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THE LAY MAGISTRACY IN NEW ZEALAND

JUDICIAL ASSET OR COLONIAL ANACHRONISM?

PHILIP VAUGHAN HARKNESS

A thesis submitted in partial fulfilment of the requirements for the Degree of Doctor of Philosophy in Political Studies

University of Auckland

2009
This thesis examines the concept of lay magistracy – what it is, how it developed, and why it is considered to be important. It also explores whether or not the service should be dissolved, retained and expanded, or revised. Lay magistracy performance was evaluated and New Zealand roles were compared with other jurisdictions to determine whether or not the New Zealand system could be labelled as ‘effective’. Overseas reviews of lay magistracy were used to critique the New Zealand context. A review of the literature indicated that while lay magistracy was languishing in New Zealand it was progressing in overseas jurisdictions. In order to determine whether or not lay magistracy represents an effective judicial instrument that should be retained, reformed or jettisoned, a mixed-mode methodological approach was used. This involved working with a group of selected JP officials, and a focus group, to identify core issues that could be seen as potential threats to a viable and effective lay magistracy. This preliminary research affirmed the need for a nationwide qualitative and quantitative survey of the JP population. The results of this survey ($\sum N = 630$ responses from 993 sampled) revealed a healthy and viable lay magistracy anxious to continue serving the community but frustrated by apparent government disinterest in extending their judicial activities. Most respondents saw themselves as active in JP duties, felt they now received better training, and thought membership of JP associations should be compulsory. A majority were opposed to the political appointment process and favoured the introduction of non-partisan selection procedures. Further comparative research involved a critical examination of aspects of New Zealand’s lay magistracy by comparing and contrasting them with those of other countries. Arguments for and against the principle and practical use of lay magistracy were then advanced. It is concluded that a relative absence of New Zealand studies is problematic but a mixed method approach provides a suitable approach for future studies. This research is the first major survey of the JP population in New Zealand. It provides demographic descriptors of the JP body and information about their views and opinions. Such data have not previously been available and now need to be extended. Rather than being anachronistic, this thesis affirms that lay magistracy is effective and should be retained and reformed as a major component of the New Zealand judicial system.

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1 Refer definition of ‘effective’ p.7
ACKNOWLEDGEMENTS

I wish to thank my three supervisors, Professor Emeritus Andrew Sharp, Dr Helena Catt, and Dr Joe Atkinson for their advice and support at various stages of this project. I also am indebted to Dr Jens Hansen of the Woodhill Park Research Retreat for his valuable mentoring and guidance during the latter stages of this thesis project, and to Anna Jo Perry, Chris Jenkin and Jacinta Hawkins for their peer review.

My thanks also go to former District Court Judge Tony Latham, Community Magistrate Mary Symmans, and Bob Armstrong JP, who kindly agreed to participate in a focus group to identify or substantiate real or perceived concerns of JPs that constituted the principal research issues of this thesis. I am also grateful to current and former senior officials of the RFNZJA who willingly provided me access to information at various stages of the project.

Appreciation is due to Alan Hart JP (registrar of the RFNZJA) and Roger Brookes JP (registrar of the Auckland JP Association), who deftly fielded a multitude of questions over many months with patience and good humour.

My thanks also go to the president and staff of Wolfson College, Cambridge, and the director and librarians at the Institute of Criminology, University of Cambridge, where I was privileged to spend three months in 2005.

Ann Flintham JP of the Magistrates’ Association kindly provided me with research facilities in London, and Brenda Large JP, a member of the Lord Chancellor’s Advisory Committee, made a valuable contribution to my research. For this I am also grateful.

