THE LAY MAGISTRACY IN NEW ZEALAND

JUDICIAL ASSET OR COLONIAL ANACHRONISM?

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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’.\(^1\) 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 (\(\Sigma N = 630\) 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.

\(^1\) Refer definition of ‘effective’ p.7
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<tbody>
<tr>
<td>ACJA</td>
<td>Australian Council of Justices’ Associations</td>
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<tr>
<td>ACT</td>
<td>Australian Commonwealth Territory</td>
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<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>
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<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>
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<tr>
<td>DCA</td>
<td>Department of Constitutional Affairs</td>
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<tr>
<td>DCJ</td>
<td>District Court Judge</td>
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<tr>
<td>HDLS</td>
<td>Hamilton District Law Society</td>
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<tr>
<td>JAB</td>
<td>Judicial Appointments Board (Scotland)</td>
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<td>JAC</td>
<td>Justices’ Appraisal Committee (Scotland)</td>
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<tr>
<td>JALO</td>
<td>Judicial Appointments and Liaison Office</td>
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<td>JP</td>
<td>Justice of the Peace</td>
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<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>
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<tr>
<td>LCD</td>
<td>Lord Chancellor’s Department</td>
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<tr>
<td>LCJ</td>
<td>Lord Chief Justice</td>
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<td>Abbreviation</td>
<td>Description</td>
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<td>----------------------------------------------------------</td>
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<tr>
<td>LJ</td>
<td>Lord Justice</td>
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<tr>
<td>LM</td>
<td>Lay Magistrate (Northern Ireland)</td>
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<tr>
<td>MAAC</td>
<td>Magistrates’ Appointments and Advisory Committee</td>
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<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>
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<tr>
<td>NZFUW</td>
<td>New Zealand Federation of University Women</td>
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<tr>
<td>NZLC</td>
<td>New Zealand Law Commission</td>
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<tr>
<td>NZLS</td>
<td>New Zealand Law Society</td>
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<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>
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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.

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.
CHAPTER 1

INTRODUCTION: DEVELOPMENT OF LAY MAGISTRACY IN NEW ZEALAND

My thesis is that lay magistracy is effective and should be retained and reformed as a major component in the New Zealand justice system. It is submitted that lay magistrates importantly provide democratic local justice; as unpaid volunteers they offer a low-cost judicial service to the taxpayer; and by substantially reducing court caseloads they enable more experienced law-trained professional judges to handle more serious hearings.

Before discussing the main points upon which the argument is predicated, it is appropriate to define the term ‘effective’ in order to contextualize its meaning in relation to this thesis:

**effective** – adjective 1 successful in producing a desired or intended result: *effective solutions to environmental problems.* … 2 [attrib.] fulfilling a specified function in fact, though not formally acknowledged as such. …

It should be noted that while some sources quoted in this study have chosen to use the terms ‘effective’ and ‘efficient’ synonymously, for the most part I have used the term ‘effective’ throughout the thesis. On the few occasions when I have used the word ‘efficient’, it has been used in the sense as here defined:

**efficient** – adjective …(of a person) working in a well-organized and competent way: *an efficient administrator.*

It is appropriate also to define a number of judicial and other terms ascribed to, or associated with, this particular form of adjudication.

In England and Wales the term ‘magistrate’ is synonymous with Justice of the Peace and Stipendiary Magistrate by definition:

**magistrate** *n.* Civil officer administering law; person conducting court of summary jurisdiction (stipendiary or Justice of the Peace); ~*ates’ court* (for minor cases and preliminary hearings); hence or cogn. ~acy, ~*ateship*, ~*ature*, *ns.* [ME, f. L *magistratus* (orig. office of) magistrate (as prec.; see -ate)].

And notes to recent United Kingdom courts legislation offer a further explanation:

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The title of Justice of the Peace still applies to lay justices; but technically it may refer equally to a lay justice and to a District Judge (Magistrates’ Courts). For clarity throughout this Act the term “lay justice” has been used in those sections where a District Judge (Magistrates’ Courts) is not meant to be included in the provision. Although existing legislation, and the Act, refers to lay justices, they are also popularly known as “lay magistrates”, the expression used in these notes.\(^\text{10}\)

Lay magistracy plays an important role in the justice systems of other jurisdictions that do not embrace the traditions of English common law. Bell,\(^\text{11}\) an authority on European judiciaries, cited an official report’s conviction that lay magistrates were essential for three reasons: To guarantee effectiveness by keeping judicial decisions in line with social values; to maintain confidence of citizens in the effectiveness of courts; and to keep the interest of the public in the effectiveness of justice by collaboration of lay people.

In his recent study he asserts that the lay judiciary ‘serves to ensure both the effectiveness and the legitimacy of the judicial system, including as a check on the power of professional judges. At the same time it has to be recognized that not all non-professional judges are lay people – they are often lawyers from a different professional background.’ This same circumstance may occur in New Zealand, where a lay Community Magistrate may be a qualified lawyer but not necessarily be qualified (or indeed interested) in being appointed a District Court Judge.

In New Zealand, however, the term ‘magistracy’ has a somewhat different connotation that requires further examination and explanation. Here the term ‘lay magistrate’ applies both to Justices of the Peace and Community Magistrates, although the jurisdiction of these two categories of judge differs (as described on page 10). While all eight Community Magistrates\(^\text{12}\) in New Zealand serve as lay magistrates, less than 50 per cent of the Justices of the Peace specially trained to adjudicate in the courts have actually been appointed to serve on the bench. When these JPs are selected to sit on the bench as lay magistrates they are designated as ‘judicial JPs’.

This has not always been the case. Until 2007 all Justices of the Peace, following appointment and having their names published in the New Zealand Gazette, by virtue of their office automatically became officers of the local District Court. In this role, and often with little or no formal training, they were liable to be called upon to adjudicate on the bench when summoned by the local court Registrar. However, a protocol signed in 2007 between the Royal Federation of New Zealand Justices Associations and the Ministry of Justice for court services stipulated that only those JPs who had successfully completed a

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\(^{10}\) Explanatory note to the U.K. Courts Act 2003, Ch. 39, s 9, par. 45.

one-year training course and received local court instruction from a District Court Judge, would henceforth serve on the bench.

At this point it is relevant to provide some working definitions. Such terms as ‘Commission of the Peace’, ‘lay justice’ and ‘lay magistracy’ need to be defined, and the difference between ‘lay magistrates’ and ‘professional magistrates’ explained.

The term **Commission of the Peace** refers to the institution to which Justices of the Peace (lay magistrates) are appointed. Originally in England Justices of the Peace were appointed to the Commission of the Peace by the Lord Chancellor under authority of the Great Seal of the Monarch. Today in New Zealand all appointments to the Commission of the Peace must be approved by the Governor General, as official representative of The Queen, acting on the recommendation of the Minister of Justice.

**Lay justice** involves adjudication and dispensing of summary justice and the handling of local administrative applications in lower courts with criminal and common law jurisdictions. These lay adjudicators are appointed or elected from the citizens of the jurisdiction in which they serve and are not usually required to have formal legal qualifications.

**Lay magistracy** is the term given to such lay people who serve on the bench in the lower criminal courts. Doran and Glenn\(^\text{13}\) contend that the issue of lay magistracy has engendered considerable debate, and that there appears to be a marked divergence of opinion between supporters and detractors of the principle. They suggest that while arguments in favour of the principle of lay participation tend to be developed by reference to the ideology of democracy, opposing sentiments tend to be more redolent of bureaucratic thinking.’

Until 2000 all lay magistrates in New Zealand were drawn from the ranks of **Justices of the Peace**, but since then a few lay magistrates known as **Community Magistrates** have been appointed from outside the ranks of Justices of the Peace. The nuances in these judicial titles and positions will be further clarified in Chapter 1.

Appointment as a lay magistrate today presupposes solid citizenship and completion of basic judicial training to satisfactorily perform bench duties. In some overseas jurisdictions all lay magistrates are Justices of the Peace; in other countries they are not. In some jurisdictions (England and New Zealand for example) lay magistrates serve voluntarily and are unpaid; in others they are modestly remunerated for their services, usually on a \textit{per}

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\(^{12}\) Increased to 16 in February 2009.

\(^{13}\) S. Doran and R. Glenn, Lay Involvement in Adjudication Review of the Criminal Justice System in Northern Ireland, Northern Ireland Office, 2000, p. 9.
In the United States lay magistrates are elected to office; in others jurisdictions such as England and New Zealand they are appointed to the position. While variations in the office of Justice of the Peace exist in other regions, such as the public election of JPs in some states of the United States, the focus of this thesis for purposes of comparison is based on the original model, that of England and Wales.

This thesis will refer to all lay magistrates in New Zealand as either ‘Community Magistrates’ or ‘judicial JPs’ [those JPs specifically trained and selected to serve as magistrates on the bench in the lower courts]. At this point the third type of judge presiding in the lower court (the District Court Judge) should also be introduced to the discussion and that position be defined and explained.

Different adjudicators preside in lower courts

Defendants appearing in New Zealand District Courts on charges that can be dealt with summarily, or in deposition hearings in the case of more serious offences, may find themselves facing one of three different categories of judge – either a professional District Court Judge (formerly known as a Stipendiary Magistrate), a Community Magistrate, or two judicial Justices of the Peace. This information about DCJs, while not strictly pertinent to the subject of lay magistracy, is included here to assist the reader in relating the professional lower court DCJ to the CMs and the judicial JPs. These three levels of magistrate differ in the following respects:

District Court Judges\(^{14}\) (DCJ), prior to 1980 known as Stipendiary Magistrates, must be graduates in law with a minimum of seven years of practical experience being required before they can apply for the position. After appointment they must attend a five-day live-in orientation course followed by two to three weeks of specified court sittings under the supervision of a senior mentor judge. The new DCJs then sit in their own courts where they are assisted by another mentor judge for a further six months.

Community Justice Officer (CJO) was the nomenclature proposed for a salaried law-trained ‘junior’ judge in the Community Court recommended by the New Zealand Law Commission in 2004.\(^{15}\) Neither the new lower court system nor the appointment of CJOs was adopted by the Labour government of the day.

\(^{14}\) The District Courts Act 1947 allows for the appointment of a maximum of 120 District Court judges, but there is provision for the number to be increased when required by the short-term extension of warrants of retired judges.

\(^{15}\) This CJO proposal is described in some detail on p 43.
Community Magistrates (CM) may apply for the position and are appointed by the Ministry of Justice under a government regulation\textsuperscript{16} as and when the Minister sees the need for further appointments. Before being designated as a CM the applicants must satisfactorily complete a course of training approved by the Chief District Court Judge (CDCJ) in relation to discharging their duties as a lay magistrate. If the applicant is then certified as being suitable as a CM the CDCJ notifies the Ministry and the Minister of Justice then confirms the appointment. The level of sentencing jurisdiction of a CM is higher than that of judicial JPs but lower than that of a DCJ. This background to the CMs is pertinent to the study because some CMs are recruited from the ranks of judicial JPs, and in one of the possible lay magistracy models outlined in Appendix F the suggestion has been advanced that judicial JPs seeking to advance their judicial career could be promoted to the ranks of the Community Magistrates.

Judicial Justices of the Peace (judicial JP), on the other hand, are regular JPs who have indicated an interest in serving on the bench and applied to become a judicial JP. Before being considered for appointment to the bench the aspiring judicial JP must satisfactorily complete and pass a one-year tertiary course structured for judicial work and administered by a retired District Court Judge. Then, before being assigned to bench duties, the new judicial JP must undertake further regular training courses conducted by designated JP training officers under a joint protocol between the RFNZJA and the Ministry of Justice\textsuperscript{17}. The newly appointed judicial JP is then mentored for several months before sitting on the bench as a probationary judicial JP alongside a more experienced senior judicial JP. This information is provided here to dispel the argument often advanced by opponents of lay magistracy that judicial JPs lack the necessary training and experience for their role as adjudicators in the lower courts.

Before returning to a discussion of the points upon which my thesis argument for the retention and development of lay magistracy is predicated, the reader is offered a short history of the origin and purposes of lay magistracy. This chapter will assist in setting the context for this thesis. It explains the metamorphosis of lay magistracy from England to New Zealand and outlines the early history of lay magistracy in this country.

This chapter covers an era from the appointment of New Zealand’s first Justice of the Peace in 1814 to 1975, and details the wide range of judicial authority vested in JPs during this period. By the 1950s the lay magistracy appeared to be in terminal decline, but was saved by a ‘renaissance’ of sorts in the 1960s, as a consequence of which judicial JPs still

\textsuperscript{16} Community Magistrates Regulations 1998 (SR 1998/234), Ministry of Justice, Wellington, N.Z.
\textsuperscript{17} Justices of the Peace Best Practice Manual, Ministry of Justice and RFNZJA report, 2008.
perform a limited judicial function in the court system. This more recent period of lay magistracy endeavour from 1975 to the present is considered in the following chapter.

Origin and history of lay magistracy

It has long been a British tradition that ordinary people untrained in the law should take part in the legal process, whether as members of juries, assessors, or as magistrates. It was this tradition that New Zealand adopted from the English common law system more than 160 years ago.

According to Skyrme\textsuperscript{18} the origin of the Commission of the Peace was when “Keepers of the Peace” were introduced in England in the 12th century and saw their duties expanded during the reigns of Richard I, John and Henry III. In the absence of a police force these officials were expected to deal with violence and lawlessness, as were their successors who emerged as “Justices of the Peace” in the early fourteenth century. Eventually, this judicial office of lay magistrate was transported with varying degrees of success to territories within the British Empire. Since that period lay magistracy has also been adopted in other parts of the world. Few other surviving institutions can trace their history for at least 800 years, and fewer still have had such a profound influence for an appreciable time upon the communities in which they operated.

Magistracy in England saw ‘radical change’

In addition to tracing the origin and development of JPs throughout their 800-year history in England and Wales, Skyrme\textsuperscript{19} described their changing duties and responsibilities over the centuries – from keepers of the peace for the monarch in 1200 to their transition to Justices of the Peace in the 14th century until the end of the 16th century. He explained the expansion of their powers under the Tudors to matters of trade, shipping, agriculture, liquor licensing, hunting, and weights and measures. They also fixed prices and wages, exerted strict authority over vagrants, administered the Poor Law, and were responsible for controlling bridges, highways, gaols and the military units operating in their locality.

During Elizabethan times the Queen and her Council governed England through its Justices of the Peace, who reached the zenith of their power and influence as ‘undisputed rulers of the countryside’ between 1689 and 1820.\textsuperscript{20} Then, following claims that the appointment of JPs was becoming dominated by politics, municipal reforms of the 19th century saw the removal of their administrative functions by the Municipal Corporations Act 1835. The

\textsuperscript{19} Skyrme, p. 735.
image of JPs became tarnished largely because of the impossible range and diversity of their judicial and civil responsibilities, and curbs were put on their administrative duties. The function of JPs then became primarily directed to the administration of justice in the courts, where it has been focused in England to this day.

Today the lay magistracy thrives in England and Wales and handles 96 per cent of all criminal and civil court hearings. However, in New Zealand the judicial authority of JPs has been steadily eroded over the past 100 years, and currently only about 10 per cent of cases in our lower courts are heard by judicial JPs. Today judicial JPs serving in our courts are seen as such minor players that in 2004 the New Zealand Law Commission recommended that they be replaced with a new type of junior professional magistrate.\textsuperscript{21} It is this reality which, among other things, has initiated the preparation of this thesis.

A brief history of Justices of the Peace in New Zealand may assist the reader in better understanding the reasons for the introduction of lay magistracy in this country and what brought about the gradual decline in its jurisdiction.

**Beginning of lay magistracy in New Zealand**

Justices of the Peace officiated in the Bay of Islands before a government was established in the British colony, and for decades afterward JPs were the cornerstone of the New Zealand justice system.

New Zealand’s first Justice of the Peace was a missionary, Thomas Kendall, appointed in 1814 by Governor Macquarie of New South Wales at the request of Rev. Samuel Marsden. Until 1840 New Zealand was considered to be part of the colony of New South Wales, and Marsden was concerned about the lawlessness and violence existing at Kororareka in the Bay of Islands, frequented by crews of sealing and whaling vessels, escaped convicts from Australia, beachcombers, traders and a few local settlers.

Neither Kendall nor the second JP appointed by Governor Macquarie in 1819, Rev. John Butler, were successful in their judicial mission. Neither man had any police or militia support, they disliked each other, and both soon turned to supplementing their income by selling muskets, powder and shot to local Maori renegades – hardly the outcome envisaged by Marsden. But as Chief Justice Dame Sian Elias has noted,\textsuperscript{22} the governor’s authority to make such appointments was ‘suspect’. Before and after the appointment of the first two JPs the maintenance of order in the colony was haphazard and virtually non-existent.

\textsuperscript{20} First JPs in Australia and New Zealand were appointed during this period of transition in England.
\textsuperscript{21} The Community Justice Officer proposed by the NZLC was to be full-time, salaried and qualified in law.
The Royal Charter of 1840 constituted New Zealand as a separate colony and the first Chief Justice of New Zealand arrived in 1842. The law of England was applied to New Zealand first as a matter of common law,23 and the country was governed as a Crown Colony until passage of the New Zealand Constitution Act in 1852.24 The laws of England in force at 1840, both statutory and common law, became the laws of New Zealand “so far as applicable to the circumstances of New Zealand” with passage of the English Laws Act 1854, and later modified in 1858.25 The legal institutions, including the Commission of the Peace, remained modelled on those of England itself.26

A Legislative Council was created with powers to make laws for the ‘peace, order and good government’ of New Zealand, and Governor William Hobson ordained that the Legislative Council should include three senior Justices of the Peace27– presumably selected from the 27 JPs he appointed that year.

The Magistrate’s Court was established in 1846 as a summary tribunal, without a jury and having limited criminal and civil jurisdiction. The magistrate, who was appointed from the schedule of Justices of the Peace, was required to sit with two other JPs in cases involving Maori.28 Eventually the Magistrate’s Court Act of 1893 set up the modern court of record that existed until the present style of District Courts were established.

**Until 1868 JPs were the principal judges**

So for 54 years from 1814 until the arrival of the first Stipendiary Magistrate in 1868, and with the exception of the Chief Justice and his associates, Justices of the Peace comprised the colony’s primary judicial system. In 1846 Quarter Sessions were established to hear and determine all felonies and indictable misdemeanours except treason, murder, other capital felonies, (offences punishable by transportation on first conviction), forgery, arson, perjury and bribery.

By 1868, when the first Stipendiary Magistrate was sworn in, Captain William Hobson and his successors had already appointed 678 Justices of the Peace and, according to judicial scholiast Judge J.E. Maze, the judicial authority of these lay magistrates was as colourful as it was varied and extensive:

23 R v Symonds, (1847) NZPCC 387.
25 English Laws Act 1908, s.2.
26 Burns and O’Keefe, p.2.
27 This was a requirement of the Royal Charter of 1840, which established New Zealand as a separate colony.
Justices were empowered to determine paternity . . . could preside over proceedings to determine the legitimacy of European or ‘half caste illegitimate’ children . . . and order the father of any destitute person to pay support of up to 20 shillings per week. . . . They had the power to send ‘neglected and criminal children’ to industrial or reformatory schools and could determine ‘which religion, creed or religious denomination the child should be brought up in’. . . The husband of a lunatic wife would be required by Justices to pay a contribution towards his wife’s support while she was detained in an asylum, and they could order prostitutes to be subjected to periodic examination by a ‘visiting surgeon’. . . A Justice could also detain a prostitute for the purposes of treatment for up to three months under the Contagious Diseases Act 1869 and could imprison for up to three months (with or without hard labour) any prostitute who was deemed to be still infected and found to be visiting any place for the purpose of prostitution . . . JPs could summarily convict and fine up to £100 any person removing spirits from a distillery without a permit . . . and they had the power to imprison for up to three months (with or without hard labour) any habitual drunkard who had been convicted of such an offence three times in the previous 12 months. They could also imprison for up to three months any prostitute behaving in a ‘riotous or indecent manner’, and could imprison for up to two years any person convicted of being ‘an incorrigible rogue’.29

Salaried magistrates and lay Justices of the Peace had shared responsibility in all lower court criminal and civil cases for more than a century before the appearance of Maunsell’s volume, in which he stated ‘there is some risk in relying upon the English textbooks as, although our Statute is founded on the English Summary Jurisdiction Acts, there are some material differences, which render English decisions inapplicable to New Zealand.’30 This aspect of JPs’ activities are touched upon here, but further attention to Maunsell’s accounts are referred to in the Literature Review.

**Justices’ had a duty to read the ‘Riot Act’**

At the time of Maunsell’s writing, JPs still had formidable powers not only in the criminal jurisdiction but also in respect of civil hearings. The author alerted JPs to the dangers of bias, and what actions should be taken when members of a bench panel31 disagreed on a decision. His advice and instruction reminded his readers of their continuing responsibilities to maintain community order when called upon. On the centuries-long duty of JPs to quell riots, Maunsell wrote:

> Justices may be concerned with riots either (a) when they are notified that a riot is apprehended, or (b) when a riot is in actual progress. When a riot is apprehended, application may be made to them (in practice most likely by the police but may be by any credible witness) to swear-in special constables to assist the police . . . It is not proposed to detail the provisions because . . . there is perhaps no country in the world where rioting is more uncommon than in

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31 Bench panel refers to the number of JPs sitting together in court to hear a case. In England and Wales Justices traditionally sit as a panel of three, while in New Zealand a panel is usually set as two. Justices may sit alone in New Zealand to attend to minor procedural matters such as remands and bail applications.
New Zealand . . . [but] it is to be noted that two Justices must act together; a Magistrate may, however, act alone.32

He then admonished his reader that if the Sheriff or Justice failed to perform the duty imposed upon him to read the Riot Act, he was liable to imprisonment for two years, but fortuitously then went on to say that the Justice did not necessarily have to expose himself unduly to injury as long as he acted as ‘a man of ordinary prudence and average courage. Reasonable fear may be an excuse, but it must be a fear arising from such danger as would affect a man of ordinary firmness.’

Burns and O’Keefe also mentioned the Riot Act responsibility of JPs,33 but only to establish that under further statutory erosion the Justices had been deprived of this ancient power. The riot responsibilities of JPs were now, they explained, ‘entirely at the behest of the police . . . surely an extraordinary state of affairs in a democracy.’ According to s.88 of the new Crimes Act 1961 . . . Justices “may, at the request of the police,” read the Riot Act.34 The operative word is “may”, so that not even a Magistrate can act without that request. The time-honoured notion of duty to conserve the Queen’s peace has given way to the direction of the police.”35

**From 1900 the powers of JPs declined**

From the turn of the century the judicial powers of JPs declined as more full-time Stipendiary Magistrates were appointed. Complexities of the law and of society led to the need for legally qualified magistrates or judges to deal with much of this judicial work according to Maze, who asserted that ‘the changes were not because these unpaid servants of the community were not performing their task, but because the community was demanding too much of them.’36

While Judge Maze’s theory – that complexity of the law and of society and the need for legally qualified Magistrates – may have some validity, the most likely reason for the curtailment of Justices’ powers was disclosed by J.L. Noakes in *Federation: 1924–1973*,37 in which records of the first 80 years of the JP conferences reveal that the JPs saw their role

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32 Maunsell, p.13.
33 *Encyclopaedia of New Zealand* cites eight riots: 1868 (Battle of Addisons Flat); 1879 (the Timaru Orange Riots); 1897 (the Worthington Riots); 1913 (the Waterfront Strike); 1932 (the Depression Riots); 1943 (the Battle of Manners Street, Wellington); 1965 (the Auckland Prison Riot); and 1965 (Paparua Prison Riot, Christchurch). Magistrates “read the Riot Act” successfully in 1879 and in 1897, and Wellington magistrates were ‘ready to read it’ in 1913.
34 Crimes Act 1961 (part 5, s.87) defines ‘riot’ as ‘a group of 6 or more persons, who, acting together, are using violence against persons or property to the alarm of persons in the neighborhood of that group’, and although the same Act repealed Reading the Riot Act as a responsibility of JPs (pt.5, s.88), they may, as indicated above, ‘at the request of the police’ read it before the assembled rioters.
35 Burns and O’Keefe, p.47.
36 Maze, ibid.
as being as much political as judicial. This continuing attempt to impinge on affairs of state appears to have rankled the country’s politicians. Noakes records that between 1936 and 1955 an average of 38 remits – many politically motivated – were considered annually at the 15 conferences where figures were provided. At the 1947 conference a staggering 69 remits were considered.

**JPs agenda of social reform**

It is understandable that Members of Parliament regarded the RFNZJA primarily as a pressure group and their conferences as social reform talkfests. The Federation saw itself as a lobby group and watchdog over government, and Noakes records conference remits on such diverse issues as ‘Half-way houses for non-violent mental illness sufferers (1927); financial support for the needy dependents of prisoners (1927); need for judicial protection of justices (1932); abolition of the Grand Jury (1935); grounds for divorce should be widened (1952); effective hydatid control measures needed (1959); and improvements in the living standards of Maori children (1945).’

While delegates focused on such political and legal reform they and their Federation executives had neglected to put their own institutional house in order. Time spent at conferences debating perceived government and legal shortcomings should arguably have been devoted to such issues as appointment procedure, education and judicial training – the very issues that still remain of concern to JPs 50 years later. This is one of the foci of this thesis.

While there appears to have been little overt government criticism of the Federation and its member associations prior to passage of the Justice of the Peace Act and Summary Proceedings Act 1957, a study of the Federation’s activities between 1935 and 1950 provides ample justification for parliamentarians and the legal profession to have become disenchanted with the JP organization. The Federation, simply put, had lost its way and was being run by a group of very elderly men who saw themselves as political reformers and watchdogs over government. Regrettably they did not see their role as inspirational leaders of a Federation of lay magistrates with the potential to become a major force in the country’s judicial system.

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38 Noakes, p.53.
Royal Federation of New Zealand Justices Associations

The Federation has a long history. The first conference of the RFNZJA was held in Wellington on 30 September 1924 and was attended by delegates from five established regional JP associations.39

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<tr>
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<th>(established 1918)</th>
<th>245 members</th>
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<td><strong>Canterbury</strong></td>
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<tr>
<td><strong>Wellington</strong></td>
<td>(established 1921)</td>
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<td><strong>Auckland</strong></td>
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<td><strong>Taranaki</strong></td>
<td>(established 1922)</td>
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<td><strong>Wanganui</strong></td>
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Individual delegates also attended from six other regions where Justices’ associations had not yet been established. It was reported at the inaugural conference that there were 5,500 JPs in New Zealand, of which 930 Justices were members of the five associations.

Since 1924 many groups of JPs in districts throughout the country have formed their own autonomous regional associations and applied to the national Federation for recognition and affiliation. Although all JP associations established on this basis have retained the right to secede at any time they choose, and at times there have been threats to do so, none to date has ever defected.

Post-war ‘years of decline’ for lay magistracy

By the 1950s the Commission of the Peace was seen by one parliamentarian40 as a self-perpetuating, moribund, self-serving organization of predominantly elderly, self-satisfied, middle-class males. Federation officials appeared to be unaware that government disillusion with the Commission of the Peace had reached the point where government action against the lay magistracy was intended.

39 Noakes, p. 9.
40 Hon. Mabel Howard and others during debate on the Justices of the Peace bill, 1957.
The barrage of social engineering remits from previous conferences had provoked government annoyance. Even more irritating, Noakes\textsuperscript{41} suggests, were a number of remits designed solely to benefit the JPs themselves – for example the suggested establishment of a mortuary fund for their members, railway fare concessions to JPs’ representatives when travelling on official business, and an allowance for personal stationery. While some of these claims may not seem to be unreasonable today, they were not received favourably by the then Minister of Justice, Hon. T.C. Webb,\textsuperscript{42} who expected JPs to make contributions to meet all the expenses of their organization.

Relations between the Ministry and the Federation had reached an all-time low by 1949, and the final straw appeared to be self-serving remits from the 1950 Conference (where the 94-year-old president was again absent through illness) recommending that judicial Justices should wear black gowns when presiding in court, and that in future wives of JPs be included in delegations to meet the Minister.\textsuperscript{43}

The Minister took a firm stand on the financial issue and told the Federation it was to fund all its operations through levies on its members. Even the education of new and existing JPs was to remain the financial responsibility of the Federation and its regional associations. No action was to be taken against JPs who refused to join their regional JP associations and who would thereby avoid paying levies applied by the RFNZJA and its affiliated associations.

Until 1950 the JP system had been largely a self-perpetuating organization. When a shortage of JPs was seen to exist in a city or country area the local JP association approached a “suitable worthy citizen” and asked if he or she would accept an appointment if it were offered. If the reply was positive, the association would contact the Minister who would then “rubber-stamp” the application after a police check. The appointment was then confirmed by signature of the Governor-General and a subsequent announcement published in the \textit{New Zealand Gazette}.

In his record of annual JP conferences Noakes described the period from 1947 to 1958 as “the years of decline in jurisdiction”,\textsuperscript{44} during which the government’s introduction of the Justices of the Peace Act 1957 and the Summary Proceedings Act 1957\textsuperscript{45} clearly showed an official determination to curb judicial JPs’ jurisdiction by removing many of the more important judicial functions previously entrusted to them in law in the lower court.

\textsuperscript{41} Noakes, p. 54.
\textsuperscript{42} Hon. T.C. Webb became Attorney General and Minister of Justice in the National government in 1949.
\textsuperscript{44} Noakes, p. 32.
\textsuperscript{45} The Summary Proceedings Act came into force on 1 April 1958.
JP apathy contributed to decline in powers

Noakes claims that based on the evidence available, much of the criticism levelled by Ministers of Justice at JPs in general, and the Federation in particular, appears to have been justified. Justices of the Peace had received a clear-cut admonition to put their house in order or face the consequences. He noted that Justices of the Peace were largely instrumental in bringing about their own decline. Apathy among regional Justices’ associations during and after World War II had led to a lack of confidence in JPs and their national body (RFNZJA) by the government and the Ministry of Justice. The government, however, must bear some of the blame for the parlous financial state of the Commission of the Peace.

The Federation was under-funded, complacent, and run by very elderly officials. The annual conferences, sometimes lasting four days, had become conclaves at which delegates introduced countless remits admonishing government ministers on the conduct of their Justice and other portfolios. These annual censures caused resentment, and Ministers of Justice decided the time had come to curb the conference ‘outpourings’ by placing some restraint on the activities of Justices of the Peace.

Arguably the lowest point in government confidence in the Commission of the Peace occurred at Tauranga in 1949 when Hon. B.C. Robbins, aged 93, was elected president of the Federation and the retiring registrar, aged 88, was ‘presented with an engraved memorial, a jewel, and granted an honorarium of £100.’ A year later the 94-year-old president was prevented by illness from attending the conference in Christchurch where the Otago association proposed that annual conferences become biennial, a suggestion that did not garner government confidence in the institution.

The appointment of JPs was a recurring issue at Federation annual conferences, and a regular source of annoyance to Members of Parliament. One particular 1945 conference remit that rankled politicians recommended that ‘appointments to the Commission of the Peace be taken out of the hands of Members of Parliament.’ Another remit in 1947 recommended ‘that all nominations for appointment should be submitted to the local Justices’ Association,’ and in 1950 a further remit advocated that ‘nominations to the Commission of the Peace should be examined by a Magistrate and a panel of two Justices.’

Minister changed JP appointment system

When he opened the 1951 conference Hon. T.C. Webb announced he was not satisfied with the methods employed for past JP nominations and decreed that, in future, all nominations should be submitted to the Member of Parliament for the district in which the nominee resided. He admonished regional JP associations not to make their organization a closed
shop, and stressed that a more stringent examination of nominees would be made. He concluded his address by saying ‘New Zealand has the reputation for having more JPs to the square yard than there are in any other part of the world.’ One reaction to Webb’s speech by JP officials was an internal restructuring of the Federation and its publication *Justices’ Quarterly*. Executives were dismissed, and a new editor and business manager were appointed. Several amendments were made to the RFNZJA Constitution, including one (carried, but not unanimously) stating ‘that the Federation be non-sectarian and non-party-political.’

In 1954 the Federation president reported a successful year and an increase in membership, with 3,635 members recorded by the 21 district associations. Conference remits were reduced to a manageable 18, of which 10 were adopted. But a few petty remits and niggles persisted – one group of Justices resented the fact they had not been included in Royal Tour functions, and another delegate expressed concern that a mayor [JP ex-officio] convicted of an offence had again successfully contested a mayoral election. In 1956, when political opponents of the lay magistracy were already planning to clip the organization’s judicial wings, the Federation president announced that Victoria University’s offer to run a refresher course for judicial JPs had to be abandoned through lack of support.

Hon. T.C. Webb’s speech in 1951 signalled government’s plans to diminish the authority of JPs and implementation of the 1957 legislation would further severely curtail the powers and activities of New Zealand judicial Justices for the next 50 years.

**Government curtailed powers of JPs**

During 1957 relations between the Federation and the Minister of Justice (Hon. J.R. Marshall) remained strained. In the months prior to the 1957 RFNZJA conference the Ministry without consulting the Federation had published a new Commission of the Peace list containing the names of 6,255 justices (including 230 new appointees) – after purging 2,000 names of JPs from existing lists. Marshall had also proposed that a retiring age for JPs be established – a proposal vigorously rejected by delegates at the 1957 conference – and a further remit from the same conference ironically calling for speech amplifiers to be installed in the courts, [presumably for the benefit of hard-of-hearing judicial JPs] must have further tried the Minister’s patience.

The Minister, having already verbally expressed his displeasure with JPs, introduced three new bills in the 1957 parliamentary session that would further curb the jurisdiction of lay

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46 Hon. T.C. Webb in speech at Federation Conference, Napier, 1951.
47 Williams, p. 30.
magistrates – the Oaths and Declarations Bill, the Justices of the Peace Bill, and the Summary Proceedings Bill. The Federation executive accepted the introduction of this proposed legislation with equanimity. Marshall had described the Oaths and Declarations Bill as being ‘of distinct value in tidying up the purely legal aspect of oaths’, and the bill met with little opposition as it passed into the statute books.

The first reading of the Justices of the Peace Bill was described by the Minister as being ‘the second of three bills which will incorporate the provisions at present contained in the Justices of the Peace Act, and [which] deals with the provisions relating to the appointment and function of Justices . . . There are minor amendments, none of which is of a substantial nature.’ He was recorded as saying *inter alia*: ‘A committee headed by a Magistrate and including Justices of the Peace reported to the Attorney-General on the suitability of candidates. The Magistrate made the recommendations to the Minister and there were instructions that these recommendations were not to be based on political considerations.’

During its second reading on 5 July 1957 the Minister outlined the purpose of the bill and spoke in detail about the appointment system and the powers of Justices under the Police Offences Act, the Justices of the Peace Act, the Summary Jurisdiction Act, certain traffic legislation, and the Coroners Act, explaining that judicial Justices of the Peace ‘can deal with offences relating to good order, decency, vagrancy, and drunkenness, and they have jurisdiction to impose sentences where the maximum sentence provided by law is a period of two years imprisonment.’ He told the House that while most lower court hearings in the cities were heard by Stipendiary Magistrates, judicial JPs were of considerable help in disposing of the minor criminal matters coming before the courts in country districts where [stipendiary] magistrates were frequently not available. The Minister introduced the subject of JP appointment procedure, and in particular for JPs who may be called upon for judicial duties:

> It is important to emphasize the need for Justices of the Peace to be persons of character and responsibility. It must be admitted, concerning the duties imposed upon Justices of the Peace, that many of the Justices are not called upon to carry out many of them, particularly court work, but those Justices of the Peace nevertheless have a residuary responsibility [as judicial Justices], and one for which they may be called upon at any time. As they have those responsibilities, it is important that we should see that the kind of people we nominate for appointment as Justices of the Peace are people capable of performing those [judicial] functions. Justices of the Peace having those responsibilities also have a duty above the ordinary to maintain and uphold the law. I feel bound to point out that there have been some regrettable cases of Justices of the Peace who have failed in that duty . . . It is necessary for a Justice of the Peace to set an example in the observance of the law.’

48 Williams, p. 33.
49 Williams, p. 33.
The Federation executive appeared to accept that the bill would have a comparatively minor effect on its members and their judicial responsibilities, obviously unaware that the proposed new legislation – the Summary Proceedings Act 1957 – would severely curtail the powers and activities of New Zealand Justices for the next 50 years. Ironically, one of the remits at the 1955 RFNZJA Conference called for the establishment of a Watch Committee, the function of which would be to report to the Federation executive on proposed new legislation. Federation records are silent on what action, if any, this committee took in respect of the proposed new legislation. If it had been active and aware of the significance of the legislation the Federation executive would have been expected to protect itself from the shock it was soon to receive.

**Minister’s ‘no confidence’ in lay magistracy**

Justices of the Peace and the RFNZJA, somewhat relieved at the mildness of the previous two bills, were not prepared for the last bill in the Minister’s troika of ‘tidying up measures’ that delivered a *coup de grace* to the lay magistracy - the Summary Proceedings Bill.51 Almost casually and with little fanfare, Marshall told the House that this was ‘the third part of three bills to consolidate the remaining provisions of the Justices of the Peace Act 1927, the other bills being the Justices of the Peace Bill and the Oaths and Declarations Bill, which have already been dealt with in this session . . . It looks formidable, but there are very few major amendments . . . it is rather a consolidation of the law as contained in the Justices of the Peace Act, the Summary Penalties Act, the Summary Jurisdiction Act, and some provisions of the Magistrates Court Act.’

With those few words the Minister moved that the bill be read a first and second time and then be referred to the Statutes Revision Committee. The RFNZJA was caught completely off guard, and there is no record of any comment or action by the Federation or its Watch Committee, which should have been aware of all aspects of the impending legislation. The JP Federation had been caught off-guard and effectively disenfranchised of their judicial authority.

When the Minister rose from his seat in the House 12 days later and moved that the bill be committed Justices of the Peace were stunned by the machiavellian skill with which the Minister effectively decimated their judicial jurisdiction:

> This is a bill that has been welcomed by the legal profession. It has long been in preparation and has been very carefully examined. A committee was set up by the Department of Justice [including] the magistracy, the Crown solicitors, the New Zealand Law Society, and the police. That committee had the

51 The Summary Proceedings Bill was introduced on 10 October 1957.
responsibility of preparing this consolidation and all the amendments contained in it. A draft of the Bill was sent to the New Zealand Law Society and it was circulated among district law societies, which have also very carefully examined the provisions. The Bill was referred to the Statutes Revision Committee of this House and it spent about three hours going through the measure clause-by-clause and hearing explanations, particularly those of the Law Draftsman and the Department. A message was sent to the Statutes Revision Committee, by the secretary of the New Zealand Law Society stating that the society was satisfied with the Bill and had no representations to make on it. This Bill has been very carefully prepared and has been examined by the people best qualified to express an opinion upon it, and it is acceptable to those who are in a position to assess the value of it.\(^{52}\)

The Minister, looking for a quick passage of the bill into law, left little opportunity for dissent. With his Department’s connivance he had excluded the JP associations from any discussions, and when selecting the committee that “carefully examined” his legislative proposal the Justices of the Peace and their advisers were conspicuously excluded. The full significance of the measure on judicial JPs only became apparent as the Minister, working through the bill, drew attention to clauses 6 and 9 restating the jurisdiction of Magistrates and Justices:

> **Clause 6** re-enacts the existing provision of the Summary Jurisdiction Act under which Magistrates have summary jurisdiction in respect of a large number of indictable offences, but gives no similar jurisdiction to Justices. At the present time Justices have a very minor jurisdiction to deal with cases of theft or attempted theft of property under the value of £20, and cases of receiving. They were given that jurisdiction in 1952 because of the practical difficulties in some country districts of requiring all the charges to be heard by Magistrates. The question of whether Magistrates can handle this work was discussed at the recent Conference of Magistrates, which indicated to the Department that it was now practicable for them to handle these cases. In those circumstances it is thought proper that they should do so.

Having significantly reduced the JPs’ existing jurisdiction with clause 6, the Minister then unveiled a more restrictive clause that enabled the role of judicial JPs to be further diminished as parliamentary legal reformists had from time to time proposed: ‘Clause 9 provides that Justices are to have jurisdiction where they are expressly given it by the statutes creating the offences. That is considered a more satisfactory way of determining the jurisdiction of Justices.’

Other clauses discussed had little bearing on the changed jurisdiction of Justices, except for Part VIII of the bill that ‘provides for the protection of Magistrates and Justices and for their indemnity where they act in good faith and under a belief that they have

\(^{52}\) *Hansard*, v. 314, 1957, p. 2951.
jurisdiction.” 53 Since they were to have reduced judicial powers in future the JPs probably treated this provision as a somewhat empty gesture.

The third readings of the Summary Proceedings Bill, the Oaths and Declarations Bill, and the Justices of the Peace Bill took place on 24 October 1957 and passed into the statute books without public dissent. The Federation and JP associations appeared to have been caught unaware of the Minister’s plan to truncate their jurisdiction with the most devastating legislation to affect lay magistracy in New Zealand’s history.

The Minister and his Department, along with the legal profession and its various professional societies, appeared to have successfully diminished the authority of a lay magistracy they perceived to be self-serving, aged, elitist, complacent, and out of touch with the judicial standards expected of it. If indeed the Federation’s Watch Committee was fully aware of the Minister’s legislative proposals and failed to act, a major degree of incompetence must be attributed to the Federation executive.

After almost 150 years of tradition and influence the office of Justice of the Peace in New Zealand was seriously eroded, largely due to complacency by the JPs themselves. With their institution seriously impaired by this new legislation, the Commission of the Peace and lay magistracy were at the nadir of their judicial influence. Williams summed up this post-war period of decline (1947-1958) in his monograph by chiding the JP executives:

As the full implications of the new act came to be recognized a sense of dismay spread amongst Justices as their employment in the courts dwindled . . . . It would appear that while the Federation’s executive council was aware of the impending legislation . . . their only representation made in respect of the Justices of the Peace Act 1957 was on the issue of JPs being appointed by the Governor General “in the name of Her Majesty” instead of being appointed “by Her Majesty” as had previously been the case. . . . So it appears that while Justices were preoccupied with matters of dignity the really important [implications of the] legislation were missed.” 54

**Justice Department ‘failed in its trust’ to JPs**

Noakes was critical of the Federation leaders, but even more disparaging about the behaviour of the Minister of Justice and his Department at this time in the organization’s history. He claimed the official policy between 1955 and 1958 was clearly to curtail Justices' responsibilities and placed most of the blame on the Department:

It is difficult to tell if this policy was justified on the past performance of Justices, but if we can judge from the many adverse comments and reports of the period – even the comments of the Justices themselves in conference – then there must have been some justification. Justices complained of lack of

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54 Williams, p. 34.
training, official disregard of their problems, unsuitable appointments and so on. The Department of Justice was (and still should be) responsible for a competent and efficient Commission of the Peace; certainly it did not live up to this responsibility; and then, having failed in its trust, it became the principal agent in the 1957 legislative campaign to cut the Commission to size. The Minister and his Department emerge with no credit to themselves. 55

With a twist of irony the Minister attended the 1957 Federation conference, thanked JPs for their work and told them he thought they were ‘infinitely more important to society and in society as citizens.’ And the following year, adding insult to injury, the Secretary for Justice, writing in the *Justices’ Quarterly*, 56 sought the opinions of JP associations ‘with respect to keeping Justices abreast of new legislation and the way in which Justices are affected by this legislation.’ The *Quarterly* editor retorted ‘there are lessons to be learnt from all this . . . perhaps that no reliance should ever be placed on official public assertions of faith in the Commission of the Peace, and that the Federation should be ever vigilant to protect the Commission by thoroughly examining proposed legislation affecting Justices and by protesting, if need be, before enactment.’

The manner in which Justices of the Peace had been reduced in authority by the passage of the Summary Proceedings Act 1957 was an issue at the 1959 Federation conference in Hamilton. Representations had been made to the Minister of Justice but his responses were non-committal and contained the usual past clichés. Asked by the Federation executive to restore Justices’ jurisdiction he replied that ‘the situation would be carefully watched.’ Asked if JPs could be offered courses of instruction he replied that it would constitute a considerable expense, he doubted that the expense would be justified, and suggested that associations confer with court Registrars.

The attitude of this and former Ministers of Justice was all too familiar, and the jurisdiction of Justices of the Peace in New Zealand had been diminished to such an extent that the Commission of the Peace’s days appeared to be numbered.

**Reform of British and New Zealand JPs**

During the first half of the twentieth century the competence and training of JPs in England and New Zealand became the butt of criticism by law societies and politicians in both countries, and major reform took place in both jurisdictions to meet the social and judicial needs of the time.

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55 Noakes, p. 41.
56 Noakes, p. 42.
Skyrme suggests that from 1949 JPs in England began to bear a heavier burden than their predecessors and ‘the office of Justice of the Peace could no longer be regarded as a sinecure’. Bench duties were onerous and those who did not perform adequately were removed from the commission. The remaining Justices faced increased workloads, were expected to adhere firmly to regular sitting schedules in their local courts, and absences required explanation to the Lord Chancellor’s Department. As pressures of the role increased many JPs had to make personal and family sacrifices to ensure they met the more stringent court attendance requirements.

He asserts that during the 40 years following the Justices of the Peace Act 1949 JPs as individuals ‘underwent a transformation from amateurs to a status verging on professionalism’ and that the subsequent improved selection and training of JPs in England and Wales had undoubtedly saved the lay magistracy from extinction and their total replacement by Stipendiary Magistrates. This outcome was only achieved, in Skyrme’s view, through the careful selection of members of the local community who appeared to be best qualified to discharge their important judicial duties. They were subjected to intensive training -- which was to continue during their entire term of sitting on the bench – and their selection was more representative of the ethnic composition of their communities than had earlier been the case. He further asserts that because of government and parliament awareness of this marked improvement in the quality and efficiency of JPs a number of enactments were introduced to extend their powers:

An example of this was the radical change that occurred in the metropolitan area in the 1960s when the lay JPs, having been virtually excluded for a century and a half from almost every part of the administration of the criminal law, were reinstated and placed on the same level as the professional magistrates.

It may, therefore, have been more than a coincidence that the fortunes of Justices of the Peace in New Zealand also changed in the 1960s. It is likely that when the Minister of Justice, the Hon. Ralph Hanan, reintroduced JPs as lay magistrates to the bench of the Auckland traffic court he was influenced by the increased jurisdiction being given to British lay magistrates at the time.

This rejuvenated lay magistracy operated effectively until the 1980s, when the criminal courts of England and Wales again came under criticism, both for inefficiency and for injustice, from law societies and individual members of the legal profession. Legal

57 Skyrme, p. 911.
58 Skyrme, pp. 909-10.
said the ‘criticisms of inefficiency had been concerned most with cost and delay, and those of injustice had ranged from wrongful convictions (or sometimes failure to convict), through racial prejudice, to inconsistency or severity in sentencing. Other criticisms concerned the competence of lay magistrates to try complicated cases, the number and role of stipendiary magistrates (now district judges), the social composition of the judiciary (especially the higher judiciary), their method of appointment, and the composition and competence of juries.’

Of the criticisms outlined by Faulkner the most apposite to New Zealand at the time were those relating to appointment procedure, although several submissions to the 1977 Royal Commission on the Courts had asserted that judicial JPs lacked competence, and one suggested that lay magistrates were more likely to accept uncorroborated police evidence than their professional colleagues – though no evidence had been produced to substantiate the claim.

Although the lay magistracy in England had by 1990 again made the necessary adjustments to survive in the prevailing political and social climate, Justices of the Peace remained concerned about their long-term future. A note of encouragement came when the Lord Chancellor, Lord Irvine, in thanking them for their voluntary services to their communities, said ‘the role of the lay magistracy is pivotal to the administration of justice . . . its continued good health depends essentially on sufficient numbers of suitable people from all walks of life applying for appointment.’ And the following year when he ordered a further major study of the British court system he reaffirmed his earlier endorsement of the lay magistracy as a significant part of the justice system and said the government’s overriding concern was ‘to dispense justice fairly and efficiently and to provide public confidence in the rule of law.’

That, briefly, outlines the origin and history of lay magistracy in England and its introduction to New Zealand in 1814. Since that time the lay magistracies in both jurisdictions have experienced similar periods of public and government approbation that has led to reform. A slump of political support and public confidence in lay magistracy in both jurisdictions, followed by a period of reform, occurred in the decades following World War II.

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60 HDLS submission to 1977 RCC, No. 107.
1959-1973: Self-examination and reassessment

The JP Federation, though badly shaken by the serious diminution of its jurisdiction in 1957, immediately embarked on an education programme for all JP association members. At the same time, in what Noakes describes as “the years of self-examination and reassessment (1959-1973)”, Federation officials worked assiduously to justify to politicians and the Ministry of Justice the Commission’s existence and to demonstrate its usefulness and importance by eliminating incompetency within its ranks.

Then in 1962, after a five-year hiatus, support arrived for the Commission of the Peace when a new Minister of Justice (Hon. J.R. Hanan) attended the RFNZJA conference in Wellington accompanied by the Chief Justice (Sir Harold Barrowclough), the Chief Magistrate (M.B. Scully SM) and the president of the Wellington Law Society (John White). The presence of such an eminent group signalled an official resurgence of interest in lay magistracy.

The previous resentment and anguish of Justices was partially assuaged by the Minister’s offer to list all Justices’ names and addresses free-of-charge in the yellow pages of New Zealand telephone directories. Furthermore, he agreed to consider appointing selected panels of JPs for court duties if they possessed special qualifications or would qualify by attending a training course.

Relations were thawing between the RFNZJA, Justices’ associations, the judiciary and the politicians, and a new era was about to dawn for Justices of the Peace in their role as lay magistrates in the court system. In 1965 following a period of lay magistracy reform in England and Wales the Secretary of Justice (Dr J.L. Robson), in a concerted bid to improve the public image and the effectiveness of Justices of the Peace in New Zealand, urged RFNZJA officials to design new courses of instruction for ministerial and judicial JPs.

Although this was taken as an encouraging sign by Federation there were still troubling times ahead. Lamentably, the day after Chief Justice Sir Richard Wild addressed the 1967 conference on possible changes to the law on preliminary hearings, the New Zealand Herald appeared with the headline “Justices Call for Lash and Noose” in response to a controversial JP conference remit calling for the reintroduction of capital and corporal punishment.

Stung by the headline the RFNZJA implemented a long-overdue decision that all future remits from associations would be screened and approved by the Federation executive before being considered by conference – a move that effectively reduced the tedious and
repetitious assortment of remits submitted each year. As Noakes said in *Federation 1924-1973*: ‘Conferences were never intended to become public forums to discuss and pontificate upon any matter any delegate might choose to present to it. Far too much time seems to have been spent in conferences well beyond JPs’ interests to the neglect of the major legitimate problems of status, education, appointments and employment.’

The reforms that took place in the JP system during the years from 1959 to 1973 were significant and most of the changes made during that period remain largely unaltered today. A Code of Ethics ratified by the 1971 Conference in Palmerston North was distributed to members of all JP associations, an instruction film was prepared, a judicial studies correspondence course was introduced, and free updated copies of the *Justices’ Handbook* were issued to newly appointed JPs. Delegates to the 1973 conference in Hamilton added further impetus when they agreed to set up a Jubilee Education Fund to raise $30,000 to ‘better equip Justices to perform their duties.’

The government reciprocated by contributing $9,000 towards the new education fund, offered to include the Code of Ethics and other RFNZJA information in a new manual being prepared for JPs, and approved token lunch allowances for judicial Justices sitting in the District Court. These were small gestures, but more than JPs had received from former administrations.

**Governor-General issued challenge to JPs**

The following year the Governor-General (Sir Dennis Blundell) issued a challenge to JPs when he addressed the annual conference in Invercargill. He laid down the gauntlet with this question: ‘Have you in the past 50 years of your Federation revealed your potentiality to a sufficient extent, having regard to all the admitted problems and difficulties, having 27 different associations of people of all ages, and in your primary sphere as members of the Commission of the Peace? If [you have] not, is it your wish that you should do something more?’

The Governor-General then answered his own rhetorical questions:

> As one who has lived in the community, as one who has read of your activities, as one who was president of the Law Society which is associated in many ways with your activities, I would suggest to you that the answer to the first of those propositions I put to you must be: ‘No, you have not done as much as you should have.’ The answer to the second query I put is, of course, your own business. Perhaps you may think it is presumptuous of an outsider to

63 Skyrme, p.1177, refers to the same Mr. Scully SM
64 Noakes, p. 53.
65 It is uncertain what the Governor-General was alluding to with this comment about ‘people of all ages’.
suggest what your business should be, but in the most helpful way, most friendly way, I do urge that there is more – that with better organization, better getting together, more facilities – that Justices individually, [and] in association through their Federation, can and should do more for our community'.

The speech proved to be a rallying call for Justices of the Peace. Donations flowed in to the Jubilee Education Fund, the Federation called on the Department of Justice to publish details of the court work of Justices in its annual reports, delegates voted to increase their per-member capitation fee to the RFNZJA, and the Federation appointed its first director of training.

Justices were further buoyed when the Minister of Justice (Hon. David Thomson) told the 1977 conference there were a number of additional avenues where JPs could become involved – such as insolvency referees or High Court jury supervisors: ‘There is one thing I would like to make clear at the outset – and that is that in my view we should continue with the tradition of lay involvement within our judicial system. I’m certain there is still scope to involve lay people with the administration of justice and their contribution can be most significant.’

But after years of receiving mixed messages about their value to the community from parliamentarians, law society officials, Ministers of Justice and Governors-General, the Federation remained sceptical about the future of judicial JPs. They had long become accustomed to platitudinous speeches followed by inaction from people in authority attending their conferences. And although the Ministry had offered financial assistance towards JP training, there was no suggestion that the lay magistracy success in Auckland traffic courts would be expanded throughout the country.

**Early history of New Zealand lay magistracy**

The first 160 years covered by this chapter reveals a convoluted history of the lay magistracy in New Zealand. For more than half a century, from its inception at Kororareka in 1814, until the first Stipendiary Magistrate was appointed in 1868, Justices of the Peace appointed from the ranks of pioneer settlers constituted the colony’s sole judicial system. During that period 678 settlers, militia, and civil servants had been appointed as JPs with judicial powers covering all criminal charges except capital offences.

That first half-century of colonial lay magistracy, though historically interesting, is not deemed relevant to this study. It may, however, become an interesting research project for the future.

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66 Williams, p. 50.
What is significant is the fact that from 1868 through to the 1930s, as Stipendiary Magistrates were gradually introduced throughout the country, the settler and militia JPs continued to preside in the courts and perform an important judicial role alongside their professional Stipendiary Magistrate colleagues. This is important from the standpoint of this thesis, which posits that an effective lay magistracy should be retained in the justice system. To this effect a series of options are suggested in the Conclusion (and outlined in Appendix F) whereby lay magistrates would preside independently, or symbiotically, with other lay magistrates (CMs) or professional judges (DCJs).

However the diminution of lay magistracy authority accelerated in the 1930s as more Stipendiary Magistrates were appointed to provincial courts, and reached its nadir in the 1950s. Much of the blame for this slump in public and government support, according to RFNZJA records, is attributed to the Justices of the Peace leadership. According to Noakes a few inept officials were uncooperative with government, incompetent, arrogant, and displayed a dereliction of duty, as has been recounted earlier in the chapter.

Equally, some blame must be attributed to antagonistic and disinterested politicians and Ministers of Justice who, over the years, offered little or no financial or departmental support and encouragement to the JP organization. The 1950s clash between government and lay magistracy that resulted in passage of the 1957 Summary Proceedings Act – that stripped away virtually all the judicial powers of JPs – appeared to be an inevitable outcome of this long period of apathy and dissension.

**Argument in support of the thesis**

My thesis that lay magistracy is effective and should be retained and developed as a permanent component of the New Zealand justice system is predicated on a number of conditions having being established, or yet to be realized:

First, it is submitted that the concept of a well organized lay magistracy, within which ordinary citizens untrained in the law become appointed to sit on the bench of local courts, has passed the test of centuries and won the support of outstanding international exponents of the law. Furthermore, a comparison of New Zealand’s lay magistracy with that of other common law jurisdictions, supports an argument that improved administration and control systems would produce a reformed lay magistracy that could play a more significant role in our lower court system.

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67 Williams, p. 54.
68 Noakes
69 Three referred to in this thesis are Lord Hailsham (Lord Chancellor in 1971); Lord Irvine (Lord Chancellor in 1990); and the Lord Chief Justice, Lord Irvine (in 1999).
A review of New Zealand literature further supported the need for research on this subject. Analysis of the 1978 Report of the Royal Commission on the Courts, reports of annual conferences of the JP Federation, and a study of parliamentary debate on lay magistracy in *Hansard* provides added compelling argument for such retention and development of lay magistracy. Of significance in this respect was the introduction in 2000 of Community Magistrates, a varied form of lay magistracy, to specified District Court regions.

Impetus to undertake the research also resulted from the admonition of respected New Zealand judges\(^70\) that lay magistracy formed an important component in the judicial system that should not be lost. And the New Zealand Law Commission’s recommendation to government in 2004 that a new lower summary proceedings court be established at a level below the District Court. This proposal indicated an ideal forum for lay magistrates if the Commission’s suggestion of a newly created professional ‘Community Judicial Officer’ (CJO) was rejected.

I also postulated that the application of a list of arguments for and against lay magistracy, used in a recent official study in England and Wales, when applied in the New Zealand situation would affirm my conviction that lay magistracy should be retained. The final substantiation, or otherwise, would largely depend on the outcome of a proposed national survey of all Justices of the Peace (a population from which all lay magistrates had traditionally been drawn). It was also anticipated that the qualitative element of the proposed survey, supplying for the first time a demographic profile of the entire JP population, would affirm the existence of a likely permanent recruitment source for lay magistrates.

Overarching the thesis project was the knowledge that the present court system was overstretched to the extent that caseloads had reached unacceptable levels and urgent action was needed to alleviate the problem. Implementation of a new Community Court below the level of the District Court already had been proposed by the NZLC, but with junior professional CJOs on the bench. In my view such a court presided over by lay magistrates would provide a speedier and more effective solution to this problem.

The study also examines why the jurisdiction of lay magistrates, once the cornerstone of the New Zealand judicial system, has been steadily eroded to such an extent that today lay magistrates perform a relatively minor role in the administration of justice. It also explores why the authority and socio-judicial potential of New Zealand lay magistrates has not been

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\(^{70}\) These include Dame Sian Elias (Chief Justice); and Sir Alexander Turner and Sir Thaddeus McCarthy (both former presidents of the Court of Appeal). Dame Sian’s comments were made in an address to the RFNZJA Annual Conference at Greymouth in 2006 (see p. 229); and Turner J. and McCarthy J. expressed their views in a submission to the 1977 Royal Commission on the Courts (see p. 159).
reassessed and their jurisdiction restored to previous levels. And finally this thesis proffers several options for the reform and effective control of the lay magistracy. As a proponent of reform and retention, I submit, there is an ethical obligation on the researcher to provide an appropriate model to replace the existing system for which reform is advocated.

Recent moves to reform the lower court in New Zealand, and indecision concerning the recently introduced Community Magistrate scheme as a panacea for the case backlog problem, suggests that further court reform is inevitable. In the event that lay magistracy is retained and developed the survey research for this thesis will provide an assessment of the strengths and weaknesses of the Commission of the Peace. It will also provide an assessment of the competence and inclination of JPs to assume greater judicial responsibility if and when called upon. The argument for and against lay magistracy in Chapter 6 raises democratic justice issues, human rights issues, and discusses the fact/law distinction, particularly important in considering the case of non-professional lay magistrates.

**Lay magistracy role remains uncertain**

Judicial JPs (and Community Magistrates) are aware that their future role as voluntary non-salaried judges in New Zealand courts remains uncertain. Their future may involve increased judicial responsibility on a national basis, or they may be replaced in the lower courts by a new type of salaried judge such as the law graduate Community Justice Officer (CJO) envisaged by the NZLC. Judicial JPs recognize their continued role as lay magistrates is dependent on an evaluation of their courtroom competence and acceptance of lay magistracy as an important element in the justice system. Politicians, jurists and legal reformers have – arguing from competence, age or lack of training – levelled criticism at judicial JPs and called for termination of lay magistracy, that form of ‘justice by one’s peers’ which has long been the preserve of judicial JPs in lower criminal courts. These pressures continue.

Many reformers have questioned whether the lay magistracy should be retained in Britain’s former colonies – albeit in a modified form as in parts of Canada, several states in Australia, and New Zealand – or should be replaced by a fully professional judiciary. In New Zealand these questions remain unanswered: If our existing lay magistracy can provide a skilled, competent and reliable voluntary judicial service, should lay magistracy be retained and expanded? Should lay magistrates, regardless of their training and effectiveness, be replaced with a fully professional judiciary? Should both lay [judicial JPs and Community Magistrates] and professional magistrates [District Court judges] continue to preside in the lower court as they do at present? It is with such questions that this thesis is concerned, even though the questions do not necessarily constitute the thesis.
Professional as opposed to lay magistracy

Professional magistracy presupposes the full-time appointment of a qualified lawyer with several years of professional experience to the bench of a lower court. The term ‘stipendiary magistrate’ is no longer used in New Zealand, and these professional magistrates became designated as ‘District Court Judges’ in 1980. They preside singly in the same district courts as their part-time colleagues, the judicial JPs (who sit in pairs) and Community Magistrates (who sit singly or in pairs).

The situation in New Zealand is somewhat different in that while all Justices of the Peace are magistrates by virtue of their appointment to the office, a recent protocol limits judicial jurisdiction to those JPs who have completed a tertiary training requirement and been approved for bench duty by the appropriate authorities. Conversely, all lay magistrates in New Zealand are not Justices of the Peace, the exception being Community Magistrates appointed since 2000 who were not drawn from the ranks of Justices of the Peace – a further anomaly that will be referred to later.

JP s have ‘ministerial’ and ‘judicial’ roles

Today all 7,500 New Zealand JPs are required to undertake ministerial duties, which involves being available to members of the public to certify the authenticity of documents, administer oaths, take declarations, and attend to a myriad of quasi-legal tasks which in England and Wales are usually performed by solicitors or notaries public. Judicial JPs – those who have been specially trained for court work – are also expected to undertake ministerial duties in addition to their judicial responsibilities. This voluntary and free aspect of New Zealand JPs’ jurisdiction (a function at one time shared with local postmasters and postmistresses throughout the country) has understandably never been under political threat of termination. However, the more significant and challenging aspect of JP work, that of presiding over minor hearings in the District Courts, has been under threat for the past 50 years. More than 500 JPs seeking a greater challenge than ministerial work, and who have completed the mandatory one-year tertiary qualification for judicial JPs, are understandably concerned that they have not been called upon for bench duties to relieve the growing caseload problem.

Since 1978, New Zealand JPs interested in undertaking court work have been required to undertake a one-year judicial training course to qualify them for selection as a judicial Justice, although successful completion of the course does not in itself ensure judicial appointment. Selection of judicial JPs is made solely at the discretion of the local District...
Court Judge in consultation with the court Registrar and the local JP association. Judicial JPs are usually appointed to courts where the District Court Judge believes they can help reduce a heavy criminal caseload in the local court.

Despite significant improvement in the training of judicial Justices, some politicians and law spokespersons\textsuperscript{72} still hold the view that judges and magistrates in the lower courts should be qualified in law and with several years of professional experience. At least one judge has publicly criticized the lay magistracy\textsuperscript{73} and questioned its relevance in the modern judicial framework. Some New Zealand politicians\textsuperscript{74} saw the nomination of local constituents as JPs as their exclusive right to bestow political patronage, a majority of JPs questioned in a survey for this thesis opposed the practice.\textsuperscript{75} They regarded partisan nomination as wrong in principle and damaging to their position as impartial voluntary officers of the court.

Justices of the Peace and their association officials had also criticised politicians for lack of government support and parsimonious funding,\textsuperscript{76} and in particular the Ministry of Justice’s failure to extend the use of judicial JPs in the court system. The Ministry was criticised for not providing adequate human and financial resources for lay magistracy, and the Department for Courts for omitting any reference in its annual reports to the substantial contribution made by judicial Justices to the court system.

**Prescription for a future lay magistracy**

This research project set out to gauge the current level of effectiveness of the lay magistracy as perceived by the JPs themselves. This was accomplished with a review of literature and the collection of quantitative and qualitative data from a focus group discussion, personal interviews, and two surveys of Justices of the Peace. It then compared those findings with the recorded complaints, criticism, praise and confidence expressed about judicial JPs over the years by lawyers, judges and politicians, court officials and academics – many of whom opposed lay magistracy and many who favoured its retention.

