necessarily of the most serious charges, but of some crime as close as possible to the most serious offence charged. Charges of conspiracy were noted as causing problems:

> *[Charges] of conspiracy are laid where it is pointless to charge conspiracy. [Cases arise] where there are substantive offences ... alleged by the Crown. Conspiracy invariably leads to drawn out arguments as to admissibility, what evidence is probative, what against the accused. One example is of charging conspiracy to traffic in drugs where there is clear prima facie evidence of specific drug trafficking transactions.*
>
> *Where there is no evidence to charge people with conspiracy to traffic in drugs ... it seems the Crown is doing it in an attempt to get before the Court evidence in a form where it can be admissible against an accused other than the person to which [the charge] directly relates ... [T]he Crown is often wrong in that complex legal discussions about conspiracy [intrude causing delay].* (Lovitt, oral evidence, 16.11.1983, at p. 258.)

The comment was made that "it comes back to the attitude of those ... signing presentments":

> *Without appearing over critical of Prosecutors for the Queen, it is not only difficult in the sense they aim at the top, but it is difficult then to get them to agree to arrive at the middle - in other words, to settle the case.*
>
> *Recently I was involved in a case of armed robbery where an offer was made of a plea of robbery. The principal accused had pleaded guilty and*

he was the one [carrying] out the robbery. [The others] ... were minions ... lurking in the vicinity ... The question was whether they were acting in concert, as part of a team with him.

Good reasons existed for the Crown to accept a plea for simple robbery. Although there were admissions ... there was little evidence that [the "minions"] had [known of] an offensive weapon, namely a knife. The Crown said, "Away we go", and away they went. The accused were acquitted of armed robbery, acquitted of robbery, and convicted of being accessories after the fact. That took seven days in the Supreme Court with three counsel. (At p. 260.)

165 Mr. O'Brien of the Legal Aid Commission also referred to difficulties arising because, he said, the Crown appears to be pursuing a policy of charging offenders with the most serious crime possible, where a plea to a lesser crime would have been more in keeping with the final result, following trial. He produced statistics relating to 1982. The statistics show that in 1982 in eight cases clients of the Legal Aid Commission were charged with attempted murder and went to trial on that charge. In each case, the Commission offered lesser counts. The offer was refused by the Crown, and the trial proceeded on the basis of attempted murder. In only one of the eight cases did the jury convict the accused of the charge put forward by the Crown - namely, attempted murder. In the remaining seven cases, the jury either convicted the accused of the count offered by the Commission as a plea, or acquitted the accused of all charges, or convicted on a lesser count. Referring to these statistics, Mr. O'Brien told the Committee:

It has been said to me by prosecution representatives that the fact that a jury verdict is the same as we offered to plead to, or a lesser count, there is no indication that our original offer was a reasonable one. I concede that in an isolated case. But when you get a pattern over a period of years and a multiple number of cases where the pleas that we are offering are either accepted at the door of the court by the Crown or alternatively the jury verdict is a conviction on the count we have

offered, that is a conviction on a lesser count, I say that pattern demonstrates that we are reasonable in our offers and that this is something that needs to be looked at and there ought to be more effective plea negotiation ...

... in the light of the figures, and what they mean in terms of resources, something has to be done ... From the position of the Criminal Division of the Legal Aid Commission all I can say is that the figures support my contention that the offers we make are reasonable, because there has been only one instance where a jury has convicted on a count higher than our offer - and that happened only recently. (Oral evidence, 27.7.1983, at pp. 172-173, 174.)

166 Mr. O'Brien also informed the Committee that there appear to be difficulties in communication between the Crown and the Listings Directorate, particularly in relation to notification of pleas. He provided the Committee with a submission originally given to the Flanagan Committee. That document covered March and April 1983. Mr. O'Brien's submission was made to the Flanagan Committee as a result of information supplied to that Committee, which Mr. O'Brien believed was incorrect.

167 The information given to the Flanagan Committee stated that 14 persons who had been listed for trial in March pleaded guilty immediately before commencement of the trial. Further, that 29 persons were in a similar position in April of that year. If this were true, the expenditure of resources in trial preparation and inconvenience caused to those individuals being required to come to court (including counsel, the judges scheduled to sit on the particular case, witnesses and others), or at least being put on standby in the expectation of being called to give evidence would be unjustified. Mr. O'Brien obtained a list of the names of the 14 people said to have pleaded guilty in March and the 29 said to have pleaded guilty in April. At the Legal Aid Commission, the names were checked against those of clients. Of the 43 persons named, the Criminal Division of the Legal Aid Commission acted for 30. A breakdown showed:

(a) three of those persons were listed as trials and in fact proceeded to trial

(b) two of those persons were listed for pleas and proceeded with pleas

(c) one of those persons was involved in a fitness to plead matter

(d) three of those persons pleaded to the presentment as provided

(e) one person changed his plea when the judge gave an indication that a non-custodial sentence would be imposed

(f) six of those persons were involved with co-accused who had indicated they were going for trial - in the case of each of those six, the Legal Aid Commission had advised both the Director of Public Prosecutions (the Crown) and the Criminal Listings Directorate that its client was pleading guilty

(g) nine of the persons pleaded to a lesser number of counts than those on the presentment - in one of these cases, not only was a plea to a lesser number of counts accepted, but also to less serious counts

(h) five of those persons pleaded to less serious counts than were on the presentment

Additionally, with respect to approximately half the 14 persons referred to in points (g) and (h) above, the plea ultimately accepted by the Crown was a plea that had been offered previously on behalf of the accused that had been rejected. (See Memorandum to Members of Attorney-General's Working Party, from Associate Director (Criminal Division), Legal Aid Commission of Victoria, 22.6.1983, at p.1.) Members of the private Bar also observed difficulties in communication between agencies. (Transcript, 16.11.1983, at pp. 251-268.)

168 The Committee was then informed of a practice "quite common in the [very recent] past" whereby the Crown brought forward a presentment for a count of murder in cases where the Coroner had committed an accused to trial for manslaughter.* Mr. O'Brien said: "This effectively forces a plea of manslaughter because the accused will not run the risk of going down and facing a 'natural life' sentence". Two recent instances were cited where accused persons had been committed by the Coroner for manslaughter, and in each case the facts disclosed good grounds for pleading not guilty; in one of these in particular, an acquittal of manslaughter would have been very likely. In this case the Legal Aid Commission was told "by no less than two prosecutors and the preparations officer we certainly would get a presentment for manslaughter, and we kept asking for it. The day before the trial was listed, the presentment came, but it was for murder." (O'Brien, oral evidence, 27.7.1983, at p. 175.)

169 Prosecutors for the Queen giving evidence before the Committee were asked whether "one reason for delays in criminal trials was that Crown Prosecutors were unreasonable, to some extent, in refusing to engage in plea bargaining":

> *It often transpires that on the day of the hearing the Crown will accept a lesser plea whereas up until the actual date of the hearing that was not so. (It has been suggested to the Committee by other witnesses] that if there were a more efficient or more effective system of communication between defence counsel and Crown Prosecutors some of the problems could be eliminated.* (Transcript, 23.8.1983, at p. 238.)

In reply, one Prosecutor for the Crown said:

* Three such cases are Fulton, 1981; McClure and McDonald, 1981; Cooper, 1983. (Information supplied by Legal Aid Commission of Victoria.)

My experience ... is that generally it is very hard for a reasonable offer to be received by the Crown before the day of the trial. The actual run up to the trial is a psychological ramp and a road into prosecution and defence. In order to overcome that, the previous Solicitor-General introduced a trial scheme whereby solicitors for the accused should put any propositions they had to the chamber prosecutor as soon as the instructions [were made out] irrespective of whether the case was listed for trial or not. I was in chambers in the first month of its implementation in October 1981 and throughout that month I had two approaches from defence solicitors. I think the reason for that is that very often counsel are not briefed to advise the accused properly until a matter of days if not hours before the case is due to start. It is only then - when counsel for the defence is briefed - that realistic discussions get under way. (Hollis-Bee, oral evidence, 23.8.1983, at p. 239.)

On the issue of "over-charging" or the prosecution not accepting a plea which defence considers is reasonable in all the circumstances, Mr. Hollis-Bee's view was that "very often ... rather than the first offer [being] a realistic attempt to dispose of the case" the offer is inappropriate to the crime with which the accused is charged. (Oral evidence, 23.8.1983, at p. 239.)

A second Prosecutor for the Crown added:

... it must be realised that we are dealing with people and not with building blocks ... The significance of this observations is ... that the decision whether to accept a particular offer, when the offer is made at some time before the trial, will be based on the perspective of the relevant prosecutor, of the case at that time. When the case finally comes on for hearing it may be a substantial time later and a different prosecutor may look at it. He may look at not only what [the first prosecutor] looked at, but also different matters. There may be lost witnesses and [other considerations] of that kind. It is a matter of personal judgment. In relation to the figures that Mr. O'Brien prepared, [the Director of the Legal Aid Commission] provided them in a document indicating that it could not be said in relation to any particular case that

the decision was wrong. I do not mean thereby to suggest that the figures that Mr. O'Brien has [put forward] ought to be disregarded. They are significant and I think it behoves the Director of Public Prosecutions to be aware of them ...* (Hassett, oral evidence, 23.8.1983, at p. 239.)

170 Early Identification of Guilty Pleas. With the appointment of the Director of Public Prosecutions, Mr. O'Brien of the Legal Aid Commission was hopeful that any difficulties arising in this area would be overcome. Indeed, in the course of one of his appearances before the Committee, the Director of Public Prosecutions alluded to the problem, of pleas, stating that a way of short-circuiting the preparation of trials where a plea of guilty could have been negotiated would be to ensure that "judges have control over pending cases, because once the Crown makes presentment and discloses its case to the accused ... there is no infringement of civil liberties, and no other reason, why a judge should not be empowered to enquire of an accused person, 'How are you intending to plead? You have the charges against you and the case against you. Are you to plead guilty or not guilty?' An accused person might say, 'I do not want to plead guilty to all of it but only to half of it.' Then we can discuss the matter. In that way pleas can be identified at the earliest possible time and cases need not be prepared needlessly as trials." (Phillips, oral evidence 1.6.1983, at p. 106; see further on judicial control of pending cases, The Role of the Courts at p. 121.) Mr. Phillips added:

* Clarification of this point was provided to the Committee by the Legal Aid Commission, which stated in part:

With respect to matters that unnecessarily go to trial it may be conceded at the outset that simply because a jury verdict is the same as a plea offered by the defence but rejected by the Crown the plea offered is not necessarily a reasonable one ... However, ... when there is a consistent and constant pattern of a jury verdict being the same or less than the plea offered there is a scope for saying that the pleas being offered are both realistic and reasonable. (Extract dated 7 December 1982; communication from Associate Director (Criminal Law Division), Legal Aid Commission of Victoria, letter dated 14 February 1984.)

There would be a problem of having to educate defence counsel into such a system. I think if they receive material on which they can make a considered judgment we would get the necessary cooperation from the Bar. Certainly the Criminal Bar Association, which is a significant factor in this area, having some 200 members - the overwhelming bulk of those practicing in the criminal court - support this proposal completely. (At p. 106.)

171 The Flanagan Committee also drew attention to this problem area. Indeed, that Committee stated that one of the major reasons for delay in the County Court at Melbourne is that "so many matters listed as trials ultimately resolve themselves as pleas of guilty". In their First Report, that Committee said that research indicates that over the past twelve years there is a consistent 43 per cent to 45 per cent of all accused who, having pleaded not guilty at the committal proceedings, ultimately change their plea to guilty upon trial. "It is obvious", the Report continued, "that unexpected pleas of guilty wreak havoc to the long term planning of Court administrators and result in a great deal of wasted preparation and Court time. We regard it therefore as essential that every possible opportunity should be taken to identify as early as possible as many of the 45 per cent as [can be identified], that is prior to their being listed as a trial with all the preparation and arranging of witnesses which is essential to the listing of a trial, and in some cases even before a presentment is prepared". (First Report, at pp. 4-5.)

172 The Flanagan Committee considered there are many cases where the course of a trial could properly be determined by discussion between the parties prior to the presentment being drafted:

We are of the view that the present procedures do little to encourage any such meaningful discussions at an early stage, and in many cases it is fair to say that there is a complete breakdown in communication between the accused and the Crown, or the representatives of either of them. It is our view that many complex trials which require extensive

preparation and organisation of witnesses resolve themselves as pleas of guilty at the door of the Court. We therefore recommend a variation to the existing procedures which in our view will have the result of detecting at an earlier stage many pleas of guilty. (First Report, at p. 5.)

173 The Flanagan Committee recommended accordingly that:

(i) *whenever an accused's solicitor or representative from the Legal Aid Commission desires to enter into preliminary discussions about the course a trial should take, that solicitor or representative should contact the preparation section leader in charge of the particular trial in the Criminal Branch of the Crown Solicitor's Office [now the Office of the Director of Public Prosecutions] and indicate the desire to discuss the matter with a Prosecutor for the Queen.*

(ii) *it is the duty of that section leader of the preparation team to ensure that the Chambers Prosecutor (for the time being) is briefed in adequate time to enable the Chambers Prosecutor to be able to exercise discretion as to whether to accept or reject the plea offered in full satisfaction of a proposed presentment at the time that such discussions take place.*

(iii) *the instructing solicitor or his representative on each side, will then make the necessary appointment with the Prosecutor for the Queen to enable the matter to be considered. It is envisaged that a representative of the solicitors attend at each such conference to more readily facilitate expedition.*

(iv) *the same procedure should be followed even when a case has already had a date fixed for trial, but solicitors representing accused persons should be educated to the view that it is desirable that all such discussions take place at least seven days prior to the listed date.* (First Report, at p. 5.)

174 Steps should be taken "to ensure that the profession is aware of the availability of these procedures". It was also pointed out that as the Legal Aid Commission is responsible for approximately 60 per cent of the matters dealt with in the County Court criminal jurisdiction, the officers of the Legal Aid Commission "can be made readily aware of the new procedures". In the case of barristers and solicitors generally, the Attorney-General's Committee considered that the Law Institute and the Bar Council respectively "should be asked to make their members aware of the variation in procedure through their established journals or by such other means as they deem proper". The procedures "should commence immediately" and:

> ... *we anticipate that once the profession becomes more readily aware of the availability of this procedure, more pleas of guilty will be detected at a much earlier stage. The adoption of this procedure should result in many more cases being listed as pleas in the County Court by the Listing Directorate and not as trials. The consequent saving of [staffing] in the preparation section of the Prosecutors for the Queen can then be directed to the preparation and trial of other matters.* (First Report, at pp. 5-6.)

175 In their Second Report, the Flanagan Committee stated that these procedures "were implemented and are of value". However, the Report went on to say that "the experience of the last ten months" from August 1982 to June 1983 "has indicated that the profession has not taken advantage of them". The Report recommended that availability of the procedures should be made more widely known, particularly by the Law Institute and the Bar Council "through their established journals or by such other means as the deem proper". (At p. 4.)

THE ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS: SUMMARY OF ISSUES RAISED BY WITNESSES

176 Having heard evidence from Prosecutors for the Queen, the DPP, the Executive Director of the Law Foundation, members of the private Bar, and the Associate Director (Criminal Division) of the Legal Aid Commission of Victoria, amongst others, directly relating to the role of Prosecutors for the Queen and Crown Prosecutors, the Committee identified the following propositions as having been advanced:

* trials are often lengthy because some counsel lack experience, particularly where junior members of the Bar are briefed

* preparation officers in the Criminal Law Branch (now the Office of the Director of Public Prosecutions) are often inexperienced

* insufficient time for preparation is given to members of the private Bar, when matters are briefed out to them by the prosecutors

* permanent prosecutors (Prosecutors for the Queen) who are experienced in criminal trials are frequently unavailable for County Court and committal matters; their time is taken up in Supreme Court and appeal cases

* a one-sided approach may sometimes be is taken by permanent prosecutors who work only for the prosecution, and never for the defence, after their appointment as Prosecutors for the Crown

* the system fails to identify pleas of guilty at an early stage, due to presentments not being available early enough for an accused person to make an informed decision

* delays occur when a matter has been listed for trial, but a plea is accepted "at the door of the court"

* "overcharging": serious crimes being charged in presentments where less serious crimes would have been more appropriate

* an apparent tendency to charge offenders with conspiracy, when it would have been more appropriate to charge them with substantive offences

* where the Coroner commits accused persons for manslaughter, and an apparent tendency for the Crown to prosecute for murder, when a manslaughter charge would be more appropriate

* an apparent breakdown in communication, on occasion, between the Crown, the Listing Directorate, and the Legal Aid Commission in relation to a case in which it is intended that a plea should be taken rather than the matter going to trial

THE ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS: PRELIMINARY CONCLUSIONS

177 Evidence given to the Committee reveals some views that will not be easily reconciled. The question of salaried permanent prosecutors (as with salaried permanent defenders - such as the Public Defender system in New South Wales) is a vexed one. The Committee believes that this is an area where further research and enquiry should be undertaken, rather than any fixed recommendation being made in this Preliminary Report.

178 The Committee also recognises the need for prosecuting and defence counsel to be well-versed in the substantive criminal law and procedure, and experienced in running cases in the courtroom. This would reduce lengthy trials resulting from inexperience on the part of counsel. It is important that all members of the private Bar practising in the field of crime, preparation officers, and permanent prosecutors should keep abreast of developments in the field of criminal law. The Committee notes that the Leo Cussen Institute recognises the need for continuing legal education and is moving rapidly to fill present gaps.

179 The problem of insufficient preparation time cannot be ignored. The Committee observes that with the establishment of the Office of the Director of Public Prosecutions in Victoria, and the degree of expertise that Mr. Phillips has brought to it, problems of insufficient preparation time may be overcome. With the reorganisation of the Criminal Law Branch, the emphasis on a career structure, and introduction of in-house training for preparation officers, it is also to be expected that in time the problem of inexperienced preparation officers will be met.

180 It is to be hoped that the establishment of the Office of the Director of Public Prosecutions will overcome the problem of overcharging by permanent prosecutors which has been said to cause delays and inefficient use of court, counsel and preparations officers' time. The Committee notes the call made in the First Report of the Flanagan Committee and repeated in the Second Report (see pp. 4-6 and 3-4; also Appendix VA and VB at pp. 301 & 315) for "proper discussion between the parties prior to a presentment being drafted", and the outline of steps to be taken in such cases. The Committee also notes further that, on the particular issue of conspiracy charges, the Victorian Law Reform Commissioner has recently produced a Report to the Attorney-General which may lead to legislative changes that in turn may go some way toward alleviating the problem.* The High Court in particular has spoken out strongly against the liberal use of conspiracy charges as alternatives to substantive charges. In Reg. v Hoar (1981) 56 A.L.J.R. 43, 47 it was said:

> *The allurements of conspiracy charges are very great. The imprecision of the charges, the vagueness of the evidentiary rules, the tendency for committal hearings to turn into fishing expeditions, often prove attracti ve to prosecutors ...*
>
> *The overzealous use of conspiracy charges proves embarrassing and costly not only to accused but ultimately to prosecuting authorities and the courts.*

* See Crimes (Conspiracy and Incitement) Bill 1984.

It brings the administration of criminal justice into disrepute [as] ... in Australia. History shows that the administration of justice will be well served if courts keep a tight rein on the spawning of conspiracy charges.

181 With breakdown in communication between the various agencies, the Committee is aware this problem arises in other areas, to the detriment of efficient operation of the system. The criminal justice process will not operate as effectively as it should so long as adequate communication is lacking between parties and agencies involved. Parties and agencies cannot be forced to communicate adequately with one another. However, it is conceivable that a committee could be established under the aegis of the Attorney-General, comprising representatives of the criminal justice system - including the Criminal Bar Association, the Director of Public Prosecutions, the Prosecutors for the Crown, the Criminal Listing Directorate, Victoria Police, and community representatives to ensure that necessary information is made known to those requiring it. Thus procedures and other aspects of the system may be improved.

THE ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 8

182 As a general principle, the Committee believes that there is a need to make continuing legal education generally available to the practising profession. The Committee recommends that continuing legal education should be made available to persons practising in the criminal area, to ensure that expertise in the field cuts down delays. The Bar Council and the Criminal Bar Association should encourage junior members to make full use of existing facilities.

RECOMMENDATION 9

183 The Committee recommends that the procedures outlined by the Flanagan Committee in its First Report should be followed at all relevant times, namely that:

(i) whenever an accused's solicitor or accused's representative from the Legal Aid Commission desires to enter into preliminary discussions about the course a trial should take, the solicitor or representative should contact the preparation section leader in charge of the particular trial in the Office of the Director of Public Prosecutions and indicate the desire to discuss the matter with a Prosecutor for the Crown.

(ii) it be the duty of that section leader of the preparation team to ensure that the Chambers Prosecutor (for the time being) is briefed in adequate time to enable the Chambers Prosecutor to be able to exercise discretion as to whether to accept or reject the plea offered in full satisfaction of a proposed presentment at the time that such discussions take place.

(iii) the instructing solicitor or the representative on each side, will then make the necessary appointment with the Prosecutor for the Crown to enable the matter to be considered. (A representative of the solicitors should attend at each such conference to more readily facilitate expedition.)

(iv) the Chambers Prosecutor should set aside fixed times in each week for the purposes of such conferences taking place.

(v) if the Chambers Prosecutor for the Crown decides that the matter is one in which it is appropriate for the Crown to accept a plea of guilty to some lesser number of counts in satisfaction of a proposed presentment, or to a less serious offence than that originally charged, the Prosecutor should then and there by

telephone seek the approval of the Solicitor-General, or in the absence of the Solicitor General, the Crown Counsel, to the adoption of such a course. (Both being available at fixed times for the purpose of entertaining such applications.)

(vi) *the same procedure should be followed even when a case has already had a date fixed for trial, but solicitors representing accused persons should be educated to the view that it is desirable that all such discussions take place at least seven days prior to the listed date.*

Further the Committee recommends that steps should be taken to ensure that the profession is aware of these new procedures: the Legal Aid Commission should be made aware and play a role in disseminating information about the new procedures; the Law Institute and the Bar Council should make their members aware of the new procedures, by way of information published in their respective journals and any other means they deem appropriate.

RECOMMENDATION 10

184 The Committee believes that it is also necessary to overcome a general lack of communication between those bodies involved in the criminal justice process. The Committee recommends that a committee should be established under the aegis of the Attorney-General, comprising representatives from the Criminal Bar Association, the Director of Public Prosecutions, Prosecutors for the Crown, the Criminal Listing Directorate, Victoria Police and the community to ensure that as far as possible, good lines of communication are established and maintained, so that issues demanding attention may come properly to the attention of the parties and/or agencies concerned, and a pattern of co-operation is developed between the parties and/or agencies, in relation to matters concerning the good administration of criminal justice.

ROLE OF PROSECUTORS FOR THE QUEEN/CROWN PROSECUTORS: AREAS IDENTIFIED FOR FURTHER RESEARCH AND INQUIRY

185 In the course of evidence, the following matters have been raised. The Committee believes they should be subjected to further research, enquiry, public hearings and debate. Identification of these areas by the Committee does not limit the Terms of Reference of the Committee.

186 Permanent Prosecutors. The Committee believes that, due to inadequate information and incomplete research, it is impossible at this time to recommend upon the expansion, maintenance or reduction of the permanent prosecuting system in Victoria. However the Committee believes that this should be an area for review, in accordance with the terms of its Reference on delays.

187 Combining Prosecution and Defence Work. In conjunction with the foregoing, the Committee believes that it is impossible at this time to recommend upon the introduction of a system whereby those undertaking criminal prosecutions should also be required to undertake defence counsel work. However the Committee believes that this is a matter for review, with particular reference to the Treasury Counsel system operating in England and to similar systems operating elsewhere.

THE ROLE OF THE CRIMINAL LISTING DIRECTORATE

188 Daily Listing System Introduced. In 1982 the Flanagan Committee noted that the method of listing cases in the County Court at Melbourne was not working satisfactorily. The listing system was run on a monthly basis, with cases being listed in a fixed list before a particular judge for a month. This meant there was uncertainty as to what particular date any matter would actually be reached. It also meant that accused persons knew in advance which judge would be sitting on their case, and this, it was suggested, led to requests for adjournments, in the hope that the accused would "draw" a different judge in the next listing. The Flanagan Committee recommended that that listing system should be discontinued.

189 To replace it, the Flanagan Committee recommended the introduction of a daily listing system. It was intended that this would produce more certainty in the lists and much less inconvenience and cost to parties, with less adjourned hearings: "For each month, a single list of cases should be prepared for each of a number of fixed dates throughout the month's sittings - for example, a list beginning on 2 August would list cases for 2 August, 9 August, 16 August and 23 August." Cases should be allotted to judges not in advance, but on or after the date fixed, as judges become available to hear them; cases should not be brought on prior to the dates fixed, and cases not reached on those dates should remain in the list until reached. Cases remaining unreached at the end of the sittings should constitute the first list (or the first part of it) for the next unlisted sittings. As an example, the Committee stated that any cases which were left over from the August sittings should be listed first in October. (See generally, First Report, 1982, Melbourne, at p. 7; Appendix VA, at p. 301.) Under the daily system there would be much more certainty that a case would in fact be heard following upon its listing date being fixed. Less inconvenience would be caused to all parties (including witnesses) connected with the trial.

190 In giving evidence to the Legal and Constitutional Committee on the matter of listing of cases, the Chief Judge of the County Court stated:

> *... Before the Criminal Listing Directorate was set up ... a lot of cases were listed that ought not to have been. The Crown would bring them on knowing the defence was not ready or had some problem with witnesses. The list would be apparently filled for the day ... Case X [would be listed] ... where everybody knew it was not going on. That happened many times. That sort of nonsense does not occur today."* (Waldron, oral evidence, 23.3.1983, at p. 42.)

191 Current Operation of the Listing System. In January 1982 Mr. Brendan Bateman was seconded to the Criminal Trial Listing Directorate. He described the activity of the Directorate to the Committee:

> *With criminal prosecutions, there are two parties, the Crown and the defence. Up until [January 1982] the Crown had the right to list all matters ... [It] was considered proper, however, that the listing of all criminal cases should come under an independent body ...*
>
> *We took control of the listing of criminal cases in the Melbourne County Court ... We have implemented new listing procedures ... [A] new listing system was established [on a trial basis] in April 1982 and followed through until the end of July that year ... As a result of the review of the listing system and the criminal backlog generally, a permanent new listing procedure was implemented in August 1982. That system is still in train and working effectively.* (Oral evidence, 8.6.1983, at p. 116.)

The system now operates on the basis that twenty or thirty trials are fixed for each particular week of the month. A trial cannot commence until that time, unless by consent the parties are prepared to go on earlier. For the March-April period of 1983, 150 trials were set down for hearing in the County Court. Of those 150 trials 78 were reached in the week in which they were

listed for hearing, 16 were reached later than the week originally fixed, and of those 16, many were reached later by consent because witnesses were unavailable for the date originally listed; the problem was not that the courts could not accommodate listed cases. The balance of cases were removed from the list by consent - sometimes because the case turned into a plea of guilty. All pleas of guilty are heard at the end of the month.

192 Jurisdiction of the Listing Directorate. Although at its establishment it was envisaged that the Criminal Listings Directorate would take control of criminal listings of all superior courts, to date the Directorate deals only with those cases coming before the County Court in the city of Melbourne. The Crown retains control of the lists of the Supreme Court, and the County and Supreme Courts on circuit.

193 Lack of Statutory Base. It was pointed out to the Committee that the listing system in the County Court operates "on the goodwill of the people involved":

> *In the eighteen months [we have been] operative, [the Criminal Listing Directorate] has been given no statutory powers. This lack of a statutory base has not helped. We have been acting on ... goodwill ... We have good rapport with all parties concerned and a good working relationship with the Chief Judge [of the County Court], which is important.* (Bateman, oral evidence, 8.6.1983, at p. 117.)

194 Chief Judge Waldron also referred to the lack of authority of the Directorate, consequent upon its administrative standing. He said: [I]t has done a good job within the constraints of its authority to do so". However he considered that for its proper operation, clarification of its powers was necessary. Similarly, the Director of Public Prosecutions, Mr. John Phillips, Q.C. commented on this. He said:

... this body is seen by the [legal] profession generally to be independent, but it has no statutory basis [contrary to the recommendation of] the Criminal Bar Association Report of 23 December 1980. So far as I can make out, its members operate on a mixture of diplomacy, cajolery and bluff. (Oral evidence,30.3.1983, at p. 59.)

195 Mr. Bateman drew the Committee's attention to the fact that legislation providing a statutory basis for the Directorate was drawn up under the previous administration, with the intention of its being presented to the Parliament. (See Criminal Proceedings Bill 1982, Appendix VII, at p. 347.)He said that many of the powers contained in the proposed legislation are currently operative through "goodwill", but should be consolidated by way of legislation. The powers which, in Mr. Bateman's view, are essential for the continuing good operation of the Directorate, were listed in his evidence to the Committee:

With regard to gaol cases, we [should] have the right to list them within three months of committal; with bail cases, and particularly with rape cases, they must be listed in that time. With older cases, those within twelve months or two years of committal should be able to be listed by the Directorate, if the Directorate has not been notified of the matter being ready for bringing before a court, and thus ready for listing. (Oral evidence, 8.6.1983, at p. 123.)

Where provision was made for the Directorate to list a matter despite not having been notified by the Crown of its readiness for trial, the opportunity should be available for the matter to be brought before a court so that reasons for delay in preparation could be revealed. In a written submission to the Committee Mr. Bateman outlined in point-form the matters which should be taken into account in formulating legislation. He wrote:

An independent listing officer should have power to -

* *determine the order in which trials shall be heard in the Supreme Court and County Court and to fix dates for such trials*

* *vary the order and dates for trials*

* *require Clerks of Magistrates' Courts to furnish to the listing officer in writing, all information in a prescribed form*

* *require the Director of Public Prosecutions, indicating readiness to proceed, to furnish in writing a Listing Notice in a prescribed form*

* *to make enquiries of accused persons and/or their legal representatives of all matters pertaining to the fixing of dates for trial*

* *to list trials by his own motion after the expiration of fixed periods of time following committal for trial*

* *to list trials, by consent, without having received a Listing Notice from the Director of Public Prosecutions.* (Written submission, 1.12.1983, pp. 1-2.)

196 Independent Role of the Listing Directorate. Amongst those witnesses appearing before the Committee, there was some degree of debate about the placement of the Criminal Listings Directorate. The Chief Judge of the County Court stated that in his view that "probably the Directorate needs to be an arm of the Court", however he was not fixed in this:

> *... although I said earlier that initially it was contemplated that [the] Listing Directorate have statutory recognition and be independent of the Court, one thing that has to be considered is whether it ought to be brought under the umbrella of the Court, whilst still hopefully showing itself to be independent in the sense that both the Crown and the defence can go to it confident of the confidentiality of their communication with it.*

If the fact is or is going to be that presentments will be signed and filed and, therefore, the Court will have control of the list, probably the Listing Directorate needs to be an arm of the Court although still seen, I would hope, to be very much independent, with people who talk to the Listing Directorate having no fear that the judges are in any way privy to those discussions.

The confidence of the profession is very important for its effective working. (Waldron, oral evidence, 23.3.1983, at pp. 34-35)

197 Similarly, the Director of Public Prosecutions commented on this, pointing out that the Listings Directorate was established to "act as an independent organisation". Its independence from both Crown and defence was designed "so as to procure the efficient and orderly listing of the criminal business of the court". Mr. Phillips favoured the "... Directorate being absorbed into the County Court administrative structure and its Registrar [being] an officer of the Court". He said:

Once again I am plugging judicial control. If the Directorate can speak to members of the profession with the authority of the judges of the County Court, they will be listened to and their wishes will be respected. (Oral evidence, 30.3.1983, at p. 59.)

198 On the other hand, the Associate Director (Criminal Division) of the Legal Aid Commission of Victoria considered it necessary, in order to maintain and preserve the confidence of those dealing with the Directorate, for the Directorate to be provided with a statutory base and to be independent of the courts. He noted criticisms arising in the past when the Crown had control of listings. He said that although such criticisms would no doubt have "as little validity" in relation to Court control as they did in relation to Crown control, this factor should not be ignored. It is essential that the legal profession should have confidence in the Listing Directorate, recognising it as independent. He referred to the Reports of the Flanagan Committee as supporting this position . (O'Brien, oral evidence, 27.7.1983, at pp. 165-166.)

199 On the question of independence of the Directorate and its possible establishment under the control of the County Court, as well as that of its being given a statutory basis, the Director of the Criminal Listing Directorate commented:

> *As far as court control goes, I believe an independent body should be an independent body, and not be involved with the court in relation to its administration. It is a sensitive administrative area, and a specialised field. I do not believe it should come under court control.*
>
> *Certainly, the organization has and should maintain a good relationship with the Chief Judge of the County Court. However the judiciary has sufficient to do without concerning itself about the administration of this area.* (Bateman, oral evidence, 8.6.1983, at p. 123.)

A statutory base is necessary to maintain the independence of the Listing Directorate and to ensure its authority.

200 The Second Report of the Flanagan Committee commented extensively on the need for independence of the Directorate. That Committee stated:

> *We do not think it desirable that the Directorate of Public Prosecutions or the County Court should assume [the trial listing] function. It is our view that it is desirable that the Listing Function should be exercised independently of the parties and the Court. When the Crown Solicitor exercised the function of listing cases for trial the criticism was often made that one party to an action was gaining an advantage by fixing cases to suit itself, and that the Crown was involved in the selection of the trial Judge. It is conceivable that the same criticisms would be made were the Directorate of Public Prosecutions to assume the function. We believe the listing function and the exercise of priorities for trial to be administrative functions and that they should therefore remain separated from judicial functions. The performance of what is essentially an administrative function may tend to compromise Judges in their judicial role or at least have the appearance of so doing.* (At p. 6.)

201 The Report also noted that the volume of work involved for matters to be comprehensively covered would reduce a judge's availability for exclusively judicial functions. The Report concluded:

> *More importantly, a Judge would be without the freedom to ascertain in an informal administrative manner the genuine likelihood of the case becoming a plea.*
>
> *We therefore recommend that the concept of an independent Criminal Trial Listing Directorate be continued.* (At pp. 5-6.)

202 The Flanagan Committee emphasised that the Directorate should be:

* headed by an officer who is independent both of the parties and the Court

* empowered to list a criminal case for hearing on that officer's own motion where it appears that, after the expiration of a fixed number of months, the case should be ready for trial

* empowered to make searching enquiries of both parties for information which is considered to be relevant to the exercise of the listing function, and confidentiality should attach to the information so received

(See also Bar Council Report on the Listing of Criminal Cases, 23 December 1980.)

203 The Committee notes that the Second Report of the Flanagan Committee considered its recommendations on the need for a statutory base for the Criminal Listing Directorate and the need to preserve its independence "warrant urgent consideration". (At p. 6.)

204 Access to a Pool of Cases for Listing. The aim of the Directorate is to have cases brought forward to the court in an orderly and rational manner "so that the long cases are heard at the beginning of the month and the short cases at the end of the month". In addition, the role of the Directorate is to act as a focal point "to which both Crown and defence can go, ... in order to determine what cases will be trials, which will be pleas, whether there is any opportunity to reach a compromise so far as an accused may be charged with, for example, armed robbery and accept a plea of robbery, or some other lesser charge". (Waldron, oral evidence, 23.3.1983, at p. 34.) In the view of the Chief Judge of the County Court, to achieve orderly running of cases and the possibility of proper compromise, it is necessary for a channel of communication to exist between the Crown on the one side, and the defence on the other. He continued:

> *What the Listing Directorate needs and wants is a pool or reservoir of cases that are there from which they can choose so that, if one case has to be adjourned for a particular reason, there is a ready substitute for it and generally, this would lead to a use of the court to its full capacity. The Directorate has not been able to succeed in that as yet.* (At p.34.)

205 Mr. Bateman agreed that delays arise through the lack of availability of a pool of cases to be "dipped into" to complete the lists before the court, where listed cases were resolved through pleas of guilty or for other reasons were not heard on the date listed. It is also necessary to have a pool of cases ready for listing daily, in order to keep the courts busy. He said:

> *On the records from the end of May 1982, the backlog of criminal cases in the County Court would be the best since 1977. The number has been reduced to 670 accused awaiting trial, compared with 800 or 900 in the last few years. One of the problems is the lack of [preparation] staff in the Criminal Law Branch.*
>
> *It is necessary to have a good number of cases in order that the list system works to its optimum. Fourteen County Courts can sit for crime in the Melbourne court building each year. Twelve judges are set aside*

to sit in crime every month. Twelve courts are available. In 1982, eight or nine judges sat for the whole year. That was basically because there was not enough work to list. The situation has improved this year. In February, March and April twelve courts have sat every month, although there were only eleven sitting this month [June]. (Oral evidence, 8.6.1983, at p. 117.)

Mr. Bateman concluded that twelve courts should be maintained continuously, working on criminal matters, and that other courts should be readily available if sufficient cases were prepared by the Criminal Law Branch to keep up the momentum. In particular, in early 1982 problems occurred with listing sufficient cases before the court, in that there were approximately 800 or 900 accused persons, with approximately 700 cases in the preparation stage, but insufficient cases with preparation completed, so that they could be listed. (On the issue of delay through lack of rapid preparation in the Criminal Law Branch, see The Role of the Office of the Director of Public Prosecutions/Criminal Law Branch , at p. 56.)

206 Problems Arising in the Listing of Cases. Delays may arise in the preparation stage, and the Criminal Listing Directorate is in no position to exercise control over that area of delay. The Directorate cannot list cases until notice is received from the Crown Prosecutor that the cases are ready for listing. Once notice is received, the process of ensuring a case should be listed is commenced. The Directorate checks the lists of witnesses. Where the matter is on appeal, or where it has been preceded by committal proceedings, the Directorate ensures that the defence has received depositions. The Committee was informed:

> ... *where a person is committed for trial and is in custody on that matter, once [the Listing Directorate] receives notification of committal proceedings, within three months the matter should be set down for trial. The only proviso is that should the Crown or defence have some problem in dealing with the matter at that time, both have the right to apply for an extension of time.* (Bateman, oral evidence, 8.6.1983, at p. 118.)

Mr. Bateman stated that this could raise problems, if applications for extension resulted in cases which should by rights be heard speedily, being put back for lengthy periods:

> *With older bail cases, there should be a proviso whereby after six months, twelve months or a two-year period, [the Directorate] should be able to say 'You are not ready, but we will nevertheless list this matter so it can be heard'.* (At p. 118.)

Then problems relating to preparation would come to judicial attention and could be resolved.

207 Problems also arise with pleas of guilty. The listing system does not operate effectively if cases are listed for trial, then on the day of the commencement of trial a plea of guilty is accepted "at the door of the court". Mr. Bateman concluded that such delays occur through lack of communication between the Crown and defence counsel. (On the negotiation of pleas and lack of communication, see The Role of Prosecutors for the Queen/Crown Prosecutors, at p. 73.)

208 Cases are referred to the Listing Directorate by Prosecutor for the Queen (or the Director of Public Prosecutions). Once a case comes to the Listing Directorate, the Directorate notifies the accused. The Directorate holds a running record for every case: when a committal takes place at the Magistrates Court, a notice is sent to the Directorate and a running file is commenced on that case. When a listing notice arrives with details of charges and an estimate of the duration of the case, if representation is listed, contact is made by the Directorate with defence counsel immediately to ensure that the matter will go to trial. The Directorate attempts, at this time, to identify the plea to be made by the defendant: "It is no use if the Crown says that the case will go to trial if the defendant does not want it to [but wants to plead guilty]". In such circumstances, the case would not be listed "until the decision as to plea is relayed to the Directorate." (Bateman, oral evidence, 8.6.1983, at p. 120.)

The Directorate ensures that the defendant has a copy of the summary of charges prepared by the Crown. The Directorate directs the defendant to the Crown preparation office to obtain a copy if one has not already been passed on to the defendant. Depositions are distributed by the Directorate to accused persons. The Listing Directorate then holds the unlisted case for several days, waiting for the parties to confer, if necessary, on such questions as a guilty plea. If no more is heard from the Crown or defence counsel, the Directorate contacts the parties to ensure that matters are proceeding, and to determine whether contrary to the original expectation of the parties, the case will require listing as a trial; or whether the matter should be listed at the end of the month, as a plea of guilty. It may be that the defence has decided against a guilty plea, or the Crown has refused to accept the plea of guilty to a lesser offence.

209 The Listing Directorate selects the judge who will take each case in the list. Trials anticipated to run for some length are listed early in the month, whilst those which are judged to be short trials are listed late in the month. Cases involving pleas of guilty are listed at the end of the month. Some factors are taken into account in the selection of judges for cases, in addition to the judge's availability on a particular day. For example, a number of judges have been Crown prosecutors. The Directorate ensures that a party appearing before a judge has not previously been prosecuted by that judge when acting as Crown Prosecutor. Where a solicitor is on trial, the Directorate contacts the prospective judge to ascertain whether a conflict of interest may arise. The relevant expertise of the judge before whom a case may be listed is also taken into consideration. In particular if a lengthy fraud case is listed, the Directorate looks at available judges, keeping in mind the need for expertise in fraud trials. However, there is a limit to ensuring that a judge with particular expertise is selected for a case requiring that expertise. Mr. Bateman informed the Committee that there is a priority order of cases which must be maintained in fairness to witnesses: "There may be a case where there are 20 Crown witnesses and six witnesses for the defence. The trial would not be held back to wait for a judge with particular expertise". Although great care is taken in selection, it would more often occur that the first available judge

would be used for a trial, rather than finding a judge for the appropriate case. (At p. 122.)

210 Difficulties may arise where a case is listed for a day in a particular month, but due to its length threatens to run into the following month. In such a case, the Listing Directorate notifies the Chief Judge of the County Court in order to establish which judge will be available to take a case which may well run into the next month. This is an advance on past practice:

> *A case can go into the second month. It does not come out of the list. In the old days, if it was known a case would not finish at the end of the month, a judge could not take it. If we believe a case may go into the next month, now I make contact with the Chief Judge and find a judge who is available to take on the case, on the date the Directorate has fixed it for hearing.* (At p. 121.)

(Further on this issue, see The Role of the County Court, at p. 144.)

211 Advantages of the Criminal Listing Directorate Systems. In its Second Report the Flanagan Committee confirmed that the new system of listing "is working very well ..." It found that the certainty that a trial will proceed on the date on which it is listed has increased. The Report envisaged that the improvement would continue, and that "in particular, the undesirable practice of bringing cases forward to a date before that on which they were originally listed for trial has been eliminated." (At p. 59.) Witnesses appearing before the Committee invariably remarked upon the rapid improvement which had taken place in the listing of cases and consequent efficiency of the system since the setting up of the Criminal Listings Directorate, although some noted there remained room for improvement. Amongst others, the Chief Judge of the County Court acknowledged the value of the Criminal Listings Directorate (Waldron, oral evidence, 23.3.1983, at p. 42), as did the Associate Director (Criminal Law Division) of the Legal Aid Commission of Victoria (O'Brien, oral evidence, 27.7.1983, at pp. 165-168) and the Director of Public Prosecutions

(Phillips, oral evidence 30.3.1983, at p. 59). One Prosecutor for the Crown confirmed that matters had improved under the new system, although he was "still not happy with the end result of how cases are listed. There is still not enough certainty when a matter will go on". (Hassett, oral evidence, 23.8.1983, at p. 245.) The Chief Judge of the County Court earlier stated:

> *... the Listing Directorate ... has not been able to succeed ... as yet [in securing a pool or reservoir of cases, due to lack of prepared cases being available].*
>
> *I am sure it has deficiencies in its own performance, but I think it is fair to say that it is [staffed] by people who seem to be quite conscientious. I believe it does have a very good potential, ... particularly in establishing a rapport with the profession and encouraging communication. Hopefully, the earlier identification of what is going to happen with the particular matter when it gets to court, whether it is going to be a trial, whether it is going to be a plea will enable problems associated with the trial to be identified.* (Waldron, oral evidence, 23.3.1983, at p. 34.)

THE ROLE OF THE CRIMINAL LISTINGS DIRECTORATE: SUMMARY OF ISSUES RAISED BY WITNESSES

212 In summary, witnesses before the Committee raised the following issues:

* lack of a statutory base for the Criminal Listings Directorate

* lacking a statutory base, no clearly defined, enforceable powers to enable the Directorate to ensure that cases are listed within a reasonable time

* the Directorate controls only criminal listings for the County Court in the City of Melbourne; Supreme Court lists in Melbourne and the Supreme and County Court lists in the country continue to be controlled by the Crown, thus retaining

these defects identified in the operation of the County Court listing system prior to the establishment of the Criminal Listing Directorate

* lack of of a pool of cases to be brought forward into the lists on a regular basis, so that all available courts and every available judge may be used to optimum value

* interference with the proper running of the system because pleas of guilty are frequently accepted at the door of the court, on the date listed for hearing the matter as a trial. Such pleas might have been better negotiated at an earlier time, resulting in the case originally being listed as a plea, to be heard at the end of the month in the ordinary course

* the need to run cases into a second month, where it is clear that the trial will continue beyond the month for which it has been set down, and the requirement that judges therefore be prepared to sit into a second month in some instances

* the need to set cases before judges having limited experience of criminal matters, or particularly complex criminal matters, where no experienced judge is available

THE ROLE OF THE CRIMINAL LISTING DIRECTORATE: PRELIMINARY CONCLUSIONS

213 The necessarily limited nature of the recommendations to be made at this early stage of the Committee's inquiry is emphasised. However, in view of the evidence given before the Committee, some recommendations may appropriately be made. It is clear that the Criminal Listing Directorate should not continue to operate on a "goodwill" basis alone. The Committee applauds the way in which the Directorate has gone about the task despite the lack of a statutory base, and acknowledges the co-operative atmosphere which has built

up around its operations. However, the Committee believes that it is necessary to define clearly by way of statute the powers of the Directorate. The previously prepared Criminal Proceedings Bill 1982 may provide a guide. (See Appendix VII at p. 347.)

214 The Committee is also of the view that the Criminal Listing Directorate should control listing of criminal cases for all superior courts in accordance with the original concept. Those problems in the listing system prior to the introduction of listing by the Criminal Listing Directorate in the County Court, relate to listing across the board - in the country and city , and in the Supreme Court, in the country and city. The introduction of an orderly listing system under the control of the Criminal Listing Directorate operating on a basis independent of the Crown Prosecution Office, into all courts should not be delayed further.

215 The Committee considers it would be inappropriate to place the Criminal Listings Directorate under the control of the County Court. First, with the expansion to all courts, the Directorate would be dealing with Supreme Court as well as County Court cases. Secondly, although there can be no suggestion that judicial intervention in the listing process may occur, the Committee believes that this should be made clear in practice. If the Listing Directorate were under the control of the County Court (or of the Supreme Court), the implication may arise (albeit wrongly) that members of the judiciary play a part in determining when cases are listed, which cases are listed, and before whom they are listed. The Committee also notes the considered comments of the Flanagan Committee that clear distinction between judicial and administrative functions should be maintained, and of the need to retain judicial freedom in dealing with pleas. The Committee notes further that no additional load should be placed on the judiciary. To ensure this is so, the Committee believes that the Criminal Listings Directorate should operate as an independent statutory body.

216 The Committee is mindful of difficulties arising due to lack of a pool of cases to be brought before the Courts each month; problems in that pleas of guilty are accepted at the door of the court; difficulties experienced where judges have limited experience of criminal trials; and the need to run lengthy cases into the second month of sittings. It considers that these issues may appropriately be dealt with in other sections of this Preliminary Report. (See The Role of Prosecutors for the Queen/Crown Prosecutors, at p. 73 and The Role of the Courts, at p. 121.)

THE ROLE OF THE CRIMINAL LISTING DIRECTORATE: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 11

217 The Committee recommends that the Criminal Listing Directorate should be provided with a statutory base, along the lines of the proposals contained in the Flanagan Report. In making this Recommendation, the Committee emphasises that the Criminal Listing Directorate should be independent, and should not come under the control of the County Court or the Supreme Court.

RECOMMENDATION 12

218 The Committee recommends that in providing the Criminal Listings Directorate with a statutory base the Directorate should be given the responsibility of listing criminal cases not only in Melbourne County Court, but also in the Supreme Court (both in the city and the country), and in the County Court in its country jurisdiction.

THE ROLE OF THE COURTS

219 During the course of its inquiry since receiving the Reference on Delays in the Courts, the Committee concentrated more on the role of the County Court than on that of the Magistrates' Courts, the Coroner's Court, or the Supreme Court. This approach was adopted as a result of initial evidence given to the Committee, directing the Committee towards problems of delays arising in the County Court jurisdiction, where the bulk of serious crimes are heard. At the same time, during the giving of evidence, a number of witnesses referred to various aspects of delay in all three jurisdictions, sometimes adverting to issues that were peculiar to one jurisdiction, or to matters which covered the spectrum of the courts.