And special thanks go to my wife Léone, who survived endless hours of silence with her usual good grace. The project would never have been completed without her tolerance and understanding.
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<tbody>
<tr>
<td>ACJA</td>
<td>Australian Council of Justices’ Associations</td>
</tr>
<tr>
<td>ACT</td>
<td>Australian Commonwealth Territory</td>
</tr>
<tr>
<td>ADLS</td>
<td>Auckland District Law Society</td>
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<tr>
<td>CAB</td>
<td>Citizens Advice Bureau</td>
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<tr>
<td>CDCJ</td>
<td>Chief District Court Judge</td>
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<tr>
<td>CJ</td>
<td>Chief Justice</td>
</tr>
<tr>
<td>CJO</td>
<td>Community Justice Officer</td>
</tr>
<tr>
<td>CLA</td>
<td>Court Legal Advisor [previously Justices’ Clerks] (England)</td>
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<tr>
<td>CM</td>
<td>Community Magistrate</td>
</tr>
<tr>
<td>CMJA</td>
<td>Commonwealth Magistrates and Judges Association</td>
</tr>
<tr>
<td>DCA</td>
<td>Department of Constitutional Affairs</td>
</tr>
<tr>
<td>DCJ</td>
<td>District Court Judge</td>
</tr>
<tr>
<td>HDLS</td>
<td>Hamilton District Law Society</td>
</tr>
<tr>
<td>JAB</td>
<td>Judicial Appointments Board (Scotland)</td>
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<tr>
<td>JAC</td>
<td>Justices’ Appraisal Committee (Scotland)</td>
</tr>
<tr>
<td>JALO</td>
<td>Judicial Appointments and Liaison Office</td>
</tr>
<tr>
<td>JP</td>
<td>Justice of the Peace</td>
</tr>
<tr>
<td>JPAAC</td>
<td>Justices of the Peace Appointments Advisory Committee (Ontario)</td>
</tr>
<tr>
<td>JPAC</td>
<td>Justice of the Peace Advisory Committee (England and Wales)</td>
</tr>
<tr>
<td>JSB</td>
<td>Judicial Studies Board</td>
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<tr>
<td>JTC</td>
<td>Justices’ Training Committee (Scotland)</td>
</tr>
<tr>
<td>LCD</td>
<td>Lord Chancellor’s Department</td>
</tr>
<tr>
<td>LCJ</td>
<td>Lord Chief Justice</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>LJ</td>
<td>Lord Justice</td>
</tr>
<tr>
<td>LM</td>
<td>Lay Magistrate (Northern Ireland)</td>
</tr>
<tr>
<td>MAAC</td>
<td>Magistrates’ Appointments and Advisory Committee</td>
</tr>
<tr>
<td>MAC</td>
<td>Magistrates’ Advisory Committee</td>
</tr>
<tr>
<td>MDLS</td>
<td>Manawatu District Law Society</td>
</tr>
<tr>
<td>NT</td>
<td>Northern Territory (Australia)</td>
</tr>
<tr>
<td>NZFUW</td>
<td>New Zealand Federation of University Women</td>
</tr>
<tr>
<td>NZLC</td>
<td>New Zealand Law Commission</td>
</tr>
<tr>
<td>NZLS</td>
<td>New Zealand Law Society</td>
</tr>
<tr>
<td>RFNZJA</td>
<td>Royal Federation of New Zealand Justices Associations</td>
</tr>
<tr>
<td>SM</td>
<td>Stipendiary Magistrate</td>
</tr>
<tr>
<td>TCI</td>
<td>Technical Correspondence Institute</td>
</tr>
<tr>
<td>TOPNZ</td>
<td>The Open Polytechnic of New Zealand</td>
</tr>
<tr>
<td>VJ</td>
<td>Visiting Justice of the Peace (Prisons)</td>
</tr>
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</table>
PROLOGUE

The inclusion of a prologue and epilogue to a thesis is not necessarily a common occurrence. But occasionally, if a special relationship exists between the researcher and the research subject, it is incumbent upon the researcher to include such a preface. This is such an occasion and the prologue here serves as a platform for being able to reflexively locate the researcher with respect to the investigation that is described within this publication.

Although I was born in a New Zealand provincial town and raised in a middle-class professional environment where my father, two uncles and two cousins were practicing lawyers (two of whom later became High Court judges), I was never motivated or persuaded to study law. Instead my career began in 1952 as a cadet reporter for an Auckland daily newspaper, and further developed in New Zealand, the Pacific Islands and the United States, and involved wide-ranging editorial and management responsibilities in local, national and international newspapers and associated media organizations.

It was not until my return to New Zealand in 1964 that any interest I may have had in the law and judicial matters was rekindled when I was approached to see if I would accept appointment as a Justice of the Peace, an office I knew little about. The person who made the approach was the registrar of the local JP Association, a casual acquaintance, who subsequently outlined the duties and responsibilities of the office to me and stressed the public service significance of appointment to the Commission of the Peace.\(^2\)

I agreed to be nominated and eventually received a letter from my local Member of Parliament – also known casually to me – who said my nomination had been approved and that my appointment would be confirmed in a forthcoming issue of the *New Zealand Gazette*.\(^3\)

A couple of months later, on 27 July 1964, I received a certificate from the Minister of Justice, Hon. J.R. Hanan, stating that I had been ‘appointed by His Excellency the Governor General to be a Justice of the Peace for New Zealand.’ This notification was followed a week or so later by a call from the local registrar of the Magistrates’ Court asking me to present myself at the chambers of the local Stipendiary Magistrate to be sworn in officially as a JP, a judicial officer of the local court.