The study was prompted by a concern that the lay magistracy in New Zealand was *in extremis*. Members of the public and the legal profession had for years criticised government for the increasing delays in lower court hearings. Defendants often waited up to two years for their cases to come to court, yet successive governments appeared reluctant

\textsuperscript{71} Judicial JPs who had commenced bench duties before 1978 were exempted from the training requirement.
\textsuperscript{72} *Hansard*, 1998, v. 567, p. 10111.
\textsuperscript{73} CDCJ Ron Young, p.63.
\textsuperscript{74} Hon. Rick Barker, in speech to 76\textsuperscript{th} RFNZJA annual conference, Gisborne, 2004.
\textsuperscript{75} Table 4, p. 184.
\textsuperscript{76} Noakes, p.54.
to replace judicial JPs with sufficient salaried professional judges to help solve this case backlog problem.

The JP Federation had long been lobbying government for greater judicial jurisdiction to no avail, and was dismayed to learn in 1999 of a National Party initiative to establish an alternative lay magistracy system of adjudication on a trial basis in two regions of New Zealand. The chronicled strained relations between the JP Federation, the Ministry of Justice and several influential politicians, as documented in two RFNZJA publications, precluded any immediate acceptance of judicial JPs as an answer to the case backlog problem.

From this amalgam of comment and criticism about lower court delays from the public, politicians, the legal profession and the media arose the inspiration for this study. It was further stimulated by the long-standing discontent of Justices of the peace that they were not being given the opportunity to bring lay magistracy to bear on alleviating the problem.

The new knowledge this thesis provides is that today there is a sufficiently large pool of well-trained Justices of the Peace able to substantially reduce the lower court caseload problem at a low cost to the taxpayer if they are given the opportunity to do so. Furthermore this first nationwide study of JPs has revealed that the demographic profile of JPs, from which the lay magistrates (judicial JPs or Community Magistrates) could be drawn, is more representative of the general population today than at any time in the past. This is outlined in Chapter 5.

This study also reveals that there is a greater degree of assistance and cooperation between the JP Federation and the Ministry of Justice at present than has existed for the past 30 years, and this applies also with relations between the JP Federation and recent government Ministers responsible for Justices of the Peace affairs. My research has also established that a majority of political parties currently favour lay magistracy over professional magistracy in the event a new lower Community Court (as suggested by the New Zealand Law Commission) is established.

Finally, it is posited that argument in favour of lay magistracy in summary proceedings courts with common law traditions outweighs argument against. This is based on comparison of New Zealand proponents with those in England and Wales utilizing the same set of criteria. This research is discussed in Chapter 6.

Outline of thesis

Chapter 2 describes the lay magistracy as it operates in New Zealand today and appraises its significance in the lower court in respect of the type and volume of cases handled. The duties and responsibilities of the office of Justice of the Peace are explained, as is the relationship between the Ministry of Justice, the JP Federation and its 29 affiliated JP associations, judicial JPs, District Court Judges, Registrars and other officers of the court.

Chapter 3 comprises a critical review of the literature referred to during the research and preparation of this thesis. While the range of publications on lay magistracy in England and Wales is bounteous and covers all aspects of the subject, the selection of available literature on New Zealand and other common law jurisdictions is meagre. Much reliance was, therefore, placed on legal texts, academic theses, commission submissions, Hansard, government documents and conference records of the JP Federation.

Chapter 4 provides a methodological overview and outlines the research procedures used in the study. It explains the research goals emanating from the literature review. The first of these goals was to consider criteria about what effective lay magistracy involves if it is to remain a valid and viable part of the judicial system. A second goal was to establish why lay magistracy has been steadily diminished in importance in New Zealand over the decades and yet remains a potent force in other jurisdictions. The third intention is to appraise whether or not lay magistracy should be retained and further developed as a major component of the New Zealand court system. A final intention of this thesis is to advocate how this can be achieved and what part the lay magistracy should play in a modern judicial system. The research design is outlined, and the methodological approach that was adopted to achieve the desired outcomes in this mixed-method research are described. The research methods employed in the study include group discussion, interviews, and surveys involving quantitative and qualitative input. The procedures adopted for these surveys are outlined, and the management and analysis of the resultant data are explained.

Chapter 5 outlines the research results and findings. As this thesis produced the first comprehensive survey of Justices of the Peace in New Zealand, much previously unknown statistical data has been obtained about the age, gender, ethnicity, occupation and judicial activity of the general JP population. The qualitative element of the research also provides a multiplicity of views, comment and opinion from survey respondents about the principle and function of lay magistracy in general, and New Zealand in particular. Most JPs surveyed saw themselves as doing voluntary service rather than as being ‘an officer of the court.’ Most opposed the political aspect of appointment and favoured a non-partisan selection process. More than 25 per cent had already sat on the bench at some time, and most were satisfied with their training. Most had attended training sessions and found them
worthwhile, and a majority thought all JPs should be required to join an association so they would be kept up to date with changes to the law and other matters affecting JPs in their duties. Remuneration was not an issue for most respondents, and a majority thought there should be a retiring age for judicial JPs.

**Chapter 6** considers arguments in support of, and opposing, lay magistracy as a desirable component in the adjudication process in summary proceedings courts. Much of the argument advanced in parliamentary debate, or in submissions to the 1977 Royal Commission on the Courts, is compared with overseas expert argument advanced in a similar major study of lay magistracy in England and Wales in 2000. The arguments advanced in both jurisdictions, for and against lay magistracy, are compared and appraised to establish their validity and import in the New Zealand context.

**Chapter 7** reviews overseas jurisdictions with lay magistracies, focusing particularly on England and Wales, Scotland, Northern Ireland and Commonwealth countries with justice systems based on English common law. The chapter examines the public and government acceptance and perceived effectiveness of lay justice in those countries, and indicates in which jurisdictions the lay magistracy is gaining less, or more, acceptance. It also suggests ideas that New Zealand court reformers could consider, and potentially adopt, from these overseas models.

**Chapter 8 (Conclusion)** summarizes the thesis research, and concludes that lay magistracy is effective and should be retained and reformed as a major component in the New Zealand justice system. Lay magistracy is not an anachronism, but rather presents possible options to make it an enhanced element of a currently overburdened lower court. Justices of the Peace have long been involved in endless frustrating disputes with successive Ministers of Justice, law societies and other bodies on a plethora of issues. For their part, New Zealand politicians – who ultimately will decide the future of lay magistracy – characteristically remain as divided and uncommitted in their views as have their predecessors over the past 50 years.
CHAPTER 2

ISSUES FACING THE CONTEMPORARY LAY MAGISTRACY IN NEW ZEALAND

In the previous chapter it was submitted that while the lay magistracy in New Zealand, like its counterpart in England and Wales, had experienced many crises and reversals in its history, it remained a viable and effective element of the criminal justice system that should be retained.

Certainly periodic reform was needed to ensure that this form of democratic justice adjusted to meet the changing needs of society. In this chapter the structure, control, administration and function of the Commission of the Peace is explained, examined and analysed, and suggestions for a number of improvements are advanced. This is done with a view to convincing the reader that the lay magistracy is no colonial anachronism, but rather an important democratic ingredient that should be retained in a modern judicial system.

Today there are approximately 7,500 Justices of the Peace in New Zealand, of whom about 450 preside as judicial JPs in District Courts throughout the country. On appointment all JPs are ‘created equal’, and become statutory officers of the local District Court by virtue of their gubernatorial warrant to the Commission of the Peace.

From the moment a JP appointee’s name is published in the New Zealand Gazette he or she can theoretically be summoned by a court Registrar to preside on the bench of the nearest District Court as a judicial JP (lay magistrate). While such an occurrence was commonplace 40 years ago, it is unlikely to happen today due to a 2007 protocol between the Ministry of Justice and the RFNZJA. Nevertheless this ambiguity of when a ‘ministerial JP’ officially becomes a ‘judicial JP’ remains, and is noted here as an example of the lack of central administrative authority in the organization – a matter which this thesis contends should be addressed.

Some ‘ministerial JPs’ receive extensive training

The principal recruitment source for judicial Justices has always been the national population of Justices of the Peace. All newly appointed JPs now receive comprehensive

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78 Of the estimated 7,500 JPs existing in New Zealand during the course of this study (2003-2007), approximately 1,000 had completed the TOPNZ Judicial Studies Course qualifying them to adjudicate in court. Of this number about 450 had been called upon to perform bench duties.
manuals and CD-Rom training kits to prepare themselves for documentation work, and the larger JP associations hold regular regional seminars with training as the principal theme. These meetings are well attended and provide a valuable opportunity to update all JPs on new legislation and up-skilling opportunities.\textsuperscript{79} The importance and effectiveness of ministerial JPs, as with judicial JPs, is best illustrated in the Auckland region, which supports the largest number of JPs in both judicial and ministerial categories.

Since 2005 all newly appointed JPs have been required to attend at least three two-hour training sessions conducted by their local JP association before their commission of appointment is confirmed. Only after successfully completing this induction course will they be sworn in by a local District Court Judge and receive their certificate and badge of office. Then, following publication of their name in the \textit{New Zealand Gazette}, the new JPs are permitted to undertake ministerial duties.

For most JPs this involves having citizens call by appointment at their homes or places of work to have them complete statutory documentation requirements. Other Justices prefer to make themselves available for these duties on a roster basis at local branches of the Citizens’ Advice Bureaux.

A June 2007 survey of the Auckland JP Association membership revealed that Auckland-area JPs had handled 400,000 client requests in the previous 12 months: 153,000 were handled by JPs in attendance at their local CAB; 159,000 were seen at the homes of individual JPs; and 81,000 requests were attended to elsewhere, such as hospitals, places of business, airports, schools and other educational institutions.\textsuperscript{80} Auckland JP Association officials asserted that if ministerial JPs withdrew their services, and this documentation work were to be undertaken by Auckland lawyers and notaries public (at an estimated $20 to $25 per transaction), the annual cost of this legal processing would approximate $9 million. If extrapolated nationally this voluntary JP contribution to the economy constitutes a saving to taxpayers of around $53 million per year.

The 2007 Auckland survey also revealed that while one ministerial JP processed 2,000 transactions in a single month, and others were also extremely busy, some JPs did no work at all – year in, year out – a fact substantiated by a survey for this thesis in 2002. This unacceptable situation could easily be remedied if responsibility for, and control over, lay magistrates were vested in one authority with disciplinary powers. One central non-partisan

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\textsuperscript{79} An Auckland JP Association regional seminar in September 2007 was attended by 250 JPs. The half-day meeting included discussion on the Ministry of Justice/RFNZJA Stocktake Report, a Federation update on training developments, the establishment of “cottage groups” for local training purposes, a quiz on documentation issues, and a session on computer technology pertinent to JPs in their official duties.

\textsuperscript{80} The 500 questionnaires elicited 267 responses – a 15% sample of the base 1,800 members of the Auckland Justices of the Peace Association Inc.
authority, properly funded and under the control of the Ministry of Justice, to administer
the Commission of the Peace is one of the foci of this thesis if the lay magistracy is to
develop as a well-trained and efficient integral part of the lower court system.

The national importance of this total JP population, members of the Commission of the
Peace from which judicial Justices are drawn, cannot be over-emphasized. Approximately
450 (6%) of all JPs are judicial JPs – lay magistrates who sit regularly on the bench of their
local District Court. A further 550 (7%) have qualified to sit on the bench but have not yet
been assigned to a court roster.

It is submitted that as the total population of JPs become more proficient as a result of their
initial and ongoing training, it follows that the recruitment base from which lay magistrates
are historically drawn will have become more proficient.

**Judicial JPs now receive tertiary training**

Only Justices of the Peace who express an interest in court work, and successfully pass a
one-year tertiary course of instruction administered by the Open Polytechnic of New
Zealand (TOPNZ), are eligible to become court-sitting judicial Justices. The decision on
whether JPs are called for bench duty rests with the Registrar of the local District Court,
who is required to maintain a current list of court-qualified Justices living within 50 miles
of the court. From this list the Registrar will determine how many Justices will be required
to handle the caseload of criminal and traffic offences for his particular court. For example,
a permanent roster of 45 judicial JPs has been established for District Courts in the
Auckland area, and a senior JP Roster Officer assists the Court Registrars by ensuring that
Justices are available to sit in their courts when required. Justices who have qualified and
been selected for court work then undergo further short but intensive training sessions at
the local District Court. Following these training sessions they are assigned to sit with a
mentor – an experienced senior judicial JP – on the bench for the first time. The new
judicial JPs are ‘probationers’ for six months, and are then assessed on their competence to
become an ‘associate’ on the bench before their eventual appointment to a ‘lead’ JP role.

The judicial JPs have clearly defined limits to their criminal and traffic offence jurisdiction,
and their role is to reduce the workload of District Court Judges by presiding over those
minor criminal offences, and summarily laid charges, where the defendant has entered a
guilty plea. Justices also preside over preliminary hearings of indictable offences where the
defendant has elected trial by a jury, and they hear bail applications and requests for
remands and adjournments. In addition to court work judicial Justices are expected to
perform the same ministerial duties as their non-judicial colleagues.
Four events concern judicial JPs

Around the turn of the millennium, just when judicial JPs appeared to be re-emerging as a significant component of the New Zealand judicial system, four events rekindled serious concerns about their future:

1. In 1999 a pilot Community Magistrates’ scheme was introduced in Waikato and Bay of Plenty courts in an experiment designed to replace judicial JPs with a different form of lay magistrate. Subsequently, in 2000, 16 lay Community Magistrates were appointed to replace the 29 judicial JPs who previously served in the District Courts of those areas.  

2. Then, in 2001, Chief District Court Judge Ron Young, on being elevated to the High Court bench, made his unheralded pronouncement that ‘Justices of the Peace should bow out from judging.’

3. The following year, in March 2002, doubt was cast on the competence of judicial JPs when Chief Justice Dame Sian Elias questioned whether two judicial JPs had acted correctly in dismissing a case against a police constable charged with murder.


The Commission’s 372-page document, *Delivering Justice for All*, was disconcerting to JP association officials for its scant reference to, and cursory dismissal of, the lay magistracy with this brief comment:

> The use of lay judicial officers in the court system, and the potential for lay participation to enhance public confidence in the legal system, is a long standing issue which at times becomes very contentious. Our preliminary view was based on the principle that it is desirable for all judicial officers sitting in court to be legally-qualified . . . The types of cases that have been dealt with by lay judicial officers are regrettably called trivial, minor or insignificant. For those on the receiving end of the adjudication they are none of those things. Confidence that just outcomes will be delivered is vital for public acceptance of the court system, as well as being in the interest of the parties.  

Individually, the threats were of some concern to the Federation. The fact that four major events occurred within five years signalled another period of discontent and anxiety for the Federation, and was particularly worrying since relations between the RFNZJA council and the Ministry of Justice had improved markedly over the previous few years.

Community Magistrates created to “solve JP problem”?

The first event of serious concern to judicial JPs was introduction of the pilot Community Magistrates’ scheme in 2000. This was a plan devised by the Chief District Court Judge and the Minister of Justice, the Hon. Doug Graham, himself a qualified lawyer (and now a JP), to find a way around “the Justice of the Peace problem”. They considered this Community Magistrates’ scheme offered a compromise between unpaid, non-professional

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81 Although all 29 of the judicial JPs in the area applied for the CM positions, just seven were appointed.

82 *Delivering Justice for All*, p.163.
and ageing Justices on the one hand, and the more expensive legally trained District Court Judges on the other.

Most of the 29 court-sitting judicial JPs, and a number of ministerial JPs residing in the Waikato and Bay of Plenty court districts, applied for the 16 Community Magistrate positions that were publicly advertised. Seven of the 29 judicial JP applicants were appointed to the new positions, and only four of those were court-sitting JPs at the time. Applicants were told at their preliminary interview that JPs were not particularly being sought for the positions, and that age and ethnic balance was a primary consideration in the selection process. The 16 Community Magistrate appointees received a two-week total-immersion judicial training course conducted by Chief District Court Judge Ron Young and a panel of experts, and were given instruction in maoritanga that included overnight marae visits. The successful applicants were given life appointments and paid a daily courtsitting allowance of $100 (or $50 for a half-day sitting).

The Community Magistrates were warranted to sit alone (as opposed to judicial JPs who generally are required to sit in pairs), and their level of judicial authority lay between that of District Court Judge and the judicial JP. By 2003 most of the original appointees had resigned – unable or unwilling to continue working for the remuneration offered. Most of those who resigned were not replaced, and in 2007 just eight Community Magistrates still held commissions – five in the Waikato and three in the Bay of Plenty court districts.

Questioned on the success of the Community Magistrates pilot scheme in 2001, Judge Young expressed doubts about its value ‘because the comparatively narrow range of jurisdiction means that they [CMs] are not going to be a huge help in removing some of the work that the District Court does to reduce the backlog [of cases] . . . Really the conclusion is that while what work they did, they did well, it may not be the solution.’ Later in the same interview Judge Young admitted that his personal preference in solving the backlog problem was ‘to try and set up a professional court . . . but I acknowledge it’s a question for the government in the end to decide, and it’s an economic question that’s going to cost money.’

In 2004 the Community Magistrates scheme was described by a Federation official as being ‘in limbo, with its future uncertain,’ yet in 2006 the Associate Minister of Justice (Hon. Clayton Cosgrove) gave the Community Magistrates scheme an imprimatur of permanence when he wrote:

83 Interview with CM Mary Symmans, 2005.
85 Allan Spence, president of the RFNZJA, at AGM of Auckland Justices of the Peace Association, 2006.
Community Magistrates who serve in the Waikato [and] Bay of Plenty region do so on a permanent basis and are no longer part of a pilot scheme. At this stage, there is no intention to appoint Community Magistrates in other regions of the country. An evaluation of the Community Magistrates pilot was conducted from February 1999 to January 2000. The evaluation found that generally the pilot met its overall objectives and policy aims. In broad terms, Community Magistrates were effective in the exercise of their powers, increased community involvement in the justice system, and freed up District Court Judges to deal with more serious and complex cases.

In 2007 it was announced that the Community Magistrates scheme was to become a permanent feature of the justice system in 2008.

**Chief judge sought to dispose of judicial JPs**

The second event to seriously threaten the future of judicial JPs was Judge Young’s unanticipated announcement that they should be dispensed with in the courts. The reason for the judge’s sudden change of attitude towards lay magistracy remains unclear, but the fact that JPs opposed his recommendation that they retire at 68 – to conform to the mandatory retiring age at the time for District and High Court Judges – may have had some bearing on the matter. The Chief Judge’s stricture that JPs should retire from the bench at the age of 68 was ignored by Court Registrars throughout the country, because adherence to it would have brought District Courts to a standstill. In retrospect, it appears the Community Magistrates’ scheme may have been partly devised to force a lower judicial age profile in the lower courts – something sought by Judge Young and strongly resisted by Justices of the Peace.

**Judicial JPs’ decision overturned by Chief Justice**

The third event of concern – the bench review by Chief Justice Elias – was disturbing because it questioned the competence and ability of two senior and experienced judicial JPs. The lay magistrates had found there was no case to answer after hearing evidence at a month-long committal (depositions) hearing. At issue was whether the Justices had overstepped their authority in making a comment about ‘self-defence’ when announcing their decision. The Chief Justice subsequently overturned the judicial JPs’ decision and the police constable involved was sent for trial – and was eventually acquitted. Auckland University criminal law professor Bill Hodge, surprised at the time by Dame Sian’s ruling,

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87 Letter from the Associate Minister to the author dated 23 February 2006.

88 In her judgment (Wallace vs Abbott [2003] NZAR42 (Elias CJ)), in explaining why the charge should not have been dismissed, states: ‘I have come to the view . . . that there is sufficient evidential foundation to commit the respondent for trial. In coming to that conclusion, I find that the Justices who discharged the respondent at preliminary hearing did so under a misapprehension as to their proper function.’ The CJ went on to say that matters of guilt and innocence are for a jury to decide and in this particular case – while there was some measure of agreement among the evidence of witnesses – the inferences drawn were markedly different and that those inferences were matters of judgment for a jury.

said ‘[judicial] JPs make those decisions all the time. When they find the evidence cannot possibly establish guilt beyond reasonable doubt, they throw it out.’

Also of concern to the Federation – and judicial JPs – was Dame Sian’s comment that ‘in hindsight it was unfair to have judicial JPs preside at a hearing of a case carrying high public anxiety and close media scrutiny.’ New Zealand Herald editorial writer John Roughan questioned whether public anxiety and media scrutiny were decisive judicial considerations: ‘Professor Hodge believes the Justices were right; there never was a case to answer. Constable Abbott’s eventual acquittal always looked certain to anyone who took even a cursory interest in the evidence presented.’ He considered ‘the [New Plymouth] judicial JPs appeared to have been exonerated.’

However Roughan’s view was disputed by an experienced Community Magistrate, Mary Symmans, who explained that judicial JPs must only decide if a prima facie case has been established for an indictable offence, and if a prima facie case is established on any one of a number of charges all must be committed to the High Court or District Court for trial. She pointed out that ‘guilt is never considered by judicial JPs, only whether there is a case to answer for an indictable offence . . . the jury decided guilt or innocence . . . The [New Plymouth] judicial JPs ‘got it wrong’ and showed how uneven the [JP] training was throughout the country.’

**N.Z. Law Commission opposes lay magistracy**

The final, and potentially the most serious threat to lay magistracy, was the 2004 Report of the New Zealand Law Commission. The NZLC recommended a complete restructuring of the primary court system whereby the District Court would consist of nine specialist courts, collectively termed the Primary Courts. Two of these nine proposed courts of obvious interest to judicial JPs were the Community Court and the Primary Criminal Court – and yet in neither court was any suggestion given to using judicial JPs on the bench.

Instead the Law Commission suggested that all judges of these courts (apart from Coroners) should be sworn as tenured Primary Court judges. Professional judges, qualified in law and to be known as Community Justice Officers, were therefore intended to replace lay magistrates in the proposed Community Court. Although the RFNZJA had received indications that the Law Commission was leaning towards a fully professional

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90 New Zealand Herald, 7 December 2002.
91 CM Mary Symmans is a former president of the RFNZJA and sits in the Hamilton District Court.
93 Delivering Justice for All, p.109.
bench, few JPs realized the NZLC report marked the end of lay magistracy if its recommendations were adopted.\textsuperscript{94}

Advocates of lay magistracy were understandably concerned, since the Law Commission’s proposal was such a radical departure from the Royal Commission’s 1978 recommendation that a lay magistracy should be retained and its jurisdiction extended. The NZLC recommendation was even more surprising in that during the 25 years between the two reports the JP Federation had been restructured. Tertiary training had been introduced for all court-sitting Justices, and the general profile of judicial JPs had been raised considerably in the minds of politicians and the public.

So far judicial JPs have survived the threat of a fully professional lower court, and today the overwhelming bulk of their judicial work still involves remand and bail hearings, preliminary deposition hearings and minor traffic cases. By 2007 no indication about the long-term future of judicial JPs as lay magistrates in the lower courts had been forthcoming from government or the Ministry of Justice. Neither had any indication been given about the extension or further development of the other lay magistracy entity, the Community Magistrates’ scheme.\textsuperscript{95}

**Record of court activity by judicial Justices**

Meanwhile the effectiveness of the judicial Justices of the Peace in the lower courts was made apparent by the Federation’s statistics. The following table lists hearings presided over by judicial JPs in the four years 2002-2005, as reported to the RFNZJA. The judicial JP workload is understated to the extent that no summary offence hearings, youth court remands, or municipal by-laws parking offences handled by judicial JPs in the Auckland district were included in the report.\textsuperscript{96}

The 2005 RFNZJA Conference reported that judicial JPs handled over 70 per cent of the 100,000 criminal informations\textsuperscript{97} that came before the courts, and that judicial Justices contributed close to 30,000 hours of their time annually.

\textsuperscript{94} The only remaining lay magistrates would be the CMs in Waikato and Bay of Plenty court districts.
\textsuperscript{95} Since this thesis research concluded in 2007, the Community Magistrates scheme has been extended (see Epilogue).
\textsuperscript{96} This explanation by the RFNZJA in 2006 was acknowledged by the Ministry of Justice, the NZLC and the CDCJ.
\textsuperscript{97} An ‘information’ is the ‘formal accusation of a criminal offence made by a public official; the sworn, written accusation of a crime’. The purpose of an ‘information’ is to inform the accused of the charge against him, so that the recipient will have the opportunity to prepare a defence.
Table 2. Effectiveness of lay magistracy by cases heard, and hours of bench time, 2002 to 2005 inclusive.

<table>
<thead>
<tr>
<th>Year</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary hearings</td>
<td>11,266</td>
<td>11,965</td>
<td>12,731</td>
<td>13,100</td>
</tr>
<tr>
<td>Remand and bail hearings</td>
<td>18,454</td>
<td>17,797</td>
<td>21,046</td>
<td>28,950</td>
</tr>
<tr>
<td>Minor traffic offences</td>
<td>26,928</td>
<td>30,377</td>
<td>29,044</td>
<td>27,590</td>
</tr>
<tr>
<td>Defended cases</td>
<td>1,443</td>
<td>2,045</td>
<td>1,825</td>
<td>1,579</td>
</tr>
<tr>
<td>Summary offences</td>
<td>1,778</td>
<td>9,916</td>
<td>4,774</td>
<td>5,265</td>
</tr>
<tr>
<td>Total charges heard:</td>
<td>59,869</td>
<td>72,100</td>
<td>69,420</td>
<td>76,484</td>
</tr>
<tr>
<td>Hours of voluntary time:</td>
<td>25,282</td>
<td>25,944</td>
<td>26,413</td>
<td>26,005</td>
</tr>
</tbody>
</table>

Auckland judicial JP model most successful

The Auckland Justices of the Peace Association reported that the 45 judicial JPs sitting in the Auckland, North Shore, Manukau and Waitakere District Courts, for the 12 months to September 2005, handled 25,657 charges involving 1,828 JP sessions and occupying 8,089 hours. Statistics produced by the RFNZJA in October 2005 illustrated the large impact of the 45 Auckland judicial JPs on the District Court system in New Zealand:

<table>
<thead>
<tr>
<th>Types of court activity</th>
<th>Auckland c.f. rest of New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bail and remand hearings:</td>
<td>Auckland judicial JPs did 39% of New Zealand total.</td>
</tr>
<tr>
<td>Depositions hearings:</td>
<td>Auckland judicial JPs did 65% of New Zealand total.</td>
</tr>
<tr>
<td>Traffic cases/ Minor charges:</td>
<td>Different categories apply, so not easy to compare Auckland with national.</td>
</tr>
<tr>
<td>Work rate:</td>
<td>Auckland judicial JPs took only 30% of the time taken by all judicial JPs (national average) to do their judicial work.</td>
</tr>
</tbody>
</table>

The work output of the 45 Auckland judicial Justices provides persuasive evidence of the effectiveness of lay magistrates that are well trained, well organized and experienced. The fact that the Auckland judicial JPs processed their cases at three times the speed of their colleagues in other District Courts throughout the country further supports my contention

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that an effective⁹⁹ lay magistracy should be further developed to become a permanent core component of the judicial system.

**Lay magistracy lacks leadership, direction and control**

In spite of substantial judicial JP activity recorded in many courts throughout the country the full potential of lay magistrates to seriously reduce the backlog of summary offence cases has not been put to the test. This failure to fully utilize the 1,000 JPs already trained for court work can be attributed to numerous factors – political apathy and lack of will by successive Ministers of Justice, disinterest by Ministry officials, and a *laissez faire* attitude amongst some District Court staff. But the primary reason is the absence of a single effective body responsible for all lay magistrates in New Zealand – a situation of concern to politicians.¹⁰⁰

Unlike overseas jurisdictions where lay magistracy plays a significant judicial role, New Zealand lacks an equivalent to the Justices of the Peace Appointments and Advisory Committee appointed by the Department of Constitutional Affairs in England, or the Justice of the Peace Advisory Committee in Scotland.

The cumbersome structure of the RFNZJA and its affiliated autonomous regional associations, as evidenced in this chapter, makes purposeful government-to-Federation relations un-wieldy and therefore largely ineffective. This situation exists because procedurally all national issues must be referred back to the 29 individual and autonomous JP associations for approval or ratification.

In a country the size of New Zealand such a federal structure may simply be an anachronism carried over from an era of provincial government, or a historical anachronism without any rationale apart from tradition.¹⁰¹ In an effort to alleviate this problem in 1985 the 29 JP associations were divided into four regions so that negotiations with national bodies could be handled on a regional (rather than individual association) basis.

**Local JP associations oppose central control**

In 2004 the president-elect of the RFNZJA¹⁰² outlined the Federation’s plan to remove the autonomy from local associations and make them branches of the RFNZJA. The diversity

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¹⁰⁰ Hon. Clayton Cosgrove raised this matter at a meeting with the Auckland JP Association council in 2007.
¹⁰¹ The current RFNZJA structure is illustrated in Figure 3.
¹⁰² Allan Spence in an address to the AGM of the Auckland JP Association in 2004.
of association control had caused serious difficulties for the Federation in its dealings with government, and he mentioned one troublesome aspect:

The government wishes to deal with one entity, and hence the recommended change. The problem has been exacerbated by the fact that some JP associations have been “captured” by their Registrars. Presidents and councils come and go but some Registrars, it seems, go on forever and become increasingly difficult to deal with. There will always be local associations, but a large degree of control in one entity [RFNZJA] is important.\textsuperscript{103}

In the researcher’s view the Federation proposal is the correct course. While there may be some merit in small local JP branches continuing to exist for social reasons, a single controlling authority for all JPs is imperative. For administrative and training purposes the 29 autonomous associations should also be separated into to four permanent JP administrative corresponding with the four present Ministry of Justice court districts.

But the centralization proposal has its critics. One Federation past president claimed that ‘[JP] association Registrars are the only ‘constant’ in the associations and the Federation. They are more professional than earlier, keep decent records, play a more important part in associations, and are usually the point of contact for associations . . . Presidents change every year, though in some associations [they] may have two years.\textsuperscript{104} Although the Federation council in 2004 had planned to take urgent action on the matter, strong opposition to the consolidation issue by a number of smaller associations has left the problem unresolved.

2006 Federation submission to government

The Federation presented a further case for extending lay magistracy, with argument largely based on the high standard of JP training, in a submission to the Law and Order Select Committee in September 2006. The salient points in its submission,\textsuperscript{105} similar to those made in its earlier representations to the New Zealand Law Commission in 2004, were:

• That, to alleviate pressure on the District Courts, a Magistrates Court be established to deal with minor criminal and traffic offences, and administrative issues;

• That suitably trained judicial JPs sit in this Court;

• That the Federation, in conjunction with TOPNZ and the Ministry of Justice, establish an appropriate training programme for the judicial JPs;

\textsuperscript{103} Hon. Clayton Cosgrove (Associate Minister of Justice), in 2004 urged the RFNZJA to progress this matter.
\textsuperscript{104} Mary Symmans CM, past-president of the RFNZJA, in communication with the writer.
\textsuperscript{105} RFNZJA submission to the Law and Order Select Committee on Justice of the Peace Amendment Bill 2006.
• That all court-sitting judicial JPs should receive a daily sitting fee;

• That the Federation in association with the Chief District Court Judge set up a monitoring and assessment regime to ensure judicial excellence;

• That those [judicial] JPs trained for court work receive an appropriate practicing certificate, to be reviewed every 3-5 years;

• That a JP association selection panel, including a representative of the Judiciary, select the judicial JPs for court work within its area.

The Federation’s submission was soundly based, and invited oversight on the training and selection of suitable judicial JPs by representatives of the Ministry of Justice and the judiciary. But in spite of the closer Federation/Ministry relationships between 2004 and 2006 the Select Committee appeared to be unmoved by the RFNZJA submission.
The Federation’s submission placed considerable emphasis on judicial JP training, explaining that since 1978 regular trainers’ seminars had been conducted throughout the country. It also pointed out that in 2000 an Education Coordinator employed at head office had overseen publication of the Ministerial Guide, JP manuals, and the Bench Book used by judicial Justices. Plans were currently in place for the appointment of three Regional Training Officers if a funding application to the Ministry was successful.

The Federation did express concern that its lack of authority to deal with complaints, and to make continuing training mandatory, made it impossible to guarantee uniform standards of JP performance and competence. Many JPs, it said, were unwilling to attend ongoing training sessions.
Members of the Law and Order Select Committee were unmoved by the Federation submission, as had similarly occurred with its submission to the New Zealand Law Commission in 2004. But recent lay magistracy developments overseas, particularly in Scotland and Northern Ireland, now suggest that more cognisance should be taken of such proposals by future New Zealand court reformers.

**Present JP organization structure is unwieldy**

Control and administration of the RFNZJA is currently vested in a national council comprising the president, immediate past president, vice president, and four regional representatives. The secretariat consists of a registrar, education coordinator, part-time editor of *Justices’ Quarterly* magazine, and an honorary legal adviser. Four sub-committees of the Federation council are education and training, legislation and jurisdiction, finance, and publicity.

The individual JP associations are governed by their own presidents, councils and registrars, and are represented on the Federation council by four regional representatives. The 29 associations are represented at annual conferences of the Federation by a delegation comprising their president, registrar, and members of their council or committee. The individual associations usually have sub-committees involved with training and membership, and there is regular contact with Federation through the 29 association registrars.

The following table indicates the membership and voting strength of the 29 Justice of the Peace associations affiliated with the RFNZJA in 2007.

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106 Figures provided by RFNZJA and reported at the 2007 Conference in Napier.
Table 4. Comparative membership and voting strength of JP associations, 2007

<table>
<thead>
<tr>
<th>Region</th>
<th>Association/s</th>
<th>Members</th>
<th>Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auckland assn.</td>
<td>Auckland</td>
<td>1,776</td>
<td>18</td>
</tr>
<tr>
<td>Auckland region:</td>
<td>1 association</td>
<td>1,776</td>
<td>18</td>
</tr>
<tr>
<td>Northern: (excludes Auckland)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Far North</td>
<td>124</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Northland</td>
<td>132</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Franklin</td>
<td>226</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Waikato</td>
<td>629</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Rotorua</td>
<td>245</td>
<td>3</td>
<td></td>
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<tr>
<td>Hauraki</td>
<td>137</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Bay of Plenty</td>
<td>291</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Eastern Bay of Plenty</td>
<td>131</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Gisborne</td>
<td>123</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Northern Region:</td>
<td>9 associations</td>
<td>2,038</td>
<td>26</td>
</tr>
<tr>
<td>Central:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Taranaki</td>
<td>73</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Wanganui</td>
<td>160</td>
<td>2</td>
<td></td>
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<tr>
<td>Central Districts</td>
<td>305</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Hawkes Bay</td>
<td>246</td>
<td>3</td>
<td></td>
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<tr>
<td>Wairarapa</td>
<td>81</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Hutt Valley</td>
<td>224</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Wellington</td>
<td>444</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Marlborough</td>
<td>123</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Nelson Bays</td>
<td>178</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Taranaki</td>
<td>196</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Central Region:</td>
<td>10 associations</td>
<td>2,030</td>
<td>25</td>
</tr>
<tr>
<td>Southern:</td>
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<td></td>
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</tr>
<tr>
<td>Canterbury</td>
<td>696</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Ashburton</td>
<td>64</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>South Canterbury</td>
<td>125</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>North Otago</td>
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<td>1</td>
<td></td>
</tr>
<tr>
<td>Otago</td>
<td>250</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>South Otago</td>
<td>45</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Gore</td>
<td>69</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Southland</td>
<td>210</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>West Coast</td>
<td>138</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Southern Region:</td>
<td>9 associations</td>
<td>1,655</td>
<td>22</td>
</tr>
</tbody>
</table>

**Voting imbalance disadvantages some regions**

Another contentious issue at JP conferences has been the matter of a voting imbalance between JP associations and regions. On the basis of numerical representation under the present system Auckland JPs are significantly disadvantaged compared with their colleagues in other regions. The Auckland region has one vote for every 99 members; the Central region has one vote for every 81 members; the Northern region receives a vote for every 78 JPs; and the Southern region has a vote for every 75.

A further geographical voting imbalance occurs when strictly North Island and South Island JP populations are considered. When a North Island/South Island comparison is
made, North Island JPs have one vote for every 85 resident Justices, compared with one vote for every 75 Justices resident in the South Island.

Table 5. Voting imbalance between North Island and South Island associations

<table>
<thead>
<tr>
<th>JP Associations</th>
<th>Membership Numbers</th>
<th>Number of Votes</th>
<th>Member vote ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Island JPs (by residence):</td>
<td>5,543</td>
<td>65 votes</td>
<td>1:85</td>
</tr>
<tr>
<td>South Island JPs (by residence):</td>
<td>1,956</td>
<td>26 votes</td>
<td>1:75</td>
</tr>
<tr>
<td>New Zealand: 29 associations</td>
<td>7,563</td>
<td>91 votes</td>
<td>1:83</td>
</tr>
</tbody>
</table>

The issues of the Federation’s unwieldiness and the voting imbalance were revisited at the 2007 conference when a successful remit asked the Executive to investigate the possibility of further restructuring to provide six (instead of four) regions ‘roughly equal in number of members, and certainly more equitable than the present arrangement.’

Other measures to remove anomalies should also be considered. Research for this study, for example, suggests than if or when JP association boundaries are revised they should be realigned to conform to existing District Court regions. This would have the obvious advantage of matching all Justices of the Peace – and importantly all potential judicial Justices – directly with the District Courts to which they were, or would eventually be, attached. Such an arrangement would assist in balancing new JP appointments with current and likely future needs of the specific court districts.

**Improved Ministry/Federation relations**

Historically officials of the Ministry of Justice have remained detached and indifferent to the activities of Justices of the Peace, reflecting to a large extent the attitudes of successive Ministers of Justice. The principal role of the Ministry regarding JPs was in maintaining a list of appointees to the Commission of the Peace, a function it performed inefficiently.\(^{107}\) For many years one particular mid-level official was designated as the sole conduit between the Ministry and the Federation, higher-level contacts between the two organizations were few and far between, and one Minister of Justice notably refused to meet or speak with a particular Federation president.\(^{108}\)

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\(^{107}\) Discussed further in Chapter 2.

\(^{108}\) This incident is discussed in Chapter 2.
It was not until 1985 when the Federation moved to establish a permanent office in Wellington that this ‘distant’ attitude ameliorated and the Ministry offered the Federation office space in the Wellington District Court complex. In 1987 the Ministry substantially increased its financial contribution to the Federation for training purposes, and by 2003 the annual grant (then by the Department of Courts) to the Federation for training and administrative salaries had risen to $137,778.109

Although Ministry of Justice official publications exclude lay magistracy statistics and are silent on the contribution made by judicial Justices to the justice system, the relationship between Ministry and Federation officials has improved in the past few years. Recent joint initiatives have included:

- **Agreement for Services** between the Ministry and the Federation in 2006, whereby the government agreed to an annual payment of $250,000 plus GST to the Federation for services to include induction and ongoing training of judicial JPs, the special training of Visiting Justices (prisons), and the initial and regular ongoing training of ministerial JPs. The contract between the parties was for three years and then subject to annual review by the Ministry;

- **Memorandum of Understanding** between the parties on the training of certain JPs to issue search warrants;

- **Production of Stocktake Report 2007**, based on feedback from the 29 JP associations, to establish a range of best practices for all JPs (judicial and ministerial) in an effort to achieve national consistency in the duties and performance of lay magistrates; and

- **Consultation and collaboration** with the Minister of Justice prior to and during the committee stage of the Justices of the Peace Amendment Act 2007.

Positive as these Ministry/Federation joint initiatives have been, areas of responsibility for selection, training, control, court-duty assignment and discipline of all JPs remain confused. Although all JPs in fact become statutory officers of the District Court on appointment, my research110 indicates they do not regard themselves as being an integral part of the Ministry of Justice and Department for Courts. This perception applies equally to the 7,500 Justices of the Peace who perform ministerial duties as to the 450 judicial JPs.

**Single controlling authority proposed**

No single authority currently exists which has the authority or inclination to control the unknown number of Justices of the Peace in the country. In fact there is no authority charged with maintaining a complete, up-to-date and accurate record of all JPs in New Zealand. This unacceptable situation cannot be allowed to continue if government is serious about retaining and extending the lay magistracy.

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110 See Table 3, Question 15.
The most logical and obvious answer is for the government to establish a Magistrates Appointments and Advisory Committee (based on similar English and Scottish models) to have total responsibility for the selection, appointment, training and discipline of all lay magistrates (ministerial and judicial JPs as well as Community Magistrates) under the control and direction of the Attorney General or Minister of Justice. Only when such an independent authority is established will the lay magistracy gain acceptance by the legal profession and achieve a higher degree of public confidence.

A Magistrates’ Appointments and Advisory Committee should be responsible for maintaining accurate and up-to-date records of all Justices of the Peace – judicial and ministerial – something not available in the past and which is essential if future lay magistrates continue to be drawn mainly from the Commission of the Peace.

The 2002 ‘official list’ of 10,571 JPs provided for this research proved to be outdated and inaccurate. Analysis indicated that about 2,000 JPs on the list were deceased (some for as long as 20 years), and many others had changed their address and their whereabouts were unknown. Furthermore, RFNZJA officials suggested that hundreds – and perhaps thousands – of New Zealand Justices of the Peace were currently living overseas.

The fact that Ministry of Justice records are seriously flawed poses a control problem for the lay magistracy. The difficulty is exacerbated by the 10-12 per cent of JPs who are not members of their local JP association and consequently do not receive regular training material and updated advice about statutes from the Justices’ Quarterly. The significance of this became apparent in 2004 when the RFNZJA reported its affiliated associations had a combined JP membership of 7,563 while research for this thesis indicated a total JP population of approximately 8,500. The hypothesis that as many as 11 per cent of JPs were not members of an association was readily accepted by JP associations.

While most of the 450 judicial JPs throughout the country are likely to be members of a local JP association, membership is not mandatory. Repeated pleas by the Federation to successive Ministers of Justice to make membership of local JP associations compulsory have fallen on deaf ears. In 2006 and 2007 two Associate Ministers baulked at any suggestion of compulsion, and were unmoved by argument that lawyers, medical practitioners and other special interest groups were required to join trade and professional associations that represented their interests.

111 Statistical Profile of JPs provided by the Ministry of Justice in September, 2002.
112 Federation council estimate given to 2004 RFNZJA annual conference,
114 Hon. Rick Barker and Hon. Clayton Cosgrove, Associate Ministers of Justice at the time.
On the following pages are suggested proposals for restructuring and reforming the Commission of the Peace and its relationship with the RFNZJA and the Ministry of Justice. The particular concern of this study centres on the issues of non-partisan appointment of JPs, and the central administration, control and ongoing training of judicial Justices. It is the contention of this thesis that a more effective lay magistracy will best be achieved if it is totally responsible, through an independent non-partisan Appointments and Advisory Council, to the Ministry of Justice. The present and proposed nomination, selection and administrative systems are shown below.

Figure 2. The current New Zealand system of appointments for JPs.
Figure 3. The current system of governance of New Zealand JPs

**Encouraging initiatives taken by government**

Despite this setback some RFNZJA initiatives were undertaken with the Ministry, and in 2006 the Associate Minister of Justice (Hon. Rick Barker) steered the Justices of the Peace Amendment Bill through Parliament. The Bill related mainly to training, discipline, and retirement of JPs and contains the following provisions:
• All newly-appointed Justices are required to undertake training before taking the oath and assuming their duties as a JP;
• A new disciplinary regime is to be introduced to enable a Justice to be removed or suspended from office on serious grounds;
• Justices of the Peace who have served the community but now wish to withdraw their services and retire are permitted to use the appellation “JP (retired)”.

The Bill went some way to meeting the wishes of the Federation but fell short in other respects. Initially the Federation wanted legislation to establish four grades of practicing certificate that would clearly define the specific areas of jurisdiction in which individual JPs would be qualified to act. It also sought some immunity provision in the Bill to protect judicial JPs in the course of their work, similar to that which already applies to professional judges.

The Minister declined to legislate on these issues, but did not oppose the Federation’s alternative proposal to unilaterally introduce practicing certificates. This practice is now in effect, and all JPs now receive an initial “Ministerial JP” certificate following completion of initial training. Those JPs who wish to become judicial Justices (upon completion of tertiary training and selection for court duties) will be certificated as a “Judicial JP”. Other Justices, after special training, are certificated as a “Search Warrant JP”, and those JPs who choose special training for judicial duties in prisons are be certificated as “Visiting Justices”. All certificates are issued under the authority of the RFNZJA. General reaction by JPs to the new legislation was muted. Most saw the Act as cosmetic rather than substantial, but at least indicating a continued interest in the lay magistracy by government.

Figure 4. Liaison between District Court and local JP re availability for bench duties

Recent United Kingdom government inquiries and commissions on the justice system have resulted in a number of issues being resolved and new systems and procedures implemented. Such similar action is yet to eventuate in New Zealand.

Concluding comments

In terms of competence, assuredness and willingness, Justices of the Peace are better equipped to undertake a nationwide lay magisterial role today than at any time in the past 50 years. The JP selection and appointment process – always open to criticism while controlled by politicians – is more carefully monitored now than in the past.

Training is of a high standard. All new Justices of the Peace must now undergo instruction before their appointments are confirmed, and ongoing training is a requirement of office. Attendance at training sessions is monitored, and provision now exists for removal of a JP from the Commission of the Peace for committing a criminal offence, incompetence, dishonesty, or sub-standard performance of ministerial and judicial duties.

Greater effort has recently been made by JP associations and politicians to achieve a social and ethnic balance in JP appointments more representative of the local population they will serve. The average age of Justices has been significantly lowered by the recent appointment of younger JPs, and the recent conscious increase in female appointments is already leading to a better gender balance in the Commission, as is revealed in Chapter 5.

The historical opposition to lay magistrates by the New Zealand Law Society and district law societies has been tempered by their acceptance that judicial JPs are likely to remain in the lower courts, and that the presence of JPs on the bench has the advantage of relieving District Court Judges from much of the drudgery of minor undefended cases and weekend remand and bail hearings.

The acknowledged success of the Auckland JP traffic court – and the relatively few successful appeals against the decisions of judicial JPs – has also diminished much of the past criticism of their judicial work. Blanket opposition to local benches of judicial JPs (as recorded in the 1977 hearings of the Royal Commission on the Courts by the Hamilton District Law Society) is no longer a matter of contention.

The structure and operation of the RFNZJA has experienced major changes in recent years, and further plans to improve the organization are being considered in an effort to improve
its relationship with government, and specifically with the Ministry of Justice. One important RFNZJA-Ministry advance has been a three-year funding Services Agreement for training JPs – which for the first time in its history enables the Federation to plan and execute a comprehensive and effective training scheme.

The Federation council and head office staff have recently succeeded in establishing closer relationships with the Ministry of Justice on important training, professional and financial issues. These Federation-to-government relationships however, though cordial and expectant, have achieved modest tangible outcomes. The Justices of the Peace Amendment Act 2006 was a watered-down version of JP aspirations, and the Federation submission to the Law and Order Select Committee in 2004 was rejected in its entirety. The much-touted Stocktake Report (a Ministry of Justice/JP Federation joint initiative) remains a worthwhile work-in-progress to monitored by the principal stockholders in lay magistracy on a year-by-year basis.

![Diagram](image)

**Figure 5. Proposed Appointments and Advisory Committee**

Obviously many of the issues raised in this chapter will be developed and expanded in the following chapters and their relevance will become more apparent to the reader as this study develops. In the meantime, regardless of the setbacks to lay magistracy noted in this

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116 See Prologue.
chapter, Barnett’s conclusion in 1972 – that ‘although the JP system had fallen into desuetude it was by no means an anachronism’ \textsuperscript{117} – remains even more apposite today.

New Zealand’s lay magistracy, which came close to extinction in 1957, today has the potential to become an important permanent component of the justice system. Although this chapter proposes some significant changes to the structure, administration and control of the Commission of the Peace, my thesis ‘that lay magistracy is effective and should be retained’ is secure. This assurance is in great measure due to the review of literature in the chapter that follows.

CHAPTER 3
CRITIQUING REVIEWED LITERATURE

This thesis proposes that lay magistracy is effective and should be retained and reformed as a major component in the New Zealand justice system. The proposition originally stemmed from the review of literature, coupled with the researcher’s long but intermittent association with the Commission of the Peace. This chapter posits that although literature on lay magistracy in New Zealand is sparse, the two small volumes produced for the RFNZJA by two of its Registrars have provided substantial references that have lead to valuable secondary sources footnoted throughout the pages of this study.

In short, the New Zealand literature deals with more with practical and prosaic aspects of lay magistracy, and the overseas literature more with the principles of this unique form of voluntary adjudication. This is because early British texts satisfied questions about the merit of lay magistracy in terms of democratic local justice. Further literature, in particular Skyrme’s *History of Justices of the Peace*,118 confirmed that the system of lay justice, when properly managed, could be progressively modified to meet the changing social needs of local populations. Further stimulus to undertake this study arose from the review of New Zealand literature that displayed an inability or unwillingness by the main stakeholders in lay magistracy to meet changing social needs.

The concept of lay magistracy and its relationship with professional magistracy has been explained in detail in the Chapter 1 and does not require further elaboration here. Neither is it considered necessary to repeat terms and definitions in respect of court officials and lay magistracy.

This initial review of overseas literature facilitated preparation for a detailed comparison of lay magistracy in England and Wales with that of New Zealand. I wanted to establish why lay magistracy remained the core of British justice yet had experienced a diminution of authority in New Zealand and other former British jurisdictions founded on English common law. Overseas and local literature is, therefore, referenced at this point to set this research project within a conceptual and theoretical context.119

While both jurisdictions appear to the layperson to work in an almost identical legal framework, the court processes in the two jurisdictions are quite disparate. In England and Wales lay magistrates – unpaid volunteers without law qualifications – preside over 96 per cent of all court cases, while in New Zealand such lay magistrates hear only about 10 per cent of cases, and they usually involve minor charges of a summary nature where the defendant has entered a guilty plea.

For a reader studying the role of New Zealand lay magistrates an explanation of the concept, origin and history of lay magistracy in England has been provided to explain when, why and how this system of ‘judgement by one’s peers’ originated and became the foremost principle of British justice. Equally important, it is asserted, was the question of why the British chose to export this principle of justice to their colonies. Assumedly it was because lay magistracy had been the mainstay of the British justice system for centuries and it would have appeared to the authorities at the time as the most obvious model to introduce to their colonies abroad. Certainly there is no indication that any other form of colonial justice was mooted in New Zealand before the first lay magistrate was appointed. The judicial authority vested in our earliest magistrates in the Bay of Islands in the 1840s makes the jurisdiction of today’s judicial JP pale by comparison.

In New Zealand, particularly, many ordinary citizens have no idea that ordinary citizens, just like themselves, sit on the bench in their local District Court. These ordinary people hear the evidence and pass judgement on people with charges brought against them by the police for minor criminal or traffic-related offences. Most people deciding to defend a traffic ticket would never expect appear in court before someone they knew to be a schoolteacher, a dairy proprietor or a bus driver in their district. Yet that is exactly what happens every day in England and also, to a lesser extent, in New Zealand.

This system of adjudication by ordinary citizens was inherited from Britain, and although it exists today in a more diluted form than previously, it could again regain increased authority in our judicial system. Certainly this is occurring today in Scotland where volunteer lay magistrates are replacing law-qualified District Court Judges on the bench of the lower courts.120 For this reason the reader is introduced here to a rich source of English literature on the lay magistracy that was introduced to New Zealand in 1814 and remains part of our court system today.

British lay magistracy literature

It is indicative of the strength of the lay magistracy in England and Wales that there is a plethora of reference and research material on the subject. This ranges from the seminal Eirenarcha written in 1579 by William Lambard to the monumental four-volume History of the Justices of the Peace\textsuperscript{121} by Sir Thomas Skyrme published in 1990. Skyrme’s book is an indispensable reference source for any scholar researching the subject today because it best reviews the role of lay magistracy in an international context.

Skyrme’s text clearly demonstrates the depth of his experience and the undisputed knowledge of his subject. This resulted from his unique opportunities as a lawyer at the Bar, as legal adviser to the Lord Chancellor involved with the appointment and removal of Justices of the Peace, and as a magistrate himself for four decades. Later he became chairman of the Magistrates’ Association and eventually president of the Commonwealth Magistrates’ and Judges’ Association. Finally in the role of historian he produced his opus, this remarkable and indispensable 1,400-page work on the subject of lay magistracy. Skyrme was well versed on the gradual diminution of lay magistracy in New Zealand, and in his book takes one particular New Zealand judge to task for his negative attitude to lay magistracy, recounted in Chapter 6.

The review of literature revealed a recent book describing the experiences of a new English Justice of the Peace. The author Trevor Grove, in his book The Magistrate’s Tale,\textsuperscript{122} describes the rigours, delays, frustrations and tribulations of the selection and appointment process in 1997. He recounts the recruitment and interview procedure for new lay magistrates in England and Wales, and this provides an interesting comparison with that experienced by their counterparts in New Zealand. Similar issues of training, discipline, ethnic and gender balance are issues in both jurisdictions.

In Grove’s case there were two lengthy interviews before a six-person panel at which the chairman asked all the questions – largely relating to the subjects covered in the original application form – but also seeking to establish whether the applicant had any personal, ethnic, religious or cultural prejudices which the selection panel might find untoward. His interview finally ended with the salutation “We’ll let you know”. Grove said applicants were handed an eight-page application form on which they were required to answer questions about their personality, occupation, pastimes, ethnic origin, their membership in clubs and societies, and, specifically for the men, whether they were Freemasons.\textsuperscript{123} Details

\textsuperscript{121} Skyrme’s 1990 edition was revised and published as a single volume in 1994.
\textsuperscript{123} Freemasonry membership or affiliation with any specific sects, churches or societies, does not appear to have been an issue in the selection of JPs in New Zealand.
of any criminal convictions (including motoring offences) were required, and anything in their past life which, “if it became generally known, might bring the applicant or the magistracy into disrepute”, had to be noted. Many found the trickiest question was the one asking the applicant to describe briefly why he or she wanted to become a JP, having regard to the six basic requirements – namely ‘good character, understanding and communication, social awareness, maturity and sound temperament, sound judgment, and commitment and reliability.’

Candidates who passed this first hurdle were summoned a few months later to a second inquisition where the panel for about 40 minutes probed further into the political and “Freemasonry” areas, and sought the candidate’s views on ‘proper punishment’ for certain crimes and misdemeanours, attitudes to “lager louts”, and other local social problems. Soon after this meeting, if the candidate measured up, he or she eventually received a letter from the Advisory Committee saying it was ‘minded to forward the candidate’s name to the Lord Chancellor with a recommendation you be appointed a Magistrate’. In Grove’s case this whole procedure, from application to appointment, took more than a year.

Today the British interview process is thorough but less onerous, and is conducted more efficiently and without such personal questioning as Masonic and religious affiliation. Applicants require three references, are interviewed by a committee to assess ‘integrity, good character, leadership skills, common sense and an ability to listen and be impartial.’ According to DCA recruitment material ‘the interview and assessment process takes around three months, and many employers will allow their staff time off for these interviews and for the fulfilment of magistrate’s duties.’

The foregoing literature pertains to this study because it backgrounds the origin, purpose, and historical development of the lay magistracy and set the scene for the comparative discussion on overseas jurisdictions in later chapters. The comparison of lay magistracy with that of other jurisdictions is, I submit, necessary in advancing a persuasive argument that lay magistracy is not an anachronistic judicial hangover from a colonial past that should be discarded. For the same reason I submit that the arguments used in the Morgan and Russell study of 2000 should have been adopted, as they indeed have been, in my study disclosing New Zealand argument on the importance, or otherwise, of retaining lay magistracy.

124 Grove, p. 8.
Contemporary overseas studies

Recent literature also reveals a marked positive change in attitude towards lay magistracy in some overseas jurisdictions that should be noted by New Zealand judicial reformers. In 2004 — the same year the New Zealand Law Commission recommended that lay magistrates be abolished — the Summary Justice Review Committee (headed by Sheriff John McInnes) also recommended that JPs in Scotland be abolished. It should be noted that at this time all criminal summary proceedings charges in Northern Ireland were being heard by professional legally qualified Stipendiary Magistrates.

In the past five years, however, all has changed in both these overseas jurisdictions. In 2002 the Justice (Northern Ireland) Act reinstated lay magistrates to the bench in the summary proceedings courts, and in 2005 the Ministry of Justice appointed 272 new Lay Magistrates (with judicial authority approximating that of New Zealand Community Magistrates) to the lower courts. In Scotland, meanwhile, the Scottish Executive rejected the recommendation of the McInnes Committee and gave full authority for summary justice proceedings in Scotland to lay magistrates.

Five other British studies conducted between 1996 and 2002 have been of particular importance because in opening a national debate and charting a course for lay magistracy they have provided a variety of potential lay magistracy models for New Zealand consideration. These studies are: The Judiciary in the Magistrates’ Courts (Morgan and Russell, 2000.); The Development of the Professional Magistracy in England and Wales (Seago, Walker and Wall, 2000); Criminal Courts Review (Lord Justice Auld, 2001); and The Criminal Courts Review Report (National Council of Civil Liberties, 2002), and The Role of the Stipendiary Magistracy (Roger Venne, 1996). All references appear in the Bibliography, and are footnoted throughout the text.

British study arguments applied in New Zealand

The range of argument categories advanced for and against lay magistracy was well summarized in a comprehensive study by Morgan and Russell125 commissioned by the Lord Chancellor’s Department in 2000. A principal requirement of the study was to “assess the commonly held views as to the merits and demerits of employing lay and stipendiary magistrates”. Reviewing the balance between lay and stipendiary magistrates in Britain, the authors categorized the most common bases of argument into the following sets:

• **Participatory democracy versus consistency and the rule of law.** This argument suggests that lay magistrates are the embodiment of true democracy where the citizenry is actively engaged in key spheres of decision-making. The involvement of JPs is particularly important with respect to the law because, it is suggested, ‘lawyers mystify their trade and, like all professions, act, as G.B. Shaw put it, as a “conspiracy against the laity”.’\(^{126}\) It is suggested that because part-time lay magistrates are drawn from a variety of walks of life, they bring a wide experience to their decision-making — thereby ensuring they bring a “man-in-the-street” sense of fairness and interpretation to the justice they apply. The counter-view is that justice is neither simple nor a matter of common sense, and involves dispassionate application of the rule of law — and that only lawyers, by virtue of their training, are imbued with the spirit of the law and its impartial and practical application.

• **Local justice versus national consistency.** This is an extension of the “trial-by-one’s-peers” argument (above), whereby local [judicial] JPs would likely be more sensitive to local concerns — local and social economic conditions and available services for dealing with offenders — than career-driven cosmopolitan elite District Court Judges lacking local ties, knowledge and understanding. The argument also embraces the concept of national consistency in judicial training and courtroom procedure to ensure that local prosecutors, defence attorneys and defendants could expect a uniform standard of treatment and expertise from adjudicators on benches throughout the national court system. The counter-argument, often used by opponents of lay magistracy, is that justice is neither simple nor a matter of common sense. It involves the dispassionate application of the rule of law — a complex set of rules designed to achieve fairness — which lay magistrates are relatively poorly equipped to interpret and apply. Its proponents argue that lawyers, by virtue of their training, are imbued with the spirit of the law and its impartial and practical application.

• **Fresh or open minds versus case hardened minds.** This argument suggests that local JPs with outside careers, sitting in court less regularly than District Court Judges, approach cases freshly and with a more open mind than their professional colleagues who, it is suggested, tend to become “case-hardened” by accumulating prejudices as to who [prosecutor or defendant] is credible. The counter argument is that professional judges, by virtue of their legal training and personal confidence, are more likely to challenge evidence from defendants and court officials — and to be less deferential, perhaps, than the lay magistrates.

• **Symbolic legitimacy versus effectiveness and efficiency.** This is essentially an extension of the democratic justice argument, but with critics positing that the use of lay magistrates is of symbolic legitimacy rather than being of effective judicial value. The argument suggests that part-time lay magistrates are unable to provide continuity in case handling, and are fair game for lawyers wishing to engage in time-wasting and other costly delaying tactics for their own and their clients’ advantage. It also suggests that professional judges are better equipped to resist such ploys, and that lay magistrates are inclined to be swayed in their decisions by the prosecution and its witnesses. Critics contend that the working arrangements for lay magistrates must make their participation both relatively ineffective and inefficient.

• **High versus low cost of magistracy.** Morgan and Russell claimed that in the United Kingdom it had traditionally been assumed that because lay magistrates are unpaid volunteers they are necessarily cheaper than their professional judicial colleagues. Although various cost-effectiveness “approximations” produced by Morgan and Russell support the cost-saving argument, their basis of calculation is not applicable in New Zealand where the *modus operandi* of judicial JPs is markedly different from that in England and Wales. Until the structure of a future New Zealand lay magistracy model is known — for example with or without Justices’ Clerks, voluntary or paid judicial JPs, or judicial JPs combined with CMs — estimating the cost of a comprehensive lay magistracy is problematical. We can safely assume, however, that if New Zealand judicial JPs continued to sit in pairs (instead of a panel of three as in England) and did not utilize the services of salaried Justices’ Clerks (as in England), the cost of lay magistracy in New Zealand would still be substantially less *vis-à-vis* that of England and Wales.

\(^{126}\) In New Zealand’s case this would mean judicial JPs.  
\(^{127}\) Morgan and Russell, p. 6.
Morgan and Russell study conclusions

After assembling and analysing a range of evidence and opinion the Morgan and Russell study did not reach any definitive conclusion (in view of the variety of possible operational variables) that lay magistrates would prove more or less cost-effective than professional magistrates, or that they were more likely to command more or less confidence among the public. The authors simply opted for retaining the status quo in the United Kingdom – much as successive governments have done for the past 50 years in New Zealand. The study concluded:

- Although the public do not have strong feelings about the precise role of magistrates, we think that summary offences, particularly if not contested, could be dealt with by a single magistrate [JP] but that panels [of two or three JPs] should make the more serious judicial decisions.

- Cost considerations suggest that this could only be achieved (in the short-term at least) by continuing to make extensive use of lay magistrates. Calculations based only on identifiable costs do, inevitably favour lay magistrates. They make only modest claims for travel, subsistence and lost earnings (much less than they are entitled to) and further support (notably training) is delivered in highly cost-effective ways.

- Criminal justice practitioners, while appreciative of the quality of service given by lay magistrates, have greater confidence in professional judges (stipendaries). Furthermore governmental pressure to make the criminal courts more efficient, and to reduce the time that cases take to complete, will also tend to favour the greater efficiency of stipendiary magistrates.

- The nature and balance of contributions made by lay and stipendiary magistrates could be altered to better satisfy these wider considerations, but should not prejudice the integrity and support of a system founded on strong traditions. Not only is the office of Justice of the Peace ancient and, in an important tradition of voluntary public service, it is also a direct manifestation of government policy which encourages active citizens in an active community. In no other jurisdiction does the criminal court system depend so heavily on such voluntary unpaid effort. At no stage during [our] study was it suggested that in most respects the magistrates’ courts do not work well or fail to command general confidence. It is our view therefore, that eliminating or greatly diminishing the role of lay magistrates would not be widely understood or supported.

The Morgan and Russell study is pertinent to this thesis for several reasons. Theirs was a comprehensive study based on a similar range of arguments ‘for’ and ‘against’ lay magistracy as were advanced by proponents and opponents in New Zealand during hearings of the 1977 Royal Commission on the Courts. Morgan and Russell support the view of this study that lay magistrates dealing with minor criminal charges would free the more learned District Court Judges for more difficult cases. Both studies concur that, based on knowable costs, lay magistracy offers the taxpayer less expensive justice than would be the case if legally qualified professional judges were to replace lay magistrates in the lower courts. And both the Morgan and Russell study and this study agree that lay magistrates constitute an effective component of a democratic judicial system. Certainly, as Morgan

128 Morgan and Russell, p. 97.
and Russell suggest, ‘eliminating or greatly diminishing the role of lay magistrates would not be widely understood or supported.’

