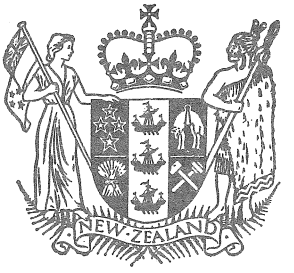

REPORT OF

ROYAL COMMISSION ON THE COURTS

1978

Presented to the House of Representatives by Command of His Excellency the Governor-General

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ROYAL COMMISSION ON THE COURTS

Chairman
The Honourable Mr JUSTICE BEATTIE

Members
Professor I. H. KAWHARU, D.PHIL.(OXON.), M.A.(CANTAB.), B.SC.(N.Z.) F.R.A.I.
Mrs R. M. KING, M.B.E., F.C.A.
J. D. MURRAY, ESQ., Q.S.O., S.M.
J. H. WALLACE, ESQ., M.A.(OXON.), Q.C.

Secretary: E. M. Basil-Jones
Research Officer: M. W. Vickerman, LL.B.(HONS.)

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PART III—THE FUTURE: PROPOSED COURT STRUCTURE

Royal Commission on the Courts

ELIZABETH THE SECOND, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To Our Trusty and Well-beloved the Honourable DAVID STUART BEATTIE, of Wellington, a Judge of the Supreme Court of New Zealand, IAN HUGH KAWHARU, of Palmerston North, University Professor, RITA MARY KING, of Wellington, Married Woman, JOHN DONALD MURRAY, of Dunedin, Stipendiary Magistrate, and JOHN HAMILTON WALLACE, of Auckland, One of Our Counsel Learned in the Law:

GREETING:

KNOW YE that We, reposing trust and confidence in your integrity, knowledge, and ability, do hereby nominate, constitute, and appoint you, the said

The Honourable DAVID STUART BEATTIE,
IAN HUGH KAWHARU,
RITA MARY KING,
JOHN DONALD MURRAY, and
JOHN HAMILTON WALLACE

to be a Commission to inquire into the structure and operation of the judicial system of New Zealand, comprising the Court of Appeal, Supreme Court, Magistrates' Courts, and Children and Young Persons Courts, and to report on what changes are necessary or desirable to secure the just, humane, prompt, efficient, and economical disposal of the civil, criminal, and domestic business of the Courts and to ensure the ready access of the people of New Zealand to the Courts for the determination of their rights and the remedying of their grievances now and in the future; and to ensure that the Courts are as well equipped as possible to adapt to changing social needs:

And, in particular, to inquire into and report on:

1. The jurisdictions of the existing Courts and divisions thereof, whether any new all-purpose or specialist Courts or divisions are necessary or desirable, and what functions and jurisdictions the several Courts or divisions should have, whether exclusive or concurrent:

2. The constitution of the Court of Appeal, in each of the following circumstances—

(a) That the Judicial Committee of the Privy Council remains the final appellate tribunal for New Zealand:
(b) That the Court of Appeal becomes the final appellate tribunal for New Zealand in all cases:

3. The constitution of the Courts (including any new Courts or, divisions recommended) with particular reference to:

(a) The qualifications for, the methods of appointment of, and the promotion of, judicial officers:
(b) The degree of specialisation on the part of judicial officers that is desirable and practicable in the conduct of the business of the Courts:

(c) The manner in which the number of judicial officers required to dispose of the business of the various Courts and divisions is determined, the manner in which those officers are allocated to the various places where sittings of the Courts are held, and what person or body should perform this function:

(d) Whether, in respect of Courts other than the Supreme Court or Court of Appeal, it is necessary or desirable to appoint chief judicial officers of the various Courts or divisions or senior judicial officers at any place where there is more than one judicial officer and, if so, what duties or powers such a chief or senior judicial officer should perform or exercise:

(e) Whether, and if so in what circumstances, there should be a power to investigate the conduct of judicial officers and, if so, what person or body should exercise that power and in what manner:

(f) Whether it is desirable to hold conferences and refresher courses for judicial officers of the various Courts and divisions and, if so, the nature and extent of such courses:

(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:

4. The obligations and responsibilities of barristers and solicitors to the Courts and to their clients to aid in securing the just, prompt, efficient, and economical disposal of the business of the Courts:

5. Whether, and if so, to what extent, the Courts or any of them should exercise greater supervision over the progress of proceedings and the making of appropriate interlocutory orders, and what judicial officer should exercise such supervision:

6. The role of Registrars of the several Courts, whether and to what extent it is proper or desirable and practicable that Registrars perform judicial functions and whether the appointment of legally qualified officers of any Court to exercise subordinate judicial functions would be desirable, practicable, or convenient:

7. The administrative procedures and the organisation and the management of the several Courts and divisions, including the places appointed and the frequency and times of sittings for the dispatch of business and the arrangement of the business thereof:

8. The relation between the Courts and officers thereof and persons who attend the Courts as applicants, or as parties to any proceedings, or as witnesses, or jurors, or otherwise and the extent to which changes in the facilities and administrative procedures of the Courts are necessary or desirable to meet the convenience of such persons:

9. Any associated matters that may be thought by you to be relevant to the general objects of the inquiry:

And We hereby appoint you the said

The Honourable DAVID STUART BEATTIE

to be the Chairman of the said Commission:

And for the better enabling you to carry these presents into effect you are hereby authorised and empowered to make and conduct any inquiry or investigation under these presents in such manner and at such time and

place as you think expedient, with power to adjourn from time to time and place to place as you think fit, and so that these presents shall continue in force and any such inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place:

And you are hereby strictly charged and directed that you shall not at any time publish or otherwise disclose, save to His Excellency the Governor-General, in pursuance of these presents or by His Excellency's direction, the contents of any report so made or to be made by you, or any evidence or information obtained by you in the exercise of the powers hereby conferred on you, except such evidence or information as is received in the course of a sitting open to the public:

And it is hereby declared that the powers hereby conferred shall be exercisable notwithstanding the absence at any time of any one or any two of the members hereby appointed so long as the Chairman or a member deputed by the Chairman to act in his stead, and two other members, are present and concur in the exercise of the powers:

And We do further ordain that you have liberty to report your proceedings and findings under this Our Commission from time to time if you shall judge it expedient to do so:

And, using all due diligence, you are required to report to His Excellency the Governor-General in writing under your hands, not later than the 31st day of December 1977, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof We have caused this Our Commission to be issued and the Seal of New Zealand to be hereunto affixed at Wellington this 4th day of October 1976.

Witness Our Right Trusty and Well-beloved Sir Edward Denis Blundell, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of Our Royal Victorian Order, Knight Commander of Our Most Excellent Order of the British Empire, Governor-General and Commander-in-Chief in and over New Zealand.

DENIS BLUNDELL, Governor-General.

[L.S.]

By His Excellency's Command—

BRIAN TALBOYS, Acting Prime Minister.

Approved in Council—

P. G. MILLEN, Clerk of the Executive Council.

Extending the Time Within Which the Royal Commission on the Courts May Report

ELIZABETH the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To our Trusty and Well-beloved The Honourable DAVID STUART BEATTIE, of Wellington, a Judge of the Supreme Court of New Zealand, IAN HUGH KAWHARU, of Palmerston North, University Professor, RITA MARY KING, of Wellington, Married Woman, JOHN DONALD MURRAY, of Dunedin, Stipendiary Magistrate, and JOHN HAMILTON WALLACE, of Auckland, One of Our Counsel Learned in the Law:

GREETING:

WHEREAS by Our Warrant dated the 4th day of October 1976* We nominated, constituted, and appointed you the said The Honourable DAVID STUART BEATTIE, IAN HUGH KAWHARU, RITA MARY KING, JOHN DONALD MURRAY, and JOHN HAMILTON WALLACE to be a Commission to inquire into and report on the structure and operation of the judicial system in New Zealand:

And whereas by Our said Warrant you were required to report to His Excellency the Governor-General, not later than the 31st day of December 1977, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof:

And whereas it is expedient that the time for so reporting should be extended as hereinafter provided:

Now, therefore, We do hereby extend until the 30th day of June 1978, the time within which you are so required to report, without prejudice to the liberty conferred on you by Our said Warrant to report your proceedings and findings from time to time if you should judge it expedient so to do:

And we do hereby confirm Our said Warrant and the Commission thereby constituted save as modified by these presents:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof We have caused these presents to be issued and the Seal of New Zealand to be hereunto affixed at Wellington this 21st day of November 1977.

Witness The Right Honourable Sir Keith Jacka Holyoake, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Member of the Order of the Companions of Honour, Principal Companion of the Queen's Service Order, Governor-General and Commander-in-Chief in and over New Zealand.

[L.S.] KEITH HOLYOAKE, Governor-General.

By His Excellency's Command—

BRIAN TALBOYS, Acting Prime Minister.

Approved in Council—

P. G. MILLEN, Clerk of the Executive Council.

**Gazette,* 1976, p. 2276

Further Extending the Time Within Which the Royal Commission on the Courts May Report

ELIZABETH the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To our Trusty and Well-beloved The Honourable DAVID STUART BEATTIE, of Wellington, a Judge of the Supreme Court Of New Zealand, IAN HUGH KAWHARU, of Palmerston North, University Professor, RITA MARY KING, of Wellington, Married Woman, JOHN DONALD MURRAY, of Dunedin, Stipendiary Magistrate, and JOHN HAMILTON WALLACE, of Auckland, One of Our Counsel Learned in the Law:

GREETING:

WHEREAS by Our Warrant dated the 4th day of October 1976* We nominated, constituted, and appointed you the said The Honourable DAVID STUART BEATTIE, IAN HUGH KAWHARU, RITA MARY KING, JOHN DONALD MURRAY, and JOHN HAMILTON WALLACE to be a Commission to inquire into and report on the structure and operation of the judicial system in New Zealand:

And whereas by Our said Warrant dated the 4th day of October 1976 you were required to report to His Excellency the Governor-General, not later than the 31st day of December 1977, your findings and opinions on the matters aforesaid, together with such recommendations as you thought fit to make in respect thereof:

And whereas by Our Warrant dated the 21st day of November 1977† the time within which you were so required to report was extended until the 30th day of June 1978:

And whereas it is expedient that the time for so reporting should be further extended as hereinafter provided:

Now, therefore, We do hereby extend until the 31st day of August 1978, the time within which you are so required to report, without prejudice to the liberty conferred on you by Our said Warrant dated the 4th day of October 1976 to report your proceedings and findings from time to time if you should judge it expedient so to do:

And we do hereby confirm Our said Warrant dated the 4th day of October 1976 and the Commission thereby constituted, save as modified by Our said Warrant dated the 21st day of November 1977 and by these presents:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand.

In witness whereof We have caused these presents to be issued and the Seal of New Zealand to be hereunto affixed at Wellington this 26th day of June 1978.

**Gazette,* 1976, p. 2276

†*Gazette,* 1977, p. 3088

Witness The Right Honourable Sir Keith Jacka Holyoake, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Member of the Order of the Companions of Honour, Principal Companion of the Queen's Service Order, Governor-General and Commander-in-Chief in and over New Zealand.

KEITH HOLYOAKE, Governor-General.

[L.S.]

By His Excellency's Command—

R. D. MULDOON, Prime Minister.

Approved in Council—

P. G. MILLEN, Clerk of the Executive Council.

Letter of Transmittal

To His Excellency The Right Honourable Sir Keith Jacka Holyoake, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Member of the Order of the Companions of Honour, Principal Companion of the Queen's Service Order, Governor-General and Commander-in-Chief in and over New Zealand.

MAY IT PLEASE YOUR EXCELLENCY

Your Excellency by Warrant dated 4 October 1976 appointed us the undersigned DAVID STUART BEATTIE, IAN HUGH KAWHARU, RITA MARY KING, JOHN DONALD MURRAY, and JOHN HAMILTON WALLACE, to report under the terms of reference stated in that Warrant.

We were originally required to present our report by 31 December 1977 but this date was extended by Your Excellency to 30 June 1978 and later to 31 August 1978.

We now humbly submit our report for Your Excellency's consideration.

Dated at Wellington this 10th day of August 1978.

We have the honour to be

Your Excellency's most obedient servants,

D. S. Beattie — Chairman.

I. H. Kawharu — Member.

Keith M. King — Member.

J. D. Murray — Member.

J. H. Wallace — Member.

FOREWORD

The appointment of the Commission, its terms of reference, and the procedure to be followed by all persons and organisations wishing to make submissions, were given wide publicity in the weeks prior to the first public hearing. Public notice of all hearings was given in the press and on radio. The Commission's proceedings were formally opened on Wednesday, 17 November 1976. At this hearing the Chairman outlined the procedures which the Commission proposed to follow. One requirement was that 30 copies of written submissions should be filed. However, it was made clear that all persons and organisations would be given every help in this regard and, if they so desired, would have an opportunity to present submissions orally.

The Commission made every effort to interest all groups, particularly those of Maori or Pacific island descent, in the issues raised in our terms of reference. The Secretary addressed the New Zealand Maori Council, the Pacific Women's Council, and other national groups, and wrote over 300 letters to various ethnic groups and other people concerned, in the hope that they would be encouraged to present their points of view on the operation of the court system in this country. As a result, a fairly considerable volume of evidence was heard from those sources. Although many areas for concern and possible reform lie outside the terms of reference of this Commission, nevertheless, throughout our deliberations we have been conscious of the needs of all groups in the community and we hope this is reflected in the report. As an example, some submissions focused on the Maori Land Court. We were initially puzzled why that court was not mentioned in the courts described in the terms of reference but we came to the conclusion that this omission was deliberate and we were obliged to rule that the Maori Land Court did not fall within the terms of reference. However, from what has been said to us in evidence and submissions, and from what we have read, we are able to support the view expressed to us by the Minister of Maori Affairs that a need exists for some examination of the structure of the Maori Land Court. We respectfully agree that this should be the subject of a separate inquiry. Before leaving this matter we should mention that a member of this Commission, Professor I. H. Kawharu, was concerned that the Maori Land Court should be readily identifiable in the context of the total New Zealand court system. To many Maori people the word "court" immediately connotes the Maori Land Court. We record that appeals lie from that court to the Supreme Court, the Court of Appeal, and the Privy Council. We welcome the prospect of a separate inquiry.

Two clauses of our terms of reference gave us special concern. Clause 4 obliged us to inquire into, and report on, the obligations and responsibilities of barristers and solicitors to the courts and to their clients to aid in securing the just, prompt, efficient, and economical disposal of the business of the court. A number of submissions by individuals touched upon the dissatisfaction of clients with the manner in which their cases had been handled by barristers and solicitors. We noted that this issue had been made the subject of separate commissions of inquiry in the United Kingdom and New South Wales. We have, however, endeavoured to deal with it, although by our terms of reference we were bound to do so in general rather than specific terms. A number of complaints raised before us were resolved when the New Zealand Law Society became aware of them.

Clause 7 referred to "the places appointed and the frequency and times of sittings" for the various courts. This was open to different constructions. We have considered the need for fixture systems in city courts, whether night courts should be introduced, suggestions that the courts (especially the Family Courts) should sit in suburban areas, and other matters of this kind, with particular reference to the larger centres of population. We did not consider we were called on to undertake a review of circuit courts in country areas. In any event, in the time available to us it was impossible to make a detailed investigation of the desirability of retaining, or closing, or establishing courthouses. Moreover, suggestions that courthouses in certain townships should be closed produced strong opposition from county and local body sources. The hearing of the merits of these objections would not only have postponed the production of this report but would have called for a major demographic study. We have, therefore, been obliged to limit our recommendations to matters of general principle.

Early arrangements were made for the lay members of the Commission to see the practical functioning and administration of both the Supreme Court and the Magistrates' Courts. The experience and the skills which the lay members brought to the consideration of matters before the Commission more than compensated for their lack of detailed knowledge of the law and the administration and operation of the courts. In acquainting themselves with these matters they were greatly assisted by the judiciary, the magistracy, and the staff of the courts. In connection with the proposal for a Family Court some members examined counselling services in Auckland and Wellington.

Because of the type of reforms suggested to us, and the claims that some of these reforms were working well in other countries, the Commission applied for permission for members to travel overseas. The Chairman and Mr Murray, accompanied by the Research Officer, Mr Vickerman, were, over a period of 7 weeks, able to visit Australia, Singapore, the United Kingdom, Canada, and the United States of America. While on a private visit to Australia, Mrs King took the opportunity to examine many aspects of the court systems of Queensland and New South Wales. In each of the countries visited, members of the Commission received the utmost co-operation from the Governments and members of the judiciary, law officers, and numerous other people connected with the court systems in those places. We were able to see at first hand how the court systems work in these countries and to hear from members of the Bench and Bar their appraisal of those systems. Besides the information the Commission was able to glean from its overseas travel, a great deal of additional material was obtained from reports and correspondence received from each of those countries and certain European nations. At every level, from diplomats, members of Government and the judiciary, senior public officials, academics, lawyers, and many other persons, we received the greatest assistance. To every one of those persons concerned we express our grateful thanks. It is apparent that our problems are not unique and we hope our association has been of mutal benefit.

We must record our appreciation of the work of those who on behalf of the Department of Justice, the New Zealand Law Society, the Police Department, the magistracy, and the Royal Federation of New Zealand Justices' Associations attended most of our public hearings and by skilful examination greatly assisted in seeing that all relevant facts were brought to our attention. On many occasions we asked representatives who were

appearing before us to make further inquiries which they did unstintingly. From the beginning we were concerned to make the widest possible investigations. Where it seemed necessary we invited people to make comments or submissions to us. We are indebted to counsel who appeared before us, particularly those many members of the Bar who went to a great deal of trouble to analyse and record their experiences before the courts and to suggest many improvements both in structure and operation.

The former Chief Justice, the Rt. Hon. Sir Richard Wild, presented a memorandum on behalf of the judges of the Supreme Court at a public sitting. Judges of the Court of Appeal (past and present), judges of the Supreme Court, and many stipendiary magistrates gave us the benefit of their suggestions and experience. Over a considerable period we had many informal discussions with people connected with the functioning of the courts, and we express our gratitude to all those persons. We also acknowledge with appreciation the mass of statistical information prepared, most of it at our behest, by the Secretary for Justice and his staff.

As the hearings of the Commission developed it soon became apparent that there was a great deal of common ground in the submissions, particularly to up-grade the Magistrates' Courts as a unit in the court system, to create a specialist Family Court, to relieve the Supreme Court judges of some of the burden of their work (including lesser crime, divorces, and certain civil jurisdictions), and to improve the overall facilities in the courts. The quality of the submissions has been high and the Commission acknowledges that it has freely borrowed and quoted from the text of the submissions from the Department of Justice and the New Zealand Law Society in compiling this report. We intend no discourtesy if we fail to attribute specific passages to their original authors. We can say that in approaching our task we have been able to reproduce and accept a large number of factual matters without making any significant alteration thereto.

One of the first documents received by us was "An account of the development of the judicial system in New Zealand" presented to us in December 1976 by the Department of Justice.* It was said in this document that:

> The findings of this Commission are likely to set a pattern not only for the immediate future but for many years to come. The constitution of our courts does not and should not change frequently; a regular and accepted court system is an important element in the stability of a rapidly changing and mobile society, as New Zealand is today. This makes it all the more important that the review to be undertaken by this Commission should be thorough and unsparing and should not balk at awkward or fundamental issues.

For his part, the Solicitor-General, in addressing the Commission on the opening day of its public hearings, said:

> . . . I think it can be said to be the proud boast of our Courts (that the community expects and) has received, a steadiness and even-handedness which reflects a recognition of one fixed standard; that of justice, which finds its solemn formulation in the judicial oath: '(to) do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill-will'.

*A condensed version of this document forms Part I, "The Past: History of the Courts".

During its term, the Commission held public hearings in Auckland, Hamilton, Wellington, Christchurch, and Dunedin. It received 184 formal submissions, numbering 2988 pages. Persons appeared before the Commission either in public or in chambers. The transcription of the hearing of these submissions totalled 2243 pages. In addition to formal submissions, letters, articles, books, etc., were submitted by 109 persons or organisations who are included among those listed in Appendices 9 and 10.

Professor I. H. Kawharu was obliged to leave New Zealand at the beginning of February 1978 to take up a fellowship at Oxford University. Thereafter Professor Kawharu was consulted, as preparation of the report continued, and the final draft was made available for his consideration and approval.

The Commission expresses appreciation and gratitude to the Secretary, Mr E. M. Basil-Jones; the Assistant Secretary, Mr C. S. Slade; Mr J. D. Rabone, counsel assisting the Commission; our editorial assistant, Mrs R. Corney; the staff who supported the Commission; the shorthand reporters; and the news media. We also wish to pay tribute to our Research Officer, Mr M. W. Vickerman; and to the Chairman's Associate, Miss P. Root; both of whom have made an outstanding contribution to the work of the Commission.

PART I

The Past: History of the Courts*

EVOLUTION OF THE JUDICIAL SYSTEM

1. Development of the judicial system of New Zealand may be said to begin with annexation of this country to the British Crown in 1840, originally as an extension of the colony of New South Wales. For some years prior to annexation there had been isolated European settlement, governed only by informal, self-made law. By 1840 about half the white inhabitants were concentrated in the Bay of Islands area, where more explicit methods of maintaining law and order had been developed: to protect respectable European society from its enemies in the locality, the Kororareka Vigilants' Association imposed and administered such sanctions as tarring and feathering and confinement in an old sea chest.

2. Letters Patent of 16 November 1840 (usually known as the Royal Charter) constituted New Zealand a colony separate from New South Wales, and conferred on a nominated Legislative Council, in what were then the standard terms, power to make laws for the peace, order, and good government of New Zealand. The Royal Charter specifically empowered the Governor to constitute and appoint judges, and, if necessary, Commissioners of Oyer and Terminer, Justices of the Peace, and any other officials required for the administration of justice. Not suprisingly, the power to set up courts was promptly exercised. In the first days of the new colony, justice had been administered among the European settlers by police magistrates and justices of the peace appointed as officers of New South Wales; the first Ordinance made by the Legislative Council in June 1841 took pains to validate all acts done by them after the date of the Royal Charter. Two of the five other Ordinances made at that session were concerned with establishing courts: Ordinance IV established Criminal Courts of General and Quarter Sessions and Ordinance VI constituted Civil Courts of Request, to be presided over by commissioners. Six months later, on 22 December 1841, a Supreme Court was set up by Ordinance I of the second session of the Legislative Council.

3. During subsequent years of early European settlement in New Zealand, many lower courts with many names were experimented with. On the other hand, the Supreme Court established nearly 140 years ago has continued to the present day, with widening jurisdiction and without change of identity. By the 1860s there emerged on both the civil and criminal side an essentially three tier system of courts of first instance: Resident Magistrates' Courts; District Courts; and the Supreme Court, together with a Court of Appeal whose personnel was identical with that of the Supreme Court until 1957. The later nineteenth century saw this three tier system evolve into a two tier one by successive extensions in jurisdiction of the Resident Magistrates' Courts (known after 1893 simply as Magistrates' Courts). The key to such evolution was a growing

*This Part of our Report has been prepared from a paper by Mr B. J. Cameron, Deputy Secretary for Justice, which we acknowledge with thanks.

practice, hardened into a statutory obligation in 1913, of appointing qualified lawyers as magistrates.

4. The other principal thread of development during the nineteenth century involved a difficult question of whether special tribunals, judicial officers, and rules should govern disputes involving the Maori people; particularly in districts where the Maori formed a majority population. By the end of the century this issue had been settled, if not resolved. Except in respect of Maori land and certain related matters, the Maori people were to be governed almost completely by the English derived law. We now trace in more detail development of each of the three courts of general jurisdiction.

THE COURT OF APPEAL

5. The first body known by the title "Court of Appeal" was constituted on 12 October 1846 by the Supreme Court Amendment Ordinance. It was felt desirable to provide a right of appeal within New Zealand from certain Supreme Court decisions but, with only two judges of the Supreme Court, to whom could one appeal? The solution, following a South Australian precedent, was to constitute the Governor and members of the Executive Council, other than the Attorney-General, to be a Court of Appeals for the colony with power and authority to receive and hear appeals from the judgments of the Supreme Court, where the sum or matter in issue amounted to £100 or upwards. The court could "affirm or reverse such judgments . . . or . . . dismiss the said appeal with costs as may be just". The court's jurisdiction was limited to an error of law apparent on the record, where any judgment of the Supreme Court upon the verdict of a jury of 12 men was appealed. Whether this court ever sat is doubtful: it came to an end in 1861 with the commencement of the Supreme Court Act 1860 and had no effect on the right of appeal to the Privy Council.

6. The Court of Appeal Act 1862 constituted a Court of Record to be styled the Court of Appeal of New Zealand. The judges of the Supreme Court were the judges of the Court of Appeal, and any two or more such judges formed a quorum. If only two judges sat they had to agree on the decision of the court. Where more than two sat the judgment was the opinion of the majority.

7. The Court of Appeal had original jurisdiction in civil cases over questions of special difficulty, or over questions arising in the course of proceedings in the Supreme Court, and removed by consent to the Court of Appeal. It had appellate jurisdiction over certain final orders of the Supreme Court, such as orders made on a point reserved at the time; or over motions for a new trial, specific performance, or injunction. In 1870, this jurisdiction was extended to permit appeals on the ground that evidence adduced at trial was not legally sufficient to support the verdict. Any judgment of the Supreme Court could also be appealed. Procedure was along the lines of the old writ of error which is to remove a judgment into a higher court to examine the record, and for that court to affirm or reverse it according to law; a contrast with the modern appeal by way of rehearing. There was a further appeal from the decision of the Supreme Court on an appeal from a District Court. Provision also existed for points of law, or the exercise of a discretionary power arising in the course of Supreme Court proceedings, to be referred to the Court of Appeal for its opinion.

8. Appellate jurisdiction of this court was limited in criminal cases. Any bill of indictment of extraordinary importance or difficulty could be tried before the judges at the Bar, with a common or special jury. This power seems never to have been invoked. Convictions and orders of inferior courts removed into the Supreme Court, whether on appeal or otherwise, could be removed into the Court of Appeal with the consent of the parties. There was also a right of appeal against any order made on such proceedings in the Supreme Court. A case stated on a question of law arising in a trial before the Supreme Court, or a case from a District Court to the Supreme Court, could be referred to the Court of Appeal for its opinion. The usual appeal in criminal cases, however, was by way of error; and this appeal lay to the Court of Appeal upon the judgment of the Supreme Court, or any inferior court, on any indictment, inquisition, information for any treason, felony, or misdemeanour. The leave of the Attorney-General had to be obtained.

9. In 1882 a new Court of Appeal Act was passed very much along the lines of the earlier Act, with the major exception that the appeal in criminal matters by way of error was not re-enacted. The other major change saw bills of exception and civil proceedings in error abolished, while henceforth all civil appeals were to be reheard on a notice of motion.

10. The Court of Appeal was re-organised in 1913 in two divisions consisting of five judges; any judge could be a member of both divisions. Either division could exercise the jurisdiction of the court and the quorum was three judges, except that any two judges could deliver any judgment or hear applications for leave to appeal to the Privy Council. The Supreme Court judges acted as judges of the Court of Appeal until 1957, despite dissatisfaction and periodic attempts to establish a separate court. When the court was reconstituted in 1957, a permanent body of judges specialising in appeal work was established for the first time. We shall refer to the new court in Part II of this report.