COURT ADMINISTRATION GENERALLY

220 In giving evidence before the Committee, the Chief Judge of the County Court commented that the courts "have expanded their activities without really expanding their administrative support over the years. A rationalisation of the administrative support is required". (Waldron, oral evidence, 23.3.1983, at p. 40.) In 1982, the Law Department carried out a study of administration in the Courts, producing a Report in December. Amongst other matters, the Report recommended that the Division of Court Administration should set as its divisional objective a stated goal, that being to:

> *Ensure the efficient and effective provision of the non-judicial services required for the resolution of disputation and litigation and the disposition of prosecutions in the State of Victoria.*

To achieve this goal, the Report recommended that a new structure should be established, based on "rational management". The review team conducting the inquiry stated further that it "considered necessary both structural change to establish that rational base; the creation of a new stratum of managment; and the vesting of that stratum with the full authority and support of the Department". (Report of the Review of the Senior Management Structure and

Staffing in the Division of Court Administration, State Law Department, 31.12.1982, Law Department, at p. 26; see further Appendix VIII Report of Review in the Division of Court Administration, at p. 354.)*

221 Many witnesses referred to the lack of time limits in the courts. In particular, the Director of Public Prosecutions stated that in his opinion, the major delays in the system itself are occasioned by the lack of any general or specific time limits to systematically alert personnel to unacceptable delays in the carriage of cases. He also referred to a lack of responsibility upon any person in authority for ensuring that acceptable time-frames are adhered to. He said:

> *First, apart from the requirement that the police must bring a person charged before a justice as soon as practicable, and that preliminary enquiries in relation to people charged with rape must take place within three months of the charge being laid and a subsequent trial within three months of the preliminary trial unless the court otherwise orders, and apart from the requirement that a convicted person in the superior courts must file a notice of appeal within fourteen days, there are just no other time frames at all for the performance of work to be done in the criminal justice system.*
>
> *This has led to a general sense of lack of urgency on behalf of both prosecution and the defence.*

* The Attorney-General, the Hon. J.H. Kennan, MLC, appointed 13.9.1983, has, subsequent to the Report, appointed a Deputy Secretary for Courts and the Public Service Board has approved the creation of two offices beneath him, a Director of Court Operations and a Director of Court Services. Additionally, a number of senior officers from elsewhere in the Public Service are to be seconded by the Public Service Board to the Deputy Secretary's staff to assist in diminishing a range of problems which the Deputy Secretary has identified, by developing solutions for them. (Communication from the Attorney-General, by letter 27.2.1984.)

Secondly, there has been no person or persons with sufficient authority to control pending criminal proceedings with a view to preventing delay. (Phillips, oral evidence, 30.3.1983, at pp. 53-54.)

222 The DPP cited figures for 1980 showing the average delay between the laying of indictable information by the police and the subsequent preliminary enquiry or inquest as being five to six months, with many persons remaining in custody during this time. He added:

In proceedings which finished [on 29 March 1983] two of the accused were arrested and bail was refused in May 1982. They have remained in custody since that date. The inquest into that case took place in December 1982. I am confident things have not changed significantly from when those figures were provided in 1980. (Phillips, oral evidence, 30.3 1983, at pp. 53-54.)

223 Mr. Phillips and other witnesses outlined ways in which time limits might be built in at each stage of the system - at Magistrates' Court level, County Court level, and Supreme Court level. The issue of "time limits" in all jurisdictions was in Mr. Phillips' view preeminent in the efforts to have the criminal justice system function efficiently and in accordance with standards of justice: its implementation would have the greatest effect in lessening delays. He said:

... in relation to pending criminal proceedings both in the Magistrates Courts and in the superior courts, none of the magisterial or judicial offices have any real control over their process. They have their hands effectively tied: so my two themes ... are, [first] the insertion of time frames into the system during which, unless exceptional circumstances exist, things have to be done or the court's permission otherwise obtained; and [secondly] investing magistrates and judges with appropriate powers to effectively control pending proceedings. (Oral evidence, 1.6.1983, at p. 991)

In Mr. Phillips' view, it is "pointless doubling the strength of the Criminal Law Branch [and taking other measures aimed at reducing delays in that area] unless one altered the system quite drastically ... and apart from some very small areas where there are time frames in which matters are required to be done, there are just no other time frames at all in the system".

224 Chief Judge Waldron spoke similarly. He stated that control by the Court of criminal matters "has to have its limitations but, nevertheless, if there is a starting time and a finishing time laid down, subject to reasonable qualifications on the imposition of those rules in individual cases, it does give the potential for matters to be properly expedited". (Oral evidence, 23.3.1983, at p. 44.)

225 Other witnesses, including members of the private Bar, Prosecutors for the Crown, and a Legal Aid Commission of Victoria Director were equally adamant about the need for time limits or time frames to ensure the effective and efficient operation of the system, so as to reduce delays. (See further, Issues Raised in the Magistrates' Court Jurisdiction, at p. 136; Issues Raised in the County Court Jurisdiction, at p. 164; and Issues Raised in the Supreme Court Jurisdiction, at p. 171.)

226 The matter of trial by jury relating to County Court and Supreme Court jurisdiction was raised. Main issues focussed upon were: the existence of two jury pools, one for the County Court, one for the Supreme Court; the need for clear instructions for juries; and reference to questions of optional jury trials, and the removal of the right to a jury trial in particular cases.

227 When the Director of Public Prosecutions appeared before the Committee in June 1983 he alluded to the bill for jury fees in the current year, which was "something in excess of $3 million". (Phillips, oral evidence, 1.6.1983, at p. 101.) The absence of any telephone information service to alert

jurors that they are not needed for a particular day adds to the cost. One Prosecutor for the Crown commented upon this, saying:

> *In recent experience it was necessary for an instructor to try to cancel a jury panel of some 200 jurors. The simple exercise of sending 200 telegrammes extends over a number of hours. The machinery needs to be well oiled in order to have a small backlog.* (Hollis-Bee, oral evidence, 23.8.1983, at p. 236.)

228 In the Supreme Court a telephone system has been in operation for some time, whereby jurors may telephone a particular number to be informed whether or not their attendance is required for that day. This recorded message "saves thousands of dollars", for once alerted that they are not required, jurors do not travel to court needlessly, to receive fees for their trouble. In the County Court, until the introduction of the telephone service jurors could be alerted to the fact they were not needed only by way of telegramme, involving large expenditure. However a dual problem exists: that of alerting jurors who have already attended court in relation to the days they are due to attend thereafter at court; and that of alerting prospective jurors that they are not needed.

229 In addition to extending the telephone service to replace telegrammes to cut down costs and improve efficiency, Mr. Phillips' suggestion was to combine jury pools for the Supreme Court and County Courts - in effect having only one pool of jurors. (Oral evidence, 1.6.1983, at p. 101.)

230 Information for Jurors. During his earlier appearance before the Committee Mr. Phillips referred to the necessity that jurors to receive clear instructions about their duties. He said:

> *... juries should be given instruction in their duties before they go on the jury ... [T]he Sheriff recently told me that his officers receive frequent complaints from jurors, the [most common] of which is: 'If only we had*

known that the judge was going to sum up the case at the end, we would not have been worried stiff throughout the trial or did not attend all of the evidence. We did not realise that we could ask for the evidence of witnesses to be read back. We were worried about that.' That causes a lot of delays. Jurors need instructions in what is involved in being on the jury and what a criminal case is all about beforehand. (Oral evidence, 30.3.1983, at p. 101.)

231 The Director of Public Prosecutions said there is a need to present jurors with short, clear information prior to their sitting, to obviate any need for judges to enter into lengthy discussions about jurors' roles, and to cut down on possible confusion arising in jurors' minds about the procedures followed in criminal trials. Mention was made of a video produced in Perth, Western Australia, to be played in the jury room to give to jurors an objective idea of their duties. (Phillips, oral evidence, 1.6.1983, at p. 103.) Justice McGarvie also expressed interest in this issue. (Interview, 19.5.1983, at p. 6.)

232 On the same issue, the Associate Director (Criminal Law Division) of the Legal Aid Commission of Victoria commented:

In particular, here in Victoria I think the charges to juries are far too long and too detailed. We have been hearing comments from judges about the intelligence and sound commonsense of juries; in the charges they give to juries they [do not] treat them [as such] in the amount of detail they enter into. This contrasts very unfavourably with the practice in New South Wales where the charges, if they are much longer than an hour, are considered to be very long charges to a jury. (O'Brien, oral evidence, 27.7.1983, at p. 164.)

233 Limiting Trial by Jury? There was some divergence of opinion on the abilities of juries to deal with cases coming before them. The Chief Inspector of the Homicide Squad told the Committee he favoured a "three judge system", such as exists in some European countries, where twelve member juries are

replaced by a judge and two civil members sitting to determine the issues. This arose from "the point of view that I as an individual and many of my colleagues feel that often some of the juries are ill-equipped to handle complex and protracted trials, and when you remember that some trials may last four or five weeks, you realise it is difficult for people to understand the complexities of them, plus the law associated with them. Quite frankly, many jurymen and women do not understand what the law is really about when it is delivered by counsel and the judge". (Page, oral evidence, 27.7.1983, at p. 189.)

234 Views on the extent to which trial by jury should be used were expressed by some witnesses. Sergeant Hester of the Prosecuting Branch of the Victoria Police commented upon the right of trial by jury in the instance of "minor indictable matters": "should the defendant be allowed to stand trial on a $5 shoplifting charge in the hope of getting a nolle prosequi?" (Oral evidence, 8.6.1983, at p. 138.) Mr. O'Brien of the Legal Aid Commission directed his remarks to the right to opt for trial by a judge alone. He commented on the practice in the United States "where the right to trial by jury is constitutionally entrenched, [but] there are a number of jurisdictions which grant an accused person the right to opt for trial by judge, or trial by judge and jury ..." He continued:

> *I can see nothing wrong with introducing that right here.*
>
> *I was a member of a working party consisting of representatives of the prosecution and defence, and academics. None of us found any cogent reason for denying such a right. It is the accused's option, and ... protection ... could be provided by ensuring an accused could exercise that option only after receiving legal advice.*
>
> *This pertains more to the defence than to the prosecution, although it should be noted that for their own reasons judges and prosecutors were not too happy with the proposal when it was canvassed.*
>
> *It was the view of the Public Solicitor, and is the view of others involved with the defence, that in certain instances it would be in the best*

interests of an accused to have a trial by judge alone, rather than trial by judge and jury. (Oral evidence, 27.7.1983, at p. 177.)

Mr. O'Brien agreed that the Criminal Bar Association took a different view.

235 Accused Standing Mute/Previous Convictions. The Director of Public Prosecutions raised two final issues in relation to the jury. He informed the Committee that there are some areas where "without removal of anyone's fundamental rights ... matters [could be] tried by a judge alone ... [T]hese are questions such as whether an accused stands mute of malice or by visitation of the Lord", and the question of non-admission to prior convictions.

236 When an accused stands mute, under current law it is necessary for a jury to try the accused, to determine whether the accused is mute for a mischievous or malicious reason, or whether the power of speech has been lost by reason of some physical or mental impediment over which the accused has no control. Mr. Phillips suggested to the Committee that it would be more efficient, whilst infringing no civil liberties, to have this question tried by a judge sitting alone, rather than involving a jury in the issue.

237 Where an accused person does not admit prior convictions, and the jury is required to decide whether that person in fact has prior convictions,* or whether convictions said to be those of the convicted person have mistakenly been attributed, Mr. Phillips told the Committee:

There was a case where very late on a Friday night a person who was probably cross about being convicted would not admit his priorconvictions. The judge had to bring the jury back on the Saturday morning to decide this issue. Naturally the jury were very angry about it. For some reason only known to himself, he then decided to admit his

* Now see Crimes (Procedure) Act 1983 s6 (1) (2).

prior convictions, so the jury's attendance became unnecessary. Again it seems to me it would not hurt anyone's fundamental liberties if that sort of issue were tried by a judge alone. (Oral evidence, 1.6.1983, at p. 102.)

COURT ADMINISTRATION GENERALLY: SUMMARY OF ISSUES RAISED BY WITNESSES

238 A general overview of the court system reveals some immediately identifiable concerns of witnesses. Witnesses advocated the introduction of various measures to overcome problems that they perceived:

* rationalisation of administrative support of the courts

* formal mechanism for informing Parliament and the community of the need for increased facilities and resources to ensure effective and efficient operation of the courts

* time limits or time frames to be built into the system to ensure that committal proceedings, coronial inquiries, trials and appeals come before the courts within the space of a specified time

* control to be exercised by the courts over cases until they come before the courts as committals, inquests, trials or appeals

* problems with trial by jury, including:
  - rationalisation of jury pools, so that one pool exists for the Supreme Court and the County Court, thus cutting down on costs and inefficiency
  - clear instructions for jurors about their duties, both as a general matter of jury duties and in relation to the specific case in which they are involved
  - questions relating to the right of trial by jury
  - trial by jury where an accused stands mute
  - trial by jury where an accused, after conviction, does not admit prior convictions

THE ROLE OF THE MAGISTRATES' COURT

239 The Magistrates' Court deals with trials for summary offences and committals for indictable offences. The role of the Magistrates' Court was not extensively touched upon by witnesses appearing before the Committee, however a number of them referred to specific causes of delay.

240 Hand-up Briefs. The hand-up brief procedure was commented on by several witnesses. (See ss. 45 and 46 Magistrates (Summary Proceedings) Act 1975.) The Director of Public Prosecutions noted that it was the "most effective means of avoiding delay" in preliminary enquiries (committal proceedings). The hand-up brief system operates so that instead of witnesses for the prosecution being called to give evidence at the preliminary enquiry, being examined and cross-examined on oath, and depositions made, the police officer in charge of a case serves on the defendants and on the defendant's solicitors statements in writing of the prosecution witnesses' evidence. This material should be served a reasonable time before the date of the preliminary enquiry. The defendant has the option of waiving the calling of the witnesses to give formal evidence. As a general rule, this option is taken up, the defendant settling for the Magistrate reading the statements and deciding on that basis whether to commit the defendant for trial. On some occasions, a number of witnesses may be called to give evidence and be cross-examined, whilst the remainder of the case comprises prepared statements. Under the present system, discretion to use this procedure remains with the police.

241 Commenting on hand-up briefs, the Flanagan Committee remarked upon a tendency which "has developed where the 'hand-up brief' procedure is adopted, whereby the prosecution only tenders before the Court so much material as it believes will be necessary to obtain the committal of the accused". (First Report,at p. 2.) Being sparing in the amount of material put before the magistrates court has, the Flanagan Committee said, "the undoubted advantage of shortening the time taken upon committal", however it causes "considerable delay in the ultimate presentation of the accused for trial". It continued:

A considerable amount of time is taken by the preparation officers in the Crown Solicitor's Office and the Prosecutors for the Queen, in endeavouring to ascertain what a case is all about. Many enquiries have to be made of the informant who takes further time to answer those queries. Much of this delay is unnecessary and could be obviated if the [officer] preparing the hand-up brief ensured that all adequate material was contained in [it]. (First Report at p. 3.)

The Flanagan Committee determined that the attention of the Commissioner of Police should be "directed to the existence of this problem" and that discussions should be held with the Commissioner "with a view to seeking a solution ...". (First Report at p. 3; see also O'Brien, oral evidence, 27.7.1983 at p. 707.) There was no further comment upon the issue in that Committee's Second Report. (See generally Flanagan First Report, Appendix VA, at p. 301; and Flanagan Second Report, Appendix VB., at p. 315.)

242 A police viewpoint on hand-up briefs was put to the Legal and Constitutional Committee by Sergeant Hester of the Police Prosecuting Branch. He said that there are "a number of provisions needing amending in relation to the time of service of briefs":

At present police must serve the brief on the defendant at least fourteen days prior to the date of the hearing. We say that that is not sufficient. We say that it should be twenty-one days.

The defence has to serve a notice on the police at least five days before the date of hearing. Again we say that that is insufficient because there is no hope of arranging witnesses in five days in a case that involves twenty witnesses [if defence counsel opt to call witness evidence rather than accept a hand-up brief]. (Oral evidence, 8.6.1983, at p.137.).

Sergeant Hester said that the short time limit leads to applications for adjournments being made on the part of the defence, which claims it has had insufficient time to prepare, to decide to call witnesses, or to accept a hand-up brief. The short time limit is another reason for delay, as:

... if a person requires legal representation for a hearing, that person sees a solicitor. The solicitor obtains the hand-up brief or the initial instructions from the client. The night before the court hearing, the solicitor rings a barrister. The barrister appears at the court and says, quite properly, 'There is no way I can do a proper job for this good fellow - I have just been handed this brief'.

What magistrate would not grant an adjournment? That is an area requiring rectifying. (Oral evidence, at p. 137.)

243 The Director of Public Prosecutions had views on problems arising with hand-up briefs, and proposals as to how they might be overcome. He told the Committee that a "strong case can be made for the proposition that the discretion to use the hand-up brief procedure and any consequential decisions should rest not on the police informant but with the magistrate". He went on to outline his proposal:

I am in favour of a system where the police informant submits all the statements of the witnesses to the magistrate who then has authority to decide whether or not a hand-up brief procedure will be used and what witnesses, if any, are to be called. This should be done on the basis of a pre-trial hearing at which both parties are represented. At present the magistrates have no legislative authority to perform this task but must act as unofficial referees in attempting to resolve the inevitable disputes between the parties. (Phillips, oral evidence, 30.3.1983, at p. 56.)

He returned to this issue when appearing before the Committee after having commenced full-time duties as the Director of Public Prosecutions. He said:

The problem at the moment is that the discretion to use the hand-up brief resides in the police in charge of the case. I have an open mind about this but I visualise something like this: the accused is charged, brought before a magistrate and questions of bail are attended to. Then, within a time frame, the police informant files with the court the police

brief for the perusal of of a magistrate, who has the power to require the production of more material if that magistrate does not think what he has is sufficient. The Magistrate and the solicitor or barrister appear and after hearing both sides the magistrate decides if it will be a hand-up brief or whether some witnesses should be called and who they are. The magistrate could also direct in the event of a dispute that the police make more disclosures, either through witness statements or other documents to the defendant. The magistrate, having ruled on those questions, would be in a position to do what magistrates are not now able to do, that is, fix a time for the hearing of the case with some real knowledge as to how long it would take. (Oral evidence, 1.6.1983, at p. 110.)

244 In the D.P.P.'s view, a current problem arises, because "the magistrate really has no idea how long a case is going to take and time is [therefore] wasted". Handing control to magistrates of the hand-up brief procedure, and creating a preliminary hearing at magistrates court level would not "infringe on anyone's rights, because accused people would retain the right to be heard, and the necessary decisions can be made. At the moment the magistrate in the City Court, which hears all metropolitan committals, would be aware of simply refereeing all disputes occurring in these cases, without having any authority to make effective orders about them. It is working reasonably well, but it is obviously an unsatisfactory situation ..."

245 Committal Proceedings. On committal proceedings generally, Sergeant Hester of the Victoria Police observed that committal proceedings are conducted by members of the Prosecutions Division of the Victoria Police (unless the matters are particularly difficult or complex). He said that problems arise "in relation to staff availability, services and support staff". He also alluded to the fact that apart from committals for country areas, all committals are conducted at the Melbourne Magistrates Court (the City Court). He told the Committee that the City Court building is "hopelessly antiquated ... and there are many problems as a result ... [lack of facilities] means it is

[almost] impossible to have a conference before [proceedings commence]". (Oral evidence, 8.6.1983, at pp. 129-130.)

246 The Director of Public Prosecutions also pointed out that all committals for the metropolitan area are presently held at the Melbourne Magistrates Court. Previously, committals were heard at other courts in addition to the Melbourne Court, some being held at Prahran and some at Preston. He commented:

> *The [centralised] system was instituted this year and I am unable to say whether that operation has improved the system ...*
>
> *I have spoken several times with the Chief Magistrate and he needs more Magistrates ...* (Phillips, oral evidence, 30.3.1983, at p.63.)

247 Mr. Phillips commented on some contemporary suggestions that committal proceedings should be abolished, indicating that this area is ripe for review. (Oral evidence, 1.6.1983, at p. 108.) The Associate Director (Criminal Law Division) of the Legal Aid Commission of Victoria also commented on this question. He acknowledged that the defence case for retaining committals is that it is "a way of testing the strength of the Crown case, trying out witnesses ..." On the other hand, he pointed out, the prosecution "refer to this preparing of the defence case as being a 'fishing expedition' on the part of the defence". He alluded to one problem that can arise for the defence, notwithstanding the holding of committal proceedings:

> *... there is ... the practice with some magistrates where [an accused] might be charged with an armed hold-up and a count of handling. The magistrate might find a prima facie case on the count of handling and commit the person for trial on that, but then on the ultimate presentment, [there appears] a charge of handling and one of armed robbery. The defence are aggrieved ..., because ... they would much rather [have] tested the evidence in relation to the armed robbery than to the [handling charge].* (O'Brien, oral evidence, 27.7.1983, at p. 170.)

Mr. O'Brien concluded that "if there was full disclosure on the part of the prosecution, a case could be made out for the abolition of committal proceedings". A full disclosure of the Crown case could, he opined, overcome qualms of the defence as to the infringement of accused's rights if the opportunity for cross-examining witnesses at the committal stage was abolished. In this regard, the Committee noted the High Court decision in Barton and Anor. v The Queen (1980) 55 ALJR 31 and the more recent comments of the Chief Justice of the Supreme Court of the A.C.T., who wrote:

> *... provided there is established a truly independent and well-qualified Director of Public Prosecutions with an adequate staff, committal proceedings are a waste of time. They have never been adopted in Scotland. Proofs of the evidence of all Crown witnesses should be furnished to the defence. The question of whether there is a prima facie case has to be decided by the judge at the trial, in any case. The course of criminal justice is encumbered by the fact that for indictable offences the responsibility is shared by two courts ...*

This, the Chief Justice added, is a waste of time, human resources, and materials. (Communication by letter, 23.6.1983.)

248 Magistrates' Training. On the training of Magistrates, Mr. Phillips indicated that the practice today is to appoint to the Bench legally qualified persons only. On the proposal that Magistrates should gain control over the hand-up brief procedure, in that discretion would lie with the Magistrate as to whether the matter should come forward as a hand-up brief, rather than that discretion remain with the police, Mr. Phillips was confident that Magistrates possess sufficient training to deal competently with this, as with other matters already within their purview: "The Magistrates can perform the work satisfactorily". (Oral evidence, 30.3.1983, at p. 63.)

THE ROLE OF THE MAGISTRATES' COURT: SUMMARY OF ISSUES RAISED BY WITNESSES

249 Evidence given by witnesses appearing before the Committee to date reveals some problems in the operation of the magistrates' courts perceived to require attention:

* the amount of material contained in hand-up briefs, leading to delays because extra information must be obtained at the post-committal, pre-trial preparations stage

* time limits governing police service of a brief on a defendant prior to hearing

* time limits governing defence service of notice on police before date of hearing

* applications for adjournment, arising from the available time for preparation on the part of defence counsel

* applications for adjournments being made as a result of too short a time for contacting witnesses and ensuring their attendance at a hearing

* discretion of police in adopting hand-up brief procedure in any particular case

* control by the magistrate over the proceedings lacking - such as whether a hand-up brief procedure is adopted, or committal proceedings held; or whether a hearing should go ahead at a particular date

* time limits lacking on commencement and conclusion of proceedings at the magistrates court stage

* the efficacy and justice of committal proceedings: are committal proceedings necessary or should they be abolished

* relocation of the City Court to a building with modern facilities which are adequate for conducting prosecutions in an orderly and proper manner

THE ROLE IN THE CORONER'S COURT

250 Coroner's Courts deal basically with inquests in the case of death. In relation to homicides, the preliminary hearing takes the form of an inquest. At an inquest the coroner has the same power as that of a magistrate at a committal proceeding, to direct that a person before the court stand trial for some indictable offence. Once such a determination is made, the depositions are prepared and a brief drawn up in the same way as in a committal arising out of a magistrate's preliminary hearing.

251 Counsel Assisting the Coroner. In recent years the practice is that the Crown Solicitor instructs counsel to appear in difficult preliminary enquiries and inquests. In such cases, counsel are briefed to assist the coroner. In other cases, the coroner is assisted by a police officer who specialises in the area. The Director of Public Prosecutions has said in regard to inquests of a special nature:

> *I propose to instruct counsel to assist the coroner in all cases in which it is said that the police have been responsible in some way for the death of an individual. It is, of course, clearly in the police interest, apart from the public interest, that I should do so. They can only gain comfort from the fact that there will be a review of the papers in the matter by an independent barrister who will assist the coroner. This will also remove the possibility of unfounded allegations that the police have been less than objective in their preparation of their material for the coroner.* (Phillips, oral evidence, 30.3.1983, at p. 60.)

252 Police Liaison. Although the Committee has not heard extensive evidence on the operation of the coroner's court, witnesses have raised possible areas of concern. Chief Inspector Page of the Homicide Squad, Victoria Police, stated that delays confronting police in the homicide area arise generally at the pre-Coroner's Court stage. Difficulties sometimes occur in the time lapse

between an alleged offence being committed and the preparation of a brief for the Coroner's Court:

> *There are matters which sometimes are very straightforward. The incident happens, we are able to get the offenders very quickly because they are either on the scene or have surrendered themselves, or we have tracked them down quickly, or because of the nature of the particular incident we do not require a lot of witnesses. That straightforward matter may be done in six or seven weeks sometimes, but sometimes it takes a couple of months.*
>
> *The more complex cases take a lot longer before we are prepared to say to the Coroner, 'We are prepared to give you this brief'. They chase us and we try to give them a date which we think is reasonable for the nature of the enquiry, and I do that in consultation with the officer in charge of the brief ...*
>
> *We do consult regularly, in the sense that we consult with the Coroner in all manner of things relating to particular cases. There is very good liaison in that area.* (Oral evidence 27.7.1983, at pp. 182-183.)

253 Control Over Cases/Time Limits. The Director of Public Prosecutions referred to the unsatisfactory nature of the coronial system, in that there are no controls built into the system requiring a case to be brought before a Coroner within particular time limits. He said:

> *With respect to the Coroner's Court, at the present time the Coroner is notified of a homicide very shortly after it is discovered. The Coroner has no legislative authority to then compel the police to proceed with the prompt preparation of the police brief in the matter. Months can elapse during which time an accused person is in custody before the inquest can be listed. A strong case can be made for giving the Coroner proper powers to order the prompt production of an inquest brief to the Court, thus facilitating the early hearing of an inquest.* (Phillips, oral evidence,30.3.1983, at p. 56.)

254 General Issues. In May 1975 a three member committee comprising Mr. W.N. Thompson, retired Stipendiary Magistrate; Dr. V.D. Plueckhahn, Director of Pathology at Geelong Hospital; and Dr. J.D. Hicks, Pathologist, was established by the then Attorney-General, the Honourable V.F. Wilcox. The committee's Terms of Reference were:

To inquire into and report to the Attorney-General as to -

1 *Whether the existing arrangements for identification of deceased persons, post mortem examinations and forensic toxicology and analysis services for Coroners in -*
   (a) the metropolitan area;
   (b) other areas
   are satisfactory, both in relation to present needs and likely future needs.

2 *If such existing arrangements are not satisfactory, what changes (whether in the law or otherwise) are recommended.*

3 *Whether the existing procedure in relation to inquests, including investigation of the facts by the police, are satisfactory, and whether any, and if so, what, channges are desirable in order to expedite inquests.*

The committee reported to the Honourable Haddon Storey, who succeeded Mr. Wilcox, on 1 February 1977. It recommended, amongst other matters, increases in specialist staffing numbers at the Coroner's Court; upgrading of physical facilities, staffing, and equipment at the Coroner's Court; centralised record keeping; and redrafting of the Coroner's Act 1958.

255 Subsequently. a general review of the Coroner's Act 1958 was conducted by the Honourable J.G. Norris, Q.C. (now Sir John Norris) former Judge of the Supreme Court. The Norris Report was completed on 9 September 1980. Its basic premise was that the Coroner's "primary function is to help establish the

cause of death in a wide variety of situations, few of which have any criminal or even suspicious overtones". The conclusion was that there is "no substantial reason for suggesting that any system other than the existing coronial system should be introduced". Recommendations included:

* that the law relating to Coroners should be codified

* that the Coroner should have jurisdiction to hold an inquest into a death in appropriate circumstances where the death occurred in Victoria, or where the death occurred outside Victoria if -
  - (i) the deceased ordinarily resided in Victoria
  - (ii) the coroner had reasonable cause to believe that the cause of death occurred in Victoria
  - (iii) the remains of the deceased are within Victoria

* an obligation to report to the Coroner deaths occurring in a prison, youth training centre, or other such institution should be cast upon the Governor or other officer in charge of the gaol, prison, youth training centre, or other such institution. A like obligation should be cast on any medical officer in charge of any assessment centre appointed and on the person in charge of a treatment centre licensed under the Acoholics and Drug Dependent Persons Act 1968 in regard to deaths occurring in such institutions

* that the common law duty of any person who is about the deceased to give notice to the Coroner or to the police of circumstances requiring an inquest be given in statutory form

* that a doctor not qualified to give a certificate of the fact and cause of death and who in the course of professional duties is informed of the death of a person whom she or he has previously attended, or who attends someone found to be dead, should be obliged to report the fact of the death to the Coroner together with any information which might assist the Coroner's inquiries; the doctor should first see the body and establish the fact of death

* that the kinds of death into which the Coroner is bound to inquire should not be stated in greater detail in the Coroner's Act

* that the Coroner should have an absolute discretion as to the manner of discharging that duty, whether by investigation short of a formal inquest, or by inquest, save in the case of -
  (i) deaths from suspected homicide
  (ii) deaths of persons deprived of their liberty by society
  (iii) deaths of persons who are unidentified
  in all of which three cases the Coroner should hold an inquest

* in cases where the Coroner thinks it proper to do so, the Coroner should have authority to receive evidence on affidavit or by statutory declaration or verified as in section 45(3) Magistrates (Summary Proceedings Act 1975, subject to proper provisions to enable cross-examination of the deponent declarant or maker of the statement if required

* that at all inquests the evidence shall be required to be put in writing and read over to and signed by the respective witnesses

Further recommendations dealt with procedures in inquests and proposals for amending the provisions of the Coroner's Act.

256 The Law Department was requested to comment upon the recommendations of the Norris Report, and a commentary was prepared by Ms. Francine McNiff, then a Legal Officer with the Policy and Research Division, and presently a Children's Court Magistrate. The McNiff Commentary recommended that the Norris Report and comments be submitted to the Coroner, Mr. Ellis, S.M. for consideration and that interested persons and groups be asked to make submissions. She noted that certain matters had not been dealt with in the Norris Report, but required clarification, including:

* the application of the title and role of Coroner to any magistrate acting in that capacity

THE ROLE OF THE CORONER'S COURT: SUMMARY OF ISSUES RAISED BY WITNESSES

257 The Committee sees the operation of the Coroner's Court as an area requiring further investigation and review. However evidence to date suggests:

* in complex or otherwise difficult cases, it is inevitable that delays will occur in police investigation, and often these delays cannot be alleviated, due to the nature of the case involved (for example, no suspects readily apparent, inadequacy of information, suspects' whereabouts unknown and the like)

* complex cases and those where any allegation of police responsibility for a death is made require counsel to assist the Coroner

* there are no time limits placed upon when a matter should be brought before the Coroner's Court

* there is no requirement placed upon a particular authority - for example, the Coroner - to ensure that any case is brought before the court within a particular time-frame

* the Coroner's Act 1958 should be reviewed

THE ROLE OF THE COUNTY COURT

258 The main body of evidence before the Committee related to the operation of the County Court. The Committee heard evidence from His Honour, Chief Judge Waldron of the County Court, who pointed out that the jurisdiction of the Court covers mainly criminal matters. A small number of crimes - including murder and treason - are outside the County Court's jurisdiction. These matters come within the purview of the Supreme Court only; the Supreme Court deals also with commercial frauds, armed robbery and like offences, but there is an overlap between the County Court and the Supreme Court in the criminal jurisdiction. The Chief Judge considered that this overlap should be subjected to review. (Waldron, oral evidence, 23.3.1983, at p. 32.)

259 Delay in the County Court relates to the criminal jurisdiction rather than the civil jurisdiction. The Committee was informed that a statistical breakdown of delays in criminal trials revealed that in the main, cases awaiting trial "are less than a year old, between time of committal and commencement of trial", though a small percentage of cases was over two years old in March 1983. The actual length of time between alleged commission of an offence and coming to trial could be extended by delays between arrest of an accused and commencement of committal proceedings. The latter delay "could be many months, and up to a year". The Chief Judge told the Committee that delay peaked in 1980 or 1981, and since then there has been "an improvement".

260 The Committee was also warned that with an increase in efficiency and less delays, it could be anticipated that there will be an increase in convictions and in custodial sentences. Often where delays have occurred in the past, witnesses have been lost to the Crown or memories have dulled, thus making it possible that an accused person might have wrongly escaped conviction. Alternatively an accused person may have used the time between charge and trial in a responsible manner - settling into a steady job, marrying and beginning a family, taking up an apprenticeship, beginning the purchase of a house,

indicating a settling down and a change of ways. This has meant that courts might take this as a maturing on the part of an accused, leading to a sentence which is less than would have been the case, had the accused not had time to show signs of rehabilitation through her or his own efforts. Several witnesses also informed the Committee that accused persons frequently welcome delays in the committal and trial process: far from wanting their cases to go ahead as quickly as possible, they are anxious that as long a time as possible should elapse between arrest, charge and trial. The motivation may be that of wishing to remain free as long as possible, or to build up a "character renewal" as previously described. However where an accused is not on bail but is in custody on remand the urgency for a speedy trial is more keenly felt. (See for example Buckley, oral evidence, 18.3.1983, at p. 93.)

261 Summary Trial at County Court Level. One matter raised before the Committee was that of enabling County Courts to try matters summarily.* The Director of Public Prosecutions raised this issue as relevant in particular cases, where time may unnecessarily be lost by cases being transferred from the County Court to the Magistrates' Courts, when they might better be dealt with immediately as they arose in the County Court. He said:

> *... it frequently happens that charges that are really inappropriate to superior courts get into their lists. For example, drugs may be found in a matrimonial home and in order that the law does not get into disrepute because the husband blames the wife and the wife blames the husband, if only one is tried that may be a successful ploy, and often both are tried. We are sometimes met with a wife saying, for example, 'I will plead guilty to just possession. I do not want to be tried in the County Court even though I am committed for trial'. At the moment that would have to go back to the Magistrates Court to be disposed of and sometimes because the police have forgotten to charge the person alternatively with a summary offence it is too late, because there is the twelve months' statute of limitations, to do anything about it. At other times*

* Now covered by Crimes (Procedure) Act 1983 s.4

the person may be convicted of some offence but there is still the residue of summary offences to be disposed of. It seems to me to be absurd if the accused is there, the lawyers are there, he is ready to have and consents to have a judge in the County Court deal with the residue even though they are summary cases, the judge cannot deal with them because there is no jurisdiction ... [W]e should give the judge jurisdiction to deal with those cases. Judges are familiar with the penalties because they hear these cases by way of review in their appellate jurisdictions from magistrates. The judges are quite agreeable to this. (Phillips, oral evidence, 1.6.1983, at pp. 102-103.)

262 Control Over Cases/Time Limits. A second issue raised by many of the witnesses appearing before the Committee relates to delays being caused in that the Court has no control over cases until they are brought before the Court. Chief Judge Waldron alluded to problems in that the bringing forward of criminal cases to the Court for trial "... is completely the prerogative of the Crown Law or the Criminal Law Branch" of the Law Department. (Now of the Office of the Director of Public Prosecutions.) He continued:

The present situation is, as it has always been historically, that there is no control by the Court, of the Crown, as to the signing and filing of a presentment ... [With] trials that come to the court day by day, the presentment is filed at the time that the trial commences, so that I very regularly have applications before me for adjournment of trials ... [These] applications are based on goodwill rather than any actual control or sanction by the court that people dutifully agree with [my ruling]. Until the presentment is filed, the Crown can turn its back on the court and [declare] it is not going on. (Waldron, oral evidence, 23.3.1983, at p. 32.)

Many others raised this problem and favoured judicial control. (O'Brien, oral evidence, 27.7.1983, at p. 161.)

263 To overcome lack of control over those matters scheduled to come

before the Court, the Chief Judge recommended that a system should be implemented "... whereby the Crown [or the Director of Public Prosecutions representing the Crown] will be obliged to sign and file at an early time a presentment in the particular case". Early filing of presentments (indictments) would give the Court "... some control over the bringing forward of criminal matters to the Court".

264 The Chief Judge illustrated with the example of setting time limits on the filing of a presentment. Filing should take place within a particular period after the date of committal; and time limits on the period within which the matter must be disposed of by the court. He said:

> *... the fact that the committal is on a particular date will demonstrate when the presentment is ultimately seen to be filed, whether it is filed within time, or what would be contemplated as to it having to be filed some time after the date of committal, so that if the Director of Public Prosecutions was slow in doing that, it would be demonstrated on the face of it. To ensure that once they are filed with the court, presentments can ensure that the matter is brought on as soon as possible, it is essential to have both a date by which the presentment is filed, and a date by which, subject to leave, the matter must be disposed of.* (Waldron, oral evidence, 23.3.1983, at p. 46.)

265 The Director of Public Prosecutions was similarly insistent that time frames should be built into the structure to ensure that a sense of urgency could be maintained, and there would be a means of ensuring that cases enter the system within a reasonable time, and can be kept within certain time limits once in the system. He referred the Committee to the system currently operating at the Central Criminal Court in London, the Old Bailey. Under that system, court rules provide that the indictment (the formal written statement of the charges in the superior court, "a presentment" in the Victorian system) must be issued and filed in the court within one month of the committal for trial, unless the court otherwise grants leave. The rules also provide for the trial of the case to take place within a further eight weeks of the filing of an indictment unless the court grants leave for a later hearing date. Mr. Phillips pointed out that although these requirements are not rigidly adhered to at the

Old Bailey, and the court "usually grants leave to permit the somewhat later performance of the necessary actions, they are still immeasurably better off than the present system in Victoria". (Oral evidence, 30.3.1983, at p. 55.)

266 The Director of Public Prosecutions went on to say that he favours the presentment rules under the Crimes Act 1958 being changed "so as to require the filing of presentments within three months of the committal proceedings, unless the courts give leave, and for the trial of accused persons to commence within three months of the filing of the presentment unless the courts give leave". This standard applies in rape cases, in accordance with section 47A of the Magistrates (Summary Proceedings) Act 1975 and "there is no reason why in principle it is not a standard which is capable of achievement generally". (Mr. Phillips added the rider that this would be conditional upon the Office of the DPP being provided with adequate staff and equipment in order to ensure the prompt preparation of the presentments. On this issue, see further The Role of the Director of Public Prosecutions, at p. 56.)

267 There would have to be sanctions to ensure that the system operates effectively. The Director of Public Prosecutions suggested that sanctions for non-compliance by the prosecuting authorities could include judicial censure, orders for costs, or quashing of the instant presentment so that the prosecution must begin anew: "Judicial officers would then be firmly in control of the pending criminal proceedings and would be able to enforce compliance of the parties by binding orders of the court". (Phillips, oral evidence, 30.3.1983, at p. 55.)

268 Pre-trial Hearings. The Old Bailey system was also referred to in relation to proposals that pre-trial hearings should be introduced into the Victorian system, in order to cut down delays during a trial.* In some cases, points are raised on the voire dire, which means that a jury which has been

* See now Crimes (Procedure) Act 1983 s.5

sworn in must be removed from the court, whilst the matter (or matters) is argued by counsel. Not only is this wasteful of jurors' time, but members of the community who have participated in jury duty may be alienated from the system needlessly. This problem is overcome in the English system by summonses for practice directions in criminal cases. Rules made by the judges of the Central Criminal Court (the Old Bailey) provide for this system to operate. Mr. Phillips informed the Committee that similar systems exist at several provincial centres in England, the superior courts in Los Angeles, and in the Supreme Court of the Australian Capital Territory. (The English Bar Association and Lord Justice Watkins' Working Party on the Criminal Trial were largely responsible for this development in the Old Bailey.) The Old Bailey system was described thus:

> *At the Old Bailey a pending criminal trial can be listed for practice directions by the court either by one of the parties or by the court of its own volition. During such hearings the legal representatives of the parties are expected to be able to inform the court, among other things, of the pleas to be tendered on trial, that is, guilty or not guilty; of the prosecution witnesses to be called, including witnesses additional to those called at the preliminary enquiry; witnesses known to the prosecution who will not be called but be made available to the defence; of facts which can be and are admitted and of any point of law which might arise at the trial including any questions as to the sufficiency of the presentment.* (Phillips, oral evidence, 30.3.1983, at p. 54.)

At the pre-trial hearing, the admissibility of evidence and any other significant matters which might affect the proper and convenient trial of a case can be decided. The judge may hear and rule upon any matters of law involved in the subsequent trial and is empowered to make such order or orders as appear necessary to secure the proper and efficient trial of the case. If the accused indicates that he or she is prepared to plead guilty, the matter is immediately prepared as a plea of guilty, so that no time is spent in needlessly preparing the case as a trial.

269 The Director of Public Prosecutions later commented upon other ways in which the pre-trial procedure would have an effect of cutting down delays and

improving the efficiency of the criminal justice process. He said:

> *My particular objection to the current system is that it results in an absolutely meaningless and counterproductive order being made. Magistrates say, 'I direct you to be tried next month in the County Court.' I have heard this hundreds of times. The client then says, 'Hey, he just said I am going to be tried next month' and the lawyer says, 'Forget that, you will not even hear from those people for two years' ..*
>
> *If the lawyer had to say, 'Listen, in three months there is going to be a pre-trial investigation into your case in the County Court. You will get the presentment against you and the evidence against you, and the judge is going to want to know how you are going to plead, whether you will plead guilty to something. You do not have to. The judge is going to want to know what parts of the evidence against you you object to and why. He is going to want to know what parts of the evidence against you you object to and why. He is going to want to know whether I am prepared to admit certain facts on your behalf, such as the car is stolen, or it did belong to Mr. Jones. The judge is also going to want to know any other matters that might affect a speedy trial of the case and you will have to be in a position to give me instructions. Please go away and think about that so you can instruct me.* (Phillips, oral evidence, 1.6.1983, at pp. 107-108.)

One of the problems presently existing is that "human nature being what it is, ... clients charged with criminal offences will always put things off. In many cases they never believe they will be tried and it is a great aid to say to someone, 'You will just have to make your decisions by such-and-such a time'. They will then make them." (Phillips, oral evidence, 1.6.1983.)

270 Mr. Phillips' view was that the Bar and solicitors would not object to such a system, providing it resulted "in the sense of the Crown showing its hand to accused persons so they can make an informed decision." Under the present system, a murder trial can begin, and "even after it starts counsel can still receive notices of additional evidence served by the prosecution ... quite

important pieces of evidence. ... I do not think the Bar and the solicitors will object providing the system makes provision for accused persons to be informed of what they are charged with." (Oral evidence, 1.6.1983.)

271 Members of the private Bar appearing before the Committee addressed the issue of pre-trial hearings. One said that in his view " ... the overwhelming majority of those practising in crime [believe] that the idea of a pre-trial hearing is basically a good idea. [T]here are not many barristers, to the best of my knowledge, who practice in that area who are opposed to it". (Lovitt, oral evidence, 16.11.1983, at p. 26.) However, Mr. Lovitt sounded a word of warning of the difficulties that might arise in the practical putting into effect of the proposal. He suggested that there was a possibility that there may be "very little depth and very little attempted solving of [the] problems" arising in the voire dire stage:

> *It seems to me that what is proposed and what [may] come out in practice are two totally different [matters]. Probably one is adding a couple of days of useless hearing to a trial... [T]here is some suggestion ... pre-trial hearings [may be attended by] in-house solicitors [from the Legal Aid Commission]. They would be the first to agree that if complex voire dires are to be run, questions of evidence [to arise, and so on], the great bulk of their solicitors ... [who] may be far more experienced than many, may [fear] it is to be nothing more than a call-over ...* (Lovitt, oral evidence, 16.11.1983, at pp. 255-256.)

Mr. Lovitt went on to say that most clients would not pay for counsel at the pre-trial hearing stage, which might lead to inexperienced solicitors dealing with the proceedings. (Oral evidence,16.11.1983, at p. 257.)

272 A second member of the Bar also referred to the pre-trial hearings proposal, having had experience of it during ten years of practise at the English Bar. He concluded pre-trial hearings are "of most use in multi-headed cases where there are a number of accused and there is a good deal of sorting out to

be done as between counsel and the accused as well as counsel for the accused and prosecution." He went on:

> *It gets people to exchange their views on how they will run their cases and what issues are likely to arise as between accused as well as demarcation of work and so on. It is most important in those cases and can be useful in all cases. In England ... it was only ever useful if you could get counsel who were going to run the cases ... [I]f it is clear that the decisions made at the preliminary hearing are to be binding at the trial, then it can only work if you can get the people up-front who are running the case, otherwise people will just defer making the decision.* (Maidment, oral evidence, 16.11.1983, at pp. 263-264.)

On the question of how far in advance of trials counsel in England are briefed, how far in advance the pre-trial investigations are held, and whether there are fixed dates given for trials which are known at the time of the pre-trial investigation, Mr. Maidment said:

> *Firstly, people are briefed very soon after committal and it may be within a matter of days both for the prosecution and for the defence. If one goes into the average English criminal practitioner's chambers, one will see a line of briefs stretched from one end of the desk to another ... [I]n the more complicated cases the date for the [pre-trial] hearing is set and [counsel] has to be prepared for that [pre-trial] hearing. [The] brief is prepared carefully.*
>
> *The [pre-trial] hearing ... would be envisaged to take place in a month, two months or three months before the trial is to be set for hearing and probably a matter of six to eight weeks at least after the committal so counsel has had a chance to prepare [the] brief. Something useful can be achieved at the [pre-trial] hearing; it is not too far in advance of the trial, so by the time the trial comes up it is fairly certain the same counsel will be involved.*

Whilst I cannot speak about the current system [having been out of the jurisdiction for two years], there was an enormous backlog of criminal cases in England [several] years ago. It decreased for a number of reasons - possibly preliminary hearings was one of the reasons - but it is more frequent now that even long cases can be set to take place on a fixed date which is maintained as a fixed date within perhaps two to three months of a preliminary hearing and I believe within four or five months of the committal taking place. Of course, that can happen more easily in the shorter cases, but even with the longer cases that was beginning to happen [two] years ago. (Oral evidence, 16.11.1983, at pp. 266-267.)

273 The Associate Director (Criminal Law Division) of the Legal Aid Commission of Victoria similarly agreed that mechanisms ensuring disclosure of evidence before the trial would lead to better disposal of cases, less delays, and better use of court and associated resources. (O'Brien, oral evidence, 27.7.1983, at p. 160.)

274 Prosecutors for the Crown giving evidence before the Committee also endorsed the proposition that pre-trial hearings should be held to clarify issues prior to trial. (Hassett, oral evidence 23.8.1983, at pp. 194, 244; Hollis-Bee, oral evidence, 23.8.1983, at p. 244.)

275 Appeals. In relation to the appeals jurisdiction of the County Court, the Chief Judge of the County Court informed the Committee that this area was "in a very satisfactory condition". Six weeks' delay may occur between the decision in a Magistrates Court and an appeal hearing, although the delay would not be as great where a custodial sentence has been imposed. Appeals from Magistrates Courts are heard each Friday, and a delay of at a least a week is inevitable, because the case for the appeal would not be organised - research would have to be undertaken, conferences would have to be held - under that time. An appellant sentenced to a custodial sentence would have the case

heard within a fortnight, which in the Chief Judge's estimation is "the earliest practical time for it to be done". (Waldron, oral evidence, 23.8.1983.)

276 County Court on Circuit. Reference was made to the County Court on circuit. Criminal work in the country is almost exclusively carried out by the County Court, although murder trials are within the exclusive preserve of the Supreme Court. A significant part of circuit work is devoted to criminal work in the country. In Ballarat and Geelong criminal circuit sittings take place along with civil sittings, so that at one time two judges will be sitting at provincial centres, one sitting in crime and the other dealing with civil work. Chief Judge Waldron commented:

> *My belief is that the country litigants are very well served ... There is, if anything, an overservice insofar as there are 27 County Court judges, in addition to the Chief Judge, who exercise County Court jurisdiction, doing the County Court judge work. There are 21 County Courts, so that six judges need to be on the road at any given time in order to keep them occupied. [As] a general proposition ... the committee ought to have no concern about country litigants, whether they be voluntary litigants or involuntary litigants ... [When] the additional court capacity [comes into being] with the new court, maybe an even harder look may be needed to be given to circuits to see whether, in fact, there should be some modest reduction in the circuit activities of the court.* (Oral evidence,23.8.1983, at p. 39.)

Later he said:

> *There is a real need for the Court to go on circuit, and certainly at the moment from time to time individual country areas get a bad deal insofar as there may be a succession of circuits where criminal work almost gets all of it, and civil litigants are forced to wait ... I am talking generally when I say they are well serviced. I think there is room for better rationalisation of the time spent by the court in the country, although one of the problems there is that courthouses are used by the*

County Court, the Supreme Court, Workers Compensation and the Family Court, so that there is a demand for facilities ...