**Review of British Courts (Auld Report)**

In 2000 another major report, *A Review of the Criminal Courts of England and Wales* (Auld Report), was published\(^{129}\). It was another topical and relevant report to emerge during this period (1996 to 2002) that was important from the standpoint of comparing British and New Zealand lay magistracy. Auld was confident that magistrates should continue to exercise their established jurisdiction alongside District Judges (the new designation given to Britain’s Stipendiary Magistrates). He noted the views of other researchers that lay magistrates may be less efficient than District Judges, and that there may not be much between them as to cost. He also confirmed his earlier recommendation that magistrates and District Judges should continue to exercise summary jurisdiction. In this respect the Auld Report and New Zealand’s earlier Beattie Report expressed corresponding views on the future role and community responsibilities of lay magistracy in their respective jurisdictions. In New Zealand the 1978 *Report of the Royal Commission on the Courts* had, like Auld, recommended that the benches of our District Courts continue to be shared between District Court Judges and lay magistrates.

In commissioning this review of the British courts by Lord Justice Auld, the Lord Chancellor’s Department sought to improve the public perception of, and confidence in, the criminal courts and the criminal justice system as a whole. The terms of the review included the structure, organization, and distribution of work between courts, and their composition (including the use of juries and of lay and stipendiary magistrates) – matters of keen interest to New Zealand court reformers at the time. Written submissions to the *Review* numbered nearly 900, and even before his report was completed Auld had reached the provisional conclusion ‘that the current jurisdiction of lay magistrates should be preserved’\(^{130}\) – an announcement that allayed the fears of some British parliamentarians about the future of the lay magistracy.\(^{131}\)

Early speculation about the outcome of the *Review of the Courts* had suggested a substantial reduction in the role of lay magistrates and a corresponding increase in the role of stipendiary magistrates [district judges] in the Magistrates Courts. It had long been argued by British opponents of lay magistracy that as Stipendiary Magistrates disposed of cases faster than JPs their judicial contribution was therefore more economically effective

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\(^{130}\) Auld, p. 99.
since the JPs sat as a group of three with the added cost of a full-time salaried and legally qualified Justices’ Clerk. Had such a claim been substantiated in England it would not likely have applied in New Zealand where judicial JPs sit in pairs and do not incur the added cost of full-time Justices’ Clerks.

In 2002, in response to the Auld Report, the National Council of Civil Liberties published *The Criminal Courts Review Report*, in which it expressed concern about the way the review of British courts had been conducted by only one man, and considered it should have been done by way of a Royal Commission – as had occurred in New Zealand in 1978. The National Council had also expressed concern regarding the quality of justice in magistrates’ courts, and argued that these courts should be reformed to achieve a split between the functions of the lay magistracy and the District Judge. The National Council believed the District Court Judge should only deal with matters of law, non-contentious hearings, and sentencing. For contested trials the National Council suggested the bench should consist of three magistrates, who decide issues of fact only, and one District Judge, who determines issues of law only.¹³²

This mixed-bench suggestion, which has appeared in other overseas papers and reports, has never been seriously advanced in New Zealand and is considered beyond the scope of this study on three counts. First, the District Judges and lay magistrates in England and Wales have identical adjudication authority and this is not the case in New Zealand. Second, District Court Judges and judicial JPs have different working hours and “conditions of employment” which would make such a scheme unworkable. Third, the issue of Justices’ Clerks came into the equation and this has never been seen as an issue in New Zealand where the jurisdiction of lay magistrates has been generally confined to undefended summary cases.

A study apposite to this thesis, in that it examines the effectiveness of lay magistrates vis-à-vis professional judges, was carried out by Seago, Walker and Wall.¹³³ That research was also commissioned by the Lord Chancellor’s Department (now the DCA), and is mainly focused on the developing trend toward centralization of courts in England and Wales. In this context the authors express concern that local judicial independence might be compromised through the expansion of a fully professional bench of stipendiary magistrates. On this ground they feared that local justice would erode as the links with local communities, as reflected through the backgrounds and experience of lay justices,

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¹³¹ In November 2000 the Parliamentary Secretary (LCD), when questioned in the House of Commons about possible changes, told Members of Parliament that the government remained committed to the principle of lay magistracy.
were diluted ‘as has been noted in relation to stipendiary magistrate. . . It is the localness and the character of routine justice that defines the special character of justice in the magistrates’ courts, whether it is conducted by lay or professional magistrates.’

This review of literature revealed at least one example where New Zealand leads the way in lay magistracy thinking. In 1995 The Role of the Stipendiary Magistracy (Venne Report) recommended that, in cases involving complex points of law or evidence, a stipendiary magistrate (District Court Judge) should undertake the complicated cases. This has always been the practice in New Zealand courts, where lay magistrates are given the more straightforward cases and the more complex cases are handled by District Court Judges. The Venne Committee’s further recommendation that case allocation should be decided in consultation between the senior District Judge and the court manager is also a long-standing practice in New Zealand District Courts.

Two other contemporary British experts in the field have contributed directly to the study. Nicola Padfield, an expert in the field of criminal law and practice, asserts that lay justice is cheap and fast, and also advocates a standardized procedure for appointing lay magistrates – an issue strongly supported by others in this study (and favoured by a majority of New Zealand survey respondents). Andrew Sanders believes a price must be put on justice, and claims that lay justice is cheap only if direct costs are attributed to it. He also contends that lay and professional judges bring different qualities to the bench.

However, Sanders also puts the case for a combined bench of lay and professional adjudicators, something that I submit is beyond the scope of this study but may possibly become a subject for further research. Variations of this combined-bench suggestion, whereby a professional judge sits with a panel of two or three lay magistrates, has been adopted in Fiji and is currently being introduced in South African courts. The idea is that the lay magistrates will determine guilt or innocence and the judge will decide the sentence. My contention is that while this may become a possible future research topic for study in New Zealand, the immediate concern should be for retention and reform of a simple and familiar lay magistracy solution to alleviate the lower court caseload problem. Any embellishment to the present form of lay magistracy would, in my view, unnecessarily complicate and possibly delay the immediate issue – that of retention and reform of an existing familiar and proven system.

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134 Seago, Walker and Wall, p. 652.
135 Roger Venne headed the committee commissioned by the Lord Chancellor’s Department in agreement with the Lord Chief Justice to undertake this study.
Limited N.Z. literature on lay magistracy

Regrettably the wealth of overseas literature on the subject of lay magistracy is counter-pointed by a dearth of similar literature in New Zealand, and this is perhaps indicative of the decline in importance of our lay magistracy. The authors of New Zealand’s principal constitutional law texts have been silent on the lay magistracy component of our judicial system, and Justices of the Peace receive scant mention in Philip Joseph’s *Constitutional and Administrative Law in New Zealand* (2001). *A New Zealand Legal History* (2001) by Spiller, Finn and Boast, and *New Zealand, the Development of its Laws and Constitution* (1967) by J.L. Robson, are silent on the subject.

One exception is *New Zealand Government and Politics* (2001), which contained a chapter by Andrew Stockley\(^\text{138}\) outlining the function and jurisdiction of [judicial] JPs in the New Zealand justice system. He briefly compared their role with that of Community Magistrates and District Court Judges, and alluded to the fact that the long-term future of JPs in the court system remained uncertain.

Only a handful of local scholarly works have considered lay magistracy, and these were the practical legal text and reference books specifically compiled to assist Justices of the Peace in their role as lay magistrates in the young British colony. They included Johnston’s *Justices of the Peace in New Zealand* (1864),\(^\text{139}\) updated as *The New Zealand Justice of the Peace, Resident Magistrate, Coroner and Constable* (1879), and later further revised by William Reeve Haselden as *New Zealand Justice of the Peace* (1895).

Johnston’s first volume was printed before the 1878 General Assembly session at which material changes to the law affecting the magistracy were proposed – so it was his 1879 edition that became the definitive textbook for JPs during the following 16 years. The author stated his book was intended primarily for non-professional readers, but provided a list of what he considered the most useful works of reference for Justices.\(^\text{140}\) He said ‘all Magistrates who are called upon to act in civil matters ought to have access to all the Statutes of the colony, and the Acts of the Imperial Parliament in force in the colony, and to some approved treatises on Contracts, such as those of Addison, Chitty, Pollock and Smith (Mercantile Law), and on Wrongs, such as Addison’s.\(^\text{141}\) In an admonition to JPs, he stressed the importance of their role:

\(^{139}\) Justice Alexander J. Johnston was a Judge of the Supreme Court in New Zealand.
\(^{140}\) Johnston’s list included: Stephen’s *Blackstone’s Commentaries*; Stephen on Evidence; Pitt Taylor’s *Law of Evidence*; Paley on Convictions, by Macnamara; Hawkins’ *Pleas of the Crown*; Burn’s *Justice*, by Maule, et al., 1969; Oke’s *Synopsis and Formulary*; Jervis on Coroners; Snowden’s *Constable’s Guide and Magistrate’s Assistant*, edited by Glen; Russell on Crimes, by Greaves; Archbold’s *Criminal Pleading and Practice*.
The office of the Justice of the Peace, in England, is of considerable antiquity and honour; and from the multiplication of the duties attached to it by a long series of statutory enactments, it has become, both in England and in her colonies, one of great responsibility and importance, requiring for the due discharge of its functions a large amount of intelligence, patience, and discretion, and a general acquaintance with a very extensive body of law. Indeed, Sir W. Blackstone, speaking of his own times, says “The Legislature has from time to time heaped upon the Justices such an infinite variety of business, that the country is greatly obliged to any worthy magistrate that without any sinister object of his own will engage in this troublesome service.” And since the time, at which the learned Commentator wrote, down to the present, constant additions have been made to the duties of this important branch of the magistracy.142

Johnston’s book (later revised by Haselden) was the “JPs’ bible” for more than half a century. He defined the role of Justices in New Zealand, compared the difference in their selection and qualification with that of their counterparts in England, explained their tenure of office and removal, and outlined the special responsibilities of JPs in the colonial situation:

The form of the Commission of Justices of the Peace of New Zealand, altered from the English form so as to suit the circumstances of the colony, . . . commands the Justices to keep the peace, and in all laws, ordinances, and statutes, and to perform and fulfil the duties belonging to the office of a Justice of the Peace in the colony, according to the law and custom of England and the colony . . . to do right to all manner of people after the laws and usages of the colony, without fear or favour, affection or ill-will. . . . [and] Justices of the Peace are obliged to take judicial notice . . . of The Common Law and the Statute Laws of England . . . existing on the 14th January, A.D. 1840, so far as applicable to the circumstances of the colony; all Acts of the Imperial Parliament passed since that time affecting all the Queen’s dominions or all colonies, or the Colony of New Zealand specially; and all Ordinances and Acts of the Legislature of New Zealand for the time being, passed since the same date.143

That requirement for Justices, if it applied today, would give pause to most aspirants to bench duties in the District Courts in New Zealand. Johnston explained in considerable detail the ministerial and judicial duties of Justices, emphasized the fact that they had jurisdiction throughout the colony, explained the occasions in which they could act alone and when they must preside in pairs, and pointed out that every Resident Magistrate generally had the same powers as two Justices of the Peace – besides other special jurisdiction.

Then came the first indication of the government’s intention to place more responsibility on Stipendiary Magistrates [full-time law trained professionals] for civil cases. Following passage of The Justices of the Peace Act 1882 [and after the death of Johnston] the government appointed a barrister, William Reeve Haselden, to produce New Zealand

142 Johnston, p.1.
143 Johnston, p. 3.
Justice of the Peace (1895). In the book the author said that the 1882 Act ‘rendered useless the references to the statutes repealed or consolidated [by it], and that a smaller book embodying as far as possible the text of the late learned Judge in his treatise on the law of evidence, and his practical directions to Justices and their clerks, was desirable. Haselden noted that his reason for giving less space to JPs’ duties under The Magistrates’ Courts Act 1893, was ‘because Justices were given very little power under it as it is evidently not the intention of the Legislature to utilize the services of Justices in civil jurisdiction except in cases of emergency; and, this book being intended for Justices rather than for Stipendiary Magistrates, it was not considered expedient to increase the size by voluminous references to civil matters. In spite of this, the book ran to 346 pages with 14 chapters covering every aspect of the office, jurisdiction and duties of Justices of the Peace in the colony.

By 1894 lay magistrates’ jurisdiction covered a wide range of offences in the criminal code – destitute persons, gaming, abattoirs, indictable offences (summary jurisdiction), lunatics, oaths, offensive publications, police offences, school attendance, shipping and seamen, fisheries, shops and shop-assistants, and stamp Acts. In addition, Haselden explained:

Justices at the time were required to “read the Riot Act” when they observed or suspected unlawful assembly, riots, affrays or routs were likely to occur, and any two Justices, together with the Sheriff, may come with the posse comitatus\(^{145}\) if need be, and suppress any such riot, rout, or assembly, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; and such record alone is sufficient conviction of the offenders. Under the law, it has been held that all persons, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the Justices in suppressing a riot, on pain of fine and imprisonment; and that any beating, wounding, or killing of the rioters that may happen in suppressing the riot is justifiable.\(^{146}\)

Forty years later a stipendiary magistrate, T.E. Maunsell SM, published N.Z. Justice of the Peace and Police Court Practice (1935). Its publication was prompted by passage of the Justices of the Peace Amendment Act of 1927, into which had been consolidated the Justices of the Peace Act 1882 and several other enactments relating to JPs during the intervening period – and apparently the authorities deemed it necessary to produce a single comprehensive textbook covering all legislation to date affecting Justices of the Peace. The detail in which these authors published legal case reports and courtroom procedure specifically for lay magistrates indicates the significance of the role Justices of the Peace held in the country at that time.

\(^{145}\) Johnston notes ‘In applying this and other English statutes which mention the posse comitatus to New Zealand, it would seem probable that the district within which the Sheriff has jurisdiction must be taken as correlative to ‘the county’ in England.
\(^{146}\) Haselden, p.76.
Maunsell’s book was the primary source of information for court-sitting Justices until *The Functions and Powers of Justices of the Peace and Coroners* was published in 1968. By the time this volume appeared the jurisdiction of New Zealand Justices had been severely curtailed by the Justices of the Peace Act 1957; the Oaths and Declarations Act 1957 [a clear and simple codification of the law]; and the Summary Proceedings Act 1957 [which had the effect of seriously restricting JPs criminal jurisdiction]. The morale of Justices of the Peace at this time was at a low ebb.

Much later appeared *The Functions and Powers of Justices of the Peace and Coroners* (1968) by Burns and O’Keefe, which gave a clear outline of the duties and responsibilities of Justices at the time of writing and, as with Maunsell, included a comprehensive list of cases and a table of statutes then currently applicable to JPs. Ministerial and judicial duties were covered in depth, and samples of typical forms to be used by JPs were included in the text. The authors felt that some systematic exposition of the rules of law would be useful not only to JPs but also to a diversity of people interested in the legal system. They hoped their book would be comprehensible to the informed layman, and also explain technical terms that JPs and others would encounter in their work. Ironically a change in the law affecting JPs rendered the volume obsolete.

The principal New Zealand literature that remains to critique has been drawn primarily from post World War II sources: Publications of the Royal Federation of New Zealand Justices Associations; *New Zealand Parliamentary Debates (Hansard)*; Submissions to the 1977 Royal Commission on the Courts; the *1978 Report of the Royal Commission on the Courts*; New Zealand Law Commission and law society reports; and academic theses on aspects of lay magistracy.

**Justices of the Peace publications**

Two literature sources produced by former officials of the Royal Federation of Justices of the Peace Associations were pivotal to my research because they recorded the high and low points in the history and activities of the institution since its formal inception in 1924. The first monograph, *Federation: 1924 – 1973*, by J.P. Noakes, is a summary of the proceedings of 45 JP Conferences and a critical survey of the usefulness of the Federation over that period. The richness of this source stems from the fact that it was within such conferences that the principal decisions concerning lay magistracy were made during those 80 years.

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It will not be lost on the reader that a remit at the first meeting of the Council resolved ‘that
the Government confer with the Justices’ Associations before making new appointments to
the Commission of the Peace.’ Relations between the JP associations and the government
on the subject of the appointment of Justices of the Peace were fragile from the beginning
and remain so today. Administration and control of JPs was, it appears, equally as
troublesome in 1925 as it is today. Noakes reports that only 920 JPs in 1924 out of a
possible 5,500 were members of an association, and today, 83 years later, the JP Federation
is still asking the government to make it mandatory that JPs join an association so they are
kept up-to-date with law changes and other judicial matters that affect them. Noakes
illustrates the frustrations of the JP Council at the time with this extract from a report of a
speech by A.J. Stratford, president of the Auckland JP Association in 1924:

The time has now come when every Justice wished to improve and make
himself conversant with court work, and that could only be done by his [sic]
serving his apprenticeship, so to speak, with such work. In the past the Justice
had been appointed, had been sworn in, and then he remained in a groove; he
did not do anything to get out of that groove; he merely waited to be called.
Before the Association came into existence, the call did not come, and the
Justice did not get any further with his undertaking; he was allowed to go on
his own way . . . He would now have, through the Association, an opportunity
to make himself useful in police court work as well as to the public. The time
had now gone by when they were to be rail-sitters. They wanted all their
members to be up and doing; they wanted them to be working bees, and to
carry out the duties vested in them”.149

This quotation from 1924 prompted Noakes, 49 years later, to ‘raise a number of disturbing
questions’:

Is the proportion of rail-sitters less today than it was in 1924?

How far has the Federation gone in 49 years towards solving the problems associated with
Justices’ appointments and training for office?

Have the achievements of the Federation over 49 years justified the great hopes of the
founders? and

If no federal organization had been formed, would the Commission of the Peace have
suffered complete demise?

Noakes submitted they were fair questions at the time, and decided to answer them in the
last chapter of his book. Writing in 1974 he said:

149Noakes, p. 13.
Rail-sitters: The proportion of “rail-sitters” is less today than in 1924. In 1924 there were only five Associations with a total membership of 930 out of about 5,500 Justices in the whole country; today there are 27 Associations with a total membership of 5,129 (in 1972) out of 6,700 – a remarkably good representation in any voluntary association of people with common interests.

Nevertheless [the question] is not one to be ignored; Associations need to be continually vigilant to attract new Justices and to maintain the interest of their members.

Appointments and training for office: Little progress has been achieved despite 49 years of agitation and reform. Political involvement still exists, the tendency remains to swamp the Commission [of the Peace] in the pursuit of conferring honours, and quality, suitability and potential for service even today are not always the paramount requisites for appointment. In education too, little has been achieved in the period. The Associations have made strenuous efforts but this has happened with little support from the Federation and less from the Department of Justice. The Department probably does not admit that it followed a policy of disengagement but this in effect was its attitude. In 49 years little has resulted in attempting to solve the problems of appointment and training of Justices for office. The whole future of the Commission depends upon a quick solution to these two distressing problems; forty-nine years ago the founders regarded them as pressing problems, but today they are much more grave.

Hopes of the Founders: The answer to this third question must be “yes” and “no” – “yes because the Federation has achieved much in unification, and “no” because it has not eliminated the weaknesses of appointment and training. The Federation has never developed a research organization of its own, it has no Education Officer, the official journal is left to the Editor who carries out such research as he can, and new laws affecting Justices’ duties and responsibilities come to the notice of Justices some time after their enactment. Money is needed to correct these deficiencies; being without it, the Federation cannot act.150

Noakes accepts that the third question is rather futile and impossible to answer, but posits that ‘the Federation should play a fuller part in reinvigoration of the Commission of the Peace as a valuable instrument for stability within our social and legal structure.’ On “the Future”, he said that despite all his criticisms he retained a strong and lasting faith in the Commission of the Peace and in the structure of Federation. It had stood the test of fifty years and was, he suggested, stronger than ever before and therefore the potential for greater strength and wider service in the interests of the community at large.

Noakes appeared to be convinced that with sufficient will and determination, and more support from the Ministry, the Federation could put its house in order and control an effective lay magistracy. This study acknowledges that Noakes was correct in his assessment that considerable progress had been made in the 50 years under review, but contends that for effective lay magistracy an independent appointment procedure and authoritative Ministerial control are prerequisite.

150 Noakes, p.63
The second important primary research source was *Royal Federation of New Zealand Justices’ Associations (75th Conference)*,\(^{151}\) produced by R. Williams in 2003. This publication, while lacking the insightful comment and opinion of Noakes (the editor of the previous RFNZJA monograph), nevertheless provides researchers with critical insight to conduct and administration of the Commission of the Peace in New Zealand over an 80-year period. Reports of the annual conferences of the RFNZJA have been essential because of the decisions on JP policy they revealed, and for the statistical information they provided. In this respect these two authors have made an outstanding contribution to literature on lay magistracy in New Zealand.

Other RFNZJA publications such as the *Justices’ Quarterly* magazine, handbooks and reports jointly produced with the Ministry of Justice were helpful in identifying specific issues of contemporary concern to JPs and establishing how those concerns were being handled by the Federation.

**RFNZJA lacked authority**

The reason the Federation conferences took the form of an annual talk-fest possibly came about because the national body had no central power-base, meagre funding entirely from its membership, and no financial support from government. The Federation was virtually ignored for many years by parliamentarians and its lobbying powers were largely ineffectual.

This persistent lack of government interest in the Commission of the Peace elicited the following hard-hitting editorial feature in the *Justices’ Quarterly*, the official magazine of the JP Federation and mailed to all Justices who were members of a JP association.

The temper of the March 1974 Jubilee Conference of Justices of the Peace Associations was such that nothing short of a complete re-examination of the Commission of the Peace in New Zealand would satisfy the participants. To put it frankly, Justices had had fifty years of brush-offs and neglect. It was still thought that an end should be put to the unsatisfactory appointments system, the marked decline in employment and status should be reversed, the role of Justices should be made a much more meaningful and useful one, and national training, planned for a two-tier system of employment, should be delayed no longer. These are matters which, in one way or another, have been features of complaint by Justices over the last fifty years; the fact that they have never been rectified – and indeed in some degree have worsened – is attributed mainly to the indifference and neglect of governments over this long period.\(^{152}\)

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\(^{151}\) R. Williams, Royal Federation of New Zealand Justices’ Associations, RFNZJA, Wellington.2003.  
\(^{152}\) *Justices’ Quarterly*, June 1974, p.47.
The article maintained that with better organization the Federation could have done more towards reform, and that such recurring matters as appointments procedure (over which Justices had never asked for control) should also be put to government for reappraisal.

The Federation executive made an urgent plea to government to establish a dialogue for an early implementation of lay magistracy reforms. ‘We hold firmly to the belief that the Commission of the Peace should not be allowed to become an anachronism, for reasons elsewhere expressed. But such a trend has been only too apparent for a long time; it should be arrested and reversed by every means possible to us. Believing as we do that government should play a major, active part in the reconstruction process we earnestly invite the Minister of Justice to co-operate with us.’

**New Zealand Parliamentary Debates (Hansard)**

*New Zealand Parliamentary Debates (Hansard)* was important in establishing and evaluating the positive and negative attitudes of Ministers of Justice, their shadow ministers, and politicians during parliamentary debate involving lay magistracy in general and New Zealand judicial JPs in particular. Both RFNZJA publications recording the reports and remits of 80 years of JP conferences allude to long-running disputes with politicians about JP appointment and training. *Hansard* therefore became my prime resource for checking on Federation claims of political obstruction or ineptitude concerning JP matters. Here are such examples:

In June 1973, the Federation executive had made several important suggestions to the Minister of Justice (Hon. Martyn Finlay) about the future appointment and training of Justices. Three months later the Federation Registrar received a letter from the Minister saying he had no intention of changing the existing system of appointment, and while being “sympathetic to [the] proposed system for training I do not accept it entirely . . . and would be loath to initiate any full-scale training of Justices of the Peace until the air is cleared somewhat.”

The Hon. Phil Goff spoke against the introduction of Community Magistrates in the Waikato and Bay of Plenty court districts:

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153 Dr Finlay was alluding to the proposed introduction of the Summary Proceedings Amendment Bill (due to be tabled in Parliament that year) and to the report of a committee he had set up to study the business of the courts – either of which could affect the role of Justices.
We looked at JPs, the existing lay people working in the judicial system, and found that most of them reflected the Minister. They were middle class, they were middle-aged – and maybe that is being a bit kind to the Minister – they were pakeha, but there were not very many women and there were certainly not very many people representing other ethnic groups within the community. So it is a misnomer again to call this the Community Magistrates Bill when clearly the people are not going to reflect the community.\textsuperscript{154}

It was almost impossible to find any genuine consensus amongst politicians about their attitudes to lay magistracy, and a wide-ranging search of \textit{Hansard} revealed that years could pass with nary a mention of lay magistracy or Justices of the Peace during debates in the House. Then, when legislation on the subject was imminent, a handful of MPs chosen from both sides of the House by the whips would deliver trite and superficial speeches for or against the issue under discussion according to which party had been instrumental in promoting the Bill currently being debated. Occasionally a nugget of worthwhile political analysis of lay magistracy support or opposition surfaced from one or other side of the House, and it is this reasoned comment that has been extracted from the record of \textit{Parliamentary Debates} and evaluated in this study. Examples of the more considered opinions attributed to the Hon. Dr Martyn Finlay, the Hon. John Marshall, the Hon. Doug Graham, the Hon. Phil Goff and others provide significant input to Chapters 2 and 6.

\textbf{N.Z. Law Commission and law society reports}

Much the same situation arose with the law profession as with politicians. Lawyers appearing in the courts were frequently at variance with members of their law society about the retention or otherwise of lay magistracy, and there was even a difference in policy about JPs in the courts from one district law society to another. Judges in the District Courts also held disparate views, and found themselves from time-to-time disagreeing with the ‘official’ view of the New Zealand Law Society and even the New Zealand Law Commission in the lay magistracy debate. An extract from a later chapter illustrates the importance of these particular reports:

\begin{quote}
When the Minister rose from his seat in the House 12 days later and moved that the bill be committed Justices of the Peace were stunned by the Machiavellian skill with which the Minister effectively decimated their judicial jurisdiction:

“This is a bill that has been welcomed by the legal profession. It has long been in preparation and has been very carefully examined. A committee was set up including the Department of Justice, the magistracy, the Crown solicitors, the New Zealand Law Society, and the police. That committee had the responsibility of preparing this consolidation and all the amendments
\end{quote}

\textsuperscript{154} \textit{Hansard}, 1998, v. 567, p.10109
contained in it. A draft of the Bill was sent to the New Zealand Law Society and it was circulated among district law societies, which have also very carefully examined the provisions. The Bill was referred to the Statutes Revision Committee of this House and it spent about three hours going through the measure clause-by-clause and hearing explanations, particularly those of the Law Draftsman and the Department. A message was sent to the Statutes Revision Committee by the secretary of the New Zealand Law Society stating that the society was satisfied with the Bill and had no representations to make on it. This Bill has been very carefully prepared and has been examined by the people best qualified to express an opinion upon it, and it is acceptable to those who are in a position to assess the value of it”.

All of this made the various law society reports, law journal commentary, and individual legal opinion important sources of literature for study and analysis in this thesis project. In 2004 the New Zealand Law Commission, in its 372-page report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, almost dismisses lay magistracy out of hand. In recommending the establishment of a Community Court as a new level of summary proceedings court below the level of the present District Court. It would, in effect be a reintroduction of a court of petty sessions similar to the previous Magistrates’ Court (which disappeared when it became known as the District Court and the Magistrates who presided there were redesignated as District Court Judges).

The Law Commission proposed that this new Community Court should be administered by a new type of professional junior judicial officer, with law qualifications, to be known as a Community Justice Officer (CJO). In dismissing the possibility that this new court be presided over by lay magistrates, the Law Commissioners in their Report said:

The use of lay judicial officers in the court system, and the potential for lay participations to enhance public confidence in the legal system, is a very longstanding issue which at times becomes very contentious . . . Our preliminary view was based on the principle that is desirable for all judicial officers sitting in court to be legally qualified. . . This view departs somewhat from that expressed in previous reviews of the court system. The 1978 report of the Royal Commission on the Courts endorsed lay involvement of Justices of the Peace as a means of allowing for greater community participation . . . The fair, accurate and efficient of less serious civil and criminal cases contributes more to enhancing confidence in the court system than does the appointment of lay people as judicial officers. However we acknowledge that there may be individuals who, because of their particular knowledge or experience, are able to determine cases in this way without a standard legal qualification . . . The proposal that judicial officers in the four jurisdictions where lay judicial officers can be appointed at present – Justices of the Peace, Community Magistrates, Dispute Tribunal and Tenancy Tribunal – should be legally qualified was discussed in workshops and at subsequent meetings with representatives of these judicial officers. The Royal Federation [of Justices of the Peace] vigorously opposed any lessening of the judicial work of Justices of the Peace.”

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There has been no indication since 2004 that the New Zealand Law Commission has resiled from this view of lay magistracy. What is significant is the fact that one member of the Commission, Prof. Ngatata Love QSO JP (who did not express a dissenting voice on the issue of lay magistracy) was also a member of the 1978 Royal Commission on the Courts (which recommended the retention of lay magistracy in the lower courts).

**Academic theses on lay magistracy**

Two New Zealand university theses were of value and provided worthwhile comparative information: Barnett’s\(^{157}\) 1972 thesis detailed the differences in appointment procedure, powers, functions and responsibilities between English JPs and their New Zealand counterparts. He discussed the civil jurisdiction of English Justices (no longer existing for New Zealand JPs) and told his readers that ‘contrary to widespread popular belief the New Zealand Justice of the Peace still retained a sizeable jurisdiction within our law despite severe limitations being placed on this in the last 25 years.’ He surveyed 100 JPs in the southern North Island and concluded the Commission of the Peace in 1972 was “far from working to its fullest capacity . . . and . . . despite severe restrictions in the past 25 years [JPs] have begun to win back functions which have previously been allowed to atrophy.” Barnett also cited the introduction of JP traffic courts as positive moves in relieving severe pressure from the Magistrates’ Court and suggested it was reasonable to allow Justices, following proper instruction, to preside over cases with which they were competent to deal. He pointed out however, that ‘Magistrates in many parts of the country have shown reluctance to allow Justices to exercise this jurisdiction, their principal objection being on the grounds of competency.’ For this reason Barnett believed that the ultimate goal for JPs must remain a national training programme. He also advocated a more stringent method of JP selection at a regional level, and the use of suitably trained Justices in the Children’s Court.

I submit that Barrett’s assessment of the lay magistracy in 1972 has many parallels today. The training situation has improved immeasurably since he published his thesis, and his suggestion that lay magistrates had an obvious role to play in the Children’s Court was perceptive, but has still not been acted upon. His conclusion (below) was perceptive and appropriate at the time he wrote. It is even more apposite today.

> Although the Commission of the Peace has fallen into desuetude it is by no means an anachronism. With the appropriate training programme made an integral part of the office it could become a valuable asset to our judicial system and, in fact, concrete examples of this are given by the successfully-

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operating Justices’ traffic courts in Auckland, Hamilton and Rotorua. It is to be hoped that in the near future the Justice Department will co-operate with the Royal Federation of New Zealand Justices Associations to introduce measures on the lines of those suggested above. These would save the Commission of the Peace from becoming an obsolete but historically interesting link with our English legal heritage as it is now in danger of doing.158

Townsend’s159 1977 thesis was significant because his study considered the political patronage aspect of JP appointments. The author estimated that New Zealand had one JP for every 500 citizens compared with a ratio of one JP for every 2,500 citizens in England and Wales which, he suggested, raised the important question: ‘Is the position of the JP a legal office, or is it little more than an honour bestowed by the government?’ In his survey of 480 JPs in Canterbury, Townsend found Justices were ‘fairly evenly divided on the question of whether their position was an honour. He received 54 (67.5%) responses from 80 randomly distributed questionnaires. Of the 54 who replied, 28 (54%) said it was “an honour”; 26 (46%) said it was not. On the question of whether a “Justiceship” was a legal office, again the recipients were fairly evenly divided – this time the majority considered that it was not a legal office by 29 (54%) to 25 (46%). And those 16 recipients who regularly served on the bench were equally divided on the issue of whether they were the holders of a legal office or not.’ On the issue of JPs and political patronage Townsend concluded:

Justices of the Peace are usually conscientious and prominent members of the community, but tend to provide an inefficient service. The suffix “JP” denotes the holder of a public office, not an honour, despite the personal opinion of many existing Justices. Many of those appointed are either too old or too busy to fully serve the public, and they owe their positions to their local Member of Parliament rather than the public at large. Favouritism and appointments made as a reward for party political services have nothing to do with Justice, and are quite antithetical to the principles of efficiency as well. Such appointments are sustained by the large number of Justices in the community, so obviously insufficient care is taken over each nomination.160

1977 hearings of the Royal Commission on the Courts

Hearings of the 1977 Royal Commission on the Courts and its subsequent 1978 Report have been crucial to this study because the hearings signalled the first significant official review and assessment of lay magistracy as a component of the New Zealand judicial system. As part of the wider inquiry (involving all the courts) the role of lay magistrates was subjected to scrutiny by some of the most senior jurists, lawyers, court administrators and JP officials in the country. The submissions presented by these experts were in turn subjected to examination and appraisal by the experienced panel of commissioners. The

158 Barnett, p. 11.
160 Townsend, p. .92.
fact that the Commission conducted hearings throughout the country was also an advantage because local and regional groups expressing lay magistracy views were able to present submissions in their own regions.

These voices may not have been heard if greater time and travel costs had deterred interested parties from making submissions. Files of all submissions to the Commission were made available by the Parliamentary Library in Wellington were invaluable in establishing the contemporary views, opinions and recommendations of all parties interested in reform of the court system. These groups included the New Zealand Law Commission, the New Zealand Law Society and district law societies, individual lawyers, High Court judges and stipendiary magistrates. Representatives from all groups expressed their views on the retention of lay magistracy, or its replacement by professional judges, in the lower court system. The five-member commission161 chaired by Mr. Justice Beattie conducted its hearings throughout New Zealand in February 1977 and submitted its Report to government in 1978.

1978 Report of Royal Commission published

The most persuasive argument for retention of lay magistracy in New Zealand came from the 1977 Royal Commission on the Courts, which described in its 1978 Report how various statutes over the years had eroded the powers of lay magistrates – and in particular the 1957 Summary Proceedings Act that ‘revolutionized the law relating to the criminal jurisdiction of Justices of the Peace.’162

The Report noted that before passage of the Act, except in a few cases where jurisdiction was specifically vested in a single Justice, two Justices of the Peace had power to try every summary offence unless it was specifically provided otherwise by statute; and in a few instances they had the jurisdiction to hear indictable charges. It also pointed out that Justices no longer had the power to pass sentences of borstal training and periodic detention, although preliminary hearing of an indictable charge to be tried by the Supreme [now High] Court was still within their jurisdiction, which they frequently exercised.

One particular Royal Commission recommendation that found favour with the Federation was its suggestion that an independent Justices’ Appointment Committee be established. This was the type of non-partisan appointment system JPs had been seeking for decades, and regrettably it was one of the Commission’s few recommendations not adopted by government. New Zealand’s Members of Parliament, it seemed, were not about to

161 Justice Beattie, J.D. Murray SM, Professor I.H. Kawharu, J.H. Wallace QC, and Mrs. R. King.
surrender their last vestige of political patronage – the opportunity to “reward” loyal party stalwarts for their services by having them appointed as a JP.

As part of its overall review of the court system the Royal Commission supported retention of lay magistracy in New Zealand, and made a number of recommendations for reform of the lay magistracy involvement in its report to government. The hearings of the Royal Commission on the Courts proved to be a pivotal event in the history of the Justices of the Peace in New Zealand. For the first time a tribunal independent of vested interests – government, law societies and JP associations – was well positioned to objectively evaluate the role of lay magistracy in this country and recommend for or against its value and relevance in a future judicial system.

The ‘Beattie Report’, as it came to be known, advocated lay magistracy as an important element in the justice system, and strongly recommended the continued use and development of judicial Justices in New Zealand’s lower courts. Specific arguments submitted at the Commission hearings, and the Commission’s subsequent report, are discussed in more detail in Chapter 6 and Chapter 8.

Concluding comments

While the catalyst for this study of the lay magistracy was undoubtedly the researcher’s intermittent personal involvement with the Commission of the Peace, the more recent motivation arose from the review of literature. The lay magistracy in New Zealand appeared to be stagnating at a time when it was expanding in overseas jurisdictions. A review of the literature rekindled an interest in establishing the reason for this situation.163

English literature provided a valuable background to the history and development of this unusual judicial institution based on voluntary “citizen judges” untrained in the law, and the Morgan and Russell164 study provided the ‘for-and-against’ lay magistracy argument adapted for this study and which forms the basis of Chapter 6. Most pertinent to this study, however, were the principal New Zealand sources referred to in this chapter – the 1978 Beattie Report, RFNZJA publications, Hansard, academic theses, and Law Commission and law society literature.

The literature review has raised issues and prompted research initiatives beyond the reference and academic books, reports and academic journals. Newspaper reports of a decision by judicial JPs in a New Plymouth court case that led to a judicial review by the

163 The author’s motivation for researching this subject of lay magistracy is discussed in greater detail in the Prologue.
Chief Justice was one example. This event prompted the question of how many decisions by lay magistrates were overturned on appeal. The response from the Ministry of Justice was surprising. Although the JP Federation claimed anecdotally that the number of JP decisions overturned on appeal to the High Court was extremely low the Ministry, when questioned in 2007, could not provide any statistics to substantiate that assertion. Such a lapse in record keeping endorses the contention of this study that the Ministry should have more accountability over lay magistracy, and vastly improved lines of communication should be established between the Ministry and the JP Federation.

Another example of directed research resulted from an individual comment appearing in *Hansard*. During parliamentary debate on the 1957 Justice of the Peace Bill both the Hon. John Marshall (National) and the Hon. Mabel Howard (Labour) were contemptuous about the lay magistracy, and more recently in 2005 Stephen Franks (ACT spokesperson) stated he was personally opposed to lay magistrates. This prompted the question of whether political parties hammered out party policy on an issue such as lay magistracy, or whether the Minister of Justice of the day took a unilateral or committee-inspired decision that fellow politicians were expected to support. This brief repartee between political opponents in the House prompted the third survey of this thesis.

The review of literature, as indicated at the beginning of this chapter, was the catalyst for this thesis project. Skyrme and other contemporary scholars and judicial experts emphasized the importance of lay magistracy in a modern democratic judicial system, and a review of the New Zealand literature substantiated that viewpoint. The research procedures adopted to advance this thesis that lay magistracy is effective and should be retained and reformed as a major component of our justice system is explained in the following chapter.

165 The Ministry has since (2009) been able to provide information on appeals. Refer to Epilogue.
CHAPTER 4

RESEARCH PROCEDURES

This chapter provides a methodological overview and outlines the research procedures used in this study to establish that lay magistracy is effective and should be retained and reformed as a major component of the New Zealand justice system. It critically details ‘why’ and ‘how’ the research was conducted. Research design is explained, ethical issues are addressed, and research methods described. The methodological approach used in this research involved mixed methods and the specific methods (procedures) used involved documentary analysis, preliminary focus group and individual interviews as a precursor to administering a two surveys, one pilot and one comprehensive. Ethics approval was obtained and this chapter also provides some discussion on ethical considerations pertaining to this study.

The research goals were:

To determine criteria about what constitutes effectiveness for the lay magistracy in New Zealand.

To establish, with reference to such criteria, whether or not lay magistracy remains a valid and viable judicial component in a modern justice system.

To establish why lay magistracy has steadily diminished in importance in New Zealand over the decades, and yet been developing and expanding in other countries.

To undertake a survey of the Justice of the Peace population in New Zealand (from which all lay magistrates had traditionally been drawn) to obtain up-to-date demographic and qualitative information about their views on their roles and procedures as lay magistrates.

To determine, on the basis of this data, whether or not lay magistracy should be retained and further developed in New Zealand, and,

To indicate how this can be achieved and what part, if any, lay magistrates should play in the justice system.

After reviewing the literature it became clear that lay magistracy in some overseas jurisdictions was flourishing while in New Zealand it was quiescent and potentially in
decline. What had brought about this situation? As indicated in the previous chapter, the New Zealand Law Commission as recently as 2004 had recommended abolishing lay magistrates, as had an authorized committee in Scotland recommended abolishing lay magistracy in that jurisdiction. A similar situation existed in Northern Ireland. Yet within three years both Scotland and Northern Ireland had rejected those recommendations and returned all criminal summary justice in their lower courts to lay magistrates.

How had lay magistracy in England and Wales been successfully remodelled over the years to meet the changing needs of society, yet had failed in New Zealand to meet local expectations and had instead been diminished in judicial status? Was lay magistracy simply an anachronistic judicial concept of the British colonial system to eventually be replaced by professional judges?

My thesis contends that if the lay magistracy (consisting of judicial JPs and Community Magistrates) were to play an increasingly important role in the New Zealand justice system an extensive remodelling of the existing institution would be necessary. Such an outcome would depend on the goodwill and combined effort of three principal stakeholders – the government, the legal profession, and the population of Justices of the Peace from whose ranks lay magistrates have traditionally been drawn.

Research design

The question arose as to whether or not this proposal constituted a serious research subject. According to Creswell to actively elevate a topic to a research study calls for reflecting on whether the topic can and should be researched and he posits that a topic can be researched if researchers have participants willing to serve in the study. The criteria he uses to justify researching any topic are:

- Does the topic add to the pool of research knowledge available on the topic?
- The issue of whether a topic should be studied also relates to whether people outside the researcher’s own immediate institution or area would be interested in the topic.
- The topic is national, rather than regional and of appeal and/or interest to a general audience.

It is submitted that this thesis topic meets these three criteria.

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166 A review of the RFNZJA conference reports and Federation publications from 1924 to 2002 had revealed a history of discord and dissent within national and regional JP associations, and disclosed strained relations between Federation councilors and conflict with various Ministers of Justice and Departmental officials.
168 Presentations based on this thesis research have already been presented to two national JP Annual Conferences, and articles based on the research have been published in the New Zealand Herald and the Justices’ Quarterly. The research has also been the subject of a personal briefing at the request of the Attorney General, Hon. Chris Finlayson.
The methodological approach was mixed methods. Hansen,\(^\text{169}\) discussing mixed-mode research, posits that ‘once the aims and attendant theory have been clarified, the methodological approach and the consequent range of possible methods that can be used should become blatantly apparent,’ and adds that ‘the success with which various research components intermesh is dependant on whether or not research is applied or theoretical . . . Pretty well all research is bound to be a blend of both; mainly quantitative or mainly qualitative.’

Quantitative and qualitative techniques have been supported by ethnographical\(^\text{170}\) and reflexive\(^\text{171}\) research prompted by the researcher’s long association with lay magistracy in ministerial, judicial and office-holding positions as outlined in the Prologue. The import of ethnographical method to this study applies to the researcher’s recent regular attendance as an observer at annual JP Federation conferences, regional JP association council meetings, and regular regional JP training sessions. Using an ethnographic approach particularly applies to collaboration with members of the advisory group and also those individual interviews that were conducted in Hamilton and Wellington. This work was qualitative in nature as were the unstructured responses from the participants in Survey B:

In terms of data collection, ethnography usually involves the researcher participating, overtly or covertly, in people’s daily lives for an extended period of time watching what happens, listening to what is said and/or asking questions through formal and informal interviews, collecting documents and artifacts – in fact gathering whatever data are available to throw light on the issues that are the emerging focus of the inquiry. Generally speaking ethnographers draw on a range of sources of data, though they sometimes rely primarily on one.\(^\text{172}\)

A further recommendation by Creswell that qualitative research be placed in a special section at the end of the study to compare and contrast with the findings of the current (quantitative) study\(^\text{173}\) has been adopted. This qualitative input from a large cross-section of judicial and non-judicial lay magistrates has informed this study.

No correlations have been determined between the demographic data and other evidence supplied by respondents because the intention was always to gain broadly descriptive information about a corpus of service deliverers as opposed to subsections defined by demographic factors.


\(^{172}\) Hammersley and Atkinson, p.3.

\(^{173}\) Creswell, p. 33.
Ethical issues

Ethics approval was sought and obtained from the Ethics Committee of the University of Auckland for the survey research. In considering the ethics of this research project it is important to note Tolich and Davidson’s\textsuperscript{174} view that ‘ethics is a process rather than a problem to be resolved.’ The authors say this does not mean that it is possible to cover all situations containing potential ethical issues. Instead they posit that considering ethics ‘requires a balancing act – that is, the ethical interests (and rights) of respondents must be compared with the researcher’s interests in gaining new information.’\textsuperscript{175}

In essence, according to Tolich and Davidson, research ethics demands of the researcher commitment to these five basic principles: (1) Do no harm, (2) voluntary participation, (3) informed consent, (4) avoid deceit, and (5) confidentiality and anonymity.\textsuperscript{176} In all stages of the research process these principles were rigidly adhered to, and ethics approval by the University of Auckland was cited to all survey respondents on the thesis documentation they received. Care was taken to ensure confidentiality and anonymity in the case of all respondents to the two surveys to Justices of the Peace (Survey A and Survey B) that involved questionnaires. Detailed letters of explanation about the surveys were sent, and assurances of anonymity given, examples of which appear in Appendices A and B.

Research procedures outlined

The research methods have included document analysis, a meeting with a focus group, individual recorded audio interviews with selected serving and former JP officials, a deductive questionnaire survey of 150 present and past officials of the 29 regional JP associations (to check the veracity of assumptions from interviewees and the advisory group), and finally the preparation of a mixed-mode\textsuperscript{177} survey questionnaire embracing the total population of Justices of the Peace in New Zealand.

Documentary evidence can be public, such as Hansard, minutes of meetings, or private (such as memos and email communications), which can provide context and background to the research. In this study the documentary evidence was that which was available to the public, and from individual JPs and Community Magistrates. According to Creswell\textsuperscript{178} documentary evidence has the advantage of illuminating issues, can exist independently of the research and are an easy way to obtain other peoples’ perspectives. Documentary

\textsuperscript{174} M. Tolich and C. Davidson, Starting Fieldwork: An Introduction to Qualitative Research in New Zealand, Oxford University Press, Auckland, 1999.
\textsuperscript{175} Tolich and Davidson, p.87.
\textsuperscript{176} Tolich and Davidson, p.70.
\textsuperscript{177} J. Hansen, Flexibleplus Research and Development Solutions, p.13.
\textsuperscript{178} Creswell, pp. 187-188.
investigation can however, be time consuming, inaccurate, and people may be unwilling to share confidential documents.

First, document analysis of RFNZJA records of annual conference proceedings from 1924 to 2003 was completed. This was followed by a review of parliamentary debate in *Hansard* over a similar period, and a study was undertaken of all submissions to the 1977 Royal Commission on the Courts. This material, supplemented by personal experience of the researcher as a lay magistrate, suggested a number of reasons for the continuing lack of confidence and steadily diminished authority vested in the New Zealand lay magistracy by the system’s main stakeholders. The literature review indicated that most of the issues identified as being problematic in the New Zealand context had recurred over the years in the British jurisdictions – issues involving appointment procedure, training, discipline, retirement age, remuneration, and social/gender/political/ethnic balance.

Next, and to better understand and evaluate current lay magistracy views “from the court bench”, an unstructured focus group reflexive interview was arranged in Hamilton consisting of a District Court Judge, a former judicial JP and two Community Magistrates (both of whom had previously served as judicial JPs). All were from the Waikato/Bay of Plenty area where judicial JPs had presided in local district courts for more than half a century.

The Waikato/Bay of Plenty region was selected because it had recently experienced two noteworthy episodes in lay magistracy evolution – judicial JPs in the Waikato had endured the most strident criticism during the 1977 Royal Commission on the Courts hearings, and also because the region had been selected in 2000 to trial the new and controversial Community Magistrates scheme. These two incursions into the status quo of lay magistracy in these areas could have been expected to influence the views and opinions of local judicial JPs in comparison with those of judicial JPs in other regions.

Probabilistic substantiation of these notions, and an assessment of the current state of relations existing between the various lay magistracy stakeholders, was effected by adopting a simple non-complicated social science-type approach involving a number of semi-structured or unstructured individual interviews in Wellington with a randomly-selected and diverse group of senior office-holders in regional and national judicial and lay magistracy organizations.

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179 Tolich and Davidson, p.39.
180 Judge Tony Latham, M. Symmans CM, R. Paterson CM, and R.B. Armstrong JP.
181 The RFNZJA, regional JP associations, the Ministry of Justice, the Department for Courts, and Minister of Justice.
182 These interviews, conducted in Wellington, involved: A. Hart (Registrar, RFNZJA); K. Little (former Registrar RFNZJA); W.G. Emerson (Registrar Hutt Valley & District JP Assn.); R.E. Williams (former education training co-
This research method is applied particularly with informal research groups with whom the researcher wishes to check his, or her, own assumptions and from whom he or she wishes to accept guidance. Stanley and Wise\textsuperscript{183} state that “relativism” is ‘the belief that the truth is relative to the particular framework or context of the knower.’ Dowsett,\textsuperscript{184}also dealing with interviewing methods, says ‘when I refer to the semi-structured interview I’m referring to a one-on-one situation largely, in which the interviewer has a series of topics or issues which they wish to discuss with the interviewee. I would regard these as broad topics rather than as a set of standard questions or standard procedures which will be followed and replicated in every interview . . . I’ve used now for about nine years in a series of different research projects.’

It is asserted that these various procedures, in tandem, enabled a corpus of data to be gathered for this thesis.

**Data gathering procedures**

The accumulation of data for this thesis thus resulted from a range of procedures as was explained in the section above. One data gathering approach, as outlined in Chapter 2, comprised a comprehensive search of the literature on lay magistracy in New Zealand and overseas. Another involved the conducting of individual and group interviews, and finally, the study involved the conduct of three ‘surveys’.\textsuperscript{185}

Specifically, the literature search in New Zealand initially involved data gathering of a historical nature from early issues of the *New Zealand Gazette* at the University of Auckland library and from legal textbooks written last century by colonial judges for the edification and guidance of Justices of the Peace appointed to the bench of New Zealand courts. Data from the legal profession, including lawyers, judges, legal academics and law reformers was drawn largely from submissions to the 1977 Royal Commission on the Courts, publications and reports of the New Zealand Law Society, provincial law societies, professional law journals, New Zealand Law Commission reports, and newspaper reports.

Data of particular importance to the study included the complete transcripts of submissions to the 1977 Royal Commission on the Courts (Beattie Commission), material made available to researchers *in situ* at the Parliamentary Library in Wellington. These


submissions were photocopied, indexed in binders, and manually annotated according to issues raised by submitters. This provided an accurate cross section of opinion about lay magistracy issues from all parties interested in the future structure, administration and operation of the courts in New Zealand.

The 1978 Report of the Royal Commission on the Courts was equally important as it provided the first comprehensive public insight into the subject of lay magistracy in New Zealand. The Report unveiled lay magistracy from the perspective of all stakeholders involved in justice and its administration, including the general public. From the standpoint of this study, an added significance of the Report’s recommendation – that judicial JPs be retained in New Zealand – resulted from the Commission’s examination of lay magistracy experience in overseas jurisdictions.

Data from parliamentary sources were largely drawn from indexed volumes of New Zealand Parliamentary Reports. This resource (Hansard) provided comment and opinion about lay magistracy from individual politicians across the political spectrum. These references have been used throughout this study when political attitudes raised in the House have been seen to be an issue.

A formal view of political attitudes towards lay magistracy resulted from a survey of party spokespersons on Justice in 2004. This survey was conducted following the New Zealand Law Commission’s recommendation that professional rather than law magistrates should preside in a proposed new Community Court. Five parties preferred lay magistrates to professional judges in such a situation, three favoured a professional bench, and one party was undecided.

Previously a unified attitude on lay magistracy by political parties had been difficult to establish. For example, in 1957 when the Hon. John Marshall (National) decided to seriously curtail the jurisdiction of judicial JPs his colleague Roy Jack was not in agreement, yet the move was supported by the Hon. Mabel Howard and the Hon. Dr Martyn Finlay (Labour). And in 1998 when the Hon. Doug Graham (National) decided to replace judicial JPs with new [lay] Community Magistrates in the Waikato and Bay of Plenty District Courts he did so with the agreement of National’s coalition partner ACT. Yet in 2004 Stephen Franks (ACT party judicial spokesman) opposed lay magistracy in favour of professional magistrates. The support or otherwise of lay magistracy, it seemed, was very much a matter of personal preference amongst politicians.

\[185\] One survey was a pilot, the second was a nationally applied questionnaire and the third was by way of an inquiry to all party spokespersons on justice.
Data from Ministry of Justice and the New Zealand Law Commission publications relating to lay magistracy were virtually non-existent before publication of Delivering Justice for All\textsuperscript{186} and Evaluation of Community Magistrates Pilot\textsuperscript{187} that provided some information (nothing about JPs appeared in Ministry of Justice annual reports).

Data gathered from the JP Federation and regional JP association sources included reports and lists of remits presented at annual conferences spanning 80 years and outlined in two JP Federation publications. A substantial amount of other data involving the operation of the JP Federation and its 20 affiliated associations was also obtained in this literature search.

Worthwhile data was gathered from professional law journals and magazines held at the Cambridge University Institute of Criminal Studies and at the library of the Magistrates’ Association in London. Other pertinent data was provided to me during visits to the Lord Chancellor’s Department (now the Department of Constitutional Affairs), and the Institute of Judicial Studies.

Data management of this material was manually arranged in clip-lock files and referenced by subject in hand-written journals. Some data were drawn and downloaded from library and trade publication sources, referenced and managed from computer files. Other data, mainly that from professional journals and publications, were managed by annotated bibliography. Analysis of the data from this search method was done by grouping the literature into relevant themes, considering what was missing and needed further investigation, and determining the best method of obtaining the ‘missing’ information. Presentation of this data was made in narrative form as applicable to thesis chapters to which it was relevant, utilized in tables or diagrams as appropriate, or included in the thesis bibliography.

**Interviews**

The second research method involved qualitative research interviews with two groups of selected individuals. The first smaller regional ‘focus group’ was selected for its depth of knowledge and experience of judicial lay magistracy in one provincial region of New Zealand (Waikato/Bay of Plenty group).\textsuperscript{188}

\textsuperscript{186} Delivering Justice for All, Report 85, New Zealand Law Commission, Wellington. 2004
\textsuperscript{187} B. Hong and R. Hungerford with Philip Spier, Department for Courts, Wellington. 2000.
\textsuperscript{188} The Waikato/Bay of Plenty advisory group of four included a retired District Court Judge; a Community Magistrate and JP who was a former president of the RFNZJA; another Community Magistrate and JP who was also a former president of the RFNZJA; and a judicial JP and former president of the RFNZJA.
Interviews can be both individual, which although time consuming enables the gathering of significant information from that person's perspective, or group, which was discussed earlier in the section on focus groups.

A specialised form of interviewing is focus groups. In the glossary of her research text Mutch\textsuperscript{189} defines these as ‘an interview technique that brings together participants to respond to the questions in a group situation.’ Morgan\textsuperscript{190} refines his definition of focus groups ‘as a research technique that collects data through group interaction on a topic determined by the researcher.’ As I was interested in following through themes that emerged when analysing the transcripts across all three case study meetings this type of group interview seemed ideal, as it seemed to fit with Waldegrave’s\textsuperscript{191} explanation: ‘Focus groups essentially involve an intensive group discussion “focussed” around particular issues’

Historically focus groups started as focused interviews conducted by Robert Merton with American soldiers at the beginning of the Second World War, in order to understand their attitudes and loyalty. Thornton & Faisandier\textsuperscript{192} say market researchers began to use them in the 1960s and 1970s, with community groups utilising them in the 1970s and 1980s.

Waldegrave notes that focus groups are not usually quantitative and generally have 6 to 12 people who share some common characteristics. A feature of focus groups is their ‘explicit use of group interaction to produce data and insights that would be less accessible without the interaction’\textsuperscript{193} ‘Participants can bounce ideas off each other to enable them to further explore and reflect upon the issues they were discussing. In addition the skills of the researcher are important in establishing and maintaining effective group facilitation and direction. Neither can researchers guarantee confidentiality, as they can not be responsible for members of the group.\textsuperscript{194} Nevertheless, a focus group ‘allows for deeper consideration of the answers as differing viewpoints are weighed and considered during the process of evolving a collective response.’\textsuperscript{195}

\textsuperscript{190} D.L. Morgan, Focus Groups as Qualitative Research (2\textsuperscript{nd} ed.), Sage Publications, Thousand Oaks, Calif., U.S.A. 1997, p.6.
\textsuperscript{193} Morgan, p. 2.
\textsuperscript{194} C.J. McLachlan, ‘The pitfalls and perils of focus groups: How useful are they for research in the early childhood setting’, New Zealand Research in Early Childhood Education, v. 8, pp 113-124.
\textsuperscript{195} Waldegrave, p. 234.
Once having decided to conduct interviews it was useful to consider Hancock and Algozine, who suggested researchers consider the setting, means of recording, and the type of questions: structured, semi-structured, or unstructured. The interviews in this project were unstructured. Morse and Richards describe unstructured interactive interviews as ‘relatively few prepared questions...Researcher listens to and learns from participant. Unplanned, unanticipated questions may be used.’

Members of the second [Wellington] group, in addition to their experience as lay magistrates, had considerable specialized knowledge of the Justices of the Peace national organization, its operation, and its relationship with government and the Ministry of Justice.

Both groups were encouraged to speak freely about all aspects of lay magistracy as they had experienced it. They were asked to give their views on the perceived strengths and weaknesses of both types of lay adjudicator (judicial JPs and Community Magistrates) and the range of their sentencing jurisdiction, training, and effectiveness. Selection procedures and remuneration were discussed and audio-recorded in a group situation. The advisory group discussion in Hamilton lasted for approximately two hours and 30 minutes.

Logistics required that members of the second and larger Wellington group had to be interviewed and audio-recorded individually. This proved advantageous in view of the different organizational responsibility and range of experience that emerged from these interviews. Again the interviews were open-ended and unstructured and provided a wide range of views and opinions about the JP organization in particular and lay magistracy in general. Interviews ranged from approximately 45 minutes to an hour for individuals in this second group.

The nine Wellington interviewees reiterated the same concerns as those expressed by the Waikato/Bay of Plenty focus group, and thereby substantiated the need for my national survey of JPs. In addition, the Waikato/Bay of Plenty group also facilitated familiarization visits and bench experience for me as a practical up-dating observational experience at the Hamilton and Tauranga District Courts.

The purpose of both these interview sessions was to establish a cross section of opinion on the current role and perceived effectiveness of lay magistracy in the District Courts from

198 The Wellington group of six interviewees included a former president of RFNZJA; former Registrar of RFNZJA; former councilor of RFNZJA; current legal adviser of RFNZJA; current editor of the RFNZJA Justices’ Quarterly magazine; and former training officer of the RFNZJA.
people who were directly involved in that system. Based on the information garnered from the interviews a questionnaire was designed upon which a comprehensive survey of the total JP population (of existing and potential lay magistrates) was conducted.

The survey was unique in that it was the first national survey of Justices of the Peace in New Zealand. The Ministry of Justice records up to that time had been incomplete, outdated and unreliable. The JP Federation had little authority over, or responsibility for, the members of its 29 affiliated but autonomous regional JP associations. And there was no control whatsoever over individual JPs who chose not to join an association. Accountability was non-existent.

The data management of these interviews involved audio transcriptions of each interview (the Waikato/Bay of Plenty group as a single entity and the Wellington interviewees individually). Analysis of the data then involved separating and categorizing from the transcriptions the various issues discussed. These points of discussion were then collated between groups on the basis of subject matter. The presentation of data was plotted initially on a spreadsheet and later formulated as narrative. The issues most commonly raised by the two interview groups were compared and revealed a close correlation with issues that had appeared recurringly in the search of literature as matters of concern to lay magistrates.

The issues that these two groups of interviewees believed faced the lay magistracy at the time substantiated the main concerns expressed by JP delegates attending RFNZJA conferences. Consequently eight of the most recurrent issues were identified and subjected to one further confirmation in a preliminary survey of contemporary and former officials of the 29 regional JP associations. Following this final test my principal survey of the entire population of Justices of the Peace throughout New Zealand was designed.

It must be restated here that the reason for surveying the population of Justices of the Peace is that traditionally all New Zealand lay magistrates (known as judicial JPs) had been drawn from the ranks of JPs throughout the country. Over the years most had served on the bench of their local courts without any training. This changed, however, in the 1970s, and no judicial JP may now serve on the bench without passing a one-year tertiary course in judicial studies followed by several weeks of courtroom instruction.

199 It should be noted that only two of the 13 interviewees were previously known to the author, whose previous association with all JP organizations in New Zealand had ceased in 1972 and not been reestablished until 1998.
Eight recurring issues identified

The following synopsis outlines those issues identified as being of most concern to the Justice of the Peace population (judicial and ministerial JPs), and provide an explanation for the need for further substantiating research. The review of literature identified this issue as being of ongoing significance in England and Wales, where the appointment process is continually revisited to ensure that it meets the changing social needs of society. In New Zealand this has not happened, and the appointment process half century has remained basically unchanged and firmly controlled by constituency Members of Parliament. Justice of the Peace appointments in New Zealand are not made with a view to being as representative of their communities in terms of age, gender and ethnicity as is the case in England.

Issue One: Appointment procedure for Justices of the Peace

This had been a matter of concern for JPs since 1951, when the Minister of Justice, Hon. T.C. Webb, stipulated that all future JP nominations should be approved by the Member of Parliament for the electoral district in which the nominee resided. There was no statutory requirement for this procedural change, and nor was the Federation consulted. Justices considered this parliamentary convention was detrimental to their organization and that it had cast public doubt on the impartiality of the lay magistracy during the past half century. The public perception of the lay magistracy was now linked with political patronage.

Issue Two: Retirement age for Justices of the Peace

Age had never been a matter of concern for Justices until the Secretary of Courts recommended in the 1990s that judicial JPs should retire when they reached the age of 68. While this remains the convention, pressure on the court system still finds Registrars asking JPs as old as 85 to help out on the bench. Pressure for an upper age limit for judicial JPs came originally from the Ministry of Justice, which required its salaried District Court Judges to retire at 68. In response the Royal Federation of New Zealand Justices’ Associations (RFNZJA) at its 2006 conference recommended that judicial Justice protocols incorporate a requirement that judicial JPs retire at the age of 72, and that ‘any Justice who has retired (having reached the age of 72 years) may be asked to continue sitting by the Registrar on an “as-required” basis as an acting judicial Justice for a further term not exceeding 12 months.’ A number of individual and senior JP association officials, however, believed that judicial retirement should be based on competence rather than age, and retirement age decided by peer review.

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200 The Justice of the Peace Act 1957 stipulates that no JP over 72 should be appointed to a court panel.
Issue Three: Compulsory membership of JP associations:

The RFNZJA had been pressuring successive Ministers of Justice for decades to make it mandatory for all newly appointed Justices to join their local JP association so they could become more fully informed of all new legislation that affected their work. In this way the Federation could ensure they were adequately trained and supervised for the ministerial and judicial tasks they undertook. The Federation would also become fully aware in the event that a JP had been disciplined or convicted of an offence. Such an arrangement would also enable the RFNZJA to maintain a complete register of all JPs holding Commissions of the Peace in New Zealand.

Successive governments have declined to make membership of JP associations compulsory on the grounds that to do so would contravene the Human Rights Act.\textsuperscript{201} The Federation refutes this argument, citing the fact that lawyers and medical practitioners are required to become members of their professional regulatory associations before they are permitted to practice. While this argument has not been tested in New Zealand,\textsuperscript{202} a European authority commenting on the issue states ‘it was found on many occasions that compulsory membership of a professional body . . . which looks after the ethics, honour, and dignity of its members . . . did not infringe the provision of the [European] Convention [for the Protection of Human Rights]’.\textsuperscript{203} The situation has not yet been resolved, but the Federation continues to pressure the government for a resolution to this matter of compulsory membership of a JP association.

Issue Four: Competence and continuing training of Justices

A large majority of JPs regarded training as extremely important, and many were resentful and critical of colleagues who did not attend regular training sessions to keep updated on ministerial skills. This was particularly apparent to JPs who were conscientious in dealing with the public, while aware that other Justices were making themselves ‘unavailable’ much of the time. The tertiary training of judicial JPs began in 1997 when The Open Polytechnic of New Zealand (TOPNZ) in Wellington established a Judicial Studies distance education course. The course provided special training for JPs who expressed an interest in court duties, and became a requirement for Justices replacing existing JPs who ceased, or retired from, court duties. The course comprised 10 academic projects that had to

\textsuperscript{201} Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), European Court of Human Rights, Rome, 4.XI.1950, Council of Europe, Brussels.