THE SUPREME COURT

11. The Supreme Court was constituted by Ordinance of the Legislative Council made on 22 December 1841. The first Chief Justice, William Martin, had been appointed by Royal Warrant on 5 February 1841 and arrived in New Zealand in September 1841, but it was not until 10 January 1842 that he took his oaths of office as the Chief (and only) Justice. The new Chief Justice had a courthouse built in Queen Street, Auckland. Gallows, stocks, and a jail were nearby. In 1852 a newspaper said of the courthouse, "It is really too bad to pen up a Judge, jury and bar in such a wretched barn as our present courthouse . . .". This was by no means the last criticism of court buildings in New Zealand.

12. Under the Supreme Court Ordinance 1841, amplified by its successor, the Supreme Court Ordinance 1844, the Supreme Court had the jurisdiction of the common law and equity courts in England, as well as a testamentary, lunacy, vice-admiralty, and criminal jurisdiction. Jurisdiction in vice-admiralty matters was withdrawn in 1846. One may note that from the beginning, the Supreme Court fused the functions of both common law and equity jurisdictions in a single tribunal of general jurisdiction. Jurisdiction of the court was to be exercised by a Chief Justice and such other judges as might be appointed. Following standard practice for colonial territories, every judge was to hold office at Her Majesty's

establishing Courts of Requests as civil courts. Criminal jurisdiction was also exercised by justices of the peace, apparently without any statutory foundation, and by police magistrates, whose powers were extended in 1844.

21. The Courts of Requests, as reconstituted by Ordinance VIII of 1844, were designed primarily for the recovery of small debts. Their jurisdiction was exercised by commissioners who were required to be barristers or solicitors of the Supreme Court and who held office at pleasure. These courts had exclusive jurisdiction "of all suits where the debt or sum alleged to be due" did not exceed £20. There was a consent jurisdiction for disputes involving more than that sum, and proceedings within the court's jurisdiction could be commenced by consent in the Supreme Court. The commissioner's judgment was not subject to appeal, although an opinion of the Supreme Court could be obtained on a point of law. No advocate was permitted to appear on behalf of the parties and the parties could not examine or cross-examine witnesses. One may detect, in these courts and their procedures, some anticipation of the most recent jurisdictional innovation in New Zealand, the tribunals set up under the Small Claims Tribunals Act 1976.

22. Courts of Sessions were re-established in 1846. They were presided over by two or more justices of the peace and had the powers, authority, and jurisdiction of the Courts of General and Quarter Sessions of the Peace in England. In particular, they could hear and determine all felonies and indictable misdemeanours except treason, murder or other capital felony, felony punishable on a first conviction by transportation, and certain other felonies such as perjury, forgery, bribery, and arson. Offences were tried by a jury and appeals lay to the Supreme Court.

23. Courts of Petty Sessions were abolished by the District Courts Act 1858, but revived in 1865. The Governor constituted districts and sittings were to be held monthly. The quorum comprised the chairman (who was elected annually at a meeting of justices) and one justice of the peace or, in the absence of the chairman, three. Every Court of Petty Sessions possessed the criminal and civil jurisdiction of the Resident Magistrates' Courts. These courts fell into disuse and were formally abolished in 1891.

Resident Magistrates

24. In 1846 the office of resident magistrate was established for the purpose of "the more simple and speedy administration of justice in New Zealand and for the adaptation of the law to the circumstances of both races" (1846, Ordinance No. 16). The office was held during pleasure and filled by fit persons, namely justices of the peace. One may discern the germ of the present Magistrates' Courts in this office. A resident magistrate had all the powers of two justices to deal summarily with cases of assault, to admit to bail persons charged with felony, and to act under any local ordinance. He could also deal summarily with theft of property not exceeding 20 shillings, and he had power to sentence a person to 12 months' imprisonment for theft of property not exceeding £5, on a plea of guilty. He could dismiss trivial cases of theft up to 20 shillings, even though the case was proved.

25. His most striking powers related to the Maori people. He was given exclusive jurisdiction over summary offences against members of the Maori race, and a summary jurisdiction in civil cases between "Native and European"; including the power to give such judgment as he "shall

find to stand with equity and good conscience", a precursor of the equity and good conscience provision in section 59 of the Magistrates' Courts Act 1947. Part V of Ordinance No. 16 established Courts of Arbitration to settle disputes and differences of a civil nature between the Maori people. Resident magistrates, together with two Maori assessors chosen by the parties, usually chiefs, had "power to hear and determine summarily all claims and demands whatsoever of a civil nature arising between persons of the Native race". In civil cases not involving the Maori people, a resident magistrate or any two justices could determine any claim or demand of a civil nature, when the debt or damage claimed did not exceed £20, and provided the defendant resided more than 10 miles from a Court of Requests.

26. In 1858 Native Circuit Courts were established by an Act of the same name "to make more effectual provision for the keeping of the Queen's peace and the administration of justice within the districts over which Native title has not been extinguished". Such courts were presided over by a resident magistrate and at least one native assessor, and had both criminal and civil jurisdiction. This Act was a companion piece to the Native Districts Regulation Act which attempted to provide for a degree of minor self-government in such areas. Both Acts were repealed as obsolete in 1891.

27. Meanwhile, the Resident Magistrates' Courts increased their powers and jurisdiction. In 1856 resident magistrates were empowered to imprison for up to 2 months any offender convicted of assault and to summons witnesses. They were prohibited, however, from hearing claims over disputed wills, or settlements, or certain torts. The civil jurisdiction of proclaimed Resident Magistrates' Courts was extended in 1862 to claims where the debt or damages did not exceed £100. A right of appeal to the Supreme Court was also given in claims exceeding £20. In 1865 criminal jurisdiction was extended, in theft cases, to those where the property stolen did not exceed £5; to sentencing a person on a plea of guilty to theft involving property up to the value of £10; and to ordering a male thief under the age of 15 years to be once whipped.

28. The law relating to resident magistrates was consolidated in the Resident Magistrates' Act 1867. This Act continued the office of resident magistrate, who had the powers of two justices and sat in Resident Magistrates' Courts constituted by the Governor. A prohibition against practising as a solicitor, attorney, or proctor was continued. A justice could sit with a resident magistrate and any two justices could act in place of the magistrate.

29. The court's civil jurisdiction in contract and tort was identical to that of the District Court, except that the claim or demand had to be £20 or less; like that court it had a consent jurisdiction. A Resident Magistrate's Court could also entertain a claim for recovery of specific chattels where their value did not exceed £20, and further had jurisdiction for recovery of possession of property where rent payable did not exceed £50 a year. The power to give an extended jurisdiction to certain proclaimed courts continued. Provision was made for removing cases into the Supreme Court for rehearing any case; also for appeals to the Supreme Court in tenancy cases, and in other cases where the sum claimed exceeded £20 (or £5 with leave).

30. Special jurisdiction in relation to the Maori people was continued in a modified form. No Maori outside the main provincial towns could be apprehended or imprisoned, except by the authority of a resident

magistrate or chairman of Petty Sessions. A Maori confessing to a charge of theft or receiving stolen goods could be dealt with summarily by a resident magistrate and sentenced to up to two years' imprisonment, unless he paid four times the value of the property stolen when he was discharged. A resident magistrate (or chairman of Petty Sessions) and two assessors (being "aboriginal Natives of the greatest authority and best repute") had exclusive jurisdiction to determine civil cases between the Maori (other than disputed wills or title to land) according to equity and good conscience. Both assessors had to concur in a decision, otherwise the case had to be reheard. Where the case was between Maori and European, the court consisted of the resident magistrate and, unless the court had extended jurisdiction, one or more justices. The debt or damages claimed could not exceed £100. A chairman of Petty Sessions was able to exercise the powers of a resident magistrate where one or both of the parties were Maori.

31. Resident magistrates' powers as police magistrates were continued and, in addition, they were given power to enforce judgments of abolished District Courts. They could also exercise their jurisdiction (but not an extended jurisdiction) outside their district, in parts of the colony not falling in any district of a Resident Magistrate's Court or Court of Petty Sessions. (As noted above, a Court of Petty Sessions could exercise the same powers and jurisdiction in all civil and criminal cases as a Resident Magistrate's Court.) In 1868 resident magistrates were given jurisdiction over absconding debtors where the amount claimed was within the civil jurisdiction. The power to take evidence at a distance, or where a witness was about to go beyond 20 miles, was given in 1870.

District Courts

32. The District Courts Act 1858 abolished Courts of Requests, Courts of Sessions, and Courts of Petty Sessions. In place of the first two courts, Courts of Record were established possessing civil and criminal jurisdiction, and called District Courts: such courts were to be held in such districts as the Governor appointed from time to time. These courts were presided over by district judges appointed during the pleasure of the Governor from fit and proper persons, namely barristers or solicitors of the Supreme Court. Lay judges could also be appointed to exercise civil jurisdiction, in respect of a claim or demand between £20 and £100, and for the recovery of the possession of tenements.

33. The court had jurisdiction in all cases of a civil nature, whether legal or equitable, with the consent of the parties; otherwise only those cases in which the claim or demand exceeded £20, but did not exceed £100 (increased to £200 in 1888 and to £500 in 1893); excluding title to real estate, disputed wills, and certain torts. In 1866 an extended jurisdiction was given to prescribed courts in civil cases, where the claim or demand exceeded £20 but did not exceed £200. This extension appears to have been limited to the goldfields. The court could grant and dissolve any injunctions in the absence of a Supreme Court judge; grant probate of wills and letters of administration in the absence of a Supreme Court judge; and act in cases for recovery of possession of property where the rent payable did not exceed £50 per year. Jurisdiction of the court was extended to absconding debtors and to partnership accounts in 1888.

34. Criminal jurisdiction of the courts embraced all crimes and offences (except perjury) punishable by fine, or imprisonment, or transportation for any period not exceeding 7 years, or penal servitude not exceeding 4

years. The reference to transportation reads oddly, since that penalty had been abolished in 1854 (if it ever was valid: *R. v. Gleich* [1879] Oliver Bell and Fitzgerald 39 (S.C.)). In 1870 general criminal jurisdiction was removed and proclaimed District Courts were given jurisdiction to hear all cases of felony and misdemeanour except treason, murder or other capital felony, felony punishable on a first conviction by penal servitude for more than 7 years, and certain other felonies. Proclamations were made in respect of Hawke's Bay, Otago Goldfields, Taranaki, Timaru, and Westland.

35. The District Court had concurrent jurisdiction with the Supreme Court to hear appeals against summary convictions, except where the convicting magistrate was also a District Court judge. To facilitate proceedings in the Supreme Court, a District Court judge could be deputed to exercise certain powers under the Supreme Court Rules in the absence of the Supreme Court judge.

36. Civil trials were heard by a judge alone unless either party required a jury. Barristers or solicitors of the Supreme Court could represent a party and, in special circumstances, any other person could appear on behalf of a party with the leave of the judge. An appeal by way of case stated lay to the Supreme Court whenever a party was dissatisfied with the court's decision on any point of law, or with the admission or rejection of any evidence.

37. Criminal cases were tried by a jury of 12 men on an indictment signed by the Attorney-General or a Crown prosecutor; an interesting precursor of the procedure devised for the Supreme Court on abolition of grand juries in 1961. Prosecutions could be removed into the Supreme Court for trial, and points of law could be referred to the Supreme Court for its opinion.

38. District Courts gradually ceased to function, and in 1909 all remaining court districts were abolished by proclamation, though the empowering legislation was not repealed until 1925. As the Hon. Sir James Parr said on that occasion, District Courts possessed no powers that were not provided for by the Acts constituting the Supreme and Magistrates' Courts.

Justices of the Peace

39. The various Acts and ordinances regulating proceedings before justices were repealed in 1866 and a new Justices of the Peace Act enacted. It provided a detailed code of procedure on the laying of an information, securing the attendance of the offender, bail, and the hearing and enforcement of sentences in summary proceedings. Complaints and the preliminary hearing of indictable offences were also dealt with. There were special provisions dealing with assaults, larceny, and riots.

40. The Appeals from Justices Act 1867 consolidated the law relating to appeals from justices acting in their summary jurisdiction. Appeals by way of case stated on a point of law lay to the Supreme Court. There was a general right of appeal to the Supreme Court or a District Court, when the penalty exceeded £5 or imprisonment exceeded one month. The justice whose decision was appealed had a right to be heard on the appeal, but this provision was not re-enacted in 1882. General appeals were by way of rehearing. There was also a procedure of prohibition, where any person aggrieved by a summary conviction or order could apply ex parte to the Supreme Court for an order calling on the prosecutor and convicting justices to show cause why they should not be prohibited from proceeding.

If any error or mistake on the part of the justice was shown, the court could amend the conviction or make such other order as the court thought proper.

41. The Justices of the Peace Act 1882 consolidated the law relating to justices of the peace; it was again consolidated in 1908 and 1927. In 1957 certain provisions of the Act were incorporated and modernised in the Summary Proceedings Act, which contains the code on criminal procedure in the Magistrates' Courts.

42. The Summary Proceedings Act 1957 revolutionised the law relating to the criminal jurisdiction of justices of the peace. Hitherto, apart from a few cases in which jurisdiction was specifically vested in one 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 jurisdiction to hear indictable charges. By the Act of 1957 the jurisdiction of justices in indictable cases was taken away and it was provided that justices of the peace should have jurisdiction in summary cases only where it was expressly conferred by statute. An amendment made at the same time to the Police Offences Act 1927 (which contains most of the more common summary offences), gave one justice jurisdiction in respect of charges of drunkenness, and two justices jurisdiction over a few other minor offences. They also have, and frequently exercise, jurisdiction over many traffic offences. The power to pass sentences of borstal training and periodic detention is not vested in justices of the peace. Preliminary hearing of an indictable charge to be tried in the Supreme Court may be taken before two justices; they are often called upon for this task.

Magistrates' Courts

43. The Magistrates' Courts Act 1893 repealed the earlier Acts relating to Resident Magistrates' Courts, establishing in their place Courts of Record with civil jurisdiction to be called Magistrates' Courts, and presided over by a stipendiary magistrate or (in very limited circumstances) two justices. The special provisions relating to the Maori people were not re-enacted, and remaining Maori assessors lost their functions.

44. The Governor appointed fit and proper persons as magistrates to exercise the ordinary, extended, or special jurisdiction of the Court. Only barristers or solicitors of the Supreme Court or resident magistrates of 5 years' standing, could be appointed to exercise the extended jurisdiction; and barristers or solicitors only could be appointed to exercise the special jurisdiction. All appointments were expressed to be at pleasure, except that the Governor might remove a magistrate appointed to exercise extended jurisdiction on the grounds of his absence from New Zealand without leave, or incapacity, or neglect of duty, or misbehaviour, or upon the address of both Houses of Parliament. This somewhat inconsistent proviso was dropped in 1913 but it was not until 1947 that magistrates acquired secure tenure of office, subject to removal by the Governor-General for inability or misbehaviour. Every magistrate, by virtue of his office, was a justice of the peace, had all the powers of two justices, and was a coroner.

45. ***Civil jurisdiction*** Ordinary and extended jurisdiction of the Magistrates' Courts was the same except for the monetary limits of claims, and disputes and proceedings under the Building Societies Act 1880 were part of the extended jurisdiction. In the following summary,

where extended jurisdiction is indicated in brackets, we show that the Magistrates' Courts had jurisdiction over:

(a) Breach of contract, or tort, where the amount claimed did not exceed £100 (£200), excepting in actions for false imprisonment, or for illegal arrest, or for malicious prosecution, or for libel or slander, or for seduction, or for breach of promise of marriage.

(b) Debt, where the sum claimed did not exceed £100 (£200), whether such sum be the original amount of the debt, or a balance after allowing payment on account, or credit for goods supplied, or the amount of any other admitted set-off.

(c) Recovery of any demand not exceeding £100 (£200) which was the whole or part of the unliquidated balance of a partnership account.

(d) Attachment of debts not exceeding in amount the sum of £100 (£200).

(e) Enforcement of claims upon, and the recovery of possession of, some specific movable property, the value whereof did not exceed £100 (£200).

(f) Recovery of possession of tenements, with or without arrears of rent or mesne profits:

(i) where the claim was alleged to have arisen on the determination of a tenancy, or on occupation at a rental not exceeding the rate of £105 (£210) by the year;

(ii) in other cases, where the value of the tenement did not exceed £100 (£200).

(g) Interpleader cases generally, where the value of the subject matter in dispute did not exceed £100 (£200).

(h) A party agreement, by writing signed by them or their solicitors, that, whatever the amount or value of the subject matter, but not in excess of £200 (£500) (provided the case was otherwise within the jurisdiction), the court should have jurisdiction.

(i) Granting of a writ of arrest for holding to bail any person about to quit the colony leaving unsettled a claim within the ordinary (extended) jurisdiction of the court.

The special jurisdiction included claims where the amount claimed or in dispute did not exceed £200 for: partnership accounts; some torts, for example, illegal arrest, libel, slander, false imprisonment; and recovery of a specific or pecuniary legacy. There was also power to grant and dissolve injunctions, and the court could exercise all the powers of a Supreme Court judge in relation to absconding debtors.

46. In the magistrate's absence, two justices could preside to hear and determine minor civil cases where the amount involved did not exceed £20. This power remained until 1948.

47. Provision was made for rehearings; for removing actions into, and for appeals to, the Supreme Court. Appeals on a point of law were by way of case stated and lay with leave of the court, if the amount involved did not exceed £20. Appeals on a matter of fact were by way of rehearing and lay, if the amount involved exceeded £50.

48. The Magistrates' Courts Amendment Act 1913 required all appointees to the magistracy to be barristers or solicitors of 5 years' standing (increased to 7 years in 1947); or the clerk (now registrar) of a Magistrate's Court for at least 10 years. This last qualification, slightly altered in 1922, still remains, although it is over 30 years since anyone other than a barrister and solicitor in private practice has been appointed

to the magistracy. A retiring age of 65 was prescribed in 1920, extended to 68 in 1924. The 1913 Act merged the extended jurisdiction of the court with the ordinary jurisdiction, no provision being made for "special" jurisdiction. The monetary limit of jurisdiction was enlarged from £200 to £300 in 1927.

49. Successive consolidations of the Magistrates' Courts Act took place in 1908 and 1927. In 1947 this legislation was replaced by a new Act, product of a careful review made under the auspices of the Law Revision Committee. Constitution of Magistrates' Courts remained the same as under earlier legislation, except that the lack of any Court of Record to exercise summary criminal jurisdiction, after Petty Sessions were abolished in 1891, was remedied by the new Act. More recently, the Small Claims Tribunals Act 1976 empowered the Minister of Justice to establish, as divisions of the Magistrates' Courts, small claims tribunals. We examine the jurisdiction of those tribunals in Part II.

50. ***Criminal jurisdiction*** The category of indictable offences triable in a Magistrate's Court was radically enlarged by the Summary Jurisdiction Act 1952. Prior to this Act, magistrates had power to try specified indictable cases, subject to the consent of the defendant where the maximum penalty for the offence exceeded 3 months' imprisonment. The 1952 legislation gave them jurisdiction to try almost all indictable offences against property, and all but the most serious of other indictable offences, such as murder, manslaughter, rape, and aggravated robbery. On conviction, the court could impose a sentence up to the maximum prescribed for the offence or 3 years' imprisonment, whichever was the lesser. These powers were subject to three qualifications: the prosecution must decide to proceed summarily rather than by way of indictment, the defendant could elect to be tried by jury, and the magistrate himself might decline to deal with the case. Enactment of this legislation had a marked effect on the number of criminal cases coming before the Supreme Court; in the 25 years since its passing, a quite intolerable burden has been prevented from falling to the judges.

51. The Summary Proceedings Act 1957 altered the procedural basis of appeal from convictions in Magistrates' Courts. Until that time such appeals to the Supreme Court were by way of rehearing in the full sense; that is, the evidence was heard *de novo*. This contrasted with the law relating to civil appeals from both the Magistrates' Courts and the Supreme Court, and with criminal appeals from a finding of guilty by a jury. The broad effect of the Act was to apply the law relating to civil appeals to criminal appeals by a person convicted in the Magistrates' Courts. The appeal is heard on the notes of evidence made by the magistrate, but the Supreme Court may, in its discretion, rehear the whole or any part of the evidence; and must do so in respect of any testimony where the judge considers that the magistrate's note of the evidence may be incomplete in any particular.

52. The "standard fine" procedure, introduced in 1955 and retained in the 1957 Act, was superseded by the minor offences procedure provided in the Summary Proceedings Amendment Act 1973. This procedure is rather more sophisticated than its standard fine predecessor. It will be treated in more detail in Part II.

53. ***Domestic jurisdiction*** The original Destitute Persons Ordinance was made in 1846. Its purpose, as recited in the preamble, was to provide for the maintenance of destitute persons and illegitimate children by making the relatives of such persons, and the putative fathers of such

children, liable for their support. Jurisdiction was vested in two justices of the peace, with a right of appeal to Quarter Sessions. A number of further enactments followed during the nineteenth century; an Act of 1894, for instance, first provided for separation orders.

54. The law was consolidated and considerably revised by the Destitute Persons Act 1910, which gave jurisdiction to magistrates. This Act dealt with the maintenance of destitute persons, illegitimate children, and deserted wives and children, and also provided for:

(a) affiliation orders adjudging a man to be the father of a child;
(b) separation orders which had the same effect as a decree of judicial separation under the Divorce and Matrimonial Causes Act;
(c) guardianship orders giving the mother sole custody of the children of the marriage.

55. The Domestic Proceedings Act 1968 replaced the Destitute Persons Act by a new code governing domestic proceedings in Magistrates' Courts. This Act radically altered substantive law in many respects, and also contained a number of important jurisdictional and procedural innovations aimed at improving and humanising family cases in the lower courts. Special conciliation proceedings distinct from the seeking of other relief were introduced; provisions introduced in 1939 for the reference of applications to conciliation were tightened; the court was given greater powers to obtain reports and call witnesses of its own motion; in the parallel Guardianship Act 1968, provision was made for the court to appoint counsel to represent any children involved; and an attempt was made to specialise by limiting jurisdiction under the Act to magistrates appointed to exercise it. This latter attempt proved abortive, however, partly because of the need for mobility of magistrates, the number of one-magistrate centres, and the demands of circuit work.

THE MAORI PEOPLE AND THE COURTS

56. In this historical outline of New Zealand's judicial system we record some of the special provisions for adaptation of laws, institutions, and procedures to accommodate the Maori people.

57. In the 1840s the Maori people were largely beyond control by the embryonic colonial administration, with much of the country seldom seeing an official. Where possible, however, British authorities were ready to assert police power over the Maori people when the need arose. Soldiers were called out for the first time in March 1840, at the Bay of Islands, when a Maori war party held up the trial of a fellow tribesman accused of stealing a blanket; an incident typical of others that occurred when immigrants felt their law was not being upheld.

58. Where enforcement was possible, Maori and colonist alike were subjected to the same restraints. The case of Pakewa is in point. He was charged with stealing a blanket and the case was heard before the first Court of Quarter Session held at Wellington. The court explained at length the principle of equality before the law, and went on to say:

> . . . in order that they may be shielded from the consequence of their ignorance, or presumed ignorance, of our laws, counsel will be assigned to them by the Court and a sworn interpreter will faithfully translate all that is important for them to know; this proceeding will have the effect of impressing them and the entire native population with the justice, the protection, and above all, the equality of the laws under which they are now placed.

That was in October 1841.

59. In the early 1840s, settler justices of the peace had limited jurisdiction in cases involving the Maori people. George Clark, Chief Protector of Aborigines, and some of his sub-protectors appointed in other districts, were made justices of the peace with jurisdiction over the Maori people. They were instructed:

> In your magisterial capacity, where natives are concerned, there are many minor offences or disputes which you may compromise or adjust in accordance with their custom, which if brought before the Court of Justice, and judged according to the strict and rigid interpretation of the law, might subject them to grievous punishments.

Clark found this too vague and asked for an enactment to clarify and legitimise the instruction, or for native customs to be legalised. Neither request was granted. Fitzroy, who succeeded Hobson as Governor, had reservations about imposing the laws of one culture upon another. When the Legislative Council met in 1844 he sought authority for some of the native chiefs to act, in a qualified manner, as magistrates in their own tribes and to be granted small salaries.

60. Under the Native Exemption Ordinance 1844 (Session 3, No. 18), no magistrate could issue a summons in disputes involving the Maori alone except on the complaint of two chiefs from the tribe of the aggrieved party, and the summons was served on two chiefs from the tribe of the offending party. If a Maori offended against a European, and lived outside a town, the warrant again went to two chiefs from the offender's tribe for execution. If the chiefs delivered the offender they received a small payment. In criminal cases, other than rape or murder, the payment of a £20 deposit allowed a Maori offender to go free, and if he did not appear at the trial the deposit could be paid to the victim. A Maori convicted of theft was able to avoid sentence by paying four times the value of the goods stolen; this fine also could be paid to the victim. The Ordinance further provided that no Maori could be imprisoned by virtue of any judgment obtained against him in any action or civil proceeding.

61. English law was further modified to meet the situation of the Maori with the passing of three other Ordinances in the same year. The Unsworn Testimony Ordinance allowed non-Christian Maoris to give unsworn evidence in court. The Jurors Ordinance allowed capable Maoris to serve on a mixed race jury when one party to an action was a Maori, although there is no evidence of Maori jurors being enrolled. The Cattle Trespass Ordinance of 1842 was amended to allow owners of unfenced land (who in practice were usually Maoris) to claim damages for crops harmed by wandering stock. This last amendment upset English immigrants who preferred that crops should be fenced and cattle left to wander freely.

62. The Native Exemption Ordinance provoked a storm of criticism from settlers. By the time their objections reached London, Grey had been named to replace Fitzroy, and he was instructed to confine the Ordinance to relations between the Maori people only.

63. As we have seen, the Resident Magistrates' Courts Ordinance of 1846 gave resident magistrates summary jurisdiction in disputes between Maori and European. The resident magistrate and two men "of the greatest authority and best repute" in their respective tribes, appointed as assessors, constituted a Court of Arbitration. This Ordinance

incorporated Fitzroy's device of allowing persons convicted of theft to pay into court four times the value of the property stolen, which sum could be used to compensate the victim. Such a payment prevented the court sentencing the person. The Ordinance also allowed the Maori people to recover debts and claim damages in a Resident Magistrate's Court, as an alternative to the more expensive and less accessible Court of Requests. Reports in the 1850s disclosed that in cases between the Maori people and Europeans, Maoris were most frequently the complainants; these reports also suggested that they always appeared satisfied with decisions of the courts, even when they were losers. The practice of settling debts through resident magistrates soon became well established in New Zealand. The role of assessors was essential to the system as they helped to identify the court with the local community.

64. The Native District Circuit Courts Act 1858 authorised the appointment of resident magistrates as Circuit Court judges, with jurisdiction slightly wider than the ordinary jurisdiction of resident magistrates, to sit with Maori assessors and juries to administer the civil and criminal law, together with by-laws made pursuant to the Native District Regulations Act of the same year. The Act also empowered the Governor-General in Council to make regulations empowering Maori assessors to hear civil cases involving up to £5, and to impose a £1 fine in criminal cases.