I would be very strongly against decentralisation insofar as both the quality of the judges and the general morale of the judges are very much dependent on their being housed together and on them being supportive one of the other. A judge who, if it were to be the case, was located in Ballarat or Warrnambool ... would become so isolated and performance is likely to significantly decline as a result.

I think this is a good reason for the present [circuit] system to be maintained, but would simply say ... that I am concerned as to the appropriateness of some circuits and maybe not enough time given to others. There is ... room for improvement ... (At p. 46.)

277 The Director of the Criminal Listings Directorate also pointed to the good operation of the circuit system, in that he told the Committee that "If all courts were running like the circuit courts, it would be a satisfactory system. With those courts where people are committed to trial in the country, most cases are dealt with during those sittings and there is really no back-log at all in the country courts, County and Supreme." (Bateman, oral evidence, 8.6.1983, at p. 126.)

278 The final matters which were raised by witnesses in relation to the operation of the County Court involved the experience of courts and counsel in criminal trials; the number of courts available to hear criminal cases and the hours and sitting programme of the Court.

279 Criminal Trial Experience. Counsel appearing before the County Court tend to have less experience than those appearing before the Supreme Court. This was noted as causing problems. Lack of experience in criminal trials also impinges upon the role played by the trial judge. A member of the private Bar told the Committee:

I believe it is accepted by nearly all members of [the Criminal Bar Association] that real delays are caused by preparation and lack of experience in some of trials. The County Court tends to be less efficient in some ways than the Supreme Court, comparing the complexity of matters in the Supreme Court. Again it is hard to demonstrate by statistics, but ... preparation and experience [probably] means cases are shorter [in the Supreme Court] because the issues are more clearly defined and ... there is no unnecessary legal argument.

You do not have, for example, a prosecutor calling the whole range of evidence in his brief where there are only two or three issues open because he is unsure ultimately what they are going to be and has not the confidence to say that the forensic material does not really worry anyone and defence counsel saying 'That is right', so that they can concentrate on identification, if that is the issue, and not blood tests and the like. You do not have the protracted trials with all the evidence being led and everything being challenged, the result being in the County Court with inexperienced counsel and a lack of preparation far more pressure is put on judges and voire dires tend to be a lot longer than ... normally expected. At times matters can get out of hand. (Barnett, oral evidence, 16.11.1983, at pp. 254-254A.)

280 The Committee was told that some problems arise in the criminal area as a result of there being "a shortage of judges ... who are experienced in crime":

That leaves entirely aside the argument as to whether more judges are needed but in the future certainly more judges are needed who know something about crime. [On many occasions] an experienced judge would say 'You are pushing an open door, Mr. so-and-so; I will hear what the prosecution have to say'. The matter can be knifed through immediately instead of wasting two or three days [on voire dire] hearing evidence on a topic which could have been dealt with [shortly] by a judge [experienced in crime]. (Maidment, oral evidence, 16.11.1983, at pp. 265-266.)

It was considered that one of the reasons for the lesser number of judges experienced in crime is that there

> *is still a prevailing feeling at the Bar that crime is at the bottom end of the market ... and that ... the best judges are those with great civil practices and not those drawn from the criminal Bar ...* (At p. 266.)

281 Expertise in criminal trials at the County Court was raised by another member of the private Bar. He claimed that the inexperience of some counsel had led to an inappropriate use of court time, in particular the inappropriate use of the voire dire. He said:

> *Some barristers used to be rather too eager to run voire dires - probably some still are - and some barristers were under the wrong impression that one runs a voire dire where one is alleging the police made up the confession. Of course, that is a question for the jury and not the judge. It is a question of fact. That seems to be ironed out now, but some time ago some pointless voire dires were being run partly because some judges in the County Court lacked the experience in criminal cases. They lacked experience in criminal jurisdiction. The aspect of the judge's discretionary role in criminal cases was somewhat mystifying to judges [who had] practice[d] only in commercial law and equity.* (Lovitt, oral evidence, 16.11.1983, at p. 257.)

282 A number of other witnesses referred to similar problems. Seminars for newly appointed judges and in-house training on a continuing basis were suggested. (See Transcript, 16.11.1983, at p. 266; O'Brien, 27.7.1983, at pp. 164, 176.) It was considered that some of the problems arising through too ready recourse to the voire dire could be overcome with the introduction of pre-trial hearings as proposed by the Director for Public Prosecutions. (See p. 56 and s. 5 Crimes (Procedure) Act 1983; amending Crimes Act 1958 with insertion of new section 391A.)

283 Court Accommodation. With 21 County Courts and 27 County Court judges, the criminal business of the court provides the major workload. During 1982 the Chief Judge of the County Court provided for most of that year twelve courts in which criminal business could be heard, but because of the lack of prepared cases, the disposal rate of the Court was only six per cent better than the input of cases committed for trial. (Phillips, oral evidence, 30.3.1983, at p. 51.) The Director of Public Prosecutions told the Committee that the appointment of two new judges to the County Court would be sufficient to cope with the greater flow of cases per month arising from the reorganisation of the Criminal Law Branch. He added:

> *The problem will be to keep the work up to them. Last year there were twelve [courts] sitting regularly. It varied down to eight, and the reason for that was that the Chief Judge had the judges available but there was not sufficient work to keep them occupied. I think fourteen judges will be sufficient, and it is my problem to keep the work up to them.* (Phillips, oral evidence, 30.3.1983, at p. 60.)

284 Court Sitting Schedule. To the question of how many trials and pleas would have been brought to the judges on a monthly basis during the year, Mr. Phillips replied:

> *On an average, approximately 110. The committals coming in from the courts of first instance are about 100. They are an approximate figure. There is a small reduction of the backlog every month.* (Phillips, oral evidence, 30.3.1983, at p. 60.)

During the period from December 1981 when the backlog stood at 878, the number of cases awaiting trial was reduced to 790 only. A significant point made by the DPP was that his enquiries showed that during 1981-1982, "to keep the work up to the judges, a large number of the easier cases were prepared and put before the Court, leaving a solid residue of the more difficult and complex cases untouched". (Phillips, oral evidence, 30.3.1983, at p. 52.)

285 To clear the present backlog, Mr. Phillips suggested that the County Court would operate best in two divisions. One division would be scheduled to hear cases for which time limits apply under the proposed new system of requiring presentments to be filed within a certain time as prescribed (see Crimes (Procedure) Act 1983 clause 3(2), amending s. 353 Crimes Act 1958). The other division would be scheduled to clear the backlog.

286 In March, when the DPP first appeared before the Legal and Constitutional Committee, the County Court programme was organised on the basis of monthly sittings. At that time a judge sat in crime for a month, then moved into the civil case load. The practice was for a judge to decline to sit in a particular criminal case if that case came up toward the end of the month, and it appeared that it would run over into the following month. This practice was acknowledged to cause delays. Mr. Phillips commented upon whether it would be preferable for a two monthly schedule to be followed, thus avoiding the waste of the last days of each month. He agreed that it would improve the smooth running of the system for judges to sit longer in the criminal jurisdiction of the County Court, and that there was no reason why this should not occur. He added:

> *In England [judges in crime] sit four terms with a fortnight in between. If one has a court like the Old Bailey one is looking at a specialist criminal court where there are High Court judges, Crown Court and part-time judges, and recorders all sitting hearing criminal cases. That is something which ought to be considered in a year or so. That is, there ought to be a central criminal court at Melbourne with Supreme Court justices and County Court judges combining to constitute the Bench.* (Oral evidence, 39.3.1983, at p. 66.)

287 At his appearance before the Committee in June 1983 Mr. Phillips again alluded to the need for action to be taken in relation to court schedules. He said:

A lot of judges say two months or three months of crime is as much as they can take. We lose an inordinate amount of time with these present monthly sittings; I would suggest getting up towards a week a month. I think most judges would take two months of crime and with a little persuasion might be prepared to take three months. (Oral evidence, 1.6.1983, at p. 112.)

He favoured the establishment of a separate criminal court, such as the Old Bailey, the Central Criminal Court in London, which deals exclusively with criminal matters at all levels. In conjunction with this proposition, Mr. Phillips considered the problem sometimes raised of the need for judges to go into other jurisdictions from time to time because the criminal area can become a particular burden. He said: "I do not envisage judges remaining on such a court constantly. Naturally there would have to be rotation, but it would be an immeasurably better system". (At p. 112.)

288 It was also remarked that this proposal would have a positive effect from the security point of view, with all criminal cases being heard in the one secure building. Additionally, the combining of jury pools for Supreme and County Courts would also be facilitated. (On combined jury pools, see pp. 125, 129.)

289 Prior to Mr. Phillips' appearance and the Committee's initial look at the sitting times of the County Court in its criminal jurisdiction, the First Report of the Flanagan Committee was published. It too commented upon this issue. The First Report of that Committee noted that the organisation of the Court's schedule around monthly sittings "creates a tendency to preclude the listing of any trials of substance or length towards the end of a particular month, due to the fact that the judge will have other commitments the following month". The Report went on to say:

On occasions, this leads to the judicial capacity of the County Court not being fully utilised. This in itself is of course conducive to further delay in other matters. It is our view that much time would be saved, and

greater continuity of the criminal business of the Court achieved, if monthly sittings were abolished. (First Report, at p. 11.)

290 The Report proposed that the legal year, for the purpose of criminal hearings in the County Court, should be divided into four terms:

i 1 February - Easter
ii Easter - Short Vacation (first two weeks of July)
iii Short vacation - 1 October
iv 1 October - Christmas

291 In commenting further on the proposed change, the Report went on:

We do not mean to suggest by this that a particular judge should necessarily sit in crime for a full term. Rather we think it has administrative advantages which would save time ... [W]e regard it as desirable and recommend that the judges of the County Court should be rostered to sit in hearing trials for two calendar months at any given time. This would permit of much greater flexibility in the listing of trials and in our view result in the more efficient utilisation of judicial [work] hours. (First Report, at p. 10.)

292 When the Second Report of the Flanagan Committee was published on 27 June 1983 the monthly calendar of the County Court remained intact. The Report commented:

We again draw attention to the fact that at the present time the criminal business of the County Court is organised around monthly sittings of the Court. This still has a tendency to preclude the listing of cases of any substance or length toward the end of any particular month,

although on occasions special arrangements are made. We are still of the view that the judicial capacity of the County Court is not being fully utilised. Whilst we favour the creation of four Terms as recommended in our earlier Report, we nevertheless believe that it is desirable that the Judges of the County Court should be rostered to sit in hearing criminal trials for two calendar months at any given time. This does not at present occur and we believe that the allocation of judges in this manner would permit of much greater flexibility in the listing of trials and result in a more efficient utilisation of judicial [work] hours. (Second Report. at p. 5.)

293 The problem caused by monthly sittings of the County Court was a recurring theme in evidence coming before the Committee. The Committee took notice of the nominal abolition of the July vacation in 1983, but noted that nonetheless a number of judges did not sit in July. (Those who had sat in January were not required to sit.) The Committee was informed that during the first two weeks of July 1983 "about six County Court judges" sat. Each month, apart from vacation times, "generally about ten" - sometimes twelve -judges sit in crime each month in the County Court. On occasion, fourteen judges have sat in crime. It appears that effectively the July vacation was not abolished in 1983. (Transcript, 27.7.1983, at pp. 162-164.)

294 The Associate Director (Criminal Law Division), Legal Aid Commission commented to the Committee on the loss of time occurring with cases listed toward the end of the month, where judges might consider themselves unavailable, in the fear that a particular trial might run over into the following month. An earlier study of judicial work hours indicated that putting days at the end of each month to proper use, with judges taking on those trials which might run over, and sitting into the next month if necessary, the equivalent of two extra judges for the Court would be added. Mr. O'Brien drew attention to the fact that the Chief Judge of the County Court is anxious to ensure that this loss of time should not continue. The Committee was informed that the Chief Judge has taken steps to overcome this problem, directing the judges that it is

appropriate for them to "go a couple of days into the next month". (Oral evidence, 27.7.1983, at p. 162.)

295 The question of two monthly sittings was raised in discussion with three Prosecutors for the Crown appearing before the Committee. It was agreed that there is no practical reason for the judges in the County Court not to sit two months at a time. (Transcript, 23.8.1983, at p. 246.) In answer to the suggestion that a reason for maintaining the monthly system is that moving to a two monthly programme would "somehow throw out the County Court circuits", it was said:

> *There are only three cities affected by that argument: Ballarat, Geelong and Bendigo where there may be two County Court judges sitting on circuit at the one time. However, that should be in favour of the suggestion rather than going against it.*
>
> *It has been said that the doubling up of country circuits ... resulted because ... preference [was given] to local practitioners who ... requested it.* (Hollis-Bee, oral evidence, 23.8.1983, at p. 246.)

296 Members of the private Bar appearing before the Committee also endorsed the two monthly sitting programme. One said:

> *The first matter we would submit is that ... delays could be cut down if more judges could sit for two months at a time. If that were so you would not have to search for cases to finish within the month or find a judge who will sit through a six-week or two-month trial. That would give the Director of Listings a lot more flexibility and give a lot more certainty in the listing of dates.* (Barnett, oral evidence, 16.11.1983, at p. 252.)

297 Daily Sitting Hours. Some criticism was also registered in evidence before the Committee of the commencement and finishing times of daily sittings. The Committee was told of instances where lack of punctuality on the part of a judge caused problems of time loss and extended the length of some trials at the County Court. (Transcript, 27.7.1983, at pp. 169-170.)

298 Listing of Criminal Trials. Many other witnesses, including the Associate Director (Criminal Law Division), Legal Aid Commission noted that the introduction of the new listing system under the Criminal Listing Directorate has had a considerable effect on the organisation of court work: the result is that there is the "lowest backlog since 1978" in the County Court in Melbourne, and "this is being reduced at the rate of 30 a month". (O'Brien, at p. 165.) He agreed that in recent months almost every case listed has gone to trial on the listed date (apart from those where pleas are entered "at the door of the court" - on this issue, see The Role of Prosecutors for the Queen, at p. 73). The comparison with the past is noticeable, when almost two-thirds of listed cases might not get on in a particular month. (O'Brien, oral evidence, 27.7.1983, at p. 165.) The Prosecutors for the Queen appearing before the Committee also commented on the relative efficiency of the County Court listing system. (Transcript, 23.8.1983, at pp. 190 - 250.)

THE COUNTY COURT ROLE: SUMMARY OF ISSUES RAISED BY WITNESSES

299 It has not been possible in the time available for the Committee to undertake a complete review of all matters arising in the County Court jurisdiction which may contribute to delays. However, those issues raised by witnesses appearing before the Committee to date and perceived by witnesses to require correction or implementation, include:

* overlap in jurisdiction between the Supreme Court and the County Court

* the necessity to take into account effects upon other aspects of the system - for example, the prison system and other levels of corrections, such as community work order schemes and other alternatives to imprisonment when delays in the County Court are reduced

* serious delays in the criminal jurisdiction of the County Court rather than in its civil jurisdiction

* those delays arising at the County Court in Melbourne, rather than in the County Court on circuit

* delays arising at trial stage rather than at appeal stage

* delays and other problems arising where the County Court is not empowered to hear matters summarily

* control, by the County Court, of cases until they are brought before the Court

* time limits, or time frames, for cases to be presented to the Court, and for cases to come to trial

* sometimes lengthy, sometimes unnecessary, hearings by way of voire dire

* briefing of counsel both in defence and prosecution of cases

* problems with the monthly sitting schedule of the court, and possible replacement with a two months schedule

* need for judges to take cases in the last days of a scheduled month's sittings, despite the possibility that any case may go over into the following month

* loss of time on occasion, due to sitting times

77377/84—7

* delays and inefficiency being experienced as a result of having two jury lists, one for the County Court, one for the Supreme Court

* lack of experience and expertise on the part of some counsel appearing in the County Court criminal jurisdiction

* lack of judges experienced in the criminal jurisdiction

* possible advantages of the introduction of a central criminal court system, as in England (with the Old Bailey)

THE ROLE OF THE SUPREME COURT

300 The role of the Supreme Court in criminal matters is limited, in that the Court deals with appeals from the County Court, with murder and treason and a number of other similar offences, and with some offences of robbery with violence and fraud. As a consequence, the Committee heard less evidence in relation to the operation of the Supreme Court than in relation to both the County and the Magistrates Courts. However, some issues were raised by witnesses appearing before the Committee.

301 With preparation of cases for hearing in the Supreme Court, the Director of Public Prosecutions informed the Committee that in the two months ending 30 March 1983 "the preparation of cases for the Supreme Court and the Full Court of Appeal ... is reasonably satisfactory ..." (Phillips, oral evidence, 30.3. 1983, at p. 51.) Members of the private Bar considered that matters might be more expeditiously despatched at the Supreme Court than at the County Court, due to the greater expertise and experience of counsel conducting cases. (Transcript, 16.11.1983, at pp. 254-254A.)

302 Monthly Sitting Programme. However, the issue of one monthly sittings versus a change to two monthly sittings was raised in relation to the Supreme Court, and like problems were mentioned as those arising in the County Court, where judges are not available at the end of the month to sit on cases if it appears that such cases might go over into the following month. One of the Prosecutor for the Queen in giving evidence to the Committee raised this point:

> *... one of the problems ... which arises in the Supreme Court in relation to long trials, is that there comes a point during the month where there is a cut-off. In other words, judges generally, by virtue of their tasks in the succeeding month, will require an assurance that a trial will finish within the allotted span of a calendar month.*
>
> *If it looks as though the case will run for three weeks, one has no hope of*

its being finished if it begins within the second week of the month. One has to start within the parameters of the first week of the month. Of course [there are also difficulties] in the last seven working days of the month.

As my colleague pointed out, an average length of trial these days is something like six days. If there is more than one accused, one can be assured virtually of doubling that time, irrespective of the issues involved. Therefore ... there is a discreet part of a month during which time only very brief cases can be heard, be they pleas or very short trials. That, in the conspectus of just one month's working roster, is possibly productive of wasted time. (Hollis-Bee, oral evidence, 23.8.1983, at p. 230.)

303 The proposition that the schedule of the Supreme Court should be altered to two monthly sittings from one monthly was discussed. It was said that if the system were changed to two monthly sittings, this would be the equivalent of appointing two new Supreme Court justices. Mr. Hollis-Bee commented:

The problem becomes more severe in relation to very long cases. So far this year, ... there have been three very long cases in Melbourne. There was a conspiracy trial that went for six months in the County Court, and there have been two very long cases in the Supreme Court. If the capacity of the prosecution side ... to prepare and present these long trials increases, I would very much doubt that the system could handle more than about four or five long trials in any one year. The greater the length of the trial, the longer the system will be held up. (At p. 230.)

304 Related Proceedings. The interrelationship of proceedings and delays in court hearing times was also raised in evidence. Vacation times and delays in delivery of judgments may add to the problem. Trials may be held up because proceedings have not been completed in relation to other trials, the outcome of the latter affecting the former. The Committee was told:

One of my colleagues .. has recently been involved in a substantial number of trials of great length involving secret commissions in relation to the sale of land ... In 1979 a complaint arose relating to the discovery of the payment of secret commissions which was peripheral to the reporting of a Royal Commission. In 1982, twelve men were committed for trial in a series of committal proceedings which ran for a total of five months of court time, which is substantially longer than calendar time.

The first of those committals commenced in March 1982 and the last in October 1982. None of those cases was able to be brought on for trial in the dying months of 1982 because, of course, the trial prosecutor could not give any court an undertaking that the trial would finish before the Christmas vacation.

In the early months of 1983, four of the accused pleaded guilty. Subsequently the first trial took place, running for some six weeks. Three accused were convicted and ... sentenced to terms of imprisonment. They appealed to the Court of Criminal Appeal. The appeals were heard but the Court of Criminal Appeal is still to give its judgment on the appeal and it is now some two months after the event.

The succeeding trials related to the series had been originally booked for this month and the problem is that they are interdependent on the matters the subject of the judgment of the Court of Criminal Appeal ... It follows, of course, in relation to that particular sequence of investigation and prosecution that a vast amount of work was done. It has been estimated that a senior and junior counsel who were involved worked for approximately ten months in the preparation and prosecution of those committals, which would mean a large part of that time would be like the base of an iceberg. That work would not be determinable by outside criteria. (Hollis-Bee, oral evidence, 23.8.1983, at pp. 223-224.)

305 Listing of Criminal Trials. The listing of cases in the Supreme Court was said to cause delays. In answer to the question of whether the delays in the County Court in Melbourne, where cases are listed by the Directorate, are fewer than in courts not within the listing jurisdiction of the Directorate, the Director replied:

> *Only the Supreme Court at present has a backlog of some 100 accused. In the past two or three months there have been a few Commonwealth trials which have gone for ten weeks or more. Therefore, there have not been judges available for the other cases.* (Bateman, oral evidence, 8.6.1983, at p. 126.)

Mr. Bateman added that if all courts were operating in the same way as County and Supreme Circuit Courts, "it would be a satisfactory system". In the normal course, those persons committed to trial in the country are dealt with during those sittings "and there is really no backlog at all" in Supreme and County Circuit Courts in their criminal jurisdiction.

306 The Associate Director of the Legal Aid Commission (Criminal Law Division) informed the Committee that, from the viewpoint of the Commission problems are occurring in the listing of cases in the Supreme Court. The listing system in the Supreme Court is not operating in as orderly a manner as that in the County Court in Melbourne, which is under the direction of the Criminal Listings Directorate. The Associate Director agreed that too many cases are being listed in the Supreme Court, and "What is happening is that if case A and case B start [in a particular month], there is no way that case C will get on [that] month. So we [at the Legal Aid commission] organise [our work] in the light of that information. Cases A and B get on and we decide that case C will not get on, [but] we are not told this [until] the next day. [That] can be multiplied." (O'Brien, oral evidence, 27.7.1983, at p. 166.)

307 In answer to the question of whether the Legal Aid Commission is given a day in the month in the Supreme Court for any particular case to come on, or put in a judge's list, Mr. O'Brien replied:

> *It varies, there is no consistency. You are told that you might get on in the month of June or in a particular judge's list. I have had the experience of being told 'There are three judges, we do not know which you will end up with'. No [date is given]...*
>
> *The worst aspect (which happened originally with the listing in the County Court until the Listing Directorate took over) is that where you were told you would not be on before a certain date, you are put on before that date. This leads to chaos.* (At pp. 166-167; see also p. 165.)

308 Members of the private Bar also alluded to this problem. (Transcript, 16.11.1983, at pp. 251-267.)

THE ROLE OF THE SUPREME COURT: SUMMARY OF ISSUES RAISED BY WITNESSES

309 The evidence available, at this date, to the Committee in relation to the operation of the Supreme Court in its criminal jurisdiction is extremely limited. However, issues perceived by witnesses appearing before the Committee to be relevant to delays include:

* overlap in jurisdiction between the Supreme Court and the County Court

* lack of control, by the Court, of cases until they are brought before the Court

* lack of time limits, or time frames, in which cases must be filed at the Court, and in which cases must be brought to trial

* a need for issues to be clarified before a trial commences without embarking on lengthy voire dires, in particular causing inconvenience to juries which have been sworn in

* problems arising in the listing of cases

* delays in delivery of judgments

THE ROLE OF THE COURTS: PRELIMINARY CONCLUSIONS

310 The Committee's work on delays in the courts has been so far, exploratory only. Already, administrative and legislative action has been taken to overcome some of the problems put to the Committee during the course of these preliminary investigations. The Crimes (Procedure) Act 1983 is relevant to issues noted in this Preliminary Report. Additionally, the Committee believes that some matters which have not yet been dealt with by legislation or administratively could be acted upon immediately. Others should be the subject of further inquiry and report in accordance with the Committee's Terms of Reference.

311 The two most pressing issues raised during the Committee's enquiries relate to the lack of control exercised by the courts over cases until they are formally brought before them, and the lack of any time frames or time limits built into the system. The Crimes (Procedure) Act 1983 is designed to rectify this. Section 3 of the Bill provides -

> *... where in respect of any indictable offence a person has been committed or remanded to the Supreme Court or County Court for trial or directed to be tried at the Supreme Court or County Court ...*
>
> *(a) a presentment ... shall be made;*
>
> *(b) an indictment shall be laid;*
>
> *(c) an information shall be laid; or*
>
> *(d) a notice of trial or of intention to prefer a presentment shall be given to the person by or on behalf of the Director of Public Prosecutions or a Prosecutor for the Queen -*
>
> *in respect of the offence within the period prescribed by the regulations made under this Act.*

It is further provided in the Act that a judge of the Supreme Court or of the County Court may grant an extension of the prescribed period, and that more than one extension may be granted.

312 Another issue raised by many of those appearing before the Committee was that of unnecessary and often lengthy proceedings by way of the voire dire. The Crimes (Procedure) Act 1983 is drafted to alleviate this problem. It provides for pre-trial hearings on questions of law, matters of evidence or any other matter, prior to the empanelling of a jury. Section 5 of the Act provides:

> *391A. Where an accused person is arraigned on indictment or presentment before the Supreme Court or the County Court (as the case may be), the court before which the arraignment takes place, if it thinks fit -*
>
> *(a) may hear and determine any question relating to evidence (including any question of law) with respect to the trial of the accused person; and*
>
> *(b) may determine any question -*
>
> *(i) concerning a question of law referred to in paragraph (a); and*
>
> *(ii) concerning any other matter -*
>
> *which it considers necessary to ensure that the trial is conducted fairly and expeditiously -*
>
> *before the impanelling of a jury in respect of the trial.*

313 Two further matters are similarly dealt with in the Crimes (Procedure) Act 1983 namely:

* the grant of jurisdiction to the County Court to determine summary offences in particular circumstances

* the grant of jurisdiction to a judge, sitting alone, to enquire concerning prior convictions

(See sections 4 and 6 respectively of the Crimes (Procedure) Act 1983.

314 The Committee recognises that there are varying views on the efficacy of the jury system. Many regard jury as indispensable to the Australian criminal justice system. On the other hand, critics argue that juries are not representative of society; or they are unable to comprehend complex forensic evidence or complex fraud and other white collar cases. Jurors have complained of inadequate information being supplied to them about their role, and about inefficient use of their time. In a survey of New South Wales' jurors by Grabosky and Rizzo respondents suggested:

> *... that more information about the nature of the trial process and about the responsibility of jurors be distributed to prospective jurors along with their summonses. It was also suggested that prospective jurors should be encouraged to attend a trial prior to their date of reporting. One might also consider the preparation of a videotape which might be shown to prospective jurors upon their arrival at court.*

(Jurors in New South Wales, June 1983, Law Foundation of New South Wales, at p. 14.)

There is no reason to believe that Victorian jurors are different from jurors in New South Wales. The Committee believes it is important that jurors are as well equipped as possible to do their duty. To ensure this, an informative leaflet for jurors, and perhaps a videotape along the lines of that produced in Western Australia, could be produced. (The Committee notes that the Law Department has in the past produced a series of leaflets, titled The Law and You, designed to inform accused persons and other litigants of their rights. A need exists for a series designed to inform jurors, witnesses and others coming into contact with the court system of their rights and duties, as well as of juror facilities and other relevant information.)

315 As for the broader question of the value of juries in particular types of cases and suggestions that the right to a jury trial in some instances should be abolished, or made optional, the Committee believes that this deserves further research and inquiry before any such proposal should be contemplated. The

Committee notes the suggestion that in England proposals for abolition of jury trials in complex commercial prosecutions have received support from the Lord Chancellor, the Lord Chief Justice, and the Chairman of the Law Commission of England and Wales. The Victorian Law Reform Commissioner commented upon this in the 1982-1983 Annual Report, in the context of a continuing inquiry by the Commissioner into corporate crime. The Commissioner's Report stated:

> *The subject encompasses not only the still much-debated question of imposing criminal responsibility on corporations (apart from or as well as upon their directors and managers) but also the scope and ambit of the law of theft and related offences, as these relate to corporate activities. In addition there are the serious issues of the trial of complicated commercial cases, where the abandonment of jury trial for indictable offences has been proposed in some jurisdictions; and the investigation and prosecution of these cases ...* (At p. 7.)

The Committee awaits with interest the results of the Law Reform Commissioner's inquiry in this area.

316 The telephone system for informing jurors whether or not they are required, used by the Supreme Court over the past three years, has been extended since January to the County Court. The Committee also understands that jury pools in Victoria have now been integrated at the County and Supreme Courts. This is calculated to increase efficiency, to the benefit of those called for service, and to the benefit of the system generally.

317 Trial by jury in cases where a convicted accused, does not admit prior convictions, is now covered by the Crimes (Procedure) Act 1983, s. 6 (1) and (2). Under that Act, a judge is empowered to deal with the issue. However trial by jury is retained in the instance of an accused standing mute. The Committee believes that this matter deserves further research and inquiry before any change is made to existing law.

318 Issues raised in relation to the hand-up brief procedure deserve further research and inquiry. The Committee understands that the Ministry of Police holds a "watching brief" in this area. Information contained in this Preliminary Report may be of interest to the Minister. The problems which have already been noted by witnesses before the Committee will be followed up by the Committee. The question whether control of the decision of whether the hand-up brief procedure should be followed should be transferred from the police informant to the magistrate, is one issue which will be of importance in the Committee's further inquiry.

319 That adjournments may be sought because witnesses are not available due to too short a time for contacting them, or too short a time for preparation on the part of counsel, is of concern. The Committee understands that this problem is currently being surveyed by the Shorter Trials Committee and the Australian Institute of Judicial Administration in its research into delays in courts. The Committee awaits with interest that Committee's report and recommendations.

320 On listing of cases in the Supreme Court, the Committee reiterates recommendations previously made in relation to the jurisdiction of the Criminal Listing Directorate: the listing of all criminal cases, in the County Court and the Supreme Court, in the city and on circuit, should be under the control of the Criminal Listing Directorate. (See Recommendation 12, at p. 120.)

321 On scheduled sitting times of County and Supreme Courts, the Committee endorses the comments of the Flanagan Committee. A two monthly schedule should replace the monthly schedule for criminal trials, so that time is not lost at the end of each month when trials are anticipated to extend into the following month. Judges should be enabled to sit, despite a trial going "over time". This would be ensured by the introduction of two monthly sittings in the criminal jurisdiction.

322 The overlap in jurisdiction between the Supreme Court and the County Court could be overcome by the centralisation of the criminal court system, along the lines of the Central Criminal Court in England (the Old Bailey). The Committee believes that suggestions to centralise the system require further research and inquiry.

323 The Supreme Court already tables an annual report to Parliament. The Committee believes that a formal mechanism should be established whereby not only the Supreme Court, but all courts - Magistrates', Coronial, County and Supreme - are able to inform Parliament and the public about their workload, problems with staffing and administration, statistical information about cases awaiting trial, cases coming to trial, adjournments sought, and the like. To this end the Committee believes it would be advantageous to courts and to the community they are designed to serve, if annual reports were to be produced by each level of the court system, to be tabled in the Parliament for public information.

THE ROLE OF THE COURTS: PRELIMINARY RECOMMENDATIONS

RECOMMENDATION 13

324 A formal mechanism should be established whereby all courts - Magistrates', Coronial, County and Supreme - can inform Parliament and the public about their workload, staffing and administration, including statistics on cases awaiting trial, adjournment, and the like. Annual reports from each jurisdiction should be tabled in the Parliament for public information.

RECOMMENDATION 14

325 The current monthly schedule followed by the County Court and the Supreme Court for criminal trials should be replaced by a two monthly

schedule, so that the trials can be heard despite their extending into the second month.

RECOMMENDATION 15

326 An information booklet should be produced by the Law Department, to alert jurors to their rights and responsibilities, and to give them any other information necessary to fulfill their duties.

THE ROLE OF THE COURTS: AREAS IDENTIFIED FOR FURTHER RESEARCH AND ENQUIRY

327 The following issues have been identified by the Committee for further inquiry and research. However this is not to limit the Committee's Terms of Reference.

328 Trial by Jury. The right to trial by jury, optional trial by jury in certain cases, and the value or otherwise of retaining jury trial in cases of a complex nature - particularly those involving complicated fraud matters or highly specialised forensic evidence - require further inquiry. Trials by jury in complex fraud and other corporate crime cases is the subject of inquiry by the Law Reform Commissioner. The Committee awaits the results of the Commissioner's researches with interest. The Committee will make the other matters pertaining to jury trial a subject of further inquiry and research, with a view to formulating recommendations.

329 Hand-up Brief. The hand-up brief procedure requires further inquiry and research, particularly the question of who should retain the right to determine whether that procedure will be followed, as an alternative to calling witnesses, and the extent of the information to be made available through the hand-up brief. The Committee will make this a subject of further inquiry and research, with a view to formulating recommendations.

330 Committal Proceedings. There are divergent views on the role of committals in the criminal justice system. The Committee believes the restriction, abolition, or retention of committal proceedings requires further inquiry and research, to be undertaken by the Committee with a view to formulating recommendations.

331 Overlap in Jurisdiction/Central Criminal Court. The question of overlap in jurisdiction between the County and Supreme Courts, and that of whether there should be a Central Criminal Court along the lines of the Old Bailey in England, require further inquiry and research, which will be undertaken by the Committee with a view to formulating recommendations.

332 Accommodation and Facilities. The Committee believes it is important that a review and possible rationalisation of court facilities and accommodation, particularly those of the City Court, take place. To this end, the Committee will visit and inspect court facilities in 1984, with a view to making further recommendations.

APPRECIATION

333 The Committee wishes to place on record its appreciation of the valuable work done and assistance received from the Committee staff.

COMMITTEE ROOM,
29 February 1984

INDEX TO APPENDICES

APPENDIX I

This appendix contains data compiled by Mr. W. Johnston of the Law Department of Victoria, covering issues relating to delays in the Higher Criminal Courts of Victoria.

APPENDIX I

ELAPSED TIMES IN HIGHER CRIMINAL COURTS

VICTORIA, AUSTRALIA.

1 INTRODUCTION

1.1 The data in the attached tables was extracted and examined for the purposes of determining what was necessary to measure elapsed times (it should be noted that delay has not been defined by either the Court or the Government), to identify factors and categories which might cause processing times to be different between such categories, to provide an overview of the total time spent in the criminal justice system and to examine segments of this time which were directly attributable to the courts in general and to the Higher Criminal Courts in particular. With the modest means available and the diverse objectives stated above it cannot be said that all these goals have been achieved. Nevertheless, the survey has been an invaluable aid to the final design of a performance oriented management information sub-system which will, inter alia, permit the public to make its own judgment of the efficacy of the judicial system.

1.2 Four events were selected as key dates and these have been compiled into two periods chosen to represent the performance of the total criminal justice system on the one hand and on the other to throw into relief the performance of the Criminal Law Branch in presenting persons for trial. These periods are:

(1) Elapsed days between arrest and sentence;

(2) Elapsed days between preliminary hearing (committal) and arraignment (start of trial).

1.3 Several methods of summarising the data have been employed. One has been to use two measures of central tendency and these are the median and mean. The median is usually considered the better measure but since it cannot be manipulated arithmetically and statistically as readily as the mean, the mean has also been included.

1.4 It is always preferable to use a measure of dispersion when measures of central tendency, particularly the mean, have been quoted to indicate how representative these measures are. One such measure is the standard deviation. A large standard deviation indicates that values are widely spread and do not exhibit pronounced central tendency.

1.5 The other measures selected were the inter-quartile range and minimum and maximum values. It could be argued that a number of other measures should have been included but it was felt that the above measures were more than adequate for an exercise conducted with such limited means.

1.6 A further technique utilised to summarise elapsed time was to provide a cumulative percentage of elapsed time in weekly class intervals. Rather than divide the information into eight categories of crime, as had been done when calculating the measures of central tendency and dispersion, all offence categories were joined together both for reasons of economy and because it was thought sufficient in this case to examine offences as one group. However, the basic breakdown of the type of plea and custody status was retained.

2 QUALIFICATIONS TO SURVEY INFORMATION

2.1 It should be noted that the information produced in the tables concerning elapsed times has a number of limitations in that:

2.1.1 It does not encompass all criminal cases dealt with by the higher courts. Since they are based on the "Sentencing Statistics for Higher Criminal Courts" they exclude nolle prosequis, mistrials, disagreements, not fit to plead, Governor's pleasure and acquittals.

2.1.2 The plea of guilty or not guilty is the plea at arraignment. This is a limitation in the data set as it does not allow for changes in plea to be isolated, nor does it allow for account to be taken of an intended plea as indicated at committal.

2.1.3 Where an accused was on both bail and remand it has not been separately recorded but instead has been shown as a bail case.

2.1.4 Remand cases in which the accused sought an adjournment have not been made distinct from other causes of delay.

2.1.5 Some cases do not have dates recorded due to clerical error or because they are inapplicable and these have not been included.

2.1.6 The files do not show the current custody status of the accused and it was necessary to interpolate from the monthly Gaol Calendars and from prison records.

2.1.7 Some difficulty was had in obtaining the date of arrest as it was not found separately recorded.

2.2 As the County Court deals with the greater number of criminal cases it is proposed to deal with that area first.

3 OVERVIEW OF COUNTY COURT RESULTS

3.1 The graph on the next page gives not only median values (the 50th percentile, shown as a dot) but also the range of cases falling between the 25th and 75th percentiles (which is known as the inter-

quartile range and is that distance enclosed by the rectangle) and the range of all cases.

3.2 Speedy Trial limits of 56 and 90 days have also been drawn on the graph to indicate the proportion of cases that would currently meet these limits.

3.2.1 Many American States have a 90-day limit within which a defendant must be tried. For example, in California a defendant must be tried within 90 days unless he asks for the case to be adjourned.

Other States have a limit of 180 days.

3.2.2 In England there are at least two time rules:

Rule 5, Indictments Procedure Rules, 1971, which requires that indictments should be signed within 28 days of committal; and

Rule 19, Crown Court Rules, 1971, which requires that the trial of indictment cases should commence not later than 56 days after committal.

3.2.3 It is obvious that Victoria would have great difficulty in meeting the standards as applied in either England or California.

3.3 The clustering effect of the first and second quartiles must be considered in relation to plea and custody status and in the following table the effects of these variables is shown.

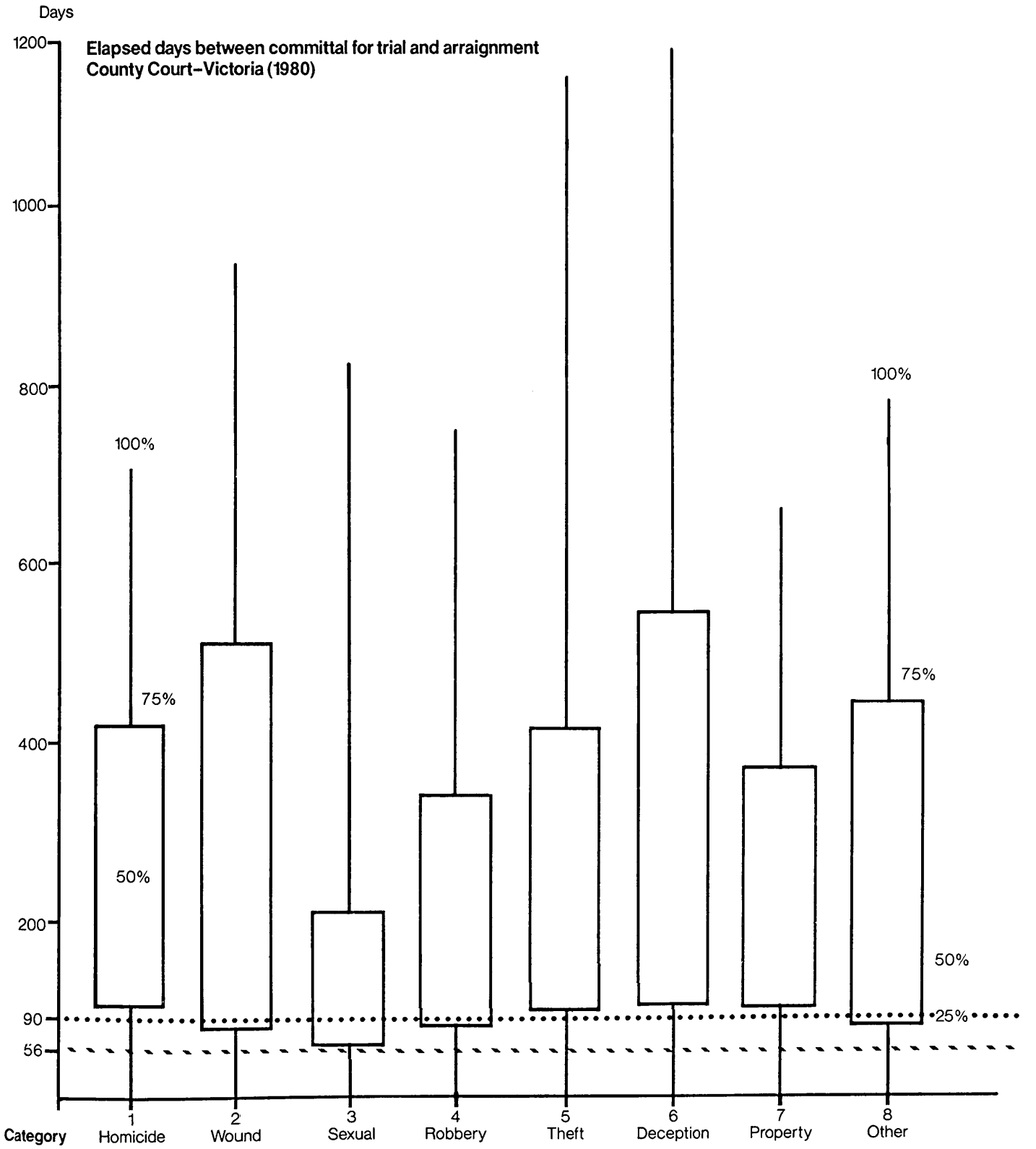

Days
Elapsed days between committal for trial and arraignment
County Court–Victoria (1980)
1200
1000
800
600
400
200
90
56
100%
75%
50%
100%
75%
50%
25%
Category
1 Homicide
2 Wound
3 Sexual
4 Robbery
5 Theft
6 Deception
7 Property
8 Other

TABLE 1

CLASSIFICATION OF MEDIANS BY PLEA AND STATUS OF ELAPSED DAYS

Plea and Status		56 or less days	57 to 90 days	91 to 180 days	More than 180 days
A.	Guilty, Bail	0	0	2	6
B.	Guilty, Remand Only	1	4	1	0
C.	Guilty, Remand & U.S.O.O.	0	3	2	0
D.	Not Guilty, Bail	0	0	2	6
E.	Not Guilty, Remand Only	0	2	1	1
F.	Not Guilty, Remand & U.S.O.O.	0	0	3	0
	Total Medians	1	9	11	13

(Note: Homicide and Deception excluded from B, C, E and F. Property Damage excluded from C, E and F. Other excluded from E and F. Wounding excluded from F.)

3.3 Although in Figure 1 it was noticeable that not one median met either standard the picture is not quite as grim when plea and custody status are taken into account. At least one median value is below the 56 days standard and nine others are below 90 days. However, the fact remains that the majority occur in the more than 180 days column.

3.4 At this stage it would be advantageous to examine the attached measures of elapsed times in greater detail.

4 COUNTY COURT MATTERS: ACCUSED ON BAIL

4.1 An examination of median times between committal and trial where the accused was on bail reveals the following points for the County Court.

4.2 Although it would normally be expected that pleas of guilty would be dealt with more quickly than pleas of not guilty, this was not always the case. In fact, the reverse occurred for woundings and assaults, sexual offences, theft and burglary and for the miscellaneous category "Other Offences".

4.2.1 The median elapsed times where the accused was on bail were:

TABLE 2

GUILTY PLEAS AND NOT GUILTY PLEAS WHERE THE ACCUSED WAS ON BAIL IN THE COUNTY COURT (ARRANGED IN ASCENDING ORDER OF GUILTY PLEA)

CATEGORY	GUILTY PLEAS	NOT GUILTY PLEAS
Sexual Offences	5 months	4 months
Property Damage	6 "	13 "
Homicide and Related	7 "	10 "
Deception	8 "	11 "
Theft, Burglary	10 "	9 "
Robbery and Allied	10 "	13 "
Wounding, Assaults	13 "	12 "
"Other" Offences	15 "	5 "

4.2.2 The Crown Solicitor's priorities in deciding which cases to prosecute were stated as: (a) rape cases (b) gaol cases (c) pleas of guilty and (d) oldest case. If the priorities were as stated and pleas of guilty were dealt with before pleas of not guilty then it could be expected that all guilty pleas would have a lower average than the lowest not guilty plea. As has been shown, this was not always the case.

4.2.3 In view of the limit of three months for rape offences to be dealt with, it is to be expected that the category of sexual offences would be quite low and this proved to be the case.

4.3 It must surely be a matter of concern that although pleas of guilty supposedly have a high priority, they can still average 13 months for wounding and fifteen months for the miscellaneous category.

4.4 By ignoring extreme values, which can be done by not considering the top and bottom 25% of cases, it is possible to get a greater feel for actual times taken. In this case, the fourteen cases which constituted the middle band of wounding cases where the plea was guilty, took between six and eighteen months to be completed. (Refer to page 1 of the tables).

5 COUNTY COURT MATTERS: ACCUSED ON REMAND

5.1 An examination of median times between committal and trial in the County Court where the accused was in remand reveals some disquieting facts.

5.2 Taking the most populous category, Theft, Burglary, etc. 23 persons had an average stay in the remand yard of three months (actually 103 days) when they had pleaded not guilty. It is noticeable that the minimum time to have a case heard was 48 days while the case that took the longest to come to trial took 20 months (603 days). It seems that the monitoring procedures must be faulty if an accused person can spend such a period of time in a remand cell. (Refer to page 3 of the tables).

5.2.1 Unfortunately, there are some other worrying figures within the tables. Nine persons who pleaded Not Guilty to Robbery and Allied Offences for Gain were held in the Remand Yard at Pentridge for a median period of seven months. The mean period was six months

but the disquieting figure is that the least amount of time that an accused spent on remand after committal was 82 days or approaching three months. (Refer to page 20 of the tables).

5.3 In normal circumstances it could be expected that those accused who are in the remand yard would be dealt with within a much lesser time interval than those who were in a normal prison because they had been convicted previously for an offence and were actually serving a sentence of imprisonment. To varying degrees this is the case, but 9 persons accused of robbery and undergoing sentence for other offences had their hearing dates set in half the time (16 weeks) of those who were in the remand yard for 31 weeks. All accused had pleaded not guilty. (Refer to page 2 of the tables.)

5.3.1 The second example of disparity between U.S.O.O. (Undergoing Sentence Other Offence) and remandees is for theft and burglary where both took three months. To highlight these apparently misplaced priorities the remand case which took the longest time to arraignment was longer (at 514 days) than the U.S.O.O. case (at 460 days). Once again, both of these refer to guilty pleas. (Refer to page 3 of the tables).

5.4 It would appear that the maximum period between committal and arraignment has been inordinately high for those on remand and who have pleaded not guilty to Robbery and Allied Offences for Gain (276 days) and Theft, Burlary, etc. (603 days). (Refer to pages 2 and 3 of the tables).

5.4.1 After 28 weeks had elapsed 73% of accused in remand who had pleaded not guilty had been dealt with (all offence categories) but this may also be viewed in the light that more than a quarter were held in the remand yard for more than six months even though they had pleaded not guilty. (Refer to page 10 of the tables.)

5.5 The equivalent figure for persons on bail was 42%. That is 6 out of 10 persons who pleaded not guilty and who were on bail had not been arraigned within 6 months of having been committed for trial. (Refer to page 9 of the tables.)

6 SUPREME COURT MATTERS: ACCUSED ON BAIL OR REMAND

6.1 Apart from those offences which by statute may only be heard in the Supreme Court, Victoria's highest court of original jurisdiction is able to choose which cases it will hear. This discretion is exercised so that the more serious type of case is heard in the Supreme Court. Since the Supreme Court has to some extent the ability to limit its workload it would not be expected that it would exhibit the same problems that are apparent in the County Court and this is generally the case.

6.2 The only categories of significant size were homicide and robbery. The median time to deal with all robbery cases between committal and arraignment was 79 days. When the individual figures are examined the relationships between the medians for robbery are what might be expected, with the proviso that the differences between accused in remand and those undergoing sentence (where the accused has pleaded guilty) are uncomfortably close. In fact, the median time for those undergoing sentence (71 days) was less than that for those on remand (82 days). (Refer to page 16 of the tables.)

6.3 In a similar vein the not guilty cases who were on bail were dealt with five days quicker than those in remand (70 as against 75 days) but too much notice should not be given to this point as the longest remand case was 102 days and there was quite a scatter about the mean for the Not Guilty on Bail category (actual values were 50, 53, 70, 250 and 276 days; note that the first three cases were dealt with quite rapidly). (Refer to page 16 of the tables.)