\textsuperscript{202} A 2007 opinion (concerning the rights of Financial Advisers) from the Attorney-General to the Ministry of Justice: New Zealand Bill of Rights Act 1990, cites Section 17, Clause 13 – Freedom of Association: ’Section 17 provides that “everyone has the right to freedom of association”. This provision recognizes that persons should be free to enter into consensual arrangements with others, and to promote the common interests and objectives of the associating group. The right also extends to the right not to associate, and protects the right of individuals to decide freely whether they wish to associate with others.’
be completed to a satisfactory standard before a Certificate of Achievement was issued. The course operated under the guidance of a retired Stipendiary Magistrate, and candidates were given 12 months to complete their assignments. Initially the Polytechnic enrolled about 50 candidates per year, of which 63 per cent completed the course successfully. Enrolments increased over the years, and by 2006 approximately 1,000 Justices had completed or were enrolled in the course. The RFNZJA then established its own courses for the ongoing training of judicial JPs, and it also provided regular courses on a regional basis for ministerial Justices who were involved with regular community-based duties.

The relevance of this issue to the thesis is important because one of the main arguments against lay magistracy, particularly from the legal profession, is about inadequate knowledge and understanding of the rule of law. Proponents of lay magistracy usually argue that is countered by the democratic justice brought to the bench by the lay magistrate’s local knowledge and wisdom. This dichotomy of argument is developed in detail in Chapter 6.

**Issue Five: Remuneration for Justices of the Peace**

This was a contentious subject, strenuously opposed in the past by successive Ministers of Justice, but still raised from time to time by judicial Justices. It is also of concern to JP association officials (particularly in main centres) who have found it difficult to persuade Justices to commit to voluntary unpaid court work. A substantial majority of JP association officials surveyed (Survey A) felt judicial JPs should be paid for presiding in court, but only 50 per cent of Survey B Justices concurred. The issue is, however, central to the principle of lay magistracy – the voluntary offering of judicial services of citizens in seeing that justice is done to their fellow citizens – the age-old British common law tradition of “justice by one’s peers”. It is therefore of considerable significance to the research conducted for this study.

**Issue Six: Practicing certificates for Justices of the Peace**

A large majority of JPs supported this proposal that all Justices should receive a certificate to indicate their competence to act as either ministerial or judicial Justices. This was a recent proposal by the RFNZJA council, discussed on several occasions at annual conferences, and scheduled to be introduced in 2006. A practicing certificate was to be issued to all members of JP associations in four grades: *Ministerial* (initial certificate); *Judicial* (for court-trained Justices); *Search warrants* (after special training); and *Visiting Justices* (JPs trained for prison duties).
Issue Seven: Duties and responsibilities of the office of JP

Since 1947 the responsibilities of New Zealand JPs became largely eroded as a consequence of their actual or perceived incompetence. Reports of Federation annual conferences indicate a period of lassitude, and Noakes\(^\text{204}\) describes the years 1947 to 1958 as “The Years of Decline in Jurisdiction”. From the 1960s, as JP ministerial and judicial training became available, there was a marked resurgence of interest by JPs in taking on more responsibility for bench work in the lower courts. In the event, research for this thesis\(^\text{205}\) revealed that JP association officials (Survey A) appeared more concerned about “lifting the image of JPs” than the general JP population (Survey B).

Issue Eight: Compulsory induction training for all new JPs

Such training was not mandatory when this study commenced, although it had been recommended for all new JPs in the Auckland region. [This section refers to newly appointed JPs, many of whom will become lay magistrates as judicial JPs]. However, as a result of pressure from the Federation, by 2006 all 29 JP associations conducted training sessions for new Justices, and the Ministry of Justice and local JP associations have sought and gained the co-operation of local District Court Judges to withhold the swearing-in of new JPs (and therefore their authority of office) until they had satisfactorily completed initial training sessions. All JPs surveyed for this thesis had placed this introductory training of new JPs as a high priority issue. Also relevant to the study were the cost and efficiency consequences on the New Zealand justice and court system if the lay magistracy were to be replaced with career District Court Judges, Community Magistrates (established in two areas of New Zealand in 1999), or the law-graduate Community Justice Officers recommended by the New Zealand Law Commission in its 2004 report.

Survey A: Preliminary survey of JP association officials

The third research method in this mixed methodological approach comprised the administration of two surveys involving Justices of the Peace. As indicated before, it was necessary to survey all JPs (whether already serving on the bench or not) because it is from the ranks of the total population of JPs in New Zealand that the lay magistrates (judicial JPs serving on the bench) are drawn. The first of these surveys was sent to a selected sample of experienced office-holders in the national Federation and regional JP associations.

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\(^\text{204}\) Noakes, p. 32.
\(^\text{205}\) Discussed further in Chapter 4.
This technique of ‘action development’ effectively moved the research from an ‘appreciative inquiry’ stage, where tentative hypotheses were developed in the Waikato and Wellington interviews, to an ‘active research’ phase where those tentative hypotheses could be tested. Trochim and Donnelly explain action development as ‘a blending of appreciative inquiry and action research – a move to incorporate deductive reasoning of having some theories about what was happening to a confirmation of appreciative inquiry hypotheses with a firm basis at the active research phase.’

**Sequence of surveys**

As indicated in Chapter 1, three surveys were conducted in the course of this study. The first survey (Survey A) involved a questionnaire and was specifically targeted at 150 current and former presidents, registrars and education officers of the 29 regional JP associations. This group was asked to rank the eight issues, already identified in the focus group and individual interviews, in order of importance on a scale of 1 to 8 (1 being the ‘most important issue’ and 8 being the ‘least important). The purpose of this survey was to substantiate, or otherwise, the concerns previously expressed by lay magistrates and JPs in the course of the Waikato and Wellington interviews. This research method was considered a necessary validation process prior to initiating the principal mixed-method demographic and opinion survey of the general JP population.

The JP Federation provided a list of the contemporary and past office holders for the survey as requested, and respondents received a letter enclosed with the questionnaire which explained the nature and purpose of the research, assured respondents of confidentiality, and confirmed that the survey had received ethics approval. A reply-paid envelope was included for return of the completed questionnaire. The information package received by each respondent is shown in Appendix A.

Data gathering involved a manual collation of the correctly completed and returned questionnaires, and data management was reduced to a spreadsheet analysis indicating the ranking value (on the 1-8 scale) attributed by the individual respondents to each of the eight issues identified as ‘issues of concern’ by earlier interview groups. All questionnaires and the spreadsheet analysis were retained and stored in lever-arch and computer files. The quantitative data analysis involved tabulation, and data presentation has been included in the thesis as text and tables in Chapter 4, Table 2.

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207 Trochim and Donnelly, p.
208 These 150 JPs were targeted for the initial survey because as association officials they were more likely to be cognizant of the concerns facing the lay magistracy than their Survey B colleagues, many of whom were not members of JP associations and therefore would have limited knowledge of their own organization, its structure and its operation.
Survey B: National survey of Justices of the Peace

While the literature review and preliminary research had to some extent presaged the validity of my hypothesis that lay magistracy was effective and should be retained, the feasibility of the proposal remained unanswered. In my view such an outcome would depend on government being assured that a source of suitable, competent, and reliable people would be available to serve as lay magistrates.

If Justices of the Peace were to play a significant role in such a development a national survey and demographic profile of the JP population of New Zealand was essential in order to convince government that such a course of action was viable. To date no such record had ever been compiled.

Analysis of the results from the Survey A group confirmed the views of the original focus group and individual interviewees. The mixed method approach with the three groups had identified the eight issues of most concern to present and potential lay magistrates (judicial and non-judicial JPs), and provided a sound basis for developing a valid questionnaire to be sent to the nationwide JP population.

Since many Justices were not members of any of the 29 regional JP associations (all of which maintain accurate lists of their members) it was necessary to work from the complete list of JPs on file with the Ministry of Justice. The Ministry could have been expected to have a current list of all current members of the Commission of the Peace in New Zealand, but that transpired not to be the case. This was because the Ministry recorded the names of Justices at the time of their appointment, but then had no further contact with appointees. No record was therefore kept of changes of address, JPs who were deceased, or JPs who had moved overseas.

Although the Ministry’s ‘Statistical Profile of JPs for New Zealand’ alluded to 10,571 persons holding appointment at 30 June 2002, the actual list of JPs provided by the Ministry three months later contained 9,923 names. It was upon this later, and lower, JP population list that this survey research was based.

The survey consisted of a questionnaire seeking responses to 21 questions and was mailed to a random 10 per cent sample of the total 9,923 names provided. A detailed letter (see Appendix B) accompanied the questionnaire explaining the purpose of the survey, assuring anonymity, and inviting respondents to contact the University’s ethics committee if they

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209 Provided by the Ministry of Justice, September 2002.
210 Research has shown the figure of 10,571 JPs listed at 30 June 2002 by the Ministry of Justice was out of date and seriously overstated.
had any concerns about the research. A reply paid envelope was attached for return of the survey forms.

Utilizing information already obtained from the Waikato focus group, the Wellington interviews and the Survey A group, a comprehensive questionnaire was sent to a randomly selected sample of 1,000 of the total JP population. This survey comprised two items with both quantitative and qualitative questions – a questionnaire with 21 questions and a separate sheet for any open-ended comments by the respondents. In addition to answering a range of questions prompted by the literature review and earlier research, the respondents were asked to furnish personal demographic information. This data was computer recorded and tabulated, and is presented in Appendix B.

This survey was prepared and conducted to ascertain the number of lay magistrates in New Zealand, to acquire as much demographic information as possible about them in respect of age, gender, ethnicity and occupation. It also expected to procure specific and general views from respondents on a variety of issues that would indicate their interest in, and potential ability to provide, a permanent source of candidates for future lay magistracy recruitment. If government saw an extended lay magistracy as an answer to the escalating lower court caseload problem it would need to be convinced that a continuing source of lay magistrates was available. It was anticipated that the survey would provide such an assurance from the ranks of existing JPs.

Inevitably, many envelopes containing the questionnaire were returned marked “gone no address”, “deceased”, or “not known at this address”, revealing that the Ministry of Justice lists were out-of-date and inaccurate. Questionnaires to replace those returned as undeliverable were then sent to the next name on the Ministry list following that of the ‘undeliverable’ recipient.

The final response rate, after all undeliverable questionnaires had been replaced to provide the corrected population sample of 992 JPs (10% of 9,923 names), was 63.5 per cent (n=630). From these 630 completed survey responses, descriptive and demographic data were mined and collated on Excel spreadsheet.

With the qualitative research element in mind all survey recipients received with their questionnaire a separate response form in which they were invited to ‘include any additional comments or opinions about the Justices of the Peace system in general, or the lay magistracy in particular.’ These unstructured qualitative responses proved to be a rich source of reflexive data for this thesis. Hammersley and Atkinson point out that reflexivity ‘does not rule out the usefulness of quantification, though it does count against the idea,
which sometimes seems to underlie the practices of quantitative researchers, that only quantitative data constitute valid knowledge.\footnote{M. Hammersley and P. Atkinson, \textit{Ethnography: Principles in Practice}, Tavistock, London. 1995.}

Three letters from experienced lay magistrates were included in Chapter 5 along with replies from all respondents covering the issues that were the focus of the qualitative research. These three specific letters were included because of the experience of their writers and the passion with which their attitudes and opinions about this thesis subject were conveyed. All the unstructured qualitative responses were analysed and organized and findings are presented in the next chapter.

The quantitative component of this survey has produced previously unavailable gender, age, occupation, and local association membership details. Information garnered from the sample indicates a broad demographic diversity of individuals who hold the Justice of the Peace warrants in New Zealand. The variables considered for this study necessarily were restricted to gender, age and occupation. Manual frequency counts were completed by gender and by age spans ranging from less than forty years of age through to people aged 91 and over. However, because the data pertaining to occupation were extremely varied, these data were not aggregated into categories. All categories of these descriptive demographic data were not cross-tabulated with any of the survey responses because of the exploratory nature of this study.

Data gathering from Survey B (the national survey of JPs) involved several procedures. Most respondents replied within two or three weeks of receiving their questionnaires. As responses were received each was given a sequential number, indexed in a journal, and the data managed manually in clip-lock files.

When all completed survey forms, including any additional qualitative data, had been received the quantitative data were transferred to Excel spreadsheets. The data then received column-by-column collation, analysis\footnote{A suggestion that Question 9 in Survey B could be construed as being ambiguous, (in that it is possible to answer ‘yes’ to both ‘not in the past 12 months’ and to one of the preceding statements) is noted. This possibility was not, however, drawn to the researcher’s notice by any of the respondents.} and computation, and the qualitative data were sorted thematically and transferred to computer storage for subsequent further thematic analysis.

The thesis was predicated on the need for an effective lay magistracy in a modern judicial system. It was essential, therefore, to carefully examine the existing lay magistracy to determine whether the necessary criteria of ‘effectiveness’ already existed in the New Zealand context, and if not, what measures needed to be adopted to achieve that situation.
The accumulation of this data constituted the first major step in this process, which is developed further in later chapters.

**Survey of political parties**

In 2004 the New Zealand Law Commission recommended that Magistrates’ Courts be reintroduced and staffed by new type of judicial officer – professional, legally qualified Community Justice Officers. The Commission was opposed to the new court being presided over by lay magistrates, whether judicial JPs or Community Magistrates.

Subsequently to this announcement, and in order to establish the level of political support for the Commission’s proposal, an inquiry was sent to representatives of each of the political parties contesting the New Zealand General Election of 2005. The questionnaire was addressed to the Judicial spokesperson of each party, and asked the following question:

- In the event the [Law Commission’s] scheme is adopted, which source of recruitment of new Justice Officers would your party most likely support?
  - Suitably trained and qualified JPs, as at present (serving voluntarily but with a *per diem* allowance), OR
  - Legally-qualified professional lawyers, with salary and tenure.

Nine parties spokespersons were canvassed and all replied. Five party spokespersons indicated their party favoured suitably trained lay magistrates to preside in such a lower court. Three parties supported the professional CJO proposal. One party was undecided (see Table 4). The nine party spokespersons on justice advanced reasons for their decisions (see Appendix C).

**Legal profession views on lay magistracy**

Obtaining accordant views about the lay magistracy from a representative group in the legal profession and the judiciary proved problematic. The literature review indicates that law societies, as professional groups motivated to act in the best interest of their members, have generally supported a professional bench in preference to a lay magistracy. It is, therefore, not surprising that the NZLS and district law societies – in submissions to the 1977 Royal Commission on the Courts, parliamentary committees and New Zealand Law Commission hearings – either opposed judicial JPs already presiding in the courts or resisted any extension of the lay magistracy.

The view of law practitioners to lay magistrates is naturally conditioned by their personal experience of judicial JPs and Community Magistrates in the courts, or by an entrenched position on the ‘democratic justice versus the rule of law’ argument. In evidence (cited elsewhere in this thesis) before the 1977 Royal Commission opinions of members of the
legal profession varied widely. In Auckland a senior barrister supported lay magistrates, and in Hamilton five provincial lawyers had expressed a lack of confidence in judicial JPs before whom they had appeared. Similarly, one Stipendiary Magistrate in Christchurch told the Royal Commission he thought the authority of lay magistrates should be contained, while his colleagues in other cities, in submissions to the Commission, had suggested the jurisdiction of lay magistrates be extended.

Research in this sector has largely relied on studying the full range of submissions made to the 1977 Royal Commission on the Courts (Beattie Commission) by individual lawyers, Queen’s Counsel, various law societies and prominent members of the judiciary. Disparate views on the advantages and disadvantages of the lay magistracy have been expounded by members of the legal profession, often in detail, and have provided a divergent range of legal and academic argument on the subject.

**Research procedures critiqued**

In summary the mixed method approach outlined in this chapter indicates a meld of positivistic research (the processing of numerical or quantitative data) supported and extended by probabilistic proof (voluntary comment and opinion from respondents). Tolich and Davidson explain this fieldwork as ‘the generation, analysis and presentation of non-numerical data based on the observation and (unstructured) interviewing of the people in the research study.’

They then describe the next step, data reduction, as ‘the process of reducing the rich data into key aspects of the issue in question.’ They assert that their theory of “fieldwork analysis” (involving data collection, data reduction, data organization and data interpretation) uses a combination of inductive and deductive logic and is also known as the generation of “grounded theory” because it emerges out of, and is based upon, the empirical data of our research.

Its supporters argue that it generates theory that is contextually sensitive, persuasive, and relevant. The veracity of this assertion will be determined from the research results and findings in the following chapter. The process is as shown in the schematic representation for inductive reasoning in the figure below:

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213 Tolich and Davidson, p. 5.
214 Tolich and Davidson, p. 9.
By way of helpful commentary, it is suggest that further research on lay magistracy could include a refined sample of Justices of the Peace who had completed the Judicial Studies Course qualifying them for bench duties in the district court. These actual and potential judicial JPs, as well as the existing Community Magistrates, would, it is reasoned, provide a valuable source of research material (both qualitative and quantitative) upon which future scholars would be able to evaluate further the ongoing effectiveness, or otherwise, of lay magistracy in our justice system.

Documentary analysis involving the New Zealand and overseas lay magistracies was important in this study, and in future studies these data could be further updated and analysed. Moreover, future researchers could also update individual interviews with senior and experienced JP officials thereby extending inquiries further than the parameters that have been traversed in this study. Future research would also benefit from having the vast
amount of available qualitative material from such surveys and interviews become more rigorously analysed with the aid of software such as NVivo 8.

Two valuable potential areas of lay magistracy research were beyond the scope of this thesis. First, an examination of the effectiveness of lay magistracy in terms of cost-effectiveness to the judicial system and the nation’s exchequer was not possible because the Ministry of Justice did not have adequate data available upon which meaningful research on the question of speed of disposal of cases by lay magistrates vis-à-vis professional judges could be undertaken. This is particularly germane to the cost-effective aspect of Ministry expense in operating courts that utilize these two forms of summary jurisdiction. However some recent data (Appendix G) comparing the disposal of summary cases by lay and professional judges has added strength to my thesis that lay magistracy in New Zealand is effective and should be retained and further developed.

An analysis of these recent Ministry of Justice statistics reveals that during the five-year period from 2004-2008, 744,764 cases were disposed in New Zealand district courts. Of this total, 535,767 (72 %) cases were disposed by District Court Judges and 99,509 (13%) by lay magistrates [JPs and CMs]. A further 109,480 (15%) cases were dealt with by other court officers. Appeals against District Court Judge and lay magistrate decisions numbered 2,445 of which 2,284 were against DCJ decisions and 161 against decisions of lay magistrates. Expressed as a proportion, total appeals against DCJ decisions was 0.4% (2,284/535,767), and against decisions of lay magistrates less than half that proportion – 0.16% (161/99,509).

While this data provides further support for the lay magistracy, it must be recognized that summary court adjudication circumstances vary -- for example District Court Judges generally handle more complex cases and handle heavier caseloads than the lay magistrates.

The second potential area for research would be a comparative study of lay New Zealand and Scottish lay magistracy jurisdiction and performance. The 2005 decision of the Scottish Executive to replace law-qualified professional district court judges with voluntary unpaid lay magistrates in Scotland occurred too recently to have provided a reliable comparative study for the purposes of this thesis.

Finally, by way of critique, it can clearly be concluded insofar as this study is concerned that the methodological approach used for this investigation, and the methods used for gathering and analysing data, have been appropriate.

215 This recent data obtained in 2009 are beyond the remit of this thesis in that they came to light after the examination. The data have been included after consultation with the principal supervisor. Their inclusion further substantiates the case for the claim that the lay magistracy in the New Zealand lower court system is effective.
CHAPTER 5

RESEARCH RESULTS AND FINDINGS

My review of literature on the history and development of lay magistracy in New Zealand revealed that appointment, administrative, procedural, remuneration and disciplinary issues had been constantly raised as issues of concern. These issues regularly became the subject of discussion at JP conferences, in parliamentary debate, in law society journals, NZLC reports, and in submissions to the 1977 Royal Commission on the Courts, as disclosed in the literature review. This present chapter is concerned with substantiating the validity or otherwise of these issues, and for this exercise I adopted four research procedures.

First, a small focus group of four experienced adjudicators in the lower court (the District Court) with lay and professional magistracy courtroom experience was assembled. Two were Community Magistrates (formerly judicial JPs), one was a former judicial JP, and the fourth was a District Court Judge formerly in charge of assigning judicial JPs to court duties in the Hamilton District Court. My own experience as a lay magistrate was dated and brief, in that I had sat on the bench for about 18 months almost 40 years earlier.

Eight issues of concern most commonly revealed in the literature were identified and corroborated by this focus group, and later reaffirmed in a series of individual interviews in Wellington with nine other experienced judicial JPs. Later a larger group of 150 experienced lay magistrates was specifically surveyed for the purpose of testing the earlier assumptions and ranking the identified issues in importance.

Without exception all nine interviewees in the Wellington group concurred with the Waikato focus group in expressing concern at the continuing lack of government interest in promoting and developing lay magistracy as a more effective element in the judicial system. All interviewees agreed there was need for improved Ministry/Federation liaison, and concurred that liaison between the JP Federation, politicians and Ministry of Justice (a regular feature of annual RFNZJA conferences) traditionally had been inadequate and must be improved.

This preliminary research led to the conclusion that an appraisal of the attitude and opinions of all New Zealand JPs on their present or future role as lay magistrates was

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216 Hansen (2005) distinguishes between quantitative results and qualitative findings.

217 These included recurring remits calling for a higher level of judicial training; compulsory membership of a JP association; more government funding of RFNZJA operations and projects; an approved appointment system; opposition to retirement age for judicial JPs; remuneration for judicial JPs; and practicing certificates.
imperative, but that the initial attitudes and opinions expressed by the Waikato focus group and individual interviewees should be further tested prior to initiating a national survey of the JP population.

Survey A: JP association officials

The research method adopted for this research has been outlined in the previous chapter, and the resultant findings were as follows:

The survey sample was 150 (∑150), and 111 replies were received correctly completed according to instructions on the questionnaire sheet. The revised sample was therefore revised to 111 respondents (100% N=111).

Eighty per cent (n=89) of these JP association office-holders stated that competence and continued training was the most important issue, and this was closely followed by the view of 74 per cent (n=82) that compulsory training was very important and should be required for all newly appointed JPs. The procedure for appointing JPs was an important issue for 67 per cent (n=74) of respondents, and 64 per cent (n=71) also considered compulsory membership of JP associations was an important (so that attendance at training courses could be controlled and monitored). Two thirds of respondents (66%, n=73) felt it was important that all JPs upon completion of specified training should receive practicing certificates as attestation of their competence. Analysis of the responses from this Survey A group confirmed the opinion of members of the original Waikato/Bay of Plenty advisory group and the Wellington interviewees, and confirmed my contention that a comprehensive questionnaire (Survey B) should be sent to the total JP population.

Issues involving the duties and responsibilities of office (28% n=31) and the remuneration of judicial JPs (26% n=29) were issues of lesser concern to most respondents, and the matter of retirement age was of least concern (3% n=3) to the these “knowledgeable” JPs. It should be noted that the ‘degree of importance’ values attached to the various issues delineated in the table below are simply my interpretation of the respondents’ assessment based on the ranking of the level of importance expressed by the group. My conclusion was that when an issue was indicated as of concern to two-thirds of a population it should be accepted as being ‘important’, and by approximately three-quarters of a population is justified in being classified as ‘very important’.
Table 6. Survey A: The ‘relative importance’ of main issues of concern

<table>
<thead>
<tr>
<th>Issues considered to be of most concern</th>
<th>Order of importance</th>
<th>Degree of importance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Competence and continued training</td>
<td>80%</td>
<td>Most important</td>
</tr>
<tr>
<td>2 Compulsory training for newly appointed JPs</td>
<td>74%</td>
<td>Very important</td>
</tr>
<tr>
<td>3 Appointment procedure for JPs</td>
<td>67%</td>
<td>Important</td>
</tr>
<tr>
<td>4 Practicing certificates for all JPs</td>
<td>66%</td>
<td>Important</td>
</tr>
<tr>
<td>5 Compulsory membership of JP associations</td>
<td>64%</td>
<td>Important</td>
</tr>
<tr>
<td>6 Duties and responsibilities of office</td>
<td>28%</td>
<td>Not particularly important</td>
</tr>
<tr>
<td>7 Remuneration for court sitting JPs</td>
<td>26%</td>
<td>Not particularly important</td>
</tr>
<tr>
<td>8 Retirement age for JPs</td>
<td>3%</td>
<td>Least important</td>
</tr>
</tbody>
</table>

Survey B: total JP population

This second survey (Survey B) of JPs throughout New Zealand (\(\sum 992\)) endorsed the views and opinions expressed in the earlier survey (Survey A) of present and past JP officials. The results of Survey B\(^{218}\), which involved a sample of 992 JPs (a 10 per cent sample the total JP population as estimated by the Ministry of Justice at the time), provided the study with both qualitative and quantitative information. Replies were received from 630 respondents (63.5%, \(n=992\)).

The New Zealand gender and age distribution statistics (see Table 7 below) represent almost a mirror image of the gender and age profile of JPs in Scotland, which in 2006 was 29% female and 71% male. The age profile of Scottish JPs was also remarkably similar to that of New Zealand, showing 8% aged 40-49; 24% aged 50-59; 27% aged 60-69; and 39% aged over 70. These statistics are important for this thesis because the potential to compare and contrast two jurisdictions which are literally on opposite hemispheres, but which have practically identical demographics represents a unique for future research in this field.

\(^{218}\) This survey was conducted in November 2003.
Table 7. Percentage of JPs by gender and by age

<table>
<thead>
<tr>
<th>Category by gender and age:</th>
<th>Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of JPs, female</td>
<td>29 %</td>
</tr>
<tr>
<td>Percentage of JPs, male</td>
<td>71%</td>
</tr>
<tr>
<td>Percentage of JPs aged under 40 years</td>
<td>0.7%</td>
</tr>
<tr>
<td>Percentage of JPs aged 41-50 years</td>
<td>5.3%</td>
</tr>
<tr>
<td>Percentage of JPs aged 51-60</td>
<td>25.8%</td>
</tr>
<tr>
<td>Percentage of JPs aged 61-70</td>
<td>29.8%</td>
</tr>
<tr>
<td>Percentage of JPs aged 71-80</td>
<td>27.8%</td>
</tr>
<tr>
<td>Percentage of JPs aged 481-90</td>
<td>9.4%</td>
</tr>
<tr>
<td>More than 91 years of age</td>
<td>1.3%</td>
</tr>
</tbody>
</table>

On the subject of association membership and training most respondents (86% n=539) thought all JPs should join a local JP association, and 89 per cent (n=568) confirmed they had attended local or regional training sessions conducted by regional JP associations. Nearly all who did attend a training sessions (93% n=511) thought it was worthwhile, and 89 per cent (n=559) felt that all new JPs should be required to undertake training before their appointments were confirmed. Most (78 % n=488) believed that future JPs should be issued with a Practicing Certificate as proof of adequate training before they be allowed to take up their public duties.

Describing their workload as JPs, only 12 per cent (n=73) saw themselves as very active; a majority of respondents (54% n=338) described their workload as ‘reasonably active’; and 29 per cent (n=184) were ‘not very active.’ Only 31 (5%) classified themselves as inactive or retired, and two did not specify. Most respondents (70% n=437) thought there were about the right number of JPs serving the area where they resided, some (6% n=38) believed there were too many JPs, and about the same number (6% n=36) thought there were too few. Still more respondents (14% n=88) considered there were too many ‘inactive’ JPs, and a few (4% n=29) did not specify.

Responses to questions about judicial JPs, court work, and training for court duties were revealing. Most surprising was the fact that 23 per cent (n=142) had sat on the bench in a District Court, indicating that more use was being made of JPs on the bench in some courts than was known to the RFNZJA, who recorded this activity. And of those who stated
they had served on the bench, 14 per cent (n=20) claimed they sat more than 20 times a year; 12 per cent (n=17) sat between 6 and 20 times a year, and 6 per cent (n=9) sat occasionally. About two thirds of designated court JPs (63% n=89) had not sat on the bench in the previous 12 months. A few (5% n=7) did not specify. When asked if they were interested in enrolling in the one-year judicial studies course for aspiring court justices, 29 per cent (n=185) said they were interested and 68 per cent (n=428) were not.

This expressed interest in judicial training by such a large number of JPs indicated that a further 2,000 Justices could be available to serve as lay magistrates if they were given the opportunity to serve on the bench. Many of those who indicated they would not undertake tertiary training may have considered themselves to be too old, or perhaps lived too far from a local courthouse, to make the training exercise feasible.

There were several other questions about continuing personal development. Most JPs (84% n=525) considered they received sufficient support, information and training to enable them to perform their duties well. Only 10 per cent (n=60) disagreed, and a few 6 per cent (n=43) did not express an opinion. A surprising 48 per cent (n=304) had received special training for the issuing of search warrants, a duty that requires being available to the police at any time of the day or night, and 10 per cent (n=66) had received training as a Visiting Justice – a JP who is authorized to attend any New Zealand prison to adjudicate on complaints raised by prisoners about matters pertaining to their incarceration. These survey results indicate a strong interest by a large percentage of JPs to undergo training that enables them to take on further responsibilities than are expected of the average Justice.

Questions about remuneration brought firm, definitive responses. Most respondents (82% n=518) believed that judicial JPs (those Justices who were trained and designated to sit on the bench in the lower courts) should be paid. Only 15 per cent (n=95) disagreed, and a few (3% n=13) did not signify a response. However when it came to the ministerial duties of JPs, the certification taking of affidavits and other documentation that JPs undertake at their home or office. A large majority (87% n=549) were opposed to any payment – a situation that has always been strictly adhered to in the past, and has been basic to the principle of lay magistracy in other jurisdictions being a voluntary unpaid contribution by citizens to the judicial system of their country.

Respondents were asked about their appointment a JP, and how they saw their role in the institution. More than half the respondents said their local Member of Parliament was directly involved in their appointment as a JP. One-third (33% n=206) said their local Member of Parliament had personally put their name forward for appointment, and another 24 per cent (n=153) said a friend or colleague had put their name forward to the local MP for nomination. A further 13 per cent (n=80) said their club, office or church had asked the
local MP to nominate them, and 10 per cent (n=65) said the local JP association had seen
the need for a further JP in the area and suggested their name as a prospective nominee.
Seven per cent (n=44) personally applied to their MP to become a Justice, something that
had been frowned upon by politicians,\(^{219}\) and eight per cent (n=50) claimed to have no idea
how they were appointed. This indication of major direct political involvement in the
appointment of JPs, and therefore ultimately the lay magistracy, provides strong evidence
for the need to introduce a non-partisan system such as that operating in England and
Wales.

Having been appointed as a JP, 81 per cent (n=508) looked upon themselves as being a
‘voluntary service worker for the community’; five per cent (n=32) saw their JP
appointment an award for community service; one per cent (n=8) saw their JP appointment
as an award for political service; and five per cent (n=31) looked upon themselves as unpaid
officers of the local District Court – which is, in fact, how the appointment is meant to be
construed.

When questioned on the system of appointing of JPs, respondents were more evenly
divided. Of those expressing an opinion, a majority 45 per cent (n=285) favoured the
introduction of a non-partisan selection committee [as operates in England and Wales], and
42 per cent (n=265) supported the present system in New Zealand where the local Member
of Parliament must nominate a person to become a JP. Thirteen per cent (n=78) of
respondents did not signify a choice.

The question about a retirement age for Justices brought widely divergent answers
depending on whether it referred to lay magistrates (judicial JPs) or the non-judicial JPs
who are confined to the ministerial duties (which I have already defined). A substantial
majority of respondents (73% n=463) said there should be a retiring age for the lay judicial
JPs – those that sat on the bench as lay magistrates. Only 17% (n=104) of JPs did not agree,
and a further 10% (n=61) did not express an opinion. Respondents were divided in their
views about a retiring age for the ministerial JPs – 55% (n=344) felt there should be a
retiring age, and 54% (n=313) did not agree. To them, appointment as a JP for life meant
just that.\(^{220}\)

On one issue there was significant agreement. When asked ‘In the event this or a future
government were to further diminish the judicial (lay magistracy) powers of Justices of the
Peace to the extent they may no longer sit in the courts, would you still see a meaningful

\(^{219}\) Hon. Rick Barker, addressing the annual JP Federation Conference in Gisborne in 2004, said he was concerned about
the motives of people who applied to become a JP and described them as ‘self-starters’.
\(^{220}\) Question 18 in the questionnaire is no longer applicable. Since the survey was completed legislation has been passed
allowing retired Justices of the Peace to continue to use the appellation ‘JP (retired)’.
role for JPs in New Zealand?’ the answer was conclusive. Eight out of 10 Justices of the Peace (81% n=508) believed their institution would survive even if it had no role to play in lay magistracy in New Zealand. Only 10 per cent (n=61) felt the end of lay magistracy by JPs would make the role of JPs purposeless. Nine per cent (n=59) did not express a view.

The results of Survey B showed that the Commission of the Peace (the institution of Justices of the Peace) remains a strong institution embodying the principles of community service and democratic justice that should remain the principal source of lay magistracy recruitment for the court system of New Zealand.

In summary, there was a strong feeling that JPs should be required to join a JP association to ensure they were kept up-to-date and familiar with law changes and other matters that could affect their effectiveness in the role. Their assessment of their current workload suggested they could take on further duties if called upon, and most believed they were receiving sufficient training and support to do their work well. More JPs had already experienced court work than records of the RFNZJA had indicated, which suggests that either the court experience occurred many years ago before records were kept, or there is a lack of information being forwarded from some regional JP associations to the Federation. Many JPs appeared keen to study for bench duties in their local court if given the opportunity to undertake this judicial duty. While the majority of JPs do not seek any payment for their own voluntary work, they do think their colleagues who sit on the bench should be paid. Payment for this lay magistracy work in the courts has been quite strongly opposed by successive governments (and in fact is opposed by a number of judicial JPs themselves). If payment for judicial JPs is pursued too vigorously it would certainly weaken the Federation’s case for continued lay magistracy in the New Zealand court system. Although the majority of JPs owe their appointment to the Commission of the Peace to the support of their local Member of Parliament, a majority would like to see the appointment system become non-partisan and independent of government like that of England and Wales. This approach would certainly give more credibility to the lay magistracy in the eyes of its critics, and in the view of the general public. Finally, while a majority JPs believed their judicial colleagues should have a retirement age imposed, they were divided about whether they themselves should have to retire at a certain age.

221 Refer Table 3, Question 12.
### Table 8. Result of survey of all New Zealand JPs (Survey B)

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>NR</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Should all justices join a local JP association?</td>
<td>539</td>
<td>73</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>86%</td>
<td>12%</td>
<td>2%</td>
</tr>
<tr>
<td>2. Have you attended a local or regional training session?</td>
<td>568</td>
<td>63</td>
<td>40</td>
</tr>
<tr>
<td></td>
<td>89%</td>
<td>10%</td>
<td>1%</td>
</tr>
<tr>
<td>3. Did those who attended find the session/s worthwhile?</td>
<td>511</td>
<td>27</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>93%</td>
<td>5%</td>
<td>2%</td>
</tr>
<tr>
<td>4. Should new JPs be required to undertake training before their appointments are confirmed?</td>
<td>559</td>
<td>63</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>89%</td>
<td>10%</td>
<td>1%</td>
</tr>
<tr>
<td>5. Should future JPs hold a Practicing Certificate showing adequate training before they practice?</td>
<td>488</td>
<td>118</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>78%</td>
<td>19%</td>
<td>3%</td>
</tr>
<tr>
<td>6. How would you describe your workload as a JP?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very active:</td>
<td>73</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reasonably active:</td>
<td>338</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not very active:</td>
<td>184</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inactive or retired:</td>
<td>31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did not specify:</td>
<td>2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
7. How well is your area served with Justices of the Peace?

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>About the right number</td>
<td>437</td>
<td>70%</td>
</tr>
<tr>
<td>Too many inactive JPs</td>
<td>88</td>
<td>14%</td>
</tr>
<tr>
<td>Too many JPs</td>
<td>38</td>
<td>6%</td>
</tr>
<tr>
<td>Not enough JPs</td>
<td>36</td>
<td>6%</td>
</tr>
<tr>
<td>Did not specify</td>
<td>29</td>
<td>4%</td>
</tr>
</tbody>
</table>

8. Have you ever sat on the bench in a District Court?

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>142</td>
<td>23%</td>
</tr>
<tr>
<td>No</td>
<td>482</td>
<td>77%</td>
</tr>
<tr>
<td>NR</td>
<td>4</td>
<td>-</td>
</tr>
</tbody>
</table>

9. As a court JP, how often have you served on the bench?

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regularly (20+ a year)</td>
<td>20</td>
<td>14%</td>
</tr>
<tr>
<td>Frequently (6-20):</td>
<td>17</td>
<td>12%</td>
</tr>
<tr>
<td>Occasionally (1-5 times)</td>
<td>9</td>
<td>6%</td>
</tr>
<tr>
<td>Not in the past 12 months</td>
<td>89</td>
<td>63%</td>
</tr>
<tr>
<td>Did not specify</td>
<td>7</td>
<td>5%</td>
</tr>
</tbody>
</table>

10. Are you interested in taking the TOPNZ JP judicial studies course?

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>185</td>
<td>29%</td>
</tr>
<tr>
<td>No</td>
<td>428</td>
<td>68%</td>
</tr>
<tr>
<td>DNS 223</td>
<td>15</td>
<td>3%</td>
</tr>
</tbody>
</table>

10.1. Have you received training for the issuing of search warrants?

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>304</td>
<td>48%</td>
</tr>
<tr>
<td>No</td>
<td>296</td>
<td>47%</td>
</tr>
<tr>
<td>DNS 223</td>
<td>28</td>
<td>5%</td>
</tr>
</tbody>
</table>

10.2. Have you been trained as a Visiting Justice (prisons)

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>66</td>
<td>10%</td>
</tr>
<tr>
<td>No</td>
<td>549</td>
<td>87%</td>
</tr>
<tr>
<td>DNS 223</td>
<td>13</td>
<td>3%</td>
</tr>
</tbody>
</table>

223 DNS indicates respondent “did not specify” in answer to the question.
11. Do you think court-sitting justices should be paid?  
<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>DNS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>518</td>
<td>95</td>
<td>15</td>
</tr>
</tbody>
</table>

No 95 15%  
DNS 15 3%  

12. Should Justices be paid for ministerial work?  
<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>DNS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>66</td>
<td>549</td>
<td>726</td>
</tr>
</tbody>
</table>

Yes 66 11%  
DNS 13 2%  

13. Do justices receive sufficient support, information and training to enable them to perform their duties well?  
<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>DNS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>525</td>
<td>60</td>
<td>15</td>
</tr>
</tbody>
</table>

Yes 525 84%  
No 60 10%  
DNS 43 6%  

14. Which appointment situation most closely fits your own experience:  
- My local MP personally put my name forward 206 33%  
- Friend or colleague put my forward to my local MP 153 24%  
- Club/office/church asked an MP to put name forward 80 13%  
- Local JP assn saw need, and asked MP to nominate me 65 10%  
- I don’t know how I came to be nominated as a Justice 50 8%  
- I personally applied to become a Justice of the Peace. 44 7%  

15. As a JP, which one of the following do you see yourself as being?  
- Voluntary service worker for the community 508 81%  
- Recipient of an award for community service 32 5%  
- Unpaid officer of the local District Court 31 5%  
- The recipient of an award for political service 8 1%  

16. Should there be a retiring age for judicial JPs?  
<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>DNS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>463</td>
<td>104</td>
<td>61</td>
</tr>
</tbody>
</table>

Yes 463 73%  
No 104 17%  
DNS 61 10%  

224 Among those answering “No” to the above question, some thought there should be more information from the Department of Courts, the RFNZJA, and the regional JP associations. A number of these respondents were not members of any regional Justice of the Peace association.
17. Should there be a retiring age for ministerial JPs?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yes</strong></td>
<td>344</td>
<td>313</td>
<td>55%</td>
</tr>
<tr>
<td><strong>No</strong></td>
<td></td>
<td></td>
<td>54%</td>
</tr>
</tbody>
</table>

18. If a retiring age were introduced, should such JPs be limited to using the designation JP (retired.)?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
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<tbody>
<tr>
<td><strong>Yes</strong></td>
<td>384</td>
<td>181</td>
<td>61%</td>
</tr>
<tr>
<td><strong>No</strong></td>
<td></td>
<td></td>
<td>29%</td>
</tr>
<tr>
<td>DNS</td>
<td>63</td>
<td></td>
<td>10%</td>
</tr>
</tbody>
</table>

19. Which of these appointment systems do you favour?

<table>
<thead>
<tr>
<th>Appointment System</th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>An independent non-partisan selection committee</td>
<td>285</td>
<td></td>
<td>45%</td>
</tr>
<tr>
<td>The present system where each JP in New Zealand must be nominated by his or her local M.P.</td>
<td>265</td>
<td></td>
<td>42%</td>
</tr>
<tr>
<td>DNS</td>
<td>78</td>
<td></td>
<td>13%</td>
</tr>
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</table>

20. If this or a future government were to further diminish the judicial powers of Justices of the Peace (to the extent they may no longer sit in the courts), would you still see a meaningful role for JPs in this country?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td><strong>Yes</strong></td>
<td>508</td>
<td></td>
<td>81%</td>
</tr>
<tr>
<td><strong>No</strong></td>
<td></td>
<td></td>
<td>10%</td>
</tr>
<tr>
<td>DNS</td>
<td>59</td>
<td></td>
<td>9%</td>
</tr>
</tbody>
</table>

Respondents’ comments

The principal survey of all JPs (Survey B) invited open-ended comment and opinion, and where respondents have included notes and letters with their questionnaires this quantitative input has become an integral part of this study to be analysed and evaluated. It is important that the JPs themselves tell their own story about their experiences as ‘lay magistrates’. Three frank and incisive abridged letters22 from disparate long-serving JPs head the list:

The first letter (from a former president and education tutor of the Auckland JP Association) cited a disparity in attitude between older and younger justices as a problem...

‘The young ones (those under 50!) are willing and eager to learn, at least at first, and the older ones cannot understand the nature of the office and do not see why they should be bothered . . . they just are palsy with their MP and wanted and expected honour and glory [of the JP appointment].’ This respondent felt it was ‘imperative, but in my view
impossible, that the **appointment process** be wrested away from politicians; that the **retirement age** for judicial JPs be the same as for DCJs; that **compulsory membership of JP associations** would be ‘desirable but impossible to achieve because of political and Ministry indifference’; that **competence and training** would not be achieved without being linked to compulsory membership and practicing certificates; that **remuneration of judicial JPs** was ‘justified and should be in line with Disputes Resolution people – though political opposition would probably oppose such a move’; that **practicing certificates** were ‘desirable as a means of controlling association members but would be difficult to monitor’; that **duties and responsibilities** ‘are generally adequately handled at present’; and that **compulsory training** ‘would be difficult to instigate because of the present lack of competence of court staff and varying training abilities of local JP association officials’. In a final comment she said ‘Until there is some agreement as to what JPs are for, and if they still have an essential part to play in the country’s administration . . . one wonders if the whole system has any useful life left in it. Judges don’t want the pettifogging duties of minor offences we [Judicial JPs] do in the criminal jurisdiction, but maybe they should just do it, making time by abandoning preliminary hearings.’

This respondent clearly expresses her concern that being made a JP is perceived by some as receiving an ‘honour’—an award for political or community service. Her views on a retirement for judicial JPs to equate with professional Judges is at variance with others who believe that lay magistracy retirement should be peer-reviewed. While she fully supports compulsory membership of associations for all JPs, the payment of judicial JPs, and a change to non-political appointments, her pragmatic view is that a government would see them as controversial and would not implement any of them. Since she wrote the letter practicing certificates have been introduced, compulsory training for court JPs has been introduced, and the retiring age for judicial JPs has been raised from 68 to 72.

The second letter (from a **corporate manager** [name withheld]) expressed concern about the future of the Justice of the Peace system and thought the lay magistracy had reached a critical stage for which both the Federation and politicians must take responsibility. He believed there was an ‘inherent weakness in the **present appointment system** as the sole nomination right rests with Members of Parliament... As a recent former electorate secretary I [know] that not all MPs are even-handed in their nomination process and that nominations can be held out for reasons other than merit or community need . . . the appointments will necessarily reflect the bias of the MP and not necessarily the needs of the local community.’ He suggested an appointment system ‘removed from local political pressure and self-interest’ is needed if the role of JP is to remain relevant to the

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225 The unabridged letters are attached as Appendix E.
communities they serve... ‘If you had an independent, closely defined and transparent system which appointed, *inter alia*, on the ability to actually comprehend, administer and execute the wide range of tasks which JPs are called upon to carry out, you might have a better show of implementing practicing certificates and a range of competency measures.’

On the issues of **competence, duties and responsibilities of office** he is ‘frankly unimpressed... [JP] associations tend to be conservative bodies whose members are at the older end of the age scale with a trumped-up sense of self-importance’. Most JP officials are, he suggests, quite change-averse despite lip service to the contrary. ‘Anything that is likely to put a dent in their perceived social standing will get short shrift.’ On the issue of **remuneration** he saw some justification for paying judicial JPs, ‘but I do not see any justification for charging for services other than sitting on the bench.’

This respondent blames the Federation and politicians for the present ‘critical state’ of lay magistracy, though it appears the criticism should also be attributed to the Ministry of Justice. While acknowledging the importance of judicial JPs in clearing lower court case backlogs, the Ministry does not openly advocate further development and extension of their court activities. Neither does the New Zealand Law Commission actively support lay magistracy in any way. This respondent, like a majority of his colleagues, advocates a transparent non-political and independent appointment process, and there is merit in his charge that older JPs, particularly, are change-averse and incline towards self-importance. This fact is apparent to all regular observers at JP association meetings and conferences, as I can personally attest.

The third letter (from a *‘lapsed JP’ with 40 years service* [name withheld]) addressed many of the current issues concerning JPs and also questioned the operational efficiency of the system itself. Although he sat on the bench as a judicial JP soon after his appointment in 1964 he later withdrew from court work because of vocational and life-style changes, let his JP association membership lapse, and remained inactive as a JP for about 20 years. On the issues of **training** and **remuneration** he recommended that if JPs were truly meant to be part of the judicial system ‘their training should be the responsibility and requirement of the Department for Courts’ [now the Ministry of Justice] and that ‘since Justices on weekend roster were there only for remand purposes for the convenience of the court I firmly believe that Justices should be paid for court duties... On occasions when hearing depositions I was able to do this only because of my managerial position, but the company that employed me bore the cost. That is not right.’ And, finally, he believed the
appointment procedure ‘needs revision (as suggested in the NZ–UK scenario) so that political patronage is eliminated.’

This experienced judicial JP, as with the two previous respondents, believes that those JPs serving on the bench should be remunerated, and that the appointment procedure should be independent and non-political. He outlines a personal dispute with his local JP association which disclosed a glaring deficiency in the JP administration system which is not pertinent to this chapter but is outlined in his unabridged letter in Appendix E.

Analysis of unstructured ‘write-in comments’

Qualitative responses from all respondents were thematically analysed and response segments grouped according to the individual views of respondents pertaining to the eight areas of concern previously noted by JPs in preliminary research:

Compulsory initial training

Survey respondents strongly supported compulsory training for newly appointed Justices. In the past there had been no mandatory requirement by individual associations that new appointees be given instruction before assuming JP duties. Although initial training is not compulsory, some associations do have stringent rules about early training – others do not. A number of respondents believed that compulsory training would deter nominees who were more interested in using the letters “JP” after their name than in contributing a service to the community.

Since 2005 new appointees in Auckland have been required to attend three three-hour ministerial training sessions (each conducted by at least two senior JPs) before they receive their warrant and badge of office. Only when they have completed this training are they sworn in by a District Court Judge and authorized to perform ministerial duties. All 29 JP associations are now required to provide training, and as a result of pressure District Court Judges have agreed not to swear newly appointed JPs until they have completed these initial training sessions.

Continuing training

While the vast majority of survey respondents agreed that continuing training (both judicial and ministerial) was extremely important, many felt the method and form that training should take was problematic. At present training is undertaken by the RFNZJA, assisted by

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226 This respondent commented that he had not received any communication from the Ministry of Justice since 1964.
227 This is not a statutory requirement, but simply a tacit agreement between officers of the Federation and the Ministry of Justice.
funds from the Ministry of Justice, and here is a poignant recommendation by one experienced JP to illustrate the problem:

Most of the training sessions are conducted by JPs themselves and the time is now ripe for the Department for Courts to provide the necessary professional trainers and run the relative courses. At present amateurs are training amateurs, which under today’s demanding requirements is not satisfactory. Trainers at all levels are however doing a great job, but with limited knowledge and resources. - Wellington association former president

A number of JPs criticized their colleagues for poor attendance at ministerial and judicial training sessions – and this appeared to be a widespread problem. Although associations provided regular training sessions, attendance generally appeared to be irregular and unsatisfactory, as one respondent attests:

It is usually the committee members who attend. - Southland training officer

One respondent suggested JPs who functioned without adequate training were ‘degrading the Justices who put in the effort to achieve correctness with duties.’

This is an ongoing concern as those JPs who function without adequate training are degrading the Justices who put in the effort to achieve correctness with duties. - Nelson Bays former president

Another JP, who had just commenced judicial training, expressed disappointment at the level of financial support he had received when taking the course:

I started doing judicial training but was disappointed at the level of support that was received. The text books alone cost in the hundreds of dollars. I feel that if you are going to do this level of training for the community that at least some financial assistance should be given to JPs. . . . All training costs should be borne by the Ministry of Justice. - Dairy farmer

And another was concerned that after having completed TOPNZ course she was not selected for court duties.

I would like to do further judicial training but like dozens of JPs I know who have done the Open Polytechnic course, I have had no opportunity to use it. So it seems to me to be a waste of energy and study time. - Counsellor

The ongoing training drew its critics, but most of the blame was directed at the government for lack of funds or, indeed, not making the Ministry of Justice responsible for conducting the training courses. Most respondents concluded that Federation and individual associations were doing there best to ensure JPs received continuing training under difficult
financial constraints. There was also some blame attributed to JPs who did not avail themselves of the opportunity to attend regular training sessions.

**Appointment procedure**

The majority of respondents from both survey groups (Survey A and Survey B) agreed that the appointment procedure for JPs was a critically important issue that must be addressed. This issue also produced the largest number of individual write-in comments from survey respondents.

Survey B group felt the appointments procedure was one of the three most important issues. On the same issue a majority of the Survey B group believed the appointment procedure used in the United Kingdom was preferable to the New Zealand system and should be implemented here. Respondents from both groups expressed varied and often differing opinions, a cross-section of which is as follows:

> It is imperative, but in my view impossible, to wrest away from the New Zealand MPs the ability to nominate their chums or pleading acquaintances as Justices of the Peace. In the United Kingdom there are local committees of nomination, in Australian states and in Canadian provinces something similar, but the New Zealand system came into being I know not how and no-one I have spoken to can be persuaded to say a good word about it. Equally, all are certain the MPs will never give it up! – witness the newer into office they are, the more eager are they with their nominations. . . . I could [tell] many a tale of Auckland MPs who asked me: “But why can’t I? I’ve got a retired rear-admiral who wants to be a JP. What can I say to him?” . . . this after having told the MP concerned that, on the figures and on our reports, there was no demonstrable need for new nominations. - **Former Auckland president**

> On one occasion a local MP in the Waikato nominated eight or ten women at once. It appeared he had invited some women’s organizations to submit names. When appointed I got [the women] all together in the local court and gave them some instruction, and assisted them and invited them and did my best to get them to join the local association. Most, I think, were only interested in the “title” after their names. - **Waikato past-president**

> I am wary of “self-appointments” – that is, people nominating themself. If MPs followed correct procedures this could be eliminated to a degree. – **Ex-president of RFNZJA**

> The appointment procedure has always been a contentious issue. I have personally known Members of Parliament who will not action self-nominations, and do not even reply to those who we can sometimes class as status seekers. We also know other MPs who put the self-motivated names forward. The latest circular to MPs from Hon. Paul Swain identified the most satisfactory method of name promotion is from a community organization or

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228 A majority of respondents correctly ‘ranked’ the issues, while 45% chose to ‘weight’ them. Responses were therefore ‘averaged’ for the purpose of this research.
group to the local MP, which if adhered would solve many problems. - Former Federation president

The appointment procedure was ‘still very messy in some instances with local MPs helping the old mates’ network. - Former Taranaki training officer

I believe that the system has been considerably tightened by the current minister in charge of JPs. ...Past failures to be involved in the appointment process perhaps lie with individual associations that have not taken the initiative to communicate with their local MPs... However in some regions, and by some parliamentarians, a more rigid appointment process is now being implemented – but not throughout the whole country. What is now evolving is much improved on past practice. - Wellington ex-president

This has been a contentious issue in my 25 years as a Justice and I believe the MPs misuse the procedures for their own ends. We do need to try and keep some pressure on to obtain some uniformity, but I see this as an issue which could take too much time with other important issues around.’ - Taranaki training officer

It was such anecdotal evidence of the misuse of the appointment process by Members of Parliament that convinced Justices of the Peace that something should be done to change the existing system. How politicians could be persuaded to relinquish their sole right of nomination was an entirely different matter. Frequent references were made to the public perception that politicians rewarded party faithful for their loyalty and support by nominating them as JPs. One respondent wrote:

Sadly in recent times it has come about that in many circles the “JP” is seen as being a “poor man’s gong” – I can’t get an OBE so I’ll get a JP.’ Another claimed ‘the system is wrong as appointments become political handouts. I have raised this issue with successive Ministers of Justice – making the point that the United Kingdom modus operandi is the only method – all to no avail.

A majority (45% n=285) of all JPs who responded to the question in Survey B believed the appointment procedure used in the United Kingdom was preferable to that of New Zealand and that a similar system should be introduced here. Those favouring the present system were 42 per cent (n=265). Thirteen per cent did not express a preference.

Respondents from both survey groups, therefore, agreed that the appointment procedure for JPs was a critically important issue that needed to be addressed. Those in Survey A who saw the appointment procedure as an important issue represented 67 per cent (n=74) of respondents

This appointment issue had been a festering issue since Hon. T.C. Webb decided in 1951 that all future JP nominations were to be approved by the Member of Parliament for the

229 In the U.K. JPs are interviewed and recommended for appointment by an independent non-partisan Justices of the Peace Advisory Committee responsible to the Department of Constitutional Affairs.
electorate in which the nominee resides. For the past half century this ‘political patronage’ aspect has been one of the most contentious issues of the JP system in New Zealand, as repeated references to this subject throughout this study attest.

Some respondents, as indicated here, revealed personal experiences of political patronage in the nomination process. One said his local MP did put his name forward even though the local party branch opposed the appointment because he opposed their political views. In his case the MP involved took a stand on the issue and his branch’s views were ignored. Another respondent was told by his local MP that he, the MP, wished to put the respondent’s name forward because of the work he did in the community.

One JP official wrote: “I guess I was a political appointment, as are most JPs – not the fairest system, and not the best cross-section of representation”; and another said "although nominated by the local MP myself I do feel that a better selection process would be appropriate. There is too much status attached to the title, unfortunately by the elderly men, and they are often patronizing and pompous. There should be more stringency attached to selection, and perhaps better definition given to the role.” This concern by JPs that their nomination was politically inspired or motivated caused them rancour and apparently intimated a debasement of the office of Justice of the Peace.

A former JP official told of a local MP in the Waikato who nominated eight or ten women at once after he had invited some women’s organizations to submit names. When the official got [the women] together in the local court and suggested they join the local JP association they showed little interest, and he became convinced “they were only interested in the “title” after their names.” Again, this comment coming from a JP official suggests an annoyance that the politicians’ main interest in the Commission of the Peace was not for the organization itself but for their personal indulgence of using the appointment process as a personal instrument for political patronage.

This appointment-en-masse phenomenon (which typically occurred after a politician completely overlooked the need for JPs in an area) was revealed in 2003 when the Associate Minister of Justice (Hon. Rick Barker) disclosed that one MP, on leaving office, had signed off 80 JP nomination forms – all of which went through the appointment process. He added that such an action would not be tolerated in future. The same Minister also told the 2003 conference he was ‘a bit nervous about people who wanted to become self-starters,’ and said he had an arrangement with his local JP association to explain to such people that they would be contacted “if and when” more JPs were required in their area.
The Minister’s statement did not ring true to delegates at the conference. It was well known that politicians were determined to retain the sole right to nominate Justices of the Peace, from whose ranks almost all lay magistrates are selected, and yet they are not averse to lay persons personally applying (in response to newspaper advertisements) to become Community Magistrates. So if politicians sought to retain the right to nominate JPs as a matter of principle rather than from purely political motives, why did they not apply the same reasoning to the appointment of Community Magistrates who are also lay magistrates?

While some survey respondents had expressed their concern about self-appointments, a former Federation president said he felt that if MPs followed correct procedures the problem could be eliminated to a large degree. Another said he had personally known Members of Parliament who would not action self-nominations. Although politicians and JP associations appeared to disapprove of self-nomination, several survey respondents admitted they had personally sought appointment. The contentiousness of this subject, it appeared, would only be eliminated if politicians were removed from the process and replaced by an independent non-partisan appointment committee.

Some Survey B respondents indicated they had no idea how they had become a JP. Several (1% n=8) said they were nominated by their local MPs for services to a political party, and others (5% n=32) said they were rewarded for service to their community. One Justice claimed he was nominated after meeting an MP at a hui (at which he was catering) in the Wairarapa. Another said his local Member of Parliament nominated him in recognition for bravery when he had ‘helped a policeman attempting to rescue miners overcome by gas following a coalmine explosion.’

This political patronage aspect of appointments remains of concern to JPs. In 2003 the Federation again made representations to the Minister of Justice and suggested the proposed Justice of the Peace Amendment Act provided an ideal opportunity to introduce a new appointment system. Unsurprisingly the Minister declined the suggestion and the Bill was sent to the committee stage without any such provision being included.

**Compulsory association membership**

The RFNZJA had petitioned Ministers of Justice for years to make it compulsory for all Justices of the Peace to join their local JP association so that an up-to-date record of all JPs

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230 Hon. Rick Barker, Associate Minister of Justice, in a speech to the RFNZJA annual conference, Nelson, 2003.
231 In this respect New Zealand differs from several overseas jurisdictions where applicants are sought by public advertisement.
could be maintained. It would also enable all JPs to receive regular updated information from the Federation, and ensure that errant JPs could be disciplined as and when necessary.

The Federation had access to the membership lists of its 29 affiliated associations, and also to the incomplete and unreliable list of JPs maintained by the Ministry of Justice – but hundreds of JPs still listed by the Ministry (in 2002) had died or were living overseas, and countless others were listed with incorrect addresses. The Ministry’s list was, in effect, simply a list of names and addresses of JPs at the time of their appointment, and in many instances the date of that appointment went unrecorded. No provision had been made by the Ministry for notification of the death, or change of address of Justices of the Peace.

Addressing this issue in 2003, the Associate Minister of Justice (Hon. Rick Barker) said the Crown had for some time been opposed to compulsory association membership. In his opinion the Bill should not make JP membership of the Federation mandatory, and nor would he make it compulsory for JPs to join a JP association. Following that admonition the RFNZJA, hoping the problem would be resolved by the introduction of practicing certificates, made no submission on this issue when the Bill was referred to a parliamentary select committee in 2006. Here are the views of three respondents each of whom who have strong views on the subject:

Labour Party ministers are not prepared to accept compulsory membership or determine a retirement age because of the Human Rights Act. . . . Some MPs are not following guidelines, especially regarding the age of appointees. There is still an element of the appointment of “mates” for services rendered. MPs assure us this does not happen, but it does. - Former Federation president

The argument has been that as the office is voluntary you cannot compel new appointees to join an association. And while the Department of Justice issues all new appointees with a tiny booklet telling them what to do, why should anyone bother? To change this would mean a great deal of persuasion and lobbying and successive executives of the RFNZJA have found complete disinterest, not to say stonewalling, by successive minions in both the Department of Justice and the Ministry for Courts’ - Auckland ex-president.

As an association member I have great concern about the way the 2,500 JPs who are not members carry out the duties required. They get no training; neither do they receive the Justices’ Quarterly or have any contact with anyone as far as we know.’ - RFNZJA past-president

The Federation remains adamant that unless all JPs are members of an association they will not be adequately trained and kept up-to-date on law changes and other matters of

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232 In response to a question posed at the RFNZJA Conference at Nelson, 2003.
importance in properly performing their duties. The Minister’s view in 2006 that compulsory membership would breach the Human Rights Act was disputed by the Federation, citing requirements that medical practitioners and lawyers were required to become members of their professional societies, to no avail. The situation has currently reached an impasse.

**Duties and responsibilities**

Only 28 per cent (n=31) of Survey A respondents, the JP association officials, viewed the question of JP responsibilities as an important issue, and most of the criticism was about the non-judicial ministerial JPs who accepted office but did not make themselves available to members of the public. Many Justices – particularly those who devoted long hours to ministerial duties in their own homes often at inconvenient hours – were critical of colleagues who shirked their duties as Justices of the Peace. An 89-year-old JP wrote: ‘My principal concern is that some JPs are not prepared to give their time to people who request their services... They like the title but not the work.’ And another, aged 81, said ‘we have enough JPs but I would like to see more of them available during the day. Because of my age and health I want to cut down on my work.’

These examples illustrate the lack of accountability that exists within the JP system, a source of ongoing frustration for the Federation, which never hears about many of these situations because at least 1,500 JPs are not members of an association. The examples cited above, and those that follow, should be referred to, and actioned by, some official body with authority to act effectively on the issue or complaint. Today no such authority exists, and the following are typical of problems that remain unresolved through lack of accountability:

A female JP, describing herself as a pet transporter, often found it very hard to make an appointment with another JP to sign documents . . . ‘In my business I often need a Justice for declarations and I wonder why so many JPs stay on the list when they are not prepared to act as a JP. Many of the people who come to see me say how hard it is to find a JP.’

Similarly, another respondent castigated ‘Justices who are not making themselves available to the public, are not in the Yellow Pages, have no JP sign on their door or gate, and are not working... They should have their warrants suspended until they can show they are actually performing their duties.’

An Auckland secondary school careers teacher, who applied to become a JP so she could handle the documentation required by tertiary institutions, was the only JP in her school with a roll of 1,400. She verified about 300 qualification certificates, birth certificates and passports each year.
Remuneration

Justices of the Peace were divided on this issue. A substantial majority (82% n=518) of the total JP population (Survey B) felt that judicial JPs, those sitting on the bench, should be paid. But an even greater number of the same respondents (87% n=549) were opposed to any remuneration for non-judicial JPs, those who handled documentation work from their homes or offices. There is no doubt that the remuneration of judicial JPs in New Zealand poses a very difficult problem as this respondent explains:

Because of the distinction between those JPs who only do ministerial duties and those who do court duties, the argument of no remuneration is a more vexed question. Ministers of Justice from Doug Graham onwards, and probably before him, stated quite plainly they would never pay JPs. On the one hand, because of obvious and invidious comparison with the Disputes Resolution people, Tenancy Tribunals, and even the token payment for those called to jury duty, it is hard to be logical. Many of us believe the silly experiment with Community Magistrates (which seems to be continuing – is it?) came in as a way to avoid paying court panel JPs as the jurisdiction range is almost identical. On the other hand if, as successive Ministers state, they want JPs to be representative of their communities, there is no argument but that those who have to leave work to serve in court should have at least replacement wages now that we are all required to save for our retirement. You cannot have a younger workforce of court Justices without taking them out of the workforce they’re already in – especially if you want them to retire at 68 already! It takes at least three years to make a reasonably confident, alert and experienced court Justice after they have done the Open Polytechnic training course. - Former Auckland association ex-president

Clearly the public spiritedness of most JPs surveyed stretched only to the extent of voluntary work they could handle in evenings or weekends. They took the view that their judicial colleagues should be remunerated for the more skilled and onerous judicial work they undertook in the courts. Most of the pressure for payment of judicial JPs had come from urban areas where judicial JPs had been most active on District Court benches – Auckland, Wellington, Lower Hutt, Christchurch and Dunedin.

In Waikato and Bay of Plenty (where in 1999 judicial JPs were replaced by Community Magistrates in the courts) the issue was contentious because the Community Magistrates in Hamilton and Tauranga receive payment for doing essentially the same work that their JP colleagues sitting in other courts in the same region undertook without payment. This furthers the argument that one central authoritative body controlling all lay magistrates (judicial JPs and Community Magistrates) would be in a position to rationalize the assignment of the different classes of lay magistrate and apply a consistent regime of payment and/or out of pocket expenses to meet the judicial responsibilities of the particular adjudication system employed.