65. The Resident Magistrates' Act 1867 again aroused settler hostility at the almost exclusive involvement of the resident magistrate in administering justice among the Maori people. Many members of Parliament sought to have the Maori subject to the same legal code and courts as the settlers, including the petty jurisdiction of justices of the peace. The Government overcame their resistance by pointing out the difficulty in enforcing the law in outlying districts. The provisions in the Act, which retained the earlier exemptions, could be applied only to districts proclaimed by the Governor in Council. The 1867 Act required an order of a resident magistrate or a superior court to apprehend a Maori offender outside the main towns. It re-enacted earlier provisions allowing a Maori convicted of theft to avoid sentence by paying four times the value of the goods stolen into court; empowered the court to compensate a victim for his loss with some of this money; provided for the appointment of assessors; and provided for the hearing of all civil disputes between the Maori people (excluding those affecting land title) by a resident magistrate with assessors.

66. There were some concessions to settlers in the Act: chairmen of Petty Sessions were given the same powers as resident magistrates in cases involving the Maori people; the Maori assessors' independent £5 jurisdiction was dropped; and disputes involving land title now had to be heard by the Native Land Court. Provision in the Native District Courts Act 1858 for civil cases between the Maori people to be heard before a Maori jury was not re-enacted, despite its success in some districts.

67. By 1893, after the passing of the Magistrates' Courts Act of that year, and the repeal of the special provisions of the 1867 Act, the Maori people were generally subject to the same laws and legal machinery as the colonists. We record, in this context, the vestigial provision in the Justices of the Peace Act 1927, carried into the Police Offences Act in 1952, where on conviction of any person for assault the court might award half the fine to the victim. This provision was enlarged in 1975 to apply to any conviction on an offence causing physical harm (section 45A, Criminal

Justice Act 1954, as inserted by section 16, Criminal Justice Amendment Act 1975).

68. In Supreme Court proceedings, there was provision from 1867 for civil cases between Maoris to be tried by a Maori jury if both parties concurred. In criminal cases, a Maori tried for an offence committed against another Maori could likewise claim to be tried by a Maori jury. These provisions endured until 1962 as one of the last vestiges of the notion of separate procedures for "purely Maori" cases. But they equally presented the appearance of gross discrimination in that, if either party (in civil cases), or either the accused or the victim (in criminal cases), was non-Maori the case was to be dealt with by a jury from which all Maoris were excluded by law. In 1962, therefore, the special provisions for Maori juries were eliminated and the Maori people made eligible for service on ordinary juries.

CHILDREN AND THE JUDICIAL SYSTEM

69. The passing of the Child Welfare Act 1925 first established separate courts for the hearing of matters affecting young people. Until that time, charges against children (other than for indictable offences) were heard in a Magistrate's Court, although the practice had developed for the magistrate to hear the case in his room. We note that at this time, and until 1961, the age of criminal responsibility was as low as eight. As the Minister, the Hon. Sir James Parr, observed when moving the second reading (206 N.Z.P.D. 676):

> . . . there is no special waiting-room at the courts for young children, and it is impossible to keep from these children the view of the sordid details of the Police Court . . .

70. The Act provided for Children's Courts and for the appointment of stipendiary magistrates or justices of the peace to exercise jurisdiction in a Children's Court. It also authorised the appointment of associate members from persons with special knowledge of, or experience in, the matters coming before the court. They were deemed to be members of the court, but the decision of the court was not dependent on their views. The specialisation envisaged in the Act was not achieved in practice, however. All magistrates were automatically appointed to sit in the Children's Court, and in the later years of the court, no associate members sat. Proceedings of the court were not open to the public and could not be published.

71. A Children's Court had jurisdiction in respect of offences committed by persons under the age of 16 years (increased to 17 in 1927), and in proceedings for the committal of a child to the care of the Superintendent of Child Welfare. The Supreme Court and Magistrates' Courts were given a discretion to refer cases involving a person over 16 (17 from 1927), but not older than 18 years of age, to a Children's Court.

72. The Child Welfare Amendment Act 1927 required that, as far as practicable, persons attending sittings of a Children's Court should not be brought into contact with those attending sittings of any other court. With a similar proviso, Children's Courts were not to be held in a room where another court ordinarily sat, or in the same building at the same time as any other court. It did not always prove "practicable" to adhere strictly to these desirable principles.

73. The 1927 Act also provided that proceedings on charges of manslaughter and murder were not to be heard in a Children's Court.

Other than that, the court could deal with any indictable offence, but its powers in respect of purely indictable offences were limited. It could impose only the special sanctions provided by the Child Welfare Act, such as committal to the care of the Superintendent of Child Welfare. If a more serious penalty was to be contemplated, the child had to be committed for trial in the ordinary way.

74. Where a child was charged with an offence, it was not originally necessary for the court to hear and determine the charge. This obligation was imposed in 1948. Throughout the Act's operation, however, the Children's Court was required to consider "the parentage of the child, its environment, history, education, mentality, disposition and any other relevant matters" before making any order. In 1954 Children's Courts were empowered to compel the parents or persons having custody of any child charged with an offence to appear before the court to be examined in respect of the child's upbringing and control. In 1961 the jurisdiction of Children's Courts to deal with traffic offences other than those punishable by imprisonment was withdrawn. Children charged with such offences were (and are) dealt with in the ordinary way by the ordinary courts.

PART II

The Present: The Courts Today

INTRODUCTION

75. All courts in New Zealand are established by statute and the jurisdiction of inferior courts is prescribed and circumscribed in the empowering legislation. The Judicature Act 1908 brought together the various Acts dealing with establishment and constitution of the Supreme Court and Court of Appeal. In 1947 a new enactment was passed governing the Magistrates' Courts. The ordinary courts, so called to distinguish them from special purpose courts such as the Maori Land Court and the Industrial Court, exercise a general civil and criminal jurisdiction. These courts are our concern in the present inquiry.

76. The hierarchy of New Zealand courts consists of the Judicial Committee of the Privy Council, the Court of Appeal, the Supreme Court, and Magistrates' Courts; later in Part II we examine the functions of each of these courts in more detail. The Supreme Court and the Magistrates' Courts are the courts of first instance, although both have appellate functions. They also exercise an equitable jurisdiction. Equity is the body of rules formulated and administered in England by the Court of Chancery to supplement the rules and procedures of the common law. The Court of Chancery was amalgamated with the common law courts in the United Kingdom in 1873 to form the Supreme Court, and the rules of equity are administered in all divisions of that court. They are likewise administered in our Supreme Court and are used in the Magistrates' Courts. According to the nature of proceedings they are more likely to be invoked in the Supreme Court. Where there is any conflict between the rules of equity and common law, equity should prevail (s.99 of the Judicature Act 1908).

77. It is convenient to examine the jurisdiction of the ordinary courts in terms of the branches of law administered in those courts: the main divisions are civil, criminal, and domestic. Domestic law includes the laws relating to marriage, children, paternity, separation, divorce, maintenance, and property rights. The Supreme Court has exclusive jurisdiction in cases relating to the validity of the marriage and to divorce. It shares with the Magistrates' Courts questions of guardianship, custody, maintenance, separation, paternity, and matrimonial property. The Magistrates' Courts have exclusive jurisdiction to make adoption orders.

78. General civil and criminal jurisdiction of our courts is set forth in the following broad survey:

(a) *Contract and commercial law* Contract law concerns a dispute arising out of agreement or alleged agreement, that is to say, a contract between parties, which is justiciable in the courts. The Magistrates' Courts have concurrent jurisdiction with the Supreme Court over all such actions where the amount in dispute or the value of the chattels claimed does not exceed $3,000. The law of contract is largely founded on the common law, with a number of statutes

modifying or extending the old rules. Commercial or mercantile law is primarily contract law specifically relating to commercial dealings. Within this heading is included the law relating to arbitration, agency, partnerships, companies, insurance contracts and insurance companies, chattels securities and other interests in chattels, banking, commercial bills, and liens.

(b) *Torts* Actions for wrongs not arising out of contract may be brought in the Supreme Court or Magistrates' Courts, though in the latter case the claim must not exceed $3,000. Here again, the action in tort is a creature of the common law, modified by statute law. The most far-reaching modification of the law of torts, achieved by the Accident Compensation Act 1972, abolishes the action for personal injury by accident. The only jurisdiction of the ordinary courts in this class of case is appellate jurisdiction on a question of law, vested in the Administrative Division of the Supreme Court and the Court of Appeal.

(c) *Trusts and wills* These are part of the equity jurisdiction of the Supreme Court and are almost wholly confined to that court.

(d) *Landlord and tenant* This area of the law is more commonly dealt with as part of land law but, for the purposes of this survey, it is convenient to refer to it separately. The subject comprises creation of the relationship of landlord and tenant: the rights, duties, and obligations of each; renewals, determination, and forfeiture of tenancy; and recovery of possession of premises. The rights and liabilities of landlord and tenant are based in contract, although subject to a number of statutory provisions, and any disputes or breaches in this area must fall within the jurisdiction in contract of either court. A Magistrate's Court also has jurisdiction in proceedings for the specific performance or for the rectification, delivery up, or cancellation of any agreement for the lease of any property valued at not more than, or for sale where the purchase does not exceed, $3,000 (s.34(1)(b) Magistrates' Courts Act). Proceedings for the recovery of land may also be brought in a Magistrate's Court, where the rent does not exceed $2,000 per year or, if no rent is payable, the value of the land does not exceed $25,000 and the other provisions of section 31 of the Magistrates' Courts Act 1947 are met. Disputes concerning the rental of dwelling-houses are heard before Rent Appeal Boards established under the Rent Appeal Act 1973.

(e) *Land* The remaining aspects of land law cover the transfer of land; the creation, extinguishment, and effect of various estates; and other interests in land including mortgages, boundary disputes, and the taking of land for public purposes. In the main, the Supreme Court exercises an exclusive jurisdiction, although the Magistrates' Courts have a limited jurisdiction.

(f) *Admiralty* The admiralty jurisdiction of the Supreme Court is concerned with civil matters connected with shipping, for example, ownership and mortgages of ships, damages through collision or foundering, and salvage. It is now set out in the Admiralty Act 1973. The Magistrates' Courts have jurisdiction in claims in personam up to $3,000.

(g) *Administrative law* This is particularly concerned with the executive and judicial powers conferred by Parliament on the administration, and with the effect of the exercise of those powers on the individual.

Apart from ordinary remedies in tort, other remedies available are habeas corpus, mandamus, certiorari, injunction, prohibition, declaratory judgments, and applications for review.

(h) *Industrial law* Industrial law is contained in a number of Acts of Parliament, the chief of which is the Industrial Relations Act 1973. The Industrial Relations Amendment Act 1977 changed the Industrial Court into the Arbitration Court and abolished the Industrial Commission. Disputes arising in this field are now determined by the Arbitration Court. This branch of the law is concerned with conditions of employment, relations between employer and employee, and the legal position of trade unions and employers' unions.

(i) *Military law* This governs the conduct of members of the armed forces and is administered within those forces. The ultimate appeal authority is the Courts Martial Appeal Court which consists of, inter alia, the judges of the Supreme Court. The registrar of the court is the registrar of the Court of Appeal.

(k) *Maori land* The Maori Land Court, constituted under the Maori Affairs Act 1953, has jurisdiction to determine claims between the Maori people as to ownership, or possession, or other interest in Maori freehold land, or to determine the proceeds of alienation of the land.

(l) *Miscellaneous jurisdiction* A number of Acts provide for a variety of applications to be made to the Supreme Court; the Magistrates' Courts are vested with ancillary jurisdiction under the Magistrates' Courts Act and other statutes.

(m) *Criminal law* Although there is no specific classification by statute, we consider that a convenient grouping of criminal offences is as follows:

(i) *Indictable or Class One offences* These may be heard only in the Supreme Court before a judge and jury, and include such offences as treason, perjury, rape, murder, manslaughter, aggravated robbery, and kidnapping.

(ii) *Electable or Class Two offences* These may be heard either in the Supreme Court before a judge and jury or in a Magistrate's Court before a magistrate. Anyone charged with an offence carrying a maximum penalty greater than 3 months' imprisonment (not being an Indictable or Class One offence) may elect to be tried before a judge and jury or before a magistrate. This category of offence includes arson, drug offences, burglary, theft, riot, aggravated assault, and unlawful assembly. Also included in Class Two are offences under the Accident Compensation Act 1972 (s.180(1)); and the Shipping and Seaman Act 1952, where the maximum penalty is a fine only; and offences under the Crimes Act 1961 where the maximum penalty does not exceed three months' imprisonment, namely, theft, obtaining by false pretence a thing capable of being stolen, receiving where the value of the goods does not exceed $10, and contempt.

(iii) *Summary or Class Three offences* For the purposes of classification according to forum, summary offences are all those offences where the maximum penalty does not exceed 3 months' imprisonment (except those that fall into Class Two, above); also common assault, and assault on a police, prison, or traffic

officer which carry a maximum penalty of 6 months' imprisonment or a fine not exceeding $400.

There are a small number of offences which may fall into the Class One (Indictable) or Class Two (Electable) category. Which category these fit depends on the prosecution who may decide to proceed indictably, that is, before a judge and jury or summarily, so that the offence takes on the characteristics of a Class Two offence and the accused may elect trial before a magistrate or before a judge and jury. We may conveniently term these offences "hybrid offences". These categories may be simplified in diagrammatic form (see Figure 1).

A defendant convicted in the Magistrates' Court may be sentenced to not more than 3 years' imprisonment on any one charge, or fined no more than $1,000 (although this figure is increased for some offences). Often a defendant may be tried for an electable offence where the maximum penalty prescribed by statute exceeds 3 years (for instance, the maximum penalty for arson of 14 years). If in such a case the magistrate, having found the defendant guilty, considers a penalty in excess of three years is necessary, the defendant is committed to the Supreme Court to be sentenced by a Supreme Court judge.

(n) *Appellate jurisdiction* The major aspect of the Supreme Court's appellate jurisdiction is to hear and determine criminal, civil, and domestic appeals from the Magistrates' Courts. In addition there are miscellaneous appeals under a number of statutes. Magistrates' Courts, or a magistrate, are also appellate bodies under a variety of statutes.

THE PRESENT COURT STRUCTURE

The Privy Council

79. In this country appeals to the Judicial Committee of the Privy Council are governed by Orders in Council, made in the United Kingdom in 1910 and 1957. Appeal may lie by leave of the court appealed from, or by special leave of the Privy Council itself. Leave is granted as of right from any final judgment of the Court of Appeal where the matter in dispute amounts to the value of $5,000 or more or involves directly or indirectly some claim to, or question respecting, property or some civil right of, or exceeding, that value. Leave may be granted at the discretion of the Court of Appeal from any judgment, whether final or interlocutory, if the court considers it proper to do so because of the great general or public importance of the appeal, or otherwise. If the Supreme Court decides its final judgment should be considered by the Privy Council because of great general or public importance, or because of the magnitude of the interests affected, or for any other reason, then leave may also be given to appeal direct to the Privy Council. There are few reported cases of such leave having been given. A former Supreme Court judge has stated:

> It is surprising to read that in the 1870s the Court of Appeal in New Zealand of those years was criticised by our public for the delays and expense entailed in its hearings, and on occasion, despite the greater distance and the problems of overseas transport, it was reputed to be less costly for appellants to proceed by leave from the Supreme Court

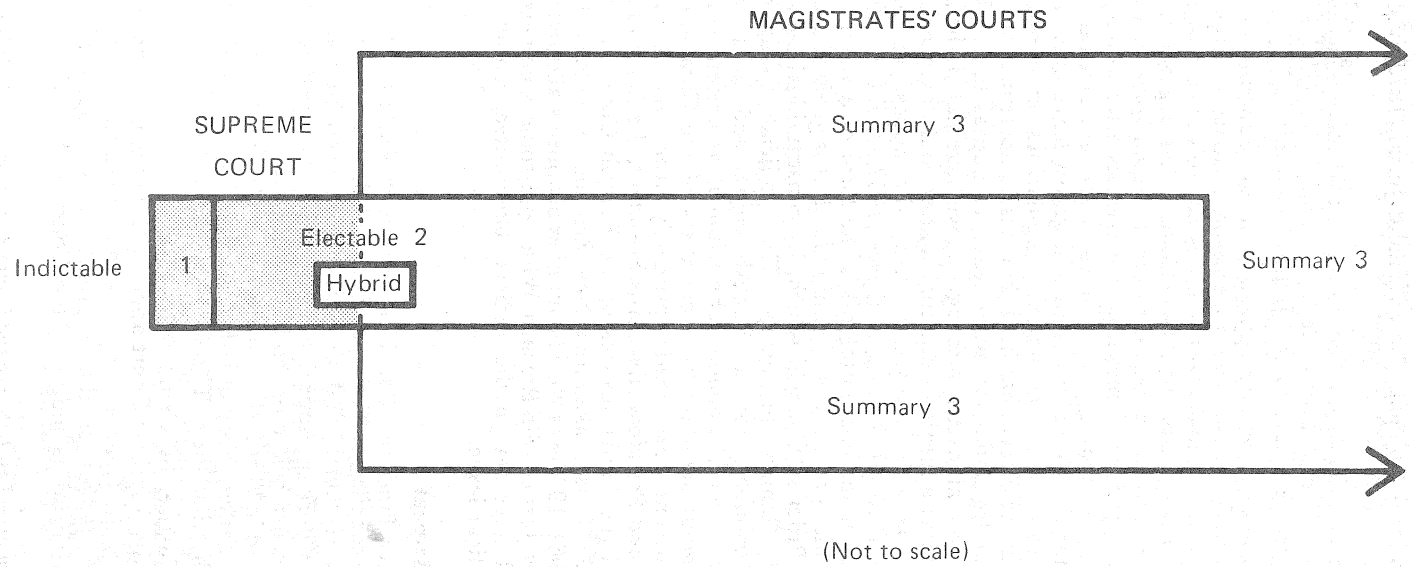

MAGISTRATES' COURTS
SUPREME COURT
Summary 3
Indictable
1
Electable 2
Hybrid
Summary 3
Summary 3
(Not to scale)

Figure 1

direct to the Privy Council. (New Zealand Jurist (1876) Vol. II Pt. III p. 44, Vol. I Pt. IV p. 30.)

This curious situation is unlikely to recur, and there is no available evidence of an attempt during the last 50 years to leap-frog an appeal from the Supreme Court to the Judicial Committee.*

We note that the rule governing appeals from the Supreme Court was formulated in 1910. We now have a permanent Court of Appeal.

80. With regard to criminal cases, there is no legislative provision for appeals, but for many years the Privy Council has regarded itself as entitled under the prerogative power to grant special leave to appeal in criminal cases. The Judicial Committee exercises its discretionary power to grant special leave sparingly; it declines to act as a general court of criminal appeal for the Commonwealth and grants leave only where to refuse would be to countenance serious irregularities or injustice. The New Zealand Court of Appeal has held that it is competent under powers conferred by local legislation to grant leave to appeal to the Judicial Committee in a criminal matter, although, as we have stated, the Judicial Committee entertains appeals in criminal matters only by special leave and could not legally be obliged to hear the appeal in question. (*Woolworths (New Zealand), Limited v. Wynne* [1952] N.Z.L.R. 496.)

81. A judgment of the committee takes the form of a report to Her Majesty of its opinions on the case submitted; effect is given to the report by means of an Order in Council, which, by constitutional convention, Her Majesty is bound to make. The Judicial Committee is Commonwealth tribunal, not an English court, and it is only for convenience that it sits in London. The tribunal at present comprises jurists of the highest standing from countries of the Commonwealth, although appointments are made primarily from the Lord High Chancellor, the Lord President, Ex-Lords President, the Lords of Appeal in Ordinary, and the Lords Justices of the English Court of Appeal.

82. The number of cases taken from New Zealand to the Privy Council over the period 1961–1976 was 28. The number of appeals allowed was 12. The former Chief Justice, Sir Richard Wild, and some members of the Court of Appeal have sat on the Judicial Committee, mainly during periods of sabbatical leave.

The Court of Appeal

83. The primary function of such a court is to settle the law of the country and to reconcile conflicting decisions of the lower courts. With a three-tier system of courts, and the middle tier exercising an original jurisdiction, the Court of Appeal must also be an appellate court for decisions of the court below on both fact and law.

84. As mentioned in Part I, the constitution of this court was changed in 1957 when a permanent body of judges specialising in appeal work was established for the first time. The Court of Appeal now consists of:

(a) the Chief Justice, by virtue of his office;
(b) a judge of the Supreme Court appointed by the Governor-General as a judge of the Court of Appeal and as President of that court;
(c) three other judges of the Supreme Court appointed by the Governor-General as judges of the Court of Appeal.

*"The Judicial Committee—Past Influence and Future Relationships" (1972) N.Z.L.J. 542, p. 544, the Hon. Sir Alec Haslam.

In fact, a judge of the Court of Appeal continues to be a judge of the Supreme Court and may sit in that court. The Judicature Amendment Act 1977 provides for the appointment of an additional judge or judges, in certain circumstances, but this provision is purely short term; we refer to the desirability of making it permanent in Part III of this report. The same Act permits the court to sit in divisions. At least one judge in each division must be a permanent member of the Court of Appeal.

85. ***Jurisdiction—civil*** While this court's jurisdiction is almost wholly appellate, the Supreme Court may remove some aspects of certain civil proceedings into the Court of Appeal, which may then exercise original jurisdiction. The court has power to hear and determine appeals from any judgments, decrees, or orders of the Supreme Court, subject to the rules governing the terms and conditions on which appeals may be made. Determination of the Supreme Court on appeals from lower courts is final unless leave to appeal to the Court of Appeal is given, although when a most difficult or important question of law is involved, appeals may be made directly from a lower court to the Court of Appeal. The decision of the Court of Appeal is final in respect of the tribunals of New Zealand, except that in some cases leave may be given to appeal to the Judicial Committee of the Privy Council.

86. ***Jurisdiction—criminal*** Although the Judicature Act 1908 allows the Court of Appeal to conduct a "trial at bar" if the case is one "of extraordinary importance or difficulty", the provision has never been invoked. The court has appellate jurisdiction over judgments of the Supreme Court relating to any conviction or order removed into that court, or taken there on appeal from an inferior court. The Crimes Act 1961 (re-enacting the Criminal Appeal Act 1945) provides that any person convicted on indictment, or sentenced on committal to the Supreme Court for sentence, may appeal to the Court of Appeal:

(a) against his conviction on any ground of appeal which involves a question of law alone; or

(b) with the leave of the Court of Appeal, or upon the certificate of the judge who tried him that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; or

(c) with the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law.

An appeal against conviction may be allowed on the grounds that the verdict was unreasonable, that there was an error of law, or that there was a miscarriage of justice. The court, on allowing an appeal, may either direct a new trial or enter a judgment and verdict of acquittal. A majority of successful appeals result in a new trial being ordered. On an appeal against sentence, the Court of Appeal may either dismiss the appeal or quash the sentence and pass another sentence warranted by law, whether more or less severe. Pursuant to s. 383 (2) of the Crimes Act 1961, the Crown may seek leave to appeal to the Court of Appeal against a sentence passed on the conviction of any person on indictment. The court has stated that it will not consider increasing a sentence unless on a review of the facts and circumstances it is clearly of opinion that the sentence imposed was manifestly inadequate, or the Crown is able to point to some error of principle into which the sentencing judge has fallen. (*R. v. Pue and Another* [1974] 2 N.Z.L.R. 392.)

87. ***The prerogative of mercy*** The Governor-General may seek assistance of the court in his exercise of the prerogative of mercy. If the application relates to conviction on indictment, or to sentence passed on a person so convicted, the Governor-General in Council may either refer the question to the Court of Appeal to be heard or determined by the court, as in the case of an appeal against conviction, or merely ask the Court of Appeal for its opinion on a point arising in the case.

The Supreme Court

88. Section 3 of the Judicature Act 1908 provides that "There shall continue to be in and for New Zealand a High Court of Justice, called as heretofore the Supreme Court, which shall be a Court of record, for the administration of justice throughout New Zealand". The Governor-General in Council appoints Supreme Court judges from the Bar. Their number is at present limited by statute to 22. There is also provision for appointment of temporary judges.

89. ***Jurisdiction—civil*** The court's jurisdiction includes:

(a) actions in contract and tort
(b) equity
(c) supervisory powers over inferior courts and tribunals
(d) wills and administration of the estates of deceased persons
(e) dissolution of partnerships and the taking of partnership accounts
(f) the sale and distribution of the proceeds of any property subject to a lien or charge
(g) proceedings relating to mortgages, leases, sale or partition of land, including specific performance of contract
(h) execution of trusts, charitable or private
(i) rectification, or setting aside, or cancellation of deeds or contracts
(j) proceedings relating to the insolvency of persons and companies
(k) family law: divorce, separation, guardianship of infants, matrimonial property, and proceedings under the Family Protection Act and Age and Infirm Persons Protection Act
(l) electoral petitions
(m) Admiralty
(n) absconding debtors.

The court was given power to issue declaratory judgments by the Declaratory Judgments Act 1908.

90. In addition, the Supreme Court has jurisdiction to hear appeals from Magistrates' Courts and from a number of administrative tribunals. The latter appeals are usually heard by the Administrative Division of the court.

91. Most civil proceedings are heard before a judge alone; though in actions in debt, or for damages, or for the recovery of chattels where the amount claimed or the value of the chattels exceeds $1,000, the action may be tried before a judge and a special or common jury of 12. The advent in 1972 of the accident compensation scheme, which has had the effect of removing personal injury cases from the cognisance of the court, greatly reduced the number of civil jury trials. The Judicature Amendment Act 1977 provided for abolition of the jury of four and raised the threshold figure for jury trials from $100 to $1,000.

92. ***The Administrative Division*** For the history of this division we draw from notes for a lecture given by Sir Richard Wild at the Faculty of Law, University of Toronto, March 1973.

93. In 1965 there were at least 60 administrative tribunals in this country. That number excluded tribunals which regulated professions or other occupations. The number continued to grow. There was a bewildering variety of appeal rights, procedures, and jurisdictions. Anomalies abounded as to where the appeals lay and the parties sometimes considered they were receiving second-rate justice.

94. Mr G. S. Orr, then a Crown counsel, researched administrative justice at Harvard University. He proposed an Administrative Court, based on the French system, with the judges of the court dealing solely with administrative matters and thus gaining as specialised a knowledge as the tribunals themselves. The court would adopt a more flexible and informal procedure than the ordinary courts. There were a number of objections to the establishment of a separate Administrative Court from Sir Richard Wild and the New Zealand section of the International Commission of Jurists. The latter, together with the New Zealand Law Society, favoured appeals to the Supreme Court rather than to any other body.

95. A report on the subject was made by the Public and Administrative Law Reform Committee which was established in 1966. The members of the committee (Mr Orr dissenting) rejected the concept of a separate Administrative Court. They saw its status coming to be regarded as inferior to the Supreme Court, and also the difficulty of having more than one high court in this country with the possibility of conflicting decisions between the two courts. They were not prepared to recommend that the prerogative writ jurisdiction be taken away from the Supreme Court and given to the Administrative Court. This finding assumes some importance when we deal with proposals for the future in Part III. The members of the committee did, however, consider that an Administrative Division of the Supreme Court was the logical and acceptable solution for New Zealand. They also set down a proposed structure.