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\(^2\) The term Commission of the Peace is defined on p.8.
\(^3\) The *New Zealand Gazette* is the official publication of the New Zealand Government.
As far as I was aware all that lay ahead now was a less-than-onerous public duty to issue the police with search warrants at weekends (or occasionally in the middle of the night), witness signatures on documents, take affidavits, and certify as true copies various photocopied items presented to me by members of the public. That was all there was to being a JP, or so I thought.

How wrong I was. Within two weeks I had received a phone call from the court registrar summoning me to court to replace a regular judicial JP on the Traffic Court bench who had fallen ill. It was an unnerving and unforgettable shock for a 29-year-old with little previous courtroom exposure even as a visitor, let alone as a judge. In fact it turned out to be a tolerable experience as I was teamed up with a seasoned JP on that occasion and became my mentor on the bench for the next few court sessions. I continued serving on the bench, as business commitments allowed, for the next two or three years, and during this period I became a councillor and served a term as president of the Waikato Justices of the Peace Association.

Many years later, after returning to New Zealand in semi-retirement, in 1995 I rejoined a local JP association, attended its annual general meeting, and soon concluded that the entire institution of lay magistracy in New Zealand had been suspended in a quarter-century time warp. The same problems existed between JP associations and government, and between individual associations and the national Federation. The JP associations had no control of their own members (let alone JPs who refused to join an association), and were constantly short of funds. Training of JPs was minimal. Morale was low.

Nothing appeared to have changed during my 30 years of absence as an active judicial JP, and I needed to know the reason why. The stakeholders in the lay magistracy – the politicians, the legal profession, the judiciary, and the Justices of the Peace themselves – needed to know why. They also needed to know how, and why, lay magistracy was considered to be an important component of the New Zealand judicial system.

This thesis was initiated to provide answers to these questions.

At this point it is appropriate to explain that the reflexive approach I have adopted with this thesis stems from long, if intermittent, association with that movement which is popularly known as Justices of the Peace. Given that this thesis is about one dimension of the JP movement, specifically the Lay Magistracy, it behoves me to locate my persona, and the worldview that is my persona, to this investigation of the Lay Magistracy.
Reflexivity, according to Tolich and Davidson, is ‘the idea that social researchers always remain part of the social world they are studying. Consequently their understanding of that social world must begin with the daily experience of life (common sense)’ and ‘reflexive research reflects upon, and questions, its own assumptions. Researchers must self-consciously reflect upon what they did, why they did it, and how they did it. The values of the researchers become an explicit part of the research process.’

Thus my world view undeniably appears either manifestly or latently throughout this thesis; it has shaped my approach to research including the formulation of the research design, the selection of data gathering strategies, the approaches to completing analyses and interpretation and finally, to the way in which I have reported and critically presented my research findings.

My provincial upbringing led to a five-year period away from home at a boarding school that seemed to place more emphasis on rules, regulations and sports, than on a worthwhile standard of education. This was followed by more rules, regulations and discipline in the form of Compulsory Military Training in an RNZAF initial training school at Taieri, near Dunedin, and the flying training school at Wigram in Christchurch.

Then followed the journalism cadetship in Auckland and the part-time Diploma of Journalism course at Auckland University before eventually setting off, like much of New Zealand youth at the time, on the big OE (Overseas Experience) and further study and steady employment abroad.

The steady diminution of lay magistracy jurisdiction since 1947 worsened with the passage of the Summary Proceedings Act 1957, and it was not until 1968 that Justices of the Peace were reinstated to the restricted role in the courts they administer today.

Lay magistracy was the only judicial system in New Zealand from the arrival of the first settlers in the 1790s until 1868, when the first professional magistrate arrived. It has been the cornerstone of British justice since the signing of the Magna Carta, and today in England and Wales 23,000 voluntary lay magistrates (JPs) preside over 96 per cent of all court cases. Unlike England, where the system was continually modified to meet changing social needs, lay magistracy in other jurisdictions such as Australia and some Canadian provinces fell into lassitude, as in New Zealand, or disappeared.

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5 Tolich and Davidson, p.39.
But times and attitudes towards community justice are changing, and there is a re-emergence of lay magistracy in parts of the former British Empire. Scotland has recently reverted from a professional to lay judiciary in the lower courts, lay magistrates have been introduced in Northern Ireland, and lay magistracy is currently being reintroduced in South Africa.

It is time for serious consideration of lay magistracy as a solution to New Zealand’s burgeoning overloaded case problems in the lower courts. There are now only 450 judicial JPs being used in the District Courts throughout the country, yet there are more than 1,000 lay magistrates trained and ready to assume court duties if called upon.

My thesis is an argument that lay magistracy is effective, and should be retained and reformed as a major component of the New Zealand justice system. The thesis also proffers a proposal for the structure, administration and control of such a reformed system of lay magistracy.