Hon. Sir Douglas Graham, Minister of Justice 1990 to 1999.
**Pro-remuneration**

The advocates of payment for judicial JPs believed current social pressures – including a more commercial mind-set – demanded a change. They submitted that younger JPs could not afford to take time away from their employment to sit in court – particularly on lengthy depositions hearings that might last for several days. Employers, they suggested, were not keen to release employees for this voluntary community work. Unless the government paid court-sitting Justices or ensured they would be reimbursed for loss of income, their argument ran, younger JPs would not make themselves available for court work. Here are some of their comments:

- **Bring JPs into the twenty-first century – user pays** - *Hauraki ex-president*

- **Judicial justices should be remunerated** - *Federation past-president*

- **Judicial justices should get payment at a lower level – I recently sat 22 days for nothing** - *Training officer from Taranaki*

- **Many times it is the JP who is the only one unpaid – payment or expenses is a must** - *Southland training officer*

- **This has become a hardy annual for many Justices on the judicial side…it is not really an issue for ministerial duty. I believe the pressure [for payment of court JPs] varies from area to area, and association to association, depending on the size and location. City areas are more vocal than country areas as the demand in the cities for Justices’ sittings are more frequent and complex. In the country are the individuals and the populations who regard it as a “status privilege” to sit on the bench and hence the issue of remuneration does not arise.’** - *Wellington ex-president*

- **I have been quite happy to perform court duties without pay, and was able to do this without loss of income. However increasing numbers of Justices do not have that freedom and I believe it is important that some form of remuneration is available, especially in view of the community** - *unidentified respondent*

A former Wellington president contended that payment of JPs sitting in court was justified because the Department for Courts had a substantial budget – ‘yet the coalface operators are being neglected and taken advantage of.’ He believed they would continue to be used ‘for free’ until their services were recognized or withdrawn:

- **There is a changing attitude towards voluntary service activity. I myself have done over 1,100 court hours over nine years and handled in excess of 4,000 remands and bail [hearings], 550 preliminary hearings, and 2,300 traffic cases. I am currently reviewing the time I make available as more important aspects of leisure and commitment are emerging…**
Another official agreed with the payment of court justices but foresaw problems with its introduction, believing court roster officers could be accused of favouring some JPs over others in selection for bench duty: ‘As one of a team of three [judicial] JPs which sat on a depositions hearing for five weeks (530 hours) for lunch and travel payment, I suggest that deposition hearings, or cases that last more than a day, should attract some recognition for the time taken.’

A judicial JP with 30 years of court experience suggested a nominal fee be paid for court work, and another judicial JP summed up the feelings of many colleagues when he said ‘there can be little doubt that JPs provide the only non-paying service in New Zealand, at times under severe demands for instant satisfaction . . . and all for no reward.’ A third court-sitting JP suggested a daily allowance in line with the meeting allowances paid to local government members.

This remuneration of lay magistrates will continue to be a difficult problem for New Zealand court reformers, and the subject is aired in detail in Chapters 5 and 6. The proposal adopted by this study is that judicial JPs, sitting infrequently, should remain as voluntary unpaid lay magistrates (with the standard travel and meal allowances), and those judicial JPs who aspire to a more regular vocation as lower court judges would graduate to Community Magistrate status (sitting alone, and with greater level of jurisdiction than judicial JPs) and consequently qualify for a more liberal remuneration package. This, and other potential remuneration/loss of wages scenarios are explored in Chapter 7.

Anti-remuneration

Opponents of remuneration for judicial JPs were equally firm in their views. They believed the office of Justice of the Peace historically had been an unpaid voluntary service to the community and should always remain so. They took the view that if government were to be faced with an ultimatum on this issue it would dispense with Justices of the Peace in the courts and would replace them with full-time paid Community Justice Officers235 employed by the Ministry of Justice or the Department for Courts. Alternatively the government may have been encouraged to expand the existing Community Magistrates scheme throughout the country.

One respondent felt strongly that there should not be any remuneration for Justices: ‘All enjoy the honour of their appointment and I feel it is somewhat hypocritical to want payment’; and another wrote ‘I do not see that JPs should be paid for their services. Over the years I have contributed many hours of community service and still do, but I do not do

235 Introduction of CJOs had been recommended by the NZLC in 1998.
it to receive any award [sic]. I do it solely because I enjoy doing things for other people and children . . . How would it be funded – another tax?’

A number of other respondents were strongly opposed to payment. One wrote: ‘It [lay magistracy] is a service to the community and should not be paid. If JPs remain unpaid there is less likelihood of criticism from the press and the public,’ and another commented ‘JPs have been unpaid since 1840, or before, so what makes 2003 so different?’ One Justice cited democratic grounds: ‘The reason JPs are called upon is they represent the “common person” (or the community person in the whole judicial process), and paying them for their services removes this – they become professionals.’

A strong case for payment was made by a Justice involved with the recruitment of judicial JPs for court duties, but he cites one serious pitfall – the possibility that too much pressure for payment of judicial JPs could encourage the government to dispense with lay magistracy in favour of a fully professional bench of law qualified junior Judges as suggested by the NZLC in 2004. This respondent hints at that possibility:

I find the work very interesting but I do think Justices who sit in court should receive some remuneration. Of course the system may be overhauled and Justices in court may cease to exist, but if their services are to be required then I think they should be paid. It will be increasingly difficult to recruit people for this work if this does not happen. I would be prepared to put more time aside to do this work if I were paid something. I have to earn a living and I need to balance what I earn with what I can give voluntarily. - Unidentified court JP

It seems the difficulty expressed by this respondent, along with lobbying by the Federation council, persuaded the Minister of Justice to revisit the issue of remuneration for court-sitting Justices of the Peace in 2007. A novel approach to the payment issue was offered by a respondent who suggested bulk payment be made to JP associations providing the services, and that the rostering [of Justices] be allocated by a ‘court appointee or other neutral person.’

To date no decisions have been reached on this issue of remuneration, but a proposed solution is proffered in Chapter 8. It is recommended that of a single authority should administer the two forms of lay magistracy (judicial JPs and Community Magistrates), and that judicial JPs continue to operate in a part-time unpaid voluntary capacity while the full-time Community Magistrates with longer hours and greater jurisdiction are remunerated.
**Retirement age**

This is an issue that appeared to concern government and the Department for Courts\(^\text{236}\) to the annoyance of the RFNZJA and Justices of the Peace throughout the country. The Ministry of Justice had long sought to arbitrarily align the retirement age of court-sitting judicial JPs with that of District Court Judges, but no logical explanation for this was ever given to the RFNZJA. For a number of years the retirement age of District Court Judges had been fixed at 68, with year-to-year extensions at the Ministry’s option until Judges reached the age of 72.\(^\text{237}\)

The Minister of Justice had recommended that judicial JPs also retire from the court bench panel at the age of 68 and, although the RFNZJA had tacitly consented to the request, its application would have been difficult because insufficient numbers of younger fully trained court Justices were available to meet District Court staffing requirements. Court Registrars and JP association Court Roster Officers have since tended to disregard the Minister’s recommendation, because to enforce it would bring the District Courts in Auckland and other cities to a standstill.

Although the Survey A (association officials) respondents ranked retirement age as the least important of the eight issues of concern to JPs, when the Survey B group (all JPs) was asked if there should be a retiring age for court Justices 82 per cent (n= 463) of those who replied answered ‘yes’, and 18 per cent (n=104) responded ‘no’. Respondents who answered ‘yes’ were asked to indicate the age at which they considered court Justices should retire. A majority of this group (73%) suggested retirement between the ages of 70 and 75. They replied as follows:

<table>
<thead>
<tr>
<th>Retirement Age:</th>
<th>65</th>
<th>68</th>
<th>70</th>
<th>72</th>
<th>75</th>
<th>78</th>
<th>80</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage:</td>
<td>10%</td>
<td>8%</td>
<td>36%</td>
<td>9%</td>
<td>28%</td>
<td>3%</td>
<td>6%</td>
</tr>
</tbody>
</table>

More than 75 per cent (n=774) of those in Survey B (the New Zealand JP sample) had, therefore, expressed their opposition to the Minister’s suggestion that judicial JPs should retire from the bench at the age of 68. This was an important development for the Federation which had long advocated that judicial JPs should be permitted to remain on the bench until they were deemed, by a peer performance review, to be unfit to perform their

\(^{236}\) The Department for Courts has since been reintegrated into the Ministry of Justice.

\(^{237}\) Retirement age of judicial JPs was extended in 2007 from 68 to 70, with a year-on-year extension to the age of 75 based on peer review.
bench duties. A number of Justices supported the Federation’s view, and typical of the responses was that of a Southland JP who said ‘you can be 70 years young, or 70 years old – take your pick’; and another who said ‘some JPs are incompetent at 40 and others are “sharp as a needle” at 80-plus. Age doesn’t equate with competence.’ A third respondent said ‘as far as judicial duties are concerned, if a member is physically and mentally sound he or she should continue... Judges retire at 68, then move on to [corporate] boards and other legal positions drawing full remuneration.’

Several questioned the legality of a mandatory retiring age. One respondent claimed that ‘the limit of 68 came from an edict from [Chief District Court] Judge Ron Young when he said judges should retire from the bench at 68 and that [judicial] JPs should come under the same rules. Since then I think the Human Rights Act prohibits discrimination on age, gender, race, etcetera.’ And a Wellington ex-president alluded to this point when he commented ‘the authorities and the Federation have currently dropped the retirement issue and it may be best not to take this matter up too far.’

One Auckland association JP official explained that it would be impossible for many, if not all, associations to staff courts if retirement at 68 were enforced:

> An age limit of 72 had been set by the Auckland association and many, like myself, complied with this retirement age. Some [judicial JPs] have not, and the association has not required them to. This is a cause of resentment among those who complied with the rule. While casting no reflection on competence, it does nothing for the dignity of the court for very elderly men to adjudicate on court matters.

The unresolved retirement age for court-sitting JPs remains problematic for most Justices of the Peace associations which, in the absence of a definitive ruling from Federation or the government, simply apply their own local practice with the acquiescence of the local District Court Registrar. This was illustrated by a Waikato judicial JP who recounted that ‘when in 1995 we were told retirement would be at 68 years of age the court Registrar said he needed me and kept me on until we had others trained – and I finally retired at 78 years of age. So it seems there should be some latitude at times to enable replacements to be trained.’

The response of those surveyed was markedly different when it came to a retirement age for ministerial JPs (those JPs without judicial responsibilities). In that case the Survey B respondents were evenly divided in the questionnaire’s choices of 70, 75 or 80. The debate seems destined to continue until a workable solution is reached between the government’s wish and District Court requirements.

The retirement issue from the standpoint of judicial JPs is crucial to the whole concept of lay magistracy, which is based on the willingness of citizens of good reputation and sound
judgement to serve their community. As lay magistrates they offer their services, voluntarily and without remuneration, as judges in their local courthouse. If wisdom comes with experience, age *per se* should not become an issue for mentally and physically healthy people in middle age or retirement years. These are the people who currently serve as lay magistrates, and some in New Zealand are still contributing effectively on the bench at the age of 80.

**Political parties express divided views**

The third survey conducted for this thesis was to the spokesperson on Justice of each of the political parties, seeking the party political view on lay *versus* professional magistracy in the lower courts. The survey was done in 2004, and the results appear in Table 4.

Politicians speaking of the lay magistracy frequently praised judicial JPs at official functions and RNFZJA annual conferences but often criticized them in the Press and in other environments. While months or years often passed between parliamentary debates involving JP issues, debate on the Justices of the Peace Bill 1957 provided a wide range of disparate views held by Members of Parliament about JPs. Further input arose from parliamentary debate in 1968 when the Minister of Justice (Hon. R. J. Hanan) reintroduced JPs to the traffic court bench in Auckland and Waikato courts.

*Hansard* then provided a further range of political opinion on Justices of the Peace – specifically in 1998 when Hon. Doug Graham, as Minister of Justice, introduced his controversial Community Magistrates Act. A more recent indication of party political attitudes towards the lay magistracy was obtained, as explained above, in a targeted survey of party political spokesmen in 2004. The response from the nine Justice spokesmen queried on their party’s attitude to lay *versus* professional magistrates in the event the 2004 recommendation to introduce a designated Community Magistrates’ Court came into effect was as follows:
Table 10. Political party preferences for lay or professional judges in the lower court, 2004.

<table>
<thead>
<tr>
<th>Party</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT Party</td>
<td>Professional bench (DCJs)</td>
</tr>
<tr>
<td>Alliance Party</td>
<td>Undecided</td>
</tr>
<tr>
<td>Christian Heritage Party</td>
<td>Professional bench (DCJs)</td>
</tr>
<tr>
<td>Green Party</td>
<td>Lay magistracy (JPs)</td>
</tr>
<tr>
<td>Labour Party</td>
<td>Professional bench (DCJs)</td>
</tr>
<tr>
<td>National Party</td>
<td>Lay magistracy (JPs)</td>
</tr>
<tr>
<td>New Zealand First</td>
<td>Lay magistracy (JPs)</td>
</tr>
<tr>
<td>United Future Party</td>
<td>Lay magistracy (JPs)</td>
</tr>
<tr>
<td>Progressive Party</td>
<td>Lay magistracy (CM /JPs)</td>
</tr>
</tbody>
</table>

**Final words on key results and findings**

This chapter validates the thesis argument that ‘lay magistracy is effective and should be retained and reformed as a major component of the New Zealand justice system.’ First, the findings from the focus group and nine individual interviews clearly substantiated the views initially delineated from the researcher’s review of literature. The further corroboration of these eight recurring issues of concern to JPs – by the 150-strong group of current and former JP association ‘officials’ (Survey A) – validated the need for the comprehensive nationwide survey of Justices of the Peace (Survey B) that followed.

From the standpoint of the effectiveness of lay magistracy, upon which this thesis rests, the following research findings are significant – keeping in mind that virtually all lay magistrates have been selected from the ranks of Justices of the Peace. Their positive attitude toward the need for continuing training, compulsory membership of associations, ambivalence towards payment for judicial JPs, and the need for a non-partisan appointment system, was aligned to official Federation thinking.

Nearly a quarter of all JPs claimed at some stage to have sat on the bench, many on a regular basis. Half the JPs surveyed had received search warrant training, and 10 per cent had been trained as Visiting Justices (prisons). A large majority felt they had received sufficient support and training from their associations, the Federation or the Ministry of Justice to enable them to perform their duties effectively.
Nearly all respondents thought all JPs should be required to join their local JP association, and that mandatory training should be given to all new Justices before their appointments were confirmed. Most reported having personally attended initial and ongoing training sessions, and virtually all had found the sessions worthwhile.

Most respondents classified themselves as ‘considerably active’ and felt that their districts were well served by JPs – although a number did express concern about colleagues who avoided their public responsibilities. Most saw themselves as being ‘voluntary service workers for the community’ rather than as ‘unpaid officers of the local District Court’ – which in essence they are.

One-third of JPs believed their local Member of Parliament had personally put their name forward for nomination, but few considered their Commission was a reward for community or political service. In spite of this, a majority of JPs believed there should be an independent non-partisan appointment and selection committee rather than the existing political appointment procedure.

Most JPs believed there should be a retiring age for court-sitting judicial JPs, but only a small number supported a retiring age for ministerial JPs. In the event Justices of the Peace were ever withdrawn from court work, a large majority (81%) saw a long-term future for ministerial JPs in New Zealand.

While the majority of respondents stressed the importance of competence and continuing training of judicial and ministerial JPs (and most felt this should be compulsory), a substantial majority of those voicing an opinion on the appointment process felt it should be non-partisan and independent of politicians.

Several respondents made reference to the duties and responsibilities of judicial JPs. On the one hand, some were critical of their non-performing colleagues; and on the other hand one said that Judges in his area had off-loaded a wide range of cases to judicial JPs on the bench, and had announced they wished to further extend the practice – an indication of the effectiveness of judicial JPs in that particular court region.

Many of these examples are symptomatic of the fact that control and direction of the Commission of the Peace is lacking, a further demonstration of the need for a central controlling organization with authority, and power to act, as advocated in this thesis.

The varied comment and opinion from the collected qualitative input from these respondents signal the existence a strong and positive body of Justices of the Peace from which a dedicated and committed supply of lay magistrates could be drawn in the future. Readers seeking a distilled yet representative synopsis of the views of this wide cross-
section of judicial and non-judicial JPs are advised to revisit the letters from three widely-experienced lay magistrates that appear earlier in this chapter.

While this chapter provides compelling reasons from the JPs themselves that lay magistracy is effective and should be developed and retained as a component of the New Zealand justice system, we must now consider the argument for and against such a proposition from other stakeholders, who state their case in the following chapter.¹²³⁸

¹²³⁸ The author concedes that while the opinions of the Justices of the Peace surveyed in this study are significant, the opinions of one group of stakeholders are in themselves not conclusive that the lay magistracy is “effective” and that external evidence from other stakeholders is essential. The thesis contends that effectiveness of lay magistracy is further amply supported and demonstrated in succeeding chapters by a range of other significant stakeholders, for example, politicians in Hansard reports of parliamentary debate (for example, Roy Jack on pp.163 and 165, Graham on p.165); senior jurists Turner J and McCarthy J in their 1977 RCC submissions on p.158; and Elias CJ in a speech on p.228. External evidence for this is also demonstrated in statistics on the number of court hearings and cases heard by judicial JPs. (See Tables 2 and 3.)
CHAPTER 6

ARGUMENTS FOR AND AGAINST LAY MAGISTRACY

This chapter compares arguments for and against a lay magistracy drawn from a range of overseas and New Zealand sources, including professional associations, academic commentators, submissions by jurists, lawyers, political debate, and numerous reports from government ministries and law commissions. The wide-ranging arguments are outlined here in defence of my thesis that lay magistracy is effective, and should be retained and reformed as a major component of the New Zealand justice system.

Sir Thomas Skyrme, arguably the foremost exponent and authority on the lay magistracy in the 20th century, believed that lay justice survived the judicial revolutionary flood of the post-war years because it was acceptable to successive governments and to the public at large. He felt the reason for its acceptability, despite latent defects, was threefold. First, because of the depths of its roots in the British social system and the Englishman’s inclination to honour tradition; second, the ability of Justices of the Peace over the centuries to adjust to changing conditions; and third, because the intrinsic merits of the system, if carefully developed, gave it a particular attraction not offered by any other form of judicial machinery.

Democratic Justice

Skyrme argued that the lay justice system was intrinsically good because it involved the layman in the administration of justice and thereby the citizens saw the law as their law, administered by men and women like themselves, and not the special preserve of lawyers. He pointed out that while a lay justice could not equal the professional skill of a stipendiary magistrate, the function of the lay justice was largely to decide questions of fact, and in doing so to exercise common sense and sound judgment against his own knowledge and experience of the world at large. By this criterion, Skyrme argued, the quality of the average Justice of the Peace was no less than that of the professional stipendiary magistrate.

239 For the ease of the reader, the overseas jurisdictions being referred to in this chapter have been clearly signposted in boldface type.
240 Skyrme, p.6.
American academic, Ian Shapiro, however, gives a somewhat different slant to the argument. He suggests that while democracy and justice are often perceived as mutually antagonistic ideas, they should in fact be pursued together. He claims that ‘justice must be sought democratically if it is to garner legitimacy in the modern world, and democracy must be justice-promoting if it is to sustain allegiance over time.’

He further argues that when power is exercised without democracy the result will be experienced as injustice, and suggests that social relations should be “democratised” in order to diminish injustice. This, he says, must be done in ways that are compatible with people’s values and goals.

Socio-legal writers in England have advanced a similar “legal relevance” argument that ‘the offences dealt with in the lower courts do not involve much law or require much legal expertise or advocacy. They can therefore be safely left to be dealt with by laymen – by lay magistrates and by the defendants themselves, with lawyers seen as normally unnecessary in the lower courts.’

The importance of democratic local justice was stressed in 2001 when the DCA announced the planned closure of a number of local courthouses throughout England and Wales. Lord Phillips of Sudbury, a Liberal Democrat peer, opined that ‘even while struggling to shore up community life and, indeed, democracy itself, the government is destroying one of its traditional bulwarks – local justice.’

And in the past, three eminent British jurists arguing from accumulated experience have championed lay magistracy as a bastion of democratic stability, popular sovereignty and common sense. In a 1971 address the Lord Chancellor, Lord Hailsham, said:

My advice to the English people after 40 years of experience of the law is: Do not try to get rid of your old style Justice of the Peace. If you do you will get rid of one of the most valuable and stabilizing of your social institutions. Insist that they go through the new training courses, if you please. Exact stiff penalties certainly. Ask them to retire to the supplemental list when they become deaf or infirm or reach the age limit, by all means. But abolish them, I hope never.

Lord Bingham 20 years later made this plea for retention of the lay magistracy in England and Wales:

The justices are chosen for their qualities of fairness, judgment and common sense, alert to the needs and concerns of the communities they serve and enabling local issues to be determined locally by local people. And in the eyes of the public they have one great advantage: they are free of the habits of thought, speech and bearing which characterize professional lawyers and which most people find to a greater or lesser extent repellent. The existence of

30,000 citizens distributed around the country, all with a sound, practical understanding of what the law is and how it works, is, I think, a democratic jewel beyond price.245

And in 1990 another British Lord Chancellor, Lord Irvine, said:

I wish to express the Government’s appreciation for lay magistrates, over 30,000 of them, who are giving their voluntary services free for the benefit of their communities... The role of the lay magistracy is pivotal to the administration of justice. Its continued good health depends essentially on sufficient numbers of suitable people from all walks of life applying for appointment.

Discussing democratic local justice in New Zealand and the need to retain JPs in the courts was stressed in 1989 by Kay,246 who claimed that ‘the important contribution of lay people to the administration of justice stems from their closeness to the society they serve and the knowledge which they bring of what is needed to protect individual members of society.’ He noted a growing involvement of lay people in the administration of justice throughout the Commonwealth who ‘as lay magistrates help to bridge the gap between the layman and the lawyer and to ensure that the law does not lose touch with the people it is designed to serve... The impact of decisions in these primary level courts is both local and immediate... so that justice can be fairly administered.’

The Rule of Law
The “rule of law” concept has a deep historical lineage traced by scholars to the notions of justice and fairness discussed by Aristotle and their assertion that it was the undemocratic Roman Empire that gave birth to the Western tradition of a well-codified and broadly applied body of law. It was the signing of the Magna Carta in England in 1215, moving the ultimate authority of the monarch to the people, which in essence established “the rule of law” in Anglo-Saxon justice. Thomas Paine,247 writing centuries later, described this concept simply as “no one is above the law... for as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.”

Modern Anglo-American legal thinking suggests adherence to the rule of law implies a clear separation of powers, legal certainty, the principle of legitimate expectation and equality of all before the law. There is an expectation that the rule of law ensures that government authority is legitimately exercised only as a result of laws scrutinized and passed in accordance with publicly accepted and established procedural steps that are referred to in legal circles as “due process”.

247 Thomas Paine, Common Sense, anonymous publisher, Philadelphia. 1776.
Yet a clear distinction between the rule of law and democracy is problematic according to Hammerstrom, who suggests ‘we who seek to build democracy must not be bound by the false assertion that the rule of law is democratic. A re-examination of history teaches us that our powerful legal system is a massive fortress against popular sovereignty.’ He further asserts ‘politicians like to say that the rule of law is a feature of democracy. The implication is that the law is an unchanging set of principles that resolves conflicts impartially . . . But the law is not impartial; it reflects the political and social biases of the legislators and judges who make it.’

One questions whether Lord Justice Auld (although a champion of the importance of local justice) had such considerations in mind in England in 2001 when he proposed that ‘all members of the judiciary, whether lay or professional, should be brought within the responsibility of the local Resident Judge and the judicial hierarchy of which he is part.’ Proponents of this view argue from the standpoint of effective and efficient case management and standardization of practice concerning bail, remand and sentencing.

In considering lay magistracy in the New Zealand context this study suggests that most opposition to lay magistracy is argued on the rule of law, and most in support of lay magistracy is argued on the principles of democratic local justice, participatory democracy, low cost, and the fact that it enables the law-qualified District Court Judges to devote their energies and experience to more serious cases.

**The fact/law distinction**

This concept is inevitably raised in the course of professional versus lay magistracy debate. The fact/law distinction has been described by Lane as ‘a fundamental tenet of legal doctrine that reflects “the critical line between factual and legal matters” and the historical importance which the law attaches to the conventional distinction between errors of law and errors of fact.’ He goes on to explain that in a criminal trial the role of the judge is to declare the law whilst the function of the jury [and assumedly the non-legally qualified judicial JPs] is to determine the facts. And in the process of litigation generally, the function of higher (or appellate courts) is mostly confined to resolving questions of law.

Feinman offers a similar explanation of the “law/fact distinction” that goes some way to explaining why judicial JPs and Community Magistrates in New Zealand have limited

jurisdiction in the lower courts, handling summary proceedings cases involving non-custodial sentences:

Labelling an issue as “law” or “fact” is simply a way for the judge to determine which issues he is willing to allow the jury [or judicial JPs and CMs] to decide. Broadening the fact category expands the jury’s [or lay magistrate’s] while broadening the law category narrows it. If the judge thinks an issue is too complex, very important, or potentially subject to misinterpretation, he will be inclined to take it from the jury [or non-professional magistrate] and preserve it for himself. As long as the judge does not go too far in usurping the constitutional function of the jury [or lay magistrate], treating issues as matters of law is an effective jury [or lay magistracy] control mechanism.251

The analogy between jurors and lay magistrates was also used by Coleman and Blumler,252 who claimed that not all judges or legal experts have respected the competence of jurors, and there has been ongoing debate about the extent to which lay people [jurors and lay magistrates], with no legal training, can provide a useful contribution to public justice. They noted that ‘given these reservations by experts, the surprising evidence from jury trials has been that of general agreement about verdicts between judges and juries’, and cited four recent U.S. and U.K. studies253 in which judges were asked to produce separate verdicts from juries, and found in most cases found that both had reached the same conclusion.254

In New Zealand the Chief District Court Judge (in conjunction with the Registrars of the District Courts and Roster Officer appointed by the regional JP association), utilizing the “control mechanism” suggested by Feinman, allocates the lay magistrates to preside over court lists that he considers come within the level of competence attained through their judicial training.

British study used in New Zealand context
The range of British arguments for and against lay magistracy was well summarized in a comprehensive study by Rod Morgan and Keith Russell255 commissioned by the Lord Chancellor’s Department in 2000. A principal requirement of that study was to “assess the

251 J. M. Feinman, p.126
254 Coleman and Blumler, p.29.
commonly held views as to the merits and demerits of employing lay and stipendiary magistrates”. Reviewing the balance between lay and stipendiary magistrates in Britain, the authors summarized the arguments as being:

**Participatory democracy versus consistency and the rule of law.** This argument posits that lay magistrates are the embodiment of true democracy whereas the “lawyers mystify their trade”.256 It is suggested that because part-time lay magistrates bring a wide ‘man-in-the-street’ sense of fairness to the justice they apply. The counter-view is that justice is neither simple nor a matter of common sense, and involves dispassionate application of the rule of law and that only lawyers are capable of its practical application.

**Local justice versus national consistency.** This is an extension of the “trial-by-one’s-peers argument (above), whereby local [judicial] JPs would likely be more sensitive to local than career-driven District Court Judges lacking local ties, knowledge and understanding. The counter-argument, often used by opponents of lay magistracy, is that justice is neither simple nor a matter of common sense. It involves the dispassionate application of the rule of law which lay magistrates are relatively poorly equipped to interpret and apply.

**Fresh or open minds versus case hardened minds.** This argument suggests that local JPs with outside careers, sitting in court less regularly than District Court Judges, approach cases freshly and with a more open mind than their professional colleagues who, it is suggested, tend to become “case-hardened” by accumulating prejudices as to who [prosecutor or defendant] is credible. The counter argument is that professional judges, by virtue of their legal training and personal confidence, are more likely to challenge evidence from defendants and court officials – and to be less deferential, perhaps, than the lay magistrates.

**Symbolic legitimacy versus effectiveness and efficiency.** This is essentially an extension of the democratic justice argument, but with critics positing that the use of lay magistrates is of symbolic legitimacy rather than being of effective judicial value. The argument suggests that part-time lay magistrates are unable to provide continuity in case handling, and are fair game for lawyers’ costly delaying tactics for their own and their clients’ advantage. It also suggests that professional judges are better equipped to resist such ploys. Critics contend that the working arrangements for lay magistrates must make their participation both relatively ineffective and inefficient.

**High versus low cost of magistracy.** Although various cost-effectiveness “formulae” produced by Morgan and Russell support the cost-saving argument, their basis of

256 Morgan and Russell, p. 6.
calculation is not applicable in New Zealand where the modus operandi of judicial JPs is markedly different from their colleagues in England and Wales. Until the structure of a future New Zealand lay magistracy model is known – for example with or without the support of Justices’ Clerks, voluntary or paid judicial JPs, or judicial JPs combined with CMs – estimating the cost of a comprehensive lay magistracy is problematical. We can safely assume, however, that if New Zealand judicial JPs continued to sit in pairs (instead of a panel of three as in England) and did not utilize the services of salaried Justices’ Clerks (as in England), the cost of lay magistracy in New Zealand would be substantially lower than that of professional magistracy.

After assembling and analysing a range of evidence and opinion the Morgan and Russell study did not reach any definitive conclusion (in view of the variety of possible operational variables) that lay magistrates would prove more or less cost-effective than professional magistrates. Neither did they establish that lay magistrates were more likely to command more, or less, confidence among the public. The authors simply opted for retaining the status quo in the United Kingdom, much as successive governments have done for the past 50 years in respect of lay magistracy in New Zealand.

**British test applied in New Zealand**

In order to establish a meaningful comparative study of the British and New Zealand lay magistracy systems the same list of arguments adopted by Morgan and Russell has been adopted for this study. Inferences have been drawn from analysis of argument obtained from the following sources:

1. Submissions to, and the report of, the 1977 Royal Commission on the Courts
2. New Zealand parliamentary debates and ministerial statements
3. New Zealand and district law society submissions, reports and articles
4. New Zealand Law Commission reports and statements
5. Academic texts, research papers and journals
6. Views and opinions of New Zealand and overseas legal experts

**Participatory democracy versus consistency and the rule of law**

**Submissions to 1977 Royal Commission on the Courts**

The 1977 Royal Commission on the Courts (Justice David Beattie, chairman, and Messrs I.H. Kawharu, J.D. Murray SM, J.H. Wallace QC and Ms R. M. King) was appointed to inquire into the structure and operation of the judicial system of New Zealand; to report on what changes were necessary or desirable to secure the just, humane, prompt, efficient, and economical business of the Courts then and in the future; and to ensure that the Courts
adapted to changing social needs. The role of Justices of the Peace in the court system fell squarely within the Royal Commission’s brief as the following paragraph attests:

3. (g) The extent to which it is proper and expedient to make use of the services of Justices of the Peace as judicial officers in the lower Courts, and what special provision should be made for the selection and training of Justices of the Peace to exercise the jurisdiction of such Courts.

Although the Royal Commission supported lay magistracy one member, concerned about the rule of law issue, felt that judicial JPs should only hear minor cases:

I have reservations concerning the use of Justices of the Peace, without legal training or assistance from a person with such training, in the taking of depositions - an important safeguard in our criminal process - and in the hearing of the more serious minor offences. . . . I believe that we need to make much more strenuous efforts to keep lay people involved in, and part of, our system of justice. I do not mean that there should be a move to install laymen in judicial positions in place of trained lawyers: to my mind one of the great advantages of our system is the trained and dispassionate consideration given to cases by our judges and magistrates. That I would wish to retain above all, since, on all the evidence known to me, persons without legal training do not make satisfactory judges in other than the most simple cases. Even then, they frequently have difficulty in exercising the degree of dispassionate judgement which is required.

However the same commissioner did support lay participation in community courts or councils at a level below the District Courts, and noted the Commission’s support of a role for judicial JPs in that situation. He also noted that the President of the Commercial Court in England had told [the Commission] that ‘the best way to counter the undermining of the rule of law is to encourage lay participation in the administration of justice.’

The rule of law arose on another occasion when the Hamilton District Law Society contended that court-sitting JPs would be incapable of carrying out the jurisdiction granted to them unless they had the same legal training required of Stipendiary Magistrates. The JP Federation, arguing from participatory democracy, disputed this and reminded the hearing that during the 10½ years in which the traffic courts in Auckland had been presided over by experienced JPs there had been no criticism of their competence from Magistrates or the Auckland District Law Society. The only comments received by the Federation, it contended, had been favourable to the manner in which the Justices had conducted their courts.

258 RCC Report, p.x.
259 J.H. Wallace QC, two years later became president of the ADLS, which for many years had lobbied for JPs to be removed from court duties.
260 RCC Report, p.337.
261 RCC Report, p.338.
Parliamentary debate and ministerial statements

A survey of early political debate and discussion on lay magistracy proved inconclusive on the issue of parliamentary democracy versus consistency and the rule of law. It was not until 1957 when the National government introduced legislation to drastically curb the powers of judicial JPs that lay magistracy became an important political issue on the parliamentary agenda.

This democracy versus rule of law argument arose during debate on the 1957 Summary Proceedings Bill when the Minister of Justice (Hon. J.R. Marshall) told the House that the jurisdiction of judicial JPs should be reduced. This was necessary, he said, because of ‘the importance attached to the sentencing of offenders and the need for having that function of the Court, at least where more serious offences are concerned, in the hands of trained and experienced men.’ However the Minister did accept that [judicial] JPs should be retained on the bench for minor criminal cases and so for the next 20 years – until the 1977 Royal Commission hearings – court-sitting JPs continued to sit compatibly in the lower courts with their full-time professional Stipendiary Magistrate colleagues.

Parliamentary debate on the lay magistracy did not recur as a major issue until May 1998 when the Minister of Justice (Hon. Doug Graham) introduced the Community Magistrates Bill. Although the Minister described the legislation as an extension of lay magistracy in the court system, it was perceived by many JPs as a move to ultimately eliminate them from their traditional judicial role if the Community Magistrates pilot scheme proved to be successful.

The Minister, after consultation with a number of other parties including the New Zealand Law Society and the police – and without consulting the RFNZJA – introduced the Community Magistrates Bill, which although extending lay magistracy was (if it proved to be successful) expected by many JPs to curtail their court jurisdiction. He claimed his proposal offered ‘a significant opportunity for providing further community involvement in the criminal justice system . . . and it ensures that the courts do not operate in a social vacuum and are cognizant of the values of the community they serve, and that the justice system does not become the province of any particular sector of society.’

The Bill provided for a new type of lay magistrate to replace judicial JPs in Waikato and Bay of Plenty courts, and although JPs were invited to apply for the positions no indication had been given that they would receive preference over other applicants. Introduction of

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263 Community Magistrates were appointed in 2000 to two regions of New Zealand on a pilot scheme.
the Community Magistrates was seen by its critics on the Federation executive as a move eventually to supplant the existing judicial JPs with an entirely new lay magistracy model.

Ironically the Minister then advanced the participatory democracy argument in supporting judicial JPs while introducing a counter argument from national consistency in promoting the lay Community Magistrates scheme:

The next level of jurisdiction below that of District Court Judges are Justices of the Peace, and they are all lay people and always have been. They have a wide jurisdiction to hear both defended and undefended traffic matters and some very minor crimes – such as, offensive behaviour or language, fighting in a public place, defacing buildings, throwing stones, sticking up bills, disturbing meetings, and that sort of thing. That is what [judicial] JPs can do now. They are all lay people and have done it extraordinarily well with very few appeals going from JPs to the District Court bench.

We need to take some of the other criminal cases that are a little more serious – but not too serious – from District Court Judges and give them to somebody or other. Do we give it to the existing Justices of the Peace? No, we do not. We create a new person – the Community Magistrate – because that person will receive much more training than Justices of the Peace. Justices of the Peace are appointed for a different purpose altogether. They are appointed on the nomination of a Member of Parliament. They are appointed to serve their community in taking declarations and doing matters of that kind. They are not appointed – all 7,000 of them – to sit on the bench. Some of them do, and some of them come up. Clearly, some of those who sit on the bench now will become Community Magistrates. But there are other people outside Justices of the Peace who are quite capable of becoming Community Magistrates, and should do so. They should be able to go straight there.

This laudatory praise of judicial JPs begs the question why the government and its Minister of Justice wished to introduce the new Community Magistrate form of lay magistracy instead of expanding and developing the existing judicial JP system. Again the Opposition could have been expected to ask why this new form of lay magistracy was deemed necessary instead of developing, and if necessary expanding, the present system of lay magistracy.

The Minister’s rule of law argument in support of the CM scheme fell short when he told the House that Hon. Phil Goff’s speech opposing the Community Magistrates Bill had been misguided on the matter of defended hearings:

He [Goff] is following the New Zealand Law Society line . . . The Law Society misunderstood the Bill . . . it thought that the Community Magistrates would be dealing with defended complex issues – such as blood/alcohol levels and matters of that kind. That was never the intention of the Government. The Bill does not state that Community Magistrates would do defended hearings. They will handle guilty pleas on those matters. If somebody wants to plead

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264 The Minister omitted to explain that the Community Magistrates were to be lay persons and, as such, clearly distinguished from the more senior District Court Judges.
“Not guilty” and argue the law, that case will go before a District Court Judge, not a Community Magistrate.265

The Minister explained that after intensive training by a DCJ the Community Magistrates ‘will deal with guilty pleas on 21,000 cases of blood alcohol, 3,500 cases of obstructing the police, 11,000 cases of driving while disqualified and, would members believe, 9,567 cases of failing to register a dog. One does not need a law degree and seven years’ experience to work out what fine to impose on those 9,500 cases of failing to register a dog.’266 And again the Opposition remained unresponsive to the fact that trained judicial JPs were being overlooked as adjudicators that were competent to handle such undefended hearings.

Later in the same debate Pansy Wong (National) further strengthened the case for retaining judicial JPs when she pointed out that Community Magistrates would preside over cases that did not involve debate over points of law, were there to pass sentence only, and would have the guidance of the menu of cases in front of them to advise them of historical sentences that have been given in relation to similar [offences]. ‘I think it is time to demystify justice by making people aware that, in effect, justice is perceived to be done when more of the public feel that they have a say, and that sentencing better reflects the sentiment and the public attitude of the time.’

In 2004, when political parties were asked whether they favoured lay magistrates or professional judges in the new ‘Community Court’ proposed by the Law Commission, the Christian Heritage policy director (Mark Munroe) supported judicial JPs on the basis of cost, but argued against lay magistracy on consistency and the rule of law: ‘JPs are not likely to be as consistent in their decisions or as procedurally correct or as legally accurate as professionally trained lawyers would be. It comes down to how much confidence one expects the public to put into the new court and whether one is prepared to pay for it.’267

Hon. Phil Goff (Labour justice spokesman) reiterated his party’s long-held preference for legally trained judges in the lower court:

Your query relates to a proposal from the Law Commission that has been consulted widely in the community for a Community Court. I believe that what the Law Commission has in mind is a court which would be presided over by a judge who would be legally qualified. This would be necessary to avoid the impression that this was a Court in which some lesser form of justice was being administered, which I doubt is the Law Commission’s intention.268

266 The Minister did not provide a source for these figures. It is assumed he was referring to the backlog of cases in the Waikato and Bay of Plenty District Courts at the time.
267 Appendix C
268 Appendix C
**New Zealand and district law societies**

Mindful that the New Zealand Law Society, district law societies, and a recent report from the New Zealand Law Commission had generally opposed retention of judicial JPs the JP Federation, arguing from participatory democracy and community justice, republished the 1971 statement of an Auckland Law Society president\(^{269}\) to demonstrate that the legal profession was less than unanimously opposed to the existing JP lay magistracy:

> I think that the office of Justice of the Peace has as much importance and relevance today as it has ever had . . . There is evidence of an ever-growing tendency towards increasing bureaucracy even in countries which cherish so dearly the traditions of the British system of justice with its marked emphasis upon participation by the ordinary citizen in the administration of justice, and . . . the system of justice by Justices of the Peace is of fundamental importance, because by this means the community itself continually has the opportunity of giving expression to its views as to how justice should be administered and how the individual should be treated.\(^{270}\)

This move by the Federation may have triggered a capitulation, of sorts, by the New Zealand Law Society. After initially stating its opposition to the lay magistracy as a matter of principle in its submission to the Royal Commission, the Society later conceded that the RFNZJA submission did in fact support a case for limited retention of lay magistrates. In the course of the Royal Commission hearings the NZLS had reconsidered the use being made of JPs in Auckland courts and consequently withdrew its earlier opposition to judicial JPs on grounds of competence and the rule of law:

> It is observed that the number of successful appeals from the decisions of those Justices is minimal and it accepts that this fact could be evidence of the satisfactory way in which the Justices perform the range of judicial duties entrusted to them. It must also be remembered, however, that the expense of appealing might often be considered disproportionate to what is involved and deter would-be appellants dissatisfied with the Justice’s decision.\(^{271}\)

The New Zealand Law Society tacitly accepted that judicial JPs should continue to be used on the bench when they were needed,\(^{272}\) and was ‘satisfied with judicial JPs continuing to sit in courts as long as any increase in their jurisdiction excluded traffic offences punishable by imprisonment, and that jurisdiction was restricted to minor offences under the provisions of the Summary Proceedings Act.’

This change of attitude by the NZLS was undoubtedly influenced by the successful use of judicial JPs in the Auckland Traffic Court, a development that had not at that time been replicated in other parts of the country and therefore not been experienced by district law societies other than Auckland.

\(^{269}\) H. M. Vautier, president of the ADLS.
\(^{270}\) Justices’ Quarterly, June 1971, p.15.
\(^{271}\) NZLS submission to RCC, p.96, par.21.4.
\(^{272}\) NZLS submission to RCC, p.98, par.21.12.
Initially the most strident opposition to lay magistrates had been expressed by the New Zealand Law Society and the Hamilton District Law Society. The NZLS submission quoted a resolution of the Society’s Council passed on 27 September 1974 in which it questioned the adequacy of JP training:

> The Society does not agree in the light of present circumstances with the suggestions of the Committee on Court Business that the jurisdiction of Justices of the Peace be enlarged to deal with additional matters – in particular (a) The extended use of their present jurisdiction for transport offences; (b) Determination of “minor offences” under the provisions of the Summary Proceedings Amendment Act... If such enlargement of the jurisdiction of Justices were to be contemplated seriously there would need to be a carefully selected group of Justices in each centre trained specifically for such duties and perhaps appointed for that task only. As a matter of principle, the Society remains opposed to the use of people unqualified in the law where a judicial function is to be performed. [Underlining in original.]

Similarly, the Hamilton District Law Society opposed the use of judicial JPs in all but the most basic summary hearings, arguing that in its view all lower court hearings should be presided over by judges who were qualified in law. The Society asserted that JPs did not have enough legal knowledge, either through formal education in law or in on-the-job training in the courts, to provide consistency and the rule of law.

The Hamilton District Law Society told the Royal Commission it opposed the use of JPs on the bench. Its submission recommended that judicial JPs be replaced with qualified lawyers or Registrars, expressed strong opposition to judicial JPs continuing to sit on defended cases, and further suggested that if judicial JPs were to be retained the Society would oppose any extended jurisdiction. The HDLS represented 281 lawyers practicing in the central North Island, and its opposition to judicial JPs was largely based on 13 replies it received from a survey of all its members. The submission cited six cases in the Hamilton Court which it claimed exhibited ‘procedural incompetence and error’ on the part of judicial JPs, and contended that the legal experience of a Magistrate [law degree and seven years of private practice] was necessary to provide any judicial officer with the fundamental knowledge of jurisprudence necessary to effectively discharge a judicial function.

The Society’s counsel suggested the RFNZJA proposal to institute a part-time course of instruction through technical institutes would do little to overcome the competence and rule of law argument. He told the Commission there was ‘no substitute for experience, nor is there any justification for Justices to obtain this experience at the expense of those who come before them expecting justice.’ He further asserted the mundane nature of much of

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273 NZLS submission to RCC, p.95, par 21.1
274 HDLS submission to RCC, No. 107.
275 D.L. Tompkins QC [later Justice Sir David Tompkins].
the work of Stipendiary Magistrates made it difficult to obtain experienced and well qualified barristers to accept appointment, and said that Magistrates spent too much time on non-judicial functions – going through the undefended case list, granting adjournments, and striking out actions – functions that the Society believed could be carried out equally effectively by Justice Department personnel.

While admitting he had no detailed knowledge of the RFNZJA educational proposals for court Justices, the Society’s counsel doubted whether an educational course would overcome the Society’s objections to Justices sitting on defended cases. He acknowledged that Justices (in Auckland and elsewhere) were widely used in defended cases and defended traffic matters, but said the Society still considered this JP jurisdiction should be curtailed – even if that meant abandoning the JP Traffic Court in Auckland. The Society’s view, he said, would remain unchanged even if there were a radical change in the education and selection of judicial Justices . . . ‘We just do not feel that amateurs – and I am afraid they would still be amateurs – are the proper persons to adjudicate upon defended cases. We do not think that the difficulties that result from a lack of, if you like, being brought up in a legal atmosphere can be compensated for by later training.’

When pressed on how the problem of half a million criminal prosecutions per year (of which about 400,000 would be for relatively minor offences) could be overcome if it opposed the extended use of judicial JPs, the Society conceded that under such a circumstance it would have no objection to JPs handling minor cases with guilty pleas that may barely warrant prosecution – and ‘particularly where there might be some alternative procedure for dealing with them.’

276 The Society’s counsel then asserted the practice of judicial JPs asking Stipendiary Magistrates for advice [during a court adjournment] was ‘a deplorable system, and one which should not be.’ He said ‘I have no doubt it has been necessary because of the absence of knowledge that the Justices have had, but it is a very grave reflection on the system that it has been necessary. I cannot see any alternative way in which they could be directed on questions of law other than the English Justices’ Clerk system, and I think I would be speaking for the Society in saying that if the JPs always had available a qualified and experienced Justices’ Clerk then a great number of our objections would go.’

277 In a counter-argument the RFNZJA refuted the claims of JP incompetence and ineptness, and claimed the Society was arguing ‘from the particular to the general’ in an attempt to denigrate all judicial Justices. The HDLS, for its part, contended ‘the lack of basic

276 New Zealand had already gained an international reputation for being at the forefront of innovative judicial reform such as community service, home detention, youth and family courts, family conferences and restorative justice.

277 The subject of Justices Clerks is discussed in more detail in Chapter 7.
knowledge that comes from being brought up in the law cannot be made up [by JP training], and these sorts of happenings are the inevitable consequence of the system. Therefore we say we cannot accept the system.’

After initially suggesting that the powers of judicial JPs should be curtailed, the Society modified its stance during the course of the hearings following submissions from the RFNZJA and a Hamilton Stipendiary Magistrate. 278 The HDLS accepted that its knowledge of the use of JPs in Auckland courts had been lacking, and as a result it now conceded that judicial JPs could perform a worthwhile role on the bench in minor summary offence cases. On the issue of depositions the Society agreed that ‘the use of Justices for this purpose [presiding over preliminary hearings of indictable offences] should remain unaltered.’ 279

While the submissions of the two law societies did not depart greatly in substance, the NZLS considered that regional law societies need not necessarily agree about JPs at the lower end of the jurisdiction – ‘which would relieve the District Court Judges of a substantial amount of the work with which they are at present burdened.’ 280 Both law societies, arguing for professionalism versus amateurism on the bench, admitted they had difficulty in arriving at a solution to the problem. The HDLS saw the only acceptable solution (to relieving Magistrates of matters it regarded as more administrative than judicial) was to give more power to Registrars. Stipendiary Magistrates, it contended, spent a very significant proportion of their time on work that was semi-administrative or semi-judicial, and therefore able to be handled by court staff with lesser skills.

The Manawatu District Law Society, 281 representing 110 law practitioners in the central North Island, agreed with the Hamilton District Law Society that Registrars of the Magistrates Courts could be given greater jurisdiction – for preliminary hearings, in granting adjournments, and dealing with such matters as judgment summonses – and concurred that they would, in general, be more competent to carry out those functions than judicial JPs.

Twenty years later, and prior to introduction of the Community Magistrates Bill in Parliament in 1998, the New Zealand Law Society took a concerted stand against extending the jurisdiction of judicial JPs. It did this in its response to a discussion document, “Magistrates and other Options for Relieving Work in the District Court”, produced by the Department for Courts and the Ministry of Justice. 282 The Ministry’s stated objective had
been to increase judicial resources available to the court system and to better target the District Court Judges’ skills and experience by further extension of the lay magistracy.

The NZLS restated its 1977 view (in a submission to the Royal Commission on the Courts) that it opposed in principle an extension of the jurisdiction of judicial JPs. Rather, it advocated that more work should be done on its earlier proposal which would in effect introduce a new tier of legally trained and well remunerated professional judges within the District Courts. It suggested such a professional magistracy could become a training ground for future District Court Judges, and remained unconvinced that extending the powers of court Registrars provided a solution to the lower court caseload problem that existed at the time.

The Society saw an ongoing role for judicial JPs, at least in deposition hearings, in the event that a legally qualified professional magistracy was introduced. But it remained adamant that non-legally qualified Magistrates should not have jurisdiction to imprison offenders or sentence them to periodic detention.

**New Zealand Law Commission reports and statements**

The most serious rebuttal of the participatory democracy argument occurred in 2004 when the New Zealand Law Commission recommended replacing judicial JPs with legally qualified Community Justice Officers, a scheme it had been advocating for several years. The 372-page report was notable for its scant reference to, and outright rejection of, Justices of the Peace who had constituted New Zealand’s lay magistracy for almost two centuries.

The five Commissioners had been “invited by government to undertake a review of the structure and operation of all state-based adjudicative bodies in New Zealand, including all courts and tribunals except the top tier of the appellate system”, but their report on lay magistracy could seemingly have been written by a committee of law society officials. It speaks of “balance”, having regard to “the Maori dimension”, “extensive consultation”, and the need to “deliver justice through procedures that are relevant and responsive to the needs and expectations of the people who use the courts . . . In this way confidence in the courts will be maintained. The degree of confidence people have in the court system will influence their belief in the rule of law.”

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283 The proposal for a lower tier court is examined in Chapter 7.
284 The NZLS proposal in 1996 was essentially the same as that recommended by the NZLC in 2004. 
Yet in the Law Commission’s view the rule of law argument totally eclipses that of participatory democracy. The four lawyers and a business academic (ironically also a JP) published two preliminary discussion documents, received more than 400 submissions, and commissioned market research focus groups. The Commission also consulted with various courts and tribunals, the New Zealand Law Society, the Bar Association, government ministries and agencies, lawyers, community groups and the Royal Federation of New Zealand Justices Associations.287

Foremost among the many reforms advocated by the Commission was the establishment of a new Community Court (at the same level as eight other specialist Primary Courts it proposed) to deal with the ‘high volume, less serious, criminal and civil cases currently heard by the District Court . . . The court should have original jurisdiction over all cases heard summarily with a possible maximum penalty of 10 years imprisonment, and should hear the preliminary hearings of indictable offences. The court should [also] hear civil disputes up to a value of $50,000.’288

This proposed Community Court was to be the preserve of new legally trained professional Judges (to be called Community Justice Officers), and the use of existing Community Magistrates or judicial JPs was never advocated in the Commission’s Report.

The Law Commission in its Report expressed firm opposition to non-professional involvement in adjudication with this brief comment:

The use of lay judicial officers in the court system, and the potential for lay participation to enhance public confidence in the legal system, is a long standing issue which at times becomes very contentious. Our preliminary view was based on the principle that it is desirable for all judicial officers sitting in court to be legally-qualified . . . The types of cases that have been dealt with by lay judicial officers are regrettably called trivial, minor or insignificant. For those on the receiving end of the adjudication they are none of those things. Confidence that just outcomes will be delivered is vital for public acceptance of the court system, as well as being in the interest of the parties.289

In spite of this statement the Commission had earlier acknowledged that in England and Wales ‘the lower end [of the court system] is handled by Magistrates’ Courts, which have jurisdiction over both criminal and civil cases, and dispose of over 95 per cent of all criminal cases.”290 And while expressing its opposition to lay magistrates on the bench in New Zealand, the Commission did mention the pilot scheme involving lay Community

287 Incorrectly referred to as ‘Royal Federation of Justices of the Peace’ in Delivering Justice for All, p.1.
288 Delivering Justice for All, p.119.
289 Delivering Justice for All, p.163.
290 At 1 April 2008 there were 29,419 Justices of the Peace (14,672 men and 14,747 women) and 136 District Judges (Magistrates Courts) presiding in the Magistrates’ Courts in England and Wales. [Source: Judicial and Court Statistics 2007, Ch. 9, The Judiciary. U.K. Government Publications, London, 2008.]
Magistrates that had been operating for five years in Waikato and Bay of Plenty courts. The Commission concurred that these “Community Magistrates have generally been able to handle work done by Judges in other courts effectively and efficiently.”

The Commission’s view was that as both lay judicial groups (judicial JPs and Community Magistrates) had made submissions that their jurisdiction be expanded, ‘the opportunity should now be taken to rationalize the current situation by combining the judicial functions of Justices of the Peace and the jurisdiction of Community Magistrates.’ The Commission suggested there seemed to be no justification for two types of judicial officer to exercise what was basically a singular jurisdiction in summary criminal proceedings. The Commission then advanced its proposal for the establishment of a Community Justice Officer (CJO) – a law-trained and salaried junior judge – a new concept that was not adopted by government.

The Commission further indicated its opposition to future involvement of judicial JPs in the court process with these observations: ‘Community Magistrates are required to be capable of performing their duties by reason of their “personal qualities, experience and skills” . . . [whereas] all Justices of the Peace are appointed in a political process and the small number who do judicial work undergo specific training. As there is no remuneration, disproportionate numbers are at or over the retiring age for professional judges.’

The Commission also alluded to the fact that JPs were appointed for life, which was not the case with other judicial officers, but the intimation was clear – as far as the Commission was concerned there was no future for JPs in the justice system without major reform of the Commission of the Peace.

While the government has not adopted the Law Commission’s recommendation of specialty courts and the abolition of judicial JPs, it has to some extent endorsed the Community Justice Officer concept by retaining the existing lay Community Magistrates as court officials ranked in authority between judicial JPs and District Court Judges.

New Zealand and overseas legal experts

In New Zealand two Judges of the Court of Appeal, supporting participatory democracy in the justice system, had told the 1977 Royal Commission that they too would like to see judicial JPs used more extensively, “especially if they could receive some training.” They

291 Delivering Justice for All, p.165
292 Delivering Justice for All, p. 167
293 Delivering Justice for All, pp. 167-168
294 Sir Alexander Turner and Sir Thaddeus McCarthy, RCC submission ‘T’ (transcription).
suggested that judicial JPs could sit with Judges in, say, ‘a highly technical case, and the Court should have the power to appoint such JPs as assessors.’

One group of Magistrates, arguing on the basis of participatory democracy, suggested respect for JPs had been tainted by the political nature of their appointment, and added that ‘there does seem to be an inconsistency in insisting on laymen having the right to determine matters of fact as jurors and in the next breath denying their ability to determine like matters of petty jurisdiction in a criminal division.’

Brian Mooney SM told the Commission his group’s suggested eventual jettison of the traditional JP from the courts really constituted a change in title. His group’s criticism of JPs was in the method of their appointment and lack of training – nothing else. ‘We could not work without them. We would have ground to a halt without their services.’ His group recommended that completion of the tertiary correspondence training course should be a prerequisite for all JPs rostered for judicial duties, and agreed with an earlier submission that the value of court JPs would be augmented by the use of experienced Justices’ Clerks.

Before 1970 serious opposition or indifference to the lay magistracy by members of the New Zealand judiciary had been muted and infrequent. Ironically the first serious criticism surfaced in London from a New Zealand Stipendiary Magistrate who questioned the competence of his lay colleagues. Skyrme recounted the incident:

The chief magistrate who represented New Zealand at the conference showed great reluctance from the outset to participate in the sessions and, after a short time, he departed and took no part in the discussions which led to the formation of the Commonwealth Magistrates’ Association (a body composed largely of stipendiary magistrates). In conversation with the author he made it clear that he not only resented the presence of some Justices of the Peace at the conference sessions but he also objected to being classed with the English stipendiary magistrates whose jurisdiction was more limited than his and that of his colleagues. It was interesting to note the change that occurred from 1980 onwards after the establishment of the District Court. The eminent position of the New Zealand stipendiaries, now called judges, was clear for all to see and there was no risk of their being confused with magistrates, whether lay or professional… They also seemed to accept that the lay justice might have a part to play at the bottom of the judicial scale. They were ready to cooperate with the Justices in New Zealand and to assist them in their newly introduced training schemes. As regards the Commonwealth Association, whereas the chief magistrate had felt obliged to ostracize the conference in 1970, the chief district court judge in the late 1980s, Judge Peter Trapski, played a leading part in the Association’s affairs and became a member of the council and one of the most popular Vice Presidents.

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295 The use and role of assessors in overseas jurisdictions is considered in Chapter 5.
296 Waikato Magistrates’ Group RCC submission 88A p.6, S847.
297 M.B. Scully SM had practiced law in Westport before his appointment as a Stipendiary Magistrate in Wellington. The 1978 Who’s Who in New Zealand listed him at that time as being the Chief Justice of Western Samoa.
298 The first Commonwealth Magistrates’ Conference was held in London in 1970.
299 Skyrme, p. 1177.
While most submissions to the 1977 Royal Commission by Stipendiary Magistrates favoured a lay magistracy, one individual SM300 expressed reservations about the jurisdiction of court-sitting JPs. Representing Christchurch Magistrates, he told the Commission that Justices in his area were used only on minor offences, and indicated that Magistrates ‘would not be happy about judicial JPs dealing with custody or bail matters or with the liberty of people.’

**Local justice versus national consistency**

**Submissions to 1977 Royal Commission on the Courts**

One submission, from the Magistrates’ Executive, refused to accept that there was any basic contradiction between local justice and national consistency in the New Zealand context. It contended the success of judicial JPs depended on adequate court experience, and recommended this be contracted on a national basis, not just provided in a few areas of the country. Magistrates wanted to see court-sitting JPs exercising the full jurisdiction ‘that they have on paper.’301 It comes back to that courtroom expertise in many cases’:

> The Magistrates’ Executive is trying to reconcile different views since there were some people who held reservations about extending the jurisdiction of [judicial] JPs . . . they felt JPs should have a limited jurisdiction until they had been able to prove themselves to a greater extent than they had been able to so far. One possible implication that could be drawn here is that ‘proving oneself’ was more problematic in New Zealand rural localities. ‘This [submission] is a compromise, heading in the direction of having Justices working to the statutory jurisdiction they have already – according to statute but denied in practice – and reviewing the thing once they had a little experience and obviously they were able to take a more responsible role . . . and as time went by they could enlarge their jurisdiction and get closer to the [United Kingdom] position. Such an arrangement should be transitional until the [JP] training scheme has been in operation and reviewed after five years.’ 302

**Parliamentary debate and political views**

Only two occasions of serious parliamentary focus on lay magistracy in New Zealand have occurred in the past few decades – during debate on the Justices of the Peace Act 1957 and the Community Magistrates Act 1998.

In 1957 Roy Jack (National, Wanganui), a stalwart of local justice and the lay magistracy, told the House that ‘as minor judges Justices of the Peace have an important function to carry out as initiators of action that sets the massive machinery of the law in motion . . . and

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300 F.G. Paterson SM.
301 This pointed to the fact that JPs had more extensive jurisdiction and sentencing powers under existing legislation than they were at the time permitted to exercise.
302 W.J. Mitchell SM, Magistrates’ Executive RCC submission No. 44, p.1492, 4Y19. It should be noted that this submission was made before the introduction of Community Magistrates.
those duties underline the importance of having as Justices of the Peace men of the greatest integrity, solid citizenship, and standing in the community.’

The Community Magistrates scheme, when it was introduced 40 years later, was seen primarily by the government as an effort to extend local justice into areas amenable to the imposition of national authority. The areas chosen for the CM pilot scheme (Waikato and Bay of Plenty) had a larger Maori population than most other parts of the country, and the government’s new Community Magistrate proposal was planned to facilitate a more local and “grass-roots” approach to community justice in the region. The presiding judges were to be sought from local communities and would have different skills, terms of appointment and sentencing powers than judicial JPs – and, although being lay magistrates, the Community Magistrates would receive modest salaries.

Hon. Douglas Graham told the House that Community Magistrates could be, but did not necessarily have to be, qualified in law. He said representatives of the legal profession had raised concerns as to the quality of justice provided by Justices of the Peace – although he claimed not to share those concerns – and explained that the only defended hearings the Community Magistrates would adjudicate on were those already being successfully heard by judicial JPs, such as remand, bail, and preliminary depositions hearings.

Peter Gresham (National, Waitotara), in suggesting that the Community Magistrates ‘would bring community wisdom and knowledge into the court system in terms of sentencing people’, alluded to the real purpose of the proposed CM scheme – the introduction of specially trained local lay magistrates more sensitive to the local mores in regions with higher Maori populations than other parts of the country. He added that it was not the government’s intention to supplant judicial JPs in the courts, and suggested that a significant number of the new Community Magistrates could come from the ranks of Justices of the Peace because they possessed the very qualities being looked for in respect of Community Magistrates. These were such qualities, he suggested, as ‘connections to the community and awareness if its diversity, and awareness of te kohanga Maori. I think one would find those qualifications in a significant majority of Justices of the Peace.’

While the JP Federation was convinced that government planned to introduce the CM scheme primarily as a means of replacing judicial JPs throughout the country, it seems that a number of politicians saw the scheme altruistically as offering a tailored system of summary justice targeted to special local needs in areas with higher-density Maori populations.

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Matt Robson (Alliance) suggested that once the system was operating the Community Magistrates themselves would find an opportunity to develop sentencing in the restorative justice area as they would have a range of community-based sentences and penalties that could be applied – supervised work for welfare groups, charitable organizations and local parks and recreational facilities. Such a new initiative, he suggested, would allow a wider representation of the community to be involved in the justice system.

Rana Waitai (NZ First) also saw merit in local justice, saying ‘the idea has been imported from other places, but it has been adapted to suit our own particular socio-cultural niche. One of the most important aspects of the whole thing is contained in the name, in the notion of a Community Magistrate, which means community involvement. It has been suggested that it means a cheapening of the judicial process. Let me suggest that it does the very opposite. It involves the community.’

Hon. Tony Ryall (Associate Minister of Justice), also arguing from local justice, reiterated many of the points previously made by the Minister and emphasized that all judicial JPs would not become Community Magistrates. He explained that the Community Magistrates scheme was being trialed in the Waikato/Bay of Plenty region because of the regional diversity of those four courts and because of the high calibre of the local judicial Justices. He said Community Magistrates would have the power to sit other than in a District Court building – ‘perhaps on a marae . . . or meet in community halls like Kawerau that do not normally have direct access to the judicial system’. The pilot scheme was to be tested for 18 months, and continued after that when some time had been spent analysing the outcome of the pilot. What was important, he said, was to appoint competent people from diverse backgrounds from local communities and have them going out into the community. He believed the community magistrate system would ‘bring justice closer to the community and allow more people to participate in the process.’

New Zealand and overseas legal experts

A key question in any study of summary court proceedings is whether lay senses of justice and legality differ from those of the professionals. Bankowski suggests the justification for lay magistrates is that they “reproduce a community sense of justice, and studies of their operation in England and Scotland have not produced any evidence that their decisions in any sense subvert lawyers’ notions of legality”. Rather, he suggests, where the law requires interpretation and discretion they bring to bear their particular experience of society in the application of the law.

On a similar theme a British academic, David Faulkner, observed that arguments in favour of lay justice were usually linked with arguments for local justice, the claim being that local lay magistrates would have a better understanding of their local communities, the nature and effects of the crime and the social circumstances and cultural background of those that commit it, than would professional judges. A similar situation had existed in the United Kingdom where the criminal courts had borne the brunt of continuous criticism since the early 1980s, for both inefficiency and injustice. Faulkner said criticisms of inefficiency had been concerned most with cost and delay: those of injustice had ranged from wrongful convictions, through racial prejudice, to inconsistency or severity in sentencing. Other criticisms concerned the competence of lay magistrates to try complicated cases; the number and role of Stipendiary Magistrates [now District Judges]; the social composition of the judiciary . . . and their method of appointment.