96. In 1968 the Judicature Amendment Act was passed. It provides for the establishment of an Administrative Division in the Supreme Court, to consist of not more than four judges of the Supreme Court, being judges assigned to the division from time to time by the Chief Justice. They remain judges of the Supreme Court. Although the committee (and submissions made to us) recommended that the judges should be assigned by the Governor-General, the Act provides for assignment by the Chief Justice. Sir Richard Wild commented that such a provision is more in keeping with the long established tradition that the Judiciary should be independent from the Executive. The Act gives the division jurisdiction to hear only such prerogative writ applications as are referred to it by the Chief Justice. Power is also vested in the Chief Justice to direct, in certain circumstances, that an appeal which would otherwise lie to the Administrative Division be heard by a judge who is not a member of the division. Cases on circuit afford examples. This provision has also been criticised and we consider that criticism in Part III. Lay assessors may sit with the judges in certain classes of cases. In addition a new set of rules has been drawn up. These place the court in the same position as the original tribunal as far as the receipt and admissibility of evidence are concerned. Wide powers are given as to the manner in which proceedings of the division may be conducted.

97. There is no appeal on fact or law from the decisions of the Administrative Division unless the statute conferring the right to appeal itself so provides.

98. ***Jurisdiction—criminal*** As mentioned in Part I, in its criminal jurisdiction the Supreme Court tries all indictable offences and electable offences where the accused has elected trial by jury. Trials are before a judge and a common jury of 12 or, in special circumstances, before a special jury. A judge sitting alone hears and determines criminal appeals from the Magistrates' Courts.

99. ***Administration*** All the judges are stationed in Wellington, Auckland, or Christchurch. The Supreme Court travels on circuit to Whangarei, Hamilton, Rotorua, Gisborne, Napier, New Plymouth, Wanganui, Palmerston North, Blenheim, Nelson, Greymouth, Timaru, Dunedin, and Invercargill. There is a Supreme Court office at Masterton but the court does not sit there. The Chief Justice determines from time to time where judges will be stationed, who will preside at sittings in the various circuit towns, and, where more than one judge sits at any one place, the allocation of cases to the various judges.

The Magistrates' Courts

100. Unlike the Supreme Court, which is one court for New Zealand, Magistrates' Courts are established as separate entities in various localities. There are 88 such courts. The Governor-General appoints places in which courts may be held for the exercise of civil or criminal jurisdiction, or both. The Minister of Justice determines in what town a magistrate shall be stationed and in which courts he or she shall sit. The number of magistrates is limited to 65 (that figure having been increased from 60 by the Magistrates' Courts Amendment Act 1977) although of that number, five magistrates are presently engaged on other duties, namely, as chairman of the Licensing Control Commission, chairmen of the divisions of the Planning Tribunal, Director of the Security Intelligence Service, and chairman of the Taxation Appeal Authority. Furthermore, magistrates perform a large number of part-time duties such as chairmen of land valuation tribunals, licensing committees, and Borstal Parole Boards. The chairman of the Police Appeal Board is a magistrate, as is the chairman of the Abortion Supervisory Committee. Where two or more magistrates are stationed in the same town, the one who is senior by length of service is responsible for the administrative co-ordination and the allocation of work between the magistrates. There is no Chief Magistrate in New Zealand. The magistrates sit in 21 towns and travel on circuit to a further 70.

101. ***Jurisdiction—civil*** Within defined monetary limits, civil jurisdiction covers almost the whole field of civil law: contract, tort, recovery of possession of land, equity jurisdiction including proceedings for specific performance and rectification of contracts, and general ancillary jurisdiction and powers. However, a Magistrate's Court has no jurisdiction to determine the validity of any devise or bequest, or the limitations under any will or settlement. Likewise, under section 59 of the Magistrates' Courts Act 1947 a court may give judgment, according to equity and good conscience, where the amount involved is less than $200. Since 1971 the general level of the Magistrates' Courts' monetary jurisdiction has been $3,000 and, by consent, a court can hear cases beyond this amount. One of the features of the Act is the powers given to registrars. We deal with their jurisdiction under a separate heading (paragraph 134).

102. Provision exists for the removal of proceedings from, or to, the Supreme Court. There is a general appeal to the Supreme Court against

any nonsuit, or final determination, or direction; without leave, where the amount involved exceeds (now) $200, and with leave where the amount is less than that figure.

103. ***Jurisdiction—criminal*** The law relating to criminal proceedings of the Magistrates' Courts was consolidated in the Summary Proceedings Act 1957. The only remaining part of the Justices of the Peace Act 1927 (relating to appointments and removals) now appears in the Justices of the Peace Act 1957. The Summary Proceedings Act created a procedural code for exercising the criminal jurisdiction of the Magistrates' Courts. Under the Act a court has jurisdiction:

(a) to conduct the preliminary hearing of an indictable offence;
(b) to hear in a summary way the indictable offences set out in the First Schedule;
(c) in respect of every summary offence;
(d) in respect of fugitive offenders;
(e) to bind persons over to keep the peace.

A magistrate may exercise all the jurisdiction of the courts. Two justices may act under paragraph (a) and paragraph (c), where the statute creating the offence so provides, or where the offence is a traffic offence as defined. The provision in the Summary Jurisdiction Act 1952 giving justices jurisdiction in respect of certain indictable offences was not re-enacted. One justice may act only when specifically authorised.

104. Nothwithstanding the wide jurisdiction given to the courts, the rights of the accused are preserved by section 66 of the Summary Proceedings Act 1952 under which any person who is charged with an offence punishable by imprisonment of over three months may elect to be tried by a jury.

105. As stated in Part I, a "minor offences" procedure was introduced by the Summary Proceedings Amendment Act 1973. Essentially, where a person is charged with an offence with a maximum penalty of a fine not exceeding $500, the prosecutor, instead of filing an information, proceeds on the basis of a notice in which the offence and the relevant circumstances are set out, together with a full statement of the accused's rights. If the person charged pleads not guilty, the matter is tried in the ordinary way. If he pleads guilty he may make any representations he wishes, either orally in open court, or in writing; and the matter will be disposed of by the imposition of a fine or such order as may be appropriate in the circumstances (including disqualification from driving for some motoring offences), or he may be discharged without conviction. If he enters no plea or takes no steps in the matter, the court may deal with it in any appropriate manner, as if he had pleaded guilty. Under this procedure applications for rehearing are readily granted. There is also power to state a case for the opinion of the Supreme Court on a question of law arising in the proceedings. Such questions may be removed into the Court of Appeal. Appeals lie to the Supreme Court on points of law decided by the court or on a general appeal against conviction or sentence, or both. All general appeals are by the way of rehearing. All appeals to the Court of Appeal require the leave of the Supreme Court or the Court of Appeal.

106. Procedure for preliminary hearing of indictable offences remained substantially unchanged over the years until the Summary Proceedings Amendment Act 1976 prescribed that written statements may be accepted instead of the usual oral evidence on oath, and that the defendant may be

committed for trial by consent provided he is represented by a lawyer. The written statements must conform to safeguards set out in the Act and may also be introduced by consent in any preliminary hearing in which evidence is given orally.

107. The procedure for enforcement of penalties was much amended in 1973. The amendment made provision for a person defaulting in payment of a fine to be examined as to his means in a hearing before a registrar. Where such a hearing has been held, the registrar may report to a magistrate that the defendant has no present means to pay the fine, or he may allow further time to pay, or issue a warrant of distress, or make an order attaching wages. Where a report is made, a magistrate may among other things, remit the fine or a part of it, or sentence the defendant to detention centre or periodic detention, or release him on probation. By more recent legislation, detention centres will be abolished and provision made for sentences of corrective training. The registrar is given power to issue a warrant to seize and detain a motor vehicle if the fine remaining unpaid was incurred in respect of an offence wholly or partly relating to use of a motor vehicle. In essence a magistrate and a registrar have the fullest powers to ensure that every appropriate avenue is explored to enforce payment of a fine, with imprisonment as the ultimate sanction.

108. ***Domestic proceedings*** When the Domestic Proceedings Act 1968 replaced the Destitute Persons Act 1910 with a new code governing domestic proceedings in the Magistrates' Courts, the classes of relatives entitled to claim for maintenance were re-defined. Special magistrates were to be appointed to exercise the domestic jurisdiction of the court, though this aim has not been achieved in practice. The Act placed greater emphasis on conciliation procedures, with the aim of endeavouring to effect a reconciliation between the parties. The grounds for a separation order were widened and a non-molestation order was introduced, its aim being to prevent or dissuade a husband from molesting or harrassing his separated wife. The old affiliation order became a paternity order, and the obligations of a father to maintain a child born out of wedlock were strengthened. Under both the Guardianship Act 1968 and the Matrimonial Property Act 1976 the Magistrates' Courts have a jurisdiction broadly concurrent with that of the Supreme Court. They have exclusive jurisdiction in adoption proceedings; indeed, the only important jurisdiction which they lack in the field of family law is power to grant divorces.

109. ***Other jurisdiction*** The court or a magistrate has power to determine proceedings brought under a number of Acts. In some cases a concurrent jurisdiction is exercised with the Supreme Court. The following list shows some of the more important Acts:

Admiralty Act 1973
Adoption Act 1955 (including, since 1962, Maori adoptions)
Aged and Infirm Persons Protection Act 1912
Alcoholism and Drug Addiction Act 1966
Electoral Act 1956
Fencing Act 1908
Guardianship Act 1968
Hire Purchase Act 1971
Illegal Contracts Act 1970
Insolvency Act 1967
Mental Health Act 1969
Minors Contracts Act 1969
Penal Institutions Act 1954.

Magistrates also have licensing powers in respect of motor vehicle dealers, real estate agents (although this is soon to pass to a board), secondhand dealers, sharebrokers, pawnbrokers, moneylenders, and auctioneers. As already mentioned, they are chairmen of Licensing Committees and Land Valuation Committees. They also exercise the jurisdiction of the Children and Young Persons Courts.

110. ***Small Claims Tribunals*** As mentioned, the Small Claims Tribunals Act 1976 empowered the Minister of Justice to establish, as divisions of the Magistrates' Courts, small claims tribunals. The jurisdiction of the tribunals can be exercised by a referee or by a magistrate so the new Act brings back the lay magistrate in civil proceedings. A referee, appointed by the Governor-General's warrant, must be a barrister or solicitor of not less than 3 years' practice, or a person who by reason of his special knowledge or experience is capable of performing the functions of a referee. A referee holds office for a term of 3 years. At present, one referee is a practising barrister and solicitor; one is a former court registrar who is also a justice of the peace; and two are justices of the peace. Three tribunals have been set up on a pilot basis at Rotorua, New Plymouth, and Christchurch. Tribunals have jurisdiction:

(a) in respect of a claim founded on contract or quasi-contract;
(b) to declare that a person is not liable on an alleged claim in contract or quasi-contract;
(c) in respect of a claim in tort for damage to property resulting from negligent use of a motor vehicle.

The monetary limit to the tribunal's jurisdiction is $500, and undisputed claims in debt are excluded. The primary function of a referee is to attempt to bring the parties in a dispute to an agreed settlement. If this is not possible the tribunal has power to determine the dispute according to the substantial merits and justice of the case. In doing so, the referee shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations, or to legal forms or technicalities. There is a wide range of orders which a tribunal may make and such orders may be enforced through the Magistrates' Courts. The procedure is much simplified. There are no general appeal rights, and legal representation is not allowed.

111. ***Children and Young Persons*** The Children and Young Persons Act 1974 introduced a number of distinctions between a child (under the age of 14) and a young person (between 14 and 17 years). The most important change brought about by the Act was the constitution of Children's Boards. A police officer or social worker is obliged to report details of every offence alleged to have been committed by a child to the appropriate Children's Board, if he considers proceedings should be taken under the Act in respect of the child. Such a person may report to the board on any other matter in which a child has been involved and which he considers should be dealt with by the board. Boards are established by the Minister of Social Welfare and consist of:

(a) a police officer appointed by the Commissioner of Police;
(b) an officer of the Department of Social Welfare appointed by the Director-General;
(c) an officer of the State Services appointed by the Secretary for Maori Affairs;
(d) a local resident.

The Minister appoints a panel of up to six residents for each board and one of the panel attends each meeting. If, in any case reported to the board, the child, or either of his parents or his guardian, does not admit the alleged offence or disputes any fact that is material to the substance of the report, then the board is precluded from acting. This is also the situation if any question of compensation or restitution is unresolved. The police officer or social worker who initially reported may then make a complaint to the Children and Young Persons Court. Meetings of a board are to be conducted as informally as possible and a child will be accompanied by his or her parent(s) or guardian.

112. In determining its course of action, the board must bear in mind the needs and rights of the child, his parents or guardians, and of the community; also the degree of co-operation offered by the child and his parents or guardians to prevent the child from committing offences in the future. The board may make such preliminary inquiries into each case as it thinks fit. It may seek reports from the police, social workers, Maori welfare officers, school teachers, medical practitioners, and other persons. In any case where the board determines to take action it may warn, or counsel, or arrange for a person to counsel the child or its parents or guardians. Medical, psychological, or psychiatric assistance may be arranged. The board may also recommend that the matter proceed to the Children and Young Persons Court.

113. The Children's Courts were replaced by Children and Young Persons Courts. The Governor-General may establish as many of these courts as he deems necessary and appoint magistrates to them. The Act provides that a magistrate "with special interest, experience or qualifications" may be appointed to exercise jurisdiction primarily in those courts. No such appointment has yet been made and all magistrates at present holding office have power to exercise the jurisdiction of Children and Young Persons Courts. Thus the goal of specialised judges for these matters has, as in the case of the domestic jurisdiction, proved illusory. The former provisions covering segregation of Children's Courts from Magistrates' Courts have been tightened. As far as practicable, persons attending a Children and Young Persons Court are not to be brought into contact with persons attending any other court; with the same proviso sittings must be arranged to ensure that the association of children and young persons awaiting hearing, and the extent to which parents are required to congregate, are both reduced to a minimum. The public are not entitled to be present at hearings of this court. Reporters may attend hearings but they are restricted in what they may publish. Reports of criminal proceedings may be published but particulars of the person involved or of his school may not be.

114. Every complaint under the Act relating to the care, protection, or control of a child or young person must be heard by the court. Where a child of, or over, the age of 10 years is alleged to have committed an offence other than murder or manslaughter, proceedings may not be commenced against him under the Summary Proceedings Act 1957. Every young person (that is, a person between 14 and 17 years of age) charged with an offence other than murder, or manslaughter, or (at the other extreme) a traffic offence not punishable by imprisonment, must be dealt with by a Children and Young Persons Court irrespective of whether the offence is punishable on summary conviction or on indictment. The preliminary hearing of a murder or manslaughter charge against a child takes place before a Children and Young Persons Court. If the court finds

that a child or young person is in need of care, protection, or control, it can do one or more of a number of things. These include placing the person under the guardianship of the Director-General of Social Welfare or under the supervision of a social worker. The Act also empowers the court to appoint a barrister or solicitor of the Supreme Court to assist its deliberations or to represent the child or young person in proceedings involving a complaint that a child or young person is in need of care, protection, or control.

115. ***Justices of the Peace*** A single justice may perform a variety of functions, particularly the taking of declarations, swearing of affidavits, and the issuing of summonses, warrants, and search warrants. A justice also possesses a large number of miscellaneous powers and functions under various statutes, and may preside over a court where the enactment creating the offence expressly so provides or where, by any other enactment, jurisdiction is expressly given to one justice; but in no other case.

116. Two justices may exercise a large number of miscellaneous powers and functions. They may preside at the preliminary hearing of an indictable offence. They may also preside over a court exercising summary jurisdiction, where the enactment creating the offence expressly provides that jurisdiction may be exercised by justices, or where, by any enactment, jurisdiction is expressly given to justices. Justices may also deal with children and young persons for the purpose of adjourning cases and remanding the child or young person. With the introduction of the Summary Proceedings Amendment Act 1973 and the creation of the "minor offence", the part played by justices in the courts has markedly increased and the work of the magistrates had been correspondingly relieved.

JUDICIAL APPOINTMENTS

Judges

117. By provision of the Judicature Act 1908 the Supreme Court consists of one judge as the Chief Justice and 22 other judges appointed by the Governor-General, in the name of, and on behalf of, Her Majesty. Their commissions continue during good behaviour though they must retire from office on attaining the age of 72 years. Temporary judges may be appointed by the Governor-General on a certificate given by the Chief Justice; also when no fewer than three other permanent judges certify it is necessary for due conduct of the court's business that one or more additional judges should be temporarily appointed.

118. In practice, the appointment of Chief Justice is made on the recommendation of the Prime Minister to the Governor-General, and the appointment of all other judges of the Supreme Court and the Court of Appeal, including the President, upon recommendation of the Attorney-General. There is no prescribed process of consultation on such appointments: for some time it has been customary for the appointment of both judges and magistrates to be mentioned in the Cabinet by the Minister concerned, before formal advice is tendered to the Governor-General. The appointments are therefore open to Cabinet discussion and there is a nice distinction between opportunity for Cabinet discussion and necessity for Cabinet approval. It can safely be assumed that if any section of the Cabinet strongly opposes appointment of any judical officer, that appointment would not be made. No outside consultations are made as of

right: the Minister responsible for the recommendation is free to seek the opinion of any person he wishes, or to decline to consult anyone at all; there are no set rules. As a matter of common sense, the views of certain persons are invariably obtained. Suggestions for the appointment of a particular legal practitioner as a judge may come from any of several quarters and the views of the Chief Justice and the legal profession would be sought, if not already known. The precise ambit of consultation doubtless varies from one Minister to another. The Solicitor-General, as the Crown's principal non-political legal adviser, is generally consulted on suitable practitioners for appointment to the Supreme Court Bench, as is, on occasions, the Secretary for Justice. Most Ministers observe the practice of consulting the president of the New Zealand Law Society. The only statutory requirement for qualification as a judge of the Supreme Court is that such a person shall have been a barrister or solicitor of not less than 7 years' practice in the Supreme Court, or a barrister or advocate of not less that 7 years' practice in the United Kingdom.

119. In making a new appointment the Government obviously looks further than the mere fact of a prospective appointee's years of practice as a barrister or solicitor. Personal character is of the first importance since the standing and independence of the judiciary derives its strongest safeguard from the personal integrity of those who hold office. Reputation as a lawyer, which may or may not be reflected in the holding of offices in a District Law Society or the New Zealand Law Society, is likewise an important consideration. In modern times, a Minister would regard high standing in the legal profession as essential for appointment to the Supreme Court or the Court of Appeal. However, it cannot be said that legal eminence alone is the test; the personal qualities of an appointee, and the respect in which he or she is held, are clearly important factors. Little emphasis falls on political affiliations or activities of a prospective judge or magistrate. The only important consideration is suitability for the Bench.

120. Under the Judicature Act, judges of the Supreme Court hold office during good behaviour and may only be removed or suspended on an address of the House of Representatives. If Parliament is not sitting, the Governor-General in Council may suspend a judge until the end of the next ensuing session. The salaries of judges may not be diminished during continuance of their office. Under the Judicature Amendment Act 1970 salaries paid to judges of the Court of Appeal and the Supreme Court were fixed at such rates as the Governor-General determined from time to time by Order in Council, following a recommendation by the Minister of Justice after consulation with the Chief Justice. Today the salaries of judges and magistrates are considered by the Higher Salaries Commission; this three-man body, constituted under the Act of the same name in 1977, fixes the salaries of members of Parliament, the highest paid executive officers of statutory corporations and other public bodies, and academics. The commission, under section 12, is required to "consider and make recommendations to . . . The Minister of Justice with respect to the salaries and allowances (and superannuation) of Judges of the Court of Appeal, Judges of the Supreme Court, and Magistrates".

121. Until recently in New Zealand, convention held that appointment to the Supreme Court Bench offered no hope of advancement to any higher office, hence no temptation to seek patronage or favour. Since 1957 it has been the practice for judges of the Court of Appeal to be appointed from the Supreme Court but judges of the Court of Appeal, other than the President, receive the same salary as those of the Supreme Court and they are all still judges of that court.

122. Judges who are Privy Councillors rank ahead of all other judges of the Supreme Court except the Chief Justice or the acting Chief Justice. Otherwise seniority is determined by date of appointment. Court of Appeal judges remain judges of that court as long as they are judges of the Supreme Court, although they may, with the Governor-General's consent, resign the former office while retaining the latter. Should any vacancy exist in the office of Chief Justice, or during the absence of the Chief Justice from New Zealand, the senior judge, not being a judge of the Court of Appeal, is deemed to be the principal judicial officer of New Zealand and has all the powers and duties of that office. No magistrate has been appointed a judge of the Supreme Court although some have recently been appointed temporary Supreme Court judges. The Chief Justice has almost invariably been appointed from the Bar, and not from the Bench.

123. At common law, judges are exempt from all civil liability for acts done by them in the exercise of their judicial functions even if they have acted corruptly, maliciously, oppressively, or without jurisdiction. (*Thomas v. Richardson* [1925] N.Z.L.R. 749; *Nakhla v. McCarthy* [1978] 1 N.Z.L.R. 291.)

124. Under the Government Superannuation Fund Act 1956, as amended in 1964, judges are required to make a contribution for the purposes of their own superannuation. A judge is entitled to 12 months' sabbatical after each 10 years of service, and by administrative arrangement, 6 months' leave may be taken after each 5 years of service.

Masters

125. We do not have, in our system, persons styled "Masters". Their duties in the United Kingdom and Australia comprise judicial work in chambers and issuing directions on practice and procedure. The line between a judge's function and that of the master can be kept intentionally vague so they may work as a team without technical barriers. The Commission members who travelled overseas made a close examination of the role of these judicial officers and we deal with the proposal concerning masters for New Zealand in Part III of this report.

Magistrates

126. Appointment of magistrates is upon the recommendation of the Minister of Justice. As with judges, suggestions for appointment of a particular legal practitioner as magistrate may come from any of several quarters; the views of the legal profession would be sought, also those of the senior magistrate in the district where a prospective appointee practices. Persons appointed to the magistracy must have been barristers or solicitors of the Supreme Court of not less than seven years' standing. If employees of the Justice Department for at least 10 years, they must also have been employed for not less than 7 years as the clerk or registrar of a Magistrate's Court, and have qualified for admission as barristers or solicitors or have been admitted as such for not less than 7 years. Names of legal practitioners who might be suitable for appointment are either drawn to the attention of the Secretary for Justice, or he initiates inquiries of his own volition. Some lawyers let it be known, directly or indirectly, that they are interested in being considered for appointment. The Secretary for Justice consults as he thinks appropriate and, if there is general support for the appointment, he will recommend to the Minister

of Justice that the person under consideration should be appointed. Occasionally the Minister may discuss suitability of the proposed appointee with people other than those consulted by the Secretary for Justice. The appointment itself is made by the Governor-General on the recommendation of the Minister of Justice. Magistrates, unlike judges, can be removed by the Governor-General for inability or misbehaviour. The distinction in procedure affecting judges and magistrates appears to be an historical one; it follows the English provisions which distinguish between judges of the High Court and County Court judges. In theory at least, magistrates do not have the same security of tenure as judges, but in practice it would be most unlikely for a government to advise removal of a magistrate in circumstances which would be insufficient to justify a resolution of Parliament.

127. The extent to which magistrates are protected by the common law is not clear (*Sirros v. Moore and Others* [1975] 1 Q.B. 118) although the position has been dealt with by statute. Under ss. 193-197 of the Summary Proceedings Act 1957, no action can be brought against any magistrate for any act done by him in the exercise of his criminal jurisdiction, unless he has exceeded his jurisdiction or acted without jurisdiction. The onus is on the plaintiff to prove the excess or want of jurisdiction and he may also be required to give security for costs. If the magistrate can satisfy a judge of the Supreme Court that he acted in good faith under the belief that he had jurisdiction and that in all the circumstances he ought fairly to be excused, the Crown is bound to indemnify the magistrate for the amount of any judgment or settlement. Under the Magistrates' Courts Act 1947 the foregoing provisions are made applicable to magistrates acting in their civil jurisdiction.

128. The salaries paid to magistrates are now the subject of recommendation by the Higher Salaries Commission (paragraph 120). Magistrates have seniority amongst themselves according to the date of their appointment. Retirement age is 68 years. Under the Government Superannuation Fund Act 1956, as amended in 1964, magistrates are required to make a contribution for the purposes of their own superannuation. The contribution is 1% higher than that of a judge. Magistrates are entitled to 6 months' furlough on completion of each 10 years of service and by administrative arrangement, 3 months of this leave may be taken after each 5 years.

Justices' Clerks

129. This office, which is an integral part of the judicial system in England and Wales, has no counterpart in New Zealand. The Commission will later examine proposals for creating career opportunities for clerks of court qualified in law.

Justices of the Peace

130. Nominations for appointment are accepted from a member of Parliament only. The nominee must be resident in the electorate of that particular member. We were told by the Secretary for Justice that two matters are important in considering a person for appointment: first, the nominee's personal suitability for appointment; and secondly, the need for the services of additional justices in the nominee's residential district, or in the business area where he or she spends the working day. Persons nominated must have an adequate standard of education, a good standing

in the community, and a genuine desire to serve the public. Appointments are not considered where (other than in exceptional circumstances) the nominee is younger than 30 or older than 68 years of age. Notwithstanding a person's character and standing, appointments are made only where there are insufficient justices to meet the requirements of the public. The purpose of appointment is not to bestow an honour on a deserving citizen but to serve the community.

131. The Secretary for Justice informed us that the practice has been established of considering nominations at three-monthly intervals, at the end of February, May, August, and November. Reports are obtained from the local magistrate, who usually consults with the local branch of the Royal Federation of New Zealand Justices' Associations, and the Police Department. The Security Intelligence Service may also be consulted. If the reports show that the nominee is suitable and the appointment necessary, the appointment is recommended to the Governor-General. We were told that occasionally a person has been appointed as a justice who has been qualified in other respects but whose presence on the Bench might militate against justice being seen to be done. Two recent examples given us were the appointment of a newly retired traffic officer and a newly retired police officer. In such instances it is arranged that the justice concerned will not be called for court service. Similarly, the Justices of the Peace Act 1957 exempts from attendance at a Magistrate's Court justices who are over the age of 72 years, members of Parliament, practising barristers or solicitors, medical practitioners, and employees of the Crown.

132. There are long settled policies towards appointment of members of certain occupational groups as justices of the peace:

(a) *Members of Parliament* Since 1926 it has been agreed that members of Parliament should not be appointed justices of the peace. However, they were given direct authority to take statutory declarations and their power to do so is contained in section 9 of the Oaths and Declarations Act 1957.

(b) *Clergymen and persons in religious orders* The personal and confidential relationships that often exist between lay members of a church and their clergy could make it difficult for clergymen to maintain the detachment necessary to perform some of the functions of a justice of the peace. Moreover, many people would regard it as inappropriate for a clergyman or person in religious orders to preside over court sittings to convict and to pass sentence on offenders. We were advised that for those reasons it has been the policy to decline nominations of clergymen.

(c) *Legal practitioners* It has been settled policy over a number of years not to appoint barristers or solicitors, while they are practising, as justices of the peace. Barristers and solicitors are officers of the court with a particular part to play in the administration of justice.

(d) *Medical practitioners* Practising medical practitioners are not, as a general rule, appointed. The reasons which led Parliament to exclude medical practitioners from liability for jury service are equally relevant in relation to their appointment as justices of the peace. It is apparent that a doctor's responsibilities in the community are so demanding and so important that additional obligations should not be imposed upon him.