6.4 When it comes to the Homicide and Related Offences category the most noticeable point is that one case where the accused was held in remand after pleading not guilty took 1 year to be brought to trial after he had been committed. The typical time is four months. (Refer to page 15 of the tables.)

6.5 However, if the time spent between arrest and sentence is examined, it can be seen that the median time that the accused spent in custody for homicide and related offences was 8 months (254 days) when he had entered a not guilty plea. (Refer to page 19 of the tables.)

6.6 In light of the above, it is interesting to note that 50% of defendants who pleaded guilty and were on bail (all offence categories) were dealt with within six months. Where the defendant pleaded guilty, and was held in remand between arrest and sentence, after six months had elapsed only 60% of accused had been dealt with. (Refer to pages 26 and 27 of the tables).

6.7 That the Supreme Court Judges are aware of problems in the criminal jurisdiction is evidenced in the following section.

7 SUPREME COURT MATTERS - CENTRALIZATION OF METROPOLITAN COMMITTAL HEARINGS

7.1 In their report to the Governor dated 24.6.1982 in respect of the 1981 calendar year, the Supreme Court Justices made damning criticism of the length of time accused persons had spent in custody awaiting committal. Because of its importance I reproduce it in full.

"6. Applications for Bail

The judges noted with concern that many applications for bail

were made by accused persons who had spent a very long time in custody awaiting committal proceedings or inquests. It was not uncommon to find that an applicant for bail had already spent some two or more months in custody on remand and that the date for committal hearing had not been set or that the committal hearing had been fixed for a date two months or even more after the date of the bail application.

Various reasons for this state of affairs were advanced by representatives of the Crown appearing on bail applications - e.g. delay in obtaining analyses or reports from the Forensic Science Laboratories, delays in having the police brief or the statements of the witnesses typed, unavailability of police witnesses, or shorthand writers and so forth. It would appear also that the centralisation of metropolitan committal proceedings into three Courts (Melbourne, Prahran and Preston) on occasion made it difficult to "book" an early date for committal proceedings.

It may be accepted that these explanations were in most cases perfectly valid and that the delays reflected an undermanning of the administrative, clerical or typographical support services.

Whatever the reasons for delay in listing committal proceedings, not infrequently the length of time an applicant for bail had been awaiting committal became a serious matter for consideration in deciding whether or not bail should be granted."

7.2 These are strong words and it is patent that a number of matters require examination. In particular, Their Honours raised the question as to whether centralisation of metropolitan committal proceedings made it difficult to book an early date for committal proceedings.

7.3 The Judges noted that the centralisation of metropolitan committal proceedings had led to difficulties and was the cause of accused persons spending a very long time in custody awaiting committal proceedings.

7.4 At 30th September 1982 a total of 660 persons had been booked in awaiting a committal hearing at one of the three specialised committal courts (Preston, Prahran and Melbourne). Of the 64 persons in custody, 34 had to wait more than a month to have their case heard. (This excludes accused persons involved in rape cases). At the city court 6 defendants in custody were booked in to have their case heard more than four months later.

7.5 On 1 January 1983, the City Court was made the sole committal court for the metropolitan area. At 1st April 1983, a total of 568 persons were booked in awaiting a committal hearing. There was a marked improvement in the number of persons in custody. Only ten persons were booked in more than a month (excluding rape cases). This improvement has been due to the instructions of the Chief Stipendiary Magistrate, and the practice of his Deputy, of creating a fast track for custody cases at the City Court.

7.6 This seems to prove, once again, that unless the spotlight is kept on case management practice and service management takes a real and active interest in the flow of cases and monitor potential bottlenecks, problems of some magnitude will arise.

7.7 Anecdotal evidence has it that prior to this specialisation, it was rare for a committal case to wait more than a month before being dealt with. However, that still left the problem of transcribing the depositions and it is well known that there were considerable problems in that area.

7.8 Another problem area involves the practice of the booking clerks at the specialised committal courts (now only the City Court) of

accepting cases for booking without insisting that the brief be prepared beforehand. This may contribute to the problem mentioned by the Judges.

7.8.1 Hand-up brief cases are booked in sometimes for periods in excess of six months and the Informant would not be human if he did not put aside preparing the case until it became more pressing.

7.8.2 If the rule was introduced that a case could not be booked in unless it was fully prepared, there would be an incentive for the Informant to prepare his case as quickly as possible.

7.8.3 At the moment those Informants who have prepared their case in advance do not receive any priority and must take their place in the queue of booked cases.

7.8.4 A further advantage is that police caused delay is then shown separately to court caused delay. While it is arguable as to whether the specialised committal court booking in practice causes delay, it has a deleterious effect in that it is not possible to pin responsibility on the agency causing delay.

7.8.5 Another improvement might involve court staff not booking a Hand-up Brief into any particular month but instead just allocating a priority number so that a case might be dealt with whenever a Magistrate is available; for example, when an adjournment is granted leaving a Magistrate unexpectedly free.

7.9 The prosecution in England has only a short time to bring a case for a committal hearing. As there are adequate court resources in the lower courts it must be assumed that difficulties in Victoria are due to scheduling problems in the courts or procedural problems with the Victoria Police.

7.10 There would appear to be value in conducting a review of the method of arranging and scheduling preliminary examinations and of any other matter that might cause the committal hearing to be postponed. The current inquiry into the Victoria Police Force might be the appropriate vehicle to investigate the latter type of problem.

8 PUBLICITY

8.1 Under section 28 of the Supreme Court Act:

> "A Council of the Judges of the Court, ... shall assemble ..... for the purpose .....of inquiring and examining into any defects which appear to exist in the system of procedure or the administration of the law in the Court or in any Court from which any appeal lies to the Supreme Court or any Judge thereof. And they shall report annually to the Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act or in any law relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice."

8.2 The current procedure is for the Chief Justice to forward his report to the Governor who in turn transmits it to the Attorney-General who lays it before the House. It is not ordered to be printed. The report is not available to the public through the Government Printer's bookshop.

8.3 It has been recognised in other countries, particularly the United States, that an Annual Report, suitably presented, can be a very powerful means of securing for a court system its share of resources in order that delay might be reduced.

8.4 Consideration should be given to giving wider circulation to the Supreme Court Annual Report.

8.5 This would be all the more potent if all court and related staff were to be assigned to the Chief Justice as a separate entity.

9 GENERAL MATTERS OF ADMINISTRATION

9.1 Each month a list of cases outstanding in the higher criminal courts is prepared. It is known as the adjournment list.

9.2 The monthly adjournment list is produced to comply with section 360 of the Crimes Act:

> "When in respect of any indictable offence any person has been committed or remanded for trial ... the court may .... in the interest of justice ....., whether the accused person is present or not direct ..... that the trial shall be postponed ..... The time and place for the commencement of any such sittings to which the trial is postponed shall be stated in open court ....."

9.3 In South Australia all prisoners in gaol who have been committed for trial at the Supreme Court and the District Criminal Court are arraigned on the first day of sittings of each month. The important point though is that an accused person in custody is brought before the court personally at the commencement of each session until his trial has commenced.

9.4 The English have a system whereby a weekly list of all persons committed in custody is sent to the court. The court notifies the prison of the case number which it has allocated upon receipt of the relevant committal documents and in turn the prison repeats this number on its weekly list. If a prisoner's name appears on the list

without a court file number immediate steps are taken to contact the committing court to ascertain the reason.

9.5 In the past it has not been unknown in Victoria for the case of an accused in remand to be overlooked and in the final analysis it is the court that has been responsible. Because the court has not exercised management control of its caseload and because neither the court nor the Parliament has laid down any guidelines as to what is a reasonable amount of time in which a case should be dealt with, the judicial arm has fallen largely into the hands of the prosecuting authority. (The Criminal Listing Directorate commenced operation in 1982 but even that has not been attached to the judicial arm.)

9.6 In Victoria the fact that the monthly Adjournment List does not have on it the current custody status of the accused, must surely be a matter for concern.

9.7 A further safeguard to prevent accused persons in custody, excluding those undergoing sentence for another offence, from remaining unnecessarily in remand might be for all those in custody more than three months to be brought before the court thereafter at the commencement of each sittings or once per month.

9.8 The Melbourne County Court has a record of hearing civil cases of which it can feel justifiably proud. The court exercised strict control through use of call-overs, not over-listing (the principle of the idle Judge or certainty of getting on) and a refusal to grant adjournments. While different methods of control might be required for criminal cases, the overriding principle is the same in both jurisdictions, viz. the need for court control.

9.8.1 Higher Court control could extend even as far back as the booking into committal stage.

10 SITTINGS

10.1 There are also a number of organisational matters which could be attended to and foremost amongst these is the question of the need for monthly sittings. From the point of view of the accused, it matters not whether the date which he is effectively transferred to a higher court is the first day of a sittings or any other date so long as his case is supervised by the court and not overlooked. Although he will not realise it, the fact that normally a trial will not be commenced on the fourth last day or thereafter means of course that he may spend additional time in custody.

10.2 There appears no over-riding reason why sittings should not be continuous with judges changing jurisdiction, if need be, during those sittings. It should be noted that at the Central Criminal Court in London (The Old Bailey) judges sit continuously in crime and in America it is quite common for judges to sit six or twelve months in crime.

11 IMPROVED RECORDS MANAGEMENT SYSTEMS CONCERNING CRIMINAL CASES

11.1 A summary of the information which appears on the card records of what was the Criminal Law Branch (now the Office of Public Prosecutions) appears as Appendix A.

11.1.1 Examination of the Total Column on the right hand side of that Appendix reveals that data elements are frequently repeated. For some of these items it has given rise to difficulty in updating the recorded information to reflect current status particularly when changes are frequent.

11.2 Much work has been done in America regarding the application of computer technology to the tracking and management of cases in

prosecution and court agencies. The best known system is PROMIS which is an acronym for Prosecutors Management Information System, and which was designed by the Institute for Law and Social Research in Washington D.C. in 1970. It has been updated and expanded since then and might usefully be investigated here.

11.3 In the meantime, a number of useful improvements to the manual record-keeping system could be implemented. For example, outstanding cases on the Adjournment List lack an effective sub-divisional breakdown. One such improvement could be to group related matters together, e.g. all Not Guilty Pleas over six months where the accused is held in remand and so on.

11.3.1 It is highly desirable that custody status appear on the Adjournment List for reasons previously given.

12 IMPROVED MANAGEMENT INFORMATION

12.1 Improved record-keeping procedures will enable improved information for case flow management purposes.

12.2 Case Management strategies depend on, amongst other things, statistical data on case processing times.

12.3 This survey has permitted the design of an improved performance oriented management information system concerning elapsed times in higher criminal courts. This program has been allotted the acronym TEMPIS FUGIT for Time Elapsed Management (Performance) Information System For Undertaking Graphics Information Transfer.

12.4 The Daily Progress report completed by Preparation Officers in the Criminal Law Branch has been altered so that for finalised cases the following information will be supplied as a matter of course.

DATES

1 Date of arrest.
2 Date of committal for trial.
3 Date ready for trial.
4 Date of arraignment.
5 Date of verdict.
6 Date of sentence.

PLEA

1 Plea at committal hearing.
2 First plea at trial.
3 History of changes in plea (i.e. prior to and after arraignment).

BAIL OR CUSTODY

Custody status between committal for trial and arraignment: -

1 On bail since committal.
2 Remand - in custody since committal.
3 Mixed status (i.e. bail and remand).
4 Dual status (e.g. on remand and undergoing sentence for another offence).

13 CONCLUSION

13.1 Although it is well known that there are considerable delays in trial courts, there has been inadequate statistical information as to how long cases are taking. This survey, by measuring elapsed times in conjunction with selected characteristics, has provided a baseline by which to measure future performance and will assist in judging the

success of any delay-reduction program which might be undertaken.

13.2 A number of suggestions have been made which if implemented have the potential to make an immediate and positive impact on problems confronting criminal courts.

13.3 It must be recognised that there is no single solution to the problems of delay in trial courts. It can be said, however, that success is more likely if the public spotlight is focussed on the criminal justice process and in particular on the courts and the prosecuting agency.

13.3.1 The introduction of relevant performance information is an aid to permitting the first arbiters, the public, to assess the judicial system.

13.4 Finally, there is a need for the formal specification and introduction of a Delay Reduction Program.

(Sgd.) W.U. JOHNSTON
Research Officer

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 3: Date Committed for Trial
Date of Arraignment

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
1. Homicide and Related Offences								
Guilty, Bail	7	2	212	308	121-565	47	654	226
Guilty, Remand Only	1	-	-	82	-	-	-	-
Guilty, Remand and U.S.O.O.	-	-						
Not Guilty, Bail	23	-	293	289	87-451	26	703	217
Not Guilty, Remand Only	1	-	-	39	-	-	-	-
Not Guilty, Remand & USOO	1	-	-	225	-	-	-	-
Total Homicide and Related Offences	33	2	230	271	113-423	26	703	214
2. Wounding, Assaults, etc.								
Guilty, Bail	27	4	404	375	172-534	52	924	222
Guilty, Remand Only	7	-	46	64	35-91	29	189	56
Guilty, Remand and U.S.O.O.	6	-	137	229	77-476	71	559	202
Not Guilty, Bail	18	-	360	346	61-604	18	799	250
Not Guilty, Remand Only	5	3	78	74	36-111	33	116	35
Not Guilty, Remand & USOO.	2	-	-	118	-	109	127	-
Total Wounding, Assaults etc.	65	7	206	285	79-494	18	924	300

U.S.O.O. = Undergoing Sentence Other Offence
Footnote: One person absconded in 1973 whilst on bail

Prepared by: R. JENNINGS. Date Prepared: 12/8/82.

Period 3: Date Committed for Trial to Date of Arraignment

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
3. Sexual Offences								
Guilty, Bail	96	16	148	195	71-279	13	819	157
Guilty, Remand Only	15	4	59	70	37-86	29	160	39
Guilty, Remand and U.S.O.O.	10	3	80	86	57-111	52	166	35
Not Guilty, Bail	20	-	126	185	83-149	20	719	204
Not Guilty, Remand Only	7	-	60	68	34-107	22	110	33
Not Guilty, Remand & USOO	4	-	119	125	73-165	71	189	61
Total Sexual Offences	152	23	119	167	63-211	13	819	153
4. Robbery and Allied Offences for Gain								
Guilty, Bail	43 (1)	14 (2)	295	302	114-470	22	742	214
Guilty, Remand Only	25	11	68	111	55-114	35	460	113
Guilty, Remand & U.S.O.O.	9	4	78	80	47-126	39	146	39
Not Guilty, Bail	8	-	392	423	320-616	38	697	236
Not Guilty, Remand Only	9	-	215	187	87-245	82	276	77
Not Guilty, Remand & USOO	9	-	112	136	70-143	47	395	102
Total Robbery and Allied Offences for Gain	103 (1)	29 (2)	146	230	80-335	22	742	203

FOOTNOTES:

(1) & (2) Two cases and one case excluded respectively. Persons were U.S.O.O. before bail granted.

U.S.O.O. = Undergoing Sentence Other Offence.

Prepared by: R. JENNINGS. Date Prepared: 12/8/82.

Period 3: Date Committed for Trial to Date of Arraignment

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
5. Theft, Burglary, etc.								
Guilty, Bail	156(1)	54(2)	300	320	108-469	16	1,142	231
Guilty, Remand Only	35	13	94	153	60-209	12	514	134
Guilty, Remand & U.S.O.O.	28	10	97	135	66-141	15	460	116
Not Guilty, Bail	36	-	271	377	210-620	86	867	239
Not Guilty, Remand Only	23	1	103	166	74-248	48	603	139
Not Guilty, Remand & US00	11	-	147	145	84-205	47	211	57
Total Theft, Burglary, etc.	289(1)	78(2)	201	270	92-413	12	1,142	218
6. Deception								
Guilty, Bail	43	6	249	326	130-521	47	1,169	247
Guilty, Remand Only	1	1	-	233	-	233	233	-
Guilty, Remand & U.S.O.O.	2	2(3)	-	110	-	82	139	-
Not Guilty, Bail	10(4)	-	320	382	101-556	95	832	286
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & US00	-	-						
Total Deception	56(4)	9(3)	241	314	114-544	47	1,169	243

FOOTNOTES: 1, 2 & 4. Two, one and two cases excluded respectively. Persons were U.S.O.O. before bail granted.

3. One case excluded. Person absconded on bail in 1973. Recommitted in 1979. Also U.S.O.O.

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 3: Date Committed for Trial to Date of Arraignment

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
7. Property Damage								
Guilty, Bail	33	14	174	227	92-315	19	650	179
Guilty, Remand Only	6	2	89	97	66-136	63	174	40
Guilty, Remand & U.S.O.O.	2	-	-	170	-	159	179	-
Not Guilty, Bail	13	-	376	380	185-577	161	612	165
Not Guilty, Remand Only	1	-	-	97	-	97	97	-
Not Guilty, Remand & USOO	1	-	-	97	-	97	97	-
Total Property Damage	56	16	174	242	97-366	19	650	180
8. Other Offences								
Guilty, Bail	47(1)	11	442	306	121-442	15	617	193
Guilty, Remand Only	6	3	27	38	21-65	14	89	27
Guilty, Remand & U.S.O.O.	14	-	80	99	63-127	21	202	46
Not Guilty, Bail	42(2)	1	137	237	80-400	30	779	209
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & USOO	2	-	-	163	-	122	204	-
Total Other Offences	111(1)&(2)	15	138	238	80-442	14	779	199

FOOTNOTES: 1 & 2. Four cases and one case excluded respectively. Persons were U.S.O.O. before granted bail.

Period 1: Date of Arrest to Date of Sentence

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
1. Homicide and Related Offences								
Guilty, Bail	9	-	480	497	227-731	120	769	245
Guilty, Remand Only	1	-	-	248	-	-	-	-
Guilty, Remand and U.S.O.O.	-	-						
Not Guilty, Bail	23	-	432	405	246-601	53	780	216
Not Guilty, Remand Only	1	-	-	135	-	-	-	-
Not Guilty, Remand & USOO.	1	-	-	385	-	-	-	-
Total Homicide and Related Offences	35	-	432	416	247-635	53	780	222
2. Wounding, Assaults, etc.								
Guilty, Bail	31	-	494	492	278-643	153	991	209
Guilty, Remand Only	7	-	307	381	82-728	62	771	315
Guilty, Remand and USOO.	6	-	269	333	138-591	98	612	212
Not Guilty, Bail	18	-	512	489	279-675	102	1074	257
Not Guilty, Remand Only	8	-	204	310	196-302	80	708	229
Not Guilty, Remand and USOO.	2	-	-	307	-	307	307	-
Total Wounding, Assaults etc.	72		476	442	207-644	62	1074	238

Footnote: One person absconded in 1973 whilst on bail

Period 1: Date of Arrest to Date of Sentence

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
3. Sexual Offences								
Guilty, Bail	112	-	298	336	199-414	49	1046	188
Guilty, Remand Only	19	-	198	305	127-325	53	1288	308
Guilty, Remand and U.S.O.O.	13	-	302	555	171-954	109	1719	560
Not Guilty, Bail	20	-	281	357	241-357	78	1075	240
Not Guilty, Remand Only	7	-	280	591	198-1264	136	1804	623
Not Guilty, Remand & U.S.O.O.	4	-	367	433	352-382	176	821	274
Total Sexual Offences	175	-	281	361	190-400	49	1804	284
4. Robbery and Allied Offences For Gain								
Guilty, Bail	57(1)	-	348	370	215-480	59	880	202
Guilty, Remand Only	36	-	146	186	89-203	39	924	168
Guilty, Remand and U.S.O.O.	13	-	97	132	75-168	62	398	89
Not Guilty, Bail	8	-	553	550	444-742	182	801	228
Not Guilty, Remand Only	9	-	329	327	158-375	87	864	225
Not Guilty, Remand and USOO.	9	-	268	426	144-739	127	893	296
Total Robbery and Allied Offences For Gain	132(1)	-	247	309	148-417	39	924	224

Footnote: 1. 3 cases excluded. Persons U.S.O.O. before bail granted.

Period 1: Date of Arrest to Date of Sentence

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
5. Theft, Burglary, etc.								
Guilty, Bail	210 [1.]	-	431	449	234-602	40	2400	280
Guilty, Remand Only	48	-	171	250	123-337	38	729	177
Guilty, Remand and U.S.O.O.	38	-	244	342	170-418	82	1382	264
Not Guilty, Bail	36	-	462	544	315-663	106	1858	329
Not Guilty, Remand Only	24	-	243	307	133-407	85	700	206
Not Guilty, Remand & USOO.	11	-	279	277	174-339	118	700	159
Total Theft, Burglary, etc.	367 [1.]	-	324	408	190-556	38	2400	276
6. Deception								
Guilty, Bail	49	-	443	555	256-751	71	1993	407
Guilty, Remand Only	2	-	-	336	-	147	525	-
Guilty, Remand and U.S.O.O.	4 [2.]	-	266	264	94-210	94	427	144
Not Guilty, Bail	10 [3.]	-	634	665	304-1018	146	1089	338
Not Guilty, Remand Only	-	-						
Not Guilty, Remand and USOO.	-	-						
Total Deception	65 [2&3.]		443	547	257-744	71	1993	389

Footnotes: 1 & 3. Three cases and two cases excluded respectively Persons U.S.O.O. before bail granted.

2. One case excluded. Person absconded on bail in 1973. Recommitted in 1979. Also U.S.O.O.

Period 1: Date of Arrest to Date of Sentence

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

COUNTY COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
7. Property Damage								
Guilty, Bail	47	-	341	381	217-547	42	1015	222
Guilty, Remand Only	8	-	158	155	120-196	95	210	44
Guilty, Remand and U.S.O.O.	2	-	-	208	-	201	216	- -
Not Guilty, Bail	13	-	488	504	309-667	211	994	220
Not Guilty, Remand Only	1	-	-	159	-	159	159	-
Not Guilty, Remand & U.S.O.O.	1	-	-	170	-	170	170	-
Total Property Damage	72	-	316	367	201-488	42	1015	225
8. Other Offences								
Guilty, Bail	58[1.]	-	524	489	237-549	105	2457	346
Guilty, Remand Only	9	-	57	186	31-124	29	1183	376
Guilty, Remand and U.S.O.O.	14	-	191	213	86-295	70	554	138
Not Guilty, Bail	43[2.]	-	315	397	256-464	147	841	213
Not Guilty, Remand Only	-	-						
Not Guilty, Remand and USOO.	2	-	-	400	-	285	517	-
Total Offences	126[1-2.]	-	331	404	220-543	29	2457	303

Footnotes: 1 & 2 Four cases and one case excluded respectively. Persons U.S.O.O. before bail granted.

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS - (COUNTY COURT) - VICTORIA

FOR: ALL OFFENCE CATEGORIES

FOR: PLEA OF NOT GUILTY, ON BAIL

PERIOD: 12 MONTHS ENDING 31.12.80

Period : 1 - Date of Arrest to
- Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	1	1	1
8 ≤ 12	1	1	2
12 ≤ 16	2	1	3
16 ≤ 20	3	2	5
20 ≤ 24	4	2	7
24 ≤ 28	8	5	12
28 ≤ 32	6	3	15
32 ≤ 36	10	6	21
36 ≤ 40	15	9	30
40 ≤ 44	9	5	35
44 ≤ 48	13	8	43
48 ≤ 52	8	5	48
> 52	91	52	100

Valid Cases: 171 Invalid Cases: -

Period 3 - Date Committed for Trial to
Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	4	2	2
4 ≤ 8	8	5	7
8 ≤ 12	21	12	19
12 ≤ 16	12	7	26
16 ≤ 20	15	9	35
20 ≤ 24	10	6	41
24 ≤ 28	1	1	42
28 ≤ 32	9	5	47
32 ≤ 36	6	3	50
36 ≤ 40	9	5	55
40 ≤ 44	5	3	58
44 ≤ 48	4	2	60
48 ≤ 52	4	2	62
> 52	62	38	100

Valid Cases: 170 Invalid Cases: 1

FOOTNOTE:
Three Cases excluded - U.S.O.O. before being bailed.

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (COUNTY COURT) - VICTORIA

FOR: PLEA OF NOT GUILTY IN REMAND ONLY

Period 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤ 12	1	2	2
12 ≤ 16	6	12	14
16 ≤ 20	6	12	26
20 ≤ 24	2	4	30
24 ≤ 28	3	6	36
28 ≤ 32	6	12	48
32 ≤ 36	1	2	50
36 ≤ 40	0	0	50
40 ≤ 44	5	10	60
44 ≤ 48	5	10	70
48 ≤ 52	0	0	70
> 52	15	30	100

Valid Cases: 50 Invalid Cases: NIL

FOR: ALL OFFENCE CATEGORIES
PERIOD: 12 MONTHS ENDING 31.12.80

Period: 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	1	2	2
4 ≤ 8	8	18	20
8 ≤ 12	7	16	36
12 ≤ 16	14	31	67
16 ≤ 20	1	2	69
20 ≤ 24	2	4	73
24 ≤ 28	0	0	73
28 ≤ 32	3	6	79
32 ≤ 36	5	11	90
36 ≤ 40	2	4	94
40 ≤ 44	0	0	94
44 ≤ 48	1	2	96
48 ≤ 52	0	0	96
> 52	2	4	100

Valid Cases: 46 Invalid Cases: 4

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS - COUNTY COURT - VICTORIA

PLEAS OF NOT GUILTY
FOR: IN REMAND AND U.S.O.O.

FOR: ALL OFFENCE CATEGORIES
PERIOD: 12 MONTHS ENDING 31.12.80

Period: 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤ 12	0	0	0
12 ≤ 16	0	0	0
16 ≤ 20	3	10	10
20 ≤ 24	1	3	13
24 ≤ 28	6	20	33
28 ≤ 32	0	0	33
32 ≤ 36	1	3	36
36 ≤ 40	2	7	43
40 ≤ 44	5	17	60
44 ≤ 48	1	3	63
48 ≤ 52	2	7	70
> 52	9	30	100

Valid Cases: 30 Invalid Cases: -

Period: 3 - Date Committed for Trial To Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	2	7	7
8 ≤ 12	3	10	17
12 ≤ 16	7	23	40
16 ≤ 20	5	17	57
20 ≤ 24	5	17	74
24 ≤ 28	2	7	81
28 ≤ 32	4	13	94
32 ≤ 36	1	3	97
36 ≤ 40	0	0	97
40 ≤ 44	0	0	97
44 ≤ 48	0	0	97
48 ≤ 52	0	0	97
> 52	1	3	100

Valid Cases: 30 Invalid Cases: -

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (COUNTY COURT) VICTORIA

FOR: ALL OFFENCE CATEGORIES
FOR: PLEA OF GUILTY, ON BAIL

PERIOD: 12 MONTHS ENDING 31.12.80

Period 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	5	1	1
8 ≤ 12	10	2	3
12 ≤ 16	10	2	5
16 ≤ 20	21	4	9
20 ≤ 24	31	5	14
24 ≤ 28	28	5	19
28 ≤ 32	33	6	25
32 ≤ 36	38	7	32
36 ≤ 40	28	5	37
40 ≤ 44	26	4	41
44 ≤ 48	23	4	45
48 ≤ 52	19	3	48
> 52	302	52	100

Valid Cases: 574 Invalid Cases: —

Period 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	14	3	3
4 ≤ 8	37	8	11
8 ≤ 12	38	8	19
12 ≤ 16	30	7	26
16 ≤ 20	40	10	36
20 ≤ 24	24	5	41
24 ≤ 28	23	5	46
28 ≤ 32	12	3	49
32 ≤ 36	17	4	53
36 ≤ 40	12	3	56
40 ≤ 44	13	3	59
44 ≤ 48	19	4	63
48 ≤ 52	13	3	66
> 52	161	34	100

Valid Cases: 453 Invalid Cases: 121

FOOTNOTE: Ten cases excluded: Persons were U.S.O.O. before being bailed.

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (COUNTY COURT) VICTORIA

FOR: ALL OFFENCE CATEGORIES

FOR: PLEA OF GUILTY IN REMAND ONLY. PERIOD: 12 MONTHS ENDING 31.12.80

Period: 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	9	7	7
8 ≤ 12	11	9	16
12 ≤ 16	16	12	28
16 ≤ 20	18	14	42
20 ≤ 24	14	11	53
24 ≤ 28	8	6	59
28 ≤ 32	10	8	67
32 ≤ 36	6	5	72
36 ≤ 40	4	3	75
40 ≤ 44	3	2	77
44 ≤ 48	3	2	79
48 ≤ 52	4	3	82
> 52	24	18	100

Valid Cases: 130 Invalid Cases: NIL

Period: 3 - Date Committed for Trial to Date of Arraignment.

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	9	9	9
4 ≤ 8	22	23	32
8 ≤ 12	24	25	57
12 ≤ 16	12	13	70
16 ≤ 20	8	9	79
20 ≤ 24	4	4	83
24 ≤ 28	5	5	88
28 ≤ 32	2	2	90
32 ≤ 36	3	3	93
36 ≤ 40	0	0	93
40 ≤ 44	0	0	93
44 ≤ 48	0	0	93
48 ≤ 52	2	2	95
> 52	5	5	100

Valid Cases: 96 Invalid Cases: 34

Prepared by: R. JENNINGS. Date Prepared: 12/8/82.

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (COUNTY COURT) - VICTORIA

FOR: PLEA OF GUILTY IN REMAND & U.S.O.O.
FOR: ALL OFFENCE CATEGORIES

PERIOD: 12 MONTHS ENDING 31.12.80

Period: 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤12	7	8	8
12 ≤16	10	11	19
16 ≤20	4	4	23
20 ≤24	8	9	32
24 ≤28	6	7	39
28 ≤32	7	8	47
32 ≤36	11	12	59
36 ≤40	2	2	61
40 ≤44	6	7	68
44 ≤48	5	6	74
48 ≤52	3	3	77
> 52	21	23	100

Valid Cases: 90 Invalid Cases: NIL

Period: 3 - Date Committed to Date of Arraignment.

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	3	4	4
4 ≤ 8	8	11	15
8 ≤12	21	30	45
12 ≤16	11	16	61
16 ≤20	11	16	77
20 ≤24	8	11	88
24 ≤28	2	3	91
28 ≤32	1	1	92
32 ≤36	1	1	93
36 ≤40	0	0	93
40 ≤44	0	0	93
44 ≤48	0	0	93
48 ≤52	0	0	93
> 52	5	7	100

Valid Cases: 71 Invalid Cases: 19

FOOTNOTE: One Case excluded person absconded on bail in 1973. Also U.S.O.O.

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 3: Date Committed for Trial to Date of Arraignment

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
1. Homicide and Related Offences								
Guilty, Bail	3	-	129	136	-	97	183	-
Guilty, Remand Only	2	-	-	88	-	84	91	- -
Guilty, Remand & U.S.O.O.	1	-	110	110	-	110	110	-
Not Guilty, Bail	5	-	191	170	116-210	112	210	47
Not Guilty, Remand Only	16	-	122	127	91-152	22	370	77
Not Guilty, Remand & U.S.O.O	3	-	152	159	-	152	174	13
Total Homicide and Related Offences	30	-	130	135	94-157	22	370	63
2. Wounding, Assaults, etc.								
Guilty, Bail	5	1	184	160	80-222	75	223	70
Guilty, Remand Only	2	-	-	110	-	42	178	-
Guilty, Remand (U.S.O.O.)	1	-	-	92	-	92	92	-
Not Guilty, Bail	-	-						
Not Guilty, Remand Only	3	-	55	108	-	39	230	106
Not Guilty, Remand & U.S.O.O.	1	-	55	55	-	55	55	-
Total Wounding, Assaults etc.	12	1	93	124	55-184	39	230	77

Period 3: Date Committed for Trial to Date of Arraignment

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
3. Sexual Offences								
Guilty, Bail	1	-		138				
Guilty, Remand Only	1	-		107				
Guilty, Remand & U.S.O.O.	-	-		-				
Not Guilty, Bail	1	-		1				
Not Guilty, Remand Only	1	-		91				
Not Guilty, Remand & U.S.O.O	-	-		-				
Total Sexual Offences	4	-	99	84	91-107	1	138	59
4. Robbery and Allied Offences For Gain								
Guilty, Bail	20	2	77	158	70-241	40	400	125
Guilty, Remand Only	28	6	82	78	45- 91	28	192	39
Guilty, Remand & U.S.O.O.	7	3	71	88	44-125	42	241	70
Not Guilty, Bail	5	-	70	126	53-250	50	276	97
Not Guilty, Remand Only	3	-	75	82	-	70	102	17
Not Guilty, Remand & U.S.O.O	3	-	242	221	-	100	322	112
Total Robbery and Allied Offences For Gain	66	11	79	114	54-147	28	400	92

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period3: Date Committed for Trial to Date of Arraignment

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
5. Theft, Burglary, etc.								
Guilty, Bail	6	-	99	156	41-326	30	516	181
Guilty, Remand Only	2	-		116		96	137	
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	-	-						
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O.	-	-						
Total Theft, Burglary, etc.	8	-	96	146	96-137	30	516	154
6. Deception								
Guilty, Bail	1	-		21				
Guilty, Remand Only	-	1						
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	-	-						
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Deception	1	1	-	21	-	-	-	-

Date Committed for Trial
Period 3: to Date of Arraignment

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
7. Property Damage								
Guilty, Bail	1			40				
Guilty, Remand Only	-	-						
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	1	-		213				
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Property Damage	2	-	-	126	-	40	213	
8. Other Offences (Drug Offences, Conspiracy, Perjury, Riot, Escape etc								
Guilty, Bail	5	2	74	117	69-184	67	184	62
Guilty, Remand Only	-	-						
Guilty, Remand & U.S.O.O	-	-						
Not Guilty, Bail	4	-	199	199	199-199	199	199	0
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Other Offences	9	2	184	153	74-199	67	199	62

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 1: Date of Arrest to Date of Sentence

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
1. Homicide and Related Offences								
Guilty, Bail	3	-	417	406	-	320	480	-
Guilty, Remand Only	2	-	-	291	-	251	330	-
Guilty, Remand & U.S.O.O.	1	-	210	210	-	210	210	-
Not Guilty, Bail	5	-	465	432	344-399	329	510	72
Not Guilty, Remand Only	16	-	254	271	222-302	95	455	93
Not Guilty, Remand & U.S.O.O.	3	-	457	489	-	457	553	55
Total Homicide and Related Offences	30	-	324	332	244-456	95	553	116
2. Wounding, Assaults, etc.								
Guilty, Bail	6	-	240	252	159-358	133	436	104
Guilty, Remand Only	2	-	-	205	-	62	348	-
Guilty, Remand & U.S.O.O.	1	-	180	180	-	180	180	-
Not Guilty, Bail	NIL							
Not Guilty, Remand Only	3	-	264	278	-	170	399	115
Not Guilty, Remand & U.S.O.O.	1	-	399	399	-	399	399	-
Total Wounding, Assaults etc.	13	-	260	257	172-386	62	436	114

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 1: Date of Arrest to Date of Sentence

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
3. Sexual Offences								
Guilty, Bail	1	-	-	198				
Guilty, Remand Only	1	-	-	426				
Guilty, Remand & U.S.O.O.	-	-	-	-				
Not Guilty, Bail	1	-	-	172				
Not Guilty, Remand Only	1	-	-	338				
Not Guilty, Remand & U.S.O.O	-	-						
Total Sexual Offences	4	-	268	283	198-338	172	426	120
4. Robbery and Allied Offences For Gain								
Guilty, Bail	22	-	188	231	106-330	77	511	150
Guilty, Remand Only	34	-	174	165	117-207	45	304	68
Guilty, Remand & U.S.O.O.	10	-	177	200	87-286	73	515	139
Not Guilty, Bail	5	-	212	257	100-477	84	533	175
Not Guilty, Remand Only	3	-	188	262	-	84	515	225
Not Guilty, Remand & U.S.O.O	3	-	290	291	-	181	403	111
Total Robbery and Allied Offences For Gain	77	-	185	203	110-243	45	533	124

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

Period 1: Date of Arrest to Date of Sentence

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
5. Theft, Burglary, etc.								
Guilty, Bail	6	-	151	207	86-383	59	524	167
Guilty, Remand Only	2	-	-	288	-	254	322	-
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	-	-						
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Theft, Burglary, etc.	8	-	201	227	143-254	59	524	147
6. Deception								
Guilty, Bail	1	-		115				
Guilty, Remand Only	1	-	-	212				
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	-	-						
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Deception	2	-	-	163	-		115	212

Period 1: Date of Arrest to Date of Sentence

STATISTICAL MEASURES OF DAYS BETWEEN EVENTS

SUPREME COURT - VICTORIA

Period: 12 months ending 31.12.80

Classification of Cases By Plea & Bail Condition	Valid Cases	Invalid Cases	Median (Midpoint)	Mean (Average)	Inter-Quartile Range (Middle 50%)	Minimum	Maximum	Standard Deviation
7. Property Damage								
Guilty, Bail	1	-		80				
Guilty, Remand Only	-	-						
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	1	-		360				
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Property Damage	2	-		220		80	360	
8. Other Offences (Drug Offences, Conspiracy Perjury, Riot, Escape, etc								
Guilty, Bail	7	-	147	155	112-209	77	209	52
Guilty, Remand Only	-	-						
Guilty, Remand & U.S.O.O.	-	-						
Not Guilty, Bail	4	-	1,303	1,303	1303-1303	1303	1303	0
Not Guilty, Remand Only	-	-						
Not Guilty, Remand & U.S.O.O	-	-						
Total Other Offences	11	-	209	572	125-1303	77	1303	581

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT)

FOR: Plea of not guilty, on bail PERIOD: 12 MONTHS ENDING 31.12.80

Period : 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤ 12	1	6	6
12 ≤ 16	0	0	6
16 ≤ 20	0	0	6
20 < 24	1	6	12
24 ≤ 28	1	6	18
28 ≤ 32	1	6	24
32 ≤ 36	0	0	24
36 ≤ 40	0	0	24
40 ≤ 44	0	0	24
44 ≤ 48	2	13	37
48 ≤ 52	1	6	43
> 52	9	57	57

Valid Cases: 16 Invalid Cases: -

Period : 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	1	6	6
4 ≤ 8	1	6	12
8 ≤ 12	2	13	25
12 ≤ 16	1	6	31
16 ≤ 20	1	6	37
20 ≤ 24	0	0	37
24 ≤ 28	2	13	50
28 ≤ 32	7	44	94
32 ≤ 36	0	0	94
36 ≤ 40	1	6	100
40 ≤ 44	0	0	100
44 ≤ 48	0	0	100
48 ≤ 52	0	0	100
> 52	0	0	100

Valid Cases: 16 Invalid Cases:

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT) - VICTORIA

FOR: PLEA OF NOT GUILTY
IN REMAND ONLY

Period: 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 < 8	0	0	0
8 < 12	1	4	4
12 < 16	1	4	8
16 < 20	0	0	8
20 < 24	1	4	12
24 < 28	3	13	25
28 < 32	2	9	34
32 < 36	2	9	43
36 < 40	4	18	61
40 < 44	2	9	70
44 < 48	0	0	70
48 < 52	3	13	83
> 52	4	17	100

Valid Cases: 23 Invalid Cases: -

FOR: ALL OFFENCE CATEGORIES
PERIOD: 12 MONTHS ENDING 31.12.80

Period: 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	1	4	4
4 < 8	2	9	13
8 < 12	5	22	35
12 < 16	5	22	57
16 < 20	3	13	70
20 < 24	5	22	92
24 < 28	0	0	92
28 < 32	0	0	92
32 < 36	1	4	96
36 < 40	0	0	96
40 < 44	0	0	96
44 < 48	0	0	96
48 < 52	0	0	96
> 52	1	4	100

Valid Cases: 23 Invalid Cases: -

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT)-VICTORIA

FOR: PLEA OF NOT GUILTY, IN REMAND AND U.S.O.O.

Period : 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤ 12	0	0	0
12 ≤ 16	0	0	0
16 ≤ 20	0	0	0
20 ≤ 24	0	0	0
24 ≤ 28	1	14	14
28 ≤ 32	0	0	14
32 ≤ 36	0	0	14
36 ≤ 40	0	0	14
40 ≤ 44	1	14	28
44 ≤ 48	0	0	28
48 ≤ 52	0	0	28
> 52	5	72	100

Valid Cases: 7 Invalid Cases: NIL

FOR: ALL OFFENCE CATEGORIES

PERIOD: 12 MONTHS ENDING 31.12.80

Period : 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	1	14	14
8 ≤ 12	0	0	14
12 ≤ 16	1	14	28
16 ≤ 20	0	0	28
20 ≤ 24	2	28	56
24 ≤ 28	1	14	70
28 ≤ 32	0	0	70
32 ≤ 36	1	14	84
36 ≤ 40	0	0	84
40 ≤ 44	0	0	84
44 ≤ 48	1	14	98
48 ≤ 52	0	0	98
> 52	0	0	100

Valid Cases: 7 Invalid Cases: NIL

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT)

FOR ALL OFFENCE CATEGORIES
FOR: Plea of Guilty, on Bail

PERIOD: 12 MONTHS ENDING 31.12.80

Period 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ < 8	0	0	0
8 ≤ < 12	4	9	9
12 ≤ < 16	6	13	22
16 ≤ < 20	7	15	37
20 ≤ < 24	4	9	46
24 ≤ < 28	2	4	50
28 ≤ < 32	9	19	69
32 ≤ < 36	1	2	71
36 ≤ < 40	1	2	73
40 ≤ < 44	1	2	75
44 ≤ < 48	4	9	84
48 ≤ < 52	0	0	84
≥ 52	8	16	100

Valid Cases: 47 Invalid Cases: -

Period 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	1	2	2
4 ≤ < 8	6	14	16
8 ≤ < 12	12	29	45
12 ≤ < 16	4	10	55
16 ≤ < 20	3	7	62
20 ≤ < 24	3	7	69
24 ≤ < 28	4	10	79
28 ≤ < 32	2	5	84
32 ≤ < 36	2	5	89
36 ≤ < 40	1	2	91
40 ≤ < 44	0	0	91
44 ≤ < 48	0	0	91
48 ≤ < 52	0	0	91
≥ 52	4	9	100

Valid Cases: 42 Invalid Cases: 3

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT) - VICTORIA

FOR: PLEA OF GUILTY IN REMAND ONLY

FOR: ALL OFFENCE CATEGORIES
PERIOD: 12 MONTHS ENDING 31.12.80

Period : 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	2	5	5
8 ≤ 12	4	10	15
12 ≤ 16	2	5	20
16 ≤ 20	6	14	34
20 ≤ 24	4	10	44
24 ≤ 28	7	16	60
28 ≤ 32	6	15	75
32 ≤ 36	2	5	80
36 ≤ 40	2	5	85
40 ≤ 44	3	6	91
44 ≤ 48	2	5	96
48 ≤ 52	1	2	98
> 52	1	2	100

Valid Cases: 42 Invalid Cases: -

Period 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	11	32	32
8 ≤ 12	6	17	49
12 ≤ 16	12	33	82
16 ≤ 20	3	9	91
20 ≤ 24	1	3	94
24 ≤ 28	2	6	100
28 ≤ 32	0	0	100
32 ≤ 36	0	0	100
36 ≤ 40	0	0	100
40 ≤ 44	0	0	100
44 ≤ 48	0	0	100
48 ≤ 52	0	0	100
> 52	0	0	100

Valid Cases: 35 Invalid Cases: 7

FREQUENCY DISTRIBUTION OF DAYS BETWEEN EVENTS (SUPREME COURT) - VICTORIA

FOR: PLEA OF GUILTY IN REMAND AND U.S.O.O.

Period: 1 - Date of Arrest to Date of Sentence

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	0	0	0
8 ≤ 12	2	17	17
12 ≤ 16	2	17	34
16 ≤ 20	0	0	34
20 ≤ 24	1	8	42
24 ≤ 28	2	17	59
28 ≤ 32	2	17	76
32 ≤ 36	1	8	84
36 ≤ 40	0	0	84
40 ≤ 44	0	0	84
44 ≤ 48	1	8	92
48 ≤ 52	0	0	92
> 52	1	8	100

Valid Cases: 12 Invalid Cases: -

FOR: ALL OFFENCE CATEGORIES
PERIOD: 12 MONTHS ENDING 31.12.80

Period : 3 - Date Committed for Trial to Date of Arraignment

Class (in weeks)	Frequency	Percentage	Cumulative Percentage
< 4	0	0	0
4 ≤ 8	3	33	33
8 ≤ 12	2	22	55
12 ≤ 16	2	22	77
16 ≤ 20	0	0	77
20 ≤ 24	1	11	88
24 ≤ 28	0	0	88
28 ≤ 32	0	0	88
32 ≤ 36	1	11	100
36 ≤ 40	0	0	100
40 ≤ 44	0	0	100
44 ≤ 48	0	0	100
48 ≤ 52	0	0	100
> 52			

Valid Cases: 9 Invalid Cases: 3

APPENDIX II

This appendix contains:

A The consultative document being used by the Shorter Trials Committee as a "check list" in its consultations with members of the judiciary and of the court system in relation to its inquiry into means for shortening the length of trials in Victorian courts.

B Progress report on the activities of the Shorter Trials Committee in relation to its inquiry into means for shortening the length of trials in Victorian courts.

THE VICTORIAN BAR
and
THE AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION

SHORTER TRIALS COMMITTEE

CONSULTATIVE DOCUMENT

SHORTER TRIALS COMMITTEE

Consultative Document

The Shorter Trials Committee is a Committee of the Victorian Bar Council and the Australian Institute of Judicial Administration. It was established by the Bar Council in 1982 with terms of reference which require it to consider, and to make recommendations as to, methods of shortening criminal trials and committals and of lessening the expense of such proceedings. The Committee takes a broad view of its task and pursuant to its terms of reference is investigating the whole of the trial and pre-trial criminal process and the relationships between them. In this Consultative Document the Committee has endeavoured to raise, through a series of questions classified under various heads, issues relating to its terms of reference that seem to be worthy of serious discussion at the present time.

I INTRODUCTION

In Victoria, the jurisdiction of the Supreme Court and the County Court to try persons charged with criminal offences is based on a formal accusatory pleading known (rather illogically) as a presentment. It is generally believed that the delays in cases prosecuted on presentment, from arrest to committal for trial and from committal to trial and disposal, are too long. The harmful consequences of inordinate delay are well-known and need not be recounted here. The delays in the criminal process would seem to be the product of a number of bottlenecks, the causes for which are not always clear.

It is obvious enough that if the number of cases dealt with by the trial courts each month is consistently less than the number of cases arising, and court resources remain constant, delays are likely to increase overall unless there are compensatory reductions in pre-trial delays.

Where delay-creating disparities between court disposal rates (sometimes called "court productivity") and the rates at which cases for disposal arise (sometimes called "case formulation rates") begin to emerge the explanation may lie in a fall in court productivity or in an increase in case formulation rates (or in a

combination of both factors).

In either event, if it is thought that the primary objective in criminal justice planning is to reduce delays overall, the solution may be to take steps which will have the effect (i) of increasing guilty plea rates, (ii) of reducing hearing times, and (iii) of reducing pre-trial delays. It should be noted that these effects may be regarded as good in themselves and not merely as results that should be secured for the purpose of reducing delays. For example, the objective of shortening trial times may be regarded as important for making cases more intelligible to jurors and for preventing the squandering of legal aid funds.

The criminal justice process is a seamless web and a change to one aspect, no matter what its purpose, can have unforeseen and harmful effects to another. It is partly for this reason that it is difficult to get agreement among lawyers and judges as to the nature of reforms that should be attempted. Further, because virtually all imaginable reforms may be classified according to their potential for affecting, one way or another, the delicate balance of advantage between prosecution and accused that is a feature of the common law adversary process, agreement is likely to be elusive because lawyers and judges differ (and will always differ) as to how that balance should be struck and maintained.

The Committee expects that responses to the questions posed in this document will reflect differences of opinion about how a balance should be struck. It feels that the responses will be important in assisting it to assess the nature and extent of differences of opinion about the issues under discussion and that this will in turn help it to reach a balanced view.

Discussion about the progress of cases tried on presentment may usefully be divided into two broad areas (a) pre-presentment progress, and (b) post-presentment progress.

II PRE-PRESENTMENT PROGRESS

A OBJECTIVES

The pre-presentment processes and procedures in Victoria (both formal and informal) would seem to have five basic objectives:

(i) to determine the charges that should be alleged in the several counts in the presentment;

(ii) to notify the defendant of the charges that have been, or will be, included in the presentment;

(iii) to disclose to the defendant the identity of the witnesses who will be called against him and to disclose to him the testimony that the prosecutor believes these witnesses will be able to give at trial;

(iv) to determine defendant status pending trial (whether gaol or bail);

(v) to determine, where necessary, whether the defendant should be legally aided;

(vi) to enable defence counsel to evaluate the strength of the prosecution case.