In New Zealand local justice became the issue when a senior Stipendiary Magistrate criticized the Hamilton District Law Society’s opposition to JPs on the bench. He told the 1977 Royal Commission that the Society had not referred any of the six cases (in which it alleged judicial JPs acted negligently or incorrectly) to him as Senior Magistrate, and added that ‘the complaints did not all come from one side.’ He outlined the events that had lead to much of the criticism, and explained why local justice was too time-consuming to be coped with by Stipendiary Magistrates. Local judicial JPs offered a personal service to the defendant, rather than an impersonal “computerized” alternative that would likely occur if they were dispensed with on the bench. They offered, in his view, the only immediate solution to the judicial problems of the area: ‘I readily agree that our Justices of the Peace are untrained and many lack the necessary expertise, but the Minister, and the Department by the issue of its latest handbook, have made it clear that they are here to stay.’

Generally in this study local justice has been advanced as an argument for lay magistracy in a nation’s judicial system, and it was therefore interesting to see its negative possibilities outlined. Hon. Phil Goff spoke against the introduction of Community Magistrates in the Waikato and Bay of Plenty court districts:

We looked at JPs, the existing lay people working in the judicial system, and found that most of them reflected the Minister. They were middle class, they were middle-aged – and maybe that is being a bit kind to the Minister – they were pakeha, but there were not very many women and there were certainly not very many people representing other ethnic groups within the community. So it

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307 Faulkner, p.331.
308 Faulkner, p. 309.
309 B. Mooney SM.
310 Waikato Magistrates’ Group RCC submission 88A, p. 5.
is a misnomer again to call this the Community Magistrates Bill when clearly the people are not going to reflect the community.\textsuperscript{311}

**Fresh or open minds versus case-hardened minds**

**Parliamentary debate and political views**

The argument from open-mindedness was seldom advanced explicitly in New Zealand. One occasion occurred during debate on the 1957 Justices of the Peace Act when Roy Jack (Wanganui) stressed the socially-grounded advantage of lay magistrates when he said ‘they [JPs] themselves bring to bear their experience as men of the world, their probity, and their good sense and knowledge as senior members of the community . . . in seeing that justice is done.’\textsuperscript{312}

In 2004 Nandor Tanczos (Green Party justice spokesman) supported the use of lay magistrates in the event a Community Court as recommended by the New Zealand Law Commission became a reality:

For a start I imagine we would want to be looking for people trained in mediation/facilitation rather than simply legal training, and would be looking for the Community Court to take a mediation approach at least for civil cases. For criminal cases that is (sic) better handled by restorative justice processes and we expect to see greater emphasis for that. We would probably not object to suitable trained JPs, given what seems to be an intention by [government] to improve selection and training of JPs. However we are aware that JP positions have at times been used for political patronage reasons so while many JPs do excellent work there needs to be strong quality control and oversight/accountability especially where decision-making powers are significant. (Appendix C)

From the standpoint of this thesis research it is interesting to note that this remark by the Green Party is one of the rare open admissions by a Member of Parliament that Justices of the Peace have been appointed for the purpose of political patronage.

**Symbolic legitimacy versus effectiveness and efficiency**

The term ‘symbolic legitimacy’ (as used by Morgan and Russell in their study) conveys the notion that lay magistrates are of limited value as competent adjudicators and existed simply to give an impression to the public that citizens were indeed being judged by their peers. The reality, it is suggested, is that the lay magistrates did not have the knowledge and wisdom of qualified lawyers to determine the guilt or innocence of a defendant appearing in the lower courts.

\textsuperscript{311} *Hansard*, 1998, v.567, p.10109
\textsuperscript{312} *Hansard*, 1957 v.314, p.672
**Submissions to 1977 Royal Commission on the Courts**

So it is apposite that when asked to give an opinion on the competency and effectiveness of judicial JPs before whom he had appeared, an experienced Auckland barrister said it depended on who the judicial Justices were. Some, he submitted, were extremely zealous and made a very good attempt to keep up-to-date with the law. Others, he suggested, were just wasting time and were just recorders. He indicated the standard of some judicial JPs (particularly in the country areas) was not high, but that 75 per cent of the Auckland court-sitting Justices did an excellent job and that the situation had improved in the past 10 years. He told the Commission the standard of JPs in the Auckland traffic court was high, they [JPs] presided continuously, and that without them the court system would have collapsed. In the case of preliminary hearings there was a great improvement in the standard of care and attention that Justices had taken, and that in the previous 10 years Auckland court-sitting JPs had dealt with 900,000 cases, from which there were just 20 appeals – only half of which had been successful.

The New Zealand Federation of University Women supported lay magistracy but argued that symbolic legitimacy prevailed on matters of age, gender, training and appointment. The NZFUW recommended the need for training of JPs, and that Justices should retire at the age of 65. It also claimed that the JPs appointed, after being vetted by the police, tended to be stereotypes of ‘the establishment’ or the ‘affluent middle class’. When told that approximately seven per cent of all JPs who presided in court were women, the Federation declared that ‘tokenism’ was not acceptable and proposed that if women were to be appointed to any public office they should have the proper qualification and experience. Otherwise, the Federation suggested, they would be brought into disrepute in the areas in which they served, and this would apply to Justices of the Peace. The perceived symbolic legitimacy of women, and of university training, appeared to be the Federation’s main concern.

**Parliamentary debate and political views**

Parliamentarians sometimes had more pragmatic concerns in mind, such as having lay magistrates available to relieve pressure on Judges by handling weekend court sittings and thus saving money for the taxpayer. During debate on the 1957 Justices of the Peace Bill Roy Jack (National, Wanganui) told the House that ‘having JPs available, where a magistrate or a judge of the Supreme Court is not available, is of great assistance in the rapid administration of justice and the avoidance of needless delays.’

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313 Kevin Ryan RCC submission, p.T295, par.4.
314 Sylvia Cartwright [later Dame Sylvia], RCC submission No.85, p.T760.
315 In this context the term ‘symbolic’ is taken as synonymous of ‘token’, ‘nominal’ or ‘perfunctory’.
And in 1998 the Minister of Justice, Hon. Doug Graham, advanced a similar argument when introducing the Community Magistrates Bill – his modified version of lay magistracy:

The Bill introduces a new judicial officer into the District Court – the Community Magistrate . . . This proposal will assist in dealing with the ever-increasing workload of the District Court. The workload of that court has increased dramatically in terms of volume, complexity, and range over the last decade. One of the strengths of this proposal is that it provides a flexible resource that can be focused on quickly dispatching the large volume of minor criminal matters at the lower end of that court. This will mean that the District Court judges will be able to concentrate on and process the serious criminal work in that court more quickly. This proposal, once fully implemented, will mean the District Court judges will have 70,000 fewer undefended cases to deal with. In total this represents the work of eight to nine judges.316

Peter Gresham (National, Waitotara), argued from effectiveness and efficiency during debate on the Community Magistrates Bill in 1998 when he said the scheme ‘would relieve the pressure on the District Court Judges by reducing delays and backlogs of cases . . . and lift from the District Court Judges the burden of the relatively minor cases they are dealing with, so freeing their time to enable them to deal with more important court matters.’

Matt Robson (Alliance) concurred: ‘The Bill will take 70,000 cases out of the present District Court system and allow for a speedier resolution of those cases . . . it is also allowing those cases that are in the minor category to be dealt with in an atmosphere that is not as heavy or as forbidding as the District Court can be.’

In another submission to the Commission the Waikato Magistrates’ Group317 went even further – recommending the use of experienced Registrars on the bench instead of lay magistrates. It suggested that an officer of 30 to 35 years or age who had acted as Court Registrar for seven years would be ‘better fitted for magisterial office than any layman.’ The group suggested that a Registrar, dealing with the public all the time, thereby became experienced in arguing and discussing issues with solicitors and barristers. Mr Brian Mooney SM, speaking for the group, said ‘I think they are far better qualified and experienced than so many worthy gentlemen that help us, who know nothing other than a farming experience, and we have them. They have no experience of county councils or anything like that at all.’

One of the main arguments against lay magistracy in New Zealand arose from the political patronage element of the selection and appointment process. It had long been charged that politicians of both major parties nominated chosen party officials and loyal electorate stalwarts as a reward for political service. This was perceived as damaging to the public

317 Waikato Magistrates’ Group submission to the RCC, No.88a.
image of JPs since it raised the possibility of sub-standard appointees. Nevertheless, frequent representations to successive Ministers to dispense with the political appointment system in favour of a non-partisan appointment based on need and merit had been rejected out of hand.

During debate on the Justices of the Peace Bill in 1957 Mabel Howard (Sydenham), arguing from symbolic legitimacy, launched an attack on Justices’ associations, which she termed “mutual admiration societies” – to which Hon. Ronald Algie quipped that Justices of the Peace were known as “the great unpaid”. Miss Howard questioned why the same JPs always appeared to sit in the Christchurch court, and whether they were given preferential treatment in selection . . . ‘Who nominates them? How are people selected to preside on the bench? It seems to me only one or two people are ever asked [to sit] – but recently a Justice was seen on the bench within a few weeks of his appointment.’

Labour members accused their National colleagues of “blatant political patronage” in appointing JPs, and alleged that public servants had been precluded from appointment. Government members challenged the assertion and claimed that public servants – ‘one in five of the workforce’ according to one MP – were not barred from appointment but simply were not recommended because of a possible conflict of interest if they found themselves sitting on the bench in cases involving municipalities or government departments.

While several politicians raised questions about appointees’ age and competence, none expressed outright opposition in principle to lay magistracy as an integral part of the justice system. The Minister appeared to be satisfied with clipping the wings of judicial JPs and appeared unconcerned at charges that politicians had gained complete control of the JP appointment process.

It was not until 1998 when the Community Magistrates’ Bill was being debated that the issue of lay magistracy again featured in parliamentary debate, and Hon. Phil Goff drew the House’s attention to a New Zealand Law Commission proposal that judicial JPs should be replaced on the bench with professional Community Justice Officers. He said it raised the basic question of effectiveness, and whether the government should be proceeding in the direction of having a lay magistracy without sufficient research being undertaken on the

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318 Trade union officials had often been appointed as JPs on the pretext that they would be accessible to large workforces at their place of employment. This same position prevails today with the appointment of hospital and university staff members as JPs.
320 Community Justice Officers (CJOs) were required to have a law degree and several years of professional law experience prior to applying for a judicial position.
subject . . . ‘What we are doing now is vastly expanding the role of a lay magistracy when we have had no inquiry at all into whether the current lay magistracy is effective?’

Goff told the House that during a two-week study of lay magistrates in the United Kingdom a Home Office official had said “you would have to be nuts to start off by adopting a policy of this type. We have lay magistrates as a matter of history, but if it was a matter of choice we would never have gone down that route.” He added that the United Kingdom officials he spoke to presented a bleak view of the efficiency of lay magistrates, claiming that ‘Stipendiary Magistrates – that is, the professionals – dispose of work three to five times faster than lay magistrates . . . That is the advice the Minister is getting from his own departments, the Ministry of Justice and the Department for Courts. His decision to proceed with this legislation flies in the face of that considered advice.’

Since becoming the Labour Party’s justice spokesman Goff had expressed consistent opposition to lay magistracy, in most instances echoing the views of the law societies in supporting a fully professional magistracy in the lower courts. Although he chided the National Party for seeking ‘ineffective justice’ and ‘justice on the cheap’ with judicial JPs and later with Community Magistrates, his opposition was based largely on anecdotal rather than empirical evidence. Neither did he acknowledge the large caseloads then being efficiently processed by 40 judicial JPs in the Auckland courts.

Another politician who supported the law society and Law Commission position in respect of lay magistracy was Stephen Franks (ACT justice spokesman). When asked in 2005 whether his party favoured lay magistrates or professional judges in a new Community Court recommended by the Law Commission, Franks said ‘the party has not considered it, but I have no doubt personally that courts presided over by non legally-trained people are more likely to deliver idiosyncratic or kangaroo justice, or to be under the de facto control of the staff, or the Police, or some other authority figure handy. This is not to say that JPs can’t perform superbly. Some do. But the quality is more variable’.

**New Zealand and district law society views**

In its submission to the 1977 Royal Commission generally opposing lay magistracy the Hamilton District Law Society cited judicial deficiencies in six cases in Waikato courts. The Society claimed JPs appeared as being ‘too willing to take their instructions from the prosecutor, unjustly doubtful of any defence, and therefore as ensuring the virtual

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321 While there is no known New Zealand study of the effectiveness [throughput of cases] of DCJs vis-à-vis judicial JPs, B. Hong and R. Hungerford their ‘Evaluation of the Community Magistrates Pilot’ report prepared in 2000 for the Department for Courts concludes that ‘[a] Community Magistrate generally took longer to hear cases than Judges had previously.’

322 Stephen Franks was a senior partner in a prominent Wellington law firm before entering politics.
inevitability of a committal for trial.’ The inference was that the judicial JPs did not match the Stipendiary Magistrates in professional training, consequently could not make their own judgments, and therefore referred all cases to the higher courts. The Society further suggested that Hamilton judicial JPs should only deal with undefended traffic cases and minor prosecutions – ‘as do Justices in the Rotorua area.’ It further suggested that all matters relating to heavy traffic, local body prosecutions and all defended hearings, should remain in the hands of Stipendiary Magistrates. The implication was that if the lay magistracy were to be retained for some ‘symbolic legitimacy’ value, its effective judicial jurisdiction should be severely curtailed.

New Zealand Law Commission

In 1998 the president of the New Zealand Law Commission made the following cautionary observation about the work of judicial JPs: ‘It is undesirable that a judgment of their [judicial JPs] performance should be attempted without empirical evidence. It is however still less desirable to found legislative policy on the assumptions of quality of performance which may be unjustified.’

The Law Commission had full knowledge of the 1978 recommendations of the Royal Commission on the Courts that the judicial role of Justices of the Peace should be retained. Then, 20 years later, it claimed there was no empirical evidence upon which to support a judgment on the performance of judicial JPs. Yet without this evidence the Law Commission was prepared to recommend that a new form of professional justice officer (rather than judicial JPs) should preside in a proposed new Community Court.

The question must be asked why the Commission did not, in the intervening 20 years, procure the necessary empirical evidence upon which to base a sound decision on this matter? Perhaps even more surprising is the fact that one of its Commissioners (who happens to be a JP) was also a member of the 1977 Royal Commission that supported retention of judicial JPs. The implication of both these decisions on the future of lay magistracy is too important for these questions to remain unanswered.

Cost of lay magistracy problematical

Estimating the cost of lay magistracy in New Zealand would obviously depend on which of several possible models was adopted. For example, a dedicated Magistrates Court presided over exclusively by judicial JPs and/or Community Magistrates would certainly become more expensive to operate if legally qualified Justices’ Clerks were deemed necessary.

123 HDLS submission to 1977 RCC, No.107.
Another cost variable would result if a new Community Court were to operate from premises outside established District Court buildings, and so on. Despite such unknown factors, various ‘approximations’ on the number of additional District Court Judges needed to replace and absorb the work of the current 450 part-time judicial JPs and CMs have been advanced – ranging from 13 to more than 20.

Morgan and Russell concluded that a costing of lay magistracy in England and Wales with any degree accuracy was fraught with problems until firm court operation procedures were established. A similar situation exists in New Zealand, and therefore no attempt has been made to attempt such an exercise in this study. I submit such a future research exercise will be feasible if and when a durable lay magistracy formula is adopted in this country.

British research in 1998 claimed that “District Judges [Stipendiary Magistrates] execute the same work as about 30 justices [JPs] in the provinces and 23 in London”. On this basis (since JPs in England sit as a panel of three and in New Zealand as a panel of two) at least two more District Court Judges would be required in Auckland to handle the cases currently being heard by the 45 judicial JPs sitting in the Auckland District Courts. On this basis up to 20 new District Court Judges could be required to replace the 450 judicial JPs currently presiding throughout New Zealand.

Submissions to 1977 Royal Commission on the Courts

During the Royal Commission hearings in 1977 several estimates were put forward about the number of additional Stipendiary Magistrates that would be required in the event judicial JPs were replaced in the courts. The Hamilton District Law Society estimated 13 new Magistrates would be needed if its proposal to cashier JPs were adopted. The RFNZJA in 1976 had put the figure in excess of 15 – a figure agreed at the time by the New Zealand Law Society.

Following the Royal Commission hearings occasional estimates had been produced by the RFNZJA and other interested parties, and in 1998 when Hon. Doug Graham introduced the new Community Magistrates scheme (in the Waikato and Bay of Plenty court districts) he said it would ‘alleviate the need to appoint a further eight or nine District Court Judges.’

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324 Justice David Baragwanath (president of the NZLC) letter to Hon. Phil Goff, 1998.
325 While no detailed studies have been commissioned, various ‘approximations’ have been advanced. In 1976 the RFNZJA estimated that 15 additional Stipendiary Magistrates would be needed to replace the judicial JPs on the bench at that time. The following year the Hamilton District Law Society put the figure at 13. Later, in 1998, Hon. Doug Graham told Parliament that introduction of the Community Magistrates scheme in the Waikato/Bay of Plenty area alone would alleviate the need to appoint a further eight District Court judges in the area.
Parliamentary debate and political views

During debate on the 1957 Justices of the Peace Bill, Roy Jack (National, Wanganui), arguing from cost, supported the use of judicial JPs but opposed any suggestion that they be paid for their services:

I now come to my final point in respect to the Commission of the Peace generally. A suggestion has been made that Justices of the Peace should be paid for their work, either at the rate of so much a job or annually. I am very glad that the Bill contains no provision for payment. The area of voluntary service in the community is contracting and that, I think, is a regrettable trend. I am going to make a brief comparison between the service of Justices of the Peace and . . . jury duty. Nowadays there is a payment for jury service; notwithstanding which, it is very fortunate I think that there is no payment for work as a Justice of the Peace. The distinction is that jury service is compulsory and, if there were no payment to jurors, considerable hardship would result. In the circumstances, therefore the payment [for jury service] is fully warranted.327

The Member seemed comfortable justifying the payment of parliamentarians, while at the same time supporting the Municipal Association’s view that members of most local bodies should not be remunerated for their part-time services, which he implied was a similar situation to that of JPs.

By 1998, when the Community Magistrates Bill was introduced in parliament, attitudes toward remuneration had changed and debate was reopened on the cost and effectiveness of a lay magistracy versus a professional bench. Although the Minister’s stated reason for introducing the legislation embraced arguments from democratic local justice, political debate at the time suggested it was to some extent also driven by the cost argument. As lay Community Magistrates took over the hearing and sentencing of the less serious undefended summary offences, the professional Judges could be more effectively used presiding over more serious cases. The move was seen by promoters of the Bill as being more cost-effective than extending the number of District Court Judges as the cost of a CM would be only marginally more expensive than using two Justices of the Peace, and considerably less expensive than appointing an additional DCJ.

Community Magistrates were to receive a modest per diem sitting allowance – unlike judicial JPs, who were simply reimbursed for out-of-pocket meal and travel expenses. Had the CM pilot scheme met the Minister’s expectations it was widely anticipated that the scheme would be extended to replace judicial JPs in courts where they had traditionally presided.

The Minister (Hon. Douglas Graham), conscious of Opposition claims that the government was seeking “justice on the cheap”, clarified his position on remuneration for the lay
magistracy. He said he was glad the Bill contained no provision for payment (of Justices of the Peace), and regretted the contracting of people who were prepared to undertake voluntary unpaid work in the community. He added there was no compulsion to become a Justice of the Peace, so the comparison of judicial JPs with jurors (who received payment) was invalid because jury duty was compulsory and genuine hardship could result if jurors were not compensated.

The Minister pointed out that in England and Wales ‘hundreds of thousands’ of JPs dealt with court cases without payment, and simply received travel and lunch expenses as they did in New Zealand. He said he was fully aware of a few JPs and Federation officials who suggested the system may change, but considered that most [judicial JPs] did not expect to get paid for their services, and ‘I applaud that, and value it, and congratulate them on their civic-mindedness’. He supported payment for Community Magistrates, on the other hand, because they had greater jurisdiction and responsibility than judicial JPs and ought to be [financially] recognized. The Minister then assured the House he was quite confident that there would be many people writing to him with a view to becoming a Community Magistrate, and that the question of how much money they would receive would not be relevant. He said that cost savings was a pertinent issue and that the lay Community Magistrates ‘will assist in ensuring District Court judges deal with work that is appropriate to their skills.’

Opponents of lay magistracy have also argued from cost. Hon Phil Goff, who initially argued against the Community Magistrates Bill on the basis of efficiency, later admitted he had been cynical about the government’s motivation in passage of the legislation. He told the House that evidence received by the select committee had been strongly against the Bill proceeding on the grounds that it did not address the problem it was intended to address – namely the problem of case overload in the District Court. He contended that it was uncertain whether [Community] Magistrates would be ‘cost-effective’, as no information had been given to support the proposition that lay magistrates would be cost-effective and efficient. ‘That work has never been done,’ he added.

Towards the end of the debate Goff returned to the issues of cost and efficiency of lay magistrates compared with professional judges. He said the select committee was told that no evaluation had ever been done to determine whether the existing lay magistracy was effective and warned that the lay magistracy, rather than being a cheaper form of justice, ran the risk of costing more than District Court judges. He further contended that the police

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327 *Hansard*, 1957 v.314, p.672
were opposed to the [Community Magistrates] proposal, and that its introduction would be seen as giving New Zealand a second-class form of justice. He told the House there was no evidence that the Community Magistrates proposal would produce a more cost-effective form of justice, that Treasury believed it did not warrant the risks involved, and that the Chief District Court Judge considered it to be a ‘second best proposal.’ The ideal solution, he said, was to have a properly [law] qualified magistracy. He reiterated that the country needed a cost-effective and efficient form of justice with [the cases] processed by people with the qualifications and training to do the job efficiently.

The Labour Party, he said, was against the Bill.

Returning to the cost argument in respect of remuneration of Community Magistrates Goff said ‘In terms of the lay magistracy there is another implication. The Minister considers that if one is going to employ people as lay magistrates it can be done cheaply, and the Minister has given an indication to the committee that the payment would be $100 a day. That compares say, with another group of individuals who serve on the Disputes Tribunal as referees. They get $310 a day so what we are looking for here is cheap justice from lay magistrates, and frankly, top-stream people will not sit on the bench for $100 a day.’

So using these examples of judicial remuneration Goff appears to be suggesting – on the basis of a five-day 40-hour week – that in a new two-tier District Court judicial JPs would continue to receive their present basic allowance (travel and meal costs) of around $13,000 a year; Community Magistrates approximately $26,000; and the proposed professional Community Justice Officers about $80,000 – in comparison with a salary of $235,000 received by District Court Judges in 2009. By this yardstick, and considering the salary of a District Court Judge, the lay magistracy is providing New Zealanders with “justice on the cheap” as Goff suggests.

Also arguing from cost during the Community Magistrates Bill debate, Dianne Yates (NZ Labour) said ‘JPs are suspicious of this Bill, and so is Treasury, because it is a case of the Minister of Justice cost cutting . . . The Minister is trying to get legislation through that obviously is not wanted by the police, the [New Zealand] Law Society, the Law Commission, or the JPs themselves. Treasury has said it will cost half a million dollars to patch up the inefficiencies . . . Even the Chief District Court Judge said it is second-best; it is a step on the way to decent, qualified paid Magistrates . . . A report to the Minister of Justice and the Minister for Courts states “savings can only be made if Magistrates are paid at a nominal rate and are relatively efficient. Since the efficiency of the Community
Magistrates is unknown, if [they] turn out to be inefficient we run a substantial risk that the option will cost more than District Court judges.”

New Zealand and district law society views

The New Zealand Law Society, during the 1977 Royal Commission hearings and after studying RFNZJA submissions outlining the successful use made of JPs on the bench in Auckland courts, resiled from its original competence argument against lay magistrates. The Society decided to support the retention of judicial JPs on grounds of cost.

The Society noted the RFNZJA claim that if judicial JPs were dispensed with [as at 1976] a further 15 stipendiary magistrates would be needed to replace them. The NZLS told the Commission that ‘if this is correct, from an economic point of view at least, there is much to justify the present employment of Justices of the Peace. Consequently, the Society accepts that, as far as the present employment of Justices is concerned, the clock cannot be turned back.”

Academic texts, research papers and journals

In 1996 the New Zealand Law Society, in response to a Ministry of Justice discussion document canvassing possible extension of the lay magistracy, argued that introducing new legally-trained Magistrates (who would sit alone) would be more efficient and less costly than the alternative of having two non-legally qualified Magistrates [JPs] sitting with a legal adviser’ – an allusion to the system operating throughout England and Wales. And one of the most surprising aspects of the English criminal system, according to Padfield, was the ‘vast role given to lay magistrates [who decided on] questions of both guilt and sentence in about 98 per cent of all criminal prosecutions.” She maintained that lay magistrates’ justice is cheap and relatively fast, and that following the recommendations of the Home Affairs Select Committee on Judicial Appointments (1996) the revised procedures for appointing JPs should result in a more standardized approach to the appointment of magistrates.

New Zealand and overseas legal experts

The RFNZJA disputed a suggestion by the New Zealand Law Society to the 1977 Royal Commission that judicial JPs could be replaced cost-effectively by modestly paid professional court staff. The Waikato Magistrates Group had already told the Commission

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331 NZLS submission to RCC, p.96.
332 ‘Magistrates and Other Options for Relieving Work in the District Court’, Ministry of Justice publication, 1996.
333 This proposal assumed the introduction of a new level of judicial officer and the establishment of a new lower-tier court. The concept is further considered in Chapter 7.
that in some centres (Hamilton, for example) a crisis point had been reached where essential clerical work simply could not be covered. Six experienced graded officers had resigned during one year because of intolerable working conditions, and had reported dissatisfaction with job opportunities and the level of remuneration. The Commission was told that to expect young (in many cases teenage) Registrars to largely replace existing judicial JPs on the bench as suggested by the New Zealand Law Society in earlier submissions, and later supported by the Hamilton District Law Society, ‘appeared ludicrous.’

Judicial JPs’ jurisdiction questioned

In 1988 the Public Affairs Committee of the Auckland District Law Society made an attempt to have the jurisdiction of court-sitting JPs limited to non-custodial offences. The specific case on which the Committee’s opinion relied is outlined in some detail here because its report raised a number of points on the competence argument concerning [the jurisdiction of judicial] JPs sitting on more serious cases.

In this instance it transpired that a woman – alleged to be a key prosecution witness in a case involving a knifepoint robbery at a bank – was imprisoned on three occasions by order of judicial JPs presiding at the preliminary hearing of depositions when she declined to give evidence. The woman, who had feared retribution if she gave evidence, served a total of three weeks in prison. As a consequence the case failed through lack of evidence and the defendant was discharged. The ADLS report\(^\text{335}\) stated that while the Justices arguably had the power to take the action and impose the penalty they did, in view of the significance of their action – that is to say, imposing a prison term – they should have remanded the case to be heard by a District Court Judge. The committee, primarily concerned about the competence of judicial JPs in such a situation as this, said:

> Imprisonment is the most extreme sanction available in New Zealand. Its imposition is usually the responsibility of High Court or District Court Judges…. Justices of the Peace needing no legal qualification and having restricted judicial experience have been accorded few powers in this respect. The recent case highlights anomalies giving rise to risk of great injustice . . . [namely] whether it is appropriate for Justices of the Peace to be entrusted with the power to imprison in such [a] circumstance and, if so, whether any additional safeguards are needed.

The ADLS report added: ‘What is significant about this case is that “competence” is being raised about an extreme exercise of powers in such a manner as to suggest that it is not an issue for less extreme cases where rapid Magisterial and Judicial Review is likely. The

\(^{334}\) N. Padfield, Text and Materials on the Criminal Justice Process, Ch. 6.
\(^{335}\) ADLS Public Issues Committee Report, October 1989.
witness is an “innocent” person going to prison, where there must be doubt imprisonment is ever appropriate.’

The report then expounded on other areas where judicial JPs could exercise the power to imprison defendants, as well as reluctant witnesses:

It is not the intention of this paper to detract from the important role that Justices of the Peace play in the community. In New Zealand today Justices of the Peace occupy positions of some responsibility in the criminal justice system, hearing a wide range of cases. They undergo training and require judicial experience within their jurisdiction. They bring maturity and their own experiences in the community to the Courtroom situation. It is presumably against that background that they have been given the power to imprison the recalcitrant witness. It can be argued that should Justices of the Peace not have that power, the efficient control of their hearings might be rendered nugatory.

And the report went on to cite other instances in which judicial JPs still retained the power to imprison offenders:

Justices of the Peace have other powers to imprison. For instance they may issue a warrant for arrest of an offender for breach of bail, they may issue a warrant for an offender who fails to appear, they may issue a warrant of commitment for a default of payment of a fine and may commit to prison for contempt of Court. The exercise of these powers, however, may be distinguished from the case in point. The instances when it will be exercised will usually mean that the defendant will appear before a Judge within 24 hours of his arrest. The power will most usually be exercised following an earlier court hearing. There is also a distinction in role as these powers all relate to dealing with a defendant rather than a witness… In a climate where imprisonment as sentence for a convicted criminal is increasingly being questioned, the time has come to review critically the powers of Justices of the Peace to imprison a witness. We are of the view that the decision to commit a reluctant person to prison requires the careful consideration of a fully qualified Judge.

The Committee report advocated that ‘the power of Justices of the Peace to imprison reluctant witnesses should be abolished, and that the law should require referral of all such cases to a District Court Judge for consideration with the judicial JPs exercising their power to adjourn if need be’.336

No legislative action resulted from this recommendation, and the power to imprison reluctant witnesses still remains within the jurisdiction of Justices of the Peace today.

**Royal Commission advocated retention of judicial JPs**

The most persuasive argument for retention of lay magistracy in New Zealand came from the 1977 Royal Commission on the Courts, which described in its 1978 Report how various statutes over the years had eroded the powers of lay magistrates – and in particular the

336 It is noted that the Public Issues Committee of the Auckland District Law Society is not authorized to speak on behalf of the Society. Its views are its own.
1957 Summary Proceedings Act that ‘revolutionized the law relating to the criminal jurisdiction of Justices of the Peace’.

The Report noted that before passage of the Act, except in a few cases where jurisdiction was specifically vested in a single Justice, two Justices of the Peace had power to try every summary offence unless it was specifically provided otherwise by statute; and in a few instances they had the jurisdiction to hear indictable charges. It also pointed out that Justices no longer had the power to pass sentences of borstal training and periodic detention, although preliminary hearing of an indictable charge to be tried by the Supreme [now High] Court was still within their jurisdiction, which they frequently exercised.

The Commission’s recommendations were far-reaching. The report advocated that Magistrates’ Courts be abolished and replaced with District Courts; that present Magistrates should be designated District Court Judges and a Chief District Court Judge be appointed; that the civil jurisdiction of the District Court be extended from fines of $3000 to $10,000, and that some District Court Judges be warranted to preside over some criminal trials.

The Royal Commission’s recommendations concerning Justices of the Peace were:

- A Justices’ appointments committee should be established. It should comprise the senior District Court Judge for the area covered by the Justices of the Peace Association, the senior registrar of the District Court for the area, and the registrar of the Justices of the Peace Association concerned. It should make recommendations to the Minister of Justice for appointments to the commission of the peace.
- Nominees for appointment as Justices of the Peace should be required to indicate willingness to undertake all duties attached to the office, and to being listed under ‘Justices of the Peace’ in the yellow pages of the telephone directory.
- The Justices’ appointments committee should be authorized to remove the name of a Justice from the list of those available for court work.
- Special efforts should be made to ensure more effective community representation among Justices of the Peace.
- The Chief District Court Judge, as a member of the Judicial Commission, should investigate the utilization of lay Justices as in Ontario.
- Justices of the Peace should be authorized to exercise jurisdiction in a division of the District Courts in respect of minor offences; they should continue to exercise jurisdiction in remand and bail applications as at present and also preside over preliminary hearings of indictable offences. The extent to which that jurisdiction is exercised should be determined by the senior District Court Judge in the area . . . The extent to which an individual Justice may exercise the jurisdiction conferred on Justices in the area should be determined by the local assignment judge.
- There should be a simple procedure whereby appropriate cases, either on the application of the parties or on the motion of the presiding justices, may be referred for hearing by a District Court judge.

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• Responsibility for determining whether the name of any Justice of the Peace should be approved for court duties should rest with the senior District Court judge of the court.

• Matters dealt with by Justices should be readily reviewable by way of rehearing by a District Court judge.

• A supplemental list of Justices of the Peace should be created similar to the United Kingdom provisions. All future appointees to the commission of the peace should move from the active list to the supplemental list on reaching the age of 65 years, with provision for retention on the active list until age 70, subject to an annual review by the Justices’ appointments committee. Existing Justices should move to the supplemental list on attaining the age of 70 years, or at any time after reaching 65 years if they so desire.

• Allowances for Justices of the Peace performing judicial duties should be reviewed to provide for an adequate daily allowance, with transport costs where appropriate, together with special payment for reimbursement of any loss of wages.

• Justices of the Peace should be selected as official visitors [Visiting Justices] by the Justices’ appointments committees to receive complaints from prisoners. \(^338\)

**Summary of lay magistracy argument**

The most frequently voiced arguments for retention of the lay magistracy were on the basis of ‘participatory democracy’, ‘local justice’, and ‘low cost’. Opposition to continuing or extending lay magistracy was generally argued on the basis of ‘consistency and the rule of law’, and ‘effectiveness and efficiency’.

The strongest support for lay magistracy emerged from submissions to the 1977 Royal Commission on the Courts and the Commission’s subsequent report\(^339\) published the following year. Analysis of submissions to the Commission indicates the greatest support for lay magistracy came from the larger metropolitan and urban areas where judicial JPs were more active and visible in the District Courts. The fact that judicial JPs in these centres received more mentoring support and access to training sessions also may have been a contributing factor. Conversely, much of the anti-judicial JP sentiment emerged from the provincial regions where court caseloads traditionally were lower and where the training and recruitment of suitably qualified judicial JPs was problematic.

During the Commission hearings a significant number of Judges and Stipendiary Magistrates urged retention (and in some cases extension) of judicial JP jurisdiction. Strong support also came from one president of the Auckland District Law Society, and qualified support (arguing pragmatically from cost) from the New Zealand Law Society and the New Zealand Federation of University Women.

Although the NZLS and district law societies argued generally in support of a professional bench some submitters – arguing from cost effectiveness and ‘convenience’ – modified


\(^339\) The 1978 Report of the Royal Commission on the Court (referred to as the ‘Beattie Report’).
their initial opposition to lay magistrates by recommending the establishment of a new lower-tier court as the exclusive domain of legally trained lay magistrates.\textsuperscript{340}

In parliamentary debate politicians from both sides of the House concurred that judicial JPs relieved Stipendiary Magistrates from mundane tasks so they could devote their skills to more important cases. This argument was also advanced in most instances by New Zealand professional judges and overseas academics.

The local justice argument was strongly endorsed during parliamentary debate on the Community Magistrates scheme proposed for districts with large Maori populations. The idea was that lay magistrates be specifically selected on the basis of local knowledge of the area and its population.

From an overseas perspective the importance of lay magistracy in \textit{England and Wales} was emphasized by three Lords Chancellor – Hailsham, Bingham and Auld – who were unequivocal in their view that lay magistracy, with its emphasis on participatory democratic local justice, was a vital and important element in the justice system that should be retained. Their certitude was reinforced by a recent major review commissioned by the Lord Chancellor’s Department, which concluded that ‘eliminating or greatly diminishing the role of lay magistrates would not be widely understood or supported.’\textsuperscript{341} Ironically, this review had been commissioned with a view to possibly increasing the number of professional judges and reducing use of lay magistrates.

Arguing for the lay magistracy from ‘cost’ is more equivocal in \textit{England and Wales} than in New Zealand. \textbf{British} judges, academics and legal historians have normally supported Justices of the Peace in the lower courts despite some disparity of opinion about the cost of lay magistracy \textit{vis-a-vis} stipendiary magistracy. In New Zealand, however, the voluntary unpaid judicial JPs and Community Magistrates – adjudicating singly or in pairs and without Justices’ Clerks – unequivocally provide less expensive justice to the community than their colleagues, the District Court Judges.

Most groups in New Zealand opposed to lay magistracy argued from ‘consistency and the rule of law’ or from ‘cost and efficiency’ as counter-arguments to ‘participatory democracy’ and ‘local justice’. The most strident opposition to lay magistrates, argued on this basis, was the Hamilton District Law Society’s submission to the Royal Commission. However the Society’s opposition was based anecdotally on just six complaints from its 281 members.\textsuperscript{342} The complainants had asserted instances of ‘procedural incompetence and

\textsuperscript{340} This issue is considered further in Chapter 7.  
\textsuperscript{342} The HDLS received only 13 responses on the JP issue from the 281 members polled.
error’ on the part of individual judicial JPs presiding in courts in their region. The Commission, however, was not sufficiently moved by the submission to resile from its recommendation that lay magistrates be retained in the justice system, and the Society eventually conceded that the status quo should remain as regards judicial JPs in the lower court system.

Some groups that argued against lay magistrates on the grounds of consistency and the rule of law (because they were not qualified lawyers) accepted that judicial JPs could fulfil a symbolic role in the lower court system provided their jurisdiction was restricted to minor cases where imprisonment was not a sentencing option – ironically a role that most judicial JPs currently perform. The intent of these submitters was obviously to maintain the status quo and not extend lay magistracy jurisdiction.

Political opposition to extension of lay magistracy resurfaced in 1998 when Hon. Phil Goff (Labour justice spokesman) opposed the Community Magistrates Bill, and again in 2005 he restated the Labour Party’s opposition to lay magistrates in response to a poll conducted for this thesis. In his reply he indicated support of the Law Commission’s view that courts ‘should be presided over by a judge who would be legally qualified.’ (Appendix C) Despite their party’s political rejection in principle of lay magistracy two recent Labour Associate Ministers of Justice343 have been pro-active in dealings with the JP Federation and have fostered a greater degree of cooperation between the Ministry of Justice and the RFNZJA than has existed for many years.

Arguments from cost and efficiency have been at variance and inconclusive. The Ministry of Justice, and later the Department for Courts, have been admonished during parliamentary debate for not commissioning cost-efficiency studies on the use of lay magistracy vis-à-vis professional Judges in the lower court. Informal estimates by the RFNZJA, politicians, and other interested parties on the number of extra District Court Judges required to replace judicial JPs have ranged from 13 in 1977 to 21 in 2003. When a visiting British JP (in the course of a New Zealand study tour) was told that “should the preliminary hearings system be modified or possibly eliminated, a further 21 Judges may need to be appointed, at considerable cost to the judicial system, and thereby requiring fewer judicial JPs to take an active role in bench work”.344

343 Hon. Rick Barker and Hon. Clayton Cosgrove.
In the past few years there has been no further published estimate on the above figures, nor any indication that the Ministry of Justice has undertaken a definitive study on this costing issue. Suggestions by Hon. Phil Goff and other politicians that use of judicial JPs on the bench is “justice on the cheap” has never been denied by proponents of lay magistracy who, in many instances, believe this voluntary non-payment factor constitutes the essence of participatory democratic justice.

For many years the legal profession in New Zealand has been divided in its attitude towards lay magistracy. While many individual lawyers have expressed support for judicial JPs, their district law societies have generally been opposed to judicial JPs presiding in District Courts. Some of the arguments have called for abolition of the lay magistracy in New Zealand, others have sought further curtailment of the jurisdiction of judicial JPs, and some have recommended the *status quo*.

Occasional criticism of judicial JPs by lawyers and law societies has appeared in New Zealand legal journals, conference speeches and newspaper articles. These commentators also have usually argued from competence and efficiency while advocates of lay magistracy have generally advanced arguments from authority and experience, democracy, and local justice.

The most notable recent opposition to judicial JPs has come from the New Zealand Law Society, the New Zealand Law Commission, and the government itself in:

- Passage of the Community Magistrates Act in 1998, which introduced a new category of lay magistrates [CMs] positioned in their jurisdiction between the judicial JPs and District Court Judges
- The 1996 recommendation by the New Zealand Law Society that judicial JPs be dispensed with and replaced by new professional community justice officers, who would gain experience to eventually become District Court Judges
- The 2004 Report of the New Zealand Law Commission that recommended lay judicial JPs be replaced with legally-qualified professional court officials to be known as Community Justice Officers – in effect a mirror-image of the 1996 New Zealand Law Society proposal.

To date the government has given no indication that it intends to implement either of the latter two recommendations, and the long-term future of the Community Magistrates scheme seems more assured than it did a few years ago. The fact that CMs were moved from ‘pilot scheme’ status to become a permanent feature of the court system is significant,

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345 Law Talk, Law News, and RFNZJA annual conferences.
346 The NZLC’s suggested title for the proposed new court official was Community Justice Officer.
as it validates my thesis that lay magistracy is effective and should be retained as a major component of the New Zealand judicial system. It is anticipated that this contention will be further corroborated by a comparison of the New Zealand lay magistracy with that of other jurisdictions in the following chapter.

347 Since research for this thesis was completed the Minister of Justice in 2007 confirmed that Community Magistrates would remain as a permanent feature of the judicial system, and in 2009 applications were called for eight new Community Magistrate positions in the Auckland court district.
CHAPTER 7

NEW ZEALAND AND OVERSEAS LAY MAGISTRACIES COMPARED

This chapter provides a brief comparison between New Zealand and overseas systems of lay magistracy in order to demonstrate that the contemporary New Zealand system can continue to operate effectively, especially if modifications are introduced to ensure such effectiveness. Such modification would require New Zealand government establishment of a non-partisan appointment system to ensure that the lay magistracy reflects the cultural and socio-economic diversity of New Zealand. Moreover, realistic administrative and financial support would need to be guaranteed to enable a continuing high level of training and development to be sustained. Only then can quality be assured. This chapter, therefore, compares and contrasts overseas and New Zealand systems in order to chart ways for possible future improvements of the lay magistracy.

Some form of lay magistracy exists today in countries with diverse constitutional and legal systems. The responsibilities of these lay magistrates differ greatly, as Bell\textsuperscript{348} illustrates in his recent study of lay magistracy in European countries. In 2000 Morgan and Russell also noted a bewildering variety of lay magistracy models used in lower courts around the world, but posited that ‘the heavy dependence on lay judges in England and Wales appears to be unique.’\textsuperscript{349}

Constitutional and legislative authority still provides for the appointment of Justices of the Peace and the use of lay magistrates in a number of New Zealand’s small Pacific island neighbours such as Fiji, Cook Islands, Niue and Vanuatu.\textsuperscript{350} However the role and jurisdiction varies greatly and sometimes bears little resemblance to the function of judicial JPs in New Zealand.\textsuperscript{351} This chapter will therefore focus on comparing the lay magistracy in New Zealand with that of England and Wales. Other overseas jurisdictions will be introduced when their lay judicial systems appear relevant in advancing the thesis. Of particular interest in this regard are recent developments in Scotland, Northern Ireland, and Canada.

\textsuperscript{348} J. Bell, Judiciaries within Europe: A Comparative Review, 2006.
\textsuperscript{349} Morgan and Russell, p.xiii.
\textsuperscript{350} J. Care, Civil Procedure and Courts of the South Pacific, Cavendish, London. 2004. p. 36
\textsuperscript{351} Care points out that in the Cook Islands the Judicature Act 1980-81 provides for Justices of the Peace to sit in the High Court either alone or as a bench of three, and in Nauru the Courts Act of 1972 provides for a district court consisting of a Resident Magistrate and no fewer than three lay magistrates appointed by the President after consultation with the Chief Justice. In Fiji, she says, JPs on occasion sit as assessors with a High Court Judge in major criminal cases.
Although New Zealand’s lay magistracy derives from English roots it exercises considerably less judicial authority than that of its British counterpart. Both systems have had their existence threatened over the years by successive governments, and both have survived in varying degrees as they have adapted to changing social and economic circumstances and political demands.

In England and Wales Justices of the Peace are volunteer members of the community who, after scrupulous selection and training, are appointed by the Crown to sit on the bench of the lower courts. They are generally not qualified in law, receive only a token daily payment for their work, and are required to attend a minimum number of court sessions per year. The 30,000 JPs in England and Wales – all of who are required to sit on the bench when called upon – handle 96 per cent of all criminal cases in the country.

In comparing New Zealand’s lay magistracy model with that of England and Wales and other overseas jurisdictions, the following elements are examined: Geographical and judicial jurisdiction; selection and appointment procedure; gender, ethnic and political balance; duties and responsibilities; term of appointment; initial and ongoing training; court procedure; legal assistance in court; and remuneration.

**Geographical and judicial jurisdiction**

The United Kingdom, unlike New Zealand, does not have a single unified judicial system. England and Wales have one system while Scotland and Northern Ireland have their own independent systems. Justices of the Peace have a different *modus operandi* in each of the three United Kingdom models, but the New Zealand lay magistracy today bears closest resemblance to the model introduced in Scotland in 2007.

Historically England’s lay magistrates had been authorized only to sit in courts located in the district in which the magistrates resided, but in 2005 national jurisdiction was introduced that authorized JPs to sit in any Magistrates Court. This greater flexibility was designed to allow reassignment quickly if JPs changed their address or requested to sit in a court close to their place of employment. Their New Zealand counterparts, while generally rostered to sit in their local courts, are authorized by their warrants to sit in any District Court in the country.

British lay magistrates have significantly greater judicial authority than their counterparts in New Zealand courts, and in 2002 Britain’s Lord Chancellor (Lord Falconer) further strengthened the power of lay magistrates in the criminal justice system by giving them authority to adjudicate and sentence over a wider range of charges. A further increase in JP authority came in 2005 when their sentencing powers were increased from six months to 12 months imprisonment and a maximum fine of £10,000, and a new sentencing framework
was introduced that encouraged full use of community sentences – with custodial sentences reserved for serious, dangerous and persistent offenders.352

Today British JPs (who also serve in the family and youth courts) can impose custody-plus penalties, which allow a sentence of less than 12 months imprisonment plus such possibilities as a curfew programme or unpaid work requirements [community service] for the defendant. In this context it is interesting to note that the British government has introduced the use of restorative justice,353 in many instances following the model already operating in New Zealand.

The New Zealand lower court system differs from that of England in that our District Court is presided over by District Court Judges, Community Magistrates354 and judicial Justices of the Peace – with each category of judge having a different level of jurisdictional authority. The Registrar of the court in consultation with the senior DCJ in effect acts as a “gatekeeper” and allocates cases (according to the seriousness of the charge) that are appropriate to the judicial powers and sentencing authority of the presiding lower court Judge.

New Zealand judicial JPs have restricted powers to impose a prison sentence,355 and where no maximum fine is prescribed in an enactment a Justice may in most cases impose a fine only up to $400.356 Judicial JPs do not have jurisdiction in family courts or in civil cases heard in the District Court. They do, however, have certain limited jurisdiction in some youth court appearances. When judicial JPs presiding over preliminary hearings of indictable offences decide there is a case to answer they remand the defendant to appear before a District Court Judge. Judicial JPs handle most minor criminal cases within their jurisdiction summarily, and they also preside over most of the minor and undefended traffic cases. New Zealand’s recently established lay Community Magistrates have sentencing authority at a level midway between the judicial JPs and the legally qualified professional District Court Judges. The Community Magistrates usually sit on the bench alone and judicial JPs sit as a pair.

In Australia the jurisdiction of Justices of the Peace differs from state to state. Problems faced by lay magistrates in Australia and Canada in adapting to the changing needs of their communities are exacerbated by the fact that they do not have national jurisdiction and operate solely under the legislation of the state or provincial governments by which they

354 Community Magistrates (introduced in 1990) have sentencing authority between that of judicial JPs and DCJs.
355 Judicial JPs have limited powers to imprison under a few statutes, as noted in Chapter 5. Today these powers are rarely exercised, and such a case would normally be adjourned for hearing before a DCJ.
356 Jansen, p.10.
were appointed. The geographical areas in which Australia’s JPs have jurisdiction are vast, and in two states “special needs courts” have been established to handle indigenous tribal customs as an adjunct to the adopted British judicial system.

One significant development is South Australia’s recent decision to reintroduce Justices of the Peace to the state’s court system, and limited bench roles for JPs occur in Western Australia (which introduced a Magistrates’ Court in 2005), Queensland and the Northern Territory. Judicial responsibilities of JPs in Victoria and New South Wales are limited to remand and bail hearings held outside normal court hours, and in 2006 Queensland’s JP situation remained problematic – with only 4,500 of the 70,000 Justices of the Peace in the state being members of a JP association.357 Neither the Australian Commonwealth Territory (ACT) nor the Northern Territory (NT) have demonstrated any marked changes in the way their JPs have functioned in recent years.

A state-by-state disparity in the significance of lay magistracy in Australia is illustrated by the figures prepared for Sir Thomas Skyrme’s study in 1986.358 This table showing JP total numbers and JP association membership (updated in 2004 for this study359) illustrates a situation similar to that existing in New Zealand in 2004 when the Ministry of Justice’s record of JPs was exposed as incomplete and out-of-date.360 Similarly, some Australian states revealed they did not maintain accurate records,361 and since these figures were provided in 2004 all 130,000 JPs in New South Wales – in an effort to clean up their register – have had their commissions revoked and been required to re-apply if they wished to have their commission reinstated.

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357 Federation officials in New Zealand had established that JPs who did not show an interest in joining a JP association were unlikely to be effective, since it was the associations that generally offered study facilities, operated training sessions and workshops, and kept members informed about changes in legislation and court procedures.
358 Skyrme, p.1156.
359 Figures rounded to the nearest 100 or 1,000. In some cases they have remained static for 18 years and therefore cannot be relied upon to any extent.
360 Reference to this is made in Chapter 1.
361 The Australian JP figures for 2004 in Table 8 were verified directly with state and territory authorities for this study.
Table 11. Number of JPs in Australian states and territories, 1986 and 2004

<table>
<thead>
<tr>
<th>State or Territory</th>
<th>Number of Justices</th>
<th>Members of JP Assns.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1986</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>130,000</td>
<td>6,000</td>
</tr>
<tr>
<td>Queensland</td>
<td>80,000</td>
<td>10,500</td>
</tr>
<tr>
<td>South Australia</td>
<td>8,000</td>
<td>4,300</td>
</tr>
<tr>
<td>Victoria</td>
<td>4,000</td>
<td>2,500</td>
</tr>
<tr>
<td>Western Australia</td>
<td>2,500</td>
<td>2,300</td>
</tr>
<tr>
<td>Tasmania</td>
<td>1,500</td>
<td>800</td>
</tr>
<tr>
<td>ACT</td>
<td>1,100</td>
<td>Nil</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>N/A</td>
<td>Nil</td>
</tr>
<tr>
<td>Total:</td>
<td>227,100</td>
<td>26,400</td>
</tr>
<tr>
<td><strong>2004</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>130,000 (est.)$^{362}$</td>
<td>4,500</td>
</tr>
<tr>
<td>Queensland</td>
<td>70,000</td>
<td>10,500</td>
</tr>
<tr>
<td>South Australia</td>
<td>9,600</td>
<td>4,300</td>
</tr>
<tr>
<td>Victoria</td>
<td>3,000</td>
<td>2,500</td>
</tr>
<tr>
<td>Western Australia</td>
<td>3,300</td>
<td>1,250</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2,800</td>
<td>800</td>
</tr>
<tr>
<td>ACT</td>
<td>800</td>
<td>220</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>216</td>
<td>N/A</td>
</tr>
<tr>
<td>Total:</td>
<td>219,716</td>
<td>24,070</td>
</tr>
</tbody>
</table>

South Africa and Japan, like several other countries and states noted in this study, have recently introduced or reintroduced lay magistracy. In South Africa legislation was passed$^{363}$ to open the way for lay assessors to be introduced in the judicial system to sit with Stipendiary Magistrates (the equivalent of District Court Judges in New Zealand) who had

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$^{362}$ The NSW Justices of the Peace Act 2002 cancelled all Commissions of the Peace authorized under the Justices of the Peace Act 1902 and required all JPs to reapply if they wished to continue in office under the new Act. They were given until 8 December 2006 to do so, and any JP who failed to reapply for reappointment ceased to be a Justice of the Peace from that date.

$^{363}$ Magistrates’ Court Amendment Act, 1998, Republic of South Africa.
previously sat alone. The administration of justice was seen by the Republic of South Africa government to have been alienated from the general population, and lay assessors were introduced in a move to make the justice system more acceptable to the public.

In Canada Justices of the Peace play a key role in the administration of justice in some provinces and a minor role in others. In some they are not required to have legal training, and their functions vary from province to province. Some JPs conduct routine trials, and others preside over bail hearings and conduct ministerial functions such as the issuing of search warrants.

Skyrme\textsuperscript{364} in the 1980s discerned an increasing appreciation of the potential role of the lay Justice of the Peace, and predicted that ‘in some parts of Canada, at least, changes . . . are likely to enhance rather than diminish the role of Justices.’ His assertion proved correct in the province of Ontario, where over 300 JPs have been assigned judicial responsibilities. Today both Provincial Court Judges and Justices of the Peace constitute the Ontario Court of Justice, one of Ontario’s two trial courts. Primarily, the two main areas of jurisdiction are criminal law and regulatory law (provincial offences). Justices of the Peace preside over most judicial bail and remand hearings in the province and the majority of remand courts. They also preside over other minor criminal hearings, receive informations, and issue summonses and search or arrest warrants.

**Selection and appointment procedures**

Prior to 1896 lay magistrates in England were appointed by the Lord Chancellor but later, in an effort to bring a greater political balance to the bench, a Liberal government passed this responsibility to Lords Lieutenant of the counties. A few years later the Justice of the Peace Act 1906 removed the property qualification for county magistrates, which allowed any person regardless of social position to be eligible for appointment as a Magistrate. The Lords Lieutenant today are assisted in this role by 94 such regional appointment committees whose members (appointed for six year-terms) advise the Lord Chancellor on the appointment of new magistrates selected on the basis of local need.

Once the need for new magistrates in an area is determined the committee seeks to recommend suitable applicants on the basis of the local population matrix – matching as closely as possible the ethnic, socio-economic, occupation, age and gender balance of the community. This move to de-gentrify the magistracy in Britain has been largely successful, and today citizens are encouraged to personally apply for appointment – an unthinkable

\textsuperscript{364} Skyrme, p. 929.
notion in earlier times when aspirants “waited for the nod” to join the ranks of a perceived elite “chosen few”.

In 1990 the Lord Chancellor (Lord Irvine) launched a month-long recruitment campaign ‘to raise the profile of the lay magistracy and to increase awareness that ordinary people can apply to be magistrates.’ The campaign was a success, with more than 15,000 inquiries received from members of the public, and the long-term future of the British lay magistracy seemed assured.

**Gender, ethnic and political balance**

In New Zealand the 1978 Royal Commission on the Courts and other bodies and individuals interested in court reform had advocated that the lay magistracy should be more representative of the community at large. They also recommended that when JPs were considered for appointment greater emphasis should be placed on age, gender, ethnicity, political persuasion, occupation and even religion.

These criteria remain firmly entrenched today in England and Wales and are emphasized to a lesser, but still significant, extent in New Zealand. Where the lay magistracy of England and Wales does differ significantly from that of New Zealand is in the method and term of appointment of JPs, and their ongoing training, regional representation, jurisdiction and court procedure. Before the present appointment system was introduced in England and Wales most Justices of the Peace were middle-aged, upper or middle-class Anglo-Saxon males – a profile much like that of New Zealand JPs before the 1990s.

The ethnic and cultural mix of candidates mentioned by Grove suggested that Britain’s lay magistrates were at least as representative of their communities, and possibly more so, than was the case in New Zealand: ‘South Cheshire bench occupations included train drivers and postal and hospital workers – not just doctors and nurses. One newly-appointed JP in Liverpool bought a suit especially to sit on the bench.’ And in a foreword to the Grove’s book Lord Chief Justice Auld said of England’s modern day lay magistracy: ‘Instead of the old stereotype of an authoritarian, largely middle-class and late-middle-aged male bench, [the author] found it to be composed, in general, of a wide variety of men and women from all walks of life and ethnic backgrounds. All or most of them in his tale come over as persons with a refreshing humility and anxiety, not only to perform well forensically, but also, in the process, to do good for society and individuals in the cases before them.’

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365 Grove, p.x.
In 1998 this endeavour in England and Wales to achieve political balance on Magistrates’ benches was called into question by the Lord Chancellor (Lord Irvine). In an address to the Magistrates’ Association, he said ‘I am considering the argument that political balance is an anachronistic hangover from the days of class-based voting; that political affiliation is no longer an effective test of background; and that political balance no longer equals social balance. I have come to the view that it may be time for change.’

The change was realized in England and Wales five years later when the National Recruitment Strategy was introduced in 2003. This involved a number of initiatives aimed at encouraging young people and minority ethnic groups to become involved in the judicial process. It pointed out that regional variations still existed – in age and ethnicity – that needed to be addressed. The strategy aimed to highlight the importance of the work of Magistrates, particularly to employers, who needed to be persuaded that by allowing staff who are Magistrates time off to carry out their duties they were contributing enormously to ‘the maintenance and the values of good citizenship’. The approach was also designed to encourage the self-employed that they, too, had a role to play in serving their community by directing their individual talents towards furthering the cause of justice in the community.

A pilot study to see whether a mixture of occupational, industrial and social groupings might be a practical alternative to the use of political balance as a measure of social mix, took place in ten areas of varying size and geographical location – and some 1,200 Magistrates were invited to take part by completing a questionnaire. The study confirmed the new method of achieving a “balanced bench” offered a practical alternative to the previous system, and de-gentrification of the lay magistracy has subsequently been achieved to a degree acceptable to all parties. Declaration of a candidate’s political affiliation is no longer required.

Advisory Committees in the United Kingdom also try to ensure that no more than 15 per cent of Magistrates on a bench are from the same occupational group. Historically, occupation has never been factored into the selection and appointment of New Zealand Justices; nor is there any evident concern about the number of Freemasons in the judicial system in New Zealand, as has been the case in Britain where JPs were, until recently, required to reveal any affiliation with Freemasonry. The perceived fear was that the secret Masonic loyalty vows could create a conflict of interest between parties in a court case and raise concerns about judicial neutrality towards colleagues – and even the accused.367

The same point might well have been argued with respect to the role of political party patronage in the New Zealand appointment system, where class-based considerations over the years have been even more anachronistic.

Duties and responsibilities of lay magistrates

Politicians in England and Wales have in recent times held the belief that the British lay magistrate should sit in judgment on his peers as “an ordinary citizen” typical of the community in which he lived. Accordingly, Lord Auld in 2001 cautioned JPs against becoming trained to the extent they saw themselves as ‘quasi-professional’ judges:

Criminal law, both substantively and in its rules of procedure and evidence, has become one of the most technical and difficult areas of the law to administer. Trevor Grove’s account reveals the extent of the magistrates’ task – most of them without any legal qualifications. There are increasingly frequent training sessions – some of them in the evenings and over weekends... However, there is a danger if all this is pushed too far. Magistrates should not become so legally trained and give such time to their role as to adopt the mantle of ‘quasi-professional’ judges. If they were to do so, it would be at the expense of their standing as ordinary members of the public bringing fairness and good sense to the job. In the legal and procedural technicalities of their work, they have the invaluable support and guidance of their justices’ chief clerks and legal advisers, another body of persons whose critical contribution to the success of the system runs like a thread through Trevor Grove’s account. Long may it remain that way.368

Auld noted the comment of Lord Bingham, the Senior Law Lord, who said “If we were inventing the [legal] system from scratch we probably would not have come up with the lay magistracy, but that is not an argument against it”. Auld added, ‘My work on the Criminal Courts Review led me firmly to the same view’.369

Two decades later Justice Beattie and his colleagues expressed views similar to those of Lord Auld when they considered the future of New Zealand lay magistrates. In their 1978 Report of the Royal Commission on the Courts they concluded that lay magistrates should be retained in New Zealand courts370 – albeit with lesser jurisdiction than that held by their United Kingdom colleagues at the time.

Justices of the Peace in England and Wales must sit for 26 half-days per year as a minimum requirement, and most try to complete a whole day on the bench – which constitutes two sittings. An increasing number of JPs find that 26 half-days is all they can manage in a year, but others do more than 60 court sittings. More than 80 sittings a year is discouraged by the advisory councils. The rosters ensure that new Magistrates usually serve with

368 Grove, p. x.
369 Grove, p. xi.
different JPs at each court session. British lay magistrates will be asked to resign, or be permanently removed, if they persistently fail to reach this 26-day attendance requirement.

This differs markedly from the New Zealand situation where the number of days an individual judicial JP sits is at the discretion of the local JP association Roster Officer working in liaison with the local District Court Registrar and the individual judicial JPs. New Zealand judicial JPs\(^{371}\) are not committed to any specific number of court sittings. When assigned to a court roster they are expected to attend as and when required. If they are unable to attend another judicial JP is assigned by the District Roster Officer to take their place.

In England Magistrates are also liable to be called for jury duty whereas in New Zealand judicial JPs, like District Court Judges, are not permitted to sit on a jury. Their ministerial colleagues, however, are required to attend for jury duty unless they have reached the age of 65, when they may apply for exemption.

And there is a major difference in the responsibilities of JPs in both jurisdictions. In New Zealand most JPs are restricted to ministerial duties (witnessing documents, affidavits and sworn statements) whereas in the United Kingdom their primary responsibility is in the courts. The documentation duties exercised gratis by New Zealand ministerial JPs are usually carried out in the United Kingdom for a fee by lawyers or notaries public.

In most Canadian provinces JPs provide the first judicial screening of criminal charges against ordinary citizens, decide whether the police have met the legal requirements for search warrants, issue warrants for arrest, and preside over bail hearings. They conduct trials for people charged with provincial offences, set dates for trials, receive guilty pleas and sentence certain [minor] offenders.

In Queensland the JP (Qualified) designation indicates that the JP has been given the additional authority to issue search warrants and, in conjunction with another similarly qualified Justice of the Peace, to constitute a Magistrate’s Court and exercise powers to remand defendants in custody, grant bail, and adjourn court hearings. Some other JPs in the state – usually in remote communities – are designated Justices of the Peace (Magistrates’ Court) and are authorized to perform many of the functions that might otherwise fall to a salaried Magistrate. Victoria also has ‘bail bond’ Justices\(^{372}\) who are authorized to perform this function after completing a special training course paid for by the state government.

\(^{371}\) The duties and responsibilities of New Zealand JPs are described in Chapter 4.
\(^{372}\) Justices specially warranted to preside over remand hearings and who then fix bail conditions.
JPs in Victoria who no longer perform judicial functions remain appointed for life by order of the Governor in Council.

**Term of appointment and age of appointees**

A West Sussex Advisory Board member interviewed in New Zealand said that Magistrates in England and Wales are initially appointed for five years and their appointments may be extended for further five-year terms at the discretion of the DCA on advice from the local JP Advisory Committee. She added:

> The minimum age for appointment was lowered from 26 to 18 in 2004, and by 2007 the youngest recorded appointment was a 21-year-old woman. . . . The Lord Chancellor will not generally appoint a candidate over the age of 65 because it is not cost-effective to train them . . We can only select from those who apply, and there is a big push in advertising to encourage a wider range of applicants. Applicants for appointment as lay magistrates must provide the names and addresses of three referees, and if selected are expected to serve in the areas in which they reside or work, although on occasion they may be required to sit in other court districts. They may serve on the bench until the age of 70, and their performance is subject to ongoing review by their peers and the local Advisory Committee. After 70, JPs who have served more than 15 years are transferred to the Supplemental List where they have no court duties but can still act as JPs to witness documents. Annual recruitment is necessary to meet the continuous need for new JPs resulting from compulsory retirement from the bench at 70.

In New Zealand Justices of the Peace are appointed for life, but the Ministry of Justice has recommended that judicial JPs retire at the age of 70 (the mandatory retirement age for District Court Judges), and was soon expected to raise the age again to 72. Although there is no stated minimum age for appointment New Zealand JPs until recently were rarely appointed under the age of 30. In recent years a few appointments of people under 30 have been made – but none as young as in England and Wales where the minimum age is 18. And in New Zealand the Minister of Justice will not generally support the appointment of a JP over 65.

In Canada provincial governments or municipal administrations appoint judges of lower courts, magistrates, Justices of the Peace, coroners, sheriffs and other court officers. Justices of the Peace in Ontario and most other Canadian provinces retire at the age of 70. And the provinces vary in the age of appointment of JPs: in one province, Manitoba, the minimum age for appointment is 18.