(e) *State servants* We were informed the general practice is not to appoint State servants unless there are special circumstances; for example,

there is no-one else available or qualified who could meet the public need. The office of a justice is partly of a judicial nature; in order that justice be clearly independent of any bias in favour of the Crown it is best that the presiding justice is not an officer in the State employ. The Oaths and Declarations Act 1957 enables State servants to be given power to take statutory declarations where that would be a convenience to the public or to a Government department. A public servant so authorised is able to provide to the public the service most frequently sought from justices of the peace.

(f) *Officers of Local Authorities* The Oaths and Declarations Act makes provision for local body officers to take statutory declarations. An appointment under this Act is normally sufficient to meet the requirements of a district. Nomination of local body officers for appointment as justices of the peace are only made when there are special reasons for the appointment.

133. In their very comprehensive submissions, to which we later refer, the Royal Federation of New Zealand Justices' Associations (Inc.) suggested a new system of appointment of justices of the peace to be integrated with a new system of training (paragraph 447).

COURT ADMINISTRATION

Registrars

134. In December 1976 the administrative staffing of the Courts Division of the Department of Justice (including executive, clerical and typing staff, and bailiffs) was 924, servicing 61 full-time offices. In addition there were 16 courts where a police officer was the registrar or deputy registrar and received assistance from time to time from departmental civilian staff. The offices range in size from the Magistrates' Courts in Auckland, with a staff of 139 and a magisterial Bench of 12, to small Magistrates' Courts staffed only by a registrar who performs a wider range of functions, such as that of Registrar of Births, Deaths and Marriages. Some courts combine both Supreme and Magistrates' Courts and the registrars generally hold a number of other appointments. In Auckland, Wellington, and Christchurch there are Supreme Courts not combined with Magistrates' Courts. All courts are Courts of Record: the jurisdiction may vary but the maintenance and preservation of the actual records of the court is an important function vested in the registrar as the chief administrative officer.

135. ***Supreme Court registrars*** Section 27 of the Judicature Act 1908 provides that the Governor-General may from time to time appoint such registrars, deputy registrars, clerks, criers, and other officers as may be required for the conduct of the business of the court throughout New Zealand. By virtue of section 22 (3) of the State Services Act 1962 all such appointments are now made by the State Services Commission. There is no provision requiring any professional or other qualification as a pre-requisite to appointment although there have been a number of registrars who held legal or other professional qualifications. Under section 29 of the Judicature Act every registrar is also a sheriff.

136. The judicial powers of registrars are prescribed in the Code of Civil Procedure. Registrars in Auckland, Hamilton, Wellington, Christchurch, and Dunedin have, under certain legislative provisions, the jurisdiction and power of a judge sitting in chambers. The most important and significant of these powers is the jurisdiction to grant probate or letters of

administration. A registrar has various administrative responsibilities relating to the procedures of the court, ranging from validation and issue of documents such writs, subpoenas, and orders of the court, to the organisation and control of the lists of cases for hearing and trial, and the fixing of costs after a case has been heard. A registrar also exercises statutory reponsibilities under a wide range of legislative provisions such as those contained in the Property Law Act 1952 (mortgagee sales), the Rating Act 1967, the Law Practitioners Act 1955 (taxations), the Offenders Legal Aid Act 1954, and the Legal Aid Act 1969. We were informed that the latter is now an important and time-consuming function.

137. In his capacity as sheriff, the registrar has statutory functions under the Juries Act, in the execution of writs of sale, and in other processes which may be directed to him.

138. ***Magistrates' Courts registrars*** Sections 12 et seq. of the Magistrates' Courts Act 1947 provide for the appointment of registrars, deputy registrars, and bailiffs. Each appointee holds office under, and is subject to, the provisions of the State Services Act 1962. As in the Supreme Court, there is no requirement for any professional qualification as a prerequisite to appointment.

139. In some respects, registrars of the Magistrates' Courts have a broader jurisdiction than registrars of the Supreme Court. In the civil jurisdiction, the scope of registrars' work was considerably increased by the Magistrates' Courts Act 1947 and the rules under that Act. Registrars were given special powers to perform acts such as the entry of judgment in default actions and, by consent or default, in ordinary actions; the fixing of security for appeal; fixing of costs. In the absence of the magistrate a registrar may adjourn proceedings and suspend or stay judgment or execution. He also has power to deal with various interlocutory proceedings and may conduct the examination of witnesses out of court or at a distance. The magistrate may refer certain matters to the registrar for inquiry and report. Under Rule 333 of the Magistrates' Courts Rules 1948, the registrar shall, within the limits of his authority, and subject to any right of appeal or review by the magistrate, have all the powers of the magistrate: any order made by him shall have the same effect, and be enforceable in the same manner as if it were an order of the magistrate. He has authority under various enactments to consider applications for, or the renewal of, licences and permits. He may also be appointed a supervisor of a summary instalment order under the Insolvency Act 1967. In the criminal jurisdiction, he exercises judicial powers in such areas as the issue of summonses. He has many of the powers a magistrate possesses, including those of issuing search warrants and warrants to arrest in lieu of summons. A recent and significant addition to his function is contained in the 1973 Amendment to the Summary Proceedings Act 1957, relating to the collection and enforcement of fines. This provision allows for the registrar to give extended time to pay, to summons or arrest defaulters for examination, and to impose a comprehensive range of sanctions short of imprisonment.

140. ***General*** In addition, many registrars exercise a wide range of functions under other legislation, for example, the registration of births and deaths, the making of final adoption orders, acting as clerks to Licensing Committees, and granting second-hand dealers licences. Registrars at Whangarei, Gisborne, New Plymouth, Hawera, Wanganui, Palmerston North, Blenheim, Nelson, Greymouth, Timaru, and

Invercargill hold the appointment of official assignee and undertake the administration of bankrupt estates and the liquidation of companies.

141. As well as preparing for actual court sittings, a registrar has the responsibility of checking and signing most documents that issue from the court. Considerable administrative and procedural work is necessary to support judicial proceedings. This work forms an integral part of the due process of law. As controlling officers responsible for staff and accommodation, most registrars also have a substantial management responsibility. They also have a responsibility for the maintenance and security of their courts. When we come to deal with proposals for administration of the various courts it will be seen as vital to the success of the new structure that a high standard of staff training is provided.

Juries

142. The right to a judgment by one's peers, especially where liberty of the individual is at stake, is an important and central part of the administration of justice. If this right does not flow from the Magna Carta at least its existence supports and gives effect to the ideal contained in the charter. Accordingly, no discussion of the disposition of court business would be complete without considering the role of the jury in the administration of justice. The forerunner of the modern jury was the petty jury of Henry II, summonsed to settle disputes over land in the twelfth century. This was composed of men drawn from the neighbourhood who had knowledge of the facts and who were bound to answer upon their oath, and according to their knowledge, which of the two disputants was entitled to the land. When a party got 12 oaths in his favour, he won. Hence the notion that liability was to be determined by 12 of one's peers. The same idea could be seen in the Grand Jury which had 23 members, and where, to present an indictment, 12 or more had to agree.

143. The advantage of being tried by one's peers is usually said to be that 12 minds are more likely than one to arrive at the truth when the credibility or reliability of a witness is in issue. Precisely because they are untutored in the law, the jury may be better placed to see the situation with fresh eyes. The lay view can usefully ameliorate the precision of legal thought and judgment. It is also said that a cross-section of the community is able to express the values of that community and to keep the law in touch with the common facts of life—what Holdsworth called the "touchstone of contemporary common sense". A judge is more confined by the law. We also mention the additional role of the jury in criminal cases to stand between the Crown and the accused. As the Morris Committee on Jury Service (1965 Cmnd. 2627, para. 6) put it:

> There is we think a fundamental conviction in the minds of the public that a jury is in a real sense a safeguard of our liberties.

Lord Denning (*Ward v. James* [1966] 1 Q.B. 273) reiterated this view when he said, at p. 295:

> (The jury) has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal.

The disadvantages are said to lie in the cost and length of jury trials, the uncertainty of jury verdicts, the lack of reasons, and, possibly, the

difficulty a jury may have in reaching a sound conclusion in a case involving a mass of facts or complex legal issues.

144. Under s. 66 of the Summary Proceedings Act 1957, any person charged with an offence punishable by imprisonment for a term exceeding three months is entitled to be tried by a jury, with the exceptions mentioned in paragraph 78 (m). It has long been a fundamental principle of English law that a person should not be deprived of his liberty unless adjudged guilty "by the country" as represented by a jury. The three months rule probably arose from expediency. When the rule was introduced, delays in bringing prisoners to trial, even for quite minor offences, amounted to about three months: thus, whether guilty or not, some accused persons were being deprived of their liberty for that period. The argument was that no great harm would befall the guilty but for the innocent or less culpable offenders, substantial benefit would accrue if minor offences were dealt with summarily and the period of imprisonment limited to 3 months.

145. From time to time, concern has been voiced that the Supreme Court is too much engaged with what is described as minor crime. One suggested answer to this problem is to limit the right to jury trial. We agree with the Secretary for Justice that this simplistic solution should be strongly resisted. As he said, the right to jury trial is too important to be lightly set aside and there is, contrary to widely held opinions, little evidence that any substantial part of the judges' time is spent dealing with "minor " crime. Statistics produced to us show that less than 10% of all trials relate to offences where the maximum penalty is 1 year or less. We cannot describe offences carrying 12 months', or even 6 months', imprisonment as minor. Moreover, to give any significant relief to the Supreme Court, the right to jury trial would have to be limited to an offence punishable by at least 5 years' imprisonment or more, instead of the present 3 months. The Secretary for Justice believes this would be unacceptable to all except doctrinaire opponents of jury trial.

146. It is sometimes suggested that the right to trial by jury should be abridged because of a supposed greater acquittal rate by juries. We are satisfied, after allowing for the greater number of guilty pleas in the Magistrates' Courts, that there is not a great difference between the acquittal rates in the two courts. The statistics produced by the Department of Justice show that since 1975 the conviction rate has exceeded 70% in the Supreme Court. In the Magistrates' Courts (arrest cases) the conviction rate is nearer to 80% but this figure includes guilty pleas. We consider this ground does not support the argument for restricting trial by jury. The answer, in our opinion, lies not in limiting or restricting the right to jury trial but in matching judicial quality to the seriousness of the case. We discuss this important question in Part III of this report.

147. The right to jury trial in civil cases is governed by section 2 of the Judicature Amendment Act No. 2 1955. Where the only relief claimed is payment of a debt or pecuniary damages, or the value of chattels exceeds $1,000, any party may apply to have the action tried before a judge and jury of 12 persons. There are no jury trials in admiralty actions. In probate and divorce matters, contested issues of fact may be tried before a jury if the judge so orders. In 1960, 36% of all civil trials were heard before a jury but by 1975 this had fallen to 15%.

148. The reason why 12 persons constitute a jury (the jury of four for minor civil cases was abolished in 1977) is lost in history. Certainly it was,

and is, (the more so before decimalisation) a common unit of measurement in England and New Zealand. In 1970 the United States Supreme Court had occasion to study the supposed sanctity of the number 12, including Lord Coke's explanation that it is "much respected in Holy Writ as twelve apostles, twelve stones, twelve tribes, etc.". The court concluded that the reasons given in support of the number 12 rest on little more than mystical or superstitious insights. We hold the view that a verdict should be given by a number of citizens large enough to create a formidable body of opinion in favour of the side that wins. What that number should be is a matter of opinion. One of the most lucid affirmations of trial by jury was given by G. K. Chesterton in "Tremendous Trifles", and we record our gratitude to the Otago District Law Society for reminding us of it. It reads, in part, as follows:

> Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policeman and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a play hitherto unvisited.
>
> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, the by the Founder of Christianity.

The Commission is firmly of opinion that the right to elect trial by jury should remain.

149. In the important matter of incapacity or disability of a juror, we consider it necessary to cite the relevant sections of the Crimes Act 1961 in full. We will refer to section 374 (3), (4), and (5) in Part III, where an amendment is proposed. The provisions for criminal trials are as follows:

> (3) If, before the jury retire to consider their verdict, any juror becomes in the opinion of the Court incapable of continuing to perform his duty, or it becomes known to the Court that he is disqualified or that his wife or a member of his family is ill or has died, the Court may, in its discretion, discharge the jury and direct that a new jury be empanelled during the sitting of the Court, or

postpone the trial, or proceed with the remaining jurors and take their verdict:

Provided that the Court shall not proceed with less than eleven jurors unless the prosecutor and the accused both consent.

(4) It shall not be lawful for any Court to review the exercise of any discretion under this section.

(5) Where pursuant to this section the Court proceeds with less than twelve jurors, their verdict shall have the same effect as the verdict of the whole number.

150. No similar position obtains in a civil trial. There is only Rule 261 of the Code of Civil Procedure which reads as follows:

> Disability of juryman—If during any trial before a Judge and jury a juryman is taken ill, or becomes incapable of performing his duty, or proves to be beneficially interested in the result of the action, the Judge may discharge the jury, and direct another to be called.

In 1977 the Rules Committee of the Supreme Court resolved that the Juries Act should be amended by adapting the provisions of section 374 (3) of the Crimes Act 1961 to civil jury trials to apply "at any stage of the trial" instead of only before the jury retires. This would mean that if at any stage of a civil trial a juror became "incapable" in any of the circumstances at present stated in section 374 (3) of the Crimes Act, the court might, at its discretion:

(a) discharge the jury and direct that a new jury be empanelled during that sitting; or
(b) postpone the trial; or
(c) proceed with the remaining jurors and take their verdict;

but with the proviso that the court should not proceed with the trial with fewer than 11 jurors unless the parties both consented. This would not, of course, affect the court's power to accept a three-fourths verdict under section 152 of the Juries Act.

151. Later in Part III of this report we canvass the arguments for and against criminal trials being heard before a judge alone, at the option of the accused. We also examine the Crown's power to stand aside jurors in criminal trials as the Department of Justice suggests this is an historical anomaly vested in the Crown. In addition we examine the present situation concerning majority verdicts in civil cases and the suggestion by the New Zealand Law Society that majority verdicts be introduced in criminal cases. We also give attention to the proposal that reserve jurors be provided for lengthy trials.

RECENT INQUIRIES INTO THE BUSINESS OF THE COURTS

152. In this section we review the main investigations of recent years into court structure in New Zealand. This review is historical only. Our comments on the recommendations of the several investigatory committees follow in later sections of this report.

The 1962 Committee on the Criminal Business of the Supreme Court (the Barrowclough Report)

153. In September 1962 the Minister of Justice appointed a committee comprising the Chief Justice, a judge of the Supreme Court, three barristers, the Solicitor-General, the Secretary for Justice, and the

registrar of the Court of Appeal to inquire into the state of the criminal business of the Supreme Court and, in particular, whether some criminal cases should be heard before persons other than judges of the Supreme Court. The committee's report was published in 1965. It was agreed that the maximum penalty for certain minor offences (for example, vagrancy) should be reduced. On the central issues, however, there was not unanimity. Four members of the committee (which had reduced to seven) considered that merely increasing the numerical strength of the Bench would be unsatisfactory, and recommended the introduction of an intermediate court, initially in Auckland and Hamilton. This court would sit with a jury and hear cases where the maximum penalty did not exceed seven years' imprisonment. Its civil jurisdiction would comprise actions founded on contract or tort where the amount claimed did not exceed $7,000 (mainly negligence actions before juries, now abolished) but excluding defamation, seduction, and breach of promise to marry. There would be concurrent jurisdiction, and thus power to transfer appropriate cases between the Supreme Court and the intermediate court, and appeals would lie to the Court of Appeal.

154. This proposal was advanced to solve the problems of an overburdened Supreme Court, which were said to have resulted in delay, arrears of work, and a tendency towards appointing too many judges for a country of New Zealand's population. The majority found it significant that intermediate jury courts existed in England (now merged with the High Court), Queensland, New South Wales, and Victoria. (Western Australia and South Australia have since introduced intermediate courts.)

155. On the question of recorders (barristers sitting part-time as judges), the majority felt that the office was unlikely to be sought by lawyers or to appeal to the public.

156. The minority were firmly opposed to establishing an intermediate court on the grounds that there was no such demand from the public or the legal profession; it would detract from the simplicity of the present system and public confidence in it; delays in civil litigation would decrease; the criminal work proposed for the new court properly belonged in the Supreme Court, which was not overburdened by it; the new court would savour of second best for those districts where it operated; and a court which spent the bulk of its time on crime would come to be unfavourably regarded as a "police court". The minority considered that changes in civil and criminal procedures already made, the appointment of masters, increased powers for registrars, reduction of penalties, and an increase in the numerical strength of the Supreme Court (when that was warranted) would cumulatively relieve the situation.

157. The committee reported in February 1965 but the majority's main recommendations were not implemented.

The Judges Committee on Court Business 1972

158. In 1972 the judges of the Supreme Court expressed the opinion that an increasing number of criminal trials were coming before the Supreme Court which in previous times would have been heard in the Magistrates' Courts, and which incurred penalties of only minor severity. Two judges (the Rt. Hon. Mr Justice Woodhouse and the Hon. Mr Justice Speight) were deputed to examine the situation: they reported in December 1972.

159. This committee affirmed the role of the Supreme Court in conducting the more serious criminal trials. However, it contended that

the burden of conducting all criminal jury trials was overtaking the capacity of the court and could only be met by annual and progressive increases in the number of judges. It was said that:

> In a country with a population of only three millions continual increases in the numbers of the higher judiciary is far from the ideal way of coping merely with growth in the numbers of relatively straight forward but statistically numerous lesser crime.

Any limitation of the right to elect trial by jury was recognised as unacceptable but a review of penalties "in the light of modern attitudes to penology and the treatment that can and should be made available to different types of offenders" would afford some relief. It was stated, however, that significant relief would only be afforded by a restructuring of the judicial system, either by appointing barristers as commissioners to sit part-time in the Supreme Court on crime, or by the creation of a "Crown" Court. The former approach was not favoured. It was felt that commissioners would not help the flow of work or relieve the pressure on physical facilities. The committee commented that with such a small population it would be difficult for a man to act as barrister one day and as judge the next; moreover such persons would be hard to recruit.

160. The Judges Committee was strongly in favour of a Crown Court for criminal work. The court would be manned by two judges stationed in Wellington and two in Auckland, all travelling on circuit throughout New Zealand. In addition, the Crown Court would deal with all undefended and most defended divorces, ancillary applications, and straightforward matrimonial property cases. When considering what cases would be heard in the Crown Court, the committee suggested that the Chief Justice would control the allocation of cases, but would be assisted in Auckland by a judge appointed for that purpose. Eventually this work could be performed by an experienced deputy registrar. The committee considered that, although magistrates could and should be appointed to the new court, "care should be taken to avoid any impression that it was a stepping stone to the Supreme Court or alternatively that appointments to it would be made subsequently from among the magistrates".

The 1974 Committee on Court Business (the Speight Report)

161. Following the report of the Judges Committee and its endorsement by other judges, the Minister of Justice established a committee under the chairmanship of Mr Justice Speight. It comprised a stipendiary magistrate, the Solicitor-General, the Secretary for Justice, a barrister, and a retired senior civil servant. This committee was directed:

> To consider and report upon the state of criminal civil and matrimonial business in the Supreme Court . . . Whether it is desirable and appropriate that any of the . . . jurisdiction of the Supreme Court should be exercisable by any persons other than Judges of the Court . . . Whether it is desirable and appropriate that any of the . . . jurisdiction of the Supreme Court should be transferred . . . To a Court or Courts to be established . . . To the Magistrates' Courts . . . (and if so whether) any new Court or Courts should be established for minor criminal or civil cases . . . Generally, what changes in the judicial system of New Zealand (other than the Court of Appeal and the Judicial Committee of the Privy Council) are necessary or desirable to ensure the ready access of the people of New Zealand to the Courts for the determination of their rights and

the remedy of their grievances, and the efficient, speedy and inexpensive administration of justice.

162. The committee's attention focused on three aspects of court business: the nature of the criminal trials which pass through the Supreme Court; the large volume of divorce and matrimonial litigation which occupied the Supreme Court's time; and the possibility of providing relief for magistrates at the lower end of their jurisdiction. The committee found that the ever increasing volume of Supreme Court work had led to great pressure on the conduct of business with the result that not enough time for deliberation was always available. Court sitting-time in criminal cases had increased by 24% since 1971 and the increase had accelerated in 1974; for example, committals in Auckland had increased over 50% in the first 2 months of 1974 compared with the previous year. Overall court sitting days had increased by 17.5%. With an average time from committal to trial of about 4 weeks, New Zealand was infinitely better placed than any comparable Commonwealth country. However, the priority accorded criminal cases could only be sustained at the cost of delay in civil cases: the committee was of the view that "in the civil jurisdiction there are substantial delays encountered from time to time" Another feature noted by the committee was the high percentage of time spent on judge alone work. This cannot be avoided as judge alone trials cover an infinite variety of litigation, but, notably, the largest individual category was divorce, maintenance, custody, and matrimonial property, approaching some 20% of total judge alone time.

163. ***Revision of penalties*** The committee commented that a person tried summarily today for theft of $100 would in practice be in less jeopardy than a man so charged for £5 in 1908, yet the 1908 figure still stands. The committee recommended a reduction of penalty to 3 months' imprisonment for:

(a) All offences of dishonesty; namely, theft, receiving, obtaining by false pretence, credit by fraud, and forgery of an instrument of specific value or uttering the same, where the amount in issue or the value of the property does not exceed (say) $200.
(b) Unlawful interference with a motor vehicle.
(c) Car conversion.
(d) Indecent exposure.
(e) An indecent act or performance for gain.
(f) Unlawful sexual intercourse with a female under 16 where the offender is under 21.
(g) Wilful damage.
(h) A wide variety of (regulatory) offences where penalties of substantial imprisonment are listed as the maximum but would never be imposed: cases under these Acts seldom come before the courts but for the sake of consistency it might be thought desirable to extend any review of penalties to them.

It was suggested that these offences, triable summarily, should be subject to the magistrate's discretion, either on his own motion or after application by the accused, to decline jurisdiction and direct that the matter be proceeded with indictably with consequent liability for a higher penalty. The committee observed that if current trends continued, this measure would relieve the court of about 5% of its then total sitting business. A number of committee members considered that with increasing use of legal aid, and with the development of the duty solicitor

concept (both of which were endorsed), the number of comparatively minor offences tried by a jury under the present legislation would increase.

164. Much of the committee's time was taken up with proposals relating to trial by jury. One suggestion was an intermediate court. Modelled on Canadian and Australian systems, this solution envisaged District Court judges presiding with juries in a separate intermediate court jurisdiction dealing with crimes of minor to moderate gravity; this would leave only murder, rape, and other major offences to be tried before a Supreme Court judge. The committee pointed out disadvantages in this proposal: in particular, administrative difficulties with buildings and staff, and the consequential downgrading of our magistrates who exercise a wider jurisdiction than their counterparts in either Australia or Canada. The committee did not recommend intermediate courts.

165. It was also proposed that some magistrates could sit with juries. The committee decided that this suggestion would create invidious distinctions between magistrates, and between areas where the intermediate court sat and areas where all jury trials were before a Supreme Court judge.

166. ***An alternative Supreme Court system*** The committee took the view that administration of criminal law was the most important task undertaken by the courts and that jury trials should be in the superior court. The chairman felt this principle could be retained, and the inefficient application of judicial talent to minor or straightforward cases avoided, by creation of a Crown Court. (Later in Part II we refer to the Beeching Report which recommended the Crown Court system for England and Wales.) This court would exercise the criminal jurisdiction of the Supreme Court and would be presided over by judges of the Supreme Court and special judges to be called Crown Court judges. Cases would be assigned to either type of judge according to pre-determined categories and published criteria or on an ad hoc basis by a judge having regard to factors such as gravity, complexity, public concern, and novelty. Crown Court judges (initially one in Auckland and one in Wellington) would be recruited by promotion from the magistracy, or direct from the Bar. It was stated that some other judicial work as a form of variety would be desirable. The court would use existing Supreme Court facilities, staff, and procedure. It was anticipated that the public would not be concerned to differentiate between the two types of judges in the Crown Court. However, other members of the committee felt there was a need for closer examination of the proposed system and its implications, and that a careful watch should be kept on growth of the time taken by criminal trials, the effect of proposed changes in family jurisdiction, and the suggested increase in civil jurisdiction of the Magistrates' Courts from $3,000, to $5,000 or $10,000.

167. The committee recognised that "If the proposed alteration in the present Court division in minor crime and matrimonial litigation is implemented, it would mean an increase in the work load of the Magistrate's Court". Noting delays and too heavy workloads in many Magistrates' Courts, a majority of the committee recommended creation of a Court of Petty Sessions within the framework of the Magistrates' Courts and having jurisdiction in respect of:

(a) summary offences within the jurisdiction of two justices of the peace (s.9 Summary Proceedings Act 1957);

(b) traffic offences as designated by the senior resident magistrate, with power to take away licences for up to 3 months;
(c) default actions, small claims up to $150, and judgment summonses with the right to a hearing before a magistrate;
(d) all unopposed applications for real estate agents' licences, secondhand dealers' licences, money-lenders' licences, etc.
It was recommended that registrars or deputy registrars should do this type of work.

It was proposed that this division of the Magistrates' Courts would be presided over by commissioners (who should preferably be people with some legal qualifications); also registrars or justices of the peace who would be specially selected and trained. Finally, a pilot scheme was suggested.

168. Although the committee's report is called its "First Report", it was the only one.

The Proposed Green Paper

169. In 1975 the Minister of Justice and Attorney-General, the Hon. Dr A. M. Finlay, Q.C., proposed issuing a Green Paper on the structure of the courts. With a change of government in 1975 this proposal was abandoned, the National Party having stated in its election manifesto:

> The next National Government will, as soon as possible, give attention to expedients for improving the situation in the courts in the short-term; such expedients could include, for example, extra judges and magistrates, new court machinery to deal with lesser criminal charges, family law, and small claims: extended magistrates court jurisdiction; extended and more flexible hours for court sittings; more extensive use of trained Justices of the Peace.
>
> In view of the profound and rapid changes taking place in court business National believes that early attention must also be given to the long term. To this end an independent commission of inquiry, comprising laymen, as well as lawyers, will be set up to investigate the administration of the whole court system on an integrated 'in depth' basis.

Before the establishment of our Commission in October 1976, the New Zealand Law Society presented submissions, originally drafted in contemplation of the Green Paper, to the present Minister of Justice. The Society had taken an active interest in court reform and, apart from submissions made to this Commission, had previously forwarded proposals to the 1965 and 1974 Committees on Court Business. In its preliminary submissions to the Minister of Justice in December 1975, the Society repeated its contention, first voiced in commenting on the 1974 Report of the Committee on Court Business, that an independent and representative commission of inquiry should be established to carry out a full-scale investigation into the court system in 1976. The Society was not unsympathetic to the Minister's aim of obtaining a consensus among interested parties but doubted whether agreement on fundamental issues would be found, particularly having regard to the clear division of opinion over the establishment of an intermediate court for the hearing of criminal jury trials. The Society reiterated its view that an overall and comprehensive inquiry by an independent commission, including lay representation, was most likely to lead to formulation of a policy on which

the structure of the courts in this country should be based and the existing system remodelled to meet modern conditions.