In Victoria, as in many other common law jurisdictions, nearly all defendants tried on presentment have previously been committed for trial after a hearing in a Magistrates' Court. That is to say, the Magistrates' Court acts as an intake court for the formal (as distinct from the summary) trial process. Significant features of the committal hearing process are: (a) that witnesses for the prosecution must in certain circumstances be called and examined on oath and made available for cross-examination by the defendant, (b) that the examinations of these witnesses and any other witnesses are formally recorded in depositions (copies of which are available to the defendant as a matter of right), and (c) that the presiding magistrate is required by law to determine whether the defendant should be committed for trial (though this is not in itself a bar to presentment). These features would seem to suggest that the pre-presentment process has two further objectives:

(vii) to provide the defendant, in advance of the trial hearing, with an opportunity for him to see prosecution witnesses examined on oath, and for him to cross-examine them (a form of confrontation);

(viii) to provide some judicial control (albeit in an imperfect and confusing way) over the question whether a person against whom criminal proceedings have been commenced should be presented.

There is room for disagreement as to whether or not these are the pre-presentment objectives and even greater scope for divergence of opinion as to whether these should be the objectives. To a considerable extent the answers that might be given to the question contained in the following six sections of this paper turn on one's views as to what the objectives of the pre-trial process should be. Further, answers may turn on one's attitudes towards the role of counsel (particularly the role of counsel for the defence) in the adversary system. (It is sometimes suggested that English advocates, when contrasted with Australian counsel, are somewhat less than zealous and fearless in their clients' causes and are therefore more willing than they should be to co-operate in reforms that are designed to have the effect of streamlining the criminal process.)

B CONTROL OF PRESENTMENT

In some common law jurisdictions, formal prosecutions are said to be "pleas of the Crown" (see section 11(2) of the Victorian Constitution Act 1975). In theory at least, prosecutions may be private, ex officio, or State. In Victoria, the nature of the authority to initiate, to continue and to manage formal prosecutions is confused.

1 Who should have authority to settle the presentment?

2 What limitations (apart from the well-known law about the joinder of defendants and joinder of offences) should be placed upon him (e.g. should his attention be confined to the evidence disclosed by the depositions and to what extent should he be influenced by the nature of charges alleged at committal or the charges upon which the defendant is committed)?

3 In particular, should the prosecuting authorities, in drafting presentments, be subject to limitations designed to prevent trials from becoming long and complicated (e.g. by a policy to restrict the number or nature of charges that may be brought - as a possible example of the latter should permission of the DPP be required before proceeding to present on a conspiracy charge?)?

C ADVANCE DISCLOSURE OF CONTENTS OF PRESENTMENT

In common law jurisdictions it is accepted as axiomatic that a person formally accused is entitled to receive before arraignment notice of the nature of the charges of which he is accused and brief particulars of them.

4 At what stage should the presentment be drawn and served?

5 What is the most practicable way of providing the defence with adequate notice of the charges in the presentment and their particulars (and, if necessary, further particulars)?

D ADVANCE DISCLOSURE OF PROSECUTION EVIDENCE

Nowadays, in many common law jurisdiction criminal "discovery" has become a contentious issue. There are differences of opinion as to how extensive discovery should be and increasing doubt as to whether the pre-trial procedures that have evolved since the 1830's provide the most efficient and effective mechanisms for providing discovery. It is argued that the advance disclosures required to be made by the prosecution should not be limited to real evidence and proofs of the evidence of witnesses likely to be called by the prosecution at trial but should extend to all relevant material in the hands of the police (whether admissible evidence or not).

6 Should it be necessay or necessary in all cases, for prosecution witnesses (all or some) to be examined on oath and in the presence of the defendant in the Magistrates' Court before trial on presentment?

7 Should any changes be made in relation to the types of cases which can be dealt with by the "hand-up" brief procedure?

8 Should any changes be made to the procedure relating to "hand-up" briefs?

9 Should the police be required to include in the "hand-up" brief the statements of all witnesses who are to be called at trial?

10 If not, or not in all cases, should the defence be given advance notice of the identity of prosecution witnesses and be given copies of their proofs of evidence?

11 How early should Notice of Additional Evidence be given? To what extent would early notice serve to define issues and to determine whether the matter would be a plea?

12 Whatever methods are adopted for providing advance disclosure, should the prosecution be required to disclose to the defence in advance of trial the known prior convictions of all proposed prosecution witnesses and of the accused?

E DISCLOSURE BY DEFENCE

In practice, the investigatory powers and practices of the police enable the prosecution to have considerable discovery of the defence. For example, in answers to questions put by the police the accused may indicate what his answer to the charge is going to be and by exercising their powers of search and seizure the police may discover incriminating evidence in the hands of the accused. (In some common law jurisdictions the accused can gain advance disclosure of prosecution evidence only by giving discovery of his defence.) Frequently it is argued that the accused should be required to make certain disclosures.

13 Should the defence be required in any circumstances to give notice to the prosecution in advance of trial of the lines of defence likely to be developed at trial (e.g. alibi, duress, mental illness or incapacity, claim of right)?

14 Should the defence be required in any circumstances to give notice to the prosecution in advance of trial of the identity of witnesses to be called by the defence and their proofs of evidence?

F ROLE OF THE MAGISTRATES' COURT

In the U.S.A. and England, as well as in Victoria, inferior courts play a role as "intake courts" for cases destined for trial on formal accusatory pleading. It would seem that English-style committal proceedings (which evolved rapidly in the mid-nineteenth century) were imperfectly adapted to Victorian conditions (where policing arrangements, the lack of grand juries and the existence of an ex officio prosecution system made circumstances rather different). Reference was made above to the problem of identifying the objectives of the pre-presentment process and it will have been noted that in Victoria most of the objectives listed are achieved through the procedures of the Magistrates' Courts.

15 Generally, what are and what should be the purposes of committal proceedings?

16 Does the present system fulfill these purposes? If not, how should the system be changed?

17 More particularly, if it is assumed that the Magistrates' Courts should continue to act as "intake courts" and to deal with defendant status (gaol or bail) at least during the early stages of the presentment process, should these Courts play a role in facilitating the advance disclosure of the matters referred to in some of the above questions, viz. (i) the contents of the presentment, (ii) the prosecution evidence, or (iii) lines of defence and defence evidence?

18 If so, how should the Magistrates' Court procedures be tailored to meet these objectives? Are committal procedures of the traditional kind or "hand-up" brief procedures the only way?

19 Should the magistrates retain the power not to commit for trial in all or some cases and, if so, should the consequences of that decision be more decisive than at present? e.g. Should the power of ex officio indictment continue to exist?

20 In particular, given that the overwhelming proportion of defendants brought before magistrates with a view to their being committed for trial are so committed, should the procedures continue to be designed on the assumption that the important issue is whether the accused should be committed for trial when in practice, the main functions of the proceedings seem to be (a) to provide the defence with advance disclosure of prosecution evidence and, (b) by means of oral examination on oath, to provide both prosecution and defence with an indication of the credit of the evidence, the credibility of witnesses, and (c) to enable counsel (particularly defence counsel) to trawl for information that may be of assistance to him at trial?

G CONTROLLING PRE-TRIAL DELAY

In all jurisdictions there is concern about delay between arrest and trial. In jurisdictions where responsibility for moving cases forward, initially through the pre-trial process and then to arraignment, is relatively clear (in Victoria it seems hopelessly confused) it is often the case that statutory time limits are laid down.

21 Should time limits be imposed in some or all cases over the periods between arrest and committal for trial?

22 Should time limits be imposed in some or all cases over the periods between committal for trial and the settling and signing of the presentment?

23 If such time limits should be imposed how should they be enforced (does the trial court have a role, see further below)? In particular, how and according to what criteria should exceptions be allowed?

24 Instead of time limits, should there be official targets for the time between arrest and committal and the time between committal and trial?

III POST-PRESENTMENT PROGRESS

A THE PRE-TRIAL ROLE OF THE TRIAL COURT

In England, the fact that courts of quarter sessions and assizes sat infrequently and were constituted by part-time or travelling judges restricted the growth of the pre-arraignment role of the formal trial court. In America, constitutional influences on the law of criminal procedure and evidence has had an effect on the role of the inferior "intake courts" and on the pre-trial role of the formal trial court. The questions that follow in this section relate to three issues: (a) court control over case progress, (b) the power of the trial court to give pre-trial directions, and (c) listing.

(a) Case progress

25 Should the trial court have control over the progress of a case: (a) from the conclusion of the committal, (b) from the time of filing of a presentment, or (c) from some other, and if so, what time?

26 If so, how should such control be exercised? What should be the sanctions?

27 In particular, should pre-trial applications for bail (made after committal for trial) be dealt with by the trial court?

(b) Pre-trial rulings

28 Should a judge have power to give directions and make rulings before the arraignment or empanelling of a jury?

29 If so, should such power be exercisable only by the trial judge who is to try the case?

30 In substantial cases should there generally be a pre-trial hearing to enable rulings and directions for the trial to be given? (See Old Bailey procedure, para. 361 b Archbold.)

31 If so, what should be the test of a substantial case?

32 At what stage should a pre-trial hearing take place?

33 Should a pre-trial hearing be conducted by the trial judge or another judge or court official?

34 Should counsel briefed for prosecution and defence at the trial appear at a pre-trial hearing and if so how could this be achieved?

35 Should counsel be paid such a fee and should the pre-trial hearing be heard at such a time that counsel briefed at the trial will in fact attend?

36 What should be dealt with at a pre-trial hearing? (See also questions 65, 66, 67 & 68 below).

(c) Listing

37 Should the listing of cases be dealt with by an officer of the court, a separate director of listing, or some other body?

38 Should trials be listed for a specific date, for an indeterminate day during a specific week, in a particular order to be taken during a month but without reference to dates or in some other way?

39 Should there be one listing system for ordinary trials and a separate system for long trials and if so, what is a long trial?

40 Before a case is fixed for hearing should a certificate of readiness or unreadiness signed by counsel for the prosecution and the defence be required?

41 If counsel is to do the work necessary for a certificate of readiness or unreadiness should counsel be paid a proper fee for that work regardless of whether he or she appears at the trial?

42 To what extent does uncertainty as to the actual trial date involved cause inconvenience to accused, civilian witnesses, police witnesses, judges, barristers and solicitors, or jury panels and does that inconvenience cause any lengthening of trials?

43 What are the common grounds for successful applications for adjournments and what steps could be taken to prevent those grounds from arising?

B DETERMINING ISSUES TO BE TRIED

Efforts to limit the expense and shorten the length of criminal trials frequently focus on the fact that the plea to the general issue leaves to be determined at trial issues which (so it could be argued in a given case) are not seriously in contention and which if admitted or accepted by the defence at the outset as not being in issue, would enable the presentation of the prosecution case to be shortened considerably. (Reference has already been made to the problems caused by late service of Notices of Additional Evidence, see question 11.)

44 Should there be procedures to encourage the making of admissions (continuity of exhibits, uncontested matters) by the Crown and/or defence? If so, what sanctions could be applied for failure to make admissions (comment to jury, order as to costs)?

45 Should there be procedures which enable the issues at the trial to be fixed and limited?

46. If there should be procedures to limit the issues at the trial should the procedures be

(a) power to settle the issues
  (i) at the pre-trial hearing?
  (ii) immediately after arraignment?
  (iii) immediately before final addresses?

(b) an opening statement by defence counsel immediately after the prosecutor's opening, stating before the jury the nature of the defence in general terms and specifying the issues of fact which

the jury will have to decide in reaching their verdicts?

(c) a form of written pleading?

(d) some other procedures?

47 Should the law be changed so that in the case of an accused represented by counsel the trial judge in his directions to the jury is obliged to deal only with issues which have actually been raised by counsel?

48 Would the earlier briefing of counsel facilitate the early determination of factual and legal issues and thereby reduce trial length?

C PLEAS

The evidence suggests that, not only are trials getting longer, but also the incidence of guilty pleas is declining.

49 Should any changes be made so that accused persons who believe they are guilty are encouraged to plead guilty?

50 Should legal aid be withdrawn if there is no reasonable defence and the accused does not wish to plead guilty?

51 Should there be some procedure (e.g. committal to a specific date, pre-listing arraignment or otherwise) by which the accused is required to plead to the presentment prior to the listing of the matter for hearing, thereby sorting "pleas" from trials? If so, what sanctions could be available against a change of plea?

52 Should the law be changed so as to correspond with the law of South Australia under which a plea of guilty, of itself, is a mitigating factor upon sentence?

53 If so, should there be a general principle that in the case of a custodial sentence the period of the sentence is as a result of the plea of guilty reduced by 10, 15 or 20 per cent or by some other percentage from what it would otherwise have been?

54 To encourage pleas of guilty should convictions be expunged from the records after a certain period?

55 Should the Crown (D.P.P.) adopt any particular criteria in relation to acceptance of offers to plead to less serious charges than those in the presentment?

56 Should there be any changes in the nature and form of pleas in mitigation of sentence?

D MODE OF TRIAL

In Victoria, when contrasted with other jurisdictions, the right to trial by jury is significantly curtailed by the extent of the exclusive jurisdiction of the Magistrates' Courts. Nevertheless, the question arises whether the use of juries on trials on presentment could be modified.

57 Should an accused person have a right to elect to be tried by a judge alone? Should such a right exist in relation to joint offences in view of the possible resultant separate trials?

58 If so, at what stage should the election be made?

59 Should the accused have the right to withdraw his election and, if so, in what circumstances?

60 Should a judge be entitled to refuse to accept an election and insist on jury trial?

61 Should the Crown be entitled to insist on jury trial?

62 Should any particular classes of cases be tried by a judge alone?

63 Should cases involving extensive or complex commercial transactions be tried by special juries of persons with accountancy, managerial, commercial or business experience?

64 Should any changes be made to the method by which and the term for which jurors are summoned?

E EVIDENCE

The difficulties involved in developing a system of criminal pleading direct attention to the possibility of suspending in relation to particular matters the normal rules relating to the form and admissibility of evidence.

(a) Rulings as to form and admissibility

65 Should there be any power at a pre-trial hearing and at the trial to direct that particular items of evidence may be proved in a manner other than in accordance with the existing rules of evidence?

66 Should there be a power at a pre-trial hearing and at the trial to direct that particular exhibits be admitted into evidence without proof where there is no real issue as to their authenticity?

67 Should there be power at a pre-trial hearing and at the trial to direct that particular evidence may be read without the witness being called?

68 Should there be power at a pre-trial hearing and at the trial to direct that particular facts are to be treated as admitted or as established without evidence?

69 In a case where there is an issue as to the effect and interpretation of records and accounts and similar material should a judge have power to authorize an expert to examine the material and give evidence of his conclusions?

70 Should it be open to an appropriately qualified expert witness, without being authorized by a judge, to give evidence of his conclusions from examination of records, accounts and similar material?

(b) Voir dire

Chronic problems in Anglo-American criminal process are caused by the admission and confession exceptions to the hearsay rule. In America, the Supreme Court case of Miranda v Arizona (a decision that was justified on the ground that it would shorten trial times) shifted the question from one of voluntariness to the question whether the accused had waived his rights (a question as frequently contested as the old one).

71 Should any changes be made to reduce the time taken on hearings on voir dire?

72 Should a trial judge by Act or Rule expressly be given a discretion whether or not to hear evidence on voir dire?

73 On a voir dire as to the admissibility of a confession should the defence present its evidence first and the Crown be called on to present evidence only if, on the judge's view of the defence evidence, the confession probably should be excluded?

(c) Confessions

74 Should S. 399 of the Crimes Act 1958 be amended so as to make it clear beyond argument that the defence could attack the evidence of a confession before the jury without risk of having evidence of bad character or prior convictions brought out?

75 Should the prosecution take the responsibility for leading evidence of a confession on the basis that it is at risk of a discharge of the jury if the judge, having heard the evidence at the trial, decides it should not be admitted?

76 Should evidence of confessions be admitted into evidence at the trial and treated in the same way as any other evidence?

77 Should the police be required, wherever practicable, to make tape recordings or video recordings of interviews with accused persons and

video recordings of identification parades to minimise time taken in challenges to such evidence?

(d) Unsworn Statements

In Victoria the right of an accused person to make an unsworn statement has recently been the subject of a report by the Law Reform Commissioner.

78 Do unsworn statements (i) decrease the likelihood of guilty pleas and (ii) lengthen trials?

79 Should any changes be made to reduce the frequency of use of unsworn statements from the dock?

80 Should counsel for an accused address the jury after the Crown prosecutor only when the accused has given sworn evidence?

81 Should the Crown have a right of reply when the accused makes an unsworn statement?

82 Should the Crown prosecutor have a right to comment upon an unsworn statement to the same extent as upon any other defence evidence?

83 Should the right to make an unsworn statement from the dock be abolished?

(e) Presentation

84 Should the trial judge take a firmer line in controlling examination and cross-examination of witnesses and, if so, how can that result be achieved?

85 Are there any forensic disincentives which could be employed to deter counsel from lengthy cross-examination?

86 Does the present delay in listing trials itself cause trials to be longer as a result of the consequent examination of witnesses about conversations

and observations occurring long before the trial?

F LEGAL REPRESENTATION

87 Are trials unnecessarily prolonged by the briefing of inexperienced counsel for the Crown/defence or by the late briefing of counsel on either side?

88 Would the length of trials be shortened by the greater involvement of counsel to advise at an early stage or by making provision for longer preparation by counsel on either side in view of the relatively inexpensive cost of preparation in comparison to the cost of court time?

89 Should some form of continuing legal education be provided for counsel in relation to substantive and/or procedural law?

90 As a general rule, when there are several accused whose defences do not conflict should each one have a separate counsel at the trial?

G EFFECT OF PROFESSIONAL REMUNERATION ON CASE PROGRESS

The manner in which lawyers are remunerated is a factor which affects the amount of work they are prepared to do on particular cases and the speed at which they work. It must be carefully considered in any serious study of the pace at which cases progress through both the trial and pre-trial phases. Further, any proposed structural or procedural reforms to "speed things up" must be evaluated in the light of this factor.

In England, at the end of a trial counsel for the prosecution has to ask for an order for costs out of central funds; further, defence legal aid costs are taxed by the court. It is said by some that the mere existence of the powers that the judges have in relation to these matters helps to restrict unnecessary growth in trial times.

91 Should the trial judge have any power to penalize the prosecution or defence if they have unnecessarily prolonged the trial?

92 Should the trial judge have power to order the prosecution to pay to the defence or an accused to pay to the prosecution some or all of the costs of a trial?

93 Should the trial judge have power to order the prosecution to pay costs to the defence

(a) where it was unreasonable to have brought the charges?
(b) where an unreasonable number of charges have been brought?
(c) where the prosecution has unnecessarily prolonged the trial?
(d) where the prosecution has unreasonably refused to admit facts relied on by an accused?
(e) where the accused is acquitted of a charge?
(f) in any other circumstances?

94 Should the trial judge have power to order an accused to pay costs to the prosecution in any of the following circumstances

(a) where it was unreasonable to have defended the charges or all of the charges?
(b) where the conduct of the accused or his counsel has unnecessarily prolonged the trial?
(c) where the accused has unreasonably refused to admit facts relied on by the prosecution?
(d) where the accused is convicted?
(e) in any other circumstances?

95 Should a public defender system be introduced by way of employment of a salaried trial counsel by the Legal Aid Commission?

96 When counsel other than permanent Crown prosecutors are briefed to prosecute should they be paid at a similar rate and on a similar basis to counsel briefed to appear for an accused person who is privately represented or who has legal aid?

97 Should any changes be made to ensure that legally aided cases are not unnecessarily prolonged?

98 Where the defence is provided by legal aid should the fees of defence counsel depend on the time the trial judge certifies the trial would have taken if not unnecessarily prolonged by that counsel?

99 Where the defence is provided by legal aid should defence counsel be paid a lump sum fee?

100 Should prosecuting counsel be paid a lump sum fee?

101 If the fee to counsel is a lump sum, should the trial judge have power to increase it where he regards it as justifiable to do so?

H ROLE OF JUDGE

In previous questions reference has been made to the powers that judges have or perhaps should have. There are a few specific questions relating to the role of the judge that need to be raised.

102 Should there be prepared and available to the trial judge for his use or adaptation (as there are in England and the U.S.A.) standard directions on subjects commonly included in directions to the jury?

103 Does the current attitude of the Court of Criminal Appeal cause trial Judges to be over-anxious in ruling on admissibility, and leaving issues to the jury and directing the jury? If so what steps could be taken to alleviate the position?

104 Should the summary of evidence contained in the judge's charge be shortened? If so how?

105 Should there be prepared a statement of guidelines to judges about the general content, length and detail of the judges directions to the jury?

106 Should judges (a) on appointment and (b) during their judicial service receive training in the techniques of conducting trials (as is done in the U.S.A. and in England)?

107 Should trial judges have any additional powers to control trial procedures?

108 Do delays in law reporting, the use of unreported judgments or other aspects of law reporting cause trials to be lengthened because of uncertainty on the part of judges and counsel as to the present state of the law? Could any reform of law reporting procedures shorten trials?

I COURT PRODUCTIVITY

It is obvious that pre-trial delays are directly affected by the manner in which trial court sittings are organised. Mention has been made in earlier pages of listing and of "court control" over case progress. Both of these matters have an effect on "court productivity". It needs to be noted that, if trial times remain constant, productivity may be improved if better use is made of the court day. If trial times increase, making better use of the court days of all courts which have jurisdiction becomes a major concern.

109 Should the daily sitting hours of courts be extended (3 or 4 periods) and, if so, to what extent? If they are extended should steps be taken to ensure that judges are not required to sit annually for more court hours than at present?

110 Should court sittings in crime be organised in four terms a year rather than in monthly sittings?

111 Should there be any alterations in the classification of offences which can be dealt with in the Supreme/County/Magistrates' Courts?

112 What are the causes of mis-trials? What steps can be taken to obviate those causes?

113 Should there be any changes to the procedures relating to Crown knowledge of the whereabouts of its witnesses? Should witnesses be bound over and if so how in the case of hand-up briefs? What steps can be taken to require witnesses to notify the Crown of any change of

addresses.

J MISCELLANEOUS

114. Should some specific short term steps be taken to reduce the backlog of trials and if so what steps?

115 If a new system of preparation, pre-trial investigation or listing is to be adopted should it apply to all trials or only to future committals for trial?

116 Should steps be taken to ensure that an assessment of all proposals for reform in the area of criminal law and procedure is made in terms of its likely effect on the time trials will take?

117 The length of trials is obviously a managerial problem for court administrators and for the Treasury in terms of costs. However does their length give rise to any other problems? To what extent should a balance be struck between cost to the community and the achievement of justice?

****

THE VICTORIAN BAR
and
THE AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION
SHORTER TRIALS COMMITTEE
PROGRESS REPORT
April 1983

The Committee was appointed in 1982 by the Victorian Bar Council to consider and make recommendations as to methods of shortening the duration of criminal committals and trials and lessening the expense of such proceedings. Later, with the consent of the Bar Council, the Committee was also constituted a Committee of the Australian Institute of Judcial Administration and will report to both the Bar Council and the AIJA.

The members of the Committee are the Honourable Mr. Justice McGarvie (Chairman), His Honour Judge Kelly (Deputy Chairman), Mr. L.W. Flanagan, Q.C. (Crown Counsel, nominated by the Victorian Attorney-General), Mr. Brian Flynn (Solicitor, nominated by the Law Institute of Victoria), Mr. Julian Gardner (Director of the Legal Aid Commission of Victoria), Mr. John Hassett (Crown Prosecutor), Mr. Frank Vincent, Q.C., Mr. Phillip Cummins, Q.C., Mr. Michael Rozenes and Mr. Timothy Ginnane (Barristers in private practice). The Director of Public Prosecutions in Victoria, Mr. John Phillips, Q.C., has accepted an invitation from the Committee that he or his nominee attend and take part in the meetings of the Committee. The Committee meets for an hour and half twice a month.

From the outset the Committee resolved to act as an independent Committee of objective inquiry. It welcomes and will take into account all suggestions from all interested persons. It aims to make objective decisions as a matter of judgment, based on reliable information empirically obtained. It is determined not to decide according to the hunches or prejudices of its members. It does not seek to reach any particular conclusions and it will not

shy away from any facts or solutions which might not be popular. It hopes that, while its recommendations will apply directly to Victoria, they will be useful in the consideration of methods of shortening trials in other jurisdictions.

The Committee takes the view that its terms of reference include all methods which would reduce the time taken by the criminal justice system in disposing of a criminal matter. Thus it is considering means of reducing unnecessary adjournments and of reducing incentives which might lead an accused person, believing himself guilty, to plead not guilty and go to trial notwithstanding. It is considering means of reducing the time taken and the expense involved in the committal or trial when it commences.

The Committee concentrated first on developing reliable and practicable methods of doing its work. In this it has received a great deal of valuable advice and practical assistance from Professor Ian Scott, Director of the Institute of Judicial Administration at Birmingham, England who is for the time being Executive Director of the Victoria Law Foundation.

Research

The Victoria Law Foundation has made available $10,000 and employed Mr. Peter Sallmann, Senior Lecturer, Legal Studies Department, La Trobe University on a part-time basis, primarily to do research for the Committee. His function is:

(a) to investigate the subjects the Committee specifies;

(b) to read the relevant available material on the subjects;

(c) to do such research on a subject as the Committee requests;

(d) to provide the Committee regularly with reports on subjects outlining

  (i) the various suggestions that have been made and courses which could be taken to reduce delay in the area;

  (ii) the reasons which have been advanced or which could be regarded as supporting the various proposals;

(iii) the results which have followed from any implementation of the various proposals;

(iv) the results of any relevant research on the subject;

(v) the considerations for and against and his recommendations upon the various proposals, with reasons for the recommendations;

(e) on a continuing basis to make recommendations to the Committee upon steps which could be taken to record and collect statistical information relevant to the assessment of the operation of the criminal justice system.

Mr. Sallmann is now doing three things for the Committee. He is preparing an issues paper to identify the issues which the Committee will need to consider in the whole area of its work. The Committee decided to direct its investigations first to the stage between committal for trial and commencement of trial. Mr. Sallmann is preparing an outline of the legislation and other law which applies to that stage of the criminal process. He is also investigating and reporting to the Committee on the subject of pre-trial directions. Mr. Sallmann attends all meetings of the Committee.

Interviews

When setting up the Committee the Bar Council contemplated that two members of the Committee, Mr. Rozenes and Mr. Ginnane, would undertake work for the Committee on a professional remunerated basis. The Chairman of the Commonwealth Legal Aid Council, the Honourable Mr. Justice Else-Mitchell, has expressed interest in and support for the work of the Committee and has indicated that the Council would give consideration to an appropriate application by the Committee for funds for its work. Application has been made to the Council for funds to enable the Judges of the Supreme Court and the County Court in Victoria to be interviewed by those members of the Committee. The Committee takes the view that ideas, comments and information coming from the experience of the Judges will be a valuable source of material to be used in making its decisions. What is said by a Judge during the interview will be recorded in summary form by the interviewer and made available to the Committee.

As a basis for seeking views and information from the Judges and other persons, the Committee has prepared a consultative document. This document, prepared with the assistance of Professor Scott and Mr. Sallmann, is designed to draw attention to the areas which the Committee has in mind to investigate. It is hoped it will stimulate the expression of views in those areas and suggestions of other areas which ought to be considered. It is a comprehensive document which raises many questions in the areas covered. No one is expected to contribute on them all, but it is hoped that it will produce responses on some of the questions which are of interest to the person being interviewed or asked for information. The document does not indicate views held by the Committee. Its questions reflect the main suggestions for shortening criminal cases which have been made by members of the Committee, by those who have responded to invitations on behalf of the Committee for suggestions and opinions, and in articles and reports read by the Committee.

Requests for Assistance

At the request of the Committee, the Chairman of the Victorian Bar Council, Mr. Brian Shaw, Q.C., wrote to the Judges of the Victorian Supreme Court and County Court, barristers, solicitors (through the Law Institute Journal), the staff of Victorian Law Schools, Legal Studies Departments and Departments of Criminology inviting suggestions and opinions as to:

(a) the various factors that may be causing committals and trials to be longer than they need to be;

(b) the various ways that may be practicable to shorten committals and trials;

(c) existing reports, articles and information that may assist the Committee in its investigations and recommendations; and

(d) methods which the Committee could follow in making its investigations.

A number of valuable suggestions and opinions have been received.

Letters are being sent to the Chief Magistrate, the Chief Commissioner of Police and the Police/Lawyers Liaison Committee in Victoria inviting suggestions and opinions.

Letters from the Chairman of the AIJA, the Honourable Mr. Justice Fox are being prepared to be sent to the Chief Justice of each Supreme Court in Australia, the Chief Judge of each District Court and County Court and each Chief Magistrate enclosing this progress report and a copy of the consultative document with a request for suggestions and opinions similar to those mentioned above. Letters to the same effect will be sent to a number of Law Reform Commissions and Institutes or Departments of Criminology throughout Australia.

The Honorary Secretary of the AIJA, Mr. Peter Heerey, is sending a letter to the Standing Committee of Attorneys-General with similar information and a similar request for suggestions and opinions. The letter asks that it be brought to the notice of each Attorney-General in Australia.

Decisions Based on the Experience of Committee Members

There are some areas in which the Committee is able to reach tentative views based on the knowledge and experience of the criminal justice system in Victoria possessed by members of the Committee. The Committee has heard addresses prepared by Committee members and has given preliminary consideration to:

(a) prosecution policy on the charges to be brought;

(b) drawing and serving the presentment; and

(c) providing particulars of the presentment.

Persons with particular expertise and knowledge of aspects of the area being considered by the Committee have attended meetings and had discussions with the Committee. Professor Ian Scott discussed methods which the Committee could follow and outlined changes which had been proposed in England. Mr. Michael McKenzie, Court Administrator of the Old Bailey, London, spoke on the methods used to identify and reduce delays in criminal trials. Mr. W. Johnston, who has been responsible within the Victorian Law Department for collecting and presenting statistics in relation to criminal trials, gave an outline of available statistics, produced copies and explained how they could be used.

Mr. Ginnane keeps the collection of reports and articles which the Committee is collecting for the use of its members.

Liaison with Others Doing Similar Investigations

So as to avoid the risk of overlap or duplication within Victoria, the Committee, The Legal and Constitutional Committee of the Victorian Parliament and the Director of Public Prosecutions keep each other informed of the areas they are investigating and considering. There is agreement that except for information obtained on a confidential basis there will be an exchange of information obtained by one which is relevant to the work of another. The Chairman of the Shorter Trials Committee and Mr. Sallmann have both given evidence before the Legal and Constitutional Committee of the Victorian Parliament upon the work of the Committee.

Invitation

The Committee would welcome any suggestions and opinions of the type mentioned above from anyone prepared to provide them. Any correspondence may be addressed to the Honorary Secretary of the Committee -

Mr. John Styring,
Associate,
Supreme Court,
William Street,
Melbourne, Victoria 3000

APPENDIX III

This Appendix contains a Report compiled by the Directorate of the Forensic Science Laboratory relating to staffing requirements at the Laboratory.

VICTORIA POLICE FORENSIC SCIENCE LABORATORY

CURRENT AND FUTURE PROPOSALS FOR THE SCIENTIFIC STAFFING OF THE FORENSIC SCIENCE LABORATORY PURSUANT TO THE ROBINSON REPORT

Directorate, Forensic Science Laoratory, Melbourne.
November, 1982.

Compiled for the information of the Secretary to the Ministry and the Assistant Commissioner (Crime).

CONTENTS

1 INTRODUCTION

In November, 1980, the former Premier commissioned a Treasury Officer (Mr. E. Bennett) to investigate claims that the Forensic Science Laboratory needed additional scientific staff in order to contain mounting backlogs of work. Heavy overload situations existed particularly in sections dealing with questioned documents, arson, illicit drugs and rape cases and, following his investigation, Mr. Bennett recommended an immediate increase of 8 scientific officers and support staff for these areas. However, only 2 new permanent positions for Scientific Officers were created as a result of this investigation.

Shortly after this investigation Dr. B. Robinson, Coordinator of State Laboratories, successfully negotiated on our behalf for 3 exempt scientific officers to be employed for 6 months on the analysis of drug (Cannabis) samples and this temporary assistance succeeded in reducing the drug backlog in 1981 from 427 to 107 cases. Nevertheless the Laboratory went into 1982 with a backlog of 656 cases, mainly made up of rape, questioned document and arson cases, and this had grown to 1342 cases at the end of September.

Although 3 exempt scientific officers were again engaged earlier this year to stem the growth of the backlog in the Drug Section, staff resources have been insufficient to control the overload conditions existing in the other areas mentioned (e.g. relating to arson, rape, fraud etc.) and the backlog at the end of this year will amount to between 1400 and 1500 cases.

It is obvious that this problem will not go away of its own accord and therefore a significant number of high calibre Public Service scientists will have to be inducted into the Laboratory as soon as possible, in spite of current limitations on the creation of new permanent positions within the Public Service.

It is noteworthy that Dr. Robinson ('Review of the Norman McCallum Police Forensic Science Laboratories' - Feb. 1982) makes many references to the staffing of the Laboratory and, in particular, suggests that a formula should

be established for staffing it which relates to Force members (C.I.B. number, p.26 para 4).

The following sections of this report delineate formulae which can be used to assess future (and current) scientific staff numbers, and lists those new Public Service staff members immediately required (i.e. before June 1983).

On several occasions in recent years Treasury officers have suggested that as the Laboratory is overcrowded it would be unwise to increase the Public Service staff until more accommodation is available, yet the Police strength at the Laboratory has been allowed to increase by 17 since 1980.

With the completion of the first building at Macleod, in the first half of 1983, 12 Police Technicians will be relocated there and this move will allow additional Public Service scientists to be hired for the City laboratory.

2 RECOMMENDATIONS

2.1 That recognition be given to the fact that changing crime patterns and the total police and C.I.B. strengths directly affect the F.S.L. workload, and that high priority be given to the employment of additional Public Service scientists whenever there is a significant increase in police manpower, as a matter of policy.

2.2 That the Government be asked to provide the following new Public Service staff before the end of the 1982/83 financial year: -

6 Scientific Officers, Class SO-1
2 Technical Assistants, Grade 1
1 Computer Programmer

- in addition to the staff (i.e. 1 Technical Assistant and 1 Scientific Officer) provided in the 1982-83 Budget for the immediate replacement of Police personnel.

2.3 That future staffing of the Laboratory with Public Service Scientific Officers be determined by one of the formulae suggested in this report, until such time as another formula is derived.

2.4 That all 5 year staffing plans for the Police Force prescribe top priority to the staffing of the Laboratory with Public Service Scientific Officers and support staff, where these staff additions are recommended by the Assistant Commissioner (Crime).

3 THE NATURE OF BACKLOGS

3.1 General - Overload situations and backlogs are not confined to the Forensic Science Laboratory but forensic laboratories throughout the world appear to be subject to them more frequently than most other public institutions.

There are, of course, many reasons which explain how it comes about that laboratory resources are often insufficient for the needs of the community, and some of these will be discussed further. The first and most important consideration is that work submitted in relation to current criminal investigations and for Court prosecutions cannot be controlled by the Laboratory. The volume of this work is directly dependant on external factors such as: -

(a) Legislation (e.g. Sexual Offences Act etc.) or lack of it
(b) Court procedures (i.e. Evidence Act etc.)
(c) Policing policies (e.g. special efforts re 'drinking driver', drug use, clandestine laboratories, white collar crime etc.)
(d) Changing spectrum of crime
(e) Complexity of investigations (large scale crime e.g. Meat scandal etc.)
(f) Public/Police cooperation
(g) Police numbers
(h) C.I.B. numbers
(i) Specialist squad numbers and requirements (e.g. Arson, Fraud Squad, Drug Squad)
(j) Population
(k) Social attitudes
(l) Economic climate

While it is obvious that the aim of increasing the size of a Police Force is to improve law and order in the community when there is such an increase the Laboratory never simultaneously gains extra scientific staff to lend support in achieving this aim. Backlogs and Court delays are an inevitable result of this incomplete and therefore poor planning.

The generation of backlog conditions in the Laboratory by these external factors is seen as only the first step in creating a chronic backlog state, which now exists at the F.S.L. since internal factors now become important in backlog growth. This growth is fed by the following factors: -

(i) In the past ten years staff have rarely been provided on a proper needs basis; more often than not they have been supplied as only a token gesture to show the Courts and the public that something was being done to cure the Laboratory's problems.

This haphazard approach to staffing seldom solves overload situations, in fact the history of the F.S.L. proves that it generates an on going staff shortage, and ensures a chronic backlog condition for the Laboratory.

(ii) In overload situations staff efficiency drops. Although on many occasions overtime duties are introduced to contain the backlog this too is basically inefficient since staff morale, efficiency, and productivity very often deteriorate further. Furthermore it is not cost effective.

(iii) Overload situations deny proper methods development and staff development. This prevents the Laboratory from becoming more cost effective and does not allow the Management freedom in staff deployment since sufficient all round expertise has not been developed for this purpose.

(iv) Complaints from the Courts and investigators about laboratory delays place added pressure on Sections with appreciable backlogs, and this further affects morale, work output, and the proper allocation of work priorities.

(v) It is understood by Laboratory members that this small section of the Department cannot get proper consideration for its staffing requests by virtue of it having to compete with administrative areas, and their priorities for clerks and typists. This realisation that staffing of the F.S.L. is done on an ad hoc basis also affects morale and output, through the knowledge that management is often powerless to effect remedial action.

(vi) Chronic overload situations create staff health problems and sick leave absences have been high in 1982, especially in areas with the higher backlogs of work.

(vii) Staff become more fearful that due to the pressure of work they may cut corners and that this drop in quality of their work will be uncovered in Court, to the detriment of the whole laboratory and, of course, the Department.

Working conditions such as lack of space and lack of facilities and equipment also affect work output and no doubt make some contribution to the development of a chronic backlog state.

Although many believe that when the Laboratory is rehoused at Macleod most of these problems will be solved, relocation, per se, will not solve the shortfall of trained scientists who are needed to carry out the work, nor will additional equipment alone significantly reduce the rate of growth of the backlogs.

3.2 Policy - Mr. E.J. O'Brien, in his review of the Forensic Science Laboratory in 1972 expressed concern that there had been a tendency (by Treasury) to providing the Laboratory with machines in order to replace men: backlogs become firmly established under such a policy. While this situation still exists backlogs will continue to grow and it is not inconceivable, if more staff are not provided soon, that much of the work currently being done at the Laboratory will have to be contracted out to other State or private laboratories. Such a course of action will of course prove most expensive by virtue of the costs that will be charged and the necessary employment of F.S.L. manpower in on-going quality assurance programs that will closely monitor the quality of work being done by contractors.

Policy must now be established on whether the F.S.L. is going to be developed to meet Police needs or not.

4 TRAINED SCIENTIFIC STAFF REQUIREMENTS FOR 1983

4.1 General - The failure of Treasury to honour its commitment to provide the Laboratory with 8 additional scientific personnel (Public Service) in December 1980 has been mainly responsible for current backlogs.

Although the current policy of replacing selected police laboratory members with scientific support staff will prove more cost effective for the Department, transfer of police members is not being coordinated with the induction of their Public Service counterparts. Delays experienced in obtaining Public Service personnel to fill these vacancies will of course mean that the backlog situation will be further exacerbated.

In carrying out this exercise of replacing police fit for operational duties with civilians there is a distinct possibility that the increase in Public Service complement will be seen as an increase in staff and divert attention from the real issue, namely the provision of additional specialist scientific officers to service the Courts and criminal investigations.

With this in mind, sections of the Laboratory embarrassed by serious work overloads have been reviewed on immediate needs basis in order to keep laboratory services running until the end of this current financial year. These needs are summarised in the following section (4.2).

4.2 Scientific staff additions 1982/83 -

The following additional Public Service personnel are needed by the Laboratory before the end of this financial year

Biology Division	- 1 scientific officer (SO-1) - 1 technical assistant (Cr.1)
Chemistry Division	- 2 scientific officers (SO-1) for drug work - 2 scientific officers (SO-1) for arson and other work - 1 scientific officer (SO-1) for document examination - 1 technical assistant (Gr.1) for drug work
Computer Services Division	- 1 computer programmer

Currently there are three exempt scientific officers attached to the Biology (1) and Chemistry Divisions (2) for the next six months. However, due to the short tenure of these positions these scientists cannot be subjected to anything other than rudimentary training, and therefore the scope of work they can perform is very limited. The employment of permanent scientific officers is seen as being more efficient and more cost effective in the long term.

It must be noted that the above staff requirements (6 SO's, 2 TA's and 1 programmer) are additional to the 1 scientific officer and 1 technical assistant (Gr.2) provided in the 1982-83 Budget, for the replacement of 2 police members at the Laboratory.

LABORATORY STATISTICS (1975 - 1982)

Year	Total FSL Staff	No.of Scientific Staff	No.of Police Technicians	No.of 'Operators'	No.of Cases	No.CIB Investigators	No. Police Force	CIB/FSL Operator Ratio	FSL End of Year Case Backlog
1975		21	13	34	N.K.	749	6156	22.03	N.K.
1976		23	13	36	4803	749	6487	20.80	N.K.
1977		28	13	41	5550	818	6819	19.95	N.K.
1978		29	14	43	5284	869	7238	20.21	N.K.
1979	79	29	17	46	5446	908	7569	19.74	-
1980	89	29	19	48	6069	1162	7814	24.21	-
1981	104	30	21	51	7044	1281	8050	25.12	656
1982	114	32	24	56	8400 Est.	1317 Est.	8300 Est.	23.52	1450 Est.

KEY

NO. SCIENTIFIC STAFF ("SCIENTISTS") - No. scientific officers and technical assistants - excluding those with administrative duties and three engaged in analysing hospital blood samples.

NO. POLICE TECHNICIANS - No. police in Field Investigation, Firearms and Document Sections performing casework. Exclude Breathalyser Maintenance and photographic (not involved in casework).

"OPERATORS" - Sum of scientific staff and police technicians.

C.I.B. & FORCE NO. - As supplied by Personnel Department.

NO. CASES - As reported in Annual Police Report.

5 MODELS FOR STAFFING THE OPERATIONS AREA OF THE FORENSIC SCIENCE LABORATORY

5.1 Definitions -

The scientific areas of the F.S.L. are defined as those areas which come under the Assistant Director (Operations) and include both Police and Public Service personnel engaged in casework. These members are described as 'operators' in the following Table.

The term 'Scientific Staff' embraces Public Service scientific officers, technical officers and technical assistants that handle casework, but it does not include scientific officers and other staff whose duties are mainly of an administrative nature.

5.2 Staffing on a case basis -

The following Table (Table 2) shows casework statistics for the period 1976-1982:

TABLE 2

Year	Cases	No.Scientific Officers		No.Scientific Staff	No.Police involved	No.Operators
1976	4803	21	23	13	36	133.4
1977	5550	23	28	13	41	135.4
1978	5284	28	29	14	43	122.9
1979	5446	28	29	17	46	118.4
1980	6069	31	29	19	48	126.4
1981	7044	33	30	21	51	138.1
1982	N.K.	34	32	24	56	N.K.
					Mean	129.1

If the caseload rates for the two worst years of overload are ignored, namely 1977 and 1981, the average rate is 125 cases per operator. This figure when applied to 1981 shows that it is a reasonable figure on which to base overload (carry over) predictions, and staff needs.

1981	Cases received	7044
	No. 'Operators'	51
	No. 'Operators' x 125 (cases)	6375
	Calculated backlog (7044-6375)	669
	Actual backlog (cases)	656

Figures to the end of September 1982 also suggest that this formula will hold good and a backlog of about 1455 cases can be expected at the end of this year (c.f. September 1982 backlog - 1342).

It should also be noted in Table 2 that there has been a disproportionate increase in police operators in the period examined:

1976 - 1982	Police operator increase	84.6%
	Science graduate increase	61.9%
	Scientific staff increase	39.1%
	Total 'operator' increase	55.6%

To some, an increase in 'operators' of 55.6% in the period 1976 - 1982 may appear to be bountiful but such an opinion would neglect considerations that, in the same period, the C.I.B. strength has risen by 75.8% and the number of cases submitted to the Laboratory will have increased by approximately 74.9% at the end of 1982.

These calculations provide a tangible reason for staffing the laboratory according to a formula based on the strength of the C.I.B. and a total complement of 63 'operators' would currently apply if such a simple formula (i.e. 75.8% C.I.B. increase) were to be used (see also Table 3A).

Although staffing on a case basis is used in many areas of employment, it is doubtful whether such a formula could be applied to the F.S.L. at the end of each calendar year, while still allowing time for proper discussion on staffing priorities for the ensuing Budget to take place.

It is felt that a formula based on Force or C.I.B. numbers would provide a better means of predicting future staff needs for the Laboratory than a case based formula.

5.3 Staffing on a Force strength or C.I.B. strength basis -

The Robinson Report on the F.S.L. (p. 26 para 4) suggests that a Government commitment to linking the staff complement to C.I.B. numbers will be necessary if other means cannot be found to provide it with adequate manpower. It follows that, any formula derived which ties Laboratory staffing to the C.I.B. complement can be modified to link staffing with total Force numbers. Several formulae have been arrived at by taking into account the deployment of various scientific resources, overload situations and shortfalls in staff during the period 1975-1982, and these are presented in Table 3.

Although not alluded to in Dr. Robinson's report, past staffing of the Laboratory with Police Technicians and Public Service Scientists has not been coordinated and in a number of recent years this imbalance of staff has caused operational problems for both groups of laboratory operators (i.e. field and laboratory operators).

This problem will be better understood if we examine where the main part of the laboratory caseload comes from:

C.I.B. Squads (Homicide, Arson, Drugs, Fraud, etc.)
C.I.B. Stations throughout Victoria
Crime Car Squads
Field Investigation Section, Forensic Science Laboratory
Fire Investigation Section, Forensic Science Laboratory
Firearms Section, Forensic Science Laboratory

In other words a significant amount of the caseload can be generated by F.S.L. personnel through their field assignments, as most of the exhibits

brought back to the Laboratory have to receive examination by F.S.L. scientists. Consequently if there is a shortage of expert scientific staff the inhouse scientific service cannot be kept up to the field operators and the resultant delays make it appear that the field sections are also understaffed, when in fact this is not always so.

This position can only get worse when work starts to flow from field operators at F.S.L. Regional Sections (e.g. Geelong), but the increase in work cannot be gauged at this early date.

In order to maintain a balanced complement of Police Technicians and Scientific Officers serving under the Assistant Director (Operators) it would appear that both formulae (1 & 2, Table 3)* will have to be applied before making any future predictions on staff requirements in the Operations area. Staff needs in the Administration/Services area will of course be additional and be assessed on the usual needs basis.

It is noteworthy that during a recent inspection of Public Service scientists by a Public Service Board Consultant he expressed the opinion that the Laboratory is badly understaffed. This fact should now be patent to all.

5.4 The Advantages of Establishing a Staffing Formula -

The acceptance by the Department and Treasury of a formula for staffing of the Forensic Science Laboratory would prove to be a very important step in assuring that all Police obtained maximum benefits and prompt service from the Laboratory. The Courts too would see it as an improvement to the administration of justice, since current laboratory delays are often the source of injustices and hardship.

* see also Graphs 1 & 2

Establishment of a formula will provide the Laboratory with a number of other benefits, namely:

- Better forward planning capabilities.
- Greater ability to balance manpower.
- Greater flexibility in resource utilisation.
- More efficient means of allowing replacement of police with civilians, where necessary.
- Better opportunities to properly phase in capital equipment purchases (especially where new equipment needs a new 'driver').
- Better prospects of containing backlogs.

TABLE 3.

PROPOSED FORMULAE

1. TOTAL STAFF UNDER ASSISTANT DIRECTOR (OPERATIONS) *

(a) = $\frac{\text{Estimated Strength of C.I.B.}}{20}$ (end of calendar year)

or (b) = $\frac{\text{Estimated Total Strength of Police Force}}{125}$ (end of calendar year)

or (c) = $\frac{\text{Total No. cases for previous year}}{125}$ (+ carry over)

(* This includes Public Service Scientific Officers, Technical Officers, Technical Assistants and Police Technicians in the Field Investigation and Firearm and Toolmarks Examination Sections.)

2. TOTAL PUBLIC SERVICE OPERATIONAL SCIENTIFIC STAFF**

(a) = $\frac{\text{Estimated Strength of C.I.B.}}{32}$ (end of calendar year)

or (b) = $\frac{\text{Estimated Total strength of Police Force}}{200}$ (end of calendar year)

(**This includes operational Scientific Officers, Technical Officers and Technical Assistants, but does not include scientific officers who devote less than 20% of their duties to the scientific examination of Police cases.)

TABLE 3A

Examples of the application of formulae shown in Table 3 :

(A) 1982 - TOTAL STAFF REQUIRED BY ASSISTANT DIRECTOR (OPERATIONS)

USING FORMULA 1(a) = $\frac{\text{Strength of C.I.B.}}{20} = \frac{1317}{20}$ ≠

= 65.85 i.e. 66 (operational Police Technicians and P.S. scientific staff)

Current Police Technicians	24	
Current operational scientific staff	32	
Total No. operational staff	= 56	(Police and P.S. scientific staff)
Shortfall of staff (66 - 56)	= 10	
No additional staff calculated on a needs basis	= 10 *	

(≠ - see Table of Laboratory Statistics p.9 and Graph 1.)