In Australia the state of New South Wales (which had previously appointed JPs for life) recently introduced a five-year appointment plan for all JPs in a desperate move to clear out

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373 Brenda Large JP was interviewed during a study visit to New Zealand in 2004.
375 The retirement age for New Zealand judges was reduced from 72 to 68 in 1980 as recommended in the 1978 Report of the Royal Commission on the Courts.
50 years of “deadwood”. The political patronage appointments had got so out of hand - with many appointees disinterested in performing their civic duties – and public respect for Justices of the Peace had reached such an all-time low that in early 2005 the state legislature cancelled the commissions of all 130,000 JPs on the state’s books. Any JP who wished to have his or her Commission of the Peace reinstated was required to re-apply for appointment, and by mid-2005 only 4,200 had sought registration under the new regulations. The New South Wales JP Association held the view that the state government would eventually extend the new term of appointment beyond five years to assure greater continuity of the reconstituted body of JPs in the state.376

Initial and on-going training

The training of Justices of the Peace in England and Wales began with the Justices of the Peace Act 1949, but according to Skyrme it was years before the various Magistrates’ Court committees took training seriously. It was not until 1966 that an obligatory induction course was introduced for JPs, and compulsory refresher courses did not commence until 1979. The move from a voluntary to a compulsory system was gradual, depending largely on the efficiency of local court groups and the powers vested on them by the Lord Chancellor in 1973 to demand training. Bell377 noted that creation of the National Advisory Council on the Training of Magistrates in 1964 provided the first systematic training regimen, and today this training work is developed and overseen by the Judicial Studies Board ‘through which the Magistrates are linked into the general framework of judicial training.’ The training of Magistrates begins with several half-days of observation in various courts, followed by a series of formal two-hour evening lectures with agendas, audio-visual presentations, worksheets and discussion groups. The trainers are Court Clerks (now Legal Advisers), who explain such subjects as bail, verdicts and sentencing.

The new JPs are then placed on a roster (schedule) of their bench sittings, and for the next three years will sit as one of two ‘wingers’ on a three-person court bench. New JPs are assigned a mentor – a Magistrate who can accompany the new appointee on some of his or her observation court visits – and will sit on the same bench for some early sittings. The mentor is available to help and guide the new Magistrate in his or her first two years on the bench. Mentors are often relatively new themselves, perhaps with three or four years’ experience, though some Magistrates of long experience prefer to act as mentors rather than as court chairman. A similar system of mentoring judicial JPs was introduced in some New Zealand court districts in 2005, and local JP associations in conjunction with the

376 Michael Cheshire, honorary registrar of the ACJA in 2005, believed the five-year appointment plan would give way to governmental manipulation, and that the separation of powers between lay justice and the legislators would be lost in that state.
RFNZJA administer and control the continuing education and training of judicial justices. The Ministry of Justice makes an annual grant for training purposes, and a national director of training is employed at the office of the Federation.

In 2006 the RFNZJA had an annual budget of $250,000, with over 50 per cent if its income from a government administration and training grant, and the balance from members’ capitation fees and other sources. It employs a full-time salaried registrar with office support, and part-time training and education officers with head-office administrative responsibilities. Similar JP association offices operate in Australian states where JPs have significant court jurisdiction and a high public profile.

In Australia the Australian Council of Justices Associations has no salaried staff, administration is provided voluntarily, delegates or their individual associations meet travel costs to annual forums, and forum hosts and delegates meet the cost of the conferences with some financial support from local business and professional organizations. Individual state JP associations carry out much of the JP training, sometimes in conjunction with a state university or other regional tertiary educational institution. In Western Australia, where Murdoch University in Perth provides a regular training course, all JPs are now required to complete and pass a 13-week course before their appointment is confirmed. Initial and ongoing training is also now mandatory in Queensland.

Two senior international jurists have stressed the importance of adequately implemented and funded training for all kinds of judicial office, even those held by qualified lawyers. In Australia Chief Justice Gleeson said the judiciary, the legal profession, and [state] governments, recognized the value of judicial formation and continuing education, and a prominent Canadian judge, critical of the piecemeal approach to judicial training, identified two goals as a guiding light for anyone charged with the responsibility of training court Justices – firstly, judicial education (under the control of the judiciary and funded independently) to sustain an ethic of independence from political powers and provide judges with the courage and resources to exercise the authority that is theirs under the rule of law; and secondly, cultural education to instil an ethic of cultural neutrality. Courts, he maintained, should be neutral places, visible symbols of peaceful interaction where the dignity of each human being is respected and enforced, regardless of race, gender or creed.379

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377 Bell, p. 333.
In the province of Ontario the Regional Senior Judge, under the direction of the Chief Justice, is responsible for supervising and directing the sittings of Justices of the Peace in the Ontario Court of Justice. The training of new judicial JPs involves two one-week orientation workshops; five one-week seminars on rules of evidence, search warrants, bail and trial procedures; and a mentoring programme of up to eight months (depending on experience and background) coordinated with the workshops and seminars. Ontario JPs remain on full salary during their training programme.

Initial and ongoing training for Justices of the Peace – including formal exams in some instances - has recently become mandatory in Scotland. New Zealand until recently had adopted the piecemeal approach to the training of Justices of the Peace, generally by local JP associations with minimal assistance from the Ministry of Justice. In the past few years the Ministry has made a reasonable financial grant towards initial and ongoing training, but a more substantial grant will become necessary if British and Canadian training models are to be adopted. In short, the need for judicial training is widely acknowledged, not only to enhance technical competence, but also to instil underlying attitudes of independence and democratic neutrality.

Court procedure

The Magistrates Courts in England, the domain of the JPs, are presided over by either a panel of three lay magistrates or by a salaried District Judge. The court chairman is an experienced Magistrate and acts as the “lead” Magistrate on the bench. All three Magistrates on the bench have an equal say in any decision, and the two “wingers” – the less experienced JPs – can out-vote the bench chairman. Most criminal hearings initially go to the Magistrates’ Court where about 90 per cent, usually of a minor nature, are dealt with summarily. With more serious crimes, Magistrates hear the evidence and decide if there is a case to answer. If they conclude that there is, the case is remanded to the Crown Court (a superior court) for trial before a Circuit Judge or a High Court Judge, often with a jury.

In England there are some offences – including fraud, dangerous driving, burglary, theft and indecent assault – which are neither so serious that they are indictable only, nor so petty that they are only dealt with summarily by Magistrates. These are known as “either-way” offences in which the defendant can choose either to have his case heard by Magistrates (in the Magistrates Court) or be tried before a jury in the Crown Court.380

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380 The subordinate courts in England and Wales are Magistrates’ Courts (or Petty Sessions) and County Courts. Magistrates Courts are presided over by a bench of lay magistrates (JPs), or a legally-trained district judge (formerly known as a stipendiary magistrate). There are no juries. They hear minor criminal cases, as well as certain licensing applications. County Courts hear minor civil cases, and are generally presided over by district judges. Except in a small minority of cases, such as civil actions against the Police, the judge sits alone as trier of fact and law without assistance.
When an either-way offence comes before Magistrates, the bench of JPs decide if their sentencing powers would be adequate. If not, the Magistrates commit the defendant to the County Court for trial. In any event the defendant in an either-way case always has the right to have his case sent directly to the County Court for hearing. In New Zealand the court Registrar would likely bypass the judicial JPs and send either-way cases directly to a District Court Judge for hearing.

In England and Wales serious indictable criminal cases, those where a lower court has determined there is sufficient evidence to justify trial, are dealt with only in the County Court. The defendant is sent to the County Court after only one, often brief, hearing in the Magistrates Court to deal with immediate issues such as bail. In New Zealand judicial JPs will hear evidence in undefended indictable criminal cases and determine if there is a case to answer. If they conclude there is, they will remand the defendant to an appropriate court for trial.381

In New Zealand judicial JPs sit in pairs (occasionally solo) with the longest serving and most senior of the two “leading” the bench. They confer *sotto voce* from time to time as necessary, but the lead JP is the only direct voice between the bench and the body of the court.

Magistrates in both countries are provided with bench books that outline “guideline penalties” that may be imposed for a varied and wide-ranging category of offences. New Zealand judicial JPs have worked with authorized bench books382 for several years, but until an officially authorized bench book was published in 2004 JPs in England and Wales had assembled their own personal bench book based largely on sentencing guidelines issued by the Magistrates’ Association in London.

**Legal assistance in court**

Magistrates in England and Wales generally do not have legal qualifications but are assisted in court by Justices’ Clerks (qualified lawyers with at least five years experience as practicing solicitors), a system advocated in the past by legal reformers in New Zealand. The Magistrates and District Court Judges sitting in the Magistrates’ Courts hear indictable

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381 Court terminology in the U.K. also differs in many respects from that used in New Zealand. The term “bench” in England and Wales is normally used to refer both to the three JPs in court and the group of JPs who officiate in a particular court district – and this may vary from 25 to 400 Magistrates. The term “panel” is normally used to refer to those JPs who officiate in the Youth Court (the Youth Panel) or the Family Proceedings Court (Family Panel) – but they are also referred to as “the bench” in court. The JP who chairs the bench of three Magistrates is called the “court chairman”, and the JP who is elected to chair the whole bench in the particular court is known as the “bench chairman”. In this role he or she will have pastoral, administrative and reportorial duties while acting as bench chairman.

criminal cases that they may commit for trial to a higher court, and certain minor criminal cases over which they have jurisdiction.

Court Legal Advisors (previously Justices Clerks) in the United Kingdom are qualified in law and assist the three Magistrates on the bench. They are in attendance to advise Magistrates on points of law and procedure, and no court can sit without a Legal Adviser present. This facility of Justices’ Clerks is not available to New Zealand judicial Justices, who may, however, adjourn a hearing while they seek advice from a District Court Judge.

During the 1977 hearings of the Royal Commission on the Courts a Justice Department spokesman, noting that a number of submissions suggested the introduction of Justices Clerks in New Zealand, questioned the need for this type of judicial officer. He noted that while the Magistrates’ Executive supported retention of JPs in the courts (with an expanded role and the assistance of Justices’ Clerks), at the same time it recommended limiting their jurisdiction – ‘no imprisonment, maximum fine of $250 and so on.’ He suggested that in this scenario the Justices’ Clerk would have little work to do.

The Commission’s chairman suggested the position of Justices’ Clerk might not be challenging enough if the court jurisdiction of JPs was not increased, or simply maintained at the existing level, and suggested a greater role could be given to New Zealand judicial JPs – such as existed in Britain where JPs sat with their own Justices’ Clerk. He explained that a lay magistrate from the United Kingdom had jurisdiction to sentence up to one year’s imprisonment, that Justices’ Clerks were competent people receiving a salary just short of a County Court Judge’s salary, and that JPs in the U.K. sat on domestic and matrimonial cases as well as criminal hearings.

In short, the question of legal assistance in court is usually closely related to the question of jurisdiction. Sentencing knowledge is an entailment of the power to sentence.

**Remuneration of lay magistrates**

The question of financial remuneration of JPs is a recurring issue in the United Kingdom, and the subject is discussed regularly in issues of *Magistrate* in terms of sitting fees and allowances. The suggestion that Justices of the Peace should receive salaries is anathema to the principle of lay magistracy in England and Wales. A modest daily expense allowance scheme was agreed a number of years ago and, despite an agreement by the Department of Constitutional Affairs to review the matter, JP allowances have remained unchanged since 2004.

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383 Magistrates’ Executive submission to RCC, No. 44, p.1492, 4Y19.
384 *Magistrate* is the official monthly magazine of the Magistrates’ Association, 28 Fitzroy Square, London.
In New Zealand the Waikato Magistrates group, in its submission to the 1977 Royal Commission on the Courts in New Zealand, did not accept that lay magistrates should be unpaid: ‘[W]e think it is wrong to get justice on the cheap. If any person, layman or qualified solicitor, is giving a service he should be recompensed on the same basis as the Small Claims Division [now the Disputes Tribunal].’ 385

And the Court Officers’ Group, which supported the lay magistracy, expressed the view that judicial JPs were being undervalued:

Justices of the Peace sat daily at Auckland dealing with defended minor traffic cases and with thousands of minor offences each month . . . The burden of these commitments will clearly soon become intolerable for these dedicated laymen who so freely give their time at no expense to the Justice Department. In our opinion there is a place for Justices of the Peace, but we are of the opinion that they are being over-used in certain directions as a cheap form of justice. These persons who willingly give up their time are not paid. 386

Despite the suggestion of remuneration for judicial JPs in these submissions, there has never been any formal move from within the RFNZJA or the JP associations for remuneration of Justices. As in Britain, the subject has been raised occasionally and informally as judicial JPs’ hours in court have increased. In two New Zealand cities with a high judicial JP court input there has been some suggestion that a per diem fee for court JPs, similar to that paid to lay members of disputes and other tribunals, should be considered. But to date the suggestion has gone no further than open discussion at conferences of the Federation, and annual meetings of associations.

In 2005 the Lord Chancellor agreed that the lay Magistrates in Northern Ireland should be paid an attendance allowance of £160 per day when they sit in court. In Ontario (Canada) the remuneration situation is somewhat different. All JPs on appointment must cease other employment and refrain from any political activity. They receive full pay during their period of training, and the annual salary of a full-time presiding Justice in 2007 was C$88,500. After appointment JPs receive information about statutory holiday and vacation entitlements, mileage expenses, judicial attire, group insurance and pension. Given the increased commercialisation of many public functions in New Zealand since the mid-1980s it is difficult to see how non-payment of lay magistrates can be sustained indefinitely on grounds of tradition or principle.

**Recent developments in England and Wales**

Following a 2003 review of the selection and JP appointment system in England and Wales the Department of Constitutional Affairs streamlined the process but re-emphasized the

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385 Waikato Magistrates submission to RCC No.88, p. T683.
386 Court Officers’ Group submission to RCC, No.127.
following three policies and procedures: Encouraging applications for appointment to the
lay magistracy from all sections of society; eliminating discrimination in the appointment
process and ensuring that all applicants are treated fairly; and appointing lay magistrates
who, as a group, reflect the diversity of the society they serve.387

The initiatives outlined above were in response to the earlier *Review of the Criminal Courts
of England and Wales* in which its author, Sir Robin Auld, considered the selection and
appointment of Magistrates. In that report Sir Robin identified as the main problem the
discovery and recruitment of a sufficient and appropriate range of candidates for
appointment – not the criteria for, nor the mechanics of, their appointment. He pointed to
the need to provide benches of Magistrates that ‘reflect more broadly than at present the
communities they serve.’ The Lord Chancellor told JPs in 2003 that his proposed ‘National
Recruitment Strategy’ ‘not only sets out the most wide-ranging programme of Criminal
Justice reform for 30 years, but also banishes the myths of a few years ago when many
press articles claimed the lay magistracy was an endangered species. . .Year after year I
have tried to reassure you that nothing could be further from the truth and that the
Government has remained fully committed to our unique system of lay justice.’ 388

Two years later the recruitment strategy was showing signs of success. Between April 2004
and February 2005 the number of magistrates had increased by 527 (from 28,029 to
28,566), and showed a higher percentage of JPs from ethnic backgrounds and a small
increase in the number of magistrates under 40 years of age. In the intervening period the
DCA had researched people’s perceptions about the magistracy and the recruitment
process, and concluded the perceived barriers to becoming a magistrate were shown to be a
lack of awareness of who can apply and how to apply; a strong sense that applications from
members of ethnic minority communities would not be looked on favourably; and a
perception that younger non-professional applicants would not be considered or would not
have the same likelihood of being appointed as older or professional people.389

The DCA research in 2004 revealed that once people began to find out more about the
magistracy, other significant barriers arose – the level of commitment required, the
possibility of loss of earnings, and the reaction of their employer. As a result of the pilot
research project the DCA worked closely with local JP Advisory Committees to support
recruitment, with initiatives ranging from bus advertising and a central call centre to the
production of recruitment DVDs.

The lesson here for New Zealand adherents of lay magistracy is the importance of continual JP recruitment from the community at large. The DCA has suggested Advisory Committees in England increase their annual recruitment by up to 25 per cent for benches where magistrates sit fewer than 45 times a year, and by at least 50 per cent for those benches whose magistrates sit on average more than 45 times per year. The Lord Chancellor warned that ‘in considering recruitment of more magistrates the overriding concern must be to maintain the very high standards of the bench. There must be no question of lowering standards in order to achieve recruitment targets.’

The importance attached to the recruitment and selection of JPs in England, if adopted in New Zealand, will require a greatly increased level of cooperation, trust and respect between the main participants – the Ministry of Justice, the Federation, the regional JP associations, and various judicial and Courts committees – than has been experienced in the past. Pro-active recruitment as outlined above will be required in New Zealand, and a more efficient and transparent appointment and interview procedure will need to be established.

In Britain the lengthy appointment procedure described a few years earlier by Grove was now a thing of the past, and application and interview procedures have been streamlined.

In neither the United Kingdom nor New Zealand are Justices of the Peace required to be citizens of the country in which they officiate, although officials in both countries have for many years lobbied their politicians to introduce legislation to change this situation. Justices of the Peace are frequently asked to conduct naturalization and citizenship ceremonies in their districts, and JP officials and parliamentarians have viewed it as injudicious to have a JP who is not a citizen performing such a ceremony.

In England and Wales JPs were required by the Lord Chancellor’s Department to be citizens of the Commonwealth or the EU, but on occasion this requirement had been overlooked and some United States citizens had been erroneously appointed as JPs. This discovery in 2004 caused some consternation and the JPs in question were asked not to assume duties on the bench until the law could be changed. Today there is still no citizenship requirement for Justices of the Peace in either England or New Zealand.

Certain people in the United Kingdom, as in New Zealand, will not be considered for appointment as Magistrates. These include anyone whom the Advisory Committee does not consider to be of good character and personal standing in their community, an undischarged bankrupt, a serving member of Her Majesty’s armed forces or a member of

390 National Recruitment Strategy, p. 19
391 Interview with Brenda Large JP (member of West Sussex JP Advisory Committee), 2005.
the police force. Others excluded are traffic wardens or other persons whose role might be seen to conflict with the role of a Magistrate. Close relatives of a Magistrate already on the same bench, or any person with a disability which could be considered to impair his or her efficient duty as a Magistrate, are also excluded from selection.

However in England the DCA’s stated aim is for a lay magistracy that is diverse in every way, including age. In 2004 a 21-year-old applicant was appointed a JP, and a 23-year-old was appointed in 2005. New applicants are required to undergo considerably more training than previously, and there is an increased demand for mentors and appraisers. The training of JPs is the responsibility of the DCA [previously known as the Lord Chancellor’s Office], and is conducted by the Courts’ Service in conjunction with the Judicial Studies Board.

New Zealand’s restricted list for appointment as a JP is less stringent. Those excluded from appointment because of their special duties and responsibilities include Members of Parliament, barristers and solicitors, practicing medical practitioners and persons working in various aspects of law enforcement and the courts. There has also been a general policy not to appoint members of the clergy and persons in religious orders. It must be noted, however, that a survey of JP occupations in the course of this thesis research revealed countless breaches of the appointment restriction rule.

In New Zealand the appointment procedure today is far less rigorous, and considerably less thorough, than that of England and Wales. But whereas all Justices of the Peace in the United Kingdom are required to undertake court duties, only about 10 per cent of New Zealand JPs are presently called to the bench – and these only after background police and security checks, further interviews, and lengthy specialized judicial training.

Another point of difference between the United Kingdom and New Zealand jurisdictions is that in England the Lord Chancellor in 2005 was considering allowing barristers and solicitors who then sat as lay Magistrates to apply for salaried judicial appointments (District Court Judge). In New Zealand practicing lawyers are specifically excluded from appointment as a JP.

In New Zealand the suggestion that citizens should personally apply to become JPs has been discouraged in the past and such requests were unlikely to be considered. As recently as 2003 an Associate Minister of Justice\(^{393}\) said he ‘looked with suspicion on “self-starters” and discouraged their appointment. His comment reflected the view of many politicians,

\(^{392}\) New Zealand has no statutory requirement that judges of the District Court, High Court, Court of Appeal or Supreme Court must be naturalized citizens. Source: Judicial Appointment Processes 1997 (revised 2003), and Justices of the Peace Best Practices Manual 2008. Ministry of Justice Publications, Wellington, N.Z.

\(^{393}\) Hon. Rick Barker.
who jealously protected their position as the sole arbiters of who should be appointed as Justices of the Peace.

Politicians were therefore faced with a dilemma when the Community Magistrates project was established in New Zealand in 1999. As the CM scheme established a new level of lay magistrate (other than judicial JPs) the Ministry of Justice placed newspaper advertisements calling for applications – the same procedure it adopted when appointing Community Magistrates and professional District Judges. A major crack had developed in their jealously guarded sole prerogative of “political appointment” of lay magistrates. The Ministry of Justice had become a threat to their last bastion of political patronage.

In Australia the appointment process also differs according to the state or territory. In Queensland, for example, a Justice of the Peace must complete an examination prior to being eligible for appointment, whereas in Victoria an appointee need only prove good character by way of references. Victoria has established a non-partisan JP Appointments Board to approve nominations made by MPs and then to decide which names to recommend to the state Attorney General. That board consists of a representative from the Attorney General’s department, a retired magistrate, and a member appointed by the JP association. The establishment of a similarly independent appointment committee was suggested by a majority of JPs surveyed in New Zealand for this thesis.394

In the Canadian province of Ontario Justices of the Peace are full-time paid lay judges and personally apply for appointment to the position. The province’s Access to Justice Act 2006 resulted in a comprehensive reform to the Justices of the Peace Act 1990, and a significant feature in the new appointment process for JPs was the creation in 2007 of an independent Justices of the Peace Appointments Advisory Committee.

This committee - responsible for establishing a new review and interview process for JP applicants - consists of a core committee of seven members, including a Judge and a JP appointed by the Chief Justice of the Ontario Court of Justice, a JP who is familiar with aboriginal issues (also appointed by the Chief Justice), and four members appointed by the Attorney General. Candidates who are interviewed are classified as “Not Qualified”, “Qualified”, or “Highly Qualified” by a panel of members drawn from the core committee and from the regional committee for the region of appointment.395 As is the practice with similar committees in Canada, candidates are not notified of their classification.

394 Refer Chapter 4.
395 The JP Appointments Advisory Committee has appointed seven of these regional committees, one for each region of the Ontario Court of Justice. The regional committees comprise the Regional Senior Judge and the Regional Senior Justice of the Peace or their delegates, not more than five other members appointed by the Attorney General, and a lawyer appointed by the Attorney General.
A candidate in Ontario will not be considered by the Advisory Committee unless he or she has performed paid or volunteer work equivalent to at least 10 years of full-time experience, and has a university degree or other tertiary qualification acceptable to the committee. In addition, the candidate must satisfy the committee on a range of skills and abilities, display a gamut of acceptable personal characteristics, and exhibit a high degree of community awareness.

During the 25-year period from 1978 to 2003, while the total number of JPs in England and Wales had increased by just 8 per cent, the percentage of female JPs had increased from 38 per cent to nearly 50 per cent of the JP population.

Table 12. Number and gender distribution of JPs in England and Wales between 1978 and 2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>23,483</td>
<td>14,633</td>
<td>8,850</td>
</tr>
<tr>
<td>1990</td>
<td>28,667</td>
<td>16,090</td>
<td>12,577</td>
</tr>
<tr>
<td>1997</td>
<td>30,374</td>
<td>15,858</td>
<td>14,516</td>
</tr>
<tr>
<td>2000</td>
<td>30,308</td>
<td>15,544</td>
<td>14,764</td>
</tr>
<tr>
<td>2003</td>
<td>28,344</td>
<td>14,392</td>
<td>13,950</td>
</tr>
</tbody>
</table>

In New Zealand women represent approximately 29 per cent of the total JP population and an even lower percentage of court-sitting Justices. The government has expressed a wish to achieve a 50-50 male/female ratio within the next few years.

A concerted effort has been made to achieve a more representative ethnic balance in the New Zealand JP population following the United Kingdom initiative that began in the 1960s – when a need was felt for more immigrant representation on the bench to mirror the social structure of some areas. The first immigrant JP was appointed in 1962 to the Nottingham bench, and now well over 500 non-white JPs sit on court benches in England and Wales. The Department of Constitutional Affairs\(^{396}\) effort to achieve an ethnic balance in the magistracy has resulted in over 6 per cent of the magistracy being from ethnic minority communities that made up 7.9 per cent of the population as a whole.\(^{397}\)

As long as New Zealand Justices of the Peace must be nominated by their local Member of Parliament public perception of political bias in the appointment process is understandable,

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\(^{396}\) The DCA was previously known as the Lord Chancellor’s Department (LCD).

and any attempts to achieve social and cultural balance have been arbitrary and unsystematic. Recent Ministers of Justice have expressed the need for an ethnic-gender-age balance of JPs to be more representative of the communities they serve, and – although there has been no formal administrative mechanism set up to achieve this end – the balance being sought is being achieved.

In other overseas lay magistracy jurisdictions the issue of social and ethnic balance has not been stressed in the appointment process to the extent it has been in England and Wales. In Ontario, for example, the Justices of the Peace Appointments Advisory Committee ‘strives to ensure that JPs should be reasonably representative’ of the population they serve, and this approach appears to have been adopted in most jurisdictions.

**Royal Commission urged study of Canadian system**

The New Zealand 1978 Report of the Royal Commission on the Courts reference to the role of JPs in Ontario (par. 99) was particularly germane to this study. In Toronto lay Justices who had been selected by the Chief Provincial Court Judge were given special training under his guidance to serve in a part-time or full-time capacity. The Commission Report said:

> People from different walks of life have been appointed and they have been of very great assistance in helping to clear the volume of work in the lower courts. As the experience grew, they could receive up to C$20,000 in salary. It seems to us that the training programme established through the Federation would blend well with the Toronto concept. We recommend therefore, that the utilization of lay Justices in Ontario should be the subject of an in-depth investigation by the Chief District Court Judge as a member of the Judicial Commission, the [RFNZJA] would no doubt also wish to examine this matter.

398 **Might Scotland and Northern Ireland provide new models from which New Zealand can learn?**

Recent lay magistracy developments in Scotland and Northern Ireland have considerable relevance to the current situation in New Zealand. Scotland’s lay magistracy was under serious threat in 2004 when the Summary Justice Review Committee, chaired by Sheriff Principal John McInnes, published its controversial recommendation that lay justice be abolished. The Committee had been established to suggest ways to speed up summary justice, but its recommendation to eliminate JPs was ignored by the Scottish parliament, which instead handed full authority for summary justice in the lower courts to lay magistrates.

398 *RCC Report 1978*, p. 188, par. 615.
Before 2004 most of the 3,800 JPs in Scotland were designated as ‘signing Justices’ and had a role comparable to that of ministerial JPs in New Zealand. However, about 700 of these Scottish JPs were ‘full Justices’ who performed ministerial duties but were also authorized to preside in the District Court. Before being assigned to the bench these full Justices were trained in basic law, court procedures and sentencing issues (as are judicial JPs and Community Magistrates in New Zealand) to ensure that they exercised their authority properly, with legal assistance from their Justices’ Clerks when required.

These lay Justices were empowered to impose sentences of imprisonment or detention of up to 60 days, fines of up to £2,500, and could impose a range of other sentences including probation orders, community service orders, and compensation orders.

A handful of District Courts in Scotland were also presided over by Stipendiary Magistrates who (unlike the unpaid JPs) were full-time paid professionals similar to New Zealand’s District Court Judges. There were only four of these Stipendiary Magistrates remaining in Scotland in 2004, all of whom were based in Glasgow. The jurisdiction of the Stipendiary Magistrates and JPs was restricted to the local authority and commission area in which they were appointed.

After receiving the McInnes Committee report, the Scottish Executive had issued a consultation paper seeking views on the report’s proposals for professional involvement in the summary justice system, and followed this up with a number of focus groups. Then, in a publication explaining its momentous decision on lay magistracy the Scottish Executive said:

Our vision for the summary justice system is one which makes it clear that delivering justice is a partnership between professionals and communities. This is evident every day in our courts; without lay witnesses willing to take time and trouble to attend, many cases would not be brought to justice . . . We have considered the consultation responses on this issue very carefully. It is clear that there is a considerable weight of opinion which feels that the case for abolition of lay justice has not been made, values the contribution lay justices make to the Scottish criminal justice system, and feels that the way forward is to invest in the lay judiciary rather than abolishing it . . . Lay justices are a powerful expression of the partnership we seek between professionals and communities. An important element of our community engagement strategy is therefore to retain that role, to broaden access to it, and to invest in its delivery. . . We therefore see a continuing role for lay justices in dealing with trial business, and we are committed to invest in recruitment, training and appraisal. It is important to stress that the decision to retain lay justice is not simply a vote for ‘business as usual.’

The publication outlined in some detail the Scottish Executive’s proposals for the recruitment of lay justices by establishing a non-partisan Justice of the Peace Advisory

400 Smarter Justice, Safer Communities (McInnes Report), Scottish Government, Edinburgh. Chapter 1.
Committee, the introduction of a five-year appointments (renewable), and the establishment of training and appraisal committees to monitor and control the performance of lay justices on a continuing basis.

Following its rejection of the McInnes Committee’s majority recommendation\(^{401}\) to abolish judicial JPs, the Scottish Executive passed into law the Criminal Proceedings (Reform) (Scotland) Act 2007. This statute resulted in the Justices of the Peace (Scotland) Order 2007\(^{402}\) which vested all summary justice proceedings in Scotland to Justices of the Peace and signalled the solid support of Scottish legislators to participatory democratic justice in the form of lay magistracy.

The JP (Scotland) Order 2007 provides for the establishment of a Judicial Appointments Board for Scotland, a Justices’ Appraisal Committee, a Justice of the Peace Advisory Committee and a Justices’ Training Committee – all adequately empowered and funded to phase out the existing District Courts (currently presided over by professional Stipendiary Magistrates) and to replace them with Justice of the Peace Courts presided over by lay magistrates.

The available data on JPs in Scotland in 2007 provides an interesting comparison with the judicial JP situation in New Zealand.\(^{403}\) The data showed that of the 3,800 JPs currently commissioned in Scotland:

- 700 JPs sit regularly on the bench – compared with 440 in New Zealand;
- 1,100 (29%) of all JPs are female – the same percentage as New Zealand;
- 8% of all JPs are aged 40-49 – the same percentage as New Zealand;
- 25% of all JPs are aged 50-59 – compared with 24% in New Zealand;
- 27% of all JPs are aged 60-69 – compared with 28% in New Zealand;
- 39% of all JPs are aged 70 or over – the same percentage as New Zealand;
- The lower court systems of the two countries serve populations of comparable size.\(^{404}\)

Until 2002 in Northern Ireland a professional Stipendiary Magistrate, sitting alone, heard all [summary proceedings] cases, and a number of Justices of the Peace had been appointed

\(^{401}\) Two members of the McInnes Committee who disagreed with the recommendations relating to lay justices published a Note of Dissent in which they argued for the retention of lay justices, backed up by improved recruitment and training of justices.

\(^{402}\) This Order emanated from powers conferred by sections 67(5) and (6), 69 and 81 (2) of the Criminal Proceedings (Reform) (Scotland) Act 2007, and came into force in April 2007.

\(^{403}\) The latest statistics available for comparative purposes from the Ministry of Justice were from 2002. Figures indicate that only 1% of JPs in both countries are under the age of 40.

\(^{404}\) Census data indicates that Scotland had a population of 5.1 million in 2006, and the population of New Zealand was estimated at 4.1 million in 2007.
to preside over youth and family court proceedings. Other Justices of the Peace, although authorized to issue summonses and warrants, did not sit on the bench.

The Justice (Northern Ireland) Act 2002 changed all that by providing for the creation of the new office of Lay Magistrate, which impinged on the role and jurisdiction of Justices of the Peace to the extent that their work in the Youth Court has now been taken over by the Lay Magistrates. The new office of Lay Magistrate did not sit easily with Justices of the Peace, only a few of whom applied for the new positions when they were advertised. The Northern Ireland Court Service reported in April 2005 that 272 new Lay Magistrates had been appointed following a major summer recruitment drive that generated over 5,000 applications.

The Lay Magistrate situation in Northern Ireland is analogous to the Community Magistrate position in New Zealand. In both jurisdictions the new judicial officer appointees have been sought by advertisement from the general public rather than from the ranks of existing Justices of the Peace, and in both jurisdictions the new lay Magistrates receive a full court-sitting fee.

**Hybrid or ‘mixed bench’ in New Zealand**

One area in which the United Kingdom and New Zealand models differ markedly is with mixed benches of magistrates – a “hybrid system” favoured in European and Scandinavian jurisdictions and to a limited extent in England.

In England and Wales when there is an appeal against conviction the entire case is reheard at the Crown Court before a District Judge and usually two Magistrates. This bench of three decides on guilt or innocence, with each person (lay and professional) having an equal say in the decision. In appeals against sentencing, a similar panel (Judge and two Magistrates) is empowered to make a totally new sentencing decision – even where the appellant runs the risk of his or her sentence being increased. Less common is an appeal on a point of law, which is heard by a Judge alone and who delivers his decision in a case stated.

There is no parallel for this mixed bench system in New Zealand, although Stipendiary Magistrates appearing before the 1977 Royal Commission on the Courts made a case in

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405 This office of Lay Magistrate (introduced on 1 April 2005) is a judicial officer exercising a summary jurisdiction in criminal and more recently non-criminal or civil matters. Lay Magistrates are not normally legally qualified, and were appointed to represent the wider community within the justice system. Lay magistrates must retire on reaching their 70th birthday, whereas the JPs were appointed for life.

406 Northern Ireland Court Service press release 2005/07.

407 The lay magistrate in Northern Ireland receives a full day court sitting fee of £164 (effective 1 November 2007).

408 Morgan and Russell, p.103.
their submissions for its introduction. The Commission showed little interest in their proposal and no recommendation was made on this proposal. When Northern Ireland in 2002 replaced its professional lower court with lay magistrates a mixed-bench proposal was rejected on the grounds that “the lay element tends to be overshadowed by its professional counterpart”.

Cost of justice in lower courts

In Britain noted academics have disputed the issue of placing a price on justice. Mansfield and Wardle\(^4\) in a 1993 study argued that one cannot, or should not, put a price on justice. Andrew Sanders disagreed: ‘We can, we do and we must: it is disingenuous to suggest otherwise. Dispensing justice is an expensive state service which has to compete with the satisfaction of other, and arguably equally important, human needs like health, food and shelter and education.’\(^4\) Sanders argued that lay magistrates appeared to be cheap if only the direct costs attributable to lay magistrates – their modest loss-of-earnings and travel claims and the cost of their training – were set against the fairly substantial salaries paid to stipendiaries [professional magistrates]. ‘Thus a lay magistrate costs an average of only £495 per year compared to £90,000 cost per year of employing a stipendiary – a direct cost per appearance before lay and stipendiary magistrates of £3.59 and £20.96 respectively.’ He pointed out that court finances were more complex than this, and maintained the output of JPs compared with SMs had to be considered. Fewer courts and less retiring room space would be required for stipendiaries, and lay magistrates required substantial administrative back-up to arrange their more complex sitting schedules. A study by Morgan and Russell\(^5\) in 2000 indicated that when indirect costs such as premises, administration and staffing were taken into account the above differences were reduced, the costs per appearance amounting to £52.10 and £61.78 respectively.

Renton and Brown asserted that cost was an issue in Scottish justice, and that ‘the positive characteristics of summary justice [in Scotland] were not legal so much as economic and bureaucratic: Summary justice is fast, easy and cheap.’\(^6\)

A similar cost-effectiveness comparison between lay magistrates and professional District Court Judges in New Zealand – where DCJs receive a base salary of about $235,000\(^7\) – would produce markedly different results. For example, in New Zealand judicial JPs sit in

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\(^4\) Doran and Glenn, p.51.
\(^6\) Sanders, p.22.
\(^7\) Morgan and Russell, p.87.
\(^9\) CDCJ Russell Johnson in *New Zealand Herald*, 31 December 2006.
pairs, and not as a panel of three as in Britain, and in New Zealand they receive more modest meal and travel allowances. Furthermore, their training is largely at their own expense, and they do not have the use of professional Justices’ Clerks – an expensive addition if factored into the cost of a lay magistracy in New Zealand. In short, the cost efficiency of the New Zealand system of judicial JPs is indisputably greater than that of its British counterpart.

**Continuing roles for lay magistrates but not JPs**

One submission to the 1977 Royal Commission on the Courts in New Zealand favoured retention of a lay magistracy but advocated jurisdictional and nomenclatural changes. The Waikato Magistrates\(^{415}\) suggested the eventual abandonment of the current [judicial] Justices of the Peace and their replacement by lay magistrates and Commissioners for Oaths. Their idea was that in the Criminal Division the lay magistrates would sit with a Stipendiary Magistrate, and in the Administrative or Civil Division (an area not at present occupied by judicial Justices) some selected laymen experienced in their respective fields would actively assist – much in the way that lay members of the public are appointed to disputes, land valuation, tenancy, and other tribunals operating within the justice system.

Similar proposals have been advocated in the United Kingdom, where a recent study by Sanders\(^ {416}\) concluded that many criminal cases, whether serious or minor, would benefit from the involvement of a combination of lay and professional adjudicators. In complex cases ‘a mixed (lay and professional) panel in a Magistrates court is thus the preferred solution.’ He suggested that in simple cases, however, panel decision-making would rarely add anything over that which a single professional Judge need bring to the case. He recommended that [District] Judges should handle most uncontested business in the lower courts because ‘neither lay magistrates nor panels would be needed.’

Following passage of the United Kingdom Courts Act 2004 there was a fundamental change in the administration of the criminal courts. The middle-tier system proposed by Auld was ruled out as being ‘overly complex’ according to a member of the Lord Chancellor’s Advisory Committee.\(^ {417}\) Instead, the existing jurisdiction of Magistrates had been heavily endorsed with increased sentencing powers, and the Lord Chancellor [now Secretary of State] was ‘emphatic that JPs were to be retained with a larger role.’

Reviewing the Auld report, Sanders contended that ‘lay people and professionals bring different qualities to judging, which is why many people endorse trial by judge and jury –

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\(^{415}\) Waikato Magistrates submission to RCC, No 88, p.T683.

\(^{416}\) Sanders, p.36.
for all its faults. And Sanders noted a significant change in the experience and modus operandi of modern lay magistrates:

In some ways JPs embody fewer democratic and “justice” values than in the past. At one time JPs had virtually no legal training and most sat only once every two weeks or so. They relied almost entirely on the Justices’ Clerks for legal advice, just as juries rely on judges, which enabled them – like juries now – to make full use of whatever social and cultural diversity they may have embodied. JPs are now only semi-amateur – they are relatively thoroughly trained and sit, on average, around 40 times per year. Unlike juries they are no longer outsiders, but insiders. They are representatives of the legal system rather than of society at large and, as Auld says, ‘JPs and District Judges are very similar.’

Concluding observations

A number of conclusions can be drawn from this comparison of lay magistracies in a diverse range of countries and territories. One such conclusion, drawn from the literature and subsequent discussion in this chapter, is that lay magistracy operates most effectively in countries and territories where the following conditions exist:

**The jurisdiction has a single national judicial system.** Examples of this are England and Wales, New Zealand and, more recently, Scotland and Northern Ireland. These countries are geographically compact, have a national rather than a federal (state or provincial) legal system, and support a national Justice of the Peace organization that identifies on a national basis with the court system. In such a situation consistency and uniformity of training for the lay magistracy is more likely to occur than in other jurisdictions with diverse regional judicial models. Although some Australian states and Canadian provinces have from time to time increased the judicial jurisdiction of JPs on a regional basis, their federal judicial systems appear to preclude any likelihood of a national lay magistracy being established in the foreseeable future.

**The lay magistracy adapts to changing social and judicial needs.** The original system in England and Wales has been successfully modified over the centuries to meet the contemporary needs of society, and this ability to remodel itself applies also to the New Zealand lay magistracy, which continues today in spite of past abortive attempts to fully professionalize the bench.

**Non-partisan advisory committees make the lay appointments.** Such independent committees, responsible for the selection, training and control of the lay magistracy, have existed for years in England and Wales and have recently been introduced in Scotland, the province of Ontario in Canada, and in the Australian state of Victoria. Such a method of

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417 Brenda Large JP, member of the LC’s Advisory Committee, interviewed in New Zealand, 2005.
selection and appointment has been sought, unsuccessfully to date, by the Federation and individual JP associations in New Zealand.

**Appointees are representative of the community they serve.** Considerable emphasis has been placed on this in England and Wales, more recently in Scotland and Ireland, and to some degree in New Zealand – particularly in respect of the lay Community Magistrates scheme. This factor in appointment has been accentuated in sparsely settled regions of Australia and Canada where “special needs” summary proceedings courts have been established for aboriginal populations. Until 2003 consideration of a candidate’s political affiliation was used as a proxy for social balance, and despite this disclosure now being removed from the list of requirements it appears that de-gentrification of the lay magistracy has been achieved to a degree acceptable to all sides of the political spectrum.

**Continuing mentoring and peer review of magistrates exists.** This is the situation in England and Wales, the state of Ontario in Canada, Scotland, and recently in New Zealand. In these jurisdictions considerable time and effort has recently been invested in training lay magistrates and evaluating their competence on the bench.

**Magistrates are appointed on a fixed term.** Greater control over the appointment, training, work ethics and retirement of JPs has been accomplished by introducing short-term JP commissions that are renewable subject to satisfactory performance. This is the case in England and Wales, and the Australian state of New South Wales. It is now being considered in New Zealand, where historically Justices of the Peace have been appointed for life.

Lay magistracy does not, however, appear to reach its full potential in jurisdictions where:

**Large geographical areas have diverse justice systems.** This is apparent in Australia and Canada, which have effective lay magistracies in some regions of the country but not in others, as mentioned above. And it is particularly marked in the United States where Justices of the Peace operate with a wide variety of responsibilities in different states. A consistent standard of lay magistracy seems to be incompatible with a large national jurisdiction supporting both regional and federal judicial systems.

**Appointment is politically initiated and perceived as an “honour”.** This is most apparent in former outposts of the British empire such as Hong Kong, Singapore and Malaysia, where lay magistrates are still appointed to carry out ministerial work but have no judicial responsibilities. In a number of Pacific island nations JPs retain a minor judicial

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418 Andrew Sanders, *CJM magazine*, Centre for Crime and Justice Studies, U.K. No.46, 2001/02
role, but in some Caribbean jurisdictions appointment as a JP is a sinecure – handed out to favoured politicians, party loyalists and public servants.

**No independent non-partisan body controls the lay magistracy.** Unless a single department or committee is established with full government authority over selection, appointment, training and control, it is extremely difficult for a lay magistracy to exist and endure with the full confidence of lawyers, politicians, and the general public. This applies in several Australian states, but most notably in Tasmania. It is submitted that New Zealand’s lay magistracy has been fortunate to survive in the absence of such a body.

**Appointment is for life, and with no performance reviews.** This is the situation in most of the small island nations where appointment to the lay magistracy is regarded as a sinecure. It has also been the case in a few countries where lay magistrates still enjoy some public and judicial respect (including New Zealand), but most jurisdictions, including states in Australia, are adopting fixed-term appointments to enhance the system’s structural integrity.

In the past few years several countries or territories have either reintroduced a lay magistracy or increased the jurisdiction of an existing lay magistracy. These include England and Wales, Scotland, Northern Ireland, South Africa, the Australian state of South Australia, and the province of Ontario in Canada.

Scotland has established a Justices of the Peace Court where lay magistrates will handle all summary proceedings cases, and Northern Ireland has replaced professional judges with Justices of the Peace in its lower courts. Significantly, the governments in both jurisdictions adopted lay magistracy models contrary to the recommendations of court reform review committees that the lower courts be professionalized.

This resurgence of lay magistracy in summary proceedings courts is not confined to Anglo-Saxon justice systems. Bell notes the creation in 2002 of a new category of non-professional judge (*le juge de proximite*) in France ‘appointed for a non-renewable period of seven years these part-time judges will deal with small civil cases (up to €1,500) and petty crimes, especially traffic offences, involving fines but not imprisonment . . . They are permitted to work up to 130 days a year and are remunerated at a daily rate. The government hopes to recruit over 3,300 over five years, and began with 33 appointments in July 2003.’

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419 Bell, p.333.
These overseas lay magistracy developments have largely gone unnoticed and unreported in New Zealand, where the last concerted effort (by the 1977 Royal Commission on the Courts) to re-establish and expand a national lay magistracy was predictably opposed by sections of the legal profession and has received only token support from successive governments.

I submit that the weight of evidence elicited from this comparison of New Zealand and overseas lay magistracies strongly affirms the thesis that lay magistracy is effective, and should be retained and reformed as a major component in the New Zealand justice system. The District Court, currently presided over by District Court Judges supported by Community Magistrates and judicial JPs, is overburdened and unable to substantially reduce case backlogs and a new lower-tier Magistrates Court presided over by lay magistrates would alleviate this problem and greatly expedite summary judicial proceedings.
Lay magistracy in New Zealand is not an anachronism as inferred in 2004 by the New Zealand Law Commission. On the contrary, this thesis concludes, as did the Royal Commission on the Courts in 1978, that lay magistracy is effective and should be retained and reformed as a major component of the New Zealand judicial system.

While this research has proposed that lay magistracy effectiveness has been demonstrated in terms of ‘participatory democracy’, ‘local justice’, and ‘low operational cost’, the study has also shown lay magistracy to be effective in clearing summary court caseloads and thereby freeing District Court Judges to devote their greater skills to hearing more serious charges.

It is further asserted that the time is opportune for the lay magistracy, under the aegis of the Ministry of Justice, to assume increased authority and responsibility within the justice system. If greater control and training by the Ministry of Justice eventuates, it is contended that lay magistracy would become even more effective within the summary judicial system than it has been in the past. While it is conceded that lay magistracy effectiveness in terms of speed of disposal of cases is unlikely to match the speed with which cases are disposed by professional law-trained District Court Judges, lay magistracy case disposal has been demonstrated to be greater in Auckland, Waikato and Bay of Plenty district courts where the training of lay magistrates has been more intensive.

It is conceded that in a ‘cost-to-the-taxpayer-per-case-disposed’ sense, the effectiveness of lay magistrates (vis-à-vis that of District Court Judges) remains problematic. It is, therefore, a fruitful area for future research. Such research could not be included within the parameters of this study because no worthwhile official statistics against which such cost-effectiveness could be measured were available from the RFNZJA, the Ministry of Justice, or the Department for Courts for the years before and during the period covered by this research.
An example of official statistics\footnote{The data show the number of disposed criminal summary cases and associated appeals by judicial officer type at disposal by calendar year of disposal 2004-2008 for all District Courts; Disposed criminal summary cases as percentage of total cases, appeals as a percentage of cases disposed and appeals granted as a percentage of appeals by judicial officer type at case disposal for the calendar years 2004-2008 for all District Courts; and Disposal of criminal summary cases as a percentage of total cases by judicial officer type for the calendar years 2004-2008 for all District Courts.} that may eventually assist researchers to quantify the level of lay magistracy cost-effectiveness on such a basis has recently been obtained by the author under the Official Information Act 1982 from the General Manager, District Courts (Appendix G).

As this thesis has demonstrated, lay magistracy based on the principle of local democratic participatory justice was the cornerstone of New Zealand’s court system for the first 50 years of the colony’s existence, and judicial JPs continued to preside in an effective symbiotic relationship with professional Judges until the 1930s. Following a 30-year period of decline in government and legal confidence – for which the JPs themselves were largely to blame – the Commission of the Peace was rejuvenated, and over the past 30 years has regained judicial respect to become an effective component of the court system, albeit with severely curtailed jurisdiction.

The New Zealand Law Commission in 2004 had recommended a new ‘Community Court’ [Magistrates’ court] presided over by legally qualified Community Justice Officers – a proposal not accepted at the time by the government of the day. This thesis contends that a new Magistrates Court should be established and presided over by lay magistrates as in Scotland, where Stipendiary Magistrates have been withdrawn from the Sheriff and JP Courts and entirely replaced with non-legally qualified lay Justices of the Peace\footnote{Section 46 (4) of the Criminal Proceedings (Reform) (Scotland) Act 2007 provides that there must be at least one JP Court within each sheriff court district. In a similar context, therefore, there would be at least one dedicated JP Court}.

It is appropriate here, in concluding this work, to briefly revisit the research objectives that were specified at the outset of this thesis. The overall goal was to undertake an exploratory study of lay magistracy within New Zealand in order to determine whether the system remains pertinent or, alternatively, has become anachronistic. But there were also a number of interconnected derivative objectives to this study.

The first of these was to determine whether or not criteria could be proposed about what constitutes effectiveness with respect to the lay magistracy. To that end, a critical review of what little literature is available about the lay magistracy system was examined with
material being partially sourced from New Zealand but primarily from overseas. The
intention was, from the outset, to undertake exploratory research into the literature and
other discursive materials in order to try to gauge what other writers have suggested as
constituting effectiveness. Effectiveness is an elusive and slippery concept that is typically
associated with quality. Thus, ascertaining ‘effectiveness’ for this study has been about
‘appraising the capability of producing a desired result’ provided by the lay magistracy to
the justice system and the community.

It must be firmly stated again that the intention was never to explore ‘the law’ – the writer
is not a legal expert and would not presume to trespass into that professional domain. And
neither was there a research goal associated with evaluating perceptions of lay magistracy
stemming from the legal profession, or indeed, from the public. Such foci were never a part
of the intended research brief. Instead, this thesis was prepared with an intentional focus on
one small aspect of the ‘judicial system’, specifically, the lay magistracy. It was concerned
with how factors such as political patronage by government, the continuing education of
JPs and even recruitment processes might impact upon the overall quality of service
delivery. To that end, comparing the New Zealand system with those from overseas
jurisdictions has contributed to assessments being made about what constitutes salient
practices and useful features with respect to the deployment of lay magistrates. Such a
comparative exercise has, it is argued, been essential in order to begin to understand the
nature of what an effective lay magistracy might involve. But even though it is a difficult
concept to grasp, the notion of quality is a crucial dimension of effectiveness. Quality is to
effectiveness as the moon is to the tide; they are inexorably joined.

However, in New Zealand, the viability of the lay magistracy has also been per se like the
tide. As has been detailed, at one stage this lay element of the judicial system in New
Zealand appeared more likely to disappear than to survive. Hence, also by way of
exploratory research, the objective was nominated to seek to establish why lay magistracy
has been steadily diminished in importance in New Zealand over the decades, and yet
developing and expanded in other countries. Again, comparing and contrasting
jurisdictions provided a means for investigating this matter.

But undertaking systemic comparisons can only ever provide a partial explanation to the
overall question of whether the lay magistracy remains a relevant component of the judicial
system within New Zealand or alternatively has become anachronistic. In order to achieve
a fuller picture of what ‘the system’ is within New Zealand, it was decided that an aim of
this study should involve the undertaking of a survey of the Justice of the Peace population

established within the Auckland District Court complex. There would also be a dedicated room for court Justices, and
in New Zealand (from which all lay magistrates had traditionally been drawn). Such a survey had not previously been completed and was seen as useful because it enabled the researcher to not only obtain up-to-date demographic information but also to gather a body of qualitative information about the viewpoints of JPs with respect to aspects of their own activities, and in particular, the lay magistracy. It was reasoned that such an approach would enable the investigation to address the final two goals that were specified for this thesis, namely, to seek to determine whether or not lay magistracy should be retained and further developed in New Zealand, and, as a corollary, if they were to be retained, to indicate how this might be achieved and what part lay magistrates should then play within the justice system.

Before any concluding commentary is advanced about key findings from this thesis and their implications for scholarship, it is appropriate to mention that specific theories about lay magistracy systems remain conspicuous by their very absence. For that reason, a theoretical stance has not been able to be adopted which might usefully have provided the researcher with an explanatory platform for developing and clarifying understandings about the findings that have emerged from this research. Instead, theory has necessarily been ‘grounded’ after the data have been interpreted.

As stated earlier, this has been an exploratory study and for this reason it is considered to be entirely appropriate that theoretical explanations have emerged as an output following the gathering and interpreting of data. This is consistent with the reality that the absence of theories need not prevent or inhibit gathering of data. But as will be seen, it is possible to ‘ground’ some explanations that heighten understandings as an outcome of this study. These will be presented within the commentary that follows.

Surveys for this study have revealed that Justices of the Peace, though still anxious about their judicial future, have responded positively to all recent judicial challenges put to them by the RFNZJA and Ministry of Justice – particularly in the areas of training, courtroom expertise and sentencing proficiency. The competence of judicial JPs is now seldom questioned, and their sentencing decisions are rarely the subject of appeal.422 There is currently a surplus of judicial Justices trained and available to assume court duties.

An increased degree of respect and cooperation appears to have been developed in the past decade between the Ministry of Justice and the JP Federation, to the extent that top-level meetings between the two organizations, once a rarity, now occur on a regular basis (as shown in Chapter 2). This mutual restoration of confidence has been tangibly demonstrated

accommodation would be provided for a legal adviser and a fines enforcement officer.
422 Post-2007 information on appeals of judicial JP decisions are noted in the Epilogue.
by joint consultation on recent legislation,\textsuperscript{423} cooperation in research on JP processes and policies,\textsuperscript{424} and negotiation of a funding agreement relating to Federation administration costs, ongoing personal training of Justices, and production of published and electronic training aids.\textsuperscript{425}

It is contended that arguments supporting an extended lay magistracy as expounded in this thesis are solid and persuasive. The importance of the lay magistracy in New Zealand has been stressed repeatedly in academic literature and parliamentary debate, speeches by Ministers of Justice, Governors-General, Supreme and High Court judges, and in numerous submissions to the 1977 Royal Commission on the Courts cited in this thesis (see Chapters 3 and 6). Internationally, admonitions from three eminent British Lord Chancellors, to law reformers intent on abolishing the lay magistracy in Britain and detailed in Chapter 6, are equally apposite to the New Zealand situation.

Moreover, strong support for the local justice argument was apparent in parliamentary debate (Chapter 6), and this was later manifested with the establishment of the Community Magistrates scheme. Politicians also forcefully advanced the effectiveness argument by pointing out that judicial Justices and Community Magistrates were freeing District Court Judges to handle the more serious lower court cases. Furthermore, the survey undertaken for this thesis (Survey B) has affirmed that a supply of well-trained judicial Justices will be available from the ranks of ministerial JPs to meet foreseeable court requirements throughout the country.

Argument against an extended lay magistracy, possibly indicating self-interest, has been advanced by lawyers, law societies and the New Zealand Law Commission. Anecdotal evidence from the Hamilton District Law Society, and based on a total of seven attorneys, suggested that lay magistrates should not sit on the bench, that should only be the domain of professionals. Ironically, later in the commission hearings, an about turn was made with that same society conceding that lay magistrates could be retained for non-defended hearings. As Burney\textsuperscript{426} concurred in her overseas study, ‘most of the demand to replace magistrates comes from lawyers, and might miss the importance of the link to public opinion, however imperfect, that the lay system provides.’

This study has reviewed recent overseas studies that have revealed growing interest in participatory democracy in summary court proceedings and local judicial involvement in community courts. This has been graphically demonstrated in England and Wales, where

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\textsuperscript{423} JP Amendment Act 2006.
\textsuperscript{424} Justice of the Peace Custom and Practice by Local Associations, RFNZJA report, 2007.
\textsuperscript{425} The joint Services Agreement resulted from a 2002 ‘Training Needs Analysis Report’ and a Cabinet Memorandum prepared for the then Minister of Justice.
the authority of Justices of the Peace has been extended and their sentencing limits increased. The Scottish Executive has turned over the entire responsibility for summary proceedings to Justices of the Peace. Northern Ireland has moved significantly to lay magistracy – though more on the model of New Zealand’s lay Community Magistrates as opposed to the traditional Justices of the Peace. Lay magistrates have also been given increased jurisdiction in South Africa, Canada (particularly Ontario), one state in Australia, and most recently in Japan. Again the implication for this thesis is clear. New Zealand has a system of lay magistracy that is not anachronistic.

In 2006, following the introduction of extensive training schemes and a solid record on the bench during the intervening period, it remains evident that judicial JPs have an important part to play in our lower court system. This thesis concludes, therefore, that there is a sound case that their jurisdiction should be extended to take further pressure off the District Court case backlogs than they are permitted at present.

This study has also proposed that a lay magistracy in the lower courts is important because it provides fair, democratic and cost-effective justice to defendants accused of less serious offences in the criminal code. It is cost effective because the system does not require a high degree of more expensive legal specialization on the bench. An analysis of the research material in this thesis, augmented by results from the surveys of the JP population of New Zealand, has provided material that could be used to inform the development of several options pertaining to the future of the Commission of the Peace. For instance, a restructured system of judicial Justices should be retained in the courts provided they receive ongoing full support of the Ministry of Justice and the Department of Courts. Initiation of such lay magisterial reform will require dedicated effort by a strong Minister of Justice determined to implement the plan. In 2006 the Helen Clark Labour led government expressed a preference for a professional bench in the lower court, but the case for expanded lay involvement nevertheless remains strong and the current National led government Minister may need to be persuaded to reconsider this matter.

It has been clear from this research that the selection of JPs is both politically based and potentially biased according to the political persuasion of the nominator. Ideally, therefore, extension of judicial JP jurisdiction would also require a radical change of thinking by politicians on the appointment procedure for Justices of the Peace. An independent appointments committee to process JP nominations by electorate Members of Parliament would be able to make non-partisan appointments strictly on the basis of individual competence, age-race-gender balance, and regional need.

An interpretation that emerges from this study is that a major shift in attitude would also be required of many JPs (including past and present office holders in the Federation and regional associations) on such issues as term of appointment, retirement age, and payment for judicial JPs. Also, long overdue restructuring of the Federation and its associations is imperative.

Despite the above, this research revealed that many lawyers, jurists and politicians who supported the retention of judicial Justices of the Peace nevertheless expressed dissatisfaction with the political nature of the present appointment system. And although there was general agreement that ministerial JPs should not be paid, there was support from several quarters for the remuneration of judicial JPs.

Brian Mooney SM told the 1977 Royal Commission on the Courts his group’s main argument was that political patronage in the appointment of JPs should be removed, and he noted that the RFNZJA concurred with that view. In a supplementary submission the Waikato Magistrates expanded on their criticism of the JP appointment system:

Opposition has been expressed publicly to any increase and indeed to existing use made of Justices of the Peace. There does, however, seem to be an inconsistency in insisting on laymen having the sole right to determine matters of fact as jurors and in the next breath denying their ability to determine like matters of petty jurisdiction in a criminal division. The lack of respect in New Zealand arises, we suggest, from two causes: firstly the office has been conferred in very many cases as a reward to party faithful, something to be regarded as slightly below MBE. There are over 8,000 Justices of the Peace of whom not more than 10 per cent actively assist in the administration of justice. Secondly, the New Zealand Justice of the Peace, unlike his English counterpart, has not the guidance of a Justices’ Clerk, trained and authorized as such. This is pointed up in the submission of the Justices of the Peace Association that they should have the right to retire and consult on law or procedure with a Magistrate. That does not take care of a happening when there is no Magistrate available. Worse still, what impression would a defendant have of the standard of justice so administered? The English subterfuge of discreetly calling out the Clerk for consultation and sending him back into court ahead of the Justices is little better. For this reason, if the present Magistracy are constituted as Judges, then their petty criminal jurisdiction could be exercised by two Magistrates, one stipendiary and one lay.427

In another submission to the Royal Commission four senior Magistrates had opposed the existing ‘political patronage’ system of appointing JPs and suggested the establishment of a Magistrates’ Judicial Appointments Committee similar to, but less representative than, the Justices’ Appointments Committee proposed by the RFNZJA. The political nature of the current JP appointment process has figured as a contentious issue throughout this study and been supported solely by the politicians themselves. There is no statutory requirement for

427 Waikato Magistrates’ submission to RCC, 88A p.6, S847. (Note: In his final comment Brian Mooney SM was alluding to a proposed two-tier lower court, whereby the current Stipendiary Magistrates would become judges in a District Court, and a separate new Magistrates Court would handle the more simple, and generally undefended, cases.)
Justices of the Peace to be nominated by constituency MPs. The custom has simply
devolved as a convention from Hon. T.C. Webb’s disapproval in 1951 of some JP
gubernatorial appointments made on the recommendation of JP associations. In overseas
jurisdictions where this practice of political patronage still exists the office of Justice of the
Peace has become a sinecure, and until New Zealand JPs are selected and appointed by a
non-partisan system the office and its judicial significance will remain questionable by the
legal profession and the public.

The question of remuneration of lay magistrates will also be a matter of further debate
when court reform is readdressed. The issue has been the subject of considerable argument,
for and against, in the course of this study and the views of all parties expressed. In my
survey of New Zealand JPs the consensus was that ministerial JPs should not be paid, but
that judicial JPs should receive a more equitable remuneration for their services than the
“mileage, parking and lunch money” compensation they currently receive. A majority of
New Zealand JPs surveyed thought their judicial colleagues should receive a daily sitting
allowance commensurate with that paid to lay members of valuation, arbitration and
mediation tribunals.

Since the Royal Commission on the Courts recommended development and extension of
the lay magistracy 30 years ago, court lists have increased and the case backlog situation
has worsened. The appointment of additional District Court Judges and the introduction of
Community Magistrates seemingly has done little to alleviate the case backlog problem in
the courts. In 2004 Law Scene\textsuperscript{428} quoted Ministry of Justice figures showing the number of
District Court trials waiting more than a year for a hearing, had risen from 261 at 30 June
2003, to 348 at the same time in 2004 – an increase from 21 per cent to 28 per cent of all
cases awaiting trial. And the following year a national news source reported:

A backlog of court cases has some lawyers calling for changes to the court
system . . . Figures issued by National Party MP Simon Power show the
average waiting time for criminal trials in district courts is now nearly six
months . . . but some lawyers say they are waiting up to a year to have cases
heard because of under-resourcing and inefficiencies . . . Lawyer Marie
Dyhrberg says a complete overhaul of the system is needed. She says the
government’s plans to appoint six new judges won’t be enough to fix the
problem . . . Auckland QC David Jones says the backlog of court cases on the
region has the potential to adversely affect trials. Jones says it is a worry for
both prosecutors and defendants. He says the backlog also means people can
be held in custody for a long time, even when nothing has been proven against
them . . . Minister for Courts [Hon.] Rick Barker says court caseloads are
improving in certain areas, with the number of civil cases awaiting hearing
down and the Environment Court halving its caseload in four years.\textsuperscript{429}

\textsuperscript{428} Law Scene, September, 2004.
\textsuperscript{429} Source: Radio New Zealand news, 1 December 2005, 11:44 am.
Meanwhile Justices of the Peace, frustrated by years of political apathy and disinterest by successive governments, have received some modest financial support from the Ministry of Justice and noted growing interest and cooperation from the Department for Courts. The time for a decision on the long-term future of lay magistracy is opportune.

A critique of this thesis may suggest that advocating options for a future lower court system strays beyond its basic contention ‘that lay magistracy is effective, and should be retained and reformed as a major component of the New Zealand judicial system.’ Conversely, it could be suggested that merely proposing retention and reform of lay magistracy, without the researcher suggesting effective ways of bringing that to fruition, would be remiss. The latter view has been taken in this instance, and the options for consideration are propounded in Appendix F.

**Appointment procedure and cost may determine outcome**

The option that eventually prevails in New Zealand will likely depend on the government in office at the time and the persuasiveness of its Minister of Justice. The cost and effectiveness of the various options – rather than the principle of lay justice versus a professional bench – is also likely to be a significant factor in the ultimate decision.

Successive governments have experienced unacceptable backlogs of criminal cases in the lower courts of New Zealand for many years. In the past 25 years a Royal Commission has considered and reported on the matter; the New Zealand Law Commission has considered the problem and made recommendations to government; and an entirely new lay magistracy (in the form of Community Magistrates) has been introduced – all with minimal effect in resolving the lower court backlog problem.

Our politicians have refused to act on many of the recommendations of the groups they specifically set up to advise them, and court waiting lists have continued to increase.

**Changes must be made within the Federation itself**

For several years Ministers of Justice have stressed a desire to deal with one entity on JP matters, and not separately with each of the 29 different autonomous JP associations. When in 2004 the Federation council attempted to resolve this problem by streamlining its operation to five regions – with smaller associations relinquishing their autonomous status and becoming branches – the suggestion met fierce resistance at the local association level.