OVERSEAS COMMISSIONS AND REPORTS

170. In this section we summarise the findings of some of the commissions and other bodies which have recently been engaged on an exercise similar to ours. We have limited our attention to those situations which are comparable with our own and where the findings are, therefore, relevant to New Zealand conditions.

Royal Commission on Assizes and Quarter Sessions 1966–69 (the Beeching Report)

171. Before the establishment of this commission under Lord Beeching, the court system in England and Wales provided separate courts for the trial of criminal and civil cases, with three levels of courts dealing with criminal work (Magistrates' Courts, Quarter Sessions, and the criminal side of Assizes) and two levels with civil (County and High Courts). Within each tier, and in each division, there was a multiplicity of individually administered courts (the responsibility of local authorities, the Home Secretary, the Lord Chancellor, and the Minister of Public Buildings and Works) with their own geographical areas of jurisdiction, but with a considerable amount of overlapping. The commission concluded that this system was devised for circumstances which no longer existed and that in spite of very great changes in the life of the country, in the distribution of population, in the mobility of people, and in national and local government, far too much had been retained only because it was traditional. As a result the courts were overloaded and delay was endemic. The commission criticised the system as being rigid and inefficient. The commission proposed the complete separation of the criminal and civil business of the higher courts and the reconstitution of the Supreme Court to consist of the Court of Appeal, the High Court with civil jurisdiction, and a single court, to be called the Crown Court, for criminal work above the level of the magistrates' court. The commission recommended that the Crown Court would have jurisdiction throughout England and Wales. It would absorb the criminal jurisdiction previously exercised by Courts of Assize, the Central Criminal Court, the Lancashire Crown Courts, and the courts of Quarter Sessions, all of which would cease to exist as separate courts. The commission proposed that the judges of the Crown Court would consist of High Court judges and a new Bench of judges to be called Circuit judges, supported by a limited number of part-time appointments. Circuit judges would comprise the County Court judges and all whole-time judges (other than High Court judges) exercising criminal jurisdiction in the courts to be replaced by the Crown Court; also that their number would be supplemented by recorders (barristers sitting part-time as judges). Two High Court judges would be assigned special administrative responsibility for each of six circuits, and these persons would be known as Presiding Judges.

172. Under this scheme, the Lord Chancellor would be made responsible for the administration of all the higher courts and the County Courts. There would be a unified court administrative service, appointed and paid by the Lord Chancellor, and organised on a circuit basis, under a senior officer for each circuit, called the circuit administrator.

173. Offences within the jurisdiction of the Crown Court would be divided into three categories or bands:

(a) Upper Band Offences which would only be tried before a High Court judge (for example, murder, treason, spying), or would normally be tried before such a judge but which may, where the circumstances of the case did not warrant that level of judicial talent, be released by a High Court judge for trial by a Circuit judge.
(b) Middle Band Offences which could be tried either before a Circuit judge or a High Court judge. The assignment of each particular case would be the responsibility of the listing officer, in consultation with the High Court judge, after considering whether the offence involved death or serious risk to life, widespread public concern, serious violence, dishonesty in respect of a substantial sum of money, novel or difficult issues of law, circumstances of unusual gravity other than those mentioned, or where the accused held a public position or was a professional or other person owing a duty to the public. Offences suggested for this category included perjury, reckless or dangerous driving causing death, aggravated burglary, arson, and robbery.
(c) Lower Band Offences which would normally be tried before a Circuit judge but if the prosecution, the defence, or the committing magistrates took the view that the offence should be tried before a High Court judge then it would be treated as a middle band offence.

174. The commission's recommendations were implemented, substantially, by the Courts Act (U.K.) 1971. A sensible rationalization and centralized administration were achieved. Lord Beeching anticipated that 58 Circuit judges and 120 recorders would be needed to implement the commission's proposals. However, we understand that the judge power now at the disposal of the Lord Chancellor is far greater than that envisaged by the Beeching Commission.

The Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and Magistrates' Courts 1975 (the James Report)

175. By 1975 the number of Circuit judges had risen to 260 and recorders to 338. As at 1 January 1978 the figures were 285 and 360 respectively. Even so, the Crown Court was in danger of becoming overburdened unless the numbers of judges and staff and capital expenditure were all much increased. A committee was appointed under the chairmanship of Lord Justice James to investigate means of reallocating the criminal business between the Crown and Magistrates' Courts. The committee concluded that the advantages of trial in the Crown Court, with a professional judge presiding, the parties being represented by specialists in advocacy, and proceedings moving at a slower pace, were that the trial was able to proceed to a conclusion without interruption so that the issues were brought out more clearly and examined more thoroughly than was possible in a busy Magistrate's Court with a crowded list. There was also a somewhat higher acquittal rate in the superior court, but it could not be said whether this was due to juries acquitting the guilty or lay magistrates convicting the innocent.

176. Confronted with at least four categories of electable offences and three methods of dealing with them, the committee recommended the creation of a single intermediate category of offence to which one procedure would be applicable. It then proceeded to discuss whether the

choice of forum should be made by the court, by the prosecution, or by the accused. It affirmed the right of the accused to make the election. It was considered wrong for the authority that had investigated the offence, apprehended the accused, and decided what charge to bring, also to decide the mode of trial. The committee recognised inherent difficulties in the court having to decide the importance, and hence mode of trial, of the case without hearing it; and also in obtaining consistency between the various courts. It would not be acceptable to the public for the same court, although differently constituted, to refuse jury trial and then proceed to hear the case. It would be a potential cause of delay and create an additional task for both courts. Moreover, because jury trial must be available where the defendant is placed in greater peril than the penalty alone, such as loss of job or reputation, the court could be obliged to make invidious distinctions on the basis of standing in the community and character. Finally, although few jurisdictions have found it necessary to give defendants a choice of forum, the historical background of the right of election and its intrinsic importance strongly militated against its removal. Such a course would undermine the trust and support which the criminal justice system commands among the general public.

177. The committee concluded:

> There is in our view one valid and desirable method of encouraging defendants to consent to summary trial in cases for which that mode of trial is appropriate. This is by making summary trial more attractive.

The committee sought ways to up-grade summary jurisdiction. It noted that shortcomings in the quality of magisterial justice, when they occurred, were due to a lack, in some areas, of adequate staff and accommodation to cope with the ever increasing volume of business. Various indictable offences were reviewed and some recommended to be reallocated to the intermediate category (burglary, unlawful sexual intercourse, bigamy, reckless or dangerous driving causing death, forgery and uttering, and some rarely invoked offences). It was also suggested that theft and criminal damage, except arson, should be divided, with threshold figures of £20 and £100 respectively, before a right to jury trial obtained. This proposal did not find legislative approval. The committee recommended that for all intermediate offences there would be a uniform procedure: the accused could elect trial by jury but could not insist on summary trial. Summary trial could occur only with the consent of the court, the defendant, and the Director of Public Prosecutions (where that office was involved). A greater measure of advance disclosure by the prosecution and the provision of the statements of prosecution witnesses to the defence were also recommended. To ensure that the new deposition procedure (where there is no preliminary hearing but a perusal of the papers followed by committal) was not abused, the committee considered that counsel for the defence and prosecution should be required to certify that the papers disclosed a proper case for trial by jury. It further recommended that the Crown Court, in sentencing on an indictable or intermediate offence, should also have power to sentence the defendant for any summary offence to which he pleaded guilty. A special preliminary conference procedure (a criminal summons for directions) in the Crown Court, and the removal of certain quasi-judicial functions from the magistracy were also recommended.

The Ontario Law Reform Commission

178. In 1970 the Ontario Law Reform Commission was requested by the Government "to undertake a study and review of the administration of Ontario courts and where necessary to recommend reforms for the more convenient, economic and efficient disposal of the civil and criminal business at present dealt with by these courts". The commission concluded that "the issue before us is simply whether the remedy for conflict which a court system provides can be made more effective". The report, in three parts, was published in 1973.

179. The administration of the courts was seen as an integral part of their end product, justice. It was suggested that more damage was done to the quality of justice by managerial inefficiencies, generated by outdated practices and systems, than by incorrect judicial decisions. The commission attributed the parlous state of court administration to traditional relegation of the Ministry of the Attorney General to "poor cousin" status in its share of the provincial budget; to shortcomings revealed by a massive caseload crisis; to lack of any clear definition of responsibility for court operations; to lack of professional administrative personnel; to operation of the various levels as detached administrative units with little overall integration or central direction, and to lack of long term planning. One of the most difficult tasks in achieving an effective systems approach to court administration is the determination of the extent to which the accepted principle of judicial independence places a very real restraint on the Government's power to constitute, organise, and maintain the courts. The commission commented that recognition of this principle does not mean that the courts should be left to operate independently of reasonable managerial restraints. The commission, therefore, sought to create an administrative structure to service the courts which would not impinge upon the adjudicative function; for example, the assignment of judges to cases is an adjudicative rather than administrative function.

180. A dual administrative and adjudicative hierarchy was proposed. The former devolved from the Attorney General to a provincial court administrator, and thence from six regional court administrators through to the court officials. The adjudicative pyramid followed the established court hierarchy from the Chief Justice of Ontario to the Chief Judge of the Provincial Courts. The chief judge of each court would have an executive assistant to "liaise" with the regional court administrator, or in the case of the Chief Justice of Ontario, with the provincial court administrator. The court administrators, although responsible to the Attorney General, would also be responsible to the judiciary.

The White Paper on Courts Administration (Ontario) 1976

181. Following the Ontario Law Reform Commission's report, a model court administrative structure was established to test the proposals for reform in a region of Ontario which was a microcosm of the whole. In October 1976 the Attorney General published a White Paper presenting proposals for court reform based on the results of this pilot study. The fundamental principle of court administration was, as stated in the White Paper, that:

> the courts must be so structured as to avoid any possibility that any element of society could influence or interfere or even have the appearance of being able to influence or interfere with the judicial

determination of a case. The bulwarks of individual liberty under the law must, of course, always be vigilantly guarded.

The pilot project had revealed that a divided administrative structure prevented any real progress in the key areas of organisation of the flow of cases through courts and the allocation of court resources, including judges, to meet predetermined standards; it was concluded that:

> The attempt to introduce the case-flow management system brought into sharp focus the fundamental management weakness of dividing between the judiciary and the Ministry the overall authority for courts administration. The Central West experiment proved that divided management is detrimental to any effective court reform, cumbersome in practice and functionally impractical.

Because effective case-flow management requires the exercise of a measure of control over the actions of judges, Crown attorneys, court officials, defence counsel, police, and those members of the public who serve as jurors and witnesses; and because only the judge is vested with the necessary power to exercise effective control, only those in the judicial hierarchy can develop and apply policies, guidelines, and directions to assist the individual judges in the disposition of cases.

182. Noting that both England and the United States had unified control at the top of the system in the hands of senior judicial officers, and that an increased presence by the Government in the administration of the courts would raise the spectre of Executive interference in the judicial process, the White Paper proposed that the responsibility for court administration should vest in the judiciary. The White Paper recommended establishment of a Judicial Council consisting of the Chief Justice of Ontario as Chairman, the Chief Justice of the High Court, the three Chief Judges and a judge of the County Court appointed by the Lieutenant Governor in Council. The council was envisaged as having power to set case-flow management standards for individual courts and for the court system as a whole, including the power to assign cases and judges to various courts, and to set working standards for the judiciary. The council would have disciplinary power over judges and be responsible for the hiring and firing of all court staff, pursuant to the provisions of the Public Service Act. It would report annually to Parliament. Under the Judicial Council there would be an Office of Courts Administration charged with the day-to-day administration of the courts and headed by a Director of Courts Administration responsible to the Judicial Council.

183. The White Paper also recommended establishment of an Advisory Committee comprising the Chairman of the Judicial Council, the Deputy Attorney General, the Deputy Minister of Government Services, the Treasurer of the Law Society of Upper Canada, and two lay members. This committee would monitor the overall administration of the courts and look into any matter referred to it by the Attorney General. It would have access to all information developed within the Office of Courts Administration.

New South Wales Law Reform Commission: Working Paper on the Courts 1976

184. In New South Wales the Law Reform Commission was confronted with problems similar to those that prompted the Ontario government to produce the White Paper. While the commission was concerned with differences in procedure and jurisdictional complexity between the

various courts, it was also concerned with fragmented administrative organisation of the courts. To remedy the latter problem, the Law Reform Commission recommended appointment of a State Court Administrator with the status of a permanent department head and responsible for all aspects of court administration. He would perform such duties as directed by the Chief Justice but, in conformity with the doctrine of ministerial responsibility, he would be subject to a final power of direction residing in the Attorney-General. A Courts Administration Committee without any formal powers, and equivalent to the Ontario Judicial Council, but including two lawyers and one person appointed by the Attorney-General, was suggested. This committee would adopt an informal, supervisory role.

185. The commission was strongly in favour of professional court administrators. It drew an analogy with administration of hospitals where professional administrators manage and employ highly trained professional staff. The commission stated that a small number of courts might operate satisfactorily under the joint administrative direction of the judiciary, but as numbers increased and the system became more complex, the need for professional administration would become apparent. The Law Reform Commission firmly believed that without professional administration the advantages of court unification and of modern business methods and technology would not be fully achieved.

THE PRESENT WORKLOAD OF THE COURTS

186. In this section we refer to statistical data to illustrate the tremendous increase in court business over the last 16 years. The Department of Justice, which supplied us with a great deal of relevant data, was careful to point out that both time and resources imposed limitations on their ability to gather the information. The department also provided material specially for this Commission from research it carried out in the Supreme Courts at Auckland, Hamilton, Palmerston North, Wanganui, Wellington, Christchurch, and Dunedin. The department expressed confidence that this information had definite statistical significance for all Supreme Courts. Put another way, the sample was sufficient for the conclusions to be accepted as nationally indicative. We were also helpfully provided with further data relating to particular problems of the Supreme Court at Auckland by the senior resident judge there. Information relating to delays over fixtures in the Hamilton Supreme Court was furnished by the Hamilton District Law Society.

The Business of the Magistrates' Courts

187. ***Criminal jurisdiction*** In 1960 the total number of charges which actually came before the courts for determination was 124 796, representing a rate per 1000 mean population of 52.50. By 1976 the number of charges had jumped to 404 526, representing a rate per 1000 mean population of 129.81. Thus almost 105 persons (as distinct from charges) out of every 1000, or more than one in 10, are involved in a criminal prosecution as defendants in any one year. (Table 1 shows that 1976 had the largest annual increase since 1960 (16.23% over 1975) and occurred when the mean population figures rose by less than 1%.) In addition to those charged, there are many others involved in the criminal justice system as victims, witnesses, or jurors.

188. Traffic prosecutions form a considerable proportion of the high prosecution rate. The total traffic charges in 1960 were 82 893, as

contrasted with 307 204 in 1976; an increase of 270.6%. The traffic prosecutions in 1976 represent 75.9% of total criminal prosecutions commenced (Table 2), but the actual time spent that year in hearing traffic offences (excluding minor offences) represented only 23.2% of the combined sitting hours of magistrates and justices of the peace. Further analysis reveals that, in 1976, 83 persons out of every 1000 mean population were proceeded against in the Magistrates' Courts for traffic offences; but we are satisfied from figures produced to us that, expressed as a percentage of total criminal prosecutions, the proportion of prosecutions for traffic offences has been relatively constant.

189. This increase in actual prosecutions does not, however, reflect the total demands on administrative staff. In 1960, 21 055 prosecutions commenced in the Magistrates' Courts were, for one reason or another, never formally disposed of in court; by 1976 that figure had risen to 116 786. In the former year the number represented 14% of total prosecutions, while in 1976 it was 22%. We were told that the bulk of these charges were for failing to supply information after the issue of a parking ticket. A forthcoming amendment to the Transport Act, which will place liability on the owner rather than the driver for an illegally parked vehicle, should reduce this figure. A significant proportion of prosecutions commenced are not proceeded with because the defendant cannot be traced.

190. The total number of charges before the courts in 1976 resulted in 353 704 summary convictions which can be broken down as follows:

TYPE OF OFFENCE: SUMMARY CONVICTIONS 1976	
Offences against the person	7 648
Offences against property	29 670
Forgery and currency offences	1 546
Offences against good order	10 509
Traffic offences (excluding driving causing death or injury)	276 749
Justice administration, drugs, maintenance, social welfare offences	6 971
Other offences	20 611
Total	353 704

This table indicates that traffic and other relatively minor offending are approaching some 80% of the criminal business of the courts. Some of these offences can be described as serious, such as drinking/driving, but we agree with the Secretary for Justice when he called most of these offences "administrative". It was submitted that this information invites question as to whether all of this business should be dealt with under the ordinary criminal justice system.

191. In 1976, the sum of $9,602,000 was imposed in fines in respect of 304 268 prosecutions. The total figure for fines, costs, compensation, costs of prosecution, and other monetary orders was $11,726,673. In that year, $10,576,236 was collected. Further information supplied indicates that over the past few years there has been a remarkable consistency in the number of summary convictions resulting in fines. The percentage seems to vary between 86%–87%. Such percentages, if they do nothing more, illustrate the importance of the fine as a penal sanction. It follows that the

collection and enforcement of monetary orders places a heavy administrative burden on the courts.

192. The Commission was concerned to have information from all the courts regarding delays in the hearing of cases. Figures were available from the fortnightly returns of some of the larger Magistrates' Courts showing the waiting time for police and Ministry of Transport prosecutions. From that information we were satisfied that the waiting time for a hearing in defended cases in most courts is not unreasonable, being an average of 4 to 5 weeks. In a number of courts, however, the period is well beyond that and, to our mind, the delay is excessive and certainly undesirable. It must be remembered that this waiting period is at the final stage. Before proceedings are commenced there may have been delay in the initiation of the prosecution (4 months from the time of the alleged offence is not out of the ordinary), followed by a period up to the initial hearing date to enable service to be effected, and finally, the period between then and the date given for a defended hearing. With the aggregation of these periods, it is not unusual for 9 months or more to elapse from the time of the alleged offence to disposal of the case. This is, of course, in summons cases where the offender is not, and probably never has been, in custody. Nevertheless, such delay, only part of which can be attributed to the court process, leads to disrespect for the law and a possible denial of justice.

193. Because we have examined proposals for the Magistrates' Courts to hear jury trials, we were interested in other time factors in relation to criminal work in the Magistrates' Courts; more particularly, the time from arrest to committal in prosecutions where the offender elects jury trial, or where the information is laid indictably, or the offence is one triable only on indictment. For the year 1968, and from 1972 to 1976, the following average periods elapsed between the first appearance in the Magistrates' Courts to committal:

Year	Weeks
1968	5.3
1972	5.4
1973	5.8
1974	7.7
1975	7.9
1976	7.2

The average of 7½ weeks established from these figures did seem to us to be unduly long. In addition, we accept the submission that there appears to be a direct correlation between the waiting times experienced in the years 1974, 1975, and 1976 and the increase in numbers of those committed for jury trial in those years. We have no up-to-date information on the effect of the amendment to the Summary Proceedings Act, which enables written statements to be accepted in lieu of full depositions.

194. ***Sitting time*** The courts' annual returns reveal that in 1967 the magistrates sat for a total of 21 142 hours on criminal business. In 1976 that figure had increased to 29 862 hours, which is a 41.2% increase. Over the same period, sitting hours of justices of the peace increased from 1814 in 1967, to 5341 in 1976, an increase of 194.4%. This large increase demonstrates the considerable role of justices of the peace in the criminal business of the Magistrates' Courts. We were told that, in round terms, if all the work now handled by justices of the peace was done by magistrates, up to nine additional magistrates would be required. This assumption

may not have taken into account the fact that magistrates sit singly whereas justices sit in pairs and must confer, and that, generally speaking, because of familiarity with the work a magistrate may deal with cases more efficiently. Over the same period, the percentage of sitting time on traffic cases by both magistrates and justices of the peace has not shown any marked increase. One of the factors reducing the number of traffic prosecutions which go to hearing appears to be the success of the minor offence scheme. Another important development has been increasing use of infringement fees fixed by regulation. Later we deal with these matters and the projected increase in present Magistrates' Courts' jurisdiction.

195. The Secretary for Justice mentioned to us that the court process may contribute towards delay in the courts but it is not the sole factor. Apart from difficulties in serving documents within a reasonable time, and fixing dates for hearing of cases, there is also difficulty with rostered staff (such as Ministry of Transport officers). In addition, reference should be made to the effect which extended legal aid and the duty solicitor schemes have had. The very opportunity for legal representation, of itself, tends to increase the time taken by an average case. The merits of these forms of aid plainly outweigh consequential delay, although care needs to be taken that the right to legal aid is not abused. Overall, we were led to the conclusion that programming of court business is one of the major areas for reform. We deal with this subject in Part III.

196. It will be seen from Table 3 that the number of persons indicted is a very small percentage of the total persons charged in the Magistrates' Courts. We also produce as Table 4, the number of persons who elected trial by jury for each of the years between 1960 and 1976. In 1976, approximately 98% of offenders entitled to elect trial by jury chose to be tried summarily in the Magistrates' Courts.

197. ***Age group of offenders*** For the year 1976 the number of offenders (distinct cases, arrest only) and their ages are set out hereunder.

AGE GROUPING OF OFFENDERS: DISTINCT CASES, ARRESTS ONLY, CONVICTIONS ONLY

Age*	Number	Percentage of total	Rate per 1000 total population per age group
0–16	286	0.8	0.27
17–20	13 635	38.8	59.29
21–24	7 610	21.7	37.26
25–29	4 671	13.3	18.75
30–39	4 297	12.3	11.40
40–49	2 469	7.0	7.80
50–59	1 581	4.5	5.40
60+	566	1.6	1.40

*Note different size of age categories.

These figures reveal that the greatest proportion of offenders is in the 17–20 year-old group. However, the Commission was informed that in cities such as Vancouver and Los Angeles the proportion of persons in this age group was decreasing and one result of this was that the rate of increase in offending was also falling.

198. Some further figures of interest relate to persons committed for trial and the manner in which their cases were completed. We reproduce these as Table 5, subject to the caveat that the figures are based on a

Department of Justice research sample and are not taken from their annual statistics. In broad terms, 60.2% of those committed for trial in 1968 were found guilty. This figure increased to 75.7% in 1976. For the same years, 25.7% and 17.4% respectively were found not guilty. The method of disposal of the balance of the cases is also set out in the table.

199. Another interesting set of figures compiled by the Department of Justice deals with offences which might be handled outside the criminal justice system. 1976 was taken as a model year. The sample covered certain traffic offences, drunkenness and vagrancy, breach of maintenance orders, sale of liquor offences, and failure to pay certain fees such as television licence fees, fishing licence fees, and library fees. It was estimated that 60.23% of total prosecutions related to offences which could be removed from the court system. (Later, when we come to examine the increased burden that will fall upon the proposed District Courts if a considerable part of the High Court work is removed to them, we shall discuss in more detail the merits of this proposal (paragraph 435).)

200. ***Civil jurisdiction*** We produce as Table 6 a record of the Department of Justice's statistics on civil work of the Magistrates' Courts between the years 1960 to 1976. In 1960, 81 185 plaints were entered; the total amount sued for was $6,296,000; the number of judgments entered, or where the final order of the court was issued totalled 49 499. These figures contrast with the 1976 position: 144 005 plaints were entered (an increase of 77.4% over 1960); the total amount sued for was $33,851,000 (an increase of 437.6%); and the number of judgments entered, or where the final order of the court was issued, totalled 84 388 (a 70.5% increase). The full table shows fluctuations in the civil business of these courts which seem to defy logic. The average amount claimed in 1960 was $77. It increased to $114 by 1970, and in 1976 had risen to $235. In 1975 there were 2191 civil actions requiring formal proof heard in Magistrates' Courts, and 1742 defended cases requiring more than formal proof. In 1976 these figures had increased to 2666 for formal proof and 2057 defended cases. The increase no doubt reflects the increase in actual proceedings between 1975 and 1976. The great bulk of civil actions in Magistrates' Courts are for liquidated sums, and within registrars' jurisdiction to enter judgment by default. Some 80 000 such judgments were entered by registrars in 1976. The number of defended actions (2057) determined by magistrates is, however, significant. We also note there were only 52 civil appeals filed in the Supreme Court in 1976. This is only 2.5% of defended civil cases. The increase in volume of cases and the number for defended hearing is reflected in the increase in magisterial sitting time for civil business. In 1975 this amounted to 5566 hours and increased to 7829 hours in 1976. These figures include sitting time for domestic proceedings cases.

201. ***Waiting time*** At 19 August 1977 the average (mean) waiting time for defended civil cases was 6.7 weeks and for domestic proceedings 5.6 weeks. The longest delays were 14 and 11 weeks, respectively, in one particular court district, and the shortest as little as 2 weeks. The Secretary for Justice considered that delays in domestic proceedings cases are far from acceptable in many courts, although it may well be that delays are not solely attributable to the courts themselves. Periods of up to 11 weeks' delay in domestic matters concern this Commission.

202. ***Domestic jurisdiction*** In 1970 the total number of domestic proceedings applications (including applications for variation of

agreements and the registration of agreements) amounted to 10 717. By 1976 that figure had grown by 18.3% to 12 679. Of that total 9162 were originating applications under the Domestic Proceedings Act 1968. We reproduce hereunder a breakdown of those 9162 applications:

Relief sought	Applications	Orders made
Separation	5 856	2 381*
Maintenance	6 731	2 934
Custody	5 490	2 397
Guardianship	315	77
Non-molestation	2 774	234
Tenancy	512	190†
Matrimonial home	3 475	807‡

*795 conciliation dispensed with.
†184 in favour of wife; 6 in favour of husband.
‡746 in favour of wife; 61 in favour of husband.

Applications filed in the Magistrates' Courts in 1976 seeking a paternity order or maintenance, where the parties were not married, numbered 2735 in addition to the above. The majority of these applications were for both maintenance and paternity; however, 27 applications for paternity only were filed and 121 for maintenance only. Overall 1205 orders for extra-marital maintenance or paternity were made in the Magistrates' Courts in 1976. In the same year 33 applications for consent to marry were received and 87 minors contracts were approved.

The Business of the Supreme Court

203. We have already noted, with reference to the Barrowclough and Speight Reports (paragraphs 153 and 161), previous concern over the state of Supreme Court business. We can state unequivocally that civil business of this court has suffered because of priority given to trial of criminal cases throughout the country. We later produce figures supporting our conclusion that the number of persons who are indicted or who elect trial by jury in the Supreme Court is such that if present trends continue and no extra judges are appointed the civil work of the court will further suffer.

204. ***Criminal jurisdiction*** In 1960 the number of persons indicted was 378. In 1976 the number was 801, an increase of 111.9%. Of these, the number of persons who elected trial by jury in 1960 was 312, and in 1976, 541, representing a percentage increase of 73.4%. One factor contributing to increase in the number electing trial by jury is an increase in drug offences from nil in 1960 to 87 in 1976. Table 7 removes those tried with drug offences from the number who elected trial by jury and shows that the percentage of persons electing trial by jury, of those charged with electable offences, has declined from 5.4% in 1960 to 2.2% in 1976. This trend is contrary to the impression generally held. Nevertheless, because of the growth in prosecutions, there has been a significant increase in the number of persons electing trial by jury.