(* Comments : 9 Public Service staff required (see Recommendations 2.2) and 1 Inspector with scientific background to supervise Technical Division)

(B) 1982 - TOTAL STAFF REQUIRED BY ASSISTANT DIRECTOR (OPERATIONS)

USING FORMULA 1(b) = $\frac{\text{Strength of Force}}{125} = \frac{8289}{125}$ = 66.3 **

(** Comments - see comments under (A) above and p.10)

(C) 1982 - TOTAL STAFF REQUIRED BY ASSISTANT DIRECTOR (OPERATIONS)

USING FORMULA 1(c) = $\frac{\text{End of previous year total cases}}{125}$ (+ carry over)

= $\frac{7044 + 656}{125}$ = 61.6 (i.e. 62) ***

(*** Comments - Since this calculation does not provide adequately for workload growth in the following year a better calculation, such as (A) must be preferred)

(D) 1982 TOTAL NUMBER OF OPERATIONAL SCIENTIFIC STAFF REQUIRED USING FORMULA 2(a) :

= Estimated $\frac{\text{Strength of C.I.B.}}{32}$ (Dec. 1982) = $\frac{1317}{32}$ ✓

= 41.2 (41) *

(E) 1982 TOTAL NUMBER OF OPERATIONAL SCIENTIFIC STAFF REQUIRED USING FORMULA 2(b) :

= Estimated $\frac{\text{strength of Force}}{200}$ (Dec. 1982) = $\frac{8289}{200}$

= 41.4 *

(✓ - see Table of Laboratory Statistics, p.9, and Graph 2)

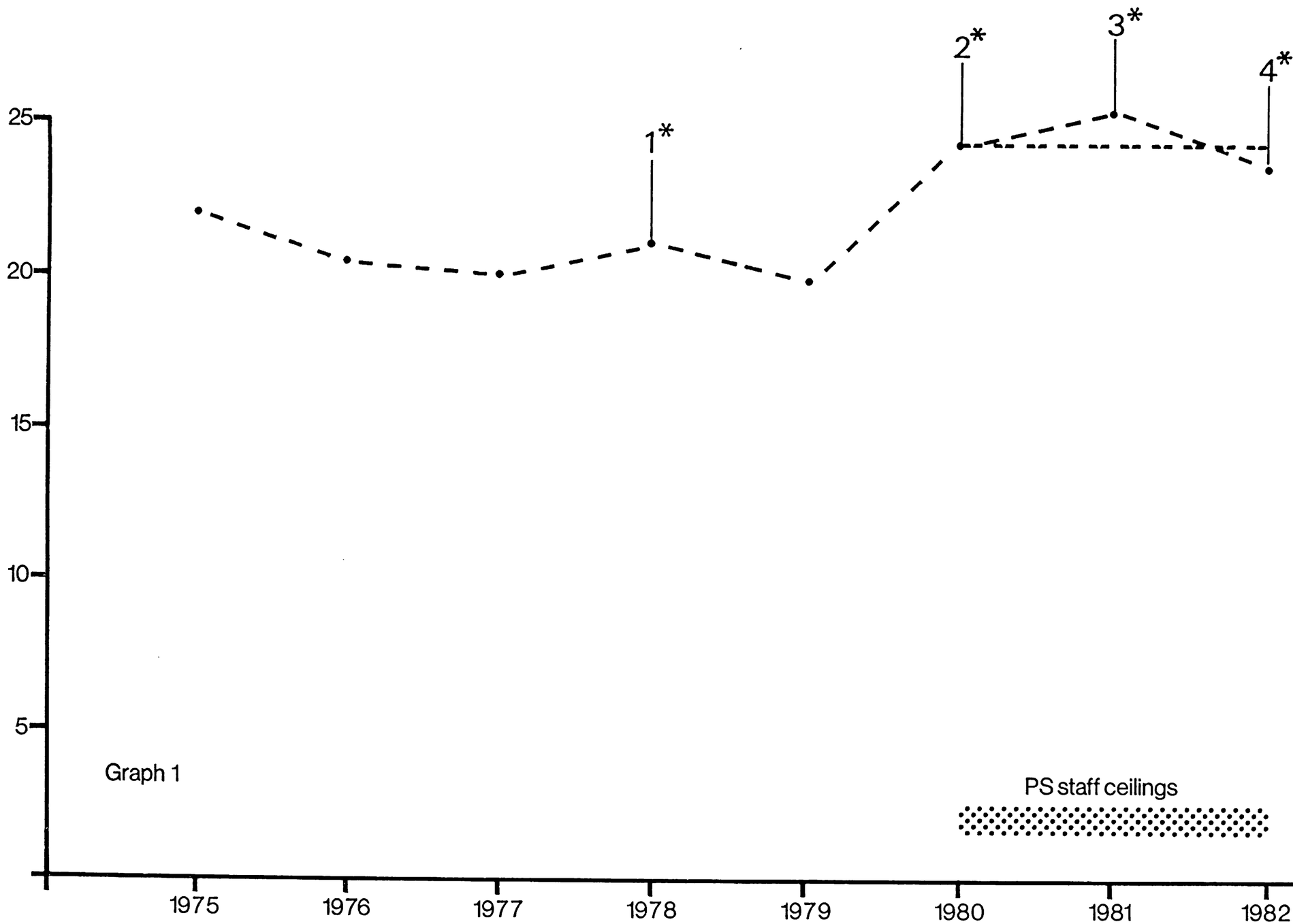
(* Comments - Currently there are 32 operational scientific staff in which total are included 22 operational scientists (i.e. Public Service Graduates). The Recommendations (2.2) in this report recommend that 9 additional P.S. scientific staff be engaged as soon as possible)

Reconciliation :

Current operational P.S. scientific staff	= 32
Required per Formula 2(a) calculation	= 41
Difference	= 9
No. recommended on a needs basis	= 9

Summary Graph 1 shows that a C.I.B. strength to F.S.L. operator strength ratio of 25:1 is associated with higher backlog conditions throughout the whole laboratory. A ratio of 20:1 is associated with more acceptable backlog conditions, and such backlogs may only apply in 1 or 2 sections of the laboratory.
The same reasoning applies to Graph 2 which relates to operational (Public Service) scientific staff (desired ratio of 32)

Graph of ratio of C.I.B. strength to F.S.L. operator strength 1975-82



Graph 1

Event markers

1. Large drug carry over into 1979. Staff increased (Scientists)
2. Backlogs mounting in rape and drug scientific work. Dec 1980—8 new scientists promised by Treasurer—only 2 supplied
3. Backlogs climb to 9.3% of yearly case input
4. Predicted 16-17% backlog at end of 1982 in cases handled by P.S. scientists

*Police staff in general accordance with 5 year projections.
P.S. staff below projections.

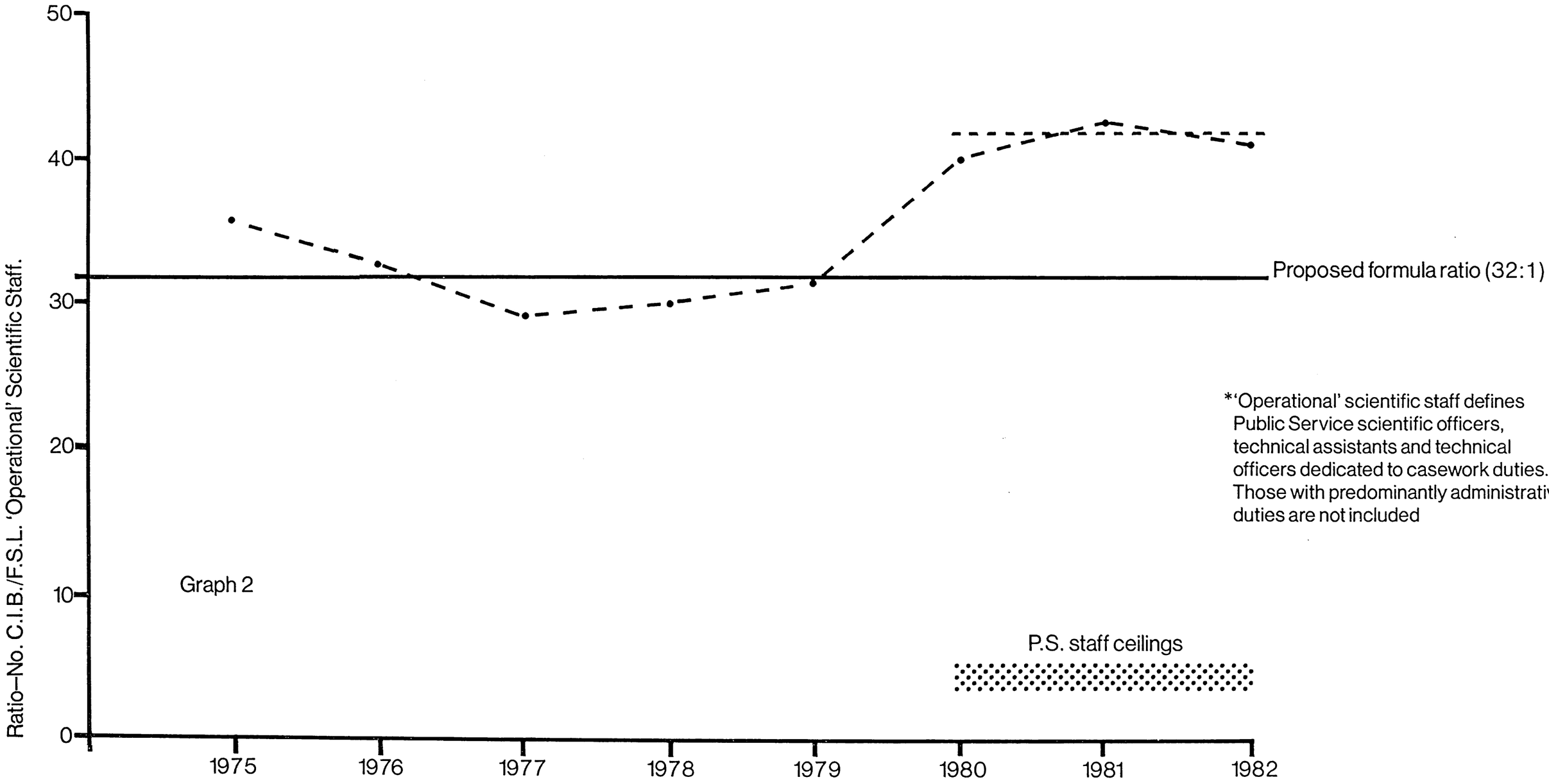
TABLE 4

	*Scientific Staff	No.C.I.B.	No. Force	Ratio C.I.B./No.Scientific Staff
1975	21	749	6156	35.7
1976	23	749	6487	32.6
1977	28	818	6819	29.2
1978	29	869	7238	30.0
1979	29	908	7569	31.3
1980	29	1162	7814	40.1
1981	30	1281	8050	42.7
1982	32	1317 estm	8289 estm	41.21
				mean 35.35
			Best estimate	32 **

* Scientific staff includes operational Scientific Officers Technical Officers, Technical Assistants but does not include Scientific Officers who devote less than 20% of their duties to the scientific examination of police cases

** Application of this ratio to 1982 gives a P.S. "scientific staff" complement of 41 compared with a total of 43 derived through increases recommended here on a current needs basis (Recommendations 2.2)

Graph of ratio of C.I.B. strength to F.S.L. operational scientific staff 1975-1982



*'Operational' scientific staff defines Public Service scientific officers, technical assistants and technical officers dedicated to casework duties. Those with predominantly administrative duties are not included

Graph 2

6. CONSEQUENCES OF IMPROPER STAFFING ARRANGEMENTS

6.1 The Ideal Situation - The Laboratory ought to be staffed with sufficient scientists and support staff to enable it to carry out its aims and functions defined in Executive Instruction 140.

In short it should have manpower sufficient not only to contain backlogs, but also sufficient to deal promptly with current major crime, while not denying a sensible level of staff development and method development.

The Laboratory can ill afford to be seen by the public as inefficient or ineffectual since this would reflect on the whole Force; nor can its members afford to be judged as inexpert or under- qualified in any Court proceedings where they give expert evidence.

6.2 Current Staffing Problems - At the present time the Laboratory is suffering the legacy of past staffing policies, especially Public Service staff ceilings and the uncompromising attitude of some Treasury Officers.

A large laboratory such as the F.S.L. depends very much on having a balanced staff complement, in addition to having a sufficiency of staff, as will be seen from the following listed categories:

Administration - management personnel, clerks, stenographers, typists, switchboard operator.

Services - Training (Scientific) personnel, Police photographers, Public Service photographic personnel, armourers, Police Liaison staff.

Operations - Police Field Investigation (Crime scene technicians)
Police Firearms and Toolmark Examiners
Scientific Officers
Computer Systems Officer
Technical Officers
Technical Assistants
Laboratory Attendants
Breathalyzer technicians

When the current deployment of staff is analysed it is found that of a total of 114 members only 56 are operational in the Operations area (Table 1.). This means that only 56 are permitted by virtue of their qualifications and training to carry out or assist in scientific examinations. Of these 56 only 22 are fully operational Public Service Scientific Officers who devote all their time to the casework and give evidence in Court. Support staff in this area, apart from 24 police technicians are:

1 Technical Officer
7 Technical Assistants
2 Laboratory Attendants
Total 10

It is seen here that 22 scientific officers are serviced by 10 support staff, which is a scientist/assistant ratio of 2.2 to 1 - this ratio is far too low for a Forensic Science Laboratory and is lower than laboratories overseas which maintain ratios 3 to 4 scientists for every technical assistant. The reason for maintaining a high ratio exists in the fact that the Courts do not recognise assistants as experts and require qualified scientists to give expert evidence.

An example of technical assistants being unsuitable and unqualified to give expert scientific testimony was recently highlighted in the Azaria Chamberlain inquest in Darwin, and it is now common knowledge that the Technical Assistant, who was forced by her superiors to give evidence, had to resign from her position through being professionally destroyed in the witness box.

As the Laboratory management would not allow Technical Assistants at the F.S.L. to do work which would place them in Court there is no sense in Treasury supplying Technical Assistants in place of Scientific Officers, if they cannot be gainfully employed. Consequently, any future additions of Public Service scientific type personnel must take into account the Scientific Officer/Technical Assistant ratio and restore it to a value of 3 or 4 to 1.

The F.S.L. Management's insistence that only Scientific Officers (i.e. qualified scientists) are assigned to scientific examinations that will lead to giving expert Court testimony is consistent with policies pursued by the Victorian Health Department, in relation to food analyses, and those of the Commonwealth Public Service where only Class 2 scientists are allowed to give evidence in the Courts. This latter Commonwealth classification (Class 2) is equivalent to a Victorian Public Service Board classification of SO-3, whereas most F.S.L. scientists are classified at the lesser classification of SO-1.

Although some may dismiss this comparison between Commonwealth and State Forensic Scientists, the fact that policeman scientists employed at the F.S.L. are entitled, under the Police Determinations, to an SO-3 classification while equivalent public servant scientists are only afforded an SO-1 classification has never been satisfactorily explained by officers of the Board.

Nevertheless the fact that the Victorian Public Service is employing forensic scientists on the cheap should be reason enough for the service to employ more of them at the laboratory.

The number and categories of additional P.S. staff required in 1983, on an immediate needs basis, are contained in the recommendations of this report (Recommendations 2.2) and, from the above discussion, it will be obvious that additional scientific officers will be necessary in the near future in order to provide both a proper staff balance and a workforce capable of handling current workloads.

6.3 The inevitable results of not increasing F.S.L. Public Service scientific staff in 1982/83 financial year -

The history of the F.S.L. since 1965 clearly shows that the following problems will develop further unless a significant number of properly qualified scientists are provided in the near future (see Recommendations, 2.2):

- Backlogs will increase further.

- Laboratory delays will cause more inconvenience to the Courts, and evoke additional newspaper and public comment.

- More offenders will escape prosecution due to delays.

- More staff will resign due to intolerable work pressures, and personal denigration in the Courts over delays.

- The allocation of work priorities will become impossible because of the volume of cases which would be considered 'urgent'.

- Loss of potential evidence will become commonplace.

- More injustice will be meted out to both complainants and defendants.

- The doors of the Laboratory may have to be virtually shut for 6 months in order to restore the Laboratory to a nil backlog condition.

- Staff will not have the time to keep pace with scientific developments and the quality of the output will progressively fall.

APPENDIX IV

This appendix contains the Director of Public Prosecutions Act 1982 (Victoria)

ANNO TRICESIMO PRIMO

ELIZABETHAE SECUNDAE REGINAE

VICTORIA

Director of Public Prosecutions Act 1982

No. 9848

An Act to provide for the Appointment of a Director of Public Prosecutions, to repeal the *Courts Administration Act* 1975, to amend the *Crimes Act* 1958 and other Acts and for other purposes.

[Assented to 21 December 1982]

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

Short title.

1. (1) This Act may be cited as the *Director of Public Prosecutions Act* 1982.

Commencement.

(2) The several provisions of this Act shall come into operation on a day or on the respective days to be fixed by proclamation or successive proclamations of the Governor in Council published in the *Government Gazette*.

Interpretation.

2. In this Act unless inconsistent with the context or subject-matter—

"Director." "Director" means the Director of Public Prosecutions appointed under this Act.

58960/82—Price 60 cents

3. (1) The

Director of Public Prosecutions.

3. (1) The Governor in Council may appoint a qualified person to be the Director of Public Prosecutions.

(2) A person is qualified to be appointed Director if he is a barrister and solicitor of the Supreme Court of not less than eight years' standing.

(3) A person who has attained the age of 65 years shall not be capable of being appointed or re-appointed as Director.

Terms and conditions.

4. (1) Subject to this Act, the Director shall hold office until he attains the age of 65 years.

(2) The Director shall be entitled to be paid such salary and allowance as are for the time being payable to a puisne Judge of the Supreme Court pursuant to section 82 (2) of the *Constitution Act* 1975.

(3) The Director is not, in respect of his office as Director, subject to the *Public Service Act* 1974.

Resignation and removal from office.

5. (1) The Director may resign his office by writing signed by him and delivered to the Governor in Council.

(2) The Governor in Council may suspend the Director from office and subject to this section may remove the Director from office.

(3) The Attorney-General shall cause to be laid before each House of Parliament a full statement of the grounds of suspension of the Director within seven sitting days after the suspension if that House is then sitting or, if that House is not then sitting, within seven sitting days after the next meeting of that House.

(4) The Director shall be removed from office by the Governor in Council if each House of Parliament within seven sitting days after the day when the statement is laid before it, declares by resolution that the Director ought to be removed from office and, unless each House within that period so declares, the Governor in Council shall remove the suspension and restore the Director to office.

(5) The Director shall not engage in the practice of his profession or in any other employment except in the exercise of the functions of his office.

Pension of Director and spouse and children of Director.

6. (1) The Director and the spouse and children of the Director shall be entitled to pensions in the same circumstances and at the same rates and on the same terms and conditions as a puisne Judge of the Supreme Court and the spouse and children of such a Judge are entitled to under Part III. of the *Constitution Act* 1975 and any such pension shall be liable to be suspended or determined in the

same

same circumstances and to the same extent as pensions under Part III. of the *Constitution Act* 1975 are liable to be suspended or determined.

(2) All pensions payable under this section shall be payable out of the Consolidated Fund which is hereby to the necessary extent appropriated accordingly.

Acting Director.

7. (1) The Governor in Council may appoint an Acting Director of Public Prosecutions to act during the absence of the Director through illness or other cause or during any vacancy in the office of Director and may at any time revoke that appointment.

(2) The Acting Director while so acting—

(*a*) shall have all the powers and duties and may exercise any of the functions of the Director;

(*b*) shall be entitled to be paid—

(i) such remuneration as is from time to time fixed by the Governor in Council; and

(ii) such travelling and other allowances as are from time to time fixed by the Governor in Council; and

(*c*) shall not in respect of his office as Acting Director be subject to the provisions of the *Public Service Act* 1974.

Staff.

8. Subject to the *Public Service Act* 1974, there may be appointed such staff as are necessary to assist the Director in the preparation and work required in relation to the institution and conduct of criminal proceedings and in the carrying out of any other function or duty given to the Director by or under this Act or any other Act.

Functions of Director.

9. (1) The functions of the Director are—

(*a*) to prepare institute and conduct on behalf of the Crown, criminal proceedings in the High Court, Supreme Court and County Court;

(*b*) where he considers it desirable to do so—

(i) to prepare institute and conduct any preliminary examination under Part V. of the *Magistrates (Summary Proceedings) Act* 1975;

(ii) to take over and conduct any proceedings in respect of a summary offence or an indictable offence tried or being tried summarily; and

(iii) on behalf of the Crown, to assist a coroner or to instruct counsel assisting a coroner in any inquest under the *Coroners Act* 1958; and

(*c*) to carry out such other functions as may be given to him by or under this Act or any other Act.

(2) The

(2) The Director shall be responsible to the Attorney-General for the due performance of his functions under this Act or any other Act.

(3) Nothing in sub-section (2) shall affect or derogate from the authority of the Director in respect of the preparation institution and conduct of proceedings under this Act or any other Act.

(4) In any proceedings instituted or conducted by the Director, or any proceedings by way of appeal from or otherwise arising out of proceedings instituted, or conducted by the Director, the Director may appear in person or may be represented by counsel or a solicitor.

Director may furnish guidelines.

10. (1) The Director may from time to time furnish guidelines to—

(*a*) Prosecutors for the Queen and other persons acting as prosecutors for the Crown;

(*b*) members of the police force; and

(*c*) any other person or persons—

with respect to the prosecution of offences but the Director is not entitled to furnish guidelines in relation to a particular case.

(2) Where the Director furnishes any guidelines to any person under sub-section (1), the Director shall cause a copy of the guidelines to be published in the *Government Gazette.*

(3) Nothing in sub-section (1) or in any guidelines thereunder shall prevent the exercise or performance by a Prosecutor for the Queen of any power or function given to him by the *Crimes Act* 1958.

Director may give directions with respect to the referral of offences.

11. The Director may from time to time give directions to members of the police force and other persons with respect to the offences and classes of offences which are to be referred to the Director for the institution and conduct of proceedings.

Director to be provided with information.

12. (1) Where a person has been charged with an offence and—

(*a*) the offence is one in respect of which a direction has been given under section 11;

(*b*) the Director directs that the matter be referred to him; or

(*c*) the informant considers that the matter should be referred to the Director—

the informant shall provide to the Director—

(*d*) a full report of the circumstances of the offence;

(*e*) copies of the statements of any witnesses;

(*f*) copies of all material documents; and

(*g*) such other information and material as the Director may require.

13. (1) Where,

Director may request assistance of Chief Commissioner of Police.

13. (1) Where, in relation to any criminal proceedings under consideration or conducted by the Director, a matter arises which requires further investigation, the Director may, in writing, request the Chief Commissioner of Police for the assistance of the police in the conduct of that investigation.

(2) The Chief Commissioner of Police shall as far as possible comply with any request made to him by the Director under sub-section (1).

Power of Director in relation to discontinuance of criminal proceedings.

14. (1) On and from the commencement of this section, the Director shall have the same power to enter a *nolle prosequi* in criminal proceedings as the Attorney-General had immediately before the commencement of this section.

(2) Nothing in sub-section (1) shall affect the power of the Attorney-General to enter a *nolle prosequi* in criminal proceedings.

Judicial notice.

15. All courts, judges and persons acting judicially shall take judicial notice of—

(*a*) the official signature of any person who is or has been the Director of Public Prosecutions or the Acting Director of Public Prosecutions on any document; and

(*b*) of the fact that that person is or was the Director of Public Prosecutions or the Acting Director of Public Prosecutions (as the case may be).

Annual report.

16. (1) As soon as is practicable in each year but not later than 30 November the Director shall cause to be prepared and delivered to the Attorney-General a report of the operations of his office during the year ending on the preceding 31 December.

(2) The Attorney-General shall cause every report received by him under sub-section (1) to be laid before each House of Parliament within three weeks after it is received if that House is then sitting or, if that House is not then sitting, within fourteen sitting days of the next meeting of that House.

Regulations.

17. The Governor in Council may make regulations for or with respect to the carrying of this Act into effect.

Repeal Schedule.

18. (1) The Acts mentioned in the Schedule, to the extent thereby expressed to be repealed or amended are hereby repealed or amended accordingly.

Transitional.

(2) Upon and from the commencement of this section—

(*a*) the Director shall take over from the Attorney-General, Solicitor-General and Crown Solicitor the conduct of any criminal proceedings continuing immediately before the commencement of this section;

(*b*) all

(*b*) all acts matters and things made or done by or on behalf of or in the name of Attorney-General, Solicitor-General or Crown Solicitor in relation to those criminal proceedings shall be deemed to have been made or done by or on behalf of or in the name of the Director;

(*c*) a reference to the Attorney-General, Solicitor-General or Crown Solicitor in any order or document arising from or relating to those criminal proceedings shall, unless inconsistent with the context or subject-matter, be deemed to be a reference to the Director; and

(*d*) all documents served on or by or on behalf of or in the name of the Attorney-General, Solicitor-General or Crown Solicitor in connexion with those criminal proceedings shall be deemed to have been served on or by or on behalf of the Director.

(3) Where in any Act the authority sanction or consent of the Attorney-General or a law officer is required for the commencement of proceedings for an offence, upon and from the commencement of this section the reference to the Attorney-General or to a law officer shall be deemed to be a reference to the Director of Public Prosecutions.

(4) Notwithstanding anything in the foregoing provisions of this section or in any Act amended by this section, the operation of any authority sanction or consent given before the commencement of this section by the Attorney-General or a law officer to the commencement of proceedings in relation to an offence shall not be abated or affected thereby.

(5) Sub-section (3) shall not apply in respect of—

(*a*) the *Companies (Administration) Act* 1981;

(*b*) the *Companies (Victoria) Code*;

(*c*) the *Securities Industry (Victoria) Code*;

(*d*) the *Companies (Acquisition of Shares) (Victoria) Code*; or

(*e*) the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Victoria) Code.*

SCHEDULE

SCHEDULE

Section 19

Act No.	*Title of Act*	*Extent of Amendment or Repeal*
6227	*Coroners Act* 1958 . .	In sections 14, 15 (4) (*b*) and 16 (2) for the words "a law officer" there shall be substituted the words "the Director of Public Prosecutions".
6231	*Crimes Act* 1958 . .	Sections 50 (5) and 52 (7) shall be repealed.
		In section 93 (3) (*b*) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions".
		In section 95 (3) for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".
		Sections 186 (4) and 193 shall be repealed.
		In section 305 the expression "It shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent of a law officer." shall be repealed.
		Sections 317 (6), 325 (5) and 326 (4) shall be repealed.
		In section 353 for the expression "Her Majesty's Attorney-General or Solicitor-General for Victoria or any Prosecutor for the Queen in the name of a law officer" there shall be substituted the words "the Director of Public Prosecutions or any Prosecutor for the Queen in the name of the Director of Public Prosecutions".
		In section 354 for the words "a law officer" there shall be substituted the words "the Director of Public Prosecutions".
		In section 357 after the expression "Attorney-General" (where twice occurring) there shall be inserted the words "or the Director of Public Prosecutions".
		In sections 359 (1), 360 (1), 443A (1), (2), (3) and (5), 449, 450A (1) and (2) (*a*), 567A (1), (2) and (5) and 577 for the expression "Attorney-General" (wherever occurring) there shall be substituted the words "Director of Public Prosecutions".
		In sections 390 (1) and 399A (2) (*c*), 3 (*b*), (4), (5) and (8) (*d*) for the words "Crown Solicitor" (wherever occurring) there shall be substituted the words "Director of Public Prosecutions".
		In section 435A (1) (*a*) for the words "or a Prosecutor for the Queen" there shall be substituted the words "the Director of Public Prosecutions or a Prosecutor for the Queen".
		In sections 516 (3) and 517 (3) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions".

SCHEDULE—*continued*

Act No.	*Title of Act*	*Extent of Amendment or Repeal*
6231	*Crimes Act* 1958—continued	In section 581—
		(*a*) in sub-section (2) for the expression "The Attorney-General may also" there shall be substituted the words "The Director of Public Prosecutions may"; and
		(*b*) in sub-section (3) for the expression "Attorney-General" (where first occurring) there shall be substituted the words "Director of Public Prosecutions".
		For the Third Schedule there shall be substituted the following Schedule:
		"THIRD SCHEDULE.
		The Director of Public Prosecutions presents that, &c.
		[*Subsequent counts may commence as follows:*]
		And the Director of Public Prosecutions further presents, &c.
		(Signed) A.B. Director of Public Prosecutions.
		[*or* C.D. Prosecutor for the Queen]."
		In the Fourth Schedule after the expression "Attorney-General" there shall be inserted the expression "[*or* Director of Public Prosecutions]".
		In the Fifth Schedule after the expression "Attorney-General" there shall be inserted the expression "[*or* Director of Public Prosecutions]".
		In the Sixth Schedule in rule 12 (1) for the expression "Crown Solicitor or the clerk of the peace (as the case may be)" there shall be substituted the expression "Director of Public Prosecutions".
		In Schedule Eight after the expression "(prosecutor for the Queen)" there shall be inserted the expression "or (Director of Public Prosecutions)".
6232	*Crown Proceedings Act* 1958	In section 5 (3) (*c*) for the words "Secretary to the Law Department" there shall be substituted the words "Director of Public Prosecutions".
6280	*Judicial Proceedings Reports Act* 1958	In sections 3 (4) and 4 (4) for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".
6291	*Legal Profession Practice Act* 1958	In section 42 (3) for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".
		In section 47 after the expression "Attorney-General" there shall be inserted the words "and the Director of Public Prosecutions".

SCHEDULE

SCHEDULE—*continued*

Act No.	*Title of Act*	*Extent of Amendment or Repeal*
		In section 48 (1)— (*a*) for the expression "to the Attorney-General by an inspector appointed under this Part" there shall be substituted the expression "made under section 47"; and (*b*) for the expression "Attorney-General" (where secondly and thirdly occurring) there shall be substituted the words "Director of Public Prosecutions". In sections 93 (3), 104G (5) and 104H (2) for the expression "Attorney-General" (wherever occurring) there shall be substituted the words "Director of Public Prosecutions".
6337	*Police Offences Act* 1958..	In section 166A for the words "Chief Secretary" there shall be substituted the words "Director of Public Prosecutions". In section 173A, sub-sections (4) and (5) shall be repealed. For section 176 there shall be substituted the following section— "176. A prosecution for an offence against section 172, 173, 173A, 174 or 175 shall not be commenced except by a member of the police force with the written consent of the Director of Public Prosecutions.". For section 177 (2) there shall be substituted the following sub-section: "(2) A prosecution for an offence against this section shall not be commenced except by a member of the police force with the written consent of the Director of Public Prosecutions.".
7405	*Summary Offences Act* 1966	In section 37 (4) for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".
8184	*Magistrates' Courts Act* 1971	In section 74 (1), (3) and (5) for the expression "Attorney-General" (wherever occurring) there shall be substituted the words "Director of Public Prosecutions". In section 77 (3) (*c*) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions".
8656	*Public Service Act* 1974 ..	In Schedule Three— (*a*) at the end of Column One there shall be inserted the words "Office of the Director of Public Prosecutions"; and (*b*) at the end of Column Two there shall be inserted the words "Director of Public Prosecutions".

SCHEDULE

SCHEDULE—*continued*

Act No.	*Title of Act*	*Extent of Amendment or Repeal*
8731	*Magistrates (Summary Proceedings) Act* 1975	In section 57 (1) (*c*) for the words "one of the prosecutors for the Queen" there shall be substituted the words "the Director of Public Prosecutions or a prosecutor for the Queen". In section 59— (*a*) in sub-section (6) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions". (*b*) in sub-section (6A)— (i) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions"; and (ii) for the expression "The Crown Solicitor's address is (State Law Offices, 239 William Street, Melbourne *or such other address*" there shall be substituted the expression "The address of the Director of Public Prosecutions is (*such address*". (*c*) in sub-section (6B) for the expression "Crown Solicitor's address" there shall be substituted the words "address of the Director of Public Prosecutions". In sections 61 (5) and 62 (3) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions". In sections 62 (3), 64 (1) and 65 (1) for the words "one of the prosecutors for the Queen" there shall be substituted the words "the Director of Public Prosecutions or a prosecutor for the Queen". In section 74 for the words "Crown Solicitor" (wherever occurring) there shall be substituted the words "Director of Public Prosecutions". In section 164 (1) (*c*) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions".
8752	*Courts Administration Act* 1975	The whole Act is repealed.
9008	*Bail Act* 1977	In section 29 (1) and (2) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions". For section 29 (3) there shall be substituted the following sub-section: "(3) For the purposes of sub-section (2) the address of the Director of Public Prosecutions is the address for the time being prescribed for the purposes of this section.".

SCHEDULE

SCHEDULE—*continued*

Act No.	*Title of Act*	*Extent of Amendment or Repeal*
9008	*Bail Act* 1977—continued	In section 30 (3) for the words "Crown Solicitor" there shall be substituted the words "Director of Public Prosecutions".
9428	*Estate Agents Act* 1980 ..	In section 90 (2) for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".
		In section 95 (2) for the word "Minister" there shall be substituted the words "Director of Public Prosecutions".
9668	*Credit Act* 1981	In section 158 for the expression "Attorney-General" there shall be substituted the words "Director of Public Prosecutions".

APPENDIX V

This appendix contains:

A Flanagan Committee Report No. 1 on delays in County Court criminal cases.

B Flanagan Committee Report No. 2 on delays in County Court criminal cases.

June 1982

REPORT NO. 1 OF THE COMMITTEE APPOINTED BY THE ATTORNEY-GENERAL TO EXAMINE METHODS OF IMPROVING THE DISPOSAL RATE OF CRIMINAL CASES IN THE COUNTY COURT AT MELBOURNE

MEMBERS:

Chairman: Mr. L.W. Flanagan, Q.C., Crown Counsel for Victoria.
Messrs. W. Fagan, Q.C., W. Morgan-Payler, and A. Lopes - alternates representing the Bar Council of Victoria.
Mr. Robert Galbally, representing the Law Institute of Victoria.
Mr. D. McLeod, Prosecutor for the Queen, representing the Prosecutors for the Queen.
Mr. J. Buckley, representing the Crown Solicitor for Victoria.
Mr. M. O'Brien, representing the Legal Aid Commission of Victoria.
Colonel J.M. Murphy, M.C., Director of Victorian Courts Administration.
Mr. V. Stafford, Director of Criminal Listings.

On 26th May, 1982, the above members were requested by the Honourable Mr. John Cain, M.P., Attorney-General for Victoria, to make recommendations on what action might be taken to improve the disposal rate of criminal cases in the County Court at Melbourne. In particular, we were asked to make recommendations as to what new or altered procedures and methods might be introduced in order to:

(a) Expedite the hearing of criminal matters.
(b) Reduce the back-log of criminal cases for hearing.

(c) Make more efficient use of the time and physical facilities of the County Court.

The Committee has met on four occasions, viz. 2nd, 7th, 10th and 17th June, and quite lengthy discussions have taken place. We approached these matters within the existing legislative framework. Our discussions were far ranging and covered consideration of quite a number of topics where we have decided to make no recommendations. We have elected to confine our recommendations to those matters which we believe will have the greatest effect in reducing delays and thus expediting the ultimate disposal of criminal cases in the County Court at Melbourne.

In particular we wish to emphasise the unanimity of our views. Although we each represent different bodies we are unanimous in our support of the recommendations we make herein.

In treating with the matters encompassed by our Terms of Reference we have at all times endeavoured to take into account the whole period which elapses from the point at which a person is committed for trial until that matter is ultimately disposed of by the Court. We have not entered upon any examination of the ever increasing delays which are taking place between the date of arrest or summons and the date on which a committal is had. This area is one which gives considerable cause for concern. Having regard to the long delays which now occur before committal it is our view that the stage has been reached where the establishment of another specialised committal court is essential.

In our view, the recommendations which we make will have an appreciable effect in reducing the existing backlog of cases and the time presently elapsing between committal and trial. However, the more discussions we had, the more we were convinced that the measures we recommend will not afford a panacea for all our ills. It is our considered view that the existing backlog of cases will only be substantially reduced or eliminated by an increase in manpower at all levels of the trial process. We particularise our views in this regard in dealing with the recommendations we make, but wish to emphasise at

this stage that the appointment of additional judges and the provision of more courts is fundamental to the solution of this problem.

RECOMMENDATIONS:

1. COMMITTALS

(a) Hand-up brief procedure

A tendency has developed where the "hand-up brief" procedure is adopted whereby the prosecution only tenders before the court so much material as it believes will be necessary to obtain the committal of the accused. Whilst this has the undoubted advantage of shortening the time taken upon committal, it causes considerable delay in the ultimate presentation of the accused for trial. A considerable amount of time is taken by the preparation officers in the Crown Solicitor's Office, and the Prosecutors for the Queen in endeavouring to ascertain what a case is all about. Many enquiries have to be made of the informant who takes further time to answer those queries. Much of this delay is unnecessary and could be obviated if those preparing the "hand-up brief" ensured that all adequate material was contained in them. Similarly, where the ordinary committal procedure is adopted much more of the available evidence should be called at that time. If for any reason the police are unable to call all the available evidence at the committal or should it be undesirable to do so, the police should be required to ensure that all the available material is in the hands of the Crown Solicitor's Office by the date upon which the depositions come into existence. The attention of the Police Commissioner should be directed to the existence of this problem and discussions had with him with a view to seeking a solution to this problem.

(b) Depositions

The first major delay which occurs in the presentation of an accused for trial results from the unacceptable time which is currently taken to record the committal proceedings. When a person is committed for trial there is an average delay of six weeks to three months before the depositions in respect of such person reaches the Crown Law Department. Indeed, in some cases of complexity and length, the delay may even amount to five or six months. Priority in the listing of trials has to be given to cases where the accused is in custody and (by virtue of the legislation) to prosecution for rape and allied offences. We are aware of one case where an accused has had to remain in

custody for a period of three months because the depositions of his committal had not been brought into existence. It is trite to comment that such situations are absolutely unacceptable. In Victoria it is the Prosecutor for the Queen who must make the determination as to whether a matter is to proceed to trial or not, subject to the review of the Solicitor-General and the Attorney-General. The result of the long delays which are occurring before depositions are available, is that the decision to prosecute is in fact occurring far too late in the procedures adopted with respect to accused persons. We therefore recommend that the present system whereby the Court Reporting Branch is responsible for the typing up of all depositions be discontinued. We recommend that independent contractors be engaged to record the evidence in every committal proceedings. It is further recommended that any contract negotiated in pursuance of this recommendation should require the contractor to produce depositions within fourteen days of the committal. We regard any further period of time as being unreasonable.

(c) Availability of Depositions

The present procedure whereby an accused person is required to collect his copy of the depositions from the Crown Solicitor's Office should be discontinued. The present practice is that the Crown Solicitor's Office writes to an accused person informing him of when a copy of the depositions is available for collection. Further delay and many consequent unnecessary adjournments arise from the present practice. It is recommended that the depositions should be distributed by the Director of Criminal Listings. The adoption of this practice will ensure that cases are not listed in the Court until the accused is possessed of his depositions and should obviate many of the applications for adjournments which are now being made either on the basis that the accused is not yet ready to proceed by reason of not having his depositions, or that he has not had the time available to process a tardy legal aid application.

It is further recommended that the Criminal Law Sub-committee of the Law Institute of Victoria takes steps to remind practitioners of the desirability of collecting depositions at the earliest possible time after receiving instructions from a client. They should be reminded that it is advisable to have

an early conference with their client so as to ascertain whether the matter is to be a plea or a trial, and if a trial, to assess the duration of it, and advise the accused of the appropriate costs. It is envisaged that the co-operation of the profession in this regard would have a marked effect in reducing delay.

2. PRE-TRIAL CONFERENCES BETWEEN ACCUSED'S REPRESENTATIVES AND THE CROWN

One of the major reasons for delay in the County Court at Melbourne is the fact that so many mattters listed as trials ultimately resolve themselves as pleas of guilty. Our researches indicate that over the past twelve years there is a consistent 43 per cent to 45 per cent of all accused who, having pleaded not guilty at the committal proceedings, ultimately change their plea to guilty upon trial. It is obvious that unexpected pleas of guilty wreak havoc to the long term planning of Court administrators and result in a great deal of wasted preparation and Court time. We regard it therefore as essential that every possible opportunity should be taken to identify as early as possible as many of the 45 per cent as it is capable to identify, i.e. prior to them being listed as a trial with all the preparation and arranging of witnesses which is essential to the listing of a trial, and in some cases even before a presentment is prepared.

There are many cases where the course of a trial could be determined by proper discussion between the parties prior to a presentment being drafted. We are of the view that the present procedures do little to encourage any such meaningful discussions at an early stage, and in many cases it is fair to say that there is a complete breakdown in communication between the accused and the Crown, or the representatives of either of them. It is our view that many complex trials which require extensive preparation and organisation of witnesses resolve themselves as pleas of guilty at the door of the Court. We therefore recommend a variation to the existing procedures which in our view will have the result of detecting at an earlier stage many pleas of guilty. We recommend:

(i) That whenever an accused's solicitor or his representative from the Legal Aid Commission desires to enter into preliminary discussions about

the course a trial should take, he should contact the preparation section leader in charge of the particular trial in the Criminal Branch of the Crown Solicitor's Office and indicate that he desires to discuss the matter with a Prosecutor for the Queen.

(ii) That it be the duty of that section leader of the preparation team to ensure that the Chambers Prosecutor (for the time being) is briefed in adequate time to enable the Chambers Prosecutor to be able to exercise his discretion as to whether to accept or reject the plea offered in full satisfaction of a proposed presentment at the time that such discussions take place.

(iii) That the instructing solicitor or his representative on each side, will then make the necessary appointment with the Prosecutor for the Queen to enable the matter to be considered. It is envisaged that a representative of the solicitors attend at each such conference to more readily facilitate expedition.

(iv) That the Chambers Prosecutor should set aside fixed times in each week for the purposes of such conferences taking place.

(v) That if the Chambers Prosecutor for the Queen decides that the matter is one in which it is appropriate for the Crown to accept a plea of guilty to some lesser number of counts in satisfaction of a proposed presentment, or to a less serious offence than that originally charged, he should then and there by telephone seek the approval of the Solicitor-General, or in his absence, the Crown Counsel, to the adoption of such a course. It is our understanding that both such gentlemen will undertake to make themselves available at fixed times for the purpose of entertaining such applications.

(vi) The same procedure should be followed even when a case has already had a date fixed for trial, but solicitors representing accused persons should be educated to the view that it is desirable that all such discussions take place at least seven days prior to the listed date. Steps should be taken to ensure that the profession is aware of the availability of these procedures. As the Legal Aid Commission is responsible for approximately 60 per cent of the matters dealt with in the County Court, the officers of that Commission can be

made readily aware of the new procedures. As to solicitors and barristers generally, the Law Insitute and the Bar Council respectively should be asked to make their members aware of the variation in procedure through their established journals or by such other means as they deem proper.

It is our view that these procedures should commence immediately and we anticipate that once the profession becomes more readily aware of the availability of this procedure, more pleas of guilty will be detected at a much earlier stage. The adoption of ths procedure should result in many more cases being listed as pleas in the County Court by the Listing Director and not as trials. The consequent saving of manpower in the preparation section and of the Prosecutors for the Queen can then be directed to the preparation and trial of other matters.

3. LISTING OF CRIMINAL TRIALS

It is our view that the present method of listing cases in the County Court at Melbourne is not working satisfactorily and should be discontinued. The present system is really a "monthly" system, and involves a number of cases being listed in a fixed list before a particular judge for a month. There is little certainty as to what particular date a matter will actually be reached and this is causing much inconvenience and considerable difficulties for all branches of the profession. Many criticisms have been levelled at the current procedure, many of which are valid, but we will not set them out here.

Essentially, what we recommend is a "daily" system, which will produce more certainty in the lists and much less inconvenience and cost to the parties, and we anticipate many less adjourned hearings.

We recommend that for the month commencing August 2nd a new trial period of listing cases should commence in the manner we suggest. From and including the sittings commencing 2nd August, a single list of cases should be prepared for each of a number of fixed dates throughout the sittings, e.g. a list prepared for August 2nd, 9th, 16th and 23rd.

Cases should be allotted to judges not in advance but on or after the date fixed as judges become available to hear them; cases should not be brought on prior to the dates fixed, and cases not reached on those dates should remain in the list until reached.

Cases remaining unreached at the end of the sittings should constitute the first list (or the first part of it) for the next unlisted sittings, e.g. remnants from August should be listed first in October.

Under this system accused persons will not know the judge before whom they are to appear and this may in itself lessen applications for adjournments. Further, there will be much more certainty that a case will in fact be heard following upon its listing date being fixed. In addition, there should be much less inconvenience to all parties (including witnesses) connected with the trial.

The criminal listing Director, Mr. Stafford, has at our request, had preliminary discussions with the Chief Judge of the County Court and it is our understanding that he is quite willing to co-operate in such a changed system. Mr. Stafford has already indicated his preparedness to accept this recommendation.

4. PREPARATION OF CRIMINAL CASES

We all agree that it is fundamental to the efficient operation of any listing system that there be a prepared pool or reservoir of prepared cases ready for trial at any given time. To the present time it has proved to be beyond the capacity of the criminal law branch as presently constituted, to have available prepared trials in the necessary numbers. Were they to have this capacity the chances of a new listing method proving successful would be greatly enhanced. A major cause in the current delay in presenting people for trial is simply that the preparation section is undermanned and many of them inexperienced. e.g. See Appendix A. In our view it needs a considerable boost in staff if the system is to function at all reasonably. We recommend that the application for 10 additional preparation staff currently awaiting approval by the Public Service Board be expedited. We regard the employment of these

officers as not only being justified but absolutely essential to the proper functioning of the present system.

We are also aware of the need for an improved system of checking the whereabouts and state of preparedness of a case at any particular time. Good office management indicates that there should be a central checking system. We have in mind a system whereby one person is responsible for auditing the entire caseload on hand on at least a weekly basis. We therefore recommend that of the 10 additional staff which we have recommended, one legal officer of suitable seniority and expertise be appointed to fulfill the function of supervisor of progress of cases.

We also think that there is another area in which the efficiency of the Crown Solicitor's Office might be improved. There currently exists a procedure whereby the preparation officer who has had charge of a particular case follows the case to court and instructs in the matter in every case which he has prepared. We recommend that this procedure be discontinued. Many of the cases heard in Court do not require the attendance of the preparation officer, and a more junior official to act as the instructor would be quite adequate. The preparation officers should generally spend their time in preparing cases. There must of course be exceptions to the general rule for the purposes of long or complicated cases. However, allowing for such special circumstances, we believe that the time of the preparation officer should be spent basically in preparing the case for trial. Many of the cases prepared for trial take a lengthy time upon hearing and that time would be much better utilised by experienced preparation officers in the preparation of other cases.

5. PROSECUTORS FOR THE QUEEN

It is well recognised that the caseload of the County Court moves more efficiently and with greater expedition when permanent Prosecutors for the Queen are engaged to prosecute. This is no doubt due to their expertise in this particular field, and their ability to readily ascertain the issues involved. Our investigations into the various duties undertaken by the Prosecutors for the Queen indicate that because of inadequate numbers they are unable to regularly

supply prosecutors for prosecution in the County Courts. Usually their numbers permit of the allocation of only two of them, or perhaps three, in a given month. This is of course by reason of their commitments in other Courts and jurisdictions. At the present time the number of Prosecutors is reduced by three by reason of two resignations and the illness of one. This seriously hampers their capacity to man lists in the County Court. Quite apart from the three we advert to, we regard it as desirable that there should be an increase in their numbers. Having regard to the fact that the aim is to have fourteen judges sitting in crime in the County Court at any given time, we recommend the appointment of three additional Prosecutors.

We are also of the view that there is some basis for suggesting that the Prosecutors for the Queen should be able to give further guidance to those instructing them when they sign a presentment. Preparation officers generally are not nearly as experienced as the Prosecutors for the Queen and it is thought that matters could be greatly expedited in the Crown Solicitor's Office if at the time a Prosecutor for the Queen signs a presentment, he also tenders in addition any advice on evidence that he regards desirable for the proper presentation of that case. We do not envisage that such advice on evidence should be lengthy but merely sufficiently adequate to direct the preparation officer as to what other evidence might be necessary.

6. SITTINGS OF THE COUNTY COURT

At the present time the criminal business of the County Court is organised around monthly sittings of the Court. This has a tendency to preclude the listing of any trials of substance or length towards the end of a particular month due to the fact that the judge will have other commitments he must start in the following month. On occasions, this leads to the judicial capacity of the County Court not being fully utilised. This in itself is of course conducive to further delay in other matters. It is our view that much time would be saved, and greater continuity of the criminal business of the Court achieved if monthly sittings were abolished. In our view there is much to be said for dividing the legal year for the purposes of criminal hearings in the County Court into four terms, e.g.

i. 1st February - Easter
ii. Easter - short vacation
iii. Short vacation - 1st October
iv. 1st October - Christmas

We do not mean to suggest by this that a particular judge should necessarily sit in crime for a full term. Rather we think it has administrative advantages which would save time. We believe that this is a matter which should be considered and recommend that discussions with the Chief Judge of the County Court be had with a view to consideration of this suggestion. In any event we regard it as desirable and recommend that the judges of the County Court should be rostered to sit in hearing trials for two calendar months at any given time. This would permit of much greater flexibility in the listing of trials and in our view result in the more efficient utilisation of judicial man hours.