The Federation council must not resile from this issue. And the RFNZJA must also re-establish a more professional image to enhance its liaison and credibility with the various government ministries with which it deals, the legal profession, and the public. Inadequate
funding in the past has restricted the Federation head office to a full-time registrar, a part-time national training officer and an honorary legal adviser.

Another weakness that must be addressed is the lack of continuity in office of key Federation office-holders. Currently, elected regional councillors progress to higher office on a traditional proscribed annual basis (as set out in the RFNZJA constitution) so that each becomes president for one year and then moves on. The procedure is not merit-based, with the result that Federation publications indicate it has at times suffered from mediocre as well as short-term leadership. A constitutional amendment to abolish the present automatic-ascendancy arrangement would enable the council to elect a president and vice president on merit for a reasonable term, perhaps three years, and thus provide greater permanence and stability at the helm of the Federation.
Magistrates’ Advisory Committee

A decision to extend the jurisdiction of judicial Justices would require a symbiotic relationship between the RFNZJA and the Ministry of Justice and, this thesis argues, the establishment of an independent, non-partisan Magistrates’ Appointments and Advisory Committee (MAAC) to provide the authoritative and professional management that a more effective lay magistracy requires.

This would require greater financial and executive input by the government into the selection, training and legal assistance aspects of a revitalized lay magistracy system. It would also require the introduction of legal training to the court-sitting Justices by experienced judges – as has been provided to Community Magistrates in the past. The committee should also be responsible for overseeing the competence of judicial JPs in the performance of their bench duties, and to handle all disciplinary matters in respect of Justices of the Peace. These changes are essential if the lay magistracy is to survive and become a permanent, strong, effective and viable component of the New Zealand justice system.

A new system of appointment

Such an independent non-political JP appointing body (suggested above) is long overdue to re-establish credibility with the public, the legal profession and the JPs themselves. This was seen as a high priority issue by the 200 JP association officials surveyed (Survey A) in this study, and by more than 50 per cent of the 992 JPs representing the total JP population (Survey B) who responded.

As New Zealand politicians are unlikely to follow the example of their parliamentary colleagues in Western Australia and relinquish their sole right to nominate Justices of the Peace, a compromise solution is feasible to break the current parliamentary impasse. Fortuitously the government has already established a non-political mechanism that could facilitate this procedure.

In 2004 the Government, acting on the advice of an independent report,430 established the Judicial Appointments and Liaison Office (JALO) – located in the Crown Law Office under the overall responsibility of the Solicitor-General, and similar in concept to a new way of appointing judges advocated by the Department for Constitutional Affairs in England.431

The report recommending the establishment of JALO suggested at the time that it should have responsibility for appointing all judicial officers “including Justices of the Peace, Community Magistrates and Coroners, as well as responsibility for quasi-judicial appointments.” This was precisely the system advocated by the 1977 New Zealand Royal Commission on the Courts, but regrettably the government chose not to accept the Commission’s advice at the time. Again in 2004 the government opted to exclude Justices of the Peace, Community Magistrates and Coroners from JALO’s appointment responsibilities.

The government should reverse its decision, and in the meantime could continue with the present MP nomination procedure by ensuring that all names put forward by constituent MPs be sent either to JALO or to the proposed Magistrates’ Appointments and Advisory Committee (MAAC) for vetting and final appointment according to community needs and the suitability of applicants.

It is acknowledged that the present sole authority for MPs to put forward names of appointees is purely a parliamentary convention, unsupported by any statute, which would leave JALO (or MAAC) free to advertise for JP applications directly from the public if it chose to do so – a system presently adopted in England and Wales by the Lord Chancellor’s Appointments and Advisory Committee. Under such an arrangement in New Zealand, of course, it would be imperative that a regular and close liaison existed between JALO and the RFNZJA office. The Solicitor General should appoint a liaison officer in his department to ensure this link is established.

The involvement of JALO (or MAAC) would effectively de-politicise lower court appointments and at the same time remove responsibility for JPs’ control and records from the Ministry of Justice to the Attorney-General’s office. Responsibility for maintaining an up-to-date and accurate register of the Commission of the Peace would then rest with JALO (or MAAC) – something that the RFNZJA was never able to achieve as long as JPs were not required to join a local JP association.

The JALO (or MAAC) would, through regional committees (RMAC) interview JP nominees as, when, and where required. JALO (or MAAC) ideally should include RFNZJA officials, Community Magistrates, retired District Court Judges or suitably qualified members of the public. Such an appointment system should satisfy the politicians and relieve the Ministry of Justice of responsibility for maintaining a permanent register of JPs – something it has failed to do satisfactorily in the past.
Compulsory initial training of newly appointed JPs

This was seen as a high priority by 90 per cent of all Justices of the Peace surveyed. Since the study commenced in 2002 this problem has to some extent been remedied. Although in 2006 there was still no statutory requirement for this initial training, representation by the RFNZJA to the Minister of Justice had resulted in District Court Judges agreeing to defer the swearing-in of new JPs (and thereby delaying their authority to take up their duties) until the local JP association confirmed that the newly appointed Justice had attended the required training sessions. It has subsequently been decided that the names of new JPs will not be published in the *New Zealand Gazette* until the training requirement is satisfied.\(^{432}\)

Compulsory membership of a JP association was advocated by 88 per cent of all JPs surveyed. By 2006 the government had refused to be persuaded on this issue, and stressed its opposition to compulsory membership of any organization on the grounds that such a requirement would contravene the Human Rights Act – regardless of the fact that compulsory membership was required for professional bodies such as law and medical societies. This problem would be alleviated if JALO (or MAAC) assumed responsibility for JP appointments and maintained a close working relationship with the Federation.

Introduction of practicing certificates for JPs\(^ {433}\) was strongly supported by 81 per cent of Justices surveyed, as a means of establishing that JPs had in fact received adequate training to perform their duties. This idea was proposed to the Minister of Justice, who agreed to include it in the Justices of the Peace Amendment Bill scheduled for its first reading in Parliament in 2006. The need for this was apparent from the hundreds of unsolicited replies from JPs documented in this study.

Competence and ongoing training was considered extremely important by the 89 per cent of all JPs who said they had attended ongoing training sessions. Of those who attended these sessions, 95 per cent claimed they found the sessions worthwhile. The importance of this issue also was further stressed in the large number of unsolicited responses of those surveyed. In my view, this issue is so important to the guaranteed survival of court JPs in the judicial system that a totally new approach is required – that new JPs should be appointed initially for five years, and that further extensions of the term of appointment by JALO (or MAAC) be conditional upon certain performance criteria being achieved by the appointees.

Every new Justice of the Peace during his or her first five-year term of appointment should be required to attend a specified number of ministerial training courses, maintain a

\(^{432}\) This was agreed by the Minister of Justice in consultation with the RFNZJA in late 2008.
complete record of home/office visits he or she provides for members of the public, and agree to attend a specified number of days (or half-days) on duty as a JP at a local Citizens Advice Bureau or similar designated community ‘signing place’ for members of the public.\(^{43}\)

Renewal of the JP’s warrant should be made following an interview and assessment by JALO (or MAAC) at which the JP would be expected to indicate a willingness to undertake TOPNZ Judicial Studies Course and be prepared to assume court duties if called upon for a prescribed number of days each year.

At this interview the JALO (or MAAC) would have an opportunity to assess the likely competence of a Justice for bench work and establish whether the appointee was in a position to undertake regular court duty on a paid or unpaid basis.

The retirement age for Justices of the Peace is a problematic issue that may not be resolved for some years.\(^{45}\) The Government’s proposal that judicial JPs retire at the age of 68 in line with District Court Judges is simply not feasible under the present system. If it were enforced, the lower court system – certainly in Auckland and the larger cities would collapse. In 2006 44 judicial JPs sitting on the bench of Auckland District Courts ranged in age from 53 to 86; 25 per cent were under 60; 25 per cent were between 61 and 66 years of age; 25 per cent were between 67 and 71; and 25 per cent were over the age of 72. Their mean age was 66.5 years.

In 2002 when they were surveyed, 82 per cent of JPs believed that judicial JPs should retire from the bench between the ages of 70 and 75. Only 52 per cent thought there should be a retiring age for their ministerial colleagues, and those respondents put the lower end of the retirement spectrum at 70 and the higher end at 80 years of age. Most JPs who were opposed to a retirement age believed JPs should submit to peer review based on competency, and be retired accordingly. In my model this would be an important function of the proposed JALO (or MAAC).

Remuneration of Justices of the Peace is arguably the most contentious issue facing JPs and their future in the courts structure. Successive Ministers of Justice have staunchly opposed payment on the grounds that JPs have been appointed as voluntary unpaid officers of their local district courts and as ministerial JPs providing a voluntary service to their community. Survey results indicated that 85 per cent of JPs questioned felt that judicial JPs should

\(^{43}\) This has been adopted since completion of this research study.
\(^{43}\) In the United Kingdom JPs are required to sit for 26 half-days per year, and in fact average about 44 sittings per year.
\(^{43}\) In New Zealand, although there is no stipulated minimum number of attendance days specified for judicial JPs, some sit for up to 100 days per year.
\(^{43}\) This situation has now changed (2009) and the retiring age for judicial JPs has been set at 72.
receive remuneration for their court duties. Conversely, 89 per cent of those polled were opposed to any payment for JPs involved in ministerial work in the community. While a large majority of JPs supported the principle of payment for court work, many of those personally involved with court work remain ambivalent on the issue. Some court justices believe their work should remain unpaid.

This issue of remuneration has been exacerbated in New Zealand and in the United Kingdom by the concerted efforts of both governments to provide a lay magistracy that is more representative of the population at large than it had been in the past. As the age-gender-ethnic mix of JPs has changed it has become apparent that a number of JPs interested in court work have been unable to take time off from their employment without loss of pay. This became a problem with the Community Magistrates’ scheme, where a number of those appointed to the bench found they simply could not survive financially on the modest $50-$100 per day fee they received on sitting days.

Magistrates in England and Wales, as in New Zealand, are only paid a modest meal and travel allowance when they are required for bench work. But in England and Wales those Justices who are required to attend court, and suffer a loss of normal income as a result, are entitled to make a claim to their local Justices’ Advisory Board and receive payment commensurate with that loss. A similar scheme would obviously need to be considered by such a committee if it were established in New Zealand.

Much of the pressure for payment to court Justices that has been inspired by RFNZJA officials in recent years is likely to prove counter-productive in light of the 2004 New Zealand Law Commission’s recommendation that judicial JPs be abolished and replaced by full-time salaried law graduates to be known as Community Justice Officers – a suggestion which the government has to date rejected.

Ways forward

Judicial Justices of the Peace would be well advised to desist from seeking to become “professional lay magistrates” and to instead heed a suggestion by New Zealand’s Chief Justice Dame Sian Elias, when she addressed the 2006 annual conference of the RFNZJA. Dame Sian appeared not only to throw JPs a lifeline, but also to chart a path through the remuneration minefield and a secure future, when she said:

The Chief Judge hopes that better integration with the professional judiciary will be achieved through Justices of the Peace participating in his Council of
Auxiliary Judiciary\textsuperscript{436}… If we are to introduce more system, with payment for Justices of the Peace, it may be that more onerous obligations for training and continuing education, and for removal will have to be addressed. The suggestions made by the Law Commission [that judicial JPs be abolished] remain up in the air … I wonder if it may be worth considering building on a legislative vehicle already available. I know the Community Magistrates’ system has been controversial among you and I think it was unfortunate that it was seen as apart from the effort of Justices of the Peace. What I wonder is whether there is room to build on that base. After all, all District Court Judges are Justices of the Peace. It may be possible in a similar way for the Community Magistrate model to be further developed, using Justices of the Peace.\textsuperscript{437} [Emphasis added.]

Dame Sian then told delegates that ‘whatever further development is around the corner, I am confident that the function you perform must continue. It provides essential services both through the courts and throughout the wider community. You are part of the social glue without which any society crumbles … I know that, despite the efforts of the Ministry of Justice, the support you have is meagre … but you took on this ancient responsibility because it matters very much. Not in status, not in money, but because it is worthwhile work which underpins peace in our communities. Your title is exactly right.’

The Chief Justice’s comments should reassure the JP Federation on a number of fronts. Most importantly she has given the New Zealand judiciary’s imprimatur to the concept of lay magistracy and suggests an important link with the Community Magistrates scheme, but she also leaves open the issue of worthwhile recompense [either by way of expenses or sitting fee] for judicial JPs or CMs for future consideration.

The politicians will finally decide the future of lay magistracy. It remains to be seen whether they will heed the comments of the Chief Justice when they make that important decision.

\textsuperscript{436} Committee set up in 2006 by the Chief District Court Judge. It is an administrative committee that keeps the CDCJ informed about the various divisions of the District Court (including JPs) for which his office is responsible.

\textsuperscript{437} Speech by CJ Dame Sian Elias to annual conference of RFNZJA at Greymouth, 3 March 2006.
This thesis is a narrative written by an ordinary person about ordinary people. It is about 450 ordinary New Zealand men and women who get dressed each morning, go off to their local courthouse and sit on the bench to hear evidence and pass judgement on their fellow citizens who have been charged with some minor infringement of the law. It is about the future of these ordinary people – these voluntary and unpaid lay magistrates who add a democratic ingredient to the attorney’s rule of law. It is not a thesis about ‘the law’ but it is a ‘grounded’ social science commentary about a small but important component of the legal system.

Most New Zealanders probably have never heard of lay magistrates, though they may have heard of Justices of the Peace -- from the ranks of which lay magistrates have traditionally been drawn. Lay magistrates have been amongst us since the first settlers arrived in the Bay of Islands. They were once our only judicial officers, and today they still play a minor but important role in our courts. These ordinary citizens are unpaid volunteers who are prepared and anxious to play a greater role – and it is submitted they should play a greater role – in relieving the pressure on our overburdened court system.

As mentioned above, it must be made absolutely clear that this thesis is not about ‘the law’. Neither should this thesis be construed as being counterproductive of, or in any way opposed to, the legal profession and the rule of law.

Members of the legal profession have, on occasion, suggested that lay magistrates should not sit on the bench because they are not qualified in law and therefore not competent to serve as judges. This, of course, completely misses the point. The lay magistrates sit on the bench, as do jurors in the jury box, as men and women of common sense to hear evidence and make determinations of guilt or innocence based upon that evidence. Ideally, lay magistracy should be recognized as a judicial public service provided by respected citizens to their local communities.

Michael Kay,\(^438\) in his 1989 study, had this to say on the subject of lawyers and the lay magistracy:

Some members of the legal profession do not agree with the system of lay justice, labelling the position of justices as an “anachronism” which was only

kept on by the Justice Department to take the pressure off district court judges. Lay people have an important contribution to make to the administration of justice. This contribution stems from their closeness to the society they serve and the knowledge that this brings of what is needed to protect individual members of society. It is a closeness that in turn may bring problems, but it is nevertheless essential if ordinary people are to understand what the law requires of them and what protection they can expect from it.

This statement lends strong support to the adjudication role of the lay magistrate. The matter of sentencing, particularly when points of law are invoked, is an entirely different matter. In this event the legal criticism has substance, and such cases are remanded for hearing before a more skilled judge. Lay magistrates in New Zealand, almost without exception, preside over cases where the defendant pleads guilty, or when the summary offence carries a non-custodial sentence.

The subject of this thesis, rather than being law-oriented, involves an aspect of political science. It considers the wisdom or otherwise of retaining a long-established principle of English justice, a person’s ‘right to be judged by his [or her] peers.’ It assesses the relevance and importance of democratic justice in a modern judicial system, and evaluates the practicality and effectiveness of ordinary New Zealand citizens continuing to serve as voluntary judges over their fellow citizens in our lower courts.

Since this thesis was not about the law a general survey of legal practitioners, specifically about lay magistracy, was never considered. For the views and opinions of criminal lawyers, and those general law practitioners who from time to time appeared for clients in the District Court, this study relied on the reports of law societies, submissions to the RCC, contributions to law journals and newspaper articles for pertinent input. Similarly, a survey of members of the general public, seeking opinion on the efficacy or appeal of lay magistrates vis-a-vis professional judges, was not undertaken because it would likely have contributed little to the study.

What is important for the future is the need for a fresh review of the most recent developments regarding lay magistracy. This should span, in a manner that extends this present work, developments as they unfold in New Zealand and overseas. Since the conclusion of this research in 2007, for instance, evidence has begun to emerge that more women are being appointed as JPs in New Zealand. There is also a current drive in New Zealand to appoint Community Magistrates within the Auckland region (as per the Bay of Plenty). Hence, the need for ongoing evaluation and research appears to be strong.

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439 The one exception is for contempt of court, when a custodial sentence may be imposed pending an appearance of the defendant before a District Court Judge.
APPENDIX A: COVERING LETTER TO OFFICE HOLDERS OF JP ASSOCIATIONS (SURVEY A)

PHILIP HARKNESS

P O Box 128-140, Remuera, Auckland    Phone: (09) 522 2071    Email: philip@mediafeatures.co.nz

14 October 2002

Mrs M Appleton JP
9 Puni Road
Pukekohe

Dear Marie,

I am currently embarked on a research project on _Justices of the Peace in New Zealand_ for a PhD thesis at University of Auckland. My academic supervisors are Professor Andrew Sharp and Dr. Helena Catt (contacts: (09) 373-7599 or email h.catt@auckland.ac.nz).

As an office holder you are well aware that over recent years a number of issues have arisen concerning the Justice of the Peace system in this country – issues concerning the powers and duties of JPs; the possible introduction of practicing certificates; the criteria and system of appointment of JPs; the question of remuneration; the introduction of a retiring age, and so on.

In view of your knowledge and experience in Justice of the Peace matters it would be most helpful to me to have your personal opinion about the importance, or otherwise, of the various issues indicated on the enclosed survey form.

As a JP myself since 1964, and former president of a regional JP association, I am well aware of the disparity of views among current JPs about the importance of many of these issues.

Your own opinion will be important to the research, and I would be most grateful if you would complete the enclosed survey form and return it as soon as convenient. A postpaid envelope is attached.

Your reply will remain confidential, and I am confident the final research project will be of considerable interest and value to the various Justices of the Peace associations and to the RFNZJA.

Yours sincerely

Philip Harkness
HOW WOULD YOU RANK THE FOLLOWING JP ISSUES IN IMPORTANCE?

(Please rank them from 1 = most important through to 8 = least important)

- **Appointment procedure for Justices of the Peace.**
  At present all Justices must be nominated by Members of Parliament. Ministry of Justice guidelines recently have been revised, but are not being followed by MPs. There is no age limit for appointment, and no specific educational qualifications are required. Appointees need not be N.Z. citizens.

- **Retirement age for Justices of the Peace.**
  There is currently no retirement age. The Federation (FNZJA) has suggested 68 for Justices doing court work, but this is only a recommendation. At least one JP on the bench is 80, and others doing ministerial work are even older.

- **Compulsory membership of JP Associations.**
  There are 10,571 JPs in New Zealand. About 8,000 are members of one of the 29 regional associations and these names appear in the Yellow Pages for the convenience of the public. The remaining 2,500 JPs are not members of any association. Training is only available through associations.

- **Competence and continuing training of Justices.**
  About 400 JPs have completed a judicial training course sufficient to enable them to sit on cases in the District Courts, and their workload is heavy. All JPs are offered ministerial training sessions on a regular basis by their district associations. These well-run and informative sessions are not compulsory, and generally the course sessions are not well attended.

- **Remuneration for Justices of the Peace.**
  Historically, since their inception in the UK in the 13th Century, JPs have not been paid for their services. Today in N.Z. the 400 judicial JP's handle about 45,000 cases a year, work which otherwise would be done by District Court judges. Recently-appointed Community Magistrates, doing similar work to JP, are paid – and this has increased the pressure from some JPs for payment.

- **Practicing certificates for Justices.**
  Some JPs are unwilling to attend training sessions while others choose not to make themselves available to members of the public. As a result the introduction of Practicing Certificates has been advocated. These would be similar to those required of members of the legal and medical professions.

- **Duties and responsibilities of office.**
  Over the years the responsibilities of JPs have been largely eroded, often because of perceived or actual incompetence. Recently, as training has become more accepted, some judicial JPs have indicated that they could handle more involved cases, similar to those being heard by Community Magistrates.

- **Compulsory introductory training for all newly appointed JPs.**
  If this were undertaken by the RNZJA (as opposed to the Justice or Courts departments) the new Justice may be encouraged to join a local JP association prior to swearing his or her judicial oath.
APPENDIX B: COVERING LETTER TO JUSTICES OF THE PEACE (SURVEY B)

DEPARTMENT OF POLITICAL STUDIES
Faculty of Arts

THE UNIVERSITY OF AUCKLAND
New Zealand
14 Symonds Street
Auckland New Zealand
Telephone 64 9 373 7599 ext. 7660
Facsimile 64 9 373 7449
The University of Auckland
Private Bag 92015
Auckland, New Zealand

Title: SURVEY OF JUSTICES OF THE PEACE IN NEW ZEALAND
To: Fellow Justice of the Peace

My name is Philip Harkness and I am a graduate student at the University of Auckland enrolled for a PhD degree in the Department of Political Studies. I am conducting this research for my thesis on Justices of the Peace in New Zealand.

You will be aware that over recent years a number of issues have arisen concerning the Justice of the Peace system in this country - issues about the powers and duties of JPs; their training and competence; the possible introduction of practicing certificates; the criteria and procedure for appointing justices; the question of remuneration; the introduction of a retiring age, and so on. I propose to include all these issues in my research, and also compare the New Zealand JP system with that of the U.K. and other countries.

In order to conduct this research, I am surveying JPs on their experiences and views on the issues outlined above. The survey should take only 10 – 15 minutes to complete, and the research results will be made available to legal and JP organizations and other interested parties, the Ministry of Justice, and for publication in newsletters, academic and professional journals, and for conference presentations.

Your name has been selected in a random sample of 1,000 from the list of 10,341 Justices of the Peace currently recorded with the Ministry of Justice in Wellington.

As a Justice of the Peace myself, I urge you to take the time to complete and return the questionnaire in the enclosed prepaid addressed envelope as soon as convenient, and preferably before August 31. The research is important and I am hopeful it will have some significant influence in determining the future role of Justices of the Peace in the New Zealand justice system.

Please do not sign or provide a return address on the questionnaire or envelope. It is important that your total anonymity is assured. However if you wish to include any additional comments or opinions about the Justice of the Peace system, or the lay magistracy in particular, a separate sheet has been included for this purpose.

Thank you very much for your time and help in making this study possible. If you have any queries or wish to know more about the survey please phone me at home (09) 522-2071 or write to me at:

Department of Political Studies
The University of Auckland
Private Bag 92019, Auckland.

My supervisor is: Dr. Helena Catt
Department of Political Studies
The University of Auckland
Private Bag 92019
Auckland

Tel: 373-7999 extn 87576

The Head of Department is: Professor Jack Vowles
Department of Political Studies
The University of Auckland
Private Bag 92019
Auckland

Tel: 373-7999 extn 88644

For any queries regarding ethical concerns, please contact: The Chair, The University of Auckland Human Subjects Ethics Committee, The University of Auckland, Research Office – Office of the Vice Chancellor, Private Bag 92019, Auckland. Tel: 373-7999 extn 87830
## JUSTICES OF THE PEACE: CONFIDENTIAL SURVEY

This survey is believed to be the most comprehensive undertaken of the lay magistracy in New Zealand, and your participation is important. Your completion and early return of this form in the pre-paid envelope would be appreciated.

Please tick or circle the appropriate answers.

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>In which year were you appointed a Justice of the Peace? Year:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 Do you think all Justices should be required to join a local JP association?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2 Have you attended any local or regional ministerial training sessions?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>3 If you answered 'yes', did you find the session/s worthwhile? Which was the last year in which you attended a session?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4 Do you consider that all new Justices should be required to undertake a training course before their appointments are confirmed?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5 Do you support the idea that in future only JPs issued with a 'Practicing Certificate', to confirm they have received adequate training, should be authorized to perform their duties as Justices of the Peace?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>6 Which one of these descriptions best indicates your activity as a JP? (Tick)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very active</td>
<td>rostered in Court, regular CAB duties, etc.</td>
<td></td>
</tr>
<tr>
<td>Reasonably active</td>
<td>frequently visits at home or office</td>
<td></td>
</tr>
<tr>
<td>Not very active</td>
<td>occasionally visited at home or office</td>
<td></td>
</tr>
<tr>
<td>Inactive or retired</td>
<td>seldom visited by members of the public</td>
<td></td>
</tr>
<tr>
<td>7 In the area where you live, which one answer do you feel is most applicable?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There are too many Justices of the Peace</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There are about the right number of JPs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There are not enough Justices of the Peace</td>
<td></td>
<td></td>
</tr>
<tr>
<td>There are too many inactive JPs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 Have you ever been called to sit on the bench in a District Court?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>9 If 'yes', how frequently would you have sat in the last 12 months?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Occasionally (1-5 times)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Frequently (6-20 times)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regularly (20+)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not in the past 12 months</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 Are you interested in taking further judicial training (Open Polytechnic or similar course) to enable you to be considered for District Court duties?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>11 Have you received any special training for:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Issuing search warrants:</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Visiting Justice (prisons):</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Other (specify):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 Do you think Justices of the Peace should receive payment for undertaking:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial duties (sitting in the District Court)</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ministerial duties (witnessing documents, affidavits, etc.)</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
Since becoming a Justice, do you feel you have received sufficient support, information and training to enable you to perform your duties effectively? Yes No

If you answered ‘no’, which of these sources do you feel should provide it?
Department for Courts in Wellington
Royal Federation of NZ Justice Associations in Wellington
Your regional Justice of the Peace association

Which of these appointment situations most closely fits your own experience?
I personally applied to become a Justice of the Peace.
A friend or colleague put my name forward to my local MP.
My club/office/church etc. asked the local MP to nominate me.
The local JP Association said there was a need and put my name forward.
My local Member of Parliament put my name forward for appointment.
I don’t know how I came to be nominated as a Justice.

As a JP, which of the following do you primarily see yourself as being?
The recipient of an award for community service
An unpaid officer of the local District Court
The recipient of an award for political service
A voluntary service worker for the community

Should there be a retiring age for judicial JPs (those sitting in Court)?
If ‘yes’, circle the age you suggest: 65 68 70 72 75 78 80

Should there be a retiring age for ministerial JPs (those not in Court)?
If ‘yes’, circle the age you suggest: 65 68 70 72 75 78 80

If a retirement age is introduced for Justices do you think, upon withdrawing their services, they should be limited to using the designation JP (retired)?

Which of the following systems of appointing Justices would you favour?
The present N.Z. system where nominations for JPs can be made only by electorate Members of Parliament?

Selection of JPs by a non-partisan independent regional committee appointed by the Attorney-General (similar to the U.K. system)?

If this or a future government were to further diminish the judicial powers of Justices of the Peace (to the extent they may no longer sit in the Courts), would you still see a meaningful role for JPs in this country?

Year of birth: Place of birth: Gender: M F
Normal occupation: Currently employed / Retired

Highest education level attained:
Primary school
Secondary school
University/Technical institute
Degrees/diplomas:

Ethnicity: European/Pakeha Maori Pacific Island Asian Other

Are you a member of a regional Justice of the Peace association?

If ‘yes’, of which regional JP association are you a member?

NOTE: Please include any further comments you may have on the separate sheet of paper provided and return it with this Survey form to: JP Survey, P O Box 128-146, Remuera, Auckland

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APPENDIX C: LETTER TO JUDICIAL SPOKESPERSONS OF POLITICAL PARTIES IN 2004 AND SUMMARY OF RESPONSES

POLITICAL PARTIES SURVEYED ON LIKELY RECRUITMENT SOURCES FOR NEW COMMUNITY JUSTICE OFFICERS:

On February 2, 2004, the leader and/or justice spokesman for the above New Zealand political parties received by email the following letter:

Dear Spokesperson:

I am a PhD student in political studies at University of Auckland, and my supervisor is Dr. Helena Catt.

As part of my research I am considering the Law Commission’s recommendation that a new level of Community Court be established in New Zealand to hear minor civil and criminal matters, and that these courts be under the jurisdiction of a single Community Justice Officer. (This new judicial officer would assume the jurisdiction presently exercised by justices of the peace and community magistrates.)

In the event the above scheme is adopted, which source of recruitment of new Justice Officers would your party most likely support?

1. Suitably trained and qualified JPs, as at present, (serving voluntarily but with a per diem allowance)

   OR

2. Legally-qualified professional lawyers, with salary and tenure.

Your assistance with this request will be much appreciated.

Sincerely, Philip Harkness
philip@mediafeatures.co.nz

The responses of the justice spokespersons of the various political parties are attached.
SUMMARY OF POLITICAL PARTIES’ ATTITUDE TO MANNING
N.Z. LAW COMMISSION’S PROPOSED ‘COMMUNITY COURTS’:

**ACT**

**Favours professional bench**

**Stephen Franks (justice spokesperson):** “The party has not considered it, but I have no doubt personally that courts presided over by non-legally trained people are more likely to deliver idiosyncratic or kangaroo justice, or to be under the de facto control of the staff, or the Police, or any other authority figure handy. This is not to say that JPs can’t perform superbly. Some do. But the quality is more variable.”

“Interestingly, speaking to experienced prison managers recently about the proposal in the Corrections Bill to ‘professionalize’ the visiting justice role, several were strongly in favour of doing away with JPs in the role, even though they admitted they get an easier ride with them, because they are more suggestible. The managers said it was not healthy. They liked the professionalism of the judges. They were also wary of the Bill’s proposal to have ‘effectively’ staff judges. They thought they too would get too close to the authorities.”

**ALLIANCE**

**Undecided: JPs or professional bench**

**Matt McCarten (leader):** “Laila Harre is our spokesman on justice. I’ll chase her up. However we quite like the current use of JPs but they need to be paid more and supported more.”

**Laila Harre (justice spokesman):** “Thanks for your inquiry. The Alliance would be more likely to support the use of legally qualified professional lawyers, with salary and tenure. Tenure, as per normal employment law, rather than to the extent that judges have it probably. Our concern with the JP/Dispute tribunal approach is that things considered ‘minor’ to some, are very major to those involved – e.g. your first conviction or a $1,000 debt that is extremely high in relative terms for low-income or no-income people. We don’t think it unreasonable to expect that those dishing out justice in such circumstances had a thorough understanding of legal process and principle gained from legal training and practice. Further, we would insist that the law (unlike the current case with the Disputes Tribunal) in the determining factor.”

**CHRISTIAN HERITAGE**

**Favours professional bench**

**Mark Munroe (policy director):** “Thank you for the opportunity to participate in your survey. Christian Heritage New Zealand would likely support the latter option. Whilst it is true that JPs who currently do much of the work that would be handled by Community Justice Officers are cheaper and they get the job done, JPs are not likely to be as consistent in their decisions or as procedurally correct or as legally accurate as professionally trained lawyers would be. It comes down to how much confidence one expects the public to put into the new court and whether one is prepared to pay for it.”
GREENS

Nandor Tanczos (justice spokesman): “Apologies for taking so long to reply. I have not yet read the Law Commission’s paper so am unable to either give a party position or engage in detail with the proposal. For a start I imagine we would want to be looking for people trained in mediation/facilitation rather than simply legal training, and would be looking for the Community Court to take a mediation approach at least for civil cases. For criminal cases that is better handled by restorative justice processes and we expect to see greater emphasis for that. We would probably not object to suitable trained JPs, given what seems to be an intention by Govt to improve selection and training of JPs. However we are aware that JP positions have at times been used for political patronage reasons so while many JPs do excellent work there needs to be strong quality control and oversight/accountability especially where decision-making powers are significant.”

LABOUR

Hon. Bill Goff (justice spokesperson): “Your query relates to a proposal from the Law Commission that has been consulted widely in the community for a Community Court. I believe that what the Law Commission has in mind is a Court which would be presided over by a judge who would be legally qualified. This would be necessary to avoid the impression that this was a Court in which some lesser form of justice was being administered, which I doubt is the Law Commission’s intention. The Law Commission has not yet released its report but is expected to do so next month. A definitive response from the Government will only be made once its recommendations and the implications of these have been fully and carefully considered”

Hon. Rick Barker (Julie Browne): “Thank you for your email addressed to the Minister of Justice and copied to the Hon. Rick Barker. Since the Law Commission’s Report has not been released publicly yet, let alone the Government have an opportunity to consider and respond to its recommendations, Hon. Barker is unable to comment on any policy which may arise out of the report.”

NATIONAL

Richard Worth (justice spokesman): “My understanding is that the proposed Community Court is for the judicial officers to be lawyers, National does not support the new court and would seek to retain JPs. A relevant speech I made recently is available on this link: www.richardworth.co.nz/Speech%20-%20Northern%20Regional%20JPs%20Conf.htm
NEW ZEALAND FIRST

G.H. (judicial spokesman):
“It is difficult to be precise when attempting to answer hypothetical questions; my best guess is that in the event the changes proposed are implemented, New Zealand First would find favour with the first option, that of JPs, suitably trained and with monetary recognition for their work. Please be reminded that this is not currently a policy position of New Zealand First and remains dependant upon the nature of legislation once introduced in Bill form. Hope this is of some assistance.”

UNITED FUTURE

Murray Smith (justice spokesman):
“Our party has not discussed this issue so these comments are essentially my own unless otherwise stated… “United Future is in favour of the devolution of community issues from centralised bureaucracies to communities subject to appropriate accountability and safeguards being put in place. We believe that justices of the peace have and continue to play an important role in achieving this and would therefore like to see their position strengthened and better recognised. The issue of whether legally trained professionals or trained community volunteers should serve in the proposed Community Courts in essence comes down to the approach that the court will take to criminal justice issues. To the extent that the philosophy of the court will be that “the letter of the law must prevail” then trained professionals are likely to best achieve that end. To the extent that a wider approach (e.g. ‘merits and justice’ as in the Disputes Tribunal) is desired, then JPs are better able to achieve that end. The eventual intent and shape of the legislation would therefore need to be considered before your question could be definitively answered. However United Future also supports a restorative justice approach to the C.J. system – particularly at the lower end of offending. Accordingly, to the extent that the proposed Community Courts are intended to largely focus on this approach, then this would seem to lend itself to JPs heading it. Using JPs is also likely to promote a less formal and alienatory process and lead to offenders feeling more self-empowered in the system instead of being reliant on a professional advocate whilst standing bewildered in the dock. I am optimistic that this could be achieved without losing the authority and respect for the legal system that rituals and ‘other-worldly’ court environments have (rightly or wrongly) generally been thought to create. So in answer to your question, I believe that United Future would be more likely to favour the first of your two alternatives.”

PROGRESSIVE

Matt Robson (justice spokesman):
“The first option but not necessarily JPs. We favour the criteria for the present Community Magistrates.”
APPENDIX D: STATISTICAL PROFILE OF JPs AS PROVIDED BY MINISTRY OF JUSTICE, 2002

Justices of the Peace for New Zealand
Statistical Profile

Section three of the Justices of the Peace Act 1957 provides for the Governor-General to appoint “fit and proper persons” to be Justices of the Peace. The Minister of Justice is responsible for advising the Governor-General on appointments.

Ministry of Justice records show that, as at 30 June 2002, there are 10,571 persons holding appointment as Justices of the Peace for New Zealand.

Set out below are statistics on gender, age, ethnic and geographic distribution of those Justices.

Gender distribution

<table>
<thead>
<tr>
<th>Gender</th>
<th>JPs</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>7534</td>
<td>71%</td>
</tr>
<tr>
<td>Female</td>
<td>3035</td>
<td>29%</td>
</tr>
<tr>
<td>Total</td>
<td>10,571</td>
<td></td>
</tr>
</tbody>
</table>

The disparity between the number of men holding appointment and the number of women holding appointment is, to some degree, historically based. The percentage of women appointed over the past 10 years has increased, as indicated in the table below.

Gender statistics for appointments made in last 10 years
(1 May 1990 – 1 May 2000)

<table>
<thead>
<tr>
<th>Gender</th>
<th>Appointees</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>2068</td>
<td>61%</td>
</tr>
<tr>
<td>Female</td>
<td>1312</td>
<td>39%</td>
</tr>
<tr>
<td>Total</td>
<td>3380</td>
<td></td>
</tr>
</tbody>
</table>

(It is noted that 3380 nominations over a 10 year period represents an average of 338 appointments per year.)
Age Distribution

The table below shows the number of Justices in each ten year grouping from 20 years to over 80 years.

<table>
<thead>
<tr>
<th>Age grouping</th>
<th>JPs</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 – 30 years</td>
<td>12</td>
</tr>
<tr>
<td>30 – 40 years</td>
<td>115</td>
</tr>
<tr>
<td>40 – 50 years</td>
<td>803</td>
</tr>
<tr>
<td>50 – 60 years</td>
<td>2408</td>
</tr>
<tr>
<td>60 – 70 years</td>
<td>2825</td>
</tr>
<tr>
<td>70 – 80 years</td>
<td>2437</td>
</tr>
<tr>
<td>Over 80 years</td>
<td>1389</td>
</tr>
<tr>
<td>Unknown</td>
<td>279</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>10,314</strong></td>
</tr>
</tbody>
</table>

Justices of the Peace are appointed for life. For this reason, it may be seen that the numbers of Justices in older age brackets is proportionally high, with approximately 68% of Justice being over the age of 60 years.

Ethnicity

Set out below is a breakdown of the population of Justice by ethnicity.

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>European/Pakeha</td>
<td>6742</td>
<td>2360</td>
<td>9102</td>
</tr>
<tr>
<td>Maori</td>
<td>439</td>
<td>369</td>
<td>808</td>
</tr>
<tr>
<td>Pacific Island</td>
<td>104</td>
<td>69</td>
<td>173</td>
</tr>
<tr>
<td>Other</td>
<td>181</td>
<td>50</td>
<td>231</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>7466</td>
<td>2848</td>
<td>10,314</td>
</tr>
</tbody>
</table>

While the percentages of non-Europeans appointed over the past 10 years has increased, European/Pakeha still represent 88% of the total number of Justices.
Geographic distribution by Electorate

The Table below shows the numbers of Justices in pre-election boundaries. (We are in the process of realigning our records to the new electorate boundaries.) Maori Electorates are shown in bold italics.

<table>
<thead>
<tr>
<th>Electorate</th>
<th>JPs</th>
<th>Electorate</th>
<th>JPs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albany</td>
<td>77</td>
<td>Aoraki</td>
<td>137</td>
</tr>
<tr>
<td>Auckland Central</td>
<td>78</td>
<td>Banks Peninsula</td>
<td>134</td>
</tr>
<tr>
<td>Bay of Plenty</td>
<td>160</td>
<td>Christchurch Central</td>
<td>71</td>
</tr>
<tr>
<td>Christchurch East</td>
<td>63</td>
<td>Clutha - Southland</td>
<td>216</td>
</tr>
<tr>
<td>Coromandel</td>
<td>226</td>
<td>Dunedin North</td>
<td>84</td>
</tr>
<tr>
<td>Dunedin South</td>
<td>96</td>
<td>East Coast</td>
<td>158</td>
</tr>
<tr>
<td>Epsom</td>
<td>167</td>
<td>Hamilton East</td>
<td>150</td>
</tr>
<tr>
<td>Hamilton West</td>
<td>87</td>
<td>Hauraki</td>
<td>38</td>
</tr>
<tr>
<td>Hunua</td>
<td>166</td>
<td>Hutt South</td>
<td>136</td>
</tr>
<tr>
<td>Ikaroa-Rawhiti</td>
<td>99</td>
<td>Ilam</td>
<td>131</td>
</tr>
<tr>
<td>Invercargill</td>
<td>90</td>
<td>Karapiro</td>
<td>175</td>
</tr>
<tr>
<td>Kaikoura</td>
<td>192</td>
<td>Mangere</td>
<td>47</td>
</tr>
<tr>
<td>Mana</td>
<td>97</td>
<td>Maungakiekie</td>
<td>86</td>
</tr>
<tr>
<td>Manurewa</td>
<td>72</td>
<td>Mount Albert</td>
<td>84</td>
</tr>
<tr>
<td>Manukau East</td>
<td>73</td>
<td>Napier</td>
<td>140</td>
</tr>
<tr>
<td>Mount Roskill</td>
<td>132</td>
<td>New Plymouth</td>
<td>122</td>
</tr>
<tr>
<td>Nelson</td>
<td>113</td>
<td>Northcote</td>
<td>117</td>
</tr>
<tr>
<td>Northland</td>
<td>168</td>
<td>Ohariu - Belmont</td>
<td>135</td>
</tr>
<tr>
<td>North Shore</td>
<td>161</td>
<td>Otaki</td>
<td>164</td>
</tr>
<tr>
<td>Otago</td>
<td>201</td>
<td>Pakuranga</td>
<td>136</td>
</tr>
<tr>
<td>Palmerston North</td>
<td>100</td>
<td>Port Waikato</td>
<td>184</td>
</tr>
<tr>
<td>Rakaia</td>
<td>135</td>
<td>Rangitikei</td>
<td>151</td>
</tr>
<tr>
<td>Rimutaka</td>
<td>76</td>
<td>Rodney</td>
<td>145</td>
</tr>
<tr>
<td>Rongotai</td>
<td>107</td>
<td>Rotorua</td>
<td>137</td>
</tr>
<tr>
<td>Tamaki</td>
<td>131</td>
<td>Taranaki - King Country</td>
<td>166</td>
</tr>
<tr>
<td>Taupo</td>
<td>166</td>
<td>Tauranga</td>
<td>117</td>
</tr>
<tr>
<td>Te Atatu</td>
<td>118</td>
<td>Tiritangi</td>
<td>80</td>
</tr>
<tr>
<td>Te Tai Hauauru</td>
<td>71</td>
<td>Te Tai Tokerau</td>
<td>76</td>
</tr>
<tr>
<td>Te Tai Tonga</td>
<td>98</td>
<td>Tukituki</td>
<td>148</td>
</tr>
<tr>
<td>Wairariki</td>
<td>101</td>
<td>Waimakariri</td>
<td>117</td>
</tr>
<tr>
<td>Wairarapa</td>
<td>156</td>
<td>Waitakere</td>
<td>115</td>
</tr>
<tr>
<td>West Coast - Tasman</td>
<td>225</td>
<td>Wellington Central</td>
<td>119</td>
</tr>
<tr>
<td>Whanganui</td>
<td>146</td>
<td>Whangarei</td>
<td>85</td>
</tr>
<tr>
<td>Wigram</td>
<td>58</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The JP population range for the General Electorates is from 47 (Mangere) to 225 (West Coast-Tasman).

The JP population range for Maori Electorates is from 38 (Hauraki) to 101 (Waiairiki).

The table below shows for these four electorates the number of Justices of the Peace per head of population.

<table>
<thead>
<tr>
<th>Electorate</th>
<th>Electoral Population</th>
<th>Ratio of JPs to Electors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hauraki</td>
<td>54,945</td>
<td>1:1445</td>
</tr>
<tr>
<td>Waiairiki</td>
<td>54,813</td>
<td>1:542</td>
</tr>
<tr>
<td>Mangere</td>
<td>53,331</td>
<td>1:1135</td>
</tr>
<tr>
<td>West Coast - Tasman</td>
<td>51,481</td>
<td>1:229</td>
</tr>
</tbody>
</table>

In regard to the range for General Electorates, it may be seen that the geographic size of the electorate has a considerable significance. The West Coast - Tasman electorate covers an extensive, and comparatively sparsely populated, geographic area whereas urban electorates such as Mangere are densely populated and are of a much smaller geographic area. The average distance that a member of the public would have to travel to a Justice in each of these two electorates would therefore be disparate.

The ratio of Justices to per head of population in the Maori Electorates is lower than the national average, although it may be noted that a number of Maori Justices are on the General Roll.
APPENDIX E: LETTERS FROM THREE SENIOR JP'S

Hundreds of survey respondents included notes and letters with their questionnaires many of which have been analysed and incorporated elsewhere in this study. But in a sense all their concerns and wide ranging views on the strengths and weaknesses of the Commission of the Peace are encapsulated in these three unabridged letters from three disparate, but experienced Justices of the Peace. Their frank and incisive unsolicited replies to the surveys are enlightening and, on occasion, disturbing. The first letter is from a former president of the Auckland Justices of the Peace Association responding to Survey A:

I was most interested to see your PhD project and hope you will find the research and writing up of interest. I have done my best with the questionnaire/rating scale but perhaps you may be interested in the comments below on each of the topics you provide. I make these comments having been the Education Tutor for the Auckland [JP] Association for many years, having served on the Council for a number of years culminating in two years as the President of the Association. On anecdotal evidence (hard evidence is very difficult to provide, as members/the public are loath to badmouth their fellow citizens) I would say there is a disparity in attitude between older and younger justices. The young ones (those under 50!) are willing and eager to learn, at least at first, and the older ones cannot understand the nature of the office and do not see why they should be bothered, they just are palsy with their MP and wanted and expected honour and glory [of the JP appointment]. When they find out that bearing the office is mostly nuisance value they often opt out of doing the duties, to the moans of their younger local colleagues. But you will have to find out ways to substantiate this if that aspect of the whole business of being a JP is to be useful.

1. Appointment process: It is imperative, but in my view impossible, to wrest away from New Zealand MPs the ability to nominate their chums or pleading acquaintances as Justices of the Peace. In the U.K. there are local committees of nomination, in Australian states and in Canadian provinces something similar, but the New Zealand system came into being I know not how and no one I have spoken to can be persuaded to say a good word about it. Equally, all are certain the MPs will never give it up! Witness that the newer into office they are, the more eager they are with their nominations. I could tell you many a tale of Auckland MPs who asked me ‘But why can’t I – I’ve got a retired rear-admiral who wants to be a JP, what can I say to him?’ This after having told the MP concerned that, on the figures and on our reports, there was no demonstrable need for new nominations. One could envisage a more appropriate system here, say centreing on the local Citizens’ Advice Bureau, with representatives from that, from the local NGO network, the community
committee, the Ministers’ Fraternal and such folk who actually work in the community and have some idea of its needs. MPs are a sheltered lot with a special focus, and their electorate secretaries don’t know everything about what goes on.

2. Retirement age: The age of 68 was advised by the (then) Chief District Court Judge Ron Young, and howls of outrage were heard throughout Associations from the good ole boys who fancied themselves as continuing forever. But, in Auckland at least, we tried to abide by the Chief Judge’s rule in that as in other matters and I believe that after about age 73 or so some JPs are persuaded to retire from Bench duties, when it has been pointed out to them enough times that DCJs retire at 68 and HC Justices at 72. The ministerial duties done by all should, ideally, be linked with competency and peer review, but you know how difficult that is in practice.

3. Compulsory membership: The argument has been that as the office is ‘voluntary’ you cannot compel new appointees to join an Association. And while the Department of Justice issues all new appointees with a tiny booklet telling them what to do, why should anyone bother? To change this would mean a great deal of persuasion and lobbying and successive Executives of the Royal Fed have found complete disinterest not to say stonewalling by successive minions in both Department of Justice and Ministry for Courts. The Minister charged with responsibility for JPs usually finds it convenient to place any discussions low on his priority list, even though most are very polite in asserting how very highly the country regards JPs and how very much they are valued by the Administration and how everything would fall down without them. Fine words butter no parsnips.

4. Competence and training: This is variable up and down the country. In large Associations ongoing Judicial seminars are held by the Liaison Judge for court JPs and in Auckland we always invite Franklin Association to these, as they get very little. You would not get better attendances at Ministerial sessions unless they were linked with compulsory membership and practicing certificates.

5. Remuneration: Because of the distinction between those JPs who only do Ministerial duties (setting aside stories of how many ‘charge’ the public $20 a document, again extremely hard to obtain evidence of) and those who do Court duties, the argument of no remuneration is a more vexed question. Ministers of Justice from Doug Graham onwards, and probably before him, stated quite plainly they would NEVER pay JPs. On the one hand, because of the obvious and invidious comparison with Disputes Resolution people, Tenancy tribunals, even the token payment for those called to jury duty, it is hard to be logical. Many of us believe the silly experiment of Community Magistrates (which seems not to be continuing – is it?) came in as a way to avoid paying court panel JPs, as the jurisdiction range is almost identical. On the other hand, if, as successive Ministers state,
they want JPs to be representative of their communities, there is no argument but that those who have to leave work to serve in court should have at least replacement wages, not that we are all required to save for our retirements. You cannot have a younger work force of Court justices without taking them out of the workforce they’re already in. Especially if you want them to retire at 68 already! It takes at least three years to make a reasonably confident, alert and experienced Court justice after they have done the polytech [The Open Polytechnic of New Zealand] training.

**6. Practicing certificates:** Fine, but remember Associations are variable and who is going to serve on the various monitoring Boards that would have to be set up? This suggestion has obvious merit, but I have heard it put forward as a means of “controlling Association members” and one wonders about the motives of those who use such words. A lot of work would have to be put in to develop an adequate system, and then I bet you the Minister of the day would not agree.

**7. Duties:** I’m not sure what you mean by this. The Auckland area gives special training for Search Warrants and has an agreement with the Police and other agencies like fisheries and customs not to call JPs who are not on a circulated list of warrant-trained JPs. And the Auckland (Northern) judicial district won’t let JPs do CYFP stuff as they have a 24-hour duty judge on tap. As for court roster JPs, see above.

**8. Compulsory training:** The Auckland Association has come to an agreement long ago with the Auckland District Courts manager that at least one training session, taken by the Association’s education tutor and Executive, will be required before a new JP is sworn in. Given the changing faces in most Courts administrations it would be absurd to expect them to understand what JPs do, never mind instruct them in it. (Their own registrars are often set to Bail duties and comply with none of the guidelines set down by the DC Judges!) As I say above, provision of training throughout NZ JP associations is variable and consistency is much to be desired. How would you ensure this? Successive Fed Executives have tried their best but in the end only the keen local JPs ever come, up to one-third of the total membership, for in-service on-going training.

**General:** Until there is some agreement as to what JPs are for, and if they still have an essential part to play in the country’s administration given the lapses in ethics and civic understanding we could all quote from general society never mind the business community) one wonders if the whole system has any useful life left in it. Judges don’t want the pettyfogging duties of minor offences we do in the criminal jurisdiction, but maybe they should just do it, making time by abandoning preliminary hearings. Perhaps your thesis will give the ‘powers that be’ something to chew on.
I enclose some papers from my time in office and wish you well with your project.

Yours sincerely,

(Signed) [Mrs]

Name withheld

The second letter was from a corporate manager concerned about the future of the Justice of the Peace system and suggesting that the lay magistracy had reached a critical stage for which both the Federation and our politicians must take responsibility. He wrote:

I believe an inherent weakness in the present appointment system is the sole nomination right that rests with Members of Parliament. As a recent former electorate secretary, I have first hand experience that not all MPs are even-handed in their nomination process and that nominations can be held out for reasons other than merit or community need. Not all MPs have good liaison with the local Justices’ association, although ministerial guidelines for appointment have become more specific over the past few years it is very much at the political pleasure and good will of the MP as to which nominations proceed to first base. The appointments will necessarily reflect the bias of the MP and not necessarily the needs of the local community.

The make-up of office holders in the local Justices’ association – particularly in small provincial or rural communities –tends to reflect business/rural strata. Often, the wider community sees itself somehow removed from the situation and the fact that the ‘usual suspects’ have to be approached as quasi members of the judiciary to complete important document transactions merely served to invest such associations with a trumped-up sense of self-importance. Associations tend to be conservative bodies whose members are at the older end of the age scale. Most are quite change-averse, despite lip service to the contrary. Anything that is likely to put a dent in their perceived social standing will get short shrift.

An appointment system removed from local political pressure and self-interest is needed if the role of JP is to remain relevant to the communities they serve. If you had an independent, closely defined and transparent system which appointed, inter alia, on the ability to actually comprehend, administer and execute the wide range of tasks which JPs are called upon to carry out, you might have a better show of implementing practicing certificates and a range of competency measures. At the moment the public is subjected to a real potpourri and it is almost like a lottery to find at random in the community a JP who
is willing, competent and sufficiently experienced to respond in the appropriate manner to a request for assistance.

I do not see any justification for charging for services other than sitting on the bench. If charges were introduced, people might just as well go to local lawyers where at least there is some recourse if incompetent action is taken. The situation is at a crossroads. If the justice system is to continue to be augmented by voluntary assistance (and I appreciate that government does not have a bottomless well from which to draw money) the calibre and competency of Justices must be able to be monitored instead of the “appoint and the devil take the hindmost” approach.

(Signed) [Name withheld]

The third comprehensive letter came from a ‘lapsed JP’ with 40 years service’, who addressed many of the current issues concerning JPs but also questioned the operational efficiency of the system itself:

I was surprised to receive your survey questionnaire for I have been inactive as a justice for some 20 years and have not been an association member during that time. It was a further surprise to learn that my address is somewhere recorded for I have had no communication from the Justice Department as far as I can recall from the time of my appointment in 1964. I wrote to the association registrar some 5 years ago to resign as a justice of the peace but was advised that it was a lifetime appointment. I have not undertaken any ministerial duties for many years. As I am not currently informed about procedures and jurisdiction some of my responses to the survey may be ill-informed but I have endeavoured to answer [the questions] within my own understanding…In the early years of my service as a JP I had been very active, attending annual training sessions arranged by the local association, doing weekend court roster, hearing depositions on a number of occasions and being available for witnessing documents etc. I did not though take up the [judicial] training course when it was established through the Institute of Technology, for with family and business commitments it would have been too time-consuming. In that period, following vocational and lifestyle changes, I gradually withdrew from active participation and let my membership of the local association lapse. In a later change of location within the nation I thought it would be appropriate to resume an active JP role but was informed that I couldn’t transfer to a new association area until I had paid arrears of membership in the former association! I therefore took the matter no further.
From earlier experience, appointments were made through the Department of Justice but then no further advice or information was given from that source to appointees apart from a manual, so it appeared that the Department was following a form of the Law but not overtly approving of the justices’ relevance in the system.

If JPs are truly meant to be part of the judicial system then training should be the responsibility and requirement of the Department for Courts. I recall how ill equipped I was to serve in court proceedings and was guided by the court duty officer of the day. Justices on weekend roster were there only for remand purposes for the convenience of the court. If offenders are dealt with during the week by the magistrate, then why are they not also at the weekend?

I firmly believe that Justices should be paid for court duties. On occasions when hearing depositions, I was able to do this only because of my managerial position, but the company I was employed by bore the cost. That is not right.

I have not been an association or Federation committee member at any time so I am not acquainted with their operation, but I have at various times wondered if they could be self-serving and self-perpetuating! I do agree that the method of selection and appointment needs revision (as suggested in the NZ–UK scenario) so that political patronage is eliminated. I am surprised too that some seek to be appointed, for there is always the human element that the JP appointment is a point of pride and social standing rather than service.

As long as documents require witnessing and affidavits affirmed etc. there will be a need for recognized persons to perform this service whether it be a JP or an appointee of a new system as suggested (UK versus NZ). I question, though, that there needs to be the number of people at present holding appointments. In my active years of service, for both business and residential occasions I would average only two occasions a month for ministerial purposes. In my years of inactivity I have required the services of a JP on only one occasion that I can recall.

Your survey is commendable. I wish you a successful conclusion that will be considered thoughtfully by those in authority.

(Signed) 
[Name withheld]
APPENDIX F: POSSIBLE FUTURE OPTIONS FOR MAGISTRATES’ COURT BENCH

There are a number of possible options for court reformers to consider in staffing the bench of a proposed new Community Court [Magistrates’ Court] – some that would include continued use of judicial JPs in the courts, and others that would exclude them. In the event governments do not countenance the status quo indefinitely, the following range of alternative options could be considered:

Option 1: Extend the use of judicial JPs in the present court system

Continue with the 1978 Report of the Royal Commission on the Courts recommendation (the present system) whereby District Court Judges share the bench with judicial Justices of the Peace in the District Court – but extend the number of judicial JPs (and possibly District Court Judges) to reduce or eliminate the backlog of criminal cases.

This would probably have had most appeal to the recent Labour government which, though not in support of lay magistracy in principle, was concerned about the case backlog problem and advocated a cost-effective method of dealing with it. What is of more immediate concern is the extent to which the present government would be prepared to increase the number of District Court Judges in the event it dispensed with judicial JPs. Conversely it is important to know whether judicial JPs (who currently carry a heavy workload in Auckland courts) would be prepared to undertake increased caseloads without remuneration, already a contentious unresolved issue in the Auckland area. Under this model increased jurisdiction and sentencing authority of judicial JPs should probably be reviewed.

With this option the present one-tier lower court would remain.

Option 2: Replace judicial JPs with extra District Court Judges

Dispense with the lay magistracy entirely and increase the number of District Court Judges in order to undertake the work presently done by judicial JPs and Community Magistrates in expectation of reducing the case backlog.

This has been the objective of the New Zealand Law Society and district law societies throughout New Zealand for several decades. Evidence suggests, however, that this option has not been generally favoured by lawyers who have later become District Court Judges or who have been elevated to the High Court bench – which suggests that as lawyers advance in their profession the more importance they attach to retaining a lay (or perhaps democratic) judicial input in the court process. The most obvious impediment to this option from the standpoint of government would hinge on the matter of cost. The lay magistracy
with its unpaid judicial JPs is inexpensive compared with the cost of appointing new District Court Judges to replace them.

This option would also mean retention of a one-tier lower court.

**Option 3: Replace judicial JPs with Community Magistrates**

Dispense with judicial Justices of the Peace and extend the Community Magistrates’ scheme nationwide – in which Community Magistrates (lay magistrates who receive a modest ‘sitting fee’ when they attend court) work in the same court with District Court Judges as and when required. Recent indications suggest this option is under consideration as the present government has announced it may extend the CM scheme to other regions of the country, although it has not suggested dispensing with judicial JPs.440

The Community Magistrates scheme was introduced in 1998 by the National government as a possible alternative to using JPs on the bench. It was also an attempt to “balance the bench” ethnically with the community it was to serve, and to attract more lay magistrates attuned to local Maoritanga – systems and values pertaining to the area that a particular court serviced. The turnover of Community Magistrates has been high as many of the appointees finding the daily allowance of $50 (half-day) or $100 (full-day) inadequate.

This option also envisages the continuation of a one-tier lower court.

**Option 4: Appoint professional CJOs to new Community Court**

Adopt the 2004 recommendation of the New Zealand Law Commission whereby judicial JPs would be made redundant and be replaced by a new type of professional magistrate – the Community Justice Officer (law graduate) – to preside in a new lower ‘Community Court’ operating independently of the present District Court.

Although it would likely have been supported by the law societies, most of which have for 50 years been in favour of a fully professional bench, the recommendation was not debated or seriously considered by government. At the time, considerable doubt was expressed that talented young criminal lawyers would be attracted to a bench career in a lower court such as that envisaged by the NZLS – yet one obvious advantage of this model would be that legal advice (either from a District Court Judge or a qualified legal associate) would not be required. However operating the new court from separate premises with salaried Judges, as envisaged by the Law Commission, would have proved costly.

440 In 2006 the Minister of Justice deemed the Community Magistrates scheme to have been a ‘modest success’, but indicated it would not be extended beyond the Waikato and Bay of Plenty court districts. At that stage only eight CMs remained of the 22 originally appointed in 1998. Subsequently Justice Minister Simon Power revealed in 2008 that the CM scheme was to be extended, and in February 2009 he announced the appointment of six new CMs.
This option would add a second tier (operating independently at a level below the District Court) to the lower court system.

**Option 5: New Magistrates Court presided over by judicial JPs**

Introduce a new lower Magistrates Court (as recommended by the 2004 Law Commission report) operating separately from, the District Courts and presided over by judicial JPs with enhanced jurisdiction to cover more serious offences than they are currently authorized to handle.

This would be more like the United Kingdom model where JPs preside over their own court specifically dealing with the minor criminal cases of the community. Such a court could operate within the precinct of the existing District Court, or be housed independently in a different building. This would continue to satisfy the recommendation of the 1978 Royal Commission on the Courts and also satisfy the 2004 Law Commission’s recommendation of a separate ‘Community Court’ in a new two-tier lower court system – allowing the District Court to hear the defended cases, more serious charges, jury trials and any appeals from the lower court presided over by JPs.

This model also envisages a two-tier lower court system.

**Option 6: New Magistrates Court presided over by CMs and JPs**

Introduce a new Magistrates Court, similar to Option 5 (above) in which judicial JPs continue to hear the minor cases in which they currently have jurisdiction, and share the bench with lay Community Magistrates who have greater jurisdiction and may sit alone rather than in pairs.

This hybrid variation of Option 5 would satisfy the 2004 Law Commission recommendation of a new lower tier court and at the same time provide a lay magistracy with two levels of bench jurisdiction. The Magistrates Court could operate within, or in close proximity to, an existing District Court. Judicial JPs sitting in pairs would be able to handle minor cases as at present, and lay Community Magistrates, sitting alone or in pairs, could handle cases more appropriate to their higher level of jurisdiction. This model would be reasonably easy and cost-effective to initiate as both the Justices of the Peace Act 1957 and the Community Magistrates Act 1998 already provide the authority and powers necessary for its implementation.

This model would also constitute a two-tier lower court.
5 August 2009

Philip Harkness
philip@medafeatures.co.nz

Tēnā koe Mr Harkness

I am writing in response to your email of 8 July 2009 requesting the following statistics under the Official Information Act 1982:

"JP decisions successfully appealed during the past 10 years – both in annual numbers and as a percentage of cases decided by JPs, CMs and DCJs"

Annex 1, attached, contains the number and percentage of criminal summary cases disposed during the calendar years 2004-2008 by a judicial officer and sets out the number of appeals lodged and the number of appeals granted.

The Ministry is only able to provide you with the number of cases decided by judicial officers over the last 5 years. The data used to produce this information is sourced from the Case Management System (CMS), which has only collected this data since 2004.

I hope this information assists, you. Please note that if you disagree with the Ministry’s response you may lodge complaint with the Ombudsman pursuant to section 28(3) of the Official Information Act.

Heoi anō, nā,

Tony Fisher
General Manager, District Courts
### Annex 1

Number of disposed criminal summary cases and associated appeals by judicial officer type at disposal by calendar year of disposal 2004 – 2008 for all District Courts

<table>
<thead>
<tr>
<th>Judicial Officer</th>
<th>Total Appeals</th>
<th>Granted Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Magistrate</td>
<td>7,600</td>
<td>7,120</td>
</tr>
<tr>
<td>Justice of the Peace</td>
<td>11,126</td>
<td>10,128</td>
</tr>
<tr>
<td>Registrar</td>
<td>17,442</td>
<td>17,897</td>
</tr>
<tr>
<td>Unknown</td>
<td>7,350</td>
<td>4,943</td>
</tr>
<tr>
<td>Total</td>
<td>148,845</td>
<td>140,670</td>
</tr>
</tbody>
</table>

Produced by the Business Information Team, Ministry of Justice
Data extracted on 23 Jul 09 from the CMS tables refreshed at 23 Jul 2009

### Disposed criminal summary cases as a percentage of total cases, appeals as a percentage of cases disposed and appeals granted as a percentage of appeals by judicial officer type at disposal for the calendar years 2004 – 2008 for all District Courts

<table>
<thead>
<tr>
<th>Judicial Officer</th>
<th>Appeals as a % of Cases Disposed</th>
<th>Appeals Granted as a % of Total Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Magistrate</td>
<td>0.3%</td>
<td>0.2%</td>
</tr>
<tr>
<td>DC Judge</td>
<td>0.5%</td>
<td>0.3%</td>
</tr>
<tr>
<td>Justice of the Peace</td>
<td>0.2%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Registrar</td>
<td>0.2%</td>
<td>0.1%</td>
</tr>
<tr>
<td>Unknown</td>
<td>0.3%</td>
<td>0.3%</td>
</tr>
<tr>
<td>Total</td>
<td>0.4%</td>
<td>0.4%</td>
</tr>
</tbody>
</table>

### Disposed criminal summary cases as a percentage of total cases by judicial officer type for the calendar years 2004 – 2008 for all District Courts

<table>
<thead>
<tr>
<th>Judicial Officer</th>
<th>Percentage of Cases Disposed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2004</td>
</tr>
<tr>
<td>Community Magistrate</td>
<td>5%</td>
</tr>
<tr>
<td>DC Judge</td>
<td>7%</td>
</tr>
<tr>
<td>Justice of the Peace</td>
<td>12%</td>
</tr>
<tr>
<td>Registrar</td>
<td>4%</td>
</tr>
<tr>
<td>Unknown</td>
<td>4%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>
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