205. In the first half of 1977, the proportion of persons appearing in the Supreme Court charged with offences where they had a right of election was 75.6%. This was higher than in any of the previous 5 years, and contrary to the 1972–76 trend, where the proportion remained fairly stable at around 70%. (See Tables 8 and 9.) However, the 1977 proportion of persons indicted with electable offences is still not as high as it was in 1968. An analysis of the Auckland business is interesting in this

regard. During the first half of 1977, 82% of the Auckland accused were indicted with electable offences only. Compared with this, Wellington has a proportional 75% and Christchurch a relatively low 69%. This explains the variation in the proportion of time spent in these centres on electable trials compared with trials involving indictable only offences (see Figure 2, paragraph 208). As the estimates in this figure show, 79% of Auckland's sitting time is apportioned to trials of electable offences compared with 67% and 66% for Wellington and Christchurch respectively. An analysis of the information received shows that counts of receiving, burglary, and assault with intent to injure, contribute to the higher rate of trials of electable offences in Auckland.

206. We received submissions that legal aid was a causal factor in growth of criminal jury trials, but we agree with the Secretary for Justice that it is difficult to establish any direct relationship between the number of persons indicted and the provision of legal aid. There are no statistics available for legal aid in the early sixties when, as Tables 4 and 7 show, the percentage of persons electing trial by jury was higher than it is now, but there were very few persons legally aided in those years.

207. We cite, as Table 10, the number of persons committed for sentence to the Supreme Court from the Magistrates' Courts. In 1960 there were 75, and 118 in 1976. Of the 118 committed for sentence in 1976 the distribution among the 3 committal provisions was:

Section 24(3) Criminal Justice Act	Nil
Section 44(2) Summary Proceedings Act	57
Section 168 Summary Proceedings Act	61

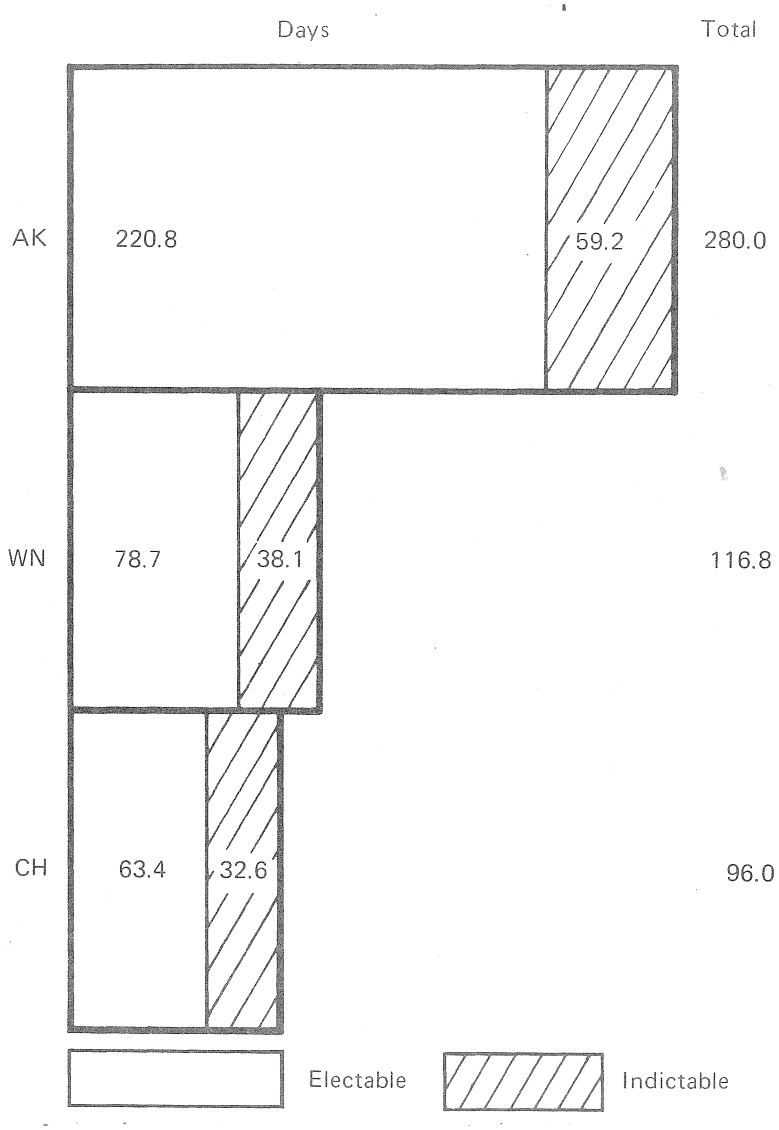
There is no conclusive explanation for the rather incoherent pattern of committals for sentence disclosed in Table 10. We can only speculate that one of the reasons for the increase in section 44 (2) committals might be a growth in, or high incidence of, offending of a particular type in a given locality, which has led magistrates to conclude that deterrent penalties over and above their jurisdiction should be considered. Another reason might be that a sentencing pattern by the judges for a particular type of offence, for example, supply of narcotics, has emerged; and the magistrate considers that to achieve consistency in that pattern, and to minimise injustices between individuals, it is desirable for a judge to consider the appropriate penalty.

208. ***Sitting time*** The percentages of sitting time devoted to criminal trials in 1976 for the main Supreme Court centres were:

	Percent
Auckland	42.9
Wellington	25.9
Christchurch	37.9
Dunedin	40.2
Hamilton	35.8

The average for all Supreme Court centres was 31.1%. However, an analysis of sitting time for the first 6 months of 1977 reveals that 39.7% of the total sitting time was devoted to criminal trials. The average number of judges sitting during that period was 15. Figure 2 illustrates, in diagrammatic form, an example of sitting time in the Supreme Court on crime. When we examined estimated time for hearing criminal trials in Auckland, Wellington, and Christchurch for the same period, we deduced that approximately 29% of judge time goes to trials where the accused is

SITTING TIME IN DAYS FOR ELECTABLE AND INDICTABLE OFFENCES 1 JANUARY – 30 JUNE 1977



5 hours = 1 judge day
Average length of indictable trial = 13.6 hours
(includes jury deliberation 2.6 hours)
Average length of electable trial = 9.6 hours
(includes jury deliberation 2.2 hours)

Figure 2

indicted with an electable offence only, and approximately 11% to trials where at least one of the counts is for a purely indictable offence. The Commission would observe, at this point, that it does not favour leaving Supreme Court judges with only 11% of their sitting time given to crime. We think it undesirable to entirely remove 29% of their total sitting time. Some foundation for this point of view was laid when the Commission spoke to High Court judges in other Commonwealth countries. In one country, judges deprecated the fact that they were losing touch with crime because only 8%–9% of their time was engaged in hearing criminal trials. We recognise the importance of this observation and when we deal with the section on Court Administration under Part III we shall pay particular attention to it.

209. ***Waiting time*** Looking at sample years, namely, 1968 and 1972–76 inclusive, the total time for Supreme Court trials from the first Magistrate's Court appearance to final disposition has increased over the years concerned. As will be seen from Table 11, the increase has been more apparent from 1974 to 1976, culminating in 17.8 weeks in 1976. In the James Report it was said that a much shorter waiting period is desirable, and the maximum waiting period between committal and trial should be 8 weeks. Table 11 shows that in this country in recent years this suggested maximum waiting period was exceeded. Further, in 1976 a jury trial lasted an average of 10.8 hours (11.3% longer than in 1968). Included in that time was the average jury deliberation of 2.3 hours, a 15% increase over 1968. (These figures bear remarkable similarity to the data in the James Report which mentions 10.9 hours average per jury trial.)

210. In 1968, 54.8% of persons convicted in the Supreme Court received non-custodial sentences; of those, 28.0% had been held in custody pending trial. The percentage of persons receiving non-custodial sentences has remained fairly constant (52.4% in 1976). The percentage of persons in custody awaiting trial who did not receive custodial sentences decreased to 19.5% in 1976.

211. Other figures produced indicate that at least 17.1% of all those committed for trial in 1976 pleaded guilty on arraignment. It will readily be appreciated that lack of knowledge as to how a person intends to plead causes problems for those arranging court programming and organisation. In the Supreme Court, preparations are made on the expectation of the plea of not guilty and a last-minute change on arraignment to a plea of guilty means that witnesses, jurors, and others can be considerably inconvenienced.

212. It is too early to assess the effect which the new committal procedure, provided for by s. 16 of the Summary Proceedings Amendment Act 1976, will have on the number of committals for trial by jury. There have been indications in the United Kingdom that a similar procedure has resulted in an increase in the number of committals to the Crown Court. We noted with interest the comment of the Secretary for Justice that if summary trial can be made more acceptable by avoiding delay, that would be advantageous.

213. Table 12 shows that there has been a significant increase between 1960 and 1976 in the number of persons charged with purely indictable offences. The mean for the years 1973–1976 inclusive, compared with the previous years, has substantially increased; indicating, in the department's view, a higher rate of prosecutions for serious offending. A research sample from the Department of Justice amplifies the same point:

SITTING TIME IN DAYS FOR ELECTABLE AND INDICTABLE OFFENCES 1 JANUARY – 30 JUNE 1977

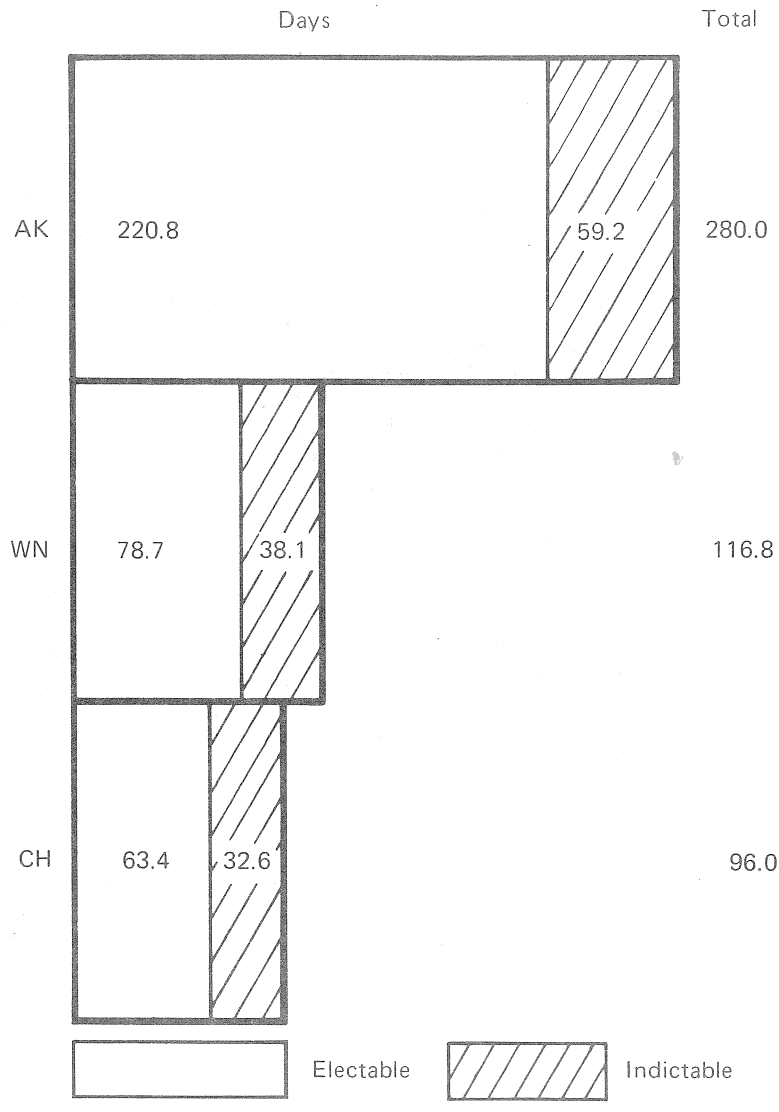


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Table 8 reveals that since 1968, there has been a marked decrease in electable offences as a proportion of the toal number of criminal jury trials, and a corresponding increase in the proportion of purely indictable trials. We emphasise that these two tables, read together, indicate that proportionately more Supreme Court judge time is now taken by trials of major crimes.

214. Table 13 demonstrates the increase in numbers of indictments and also shows that, proportionately, the increases are attributable to offences against the person and drug offending. The proportion represented by offences against the person has almost doubled between 1970 and 1976 and now totals more than 11.1% of all indictments. The figure for drug offences is particularly significant: from three cases in 1970, representing only 0.8% of indictments, these have increased to 87 in 1976 which represents 10.9% of all indictments. Indictments for burglary formed a lesser proportion of total indictments in each year from 1970 until 1976. The offences of theft and receiving (which, with fraud and false pretences, and car conversion, formed the bulk of offences considered by the Speight Committee to be of a "minor" nature), also now form a lesser percentage of the total indictments. In 1970 there were 79 indictments in respect of these offences, 21.6% of the total. In 1976, although the number had increased to 149, this represented only 18.6% of all indictments. Nonetheless, this category of offence still forms the largest single group in the criminal business calendar and, in the light of the concern expressed about relatively minor crime occupying the time of the Supreme Court, further examination is necessary.

215. It has been submitted that the threshold in value should be increased from $10 to, say, $200 in order to reduce the number of trials where people can elect trial by jury. Statistics we obtained for a sample of 110 defendants, taken during the first half of 1977, indicate that with 8 defendants (or 7.3% of the sample) charges related to offences where the amount involved did not exceed $40; 14 defendants (or 12.7% of the sample) were charged with offences where the value was between $40 and $100; and 12 defendants (or 10.9% of the sample), where the value was between $100 and $200. This left 76 defendants (or 69.1%) where the value was at least $201. The great majority of theft, receiving, and false pretences offences involved property of substantial value. Although it could be argued that, from the sample taken, 34 defendants elected jury trial over minor property crimes, the perception of an offence as "serious" or "minor" or "trivial" must develop according to particular viewpoints. Society may perceive an offence to be minor or trivial but the consequences of a conviction may be serious to the offender. We consider we are justified, however, in saying that although these offences may warrant trial by jury, it does not follow that the trial should be presided over by a Supreme Court judge. The British Parliament has rejected the notion that a threshold should even be established, let alone increased. We deal with the question ourselves in Part III of this report.

216. The Commission was given information about current distribution of prosecutions between the courts, disregarding the proposed ultimate structure of those courts. Table 14 reveals that in 1968, for example, only 1.9% (5 persons out of 264 in the sample) received a sentence in excess of a magistrate's jurisdiction while in 1976 the figure was 3% (9 persons out of 299). If magistrates are given the right to preside over jury trials for electable offences, only rarely would they need to sentence outside their present jurisdiction. In 1968, of those convicted, 75% received a custodial

sentence whereas the corresponding figure for 1976 is 63.9%. Greater use has been made of other sanctions such as periodic detention and fining. The whole topic of District Court judges' criminal jurisdiction is discussed in Part III.

217. Figures presented to us demonstrate a dramatic increase in the number of trials for offences under the Misuse of Drugs Act 1975 and its predecessor, the Narcotics Act 1965. In 1968, for offences other than under the Crimes Act, narcotics offences accounted for only 13.6%. By 1972 this had become 48.5%; by 1975, 80.2%; and based on the figures for the first 6 months of 1977, the figure for that year will be 84.8%. Excluding narcotics offences, trials for offences other than under the Crimes Act are relatively few and minor. We would mention that in the first 6 months of 1977 there were a total of 67 narcotics charges which went to trial in the various Supreme Courts of this country.

218. Apart from the increase in narcotics offences, there was an increase in both the percentage and number of the more serious crimes over the period 1968–76. This is illustrated by the number of persons accused of offences such as murder, wounding with intent, aggravated robbery, and rape. The increase in the number of indictments carrying higher maximum penalties has been the trend since 1968, except for a lower figure for 1974. Table 15 illustrates these trends. We are able to say that, excluding theft, receiving, and false pretences, approximately 80% of the offences carried a maximum penalty of at least 7 years' imprisonment. This percentage increased slightly from 82.6% in 1976, to 82.9% in the first half of 1977. Although there has been an increase in the proportion of offences carrying a penalty in excess of 7 years, the bulk of the sentences actually imposed in the Supreme Court were for less than 3 years. As a typical example, we have taken the year 1976. Figure 3 illustrates the percentage distribution of offences according to the maximum penalty carried by those offences; Figure 4 illustrates the frequency with which the maximum penalties were actually imposed, and the manner in which cases were otherwise disposed of. Approximately 70% of persons found guilty in the Supreme Court had a record of previous convictions.

219. ***Re-trials*** As earlier indicated, the Commission will be considering in Part III, the question of majority verdicts. One argument in favour of this is the number of jury disagreements and cost of re-trials. The Department of Justice has told us that re-trials because of jury disagreement constituted 4.7% of all criminal jury trials between 1974 and 1976. We note that of the 90 disagreements during this period, 25 (or 28%) eventually resulted in an acquittal, 14 (or 16%) in a stay of proceedings, and 10 (or 11%) were discharged under section 347 of the Crimes Act 1961. In other words, where in the first trial there was a disagreement, over half the re-trials did not result in a finding of guilty. The department's view is that the incidence of disagreements is not sufficient, in terms of its impact on the organisation and cost of court business, to justify abrogation of the old established principle of unanimity. The records do not show whether a disagreement resulted from, say, the intransigence of a juror or a substantial division of opinion. Overseas research on civil juries has shown that where the jury intially disagrees by a small margin there is a tendency for unanimity eventually to develop.

220. ***Appeals under the Summary Proceedings Act*** When related to the

MAXIMUM PENALTY PRESCRIBED
(MOST SEVERE PER PERSON)

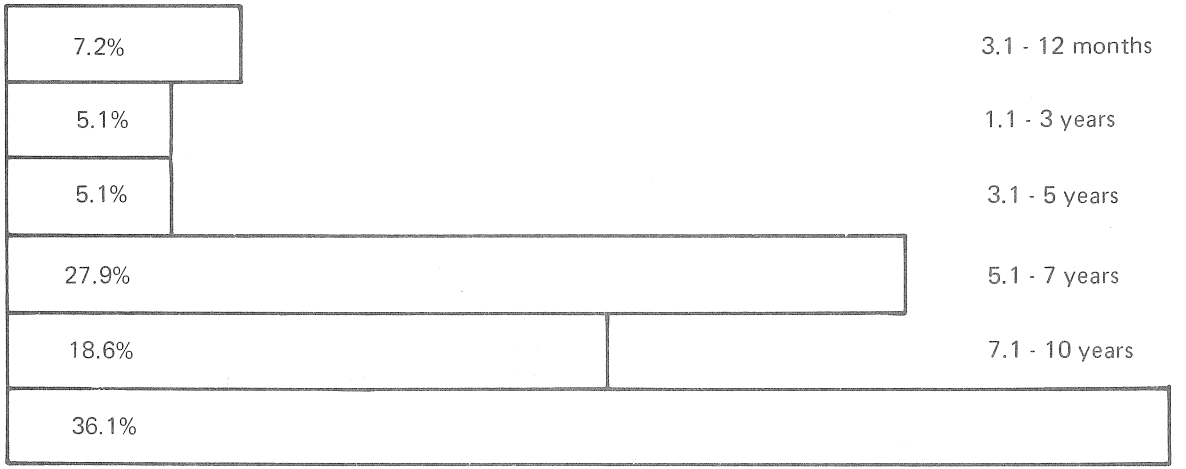
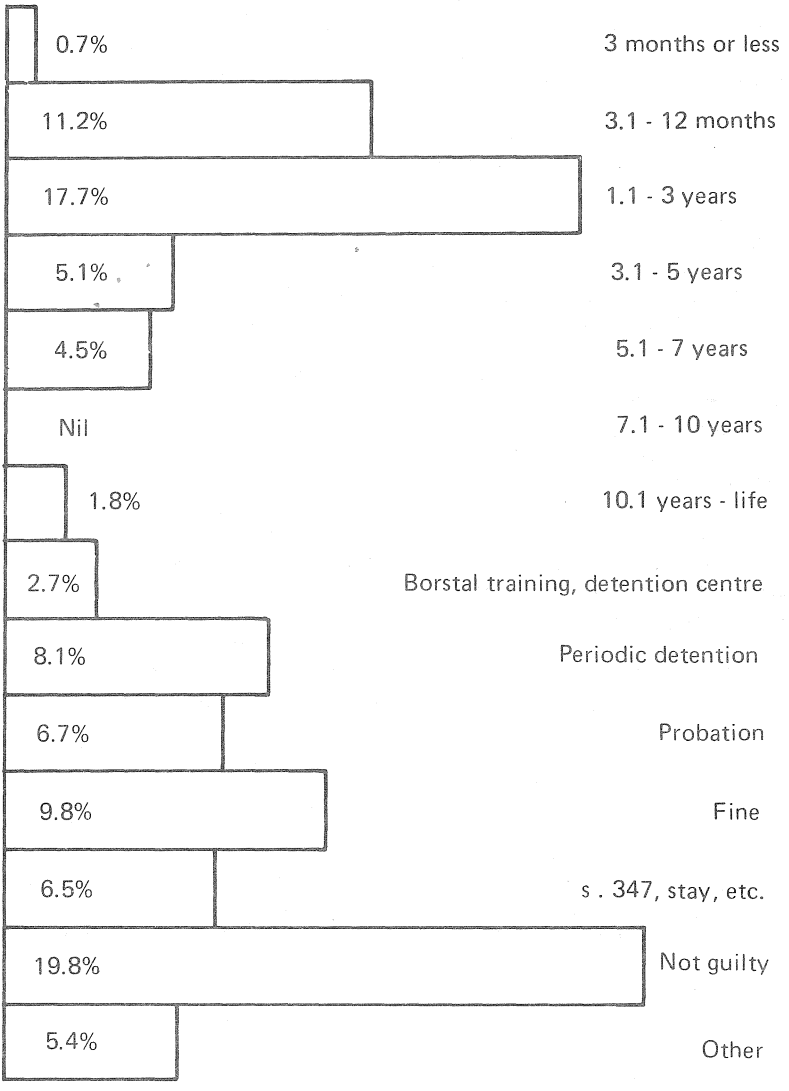


Figure 3

FINAL DISPOSITION



(Research sample)

Figure 4

number of persons convicted in the Magistrates' Courts, the percentage of appeals to the Supreme Court is very low. In the years 1973 to 1975 inclusive, appeals represented 0.4% of convictions for each year. Table 16 refers. In 1976, 64.8% of appeals were heard within 3 weeks of filing; 78.2% within 4 weeks; and 96.7% within 13 weeks. We note the comment of the Secretary for Justice that there is considerable administrative work in both the Supreme and Magistrates' Courts in preparing documentation for appeals. Abandonment or withdrawal compounds the problem and adds to delay. We would add ourselves that there is considerable cost in typing the notes of evidence taken in the Magistrates' Courts, for use in the Supreme Court.

221. ***Civil jurisdiction*** We set out, as Table 17, a synopsis of the civil actions commenced, the amount claimed, and the mode of trial, between the years 1960–76 inclusive. The most significant feature is substantial reduction in the number of actions commenced in 1976 and the main reason for this is the accident compensation legislation which came into force in April 1974. It is obvious the effect of this legislation is now being felt, but equally importantly, there has been a very large increase in the number of actions not arising from personal injury. That figure increased by almost 100% between 1973 and 1975, and has been especially significant in the Auckland and Hamilton Supreme Courts. The Department of Justice submitted that one could only speculate on reasons for this increase, but it would seem possible that some claims are now being litigated which were previously disposed of in another way. Table 18 demonstrates the extent of the increase in the 3 years referred to. The percentage increase of actions commenced in 1976, compared with 1960, is 66.6%. The total amount claimed in 1976 was $70,274,000; an increase over 1960 of 566%. The number of judge alone actions heard in 1976 was 435; an increase of 75.4% over 1960. There were 63 civil jury trials heard in 1976 compared with 138 in 1960. Relatively few jury actions are now proceeding to trial, and in 1976 civil jury trials occupied only 6.23% of the total Supreme Court sitting time. In 1973, of all civil claims filed in the Supreme Court, 53.7% were for amounts under $10,000. A departmental research sample indicated that by 1976 this percentage had reduced to 46.6%, and that of the actions filed in that year, 27.9% were in excess of $10,000 and 25.5% were for specific performance, orders, or other remedies. In Table 18 we draw attention to the number of actions transferred from the Magistrates' Courts for the enforcement of a judgment. While acknowledging that, in practice, such cases have little impact on court sitting time, we consider these transfers of proceedings to be an anachronism.

222. In its submissions, the Department of Justice also pointed out the anachronism of the bill writ procedure. The Revision Committee of the Rules Committee of the Supreme Court intends to recommend this procedure be abolished and replaced by a summary judgment procedure similar to that in use in the United Kingdom and New South Wales. We commend such a reform.

223. Table 19 is, in our opinion, a vital one. It shows that more than 70% of proceedings commenced in the Supreme Court are never set down for trial. It must be presumed that a large number of settlements are reached, but whatever the method of disposal, there is a great deal of administrative work involved in recording, issuing, and storing the documents concerned. Of civil actions filed in the Supreme Court, only 29% are set down for trial and less than 50% are heard. Like the

department, we took the year 1973 to give what seemed adequate time for the proceedings to have progressed to the hearing stage.

224. Apart from the figures already produced up to 1976, further information available for the first 6 months of 1977 indicates that 60% of civil actions were disposed of by means of settlement or withdrawal. There is a considerable difference in the statistics from various main areas of New Zealand. Taking judge alone actions for the first half of 1977 as an example, 88% of Wellington's cases, 69% of Hamilton's, 43% of Christchurch's, and 40% of Auckland's actions set down for trial were actually heard. In respect of defended matrimonial motions, the percentage heard was 88% for Wellington, 79% for Christchurch, 51% for Auckland, and 48% for Hamilton. Only 53% of Auckland's family protection cases were heard, compared with 93% for Christchurch and 100% for Hamilton and Wellington. The department submitted that there may be a number of reasons for these disparities but a reasonable assumption is that the intention of the setting down procedures, and policing of these, is better observed in some centres than others. Delay is one of the major issues before this Commission. To remedy this, programming organisation, optimum use of judicial time, administrative resources, and court accommodation will all be involved. The setting down rules were designed in the hope that only those cases ready for trial, and where a hearing seemed necessary to complete the litigation, would be set down. This objective has not been achieved. We repeat that of the actions actually set down for trial (29% of those filed), nearly 50% are in fact heard. Apart from the attention given to this vital issue by the Rules Revision Committee of the Supreme Court, the Commission itself will be discussing, under Part III of this Report, its ideas for pre-trial procedures and the obligations of the court and counsel in this regard.

225. The Department of Justice found that in 1973, of the 1423 tort and contract actions commenced in the sampled courts, only 148 (or 10.4%) went to hearing. We were told that a similar pattern exists in the Magistrates' Courts. The Commission became interested, given its concern with organisation of court business, in the delay between issuing proceedings and their setting down. We examined figures for the years 1973, 1975, and 1976 but considered the 1973 figures were more appropriate, because cases commenced in the later years may not yet be completed. From that year's figures we observed that the largest percentage of cases were not set down until at least 12 months after the proceedings were commenced. Having said this, we think we should nevertheless produce Table 20 because, on our interpretation of years subsequent to 1973, it can be said that the delay has considerably lessened in all classes of action. This table indicates that the legal profession has been improving its performance in setting down civil cases, but that civil cases are taking much longer to come to hearing. In 1976, twice as many cases were set down in under 6 months from the time of filing the claim, than in 1973.