7. CONSULTATIVE PANEL OR COMMITTEE

We have been greatly impressed by the considerable understanding which each member of this committee has of the other's problems. Although the representatives of the various bodies represent diverse and at times varied interests, there has nevertheless been shown a considerable willingness to improve the proper and efficient operation of the system for the benefit of all. We have been able to reach a unanimous view on many matters on which at first glance one would suspect lack of agreement. This experience indicates to us the real value of such a consultative body. The expertise represented here has proved to be invaluable in the compilation of the recommendations which we make. We therefore recommend that a similar consultative body should be created with representatives from the same groups for the purpose of meeting, at three monthly intervals, to monitor the success of any procedures currently being adopted.

Such constant review of the entire procedures leading to criminal trial in the County Court would prove invaluable in identifying defects in the system and making necessary recommendations for their solution.

CONCLUSION

These recommendations are designed to eliminate delay at various points between the committal of an accused person and his ultimate trial. We believe they will aid in the achievement of that object. However, criminal cases in the County Court will not be disposed of with expedition unless the Criminal Law Branch of the Crown Solicitor's Office has the capacity to produce a much greater flow of prepared cases for trial. There is, as we have observed, a pressing need for more manpower in this regard. In turn, an efficient listing system depends upon the existence of a sufficiently large reservoir of prepared cases. There can be no flexibility in listing cases nor any real certainty of cases proceeding on fixed hearing dates without the existence of such a pool.

Again, merely increasing the number of prepared cases, and achieving this in a shorter time span will not in itself reduce the back-log of cases. It will merely transfer the point of delay to the Listing Directorate unless more judges and more courtrooms are found for the trial of the increased output of cases. In our view no extensive or substantial inroads into the current back-log of cases awaiting trial will be achieved until this occurs.

Indeed, although the report was not discussed by this Committee the Bar Council representative maintained the Bar view that substantial improvement of all relevant problems could only be achieved by adoption of the measures suggested in its report dated 23rd December, 1980.

We have the honour to submit the above report.

DEPLOYMENT OF MELBOURNE COUNTY COURT

PREPARATION OFFICERS ON THURSDAY 17TH JUNE

Preparing trials	Instructing in County Court	Instructing in Mag. Crts. Non-rape Committals	Preparing Rape Committals	Preparing Non-rape Committals	On Special Leave	On Rec. Leave	Absent on Sick Leave	Total
15 (8 with less than 6 months experience)	13	2	3	1	2	1	4	41 (33 legally qualified)

REPORT NO. 2

of the

COMMITTEE APPOINTED BY THE ATTORNEY-GENERAL TO EXAMINE METHODS OF IMPROVING THE DISPOSAL RATE OF CRIMINAL CASES IN THE COUNTY COURT AT MELBOURNE

Members: Chairman: Mr. L.W. Flanagan, Q.C., Crown Counsel for Victoria.
Mr. W. Fagan, Q.C., representing the Bar Council of Victoria.
Mr. Robert Galbally, representing the Law Institute of Victoria.
Mr. G. Fitz-Gerald, Q.C., Senior Prosecutor for the Queen (alternate Mr. J. Hassett, Prosecutor for the Queen), representing the Prosecutors for the Queen.
Mr. J. Buckley, Solicitor to the Director of Public Prosecutions.
Mr. M. O'Brien, representing the Legal Aid Commission of Victoria.
Colonel J.M. Murphy, M.C., Director of Victorian Courts Administration.
Mr. B. Bateman, Acting Director of Criminal Listings.

On the 26th May, 1982, this Committee was requested by the Honourable Mr. John Cain, M.P., Attorney-General for Victoria, to make recommendations on what action might be taken to improve the disposal rate of criminal cases in the County Court at Melbourne. In particular, we were asked to make recommendations as to what new or altered procedures and methods might be introduced in order to:

(a) Expedite the hearing of criminal matters.
(b) Reduce the back-log of criminal cases for hearing.
(c) Make more efficient use of the time and physical facilities of the County Court.

In its Report tendered in June of 1982 the Committee made a number of unanimous recommendations to the Attorney-General. Many of these recommendations have now been implemented. In accordance with the request of the Attorney-General, the Committee has reconvened and the members met together on the 26th May, 1983, and the 23rd June, 1983, to review the progress made since the implementation of the Committee's earlier recommendations, and to consider what further recommendations are deemed necessary.

In our earlier report we elected to confine our recommendations to those matters which we believed would have the greatest effect in reducing delays, and thus expediting the ultimate disposal of criminal cases in the County Court at Melbourne. In particular, we emphasised the unanimity of our views. Although we each represented different bodies, we were unanimous in our support of the recommendations we made. Again, we are heartened by the fact that we are able to express unanimous views. Although our members represent bodies which at times have diverse and varied interests, there has nevertheless been shown a considerable willingness to co-operate to improve the proper and efficient operation of the system for the benefit of all.

We are pleased to report that the progressive implementation of the measures which we recommended in May of 1982 has led to a marked improvement in the number of persons awaiting trial at the end of May, 1983. Indeed, there has been a substantial reduction in both the numbers of accused persons awaiting trial and the number of cases awaiting trial in the County Court at Melbourne. At the end of May, 1982, there were 873 such persons awaiting trial which numbers comprise 660 actual cases. At the end of May, 1983, this number had been reduced to 668 persons awaiting trial in matters which comprised 492 cases. This constitutes the lowest number of persons and cases awaiting trial since December, 1977. These figures also constitute the greatest reduction in both categories in any one year.

We anticipate that the creation of the Office of Director of Public Prosecutions and the increase in staff of that office will lead to speedier and more efficient preparation of cases for trial, thus creating a larger reservoir of prepared cases available to be listed for trial at any one time. This factor when

coupled with the appointment of additional judges and the provision of more Courts will lead to further substantial inroads into the now reduced current back-log of cases awaiting trial. As we observed in our earlier Report, merely increasing the number of prepared cases and achieving this in a shorter time span does not in itself reduce the back-log of cases. It merely transfers the point of delay to the point of listing unless there is available an adequate number of judges and courtrooms to cater for the increased output of cases.

However, the creation of the Directorate of Public Prosecutions to take effect from June of this year and the Government's announced intention to create additional judges and courtrooms is most encouraging. Both such steps are recognised by us as major attempts to eliminate the back-log of persons awaiting trial in the County Court. The fact that they occur at a time when the implementation of the other measures recommended by this Committee has resulted in the lowest number of persons awaiting trial since 1977, augurs well for the future.

Depositions

We drew attention in the earlier Report to the fact that the first major delay which occurs in the presentation of an accused for trial resulted from the unacceptable time which was then taken to record the committal proceedings. This position has now been rectified. The Court Reporting Branch no longer bears the responsibility for the typing of all depositions. Independent contractors are now engaged to record the evidence in committal proceedings and are required to produce those depositions within fourteen days of the committal. Our enquiries reveal that they are generally delivered within ten days. The implementation of this procedure has eliminated an average delay of six weeks to three months which hitherto existed before the depositions reached the Crown Law Department. Indeed, in cases of complexity the delay in the past amounted to five or six months.

Our further recommendation that depositions should be distributed by the Director of Criminal Listings has also been implemented. This change in procedure has worked well in that it now ensures that cases are not listed in the

County Court until the accused is possessed of his depositions. This has obviated many of the applications for adjournments. Hitherto, many applications were supported on the basis that the accused was not ready to proceed by reason of not having his depositions, or that he had not had the time available to process a tardy Legal Aid application. The Listing Director does not now list cases for trial in such circumstances.

Police Standing Orders

In our first Report we drew attention to the tendency which had developed whereby at committal proceedings the prosecution only tendered before the Court so much material as it believed would be necessary to obtain the committal of the accused. We pointed out that whilst this had the undoubted advantage of shortening the time taken upon the committal, it caused considerable delay in the ultimate presentation of the accused for trial. Consultations were had with the Chief Commissioner of Police about this problem. He was most co-operative and as a result a Police Standing Order now exists which requires the Informant in any prosecution for an indictable offence to ensure that all relevant material in the possession of the police which was not led at the committal proceedings should be in the hands of the Office of the Director of Public Prosecutions within fourteen days of the date of committal. The adoption of this course, which is working well, has led to the elimination of a further delay in the trial process.

Pre-Trial Conferences between Accused's Representatives and the Crown

This Committee earlier recognised that one of the major reasons for delay in the County Court was the fact that so many matters listed as trials ultimately resolved themselves as pleas of guilty. Consequently, it recommended as essential that every possible opportunity should be taken to identify as early as possible as many of those who intended pleading guilty as it was possible to identify. We advised that the then existing procedures did little to encourage any meaningful discussions between the parties at an early stage. We recommended the creation of new procedures designed to encourage and facilitate pre-trial discussion between the accused's representative and the Crown before trial. These procedures were implemented and are of value. However, the experience of the last ten months has indicated that the

profession is not taking advantage of them. It was, and remains our view, that these procedures would result in the earlier detection of pleas of guilty once the profession became more readily aware of the availability of the procedure. We recommend that the availability of these procedures should be made more widely known. We recommend that the Law Institute and the Bar Council respectively should again be asked to make their members aware of the availability of the procedures for pre-trial discussion through their established journals or by such other means as they deem proper.

Listing of Criminal Trials

In our first Report we indicated our view that the then method of listing of cases in the County Court at Melbourne was not working satisfactorily and recommended that it should be discontinued. We recommended a "daily" system of listing cases rather than a "monthly" system. We indicated our view that the adoption of such a system would produce more certainty in the lists and much less inconvenience and cost to parties, and less adjourned hearings. We recommended that this new system of listing should commence for a trial period commencing in August of 1982. With the co-operation of the Chief Judge of the County Court and the Director of Criminal Listings this recommendation was implemented as recommended in August of 1982. We are of the view that the new system of listing is working very well and should be continued. There is now much more certainty than before that a trial will proceed on the date upon which it has been listed. This has reduced inconvenience and difficulties for all branches of the profession. In particular, the undesirable practice of bringing cases forward to a date before that on which they were originally listed for trial has been eliminated.

Preparation of Criminal Cases

In our first Report we indicated our view that it is fundamental to the efficient operation of any listing system that there be a prepared pool or reservoir of prepared cases ready for trial at any given time. We pointed out that a major cause in the then delays in presenting people for trial was simply the fact that the Preparation Section was undermanned and many of them inexperienced. It is our view that the creation of the Directorate of Public Prosecutions and the expansion of staff will greatly improve existing procedures

relating to prosecution. We think it pointless to now make any comments on past procedures and refrain from so doing. We have little doubt that the new Directorate with its greatly increased manpower will greatly increase the reservoir of prepared cases ready for trial at any given time. We also anticipate that those prepared trials will be prepared in a much shorter time than hitherto. We will continue to monitor the situation and make any necessary recommendation in our next Report.

Prosecutors for the Queen

We acknowledged in our last Report that the caseload of the County Court moves more efficiently and with greater expedition when permanent Prosecutors for the Queen are engaged to prosecute. Our investigations into the various duties undertaken by the Prosecutors for the Queen indicates that because of inadequate numbers they are unable to regularly supply Prosecutors for prosecutions in the County Court. Indeed, since our last Report the position has worsened. It is now rare for a Prosecutor for the Queen to be allocated to the County Court except in circumstances which might properly be regarded as exceptional. Due to resignations the existing complement of Prosecutors is four in number below their establishment. In our last Report even allowing for resignations, we recommended the appointment of three additional Prosecutors for the Queen. It is also the opinion of this Committee that generally those briefed to prosecute on behalf of the Crown in the County Court are too inexperienced. We are aware that further appointments were not made pending the appointment of the Director of Public Prosecutions. Now that that appointment has taken place we regard it as a matter of urgency that consideration should be given to restoring the Prosecutors for the Queen to their established number and providing for an increase of three.

Sittings of the County Court

We again draw attention to the fact that at the present time the criminal business of the County Court is organised around monthly sittings of the Court. This still has a tendency to preclude the listing of cases of any substance or length toward the end of any particular month, although on occasions special arrangements are made. We are still of the view that the

judicial capacity of the County Court is not being fully utilised. Whilst we still favour the creation of four Terms as recommended in our earlier Report, we nevertheless believe that it is desirable that the Judges of the County Court should be rostered to sit in hearing criminal trials for two calendar months at any given time. This does not at present occur and we believe that the allocation of judges in this manner would permit of much greater flexibility in the listing of trials and result in a more efficient utilisation of judicial manhours.

Consultative Panel or Committee

Our recommendation that such a consultative body should be created with representatives from the groups now represented on this committee has been implemented. It was, and is our view, that constant review of the entire procedures leading to criminal trial in the County Court would prove invaluable in identifying defects in the system and making recommendations for their solution. We permitted a lengthy period of time to elapse so as to better enable us to judge the effects of some of the changes implemented. We recommend that this consultative committee continue to meet at three monthly intervals for the stated purpose.

Criminal Trials Listing Directorate

We are unanimously agreed that there should be appointed an independent listing officer for all criminal trials, both in the County Court and the Supreme Court. Further it is our view that legislation should be enacted to appoint such an officer and that such legislation should define his powers. We propose that that legislation should empower him to list matters for trial after what might be regarded as an unreasonable period of time awaiting trial, has elapsed. We have in mind that in an ideal situation such officer should have the power to list cases for trial of his own motion, after three months from the date of committal has elapsed in cases where the accused is in custody, and after the period of six months has elapsed when the accused is on bail. However, the period of time adopted will have to have regard to the currently existing back-log and the capacity of the Office of the Director of Public Prosecutions to process that backlog at the same time as preparing trials from the new committals, i.e. any legislation creating and giving powers to a listing

functionary should make allowance for a time span to cover the existing back-log of cases. Those statistics indicate that a very large number would be discharged from custody or their recognizance if our proposals were immediately to apply to them. Merely to provide that the Act will apply only to persons committed for trial after the commencement of the Act will be unsatisfactory because the Office of the D.P.P. will at the same time have to be processing the outstanding back-log as well as preparing newly committed cases for trial.

The function of listing criminal trials in the County Court at Melbourne is currently being exercised by a temporary Criminal Trial Listing Directorate. This office which currently exists only for a trial period, has proved to be most successful in the listing of trials. In our view there is little doubt that its efforts have contributed substantially towards the improved position which now pertains. It took over its present function from the Criminal Law Branch of the Crown Solicitor's Office.

We do not think it desirable that the Directorate of Public Prosecutions or the County Court should assume this function. It is our view that it is desirable that the Listing Function should be exercised independently of the parties and the Court. When the Crown Solicitor exercised the function of listing cases for trial the criticism was often made that one party to an action was gaining an advantage by fixing cases to suit itself, and that the Crown was involved in the selection of the trial Judge. It is conceivable that the same criticisms would be made were the Directorate of Public Prosecutions to assume the function. We believe the listing function and the exercise of priorities for trial to be administrative functions and that they should therefore remain separated from judicial functions. The performance of what is essentially an administrative function may tend to compromise Judges in their judicial role or at least have the appearance of so doing. Secondly, the volume of work involved in order to comprehensively cover relevant matters would reduce a Judge's availability for exclusively judicial functions. More importantly, a Judge would be without the freedom to ascertain in an informal administrative manner the genuine likelihood of the case becoming a plea.

We therefore recommend that the concept of an independent Criminal Trial Listing Directorate be continued.

We are all agreed that this function should be exercised by an officer who is independent both of the parties and the court. We are further agreed that he should have the power to list a criminal case for hearing on his own motion where it appears to him after the expiration of a fixed number of months, the case should be ready for trial. He should also be empowered to make searching enquiries of both parties for information which is considered to be relevant to the exercise of his listing function, and confidentiality should attach to the information so received. Indeed, although the Report was not discussed by this Committee the Bar Council representative maintained the Bar view expressed in its Report dated the 23rd December, 1980 that the Listing Director's function and powers should be even more extensive and accord with the recommendations of that Report.

In our view this last recommendation is one which we believe warrants urgent consideration.

We have the honour to submit the above Report.

(Sgd.) L.W. FLANAGAN, Q.C.
For the Committee.
27 June 1983.

APPENDIX VI

This appendix contains a report compiled by a two-person team reviewing the administrative organisation of the Law Department of Victoria.

REPORT OF THE REVIEW OF THE CRIMINAL LAW BRANCH

LAW DEPARTMENT - 10 FEBRUARY 1983

1 INTRODUCTION

1.1 Background

The purpose of this Review has been to assist the Department in determining the most appropriate organizational structure and staffing required for the effective and efficient management of the Criminal Law Branch of the Crown Solicitor's Office: a management structure that can ensure the Branch's role as Solicitor for the Crown in all criminal cases is adequately co-ordinated and controlled as well as efficiently and effectively performed.

To that end the Review Team has formulated an organization structure and staffing proposal at variance with the status quo. In formulating this, the major weaknesses in the current system were identified and ways of overcoming them devised and the major strengths were identified and incorporated. The original ambit of the Review expanded, however, by virtue of the imminent integration of the Branch within the Office of the Director of Public Prosecutions. This required the Review Team to be additionally attuned to those issues common to both Branch and Office. Most certainly, the most important of these was the terms and conditions of the Criminal Law Branch's administrative integration into that Office.

For this reason some of the Recommendations contained later in this Report are not strictly entailed by the Terms of Reference the Review Team were given.

1.2 Terms of Reference and Review Team Membership

Terms of Reference were set and required the Review Team to make recommendations relating to:

1 Examine the appropriateness of the Branch's Objective and current operational strategies; and

2 The adequacy of the Branch's senior management structure and staff;

3 To report on the findings of the Review and an implementation strategy.

The Review Team members were:

Mr. Ross Cummins : (Review Co-ordinator) Manager, Organization Review and Manpower Planning, Law Department.

Ms Katie Lahey : Manager, Organization Branch, Operations Division, Office of the Public Service Board.

The Review Team commenced their Review on January 10, 1983 and interviewed those persons listed in Attachment A to this Report during the course of the Review.

1.3 Conduct of the Review

In addressing its task the Review Team was surprised to learn how well-known some issues associated with the Branch were. One such issue centred on the County Court criminal backlog. It soon became apparent that such issues had been the subject of considerable scrutiny over a period of years. This initial surprise was soon succeeded however by an even greater one: no one Review had ever looked - in organisational terms - at the entire process from apprehension and processing of a person charged with a criminal offence to their subsequent trial and sentencing: from the crime - through the committal - to the preparation -listing -instructing - and finally to the trial. Neither had any Review ever looked in any detail at the workings of the Criminal Law Branch component of that process. It would have been an impossible task in the time available to examine any other parts of this entire process than we did. We do wish to point out however, that we believe that progress in overcoming these problems has been slow, precisely because no review of the entire process has ever been attempted.

The issues involved are inextricably interrelated and demand such an all embracing approach. We also add that by not looking at the issues in their entirety we have found ourselves in a position of either not following problems through to their source (if that source be outside the

Criminal Law Branch in this instance) or of not looking at them at all (if the problem existed entirely outside the Branch.) With these qualifications on our results, we consider our recommendations successfully address the main sources of problems inherent in the Branch. These recommendations will also effectively and efficiently integrate the Criminal Law Branch into the Office of the Director of Public Prosecutions when the time for that integration arrives.

What follows in Chapter Two is an outline of the problems inherent in the current organization and management of the Criminal Law Branch. In Chapter Three the Review Team's proposals for overcoming these problems as well as for integrating the functions of the Branch into the Office of the Director of Public Prosecutions are given.

1.4 Objective of Criminal Law Branch

While the Branch works to a series of objectives which were defined in fairly detailed terms for manpower planning purposes in the last financial year, there is no succinct expression of its objective. After some consideration the Review Team proposes the following for consideration:

> The timely and efficient preparation of all criminal trials and County Court criminal appeals on behalf of the Crown and committals as directed.

2 AN OUTLINE OF THE BRANCH'S MAJOR PROBLEMS

The Criminal Law Branch at the time of the Review had an establishment of 101 positions and was organized into five parts: Circuit, Supreme Court, County Court, Commercial Crime, and Auxiliary, with the residue of a Listing function and a Special Projects Officer completing the Branch. By far the largest part was the County Court preparation area which employed 43 per cent of the Branch's staff (41 positions). The Branch's operational expenditure during 1981/82 was $2,815,000 which represented 4.6 per cent of the Departmental total. Of this 35 per cent was paid as fees to Counsel for Professional assistance.

In examining the structural and operational components of the Branch the Review Team was immediately confronted with the issue of the dimension and cause of the backlog of cases in the County Court preparation area. The Review Team considers that this backlog is not the inevitable product of the Criminal Justice System as was often suggested. The Team's view is that the way the Criminal Law Branch is presently structured contributes to the product to a significant degree.

Certainly, the System at large seems capable of producing what might properly be called "excessive delays", but the problem of backlog - by which we mean where cases are not examined at all for an unacceptably long period - belongs largely to the Branch. Figures prepared by the Branch's management indicate that at December 31, 1982 there were 535 unprepared cases in Melbourne County Court Section and of these 72 per cent (representing 383 cases) had had their committal hearings longer than three months previously. In examining this and other issues four main problem themes emerged.

2.1 Management

Essentially the problem in the Branch is an under-development of the management function. The Officer-in-Charge of the Branch for example, can only spend 30 per cent of his time on managerial or administrative issues. Elsewhere in the Branch little support can be

found. Of the Deputy positions one was vacant and another had a recently appointed transferee in it. The management style is one of responding to problems rather than regular review - no attention being given to looking at systematising the progress of work through the Branch or to co-ordinating an approach to alleviate the backlog of cases. For example, analysis of Personnel Branch records revealed that over the last five years in the section of the Branch with the greatest problems - Melbourne County Court - 52 per cent of Recreation Leave (of at least one week's duration) was taken during the times when the Courts were sitting. Over the last six years the Branch on average employed 12 per cent less staff than it was entitled to. Many of the most promising of its junior staff have been permitted by management to leave the Branch on transfers.

The point was constantly made to the Review Team that a clearer emphasis ought to be made between the Technical Legal work and the Managerial. With the shadow of the imminent integration of the Branch this factor grows in importance.

2.2 The Role of the Preparation Officer

The preparation role is the life-force of the branch. When that force is diminished so, too, are the workings of the Branch; crimes continue to be committed and a backlog of unprepared cases results. That, unchecked is the equation of the backlog in the Criminal Law Branch.

There are two main components in the role of Preparation Officer:

(a) The transformation of Depositions into Presentments and preparation of clerical material for the trial; and

(b) The briefing of Counsel and Instructing in Court.

Figures supplied by Branch Management indicate that during the two month period of a survey (mid September to November 1982) staff of the Melbourne County Court Preparation Section spent only 44 per cent of their time in the preparation of cases for trial and 21 per cent instructing in Court. These figures confirm the percentages inherent in

Appendix "A" of the Report of the Flanagan Committee (that examined the disposal date of Criminal Cases in the County Court at Melbourne 1982) where 46 per cent of time was spent in preparation and 37 per cent in instruction. It is the Review Team's firm contention that it is necessary to separate and distinguish these roles if the problem of the backlog is to be successfully addressed.

While it is understood that the instructing role is a boost to otherwise flagging staff morale, such a practice robs the Branch of its very life-force. With only the time available between court appearances, Preparation Officers naturally favour the cases that are quick and easy to prepare. The more difficult and complex cases are put aside for later. It is, for this reason the Branch's backlog is unrepresentative of the normal work to flow through the Section - it is strongly biased towards the hard and complex cases.

Preparation staff absences in court were of concern nine years ago when P.A. Management Consultants said of them ... "when sufficient resources are available each officer responsible for preparing a particular case should instruct in court when that case is heard" (Recommendation 3.3.2; emphasis by Review Team). Since that time when this concern was first expressed the average length of trials have increased 82 per cent in the Supreme Court (to an average of 8.2 days per trial) and 66 per cent (or 4.5 days per trial) in the County Court.

In the opinion of the Review Team, given the Branch's present circumstances it is unacceptable that only 44 per cent of the preparation staff at any given time are actually preparing cases. We estimate that about one-third of preparation time is consumed by the routine clerical component, which effectively reduces the preparation component of preparation work currently undertaken in the Branch to nearer 30 per cent; even then it is often of the easiest of the cases.

2.3 Organization and Classification of Preparation Teams

Two major problems derive from the current structures - the first is that by virtue of the size of each Team - ten members each - (and the volume of work that exists within the Branch) - the Teams do not operate at all as Teams. They in fact operate as loosely co-ordinated groups of individuals arbitrarily grouped together. Certainly no evidence of a team approach was apparent. We consider the use of the word "Team" to be a highly misleading description of the present organisation of preparation officers. Some recent attempts to overcome this - at least with respect to locating Stenographers in each Team - were rejected by the Management of the Branch.

The second problem has to do with the classification and hierarchical arrangement of the Teams. Far from a structure that permits the retention and reward of the better staff, it in fact ensures their early and inevitable departure to other parts of the Public Service. Morale is very low; recognition, opportunity and reward for skill and application almost non-existent.

The Review Team considered that the present system of dual classification of positions in the Administrative Officer/Legal Officer categories works satisfactorily and needs no amendment.

2.4 Supervision

The supervisory function within the Branch - particularly in the County Court preparations area - is in a similar state of under-development as the management function. Little authority exists in the Team Leader positions. They are further weakened by the volume of work they are expected to handle. It is essential that supervisory positions have relatively light workloads to enable an effective level of oversight to be established. Furthermore, supervisors ought to be equipped with skills in addition to those of advanced technical competency in the particular field of work. Neither training nor development is given to encourage the development of such skills in the Branch.

2.5 Other - Accommodation; Equipment and Facilities; Staff Morale

Under this heading may be grouped various related but lesser problems. Firstly, it must be said that the present standard of accommodation, fittings and equipment supplied to most members of the Branch is entirely inadequate and inappropriate. The Review Team understands that with the integration into the Office of Director of Public Prosecutions better accommodation will be forthcoming. We totally endorse this and consider, together with the other changes we propose later in this Review, Branch morale will considerably improve. Morale at this point in time is particularly low however. The surveys referred to above (at 2.2) revealed absenteeism rates of 10 per cent and 12 per cent respectively.

Facilities and equipment are virtually non-existent in the Office as are training and development programmes.

3 OUTLINE OF THE PROPOSED NEW STRUCTURE

The proposed organizational structure is designed to address the major problems outlined in Chapter 2 of this Report. It aims principally to enhance the Branch's management structure and streamline the preparation of cases. The classification levels are tentative at this stage and based on a combination of an assessment of the possible work value of the positions and the need to place the current officers in the new structure and capitalise upon their expertise.

General Manager

We propose the introduction of a General Manager which would relieve the Director of Public Prosecutions of the day-to-day management of the Office and would have responsibilities for: -

- Co-ordination of all activities in the office;
- Monitoring the performance of all Sections within the Criminal Law Branch against agreed programmes and targets;
- Determining priorities and long-term planning for the Office in conjunction with the Director of Public Prosecutions;
- Liaison with the Law Department;
- Provision of managerial services to the Office.

We consider the priorities of the General Manager should focus on co-ordinating the activities of the Office and strengthening work scheduling to eliminate the backlog of cases.

Policy and Review Branch

The Policy and Review Branch would be a small Branch established to advise the Director of Public Prosecutions and the General Manager on policy matters and provide a planning focus for the Office.

The Branch would also have the capacity to conduct legal research. This Branch will participate in the proposed review (Recommendation 17) of the wider issues which impact upon effectiveness of the Office's activities.

Administration Branch

We have recommended that the administrative function in the Office be strengthened and that an Administration Branch be established to provide a general servicing role to the rest of the office in such areas as Personnel, Accounts and E.D.P. We consider that there is great scope for the introduction of a computerised statistical information bank and work control system. This Branch would be responsible for budgetary control and for the provision and maintenance of equipment and facilities and security.

Solicitors Branch

The primary responsibility of this Branch will be the timely preparation of all criminal cases. We propose it be split into three main Branches - Commercial Crime, County Court and finally Supreme Court and Circuit, each headed by a Manager. The Solicitor will be responsible for monitoring the preparation of all cases and assisting in the development and implementation of appropriate work control systems. In addition, the Solicitor would be available to provide legal advice to the Director of Public Prosecutions. Of course while in organisational terms the Solicitor reports to the General Manager, as set out on the

Organisational Chart, he will report direct to the Director of Public Prosecutions on all technical legal matters.

(i) Commercial Crime Group

We propose that two additional positions be placed in this Group and that expertise in computers be recruited into the Group and developed in the current staff by appropriate training.

(ii) County Court Preparation

The organizational changes proposed for this Group are designed to streamline the preparation of cases and provide adequate resources to eliminate backlogs and facilitate the introduction of work control systems.

The Manager will be responsible for the co-ordination of case preparation and monitoring workloads in the teams.

We propose that the teams be reorganised into eight small teams with a greater range of classification levels which would, we consider: -

- Allow for more integrated work groups;

- Permit specialisation in cases and the development of expertise;

- Allow rotation, as officers become more experienced, to teams handling more complex cases;

- Provide an enhanced career structure and thereby assist in the retention of staff and improving staff morale;

- Facilitate on-the-job training of Instructing Officers by experienced Preparation Officers.

Each team would be provided with a Clerical Assistant, who would be available to undertake much of the routine paper processing which is

currently performed by experienced Preparation Officers. Each team would also have access to the services of a Stenographer.

In the initial stages until the current backlog is eliminated we would envisage that experienced Preparation Officers would not be involved in instructing except in the most complex cases.

(iii) Supreme and Circuit Court

We do not propose any organizational changes to this Branch, as it appears to be operating at a high level with no discernable backlogs.

4 IMPLEMENTATION STRATEGY

Mindful of the number of its Recommendations, of their inter-relatedness and - in at least three instances - of the request for further examination of the problems of the Branch, the Review Team believes it desirable to outline how it considers the Recommendations of this Report might most profitably be implemented. An important factor borne in mind in formulating this strategy was the date when staff of the Criminal Law Branch are expected to be transferred to the Office of the Director of Public Prosecutions - we understand this will be May 1983. Our suggestions for implementing these recommendations may be divided into three phases: the First Phase suggests immediate implementation; the Second Phase implementation within two months, and the Third Phase implementation subsequent to the commencement of operationss of the Office of the Director of Public Prosecutions.

To commence the First Phase we recommend that copies of this Report be circulated to the Crown Solicitor and the Director of Public Prosecutions for comment. After consideration of that comment and incorporation of suggestions where appropriate the Acting Secretary to the Law Department endorses the Report and commences the process of implementing its recommendations. It is appropriate that a copy be sent to the Public Service Board at this stage since its co-operation and approval is essential to implement many of the changes necessary. We believe also that copies of the Report - together with departmental endorsement - should be distributed to those persons interviewed in the course of this Review.

The three senior positions that will integrate the Branch into the Office must be created at this early stage. Accordingly we recommend the immediate creation of the positions of General Manager, Manager Administration and Manager Policy and Review as well as the three Team Co-ordinator positions. All six positions should properly be established by the time the Branch's staff transfer to the Office. Finally, we believe two of the additional Reviews - those into the

Training and Development Needs, as well as into the Office's Equipment and Facilities Needs - ought to be undertaken immediately.

Phase Two should commence with the restructure of the County Court Preparation Teams into eight new Teams, with their specialization with respect to the nature of the work they undertake, and with the redefinition of the role of the Preparation Officer. The position of the Officer-in-Charge Criminal Law Branch should be redesignated to that of Solicitor to the Director of Public Prosecutions and its duties amended accordingly. The two additional Preparation Officer positions in the Commercial Crime Group ought to be created. Finally the progressive examination of the classifications of the restructured Team positions should commence.

The Final Phase for implementing the Review Team's recommendations ought to commence subsequent to the transfer of Branch staff to the Office. At that point the Review into the wider issues impacting upon the effective operations of the Office and its preparation of cases for trial ought to commence. Finally, the results of the two Reviews commenced in Phase Two ought to be implemented.

5. SUMMARY OF RECOMMENDATIONS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

The Review Team recommends:

1 That the Organization Chart attached to this Report (which diagrammatically represents the proposed reorganization and integration with the Office of the Director of Public Prosecutions) be accepted and progressively implemented by the Department.

2 That a position of General Manager, Office of the Director of Public Prosecutions be created, to manage and co-ordinate the day to day operations of the Office; that the position be created at S.E.S Level 3 and in addition be responsible, under direction, for assisting the Director of Public Prosecutions in determining Office priorities and for liaison with the Law Department generally.

3 That the present position of Officer-in-Charge, Criminal Law Branch be redesignated that of Solicitor to the Director of Public Prosecutions; that the position remain classified at First Division Level 1 and be responsible, under the direction of the Director, for the technical oversight of the preparation of all cases for trial, as well as of advising the Director on legal issues as required.

4 That the position of Manager, Administration be created at the level of Administrative Officer Class A and be responsible, under the direction of the General Manager, for the management of the Office's E.D.P. and information systems (including the present Depositions and Records Sections), for its Administrative Services including Personnel matters and Finances, and for its security generally.

5 That the position of Manager, Policy and Review be created at the level of Legal Officer, Grade 6 and be responsible, under the

direction of the General Manager, for the management of the Office's research and policy development, and for conducting its effectiveness review.

MELBOURNE COUNTY COURT PREPARATION BRANCH

6 The present system of four Preparation Teams to be discontinued and the positions reassembled to form a new system consisting of eight Teams.

7 That each Team be headed by a position of Team Leader and have five other positions within it - all but one of which (including the Leaders) may be of either Administrative or Legal Officer classification. The sixth position is to be that of Clerical Assistant. We recommend the creation of eight such Clerical Assistant positions, one to be assigned per team as well as the assigning of five positions of Stenographer between the teams from elsewhere in the Office.

8 That three positions of Team Co-ordinator be created to strengthen Team supervision and performance as well as to systematise the allocation and monitoring of case progress and to generally assist in the preparation of the most complex cases.

9 That the work of each Team be specialized so as to increase Branch expertise and the rapid and smooth progress of cases; that three Teams be assigned the most complex and difficult cases, others the priority cases and the remaining Teams work of a less demanding nature.

10 That Team Leaders and members - as part of an integrated training and developmental programme for Branch staff (see Recommendation 20 below) - be progressively rotated between Teams to broaden their expertise and increase the diversity and depth of skills available in each Team.

11 That the role of Preparation Officer be redefined to emphasise and ensure maximum and continuous preparation of cases is undertaken through divesting such Officers of all clerical work and - in all but the most demanding of cases - the responsibility for instructing in Court as well.

12 That the classification of positions in the reconstituted Teams be progressively revised to accord with the classifications outlined in the Organization Chart attached to this Report.

13 That the Duties of individual Team positions be generally designated as follows:

Team Leader

- co-ordinate the day to day acitivities of the Team;
- supervise and advise on the standard of case preparations;
- monitor the progress of the Team's work;
- assist in the preparation of the more complex cases.

Senior Team Members (2 positions)

- prepare the most complex cases;
- in exceptional instances instruct in Court in complex cases, otherwise - when necessary - attend only at the launching of cases.

Junior Team Members (2 positions)

- Preparation Officer
  - prepare cases of lesser complexity;
  - instruct in those cases when necessitated by the unavailability of the Instructing Officer.

- Instructing/Preparation Officer
  - instruct in Court in all but the most complex of the Team's cases;

- prepare and assist in the preparation of cases as time permits;
- keep abreast of all Team preparations.

Clerical Assistant

- under the supervision of the Team Leader undertake all routine clerical work for Team members.

Stenographer

- under the general supervision of two Team Leaders undertake all stenographic and typing duties of the Teams as required.

CORPORATE CRIME GROUP

14 That two additional positions of Preparation Officer be created in the Corporate Crime Branch and that one of these positions require an extensive knowledge of Computers.

15 That a closer working relationship between the Branch's staff and Investigation Officers of the Corporate Affairs Office be established through involving both in the preparation of cases at the earliest possible point; and through seconding of Investigation Officers to the Branch as required.

MISCELLANEA

16 That arrangements be made immediately to relocate the staff of the Criminal Law Branch to office accommodation both more suitable and of a standard more appropriate to the effective and efficient discharge of their duties.

17 That a further Review be conducted into the wider issues that impact upon the effective operation of the Branch (and subsequently upon the Office) and the preparation of cases for trial; that this be undertaken by the same Review Team and be

conducted after the transfer of the staff of the Branch to the Office.

18 That a separate Review be undertaken (to that of Recommendation 17 above) to examine the Office's needs for facilities and equipment, such as word processor machines, an E.D.P. facility, cassette players and the like.

19 That the Management of the Branch (and subsequently of the Office) reconsider the current policy of permitting staff to take their recreation leave at any point during the year irrespective of the Office's backlog of incomplete or outstanding cases.

20 That a review of the Office's training and development needs be undertaken by a joint Departmental-Public Service Board Review Team; that they be requested to devise a programme for that training and development and to ensure its implementation.

21 That all persons interviewed in the course of this Review be given a copy of this Report.

PERSONS INTERVIEWED IN THE COURSE OF THE REVIEW

1 Acting Secretary to the Law Department, Mr. P. Carrigan

2 Crown Solicitor, Mr. D. Yeaman

3 Crown Counsel, Mr. L. Flanagan, Q.C.

4 Director, Division of Court Administration, Law Department, Col. J. Murphy, M.C.

5 Director, Personnel, Law Department, Mrs. S. Gilbert

6 Immediate past Director of the Criminal Trial Listing Directorate, Mr. V. Stafford

7 Acting Officer-in-Charge, Criminal Trial Listing Directorate, Mr. B. Bateman

8 Officer-in-Charge, Criminal Law Branch, Mr. J. Buckley

9 Deputy Officer-in-Charge, Criminal Law Branch, Mr. B. Horigan

10 Officer-in-Charge Supreme Court, Crime Section, Criminal Law Branch, Mr. B. McKenna

11 Team Leader, Team 4, County Court Preparation Section, Ms. J. Crowe

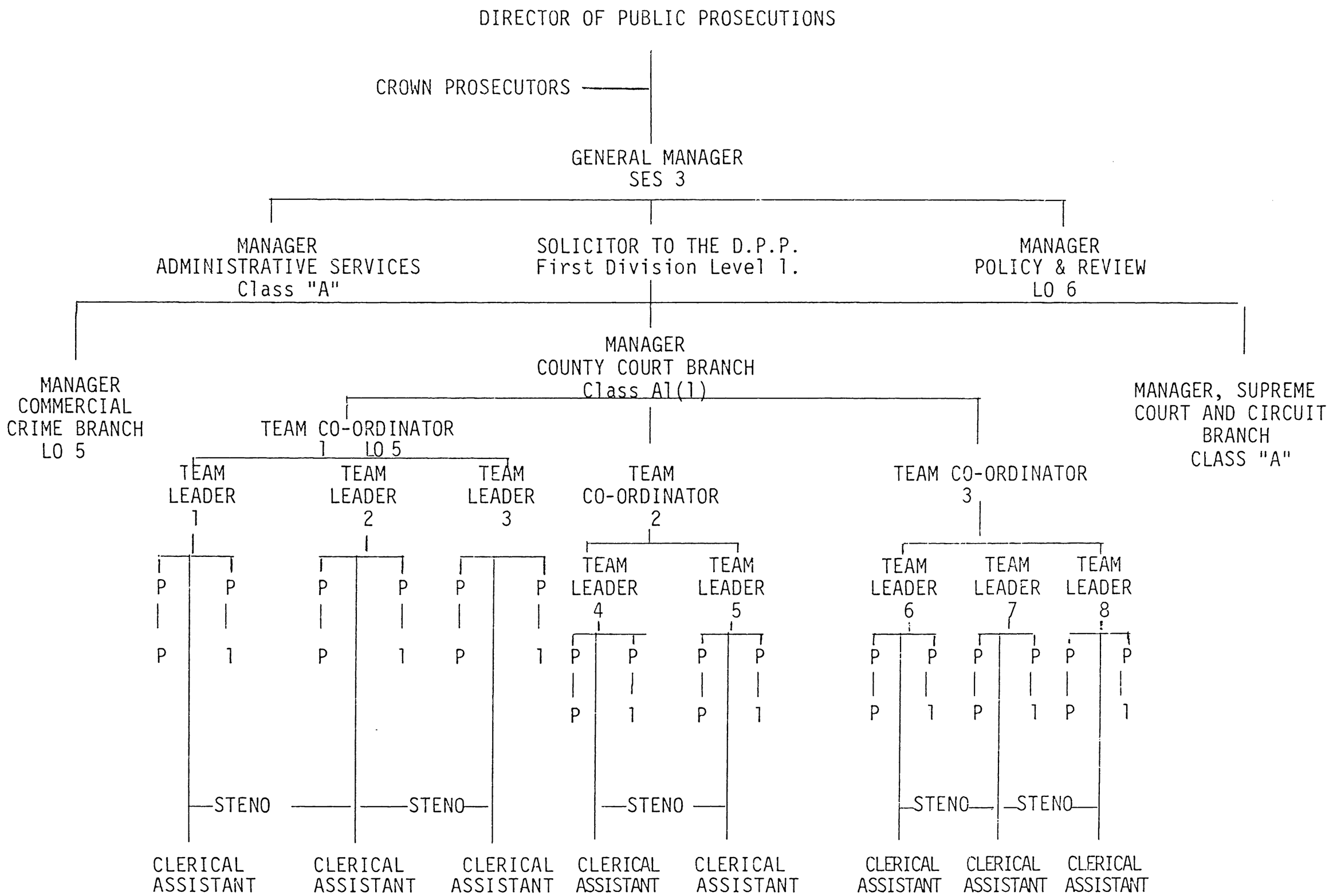
12 Officer-in-Charge Circuit Section, Criminal Law Branch, Mr. K. Anderson

13 Officer-in-Charge Supreme Court Preparations, Mr. B. Reilly

14 Officer-in-Charge Commercial Crime Group, Ms. J. Parsons

15 Preparation and Instructing Officers, Team 3, Mr. M. Hannan and Mr. L. Kelly

16 Preparation and Instructing Officer, Team 4, Mr. G. Goldhar


DIRECTOR OF PUBLIC PROSECUTIONS
CROWN PROSECUTORS
GENERAL MANAGER
SES 3
MANAGER
ADMINISTRATIVE SERVICES
Class "A"
SOLICITOR TO THE D.P.P.
First Division Level 1.
MANAGER
POLICY & REVIEW
LO 6
MANAGER
COMMERCIAL
CRIME BRANCH
LO 5
MANAGER
COUNTY COURT BRANCH
Class A1(1)
MANAGER, SUPREME
COURT AND CIRCUIT
BRANCH
CLASS "A"
TEAM CO-ORDINATOR
1 LO 5
TEAM
LEADER
1
TEAM
LEADER
2
TEAM
LEADER
3
TEAM
CO-ORDINATOR
2
TEAM
LEADER
4
TEAM
LEADER
5
TEAM CO-ORDINATOR
3
TEAM
LEADER
6
TEAM
LEADER
7
TEAM
LEADER
8
P
1
STENO
CLERICAL
ASSISTANT

APPENDIX VII

This appendix contains draft proposals for a Criminal Proceedings Bill 1982, which was prepared and circulated by the Law Department of Victoria, but not introduced into the Parliament.

PART III.—CRIMINAL TRIALS LISTING OFFICER

Listing officer.

8 (1) A criminal trials listing officer shall be appointed and may be removed by the Governor in Council.

(2) Subject to the *Public Service Act* 1974 there shall be appointed such deputy criminal trials listing officers as are required for the purposes of this Act.

(3) The listing officer shall—

(*a*) be entitled to such remuneration as is from time to time fixed by the order of the Governor in Council; and

(*b*) not be subject to the *Public Service Act* 1974.

Duties of listing officer.

9. (1) The listing officer shall be responsible for—

(*a*) the preparation in accordance with this Act of lists of trials of indictable offences to be heard in the Supreme and County Courts; and

(*b*) taking such other steps as he is authorized or required to take under this or any other enactment.

(2) (*a*) The listing officer shall at least once in every year and not later than the thirtieth day of September in each year make a report to the Attorney-General on all matters affecting the administration of his duties under this Act and on such other matters as he may be required to report on by the Attorney-General;

(*b*) Every such report shall be laid before both Houses of Parliament as soon as is practicable after the making thereof.

Power of listing officer to fix dates of trials of indictable offences.

10. (1) Subject to this Act, the listing officer shall determine the order in which trials for indictable offences shall be held in the Supreme Court and County Court and shall fix a date for each such trial.

(2) Subject to any order which may be made pursuant to section 359 or section 360 of the *Crimes Act* 1958 and subject also to sections 12 and 13 of this Act, every such trial shall be held upon the date fixed for it by the listing officer or as soon thereafter as is practicable.

(3) The listing officer may at any time vary the order in which he has determined that trials for indictable offences shall be held under sub-section (1) and may also at any time vary any date which he has fixed for the holding of a trial under that sub-section.

(4) Where a trial is not commenced on the date which has been fixed for it under sub-section (1), the listing officer may fix another date for that trial to be held.

Manner of fixing dates.

11. (1) Where a person has been directed to be tried for an indictable offence by a justice or justices of the Magistrates' Court under Part V. of the *Magistrates (Summary Proceedings) Act* 1975 or by a finding at a Coroner's inquest pursuant to section 16 of the *Coroner's Act* 1958, the clerk of the Magistrates' Court at which such direction was given or the clerk in attendance at the inquest at which such finding was made (as the case may be) shall furnish or cause to be furnished to the listing officer the following information in writing where it is available:

(*a*) The particulars of the offence or offences charged;

(*b*) The nature of any plea made by the person;

(*c*) Whether the person has been committed to prison or admitted to bail awaiting trial;

(*d*) The particulars of any bail undertakings and recognizances sworn, taken or acknowledged in the case;

(*e*) The date of the direction or finding.

(2) In all other cases where a person has been given a notice of trial or notice of intention to prefer a presentment in respect of an indictable offence or against whom a true bill in respect of an indictable offence has been found by a grand jury constituted under section 354 of the *Crimes Act* 1958, the Crown Solicitor shall furnish or cause to be furnished to the listing officer the following information in writing where it is available:

(*a*) The particulars of the offence or offences charged;

(*b*) Whether the person has been committed to prison or admitted to bail awaiting trial;

(*c*) The date on which the notice of trial or notice of intention to prefer a presentment was given on or which the true bill was found.

(3) Where the Crown Solicitor considers that the Crown case against an accused person is ready to proceed to trial, he shall give or shall cause to be given notice in writing of this to the listing officer and shall, in addition, so far as is practicable, furnish or cause to be furnished to the listing officer the following particulars:

(*a*) The offence or offences likely to be charged in any of the counts in the presentment to be made against the accused person;

(*b*) Whether it is intended to make presentment in the Supreme Court or County Court;

(*c*) An estimate of the time likely to be needed to present the Crown case;

(*d*) The place in which it is intended to make presentment;

(*e*) The date or dates for commencing the trial which would be convenient to the Crown and its witnesses;

(*f*) Any other information which, in the opinion of the Crown Solicitor, is material to the fixing of a date for the holding of the trial.

(4) At the time of giving notice under sub-section (3), the Crown Solicitor shall also give or cause to be given to the accused person a copy of such notice together with a copy of any particulars furnished to the listing officer under paragraphs (*a*), (*b*), (*d*) and (*e*) of sub-section (2) by forwarding the same by ordinary pre-paid post to the last known address of the accused person or to the legal representative of the accused person.

(5) When he has received the notice and particulars referred to in sub-section (3), the listing officer may make such further inquiries as he considers to be relevant of the Crown Solicitor and may also make such inquiries as he considers to be relevant of the accused person or the legal representative of the accused person.

(6) The listing officer may also at any time receive any written or verbal representations made to him by the Crown Solicitor or by or on behalf of the accused person as to matters which are relevant to the ordering of trials and fixing of dates under section 10.

(7) The listing officer shall not make any determination as to the order in which a trial is to be heard or fix any date for the hearing of such a trial under sub-section (1) of section 10 until he has received a notice in relation to that trial under sub-section (3).

(8) In determining the order in which a trial is to be heard or in fixing any date for the hearing of a trial under section 10, the listing officer shall—

(*a*) accord priority to trials in which the offences charged are offences under section 45 of the *Crimes Act* 1958; and

(*b*) have regard to all relevant matters, including the following:

(i) Whether the accused person has been committed to prison or has been admitted to bail;

(ii) Any circumstances of special urgency or importance;

(iii) The length of time which has elapsed since the date on which the accused person was directed to be tried or was given a notice of trial or notice of intention to prefer a presentment;

(iv) the number of judges available to preside over trials during the period for which the listing officer is fixing dates for trial;

(v) The availability of witnesses for the Crown or for the accused person;

Listing by the listing officer of his own motion.

12. (1) Where—

(*a*) the listing officer has not received a notice under sub-section (3) of section 11 in relation to an accused person; and

(*b*) such accused person has been held in prison in respect of the offence or offences for which he was directed to be tried or for which he was given a notice of trial or notice of intention to prefer a presentment or for which a true bill was found for an aggregate period of six months from the date on which such direction or notice was given or on which such bill was found; or

(*c*) such accused person has been on bail or on bail and in prison in respect of the offence or offences for which he was directed to be tried or was given a notice of trial or a notice of intention to prefer a presentment or for which a true bill was found for a period of twelve months from the date on which such direction or notice was given on or which such bill was found—

the listing officer may at any time fix a date for the accused person to be brought or to appear before the Supreme Court or County Court and shall give notice of this in writing to the Crown Solicitor and accused person.

(2) Where an accused person has, on different dates, been directed to stand trial for different indictable offences or has received notices of trial or notices of intention to prefer a presentment in respect of different indictable offences, the relevant periods under sub-section (1) shall only begin to run from the date of the last direction or notice.

(3) Where an accused person is in prison and the listing officer fixes a date under sub-section (1) for such person to be brought before the Supreme or County Court, the listing officer shall give notice of this to the officer in charge of the prison and upon receipt of such notice that officer shall cause the accused person to be removed to the court and such removal shall not be deemed an escape and no proceedings either criminal or civil shall be maintained by such accused person or any other person against any prison officer or member of the police force or against any other person by reason of any such removal.

(4) Where a notice has been given under sub-section (1), the accused person shall appear before the court on the date specified in such notice or, in the case of an accused person who is in prison, shall be brought before the court on that date by the officer in charge of the said prison and the court may make such of the following orders as it deems appropriate:

(*a*) Re-commit the accused person to prison;

(*b*) Discharge the accused person from prison or release him on bail subject to such conditions, undertakings or sureties as it thinks fit;

(*c*) Continue the accused person in his bail or discharge him from such bail; and

(*d*) Such other orders as to the continuance or otherwise of any recognizance or undertaking given in connexion with the commitment or remand of the accused person by any surety or sureties for him or by any person bound to attend as a witness or for the purpose of producing documents.

(5) Sub-section (4) does not apply in relation to an accused person where, before a date fixed in accordance with sub-section (1), the listing officer receives a notice under sub-section (3) of section 11 in relation to that person.

Application for discharge from prison bail.

13. (1) Where—

(*a*) a period exceeding 24 months has elapsed from the date on which an accused person was directed to be tried or the date on which he received a notice of trial or notice of intention to prefer a presentment;

(*b*) the listing officer has not received a notice in relation to that person under sub-section (3) of section 11; and

(*c*) that person in is prison or on bail—

a judge of the Supreme Court or County Court shall, on application made by or on behalf of that person, unless cause be shown by Her Majesty, order that such person be discharged from prison or from his bail.

(2) An accused person shall give not less than seven days' notice in writing to the Crown Solicitor and the listing officer of an intended application under sub-section (1).

(3) For the purposes of sub-section (2) the address of the Crown Solicitor is 239 William Street, Melbourne or such other address as is for the time being prescribed for the purposes of this section and the address of the listing officer is such address as is for the time being prescribed for the purposes of this section.

(4) Where an application is made by an accused person under sub-section (1), upon cause shown on behalf of Her Majesty the court may, if the accused person is in prison, admit him to bail, or, if the accused person is on bail, refused to discharge him from such bail.

(5) An accused person may be admitted to bail under sub-section (2), notwithstanding any contrary provision of the *Bail Act* 1977.

(6) Where a court makes any order pursuant to this section, it may make such other orders as to recognizances, undertakings, sureties or witnesses as it considers necessary.

Power to make presentments unaffected.

14. Nothing in this Act shall prevent the making of a presentment at the Supreme Court or County Court of any person for any indictable offence cognizable by such courts respectively at any time by Her Majesty's Attorney-General or Solicitor General for Victoria or any Prosecutor for the Queen in the name of a law officer.

Re-arrest of accused person after discharge.

15. Where an accused person is discharged from prison or from bail under section 12 or 13, he may not lawfully by arrested and taken into custody in respect of the same offence or offences of which he was formerly charged unless a presentment has been made in the appropriate court.

Transitional.

16. (1)—

(*a*) In the case of an accused person who is in prison at the date of coming into operation of section 12 a court shall not make any orders under section 12 until such person has been in prison for an aggregate period of six months from the date of coming into operation of section 12;

(*b*) In the case of an accused person who is not in prison at the date of coming into operation of section 12 a court shall not make any orders under section 12 until a period in excess of twelve months has expired from the date of coming into operation of section 12;

(2) A court shall not make any orders under section 13 until a period in excess of six months has expired from the date of coming into operation of section 13.

(3) Where, prior to the coming into operation of section 10 or 11, the Crown Solicitor has, in accordance with section 29 (1) of the *Bail Act* 1977, given notice to an accused person and to any surety or sureties of the day time and place fixed for the trial of such person, such notice shall have the same force and effect after the date of coming into operation of section 10 or 11 as it did immediately before such date.

Regulations

17. The Governor in Council may make regulations for or with respect to—

(*a*) the procedures to be followed by the listing officer in determining the order in which trials for indictable offences shall be heard in the Supreme Court and County Court and in fixing dates for such trials; and

(*b*) generally any matter or thing which is required or authorized to be prescribed for carrying this Act into effect.

APPENDIX VIII

This appendix contains a report compiled by a three-person team reviewing the administrative support for the Victorian courts.

REPORT OF THE REVIEW OF THE SENIOR MANAGEMENT STRUCTURE AND STAFFING IN THE DIVISION OF COURT ADMINISTRATION STATE LAW DEPARTMENT

31.12.1982

SUMMARY OF CONTENTS

1 INTRODUCTION

1.1 Background

The purpose of this Review has been to assist the Department in determining the most appropriate organisational structure and staffing required for the effective and efficient managemet of the Division of Court Administration: a management structure that can ensure administrative services and non-judicial functions are adequately co-ordinated and controlled, and that encourages forward planning and adaptation to a changing environment.

To that end, the Review Team has formulated an organisation structure and staffing proposal considerably at variance with the status quo. In formulating this proposal the major weaknesses in the current system were identified and ways of overcoming them devised; the major strengths were identified and incorporated; and further components were considered - as either directed or as became necessary - and either incorporated or rejected as appropriate.

The need for a review of this type was acknowledged by all concerned with its conduct and progress. From the outset on August 31, the Review Team received the thorough co-operation of all concerned. Particular mention may be made of Col. John Murphy who -as Director of the Division under review - gave his utmost co-operation to facilitate its conduct.

Numerous previous attempts were made to improve facets of the processes of the Courts, including increasing the number of Magistrates, Crown Prosecutors, real expenditure on Court Reporting etc. This review's antecedents are two other reviews: one conducted in 1975 by P.A. Management Consultants, the second in 1979 by the Public Service Board. A principle issue in both was the role and responsibilities assigned to the position of Director of Court Administration. While the former review first gave rise to

the position it did so only within narrow responsibilities. These responsibilities were subsequently very considerably expanded by the second view and presently cover full executive and management control over the Division. The latter review also recommended the Director's position be brought under the Public Service Act. The starting point for this present review therefore, was at the time that the previous review's recommendations - or at least those that concern us here - were accepted by the Department and "implemented".

One of the basic and recurrent issues to arise during the conduct of this latest review derives from this time. The question put simply is this -why haven't the actual role and responsibilities of the Director of Court Administration expanded as was intended and envisaged by acceptance and "implementation" of the P.S.B. recommendations? Effectively the position still operates in its pre-1979 form, notwithstanding acceptance and "implementation" of the changes recommended.

1.2 Terms of Reference and Review Team Membership

Terms of reference were set and required the Review Team to make recommendations relating to:

1. The role and functions of the Court Administration Division, including an examination of objectives, programmes and priorities.

2. The most appropriate senior management structure for the Division.

3. Management information systems required for the effective operation of the Division.

4. Implementation strategy.

As mentioned the Review Team were from time to time instructed to examine additional issues by individual Steering Committee members. Amongst these issues can be listed: a Departmental request of the Public Service Board for authority to authorise Clerk of Court secondments at Departmental discretion; the viability of Area Management for the Division; the viability of inclusion in the Court Division of the Law Department the administrative support for some Tribunals and Boards of Review which exercise judicial and quasi-judicial powers outside the Department.

The Review Team members were:

Mr. Ross CUMMINS : (Review Co-ordinator) Manager, Organization Review and Manpower Planning.

Mr. Michael QUIRK : Clerk of the Magistrates' Court, Melbourne.

Mr. Denis HALL : Senior Legal Officer, attached to the Division of Policy and Research.

The Review Team had the benefit of consultation with and advice from a Steering Committee. The Steering Committee comprised:

Mr. B.J. LEONARD : (Committee Chairman) Acting Deputy Secretary.

Col. J. MURPHY : Director, Division of Court Administration.

Mrs. S. GILBERT : Director of Personnel.

1.3 Methodology Employed

The objective of any methodology is to - through conscious regularity of approach - analyse and evaluate with a view to better understanding and control. The test of its worth is ultimately if it tells you the truth and results in identifiable improvement in organisation performance. Since the Division under review forms a part of the Law Department any evaluation and recommendation for change has been taken with this wider ramification in mind.

Of the methodology used in the conduct of this Review something needs to be said. Ultimately no review can be considered a success and therefore of value unless it results in beneficial change. This Review has been conducted from the outset with this foremost in mind: We have sought the most appropriate "solution" to the problems of the Division rather than an ideal or academic "answer" to them.

Part of the strategy followed emphasised personal consultations with Divisional staff and the major User Groups in order to determine their informed perceptions and to also involve them in the process of change. A list of those persons interviewed in the course of this Review is attached at the end of the Report. We consider that process of change commenced with the review itself through raising expectations, through systematic reversal of resistance and the progressive synthesis of the Division's own proposals where appropriate.

The methodology can best be explained through a medical analogy. A doctor diagnoses on the basis of symptoms, but administers treatment against causes. If he doesn't treat causes the symptoms merely subside only to reappear subsequently. In the same way the Review Team thoroughly evaluated all opinions and submissions it received so as to be certain of the symptoms it had to deal with and then systematically traced them to their source or cause.

The systematic interplay of these components shaped and guided our approach to this Review. Beneficial change directed at the underlying causes of the Division's problems was our objective.

In the following two chapters the workings of this method are revealed. The next Chapter is purely descriptive of the symptoms as we saw them. The Third Chapter evaluates them and outlines their causes.

2 "SYMPTOM" IDENTIFICATION

The Division of Court Administration as it presently exists has an establishment of 937 positions, with 878 persons actually employed against those positions as at the date of this Report. It has a total vote expenditure this financial year of $32.64 million which represents approximately 44.7% of the Law Department's vote. It is composed of a variety of operational units which are physically located in a wide variety of locations around both City and State. Very few of its officers would be able to name its component parts and how they fit together. No charts exist to represent or describe the Division.

The surface manifestations of problems in the Division's management structure and staffing were not difficult to identify. Persons interviewed in the course of the review were only too willing to avail themselves of this opportunity but were sceptical that real change would result or that they would be consulted again in the event of it affecting them. This was a point of view the Review Team was at pains to answer and believes - as an act of faith to those persons - that this Report, after it has been duly considered by the Department, ought to be distributed to them.

As a point of view however there seems to be some foundation to it in the Division. The picture to emerge is of uncertainty as to the lines of authority and communication, of fragmentation and displacement of resources and of an inadequate level of management and decision making capacity. Few of the Branch Heads in the Division could nominate the Director as their boss when we asked them; even fewer operated in a way to confirm it. The Division is characterised by fragmentation and uncoordinated parts such as is evidenced by the more than 200 reporting points in the Courts area alone. There exist no management positions other than the Director's, and this is - with the exception of a Secretarial position - completely unserviced and unsupportd by other positions.

In these circumstances it is not surprising there is a lack of a clear role and responsibility definition within the Division and of a clear and certain relationship with the Department and its senior management. To many Divisional members it is that senior management that is the real management of the Division and in many respects this is true in operational terms.

The Division has not developed its responsibilities in certain fields although, in its defence, the uncertainty as to its authority has been enhanced by the department itself. One such field is that of revenue raising; another the monitoring of its very considerable financial responsibilities.

In summary therefore, the Division of Court Administration can be said to have very real problems at all levels of its structure. That structure seems more characterised by fragmentation than unity, by omission of areas than inclusion and by particularly poor communication. The management function is little better. What management exists operates within restricted spheres and with an absence of real control or authority.

3 "CAUSE" IDENTIFICATION

3.1 Introduction

As mentioned previously, through evaluation and analysis of symptoms the causes of problems are discovered. In order to make this evaluation, a thorough questioning of the value and implications of the symptoms as outlined is required. A constant scepticism and reflectiveness of what is before one is necessary as well as a thorough awareness of how things can or ought to be. Ultimately however, the ability to distil and analyse causes comes from the ability to find the general underlying threads that link a myriad of detail.

3.2 The Four Main Causes of the Division's Problems Identified

Analysis of the material collected during the course of this Review produced the following main issues as the principal causes of the problems of the Division. While every attempt has been made to avoid overlap between them some may be apparent because their natural condition is one of interplay, and their separation is in some respects artificial. Nonetheless they are sufficiently exclusive of one another for the purposes of analysis and recommendation for change.

3.2.1 There is No Clear and Decisive Divisional Direction and Control

The management function is grossly underdeveloped for a Division of this size: the Director's position literally stands alone in this respect. It is inconceivable that adequate control and direction of resources could exist in such circumstances. The Review Team wishes to place on record its extreme concern at the fact that a Division of such importance, employing some 900 persons has but one person to direct and control it.

As mentioned in the Introduction pages the Review Team has been constantly confronted by the fact that, notwithstanding acceptance and "implementation" ofrecommendations to strengthen and expand the role, the role of Director has not

developed beyond an advisory and liaison one. We could see no evidence of "full executive and management control" as envisaged in the recommendations.

Consequently, in summary the first cause is that the Division - in both qualitative and quantitative terms - is effectively operating without a management function. It lacks even the basic information system and structural integration that could lead to a more informed and purposeful management emerging.

3.2.2 There is No Common Objective and No Performance Strategies

The importance of this cause cannot be grasped until it is realised that the Division of Court Administration is in reality a phantom Division: it exists on paper - though few persons more than the Review Team members could specify it -but not in fact.

Some of the Division's Senior Members interviewed in the course of this Review had trouble accepting that they were a part of the State Public Service, let alone the Division of Court Administration. With only two exceptions they could not correctly nominate the current Director as their boss. Clerks of Courts in particular recognise the Executive Officer (Courts), and most others the Secretary to the Law Department.

What this indicates is a profound disorientation and confusion not only of the immediate management question but also of what these Senior Members see their Branches as existing to do, and what - unchecked - these Branches actually do. The Review Team believes very strongly that a Division of Court Administration can and ought to exist but that this is being seriously retarded by virtue of there being neither acommon objective nor purposeful interrelation of the activities undertaken.

3.2.3 The Present Organizational Structure is Inadequate and Unintegrated

While obviously related to the above, this factor warrants separate analysis because of the important effects it has on these preceding "causes". The image to emerge of the Division to this point is one that exists in little more than name, with little or no management control and absolutely no co-ordination. These features have been represented largely in terms of the management function. The same is equally true of the Division in its management of its own resources, in its role as formulator and advisor on policy matters and in its liaison with both judiciary and community.

This same profound disorientation can be represented in structural terms as well and - since it is the successful marriage of management and structures that is at the basis of any successful organisation - such analysis is warranted.

Represented in this way the Division can be seen to be a series of independently operating units that jealously guard their own self-designated exclusivity and independence. Such structural disorientation obviously has a particularly serious consequence for the development of a co-ordinating management role.

It must be noted also that in addition there exist significant areas of what might properly be a part of the Division in either other Divisions of the Department or other Departments of the Service.

3.2.4 The Division Operates in a Closed and Unresponsive Manner

The Division can be fairly represented as closed and unresponsive in its internal and external communications. As mentioned at 3.2.1. it is particularly difficult to find any established pattern of communication within the Division. Further down in the hierarchy this problem compounds with considerable frustration and lowering of morale resulting. What communication exists is experienced as a one-way process. Between the Division's parts communication is also limited and essentially informal.

To the "external" environment communication is almost non-existent. No attempt is made in this direction whatsoever. What little dialogue that there is is maintained with the judiciary who expressed reservations about its effectiveness for making their views known.

The Division's retarded development will only be reversed by the joint co-operative efforts of its members and clients whose participation must be encouraged and enlisted through the establishment of a process of informed communication.

4 THE SOLUTION

In formulating its solution to these problems as outlined the Review Team kept certain factors constantly in mind. The first was that in order to decide an appropriate senior structure for the Division it would be necessary to examine the sort of system of Court Administration that was necessary in this State. This in turn meant deciding an objective for the system and on the best way of realising it.

The objective necessarily took some considerable care in formulation since it is to act as both the guiding principle directing the re-integration of the various Divisional components and the philosophy to govern their subsequent activity. The next step was to decide how the Division should be structured to achieve this objective. This process was profoundly influenced by our analysis of the problems the Division faces as well as by its strengths we perceived. In formulating the proposal the Review Team has sought to blend the changes that are unquestionably necessary with what is realistic in the circumstances. One exception to this otherwise satisfactory blending warrants special mention.

We were considerably impressed by arguments advanced in favour of creating an independent Department of Courts. While appreciating the impracticality at this early stage of such a proposal we wish to put on record our view that once the Divisional restructure is complete and a unified operation extant then this proposal be re-examined.

What follows in the next Chapter is a detailed outline of our proposal and the associated recommendations that will facilitate it.

5 THE PROPOSED NEW STRUCTURE

Before outlining the new structure it must be said that particular care has been exercised in its formulation. It attempts to overcome the major causes of the Division's problems as outlined while preserving its strengths and building in those advantages from other systems that have come to our attention. This chapter describes this new structure and makes recommendations as necessary to bring it into existence. It will be seen that some of the recommendations are multi-directional in that they simultaneously serve several objectives. This can be explained by reference to our previous comments that the natural state of the causes as outlined was one of interplay and that successful organizations are built on the marriage of structure and management components.

The essential quality the proposal seeks to realise is the establishment of a rationally based management. To achieve this implies both structural change to establish that rational base, the creation of a new stratum of management and the vesting of that stratum with the full authority and support of the Department.

We envisage an expanded responsibility for the position of Director of Court Administration. This new role will be to be responsible for efficiently and effectively directing the Division to achieve its objective; specifically through developing policy, ensuring the co-ordination of the principle activities of the Division, and through advising the Attorney-General. In addition, we envisage a responsibility for liaison with a Consultative Committee (of which more will be said shortly). We believe the qualifications necessary for the position are general managerial with a proven ability to develop policy and to organize and implement change in large and complex organizations. Because of this expansion in the position's responsibilities and since it has recently - as part of the Review of First Dvisions positions - been evaluated as under-classified, we recommend that the position be reclassified to that of E.L. level 5.

It is appropriate at this point to comment on two other aspects that the Review Team considered as necessary complements to the development of a

corporate management unit approach for the Division. The Division needs to operate within a clear and purposeful objective and we recommend adoption of the following:

> "To ensure the efficient and effective provision of the non-judicial services required for the resolution of disputation and litigation and the disposition of prosecutions in the State of Victoria."

Without the specification of such an objective the reintegration and purposeful operation of the Division will not be possible.

The second requirement is for the Department's senior management to establish clear operational guidelines and authority for the Division's management so as to ensure the latter is seen to be and to operate as the sole authority in the area. Support of this type from the outset cannot be over emphasised. Accordingly the Review Team recommends that the relationship between the Department's senior management and the Division's management be redefined to establish clear operational guidelines and authority for divisional management.

* * *

Mention must now be made of the three functional areas that will form the basis for the re-integration of the Division. The Review Team considers that given the circumstances of the Division at present as well as the varied nature of its responsibilities, three functional areas present themselves. These are Operations, Support Services and Project and Review and represent the Division's operational programmes as seen by the Review Team. While the first two of these are largely self-explanatory something perhaps needs to be said in support of a Project and Review function. (For reference see the Chart of the proposed new Organizational Structure attached to this Report.)

It is considered that the problems of the Division are so numerous and the resources needed to progressively overcome them both so considerable

and constant that the Division requires its own functional area to undertake these responsibilities. Were these needs less, reliance could be placed on resources from elsewhere within the Department (as for example was provided by this Review Team). We can confidently assert however that the responsibilities of this unit are fully justified and its workload likely to be massive. The existence and importance of the Civil Justice Project further demands the development of a facility of the type envisaged.

The Review Team considers inherent in such a project and review area responsibility - under direction - for evolving a policy and administration appropriate to realising the Division's objective. The particular responsibilities would include the collection, interpretation and supply of management information to the Division; the forward planning and development of policy; the assessment of the Division's performance against its objective; and finally the conduct of on-going reviews of the operation and structure of the Division as well as assisting in the implementation of approved policies and programmes. The emphasis of the area will be practical and "results oriented" and directed at improving the Division's effectiveness.

The Review Team recommends the creation of a position of Deputy Director (Project and Review) at the level of E.L. level 3 to - under direction - establish and manage this area of the Division. In addition we recommend the creation of a position to undertake and conduct its progressive review. We consider a classification of Administrative Officer Class B1 is appropriate for this function. Further, we recommend that the Statistical Research Unit of the Division of Policy and Research be transferred to the Division of Court Administration to form the basis of the units data collection. (This recommendation accords with one made in a separate Review recently completed into the Department's needs for non-legal research). In addition, that an additional position of Administrative Officer Class B1 be created to enable the introduction and maintenance of an information system for the Division.

We believe that at a subsequent time the unit should undertake the progressive review and alignment of the Division's operating strategies to accord with its objective, as well as their subsequent review and evaluation of performance.

We envisage policy development being undertaken by a multi-disciplinary team with representation of a Legal Officer, a Clerk of Courts, an Economist, a Social Scientist and others as are necessary. We believe that persons could be seconded to the team as appropriate. Accordingly we only recommend the creation of this functional area at this stage and leave open the issue of staffing and classification. We wish to place on record however our view that a classification of Legal Officer Grade 6 seems an appropriate one to head this area since the responsibilities and demands of the position will be considerable and largely of a legal nature.

Our final recommendation on the establishment of the Project and Review Unit is to establish one or more access groups. What is envisaged is the development of closer liaison and cooperation with the Division's main user groups, such as community welfare groups and bodies representing the legal and insurance professions. The value of that liaison is to provide a valuable consultative device for policy formation and review of operational effectiveness as well as opening up the Division to developments and changes occurring in the wider community.

In proposing the creation of this area the Review Team has taken note of the full scale review of the administration of civil justice in Victoria presently being undertaken jointly by the Victorian Law Foundation and the Law Department. That Review will have a major impact on the whole system of administration of justice in Victoria including indirectly criminal justice. The Review is to be completed by mid 1984.

The various recommendations in this Report will enable the Division of Court Administration to increase its capacity to provide input to that Review and to respond to its recommendations. To delay the

implementation of the recommendations of this Report until the completion of that Review would be a disservice to both that Review and the Division.

* * *

The next functional area proposed is that of support services. We recommend the creation of the position of Deputy Director (Support Services) at the level of E.L. 3 and it being responsible, under direction, for the efficient and effective provision of support services to the Division.

This Programme area groups together those activities undertaken within the Division which - while ancillary - are nonetheless essential to the proper and full operation of the Division. Included are certain functions that already exist within the Division, such as the Court Reporting Branch; that exist elswhere in the Department as the Criminal Trial Listing Directorate; or that the Review Team considers ought to be created. The rationale for inclusion in every case is that the activities are ancillary to, but facilitative of, the activities of the Division proper.

For the purposes of their administrative activities the Review Team recommends that the staff of the Directorate of Criminal Trial Listing and the Court Reporting Branch report to the Deputy Director (Support Services) and that the Deputy Director be vested with the authority and operational responsibilities of the Director of the Criminal Trial Listing Directorate. Also, we recommend that the J.P.'s and Commissioner's Section of the Division of Administration and Special Services be transferred to the Division, and the staff report to the Deputy Director (Support Services) with respect to their administrative functions.

We consider, in addition that the Division must be equipped with its own capacity to handle correspondence of a detailed and sensitive nature and concur, with another recommendation of the Review into the Department's requirements for non-legal research, that the position of Advice Officer be formally re-established within the Division in the Support Services Branch to undertake these activities.

The Review Team wishes also to create two new positions in the Branch in response to needs we perceived in the conduct of the Review. The first of these concerns the Division's monitoring and management of its financial resources. As mentioned previously in this Report this area is in need of strengthening: with an annual expenditure level of nearly $32 million that need is urgent. In recommending the creation of a position at Class B1 level the Review Team also wishes to assign to it responsibility for examining the Division's potential for raising revenue. We are aware of two Reviews that are presently examining this issue in the Division - in the areas of Court Reporting and Bailiffs - and consider this to properly be a part of the Division's ongoing responsibilities.

The second position the Review Team wishes to recommend the creation of is an Administrative Officer Class B position responsible for the Division's buildings and property matters and for the issue of court security. As the Division has the majority of the Department's buildings, and as many of these are either in poor repair or inadequate to meet present day requirements the need for an officer to monitor their condition, use and upgrading is obvious. Of more urgency however is the need to establish an integrated system for security for the Division's buildings, particularly those to which the public has constant access such as its court buildings. The recent murder of an accused in the Melbourne Magistrates' Court together with the attempted kidnapping of a County Court Judge bear dramatic witness to this urgency.

Finally, we recommend that with respect to their "non-judicial" responsibilities the support staff of the various Royal Commissions and Boards of Inquiry constituted from time to time report to the Deputy Director (Support Services). This will ensure a control and accountability at present unavailable in these areas.

* * *

The final functional area is that of Operations. We believe - as with the previous two functional areas - that it must be headed by a position of Deputy Director, and accordingly recommend the creation of the position of Deputy Director (Operations) E.L. level 3. The Deputy Director (Operations) would be responsible, under direction, for efficiently and effectively managing the operational functions of the Division through the management of the day to day operations, and resource co-ordination and allocation. In addition the position would act as a central reference point for operational decisions.

Operational areas involved would include procedural and performance control generally, advice and counsel to field operators (particularly in management aspects), training and specific personnel matters and the development of programmes for staff resources, budget and financial control. The appointee should have experience in the field and a courts orientated approach as well as a capacity for management; he should thus be acceptable to field operators as well as the senior management of the Division.

It is obvious to the Review Team however that not all the problems complained of by field operators and others within the Department would necessarily be resolved by the appointment of a Deputy Director (Operations). The necessity for a quick response to problems in the field, field operators involvement in resource management, and staffing problems are not solved currently by the centralization of authority. As well, the huge number of reporting points, (numbering well in excess of two hundred), would not change even though a change in personnel might gain greater confidence from those affected. We believe therefore that some form of management by areas or regions is necessary in this Operations field and accordingly recommend the establishment of four positions of Area Manager, two in metropolitan areas and two in regional areas. The responsibilities of an Area Manager are envisaged as transfer of staff within or between areas (by arrangement), leave rosters and relief staff, cyclic inspections and specific procedure advice and control as well as responsibility for budgets and finances. The creation of these Area Manager

positions as well as the Deputy Directors (Operations) will provide an additional avenue and field for career development for Clerks of Courts.

In an attempt at further Divisional rationalisation in the Operations field the Review Team recommends that the position of Prothonotary of the Supreme Court be vested with authority to supervise and co-ordinate the administrative performance of the function of the Registrar of Probate, and that administrative responsibility for both Children's Court and Coroner's Court be centralized under one of the Metropolitan Area Manager's positions. We further recommend that the positions of Sheriff of the Supreme Court and Registrar County Court be responsible to the Deputy Director (Operations) for the performance of their non-judicial duties.

The Review Team wishes to make further recommendations that there be an examination of the feasibility of including within the Division certain extra court bodies that have been granted judicial and quasi-judicial powers. We believe the activities of these bodies clearly fall within the redrafted Divisional objective and that benefits in resource utilization and co-ordination could derive from their inclusion. Such bodies would include the Crimes Compensation Tribunal; Small Claims Tribunal; Workers Compensation Tribunal; Market Court; Motor Accidents Board, etc. We note with approval the comments of Prof. I. Scott on this point: "Victoria seems to have a plethora of courts and tribunals, but it is only a small jurisdiction. Some rationalization would seem to be possible and to be beneficial." (Civil Justice Project, Preliminary Study. P. 140).

We recommend that the Secretary to the Law Department and at his discretion the Director of the Division of Court Administration have the authority to enable the secondment of Clerks of Courts to other areas of the Service as required.

The Review Team considers it vital to the ongoing success of the re-organization of the Division that the Judiciary and Magistracy assume a more direct involvement in the overall administration of the courts. It is therefore recommended that a Consultative Committee be formed to assist

the Director in his formulation of Divisional policy. The Committee would meet at regular intervals to discuss matters pertaining to the administration of the Division that are common to all three tiers of the judicial system. It would be a forum by which the Director would keep the Judiciary and Magistracy informed of the current performance of and future developments for the Division. The administration of the judicial system in Victoria will continue to evolve and the Committee will ensure that the senior representatives of the three tiers of the judicial system have an impact on that evolution.

It will be the function of the Committee to discuss and advise the Director in any matter common to the three tiers of the judicial system. Matters that are particular to a tier will continue to be the concern of the senior representatives of that tier and the Director. The members of the Committee would be: the Director (as Chairman); the Chief Justice (or his nominee); the Chief Judge (or his nominee); the Chief Stipendiary Magistrate; and other persons as required. Accordingly all three tiers of the Courts and the administrative arm of the judicial system will be represented on the Committee. The Committee would also have power to co-opt other persons as necessary.

6 IMPLEMENTATION STRATEGY

As was mentioned at the outset of this Report "ultimately no review can be considered a success and therefore of value unless it results in beneficial change." The success of this Review therefore is judged on the extent to which its recommendations are implemented and subsequently result in productive change.

Aware of the sensitivity of many of the issues involved in the Department responding to this Report, the Review Team offers the following suggestions about how it believes this Report should be handled.

Since the Report is an internal document it ought at first instance be referred to the Permanent Head of the Department. Since it will require considerable establishment action however, and since it is well aware of the need for and existence of the Review, we believe that the Public Service Board should be involved at an early stage. It will not be possible to bring about the changes that are necessary without its co-operation.

Consequently the Review Team believes that the following is the most efficient immplementation sequence. At first instance an expression of support needs to be made to officially endorse the Report. If necessary this can be done on the advice of the Chairman of the Steering Committee and/or the Co-ordinator of the Review. The importance of a clear and decisive publicised response cannot be over-emphasised. We consider that if necessary the Public Service Board may be consulted before this endorsement. If not then, as suggested above, immediately after.

We would like to offer suggestions as to the sequence in which the individual recommendations might be adopted. First we would request that copies of the Report be distributed throughout the Division together with the Departmental endorsement. Next, that the Public Service Board be requested to create the three new positions of Deputy Director. We believe that at the same time application should be made to reclassify the position of Director.

Once created and occupied (commencing with the positions of Director and Deputy Director (Project and Review) the Division ought to be progressively restructured into its three functional programmes of Services, Operations and Project and Review. At this stage those functional components to be transferred from other Divisions ought to be introduced. We further suggest that the operation of Area Management commence with the appointment of the Deputy Director (Operations).

At this stage we believe the Objective as recommended should be adopted and progressive overall review of the Division's strategies commence.

While we would be willing to advise further we consider that sufficient has been said by us to - if followed - equip the Director, his Deputies and the Permanent Head to make their own informed assessment and judgement as to implementation.

7 SUMMARY OF RECOMMENDATIONS

The essential quality the proposed new structure seeks to realise is the establishment of rationally based management. To achieve this the Review Team considers necessary both structural change to establish that rational base, the creation of a new stratum of management and the vesting of that stratum with the full authority and support of the Department.

Divisional Objective

The Review Team recommends:

1 That the Division adopt as its Objective for a restructured Division of Court Administration:

> Ensure the efficient and effective provision of the non-judicial services required for the resolution of disputation and litigation and the disposition of prosecutions in the State of Victoria.

Divisional Management

The Review Team recommends:

2 That the position of Director of Court Administration be reclassified to E.L. level 5.

3 That the Division of Court Administration's relationship with the Department's senior management be clarified and redefined to establish clear operational guidelines and authority for divisional management.

4 That the Division be restructured into the three functional programmes of Support Services, Operations and Project and Review, each to be controlled by a position of Deputy Director.

5 That three positions of Deputy Director be created and classified at

E.L. level 3.

Divisional Structure and Operational Programmes

The Review Team recommends:

6 That the Policy and Review Branch conduct the progressive review of the Division's operational strategies and structure and assess performance achievements against its Objective and that a position of Administrative Officer Class B1 be created to undertake this responsibility.

7 That the Statistical Research Unit of the Division of Policy and Research be transferred to the Division of Court Administration to form the basis of a data collection unit in the Project and Review Branch.

8 That a position of Administrative Officer Class B1 be created within the Project and Review Branch to be responsible for the creation and maintenance of an information system for the Division to permit performance monitoring and assist management in its evaluation and control.

9 That the major user groups of the judicial system be consulted regularly as part of the process of policy formation and review of operational effectiveness through the establishment of one or more access groups.

10 That policy development for the Division be undertaken by a multi-disciplinary team (the composition and classification to be decided) and that it operate in consultation with the access groups, the data collection unit and the review function.

11 That the Directorate of Criminal Trial Listing be transferred to the Division of Court Administration and that the authority and operational

responsibilities of the Director of the Directorate be vested in the position of Deputy Director (Support Services).

12 That the Court Reporting Branch report to the Deputy Director (Support Services).

13 That the J.P.'s and Commissioner's Section of the Division of Administration and Special Services be transferred to the Division and that the staff of that Section report to the Deputy Director (Support Services) for the performance of their administrative functions.

14 That a position be created in the Support Services Branch at a classification of Administrative Officer Class B1 to monitor and advise on the Division's financial resource responsibilities, to assist in the formulation of the estimates and advise on the potential for revenue raising.

15 That the position of Advice Officer be formally re-established within the Division and located in the Support Services Branch, and be responsible for inter alia the Division's Ministerial correspondence.

16 That a position be created in the Support Services Branch at the classification of Administrative Officer Class B responsible for determining and meeting the Division's requirements for court security and other matters related to its buildings and property.

17 That - with respect to their "non-judicial" responsibilities - the support staff of the various Royal Commissions and Boards of Inquiry constituted from time to time as well as those of the Extra Court Bodies included within the Division (as a result of recommendation 21) report to the Deputy Director (Support Services).

18 That four positions of Area Manager be created at a classification of Clerk of Courts Class CC7 with responsibility for co-ordination of administrative activities and resources and to be responsible to the

Deputy Director (Operations) and that two metropolitan and two country areas be designated.

19 That for Organization control purposes the Children's Court and the Coroner's Court be placed under the control of an Area Manager (Metropolitan).

20 That the position of Prothonotary of the Supreme Court be vested with the authority to supervise and co-ordinate the administrative functions of the Registrar of Probate; and report for administrative purposes to the Deputy Director (Operations).

21 That the Sheriff of the Supreme Court and the Registrar of the County Court report - for administrative purposes to the Deputy Director (Operations).

22 That the Director, Division of Court Administration examine the feasibility of returning to the Division certain extra Court Bodies that have been granted judicial and quasi-judicial powers.

23 That the Secretary to the Law Department and, at his discretion the Director of Court Administration have authority to second Clerks of Court to other areas of the Department and Service as need arises from time to time.

24 That a Consultative Committee be established to facilitate the exchange of views and attainment of consensus on matters pertaining to the administration of the Division common to all three tiers of the judicial system.

25 That copies of this Report be widely distributed throughout the Division, commencing with those persons interviewed during the conduct of the Review.

ATTACHMENT

THE FOLLOWING PERSONS WERE INTERVIEWED IN THE COURSE OF THIS REVIEW

1 His Honour Judge Waldron, Chief Judge of the County Court.

2 Executive Director, Victorian Law Foundation, Professor I. Scott.

3 Acting Deputy Secretary to the Law Department, Mr. B.J. Leonard.

4 Director, Courts Department, South Australia, Mr. G. White. (Submission).

5 Assistant Under Secretary, Courts Administration department of the Attorney-General and of Justice, N.S.W., Mr. W. Robinson. (Submission).

6 Director of Policy Division, Public Service Board, Mr. D. Smith.

7 Prothonotary, Mr. P. Malbon.

8 Sheriff and Deputy Sheriff, Mr. J. Mulvey; Mr. P. Duncan.

9 Director of the Division of Policy and Research, Mr. G. Golden.

10 Manager, Statistical Research Unit, Division of Policy and Research, Mr. W. Johnston.

11 Executive Director of the Law Institute of Victoria, Mr. G. Lewis.

12 Manager, Buildings and Property, Mr. J. Foley.

13 Acting Executive Officer (Courts), Mr. B. Meehan.

14 Executive Officer (Courts), Mr. P. Coburn.

15 Clerks of various courts: Prahran, Mr. J. Gidley; Preston, Mr. B. Wilson; Bendigo, Mr. B. Hollis; Castlemaine, Mr. G. Smart.

16 Court Reporting Branch, Mr. S. Kelly; Mrs. J. Best.

17 Accountant to the Law Department, Mr. N. Cox.

18 Director of Personnel, Mrs. S. Gilbert.

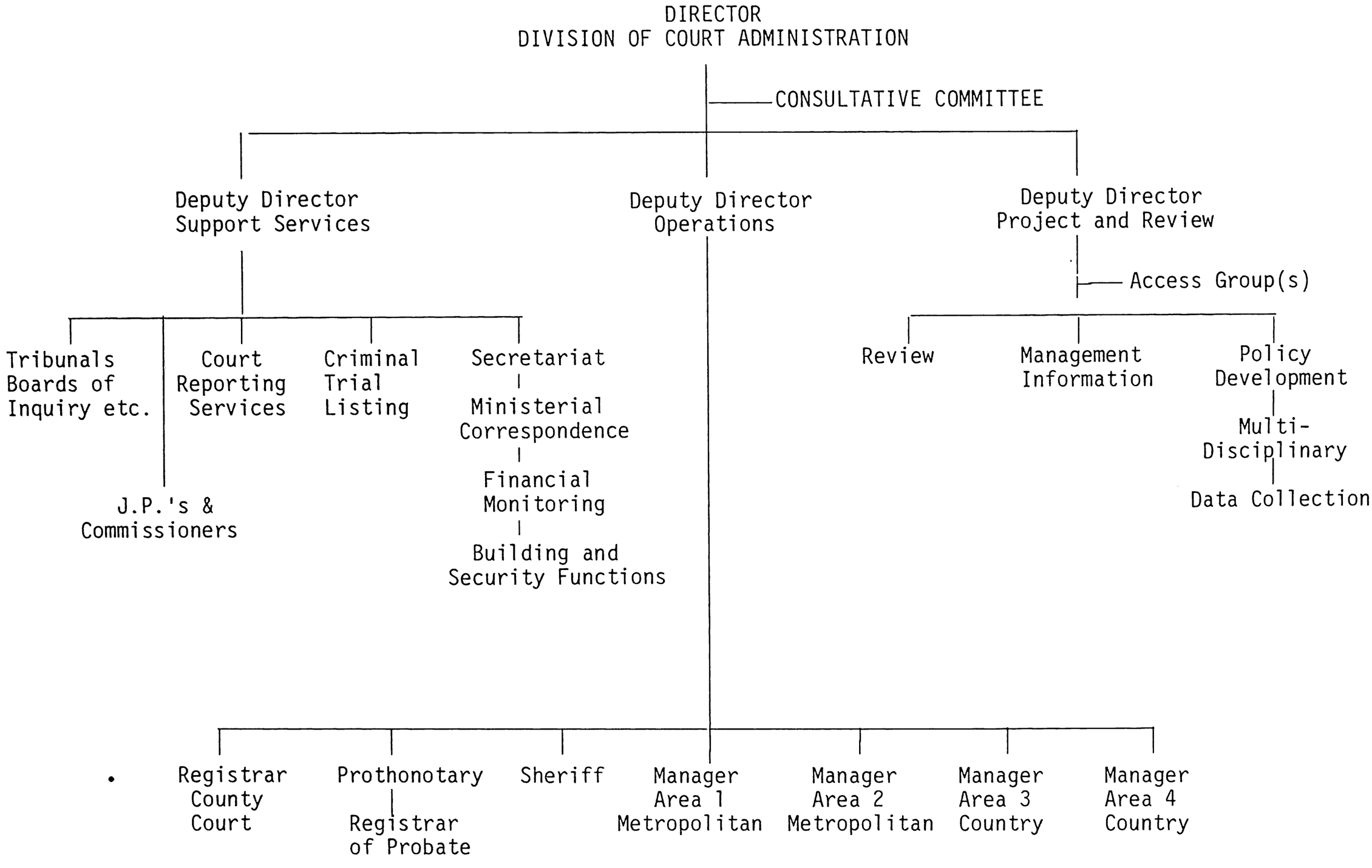
19 Director, Division of Administration and Special Services, Mr. A. Owen.

20 The Clerk of Courts Group (Submission).

21 Registrar of Probate, Mr. N. May.

22 Director, Criminal Trial Listing Directorate, Mr. V. Stafford.

23 Director, Division of Court Administration, Col. J. Murphy.


DIRECTOR
DIVISION OF COURT ADMINISTRATION
CONSULTATIVE COMMITTEE
Deputy Director
Support Services
Deputy Director
Operations
Deputy Director
Project and Review
Access Group(s)
Tribunals
Boards of
Inquiry etc.
Court
Reporting
Services
Criminal
Trial
Listing
Secretariat
Ministerial
Correspondence
Financial
Monitoring
Building and
Security Functions
Review
Management
Information
Policy
Development
Multi-
Disciplinary
Data Collection
J.P.'s &
Commissioners
Registrar
County
Court
Prothonotary
Registrar
of Probate
Sheriff
Manager
Area 1
Metropolitan
Manager
Area 2
Metropolitan
Manager
Area 3
Country
Manager
Area 4
Country

INDEX TO CASES

INDEX TO STATUTES

INDEX TO BILLS

****

INDEX TO REGULATIONS

****

INDEX TO TABLES

BIBLIOGRAPHY

Addenda to the Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force, 1976, Government Printer, Melbourne, Victoria

Australian Law Reform Commission, Interim Report - Criminal Investigation, 1975, AGPS, Canberra, Australian Capital Territory

Bar Council Report on the Listing of Criminal Cases, 23 December 1980, Bar Council of Victoria, Melbourne, Victoria

Cashman, Peter, "Legal Representation in Magistrates' Courts" in Research and the Delivery of Legal Services, Peter Cashman editor, 1981, Law Foundation of New South Wales, Sydney, New South Wales 159 (Chapter 12)

Cashman, Peter, editor, Research and the Delivery of Legal Services, 1981, Law Foundation of New South Wales, Sydney, New South Wales

Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne, First Report ("The Flanagan Committee Report No. 1"), 1982, Law Department of Victoria, Melbourne, Victoria

Committee Appointed by the Attorney-General to Examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne, Second Report ("The Flanagan Committee Report No. 2"), 27 June 1983, Law Department of Victoria, Melbourne, Victoria

The Coroner's Act 1958 - A General Review ("The Norris Report"), 9 September 1980, Law Department of Victoria, Melbourne, Victoria

Coroner's Court Review Committee, Final Report, 1 February 1977, Law Department of Victoria, Melbourne, Victoria.

Criminal Consultative Committee, Pleas of Guilty in Committals, 28 March 1983, Attorney-General's Department, Canberra, Australian Capital Territory (provided to the Legal and Constitutional Committee on a confidential basis)

Current Comment, "The Value of a Directorate of Public Prosecutions" (1984) 58 Australian Law Journal 3

Devlin, Lord, The Judge, 1979, London, England

Directorate of the Forensic Science Laboratory, Report - Victoria Police Forensic Science Laboratory - Current and Future Proposals for the Forensic Science Laboratory Pursuant to the Robinson Report, November 1982, Directorate, FSL, Melbourne, Victoria

Douglas, R. "Pre-Trial Withdrawals: Bargain or Pseudo-Bargain?" (1983) 16 A.N.Z. Journal of Criminology 210

Drewry, Gavin, "The Administration of Justice and Parliamentary Scrutiny" (1983) New Law Journal (October, 1983) 959

Fox, Richard G., Victorian Criminal Procedure 4th edition, 1983, Monash Law Book Co-operative, Monash University, Victoria

Government Gazette

Glare, Len, Formation of Prosecuting Division "O" District, July 1981, Victoria Police, Melbourne, Victoria

Greaves, Rodney and I.L.K. Marshall, "The Case for Pre-Trial Conferences" in Pre-Trial Conferences: A Debate, Law Summer School 1984 Paper, Law Society of Western Australia (Paper 6A)

Greenland, M.L. and A.D. Fenbury, "Pre-Trial Conferences: The Negative Case" in Pre-Trial Conferences: A Debate, Law Summer School 1984 Paper, Law

Society of Western Australia (Paper 6B)

Grabosky, Peter and Concetto Rizzo, Jurors in New South Wales, June 1983, Law Foundation of New South Wales, Sydney, New South Wales

Hailsham, Lord, Hamlyn Revisited: The British Legal System Today, 1983, London, England

Heath, Ian W. and John T. Hassett, Indictable Offences in Victoria, October 1983, Government Printer, Melbourne, Victoria

Hermes, Clarrie, Criminal Law Consultative Committee - Pleas of Guilty in Committals, 1979, Magistrates Court, Canberra, Australian Capital Territory

Hester, Peter, Police Procedures from Report of Offence to Committal, 1983, Police Prosecuting Branch, Victoria Police, Melbourne, Victoria

Interview, "Director of Public Prosecutions" (1983) Police Life (December, 1983) 16

Joint Task Force - Law Department/Victoria Police, Discussion Paper - Alternative Procedure in Magistrates' Courts, April 1983, Law Department/Victoria Police, Melbourne, Victoria

Kennan, J.H. Unpublished speech dated 4 November 1983

Kenny's Outlines of Criminal Law, 17th edition

Kidston, R.R. "The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958) 32 Australian Law Journal 148

Law Department, The Law and You, pamphlet series, Law Department of Victoria, Melbourne, Victoria

McNiff, Francine, Commentary on Recommendations Contained in The Coroner's Act 1958 - A General Review ("The Norris Report") ("The McNiff Commentary"), 15 June 1983, Law Department of Victoria, Melbourne, Victoria

Management Services Bureau, Research and Development Department, A Search for Sanity - A Summary Paper: A Request for Operational Powers to Enable the Victoria Police to Carry Out its Tasks, 23 February, 1982, Police Headquarters, Melbourne, Victoria

Memorandum to Members of Attorney-General's Working Party, from Associate Director (Criminal Division) Legal Aid Commission, 22 June 1983, Legal Aid Commission of Victoria, Melbourne

New South Wales Ombudsman, Annual Report 1983, Government Printer, Sydney, New South Wales

Nicholl, Warren, Submission to the Attorney-General 3.9.1979 - Modification to the Procedure Relating to the Use of Statements in Committal Proceedings, 3 September 1979, Magistrates Court, Canberra, Australian Capital Territory

Police Government Gazette

Report of the Board of Inquiry into Allegations Against Members of the Victoria Police Force ("Beach Report"), Vol. 1, 1978, Government Printer, Melbourne, Victoria

Report of the Commission to Inquire into New South Wales Police Administration ("The Lusher Report"), April 1981, Government Printer, New South Wales

Report of the Committee Appointed to Examine and Advise in Relation to the Recommendations made in Chapter 8 of Volume 1 of the Report of the Board of Inquiry Appointed for the Purpose of Inquiring into and Reporting

upon Certain Allegations Against Members of the Victoria Police Force ("The Norris Report"), Part II, "Investigation of Complaints Against Police", 1979-1980, Government Printer, Melbourne, Victoria

Report of the Criminal Bar Association of the English Bar, December 1980, London, England

Report of the Royal Commission Inquiring into Certain Committals Against K.E. Humphries ("The Street Royal Commission"), July 1983, Government Printer, Sydney, New South Wales

Review of the Norman McCallum Police Forensic Science Laboratories ("The Robinson Report"), February, 1982, FSL, Melbourne, Victoria

Sallman, Peter and John Willis, Criminal Justice in Australia, 1984, Oxford University Press, Melbourne, Victoria

Scutt, Jocelynne A. "The Jury and Court Administration: A Brief Overview of Research" (1978) 18 Law Society Journal 119

Victorian Law Reform Commissioner, Annual Report 1982-1983, 1983, Government Printer, Melbourne, Victoria

Wilcox, A.F. The Decision to Prosecute, 1972, London, England

No. D.26—77737/84—Price $14.30

F D Atkinson Government Printer Melbourne

VICTORIA

MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

VOL. 3

SESSION

1982-85