226. We have heard complaints from several quarters that in particular areas of New Zealand, the civil business of the Supreme Court is badly in arrears. Circuit judges have found that in recent years most of their sitting time has been taken up in hearing criminal trials in the various circuit towns. We shall deal later with the particular problems of Auckland and Hamilton, but in 1976 overall, 78.9% of civil cases were heard within 3 months of setting down. Because we have been told of the marked differences between some courts in the percentage of cases which are set

down and actually go to trial, we requested the Department of Justice to let us have information concerning the relative workloads in the Supreme Court at Auckland, Wellington, and Christchurch. A comparative survey was done for those centres. We were reminded that it is more realistic, when discussing workloads and backlogs, to deal with cases that are actually heard, or about to be heard, and not with those that will be settled or withdrawn. The amount of work settled or tried in Auckland, Wellington, and Christchurch varies considerably. As an example, in Wellington 76.28% of judge alone actions set down in 1976 went to trial, whereas the percentage in Auckland was 36.12%. Table 21 sets out in more detail the percentage of cases heard and the percentage settled for these three centres in 1976 and 1977. In so far as any set of tables for three selected areas can provide proper comparison, we reproduce Tables 21 and 22 for the centres involved. Several of these figures are estimates based on previous years and may well prove to be wrong when actual figures are known. We bear in mind, of course, the variable factor of circuit work for judges in New Zealand, which depends on the demands of their own particular base cities. The tables do not include work at centres which are serviced by judges on circuit from the main cities.

227. The Department of Justice informed us that in most areas of work, Auckland's workload per judge is less than at the other two centres excepting in criminal trials and divorces. In view of detailed submissions from the senor resident judge of Auckland, which we shall refer to later, we can comment in advance that close examination of Tables 21 and 22 reveals that, although there is no great margin, Auckland judges heard fewer cases than Christchurch judges for that short period of 6 months in 1977. Likewise, they heard fewer cases than the Wellington judges in all types of work except divorces and criminal trials. Further, the number of criminal trials heard per judge is fairly constant for each court. On the matter of backlog of work, however, column 7 of Table 22 indicates that each Auckland judge had more work on hand at 1 July than his colleagues in Wellington and Christchurch. The department submitted that when considering the backlog of work compared with Wellington, the Auckland Supreme Court per judge has approximately 2 more actions, 2½ fewer divorces, 1½ more originating summonses, 5 more defended motions, and 4 more appeals pending. Wellington has considerably fewer criminal trials per judge than in Auckland or Christchurch, but the Wellington judges do a great number of criminal trials on circuit. Sometimes the Wellington judges can be occupied up to a total of one-third of their sitting time on circuit duties. We would comment, however, that all these comparisons and figures are subject to the qualification that cases vary in length. For example, we understand that research by the Speight Committee indicated that there are many more lengthy criminal trials in Auckland than elsewhere in New Zealand.

228. Figures supplied to the Commission suggest the Supreme Court spends approximately 7.7% of its total sitting time on divorce, 26%–30% in hearing electable offences, and 9%–11% in hearing purely indictable offences, leaving approximately 51%–57% of total sitting time for hearing civil claims, matrimonial property actions, company and bankruptcy matters, and civil and criminal appeals. We were also told that of the claims for damages in contract and tort (excluding personal injury claims) filed in 1973 and heard subsequently, 53% were for $10,000 or less. No doubt the decreasing value of money would have reduced that percentage today, but 1973 was taken as an example so that the claims would have

been heard by now. The percentage of claims heard for amounts under $10,000 does not equate with the percentage of time spent hearing them because smaller claims generally make shorter cases. Therefore, the actual sitting time spent hearing claims under $10,000 would be less than 53% of the total sitting time on civil actions. A rough estimate is that no more than 35% of sitting time on civil actions (or 17.85%–19.95% of total sitting time) is spent hearing claims under $10,000. Therefore, if divorce, electable crime, and claims under $10,000 are removed from the jurisdiction of the Supreme Court, something like 51%–58% of that court's sitting time will be freed. However, experience with the introduction of the Accident Compensation Act suggests that the removal of areas of jurisdiction, while affording some relief, is soon off-set by an increase in cases within the jurisdiction.

229. To keep the matter in proper perspective, these comments must be viewed against the background of excessive workloads being undertaken by our judges. Indeed, the sitting times of our Supreme Court judges compare unfavourably with those of members of the judiciary exercising comparable jurisdictions in other Commonwealth countries. Our judges are virtually called on to sit in court continuously. They nearly all travel on circuit, and are expected to be available to sit in the circuit court from the start of business on Monday morning until the completion of the week's work, which may be late on Friday afternoon or evening. It seems to be taken for granted that judges should travel from their homes on Sunday, returning late on Friday or Saturday. The New Zealand Law Society and several District Law Societies told us that the present system placed unreasonable demands upon the judges. The Law Society submitted that judges should have sufficient time off the Bench to give consideration to legal argument and completion of reserved judgments. We agree that justice should not be done in haste. The complaint that the court is proceeding with undue speed is heard all too frequently, particularly in the circuit centres. From some of those centres we heard adverse comment on the demands which society unthinkingly makes of the judges of the Supreme Court at the present time. Exacting timetables also make demands on judges' associates and court staff. We think it undesirable, and in the long-run unproductive, that several judges work on reserved judgments in most of their vacation time.

230. We regard it as both necessary and desirable that judges have the opportunity to read widely in the law and related subjects, and the time to pause and reflect on developments in the law and trends in the society which the law is intended to serve. While the proposals we are making should give substantial relief to the Supreme Court, so far as judge sitting time is concerned, we nevertheless consider all Supreme Court judges will still be very busy and that there will not be an over-provision of judge power.

The Business of the Court of Appeal

231. ***Criminal*** There has been a considerable change in emphasis in the work of the Court of Appeal. We produce Tables 23 and 24 which indicate that from the time of its inception as a permanent court until 1974, the preponderance of sitting time was devoted to civil business. This trend was reversed in 1975, becoming much more marked in 1976 and 1977. The figures in Table 23 demonstrate that up to 1966 the court was able to contain its business within a sitting year. From then on (with the apparent exception of 1973), the court has not been able to keep pace with the

volume of criminal appeals. In 1976, when faced with an increase of 30.3% in the number of appeals lodged, there were upward of 80 criminal appeals still to be heard when the court opened the 1977 year's sittings.

232. The Commission discussed the increased workload with the Court of Appeal. The President of that court provided the Commission with further statistics as follows:

Criminal appeals filed 1977	210	
Criminal appeals dealt with 1977 ...	168	(52 allowed; 116 dismissed)
Cases awaiting hearing:		
February 1975	32	
February 1976	50	
February 1977	80	
February 1978	114	

The department calculated the percentage of appeals against number of persons indicted, and we set out this information for the years 1970 to 1976:

	Percent
1970	28.7
1971	30.2
1972	30.1
1973	25.4
1974	17.7
1975	19.2
1976	25.2

These figures reveal that though there is a substantial increase in the number of criminal appeals, these have not increased out of proportion to the number of persons indicted. Urgent measures were taken in 1977 to cope with the backlog of work. We deal with specific recommendations in this regard under a separate heading in Part III. The Commission is concerned that despite the measures taken last year by increasing the permanent membership of the court and by greater use of Supreme Court judges on criminal appeals, appeals are still having to wait an unreasonable length of time to be determined. We also deal with this problem in Part III.

233. ***Civil*** Table 25 shows the growth in the number of civil appeals lodged since the permanent court was established. The percentage increase between 1958 and 1976 is 164%, but because of the heavy increase in criminal appeals little additional sitting time has been available for the hearing of civil appeals: 44 days in 1976 as against 40.5 days in 1958. The figures provided for the Commission by the President of the Court of Appeal are as follows:

Civil appeals filed 1976	131	
Civil appeals dealt with 1976	52	(24 allowed; 28 dismissed)
Cases awaiting hearing:		
February 1975	15	
February 1976	18	
February 1977	40	
February 1978	60	

Overseas Comparisons

234. We reproduce in Table 26 comparative prosecution rates for New Zealand, England and Wales, and Scotland for 1976. This table reveals that the rate of prosecutions per 1000 population in the Magistrates' Courts is more than twice that of England and Wales, and Scotland. We realise that comparison between our country and the others mentioned is subject to variables, such as the age at which driving licences may be granted: in New Zealand there is one vehicle for every 2.3 persons contrasted with one vehicle for 3.6 persons in the United Kingdom. The Department of Justice submitted that this table places in stark perspective the pressure under which our criminal justice system is operating—no doubt to the detriment of its true and proper role. The department claims this data suggests that in contrast to overseas countries our courts may be overloaded with relatively trivial matters. We think there is some substance in this submission and we shall subsequently examine methods of relieving the lower court of some traffic offences which, as Table 26 demonstrates, form by far the greater proportion of the caseload in the Magistrate's Courts.

Future Projections

235. Dr J. H. Darwin, of the Applied Mathematics Division of the Department of Scientific and Industrial Research, was commissioned to prepare a series of projections on likely workloads of the courts in the future. These projections are based upon the statistics for past workload of the courts supplied by the Department of Justice. Statistical forecasting is not, of course, an exact science. The projections, reproduced as Tables 27 to 34, must be read with caution. In our view they are useful as indicators of probable trends. In particular, we note the following points.

236. There is a large number of variables which may affect the accuracy of the projections. For example, two variables, useful in interpreting the past, were the size of the police force and the rate of urbanisation: however, because of their future uncertainty, these variables have not proved useful in the projections. Other variables that will affect the predictions presently unknown, include changes in policy, the law, and social conditions. Two variables which in the past have had a calculable effect on the rate of offending, and hence on the criminal workload of the courts, are the proportion and number of persons in the 15–24 year-old age group (paragraph 197) and the proportion and number of Maori people. As far as possible, these two factors were incorporated into the projections. One difficulty in this regard is that in most cases the age and race of persons appearing before the courts have not been recorded, so that it is difficult to make a sound estimate of likely changes in the incidence of prosecutions for such significant groups as the Maori and non-Maori 15–19 and 20–24 year-old age groups. It was nevertheless necessary to estimate the relative effect of the size and proportion of different age groups in relation to the rate of prosecutions. The result is a pronounced uncertainty in the forecasts, but this is expressed in the graphs by drawing two broken lines between which the court load may be expected to lie. The figures for the years 1971–1976 are also given, connected by solid lines. The upper broken line in each graph is based on the assumption that the relationship between the workload of the courts and certain variables relating to age and race will have the same pattern in relation to the size of the population in the future as they did in the period from 1952 to 1976. Put another way, the upper line indicates the

projected workload of the courts if the estimates for the total population, the Maori population in the 15–19 and 20–24 year age groups, and the non-Maori population for the same groups, have the same relationship to the workload as they did in the years 1952–1976. The shape of this line is mainly determined by changes in the 15–24 year-old age groups, and is not greatly affected by variations in the population.

237. The lower broken line ignores any changes in the proportion of the population in the 15–24 year-old age groups. It is based on the assumption that the relationship between the workload of the courts and the size of the population will be the same in the future as it was between the years 1952–1976. Ordinarily the bounding lines for projections will diverge as time goes by. This does not occur in these graphs because, as we have indicated, different methods were used for either line. It is the shape of the upper curve as much as its actual position that is significant. Those who will be in the 15–24 year-old age group in the 1990s are mostly alive today so that changes in this age group in proportion to the total population may be accurately forecast. Current population projections assume low fertility and immigration rates, and in particular a declining birth rate, which has only recently become discernible amongst the Maori people.

238. In presenting these projections to the Commission, Dr Darwin said:

> In thinking about these lines it is probably best to expect the actual outcome suggested by past records to be closer to the upper line than to the lower line. Should the apparent upward trend in rates continue in the next few years, as could happen with some large race-age groups growing up through the difficult years, the actual outcome could be up to or over the upper line. The projections will of course, become increasingly suspect if there are substantial social changes arising for instance from unemployment, that make the background for the future different from that in the past.

The figures on the vertical axis of the graphs refer to counts or charges not persons. Because in some instances the available statistics do not distinguish different offences within the same category, for example, theft, all offences within that category have been placed in the sentence range where most of the offences would probably fall. In the case of theft, this was the 3–7 year category. The sentence categories themselves refer to the sentences prescribed by law rather than the actual sentence imposed. Finally, where a change in the law has in the past produced a jump in the number of charges within a particular category, the trend since that change has been used rather than the overall pattern.

239. In spite of these factors the Department of Justice submitted that the picture can only be described as gloomy and that positive measures will need to be taken if the criminal justice system is to cope. We share that foreboding.

240. With the exception of the Traffic Non-imprisonable category, substantial increases are projected, at least until 1986, for all offences. The basis for both lines in the Traffic Non-imprisonable category is the 1976 number of vehicles per thousand population, multiplied by 150 for the upper line with a high population estimate, and 134 for the lower line with a low population estimate. The figures 150 and 134 are the highest, and the average number, of court appearances per thousand registered vehicles for the last 5 years. Factors such as an increasing shortage of oil are to some extent accounted for by the selection of these figures.

241. Because the Children's and Young Persons Boards have only been in operation in the last 3 years, no clear pattern of change in numbers in this category has emerged. The lower line is, therefore, based on the assumption that the relationship between the number of cases and the numbers in the Maori 15–19 and non-Maori 15–19 year-old classes will persist in the future. The upper line is based on an assumed high rate per thousand, that is, about 20 percent higher than the 1976 rate per thousand. The fall off after 1981 corresponds to a projected decrease in the proportion of persons within this age class. The lines for the over one year and up to three years category are based on data which effectively is only available from 1965.

242. The fall-off indicated in some of the graphs after 1986 should not be a cause for undue optimism. The reliability of the projections is in inverse proportion to increases in the length of time projected. Thus the projections for the next 10 years, where substantial increases are forecast for the more serious offences, are more reliable than the predictions for the years following. Notwithstanding the difficulties inherent in predictions of this nature, the need to maintain an efficient and humane court system, capable of responding to all but the most savage increases in workload, is manifest.

PART III

The Future: Proposed Court Structure

243. One of the primary purposes of government is the maintenance of peace and order within the community by settling disputes between citizens or citizens and the State according to law. In our country the attainment of this goal is vested in the courts. To carry out this role the courts must be independent of the Executive and Parliament, must have sufficient resources, and must have an appropriate organisation. The courts must, in the words of the judicial oath, "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill-will". The same concepts are inherent in the principle of the rule of law to which this country subscribes.

CRITERIA FOR REFORM

244. We consider that there are seven criteria which are essential for a court structure in New Zealand. These are:

Suitability to conditions in New Zealand
Economic feasibility
Service to the public
Preservation of the independence of the judiciary
Best use of judicial and legal talent
Simplicity
Efficient administration

We turn to consider each of these criteria.

Suitability to Conditions in New Zealand

245. The court structure must be appropriate to conditions in New Zealand. There are two basic factors that restrict and shape any attempt to structure the administration of justice in this country. The first is the geographic configuration of the country. The second is the small and scattered nature of its population. These factors produce a conflict between a centralised system making best use of judicial and other legal talents, including specialised knowledge and skills, as well as buildings and administrative staff: contrasted with the need to show the face of justice throughout the country to meet the needs of the local community quickly and with minimum inconvenience to residents. The spread of population results in significant variations in court workloads in different parts of New Zealand. It needs to be recognised that a solution suitable for one or more centres may be inappropriate elsewhere. Court structure must also be in harmony with the essential nature of New Zealand society. New Zealand has a small population and the multi-cultural, relatively egalitarian character of its people has been widely commented upon. It has been suggested to us that the community places greater importance on factors tending to make the court system work efficiently and effectively than on matters of tradition and status. The issues were well summed up

by the Solicitor-General on the opening day of the hearings of the Commission:

> In the field of justice particularly, we cannot afford lightly to cast aside what has been found to have stood the test of time. On the other hand, however, we cannot afford to cling stubbornly to what is no longer worth while merely because we have had it for a long time.

Consequently, this Commission has examined the total court system to see how well it is performing the task of administering justice in the community. In this part of the report we suggest improvements which we consider should be effected.

Economic Feasibility

246. To some, administration of justice should not be limited by any question of cost. In our opinion, such a view is unrealistic. The court system in New Zealand must be economically feasible for there are necessary limits on the sum available for expenditure. Proposals relating to court structure should take due account of the costs of administration and provision of buildings and facilities necessary for the courts to function efficiently. There is much to commend proposals which fall within the existing administrative framework and avoid the cost of expansion and duplication of court buildings. In this context New Zealand's current adverse economic situation cannot be ignored. Yet recommendations based on current economic conditions should not prejudice changes which would benefit the long-term administration of justice in this country.

Service to the Public

247. It is imperative that the judicial system of this country serves the public and that it should be administered to achieve that end. It follows that the courts must be readily accessible to all; that recourse to the courts must not be unduly expensive; and that the business of persons before the court should be despatched with promptness and efficiency. Justice administered in the courts should be of a high standard. It also means that the courts must be capable of adjusting to developments and trends within society and of meeting the needs of all groups. While, in our view, generally there should not be special rules for special groups, we must ensure that all persons who come before the courts are in a position to both understand and participate in the proceedings. No person should be disadvantaged. In a democratic society the courts exist to serve the needs of the people. There is a danger that in practice, and over long periods of time, courts, as with other organised institutions, come to regard themselves as ends rather than means and prefer the needs and convenience of the institution and its members to those of the people who use it. Accordingly, it is salutary that the courts should periodically undergo scrutiny.

Preservation of the Independence of the Judiciary

248. Independence is an essential quality in a judge and it is imperative that the independence of the judiciary be respected and maintained. Without that independence, the just determination of proceedings cannot be assured and public confidence in the integrity of the judicial process is destroyed. The tradition of judicial independence, freedom from favour as well as from fear, is of fundamental constitutional importance in

maintaining a proper balance in the continuing relationship between the State and the citizen. In revising the structure of the courts this basic principle must not be eroded.

Best Use of Judicial and Legal Talent

249. The court system should make best use of the judicial talent available within the court hierarchy. Different judicial talents are required at the various levels and, given the size of the profession in this country, the number of practitioners who would be proficient in the work of the Court of Appeal or the Supreme Court is necessarily restricted. It follows that simply to increase the number of Supreme Court judges as the work of that court increases is not the answer. Supreme Court judges should not be burdened with routine and mundane matters. We should re-define the roles of various courts and carefully analyse their jurisdictions with a view to re-allocating the work. We strongly believe that to make best use of judicial talents the greatest possible degree of flexibility is both necessary and desirable. In approaching this task, two premises should be applied: first, that courts of summary jurisdiction should deal with the bulk of the work; and secondly, adopting a principle from the theory of management, that disputes should be resolved at the appropriate competent level. Judicial attributes should be matched to case importance and difficulty.

Simplicity

250. The court system should also have the advantage of simplicity and uniformity. It should appear logical and have practical meaning to the man in the street. In a country with a population of three million people, the present structure of three tiers of courts (summary court, high court, and appellate court) appears to be sound and quite sufficient to meet the needs of the citizens. As a general principle, proliferation of courts is undesirable.

Efficient Administration

251. We can do no better than adopt the remarks of the former Chief Justice, the Rt. Hon. Sir Richard Wild, when he said:

> If the law itself is bad the Courts may yet manage in many cases to achieve justice. But if the administration of the Courts is bad then, even though the law is sound, injustices will be done. The smooth working of the Courts is therefore essential to justice.

252. Before turning to consider our proposals in detail, we make particular reference to ethnic minorities in New Zealand.

253. ***Ethnic minorities*** The Commission heard a number of submissions concerning the problems encountered by members of minority groups who use our courts. Some submissions came, not from members of the minority groups, but from those who sought to assist them. Throughout this report there are many recommendations made by the Commission designed to meet the needs of minority groups. It is well, however, to remember that attempts to develop different laws for different sections of the community, or to develop a multi-lingual society, would involve considerable cost and at least be potentially divisive. The goal, if the law is to be seen to be just, must be the even handed application of the law to all members of our community. We therefore consider it is of great importance to retain one law for all our people, while making every effort

to ensure that the law is understandable to all, and that adequate allowance is made for the special needs and problems of minority groups. We appreciate that fostering different cultures increases the self-respect of citizens from those cultures and that they are likely to be better and happier citizens in such circumstances. Enhancement of New Zealand's cultural groups should, however, be combined with a process which ensures that all our citizens are taught to speak and read English well and to understand the law, it being made clear that there is one law for all.

Our Proposals for Change

254. We have tested all our proposals against the seven criteria to which we previously refer, bearing in mind that while there should be no change for the sake of change, we should firmly recommend whatever improvements we are satisfied are required.

255. Both the Department of Justice and the New Zealand Law Society agreed in their submissions that administration of justice in New Zealand can best be effected now, and in the future, by a three-tier structure of courts comprising summary courts (to be called "the District Courts"), a superior court (to be called the "High Court"), and a Court of Appeal. Although there are changes to names in this proposal, it is to all intents and purposes the same structure we now have, and we agree that for a country with our population, the present three-tier court system is sound. We have found no persuasive argument in favour of a substantial change to the basic structure. We are, however, recommending many changes within the basic structure, the cumulative result of which will have a profound and radical effect on the business of the courts.

256. The most important change we recommend concerns the administration of our courts. Our aim is to weld the courts of New Zealand into a coherent and well-administered whole. To achieve this we do not consider it necessary to create what was, in some submissions, referred to as a unified court. In our view, the proposals to create one court for the whole of New Zealand, though attractive, have certain inherent difficulties with which we deal at a later juncture. We consider that our proposals avoid such difficulties.

257. We consider that a Judicial Commission, comprising representatives of the High Court and the District Courts, the Government, and the New Zealand Law Society, should exercise overall supervision of court administration together with other aspects of the judicial function such as appointments, complaints, and study programmes. In the courts themselves we recommend the division of the country into four regions and the appointment of list judges and regional court administrators for the efficient management of the courts. A key aspect of our changes concerns flexibility, enabling not only the best use of time and availability of judges, but providing maximum service to the public. Our structure will allow for the degree of specialisation which is appropriate for New Zealand's needs at the present time. One of the factors which impedes the administration of our courts is lack of satisfactory court procedures; we have therefore considered suggestions for procedural requirements. Some of these lie outside our terms of reference but, where possible, we have drawn attention to procedural matters which should assist the smooth running of the courts.

258. We are satisfied that, as submissions from many quarters have demonstrated, a disproportionate amount of Supreme Court judges' time is being devoted to criminal trials, to the detriment of the civil work of that

court. A further submission which we endorse is that Magistrates' Courts currently exercise wide general jurisdiction, requiring a high degree of judicial competence, that is not reflected in the term "magistrate". In our opinion, these courts should be named "District Courts" and presided over by judges. We recommend accordingly. We see advantages to recruitment by improving the court's standing and extending its jurisdiction, and in relieving pressure upon the High Court. In recommending these changes we are anxious not to destroy the essential nature of the Magistrates' Courts: we see the proposed District Courts as local courts readily accessible to the people, equipped and staffed to provide justice speedily with a minimum of formality and expense. We see these courts exercising a wide jurisdiction. All sections of the community should be able to approach the court without apprehension or mistrust, and with the minimum of fuss.

259. A great number of submissions have persuaded us that there should be a Family Division of the District Courts with a wide jurisdiction in all aspects of family law. We have given very detailed consideration to the needs of the Family Court and have made comprehensive recommendations.

260. Implicit in our recommendation for newly constituted District Courts is the belief, following one of the criteria we have set ourselves, that the best possible use should be made of available judicial talent. In broad terms, we agree with the proposal that the civil jurisdiction of the District Courts should be increased to $10,000. We are also persuaded that small claims tribunals and the jurisdiction of justices of the peace should remain within the administration of the District Courts. The extent of the criminal jurisdiction of this court has been one of the vexed problems which the Commission was obliged to consider, and we later recommend that lesser criminal jury trials should be heard by certain District Court judges warranted for that purpose.

261. The terms "superior court" or "High Court" have been used to indicate a court of first instance with jurisdiction above that of a summary court. Although the Supreme Court has borne that name for over 100 years, we consider the name is better changed to that of "High Court" through the legislative practice of constituting a Supreme Court consisting of a Court of Appeal and a High Court. Precedent for this practice appears in the Courts Act 1971 (U.K.) and the Supreme Court Act 1970 (N.S.W.). The High Court's jurisdiction should be appropriate to a superior court in respect of both its original jurisdiction and its appellate and review functions. It follows that we support retention and development of the Administrative Division of the High Court. While not generally considering that the creation of other specialist divisions of the High Court is yet necessary, we accept that specialisation on the part of individual judges is desirable where this can be practically achieved. We discuss the effect of removing lesser jury criminal cases, a substantial amount of matrimonial and divorce work, as well as certain other civil business, upon the workload of High Court judges. We recommend that there be provision for trial by judge alone of indictable offences, but only at the option of the accused. Having regard to the present complement of the Supreme Court Bench we are satisfied it is reasonable to increase the number that can be appointed under the Judicature Act from 22 to 25.

262. Item 2 of the terms of reference requires us to stipulate an alternative constitution for the Court of Appeal, depending upon whether the existing right of appeal to the Judicial Committee of the Privy Council

is retained or abolished. We attend to this matter in more detail but observe that we do not recommend any change in the jurisdiction of the Court of Appeal. We do recommend, however, immediate appointment of a fifth judge to the court, reserving our reasons for the appropriate section. We also recommend that the Court of Appeal continues to be able to sit in divisions.

263. We now examine the courts and make our proposals and recommendations in more detail.

THE COURT OF APPEAL

264. We are required to consider the constitution of the Court of Appeal in each of the following circumstances:

(a) that the Judicial Committee of the Privy Council remains the final appellate tribunal for New Zealand;
(b) that the Court of Appeal becomes the final appellate tribunal for New Zealand in all cases.

265. Whether or not the right of appeal to the Judicial Committee of the Privy Council should be abolished is outside our terms of reference. We have, however, received many submissions concerning the right of appeal to the Judicial Committee, some of the submissions being from people well equipped by knowledge and experience to speak on the subject, and almost all indicating a very careful consideration of the issues. Moreover, it appears to us that the issue should not be regarded simply as a political one, for a decision to abolish the right of appeal to the Judicial Committee will have very important consequences for the whole of our judicial system and will not merely affect the constitution of the Court of Appeal. Bearing this in mind, and since the matter has been canvassed so exhaustively before us, we have come to the conclusion that we should accede to the request made by the New Zealand Law Society to summarise the arguments both for and against retention of the right of appeal. It appears to us that we can properly do this without straying outside our terms of reference and that in due time such a summary may be of assistance to those who come to make a decision on the matter. We accordingly summarise the arguments for and against the right of appeal as follows (freely acknowledging our indebtedness to those who have made submissions).

Arguments in Favour of the Right of Appeal to the Privy Council

266. The existence of the right of appeal to the Judicial Committee acts as a check upon the New Zealand Court of Appeal, that is, the further right of appeal has a beneficial effect upon the quality of judgments given in the Court of Appeal.

267. The right of appeal to the Judicial Committee enables New Zealand to maintain a two-tier appellate system. It is suggested that this is a significant advantage in that a second right of appeal is necessary to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined. It is also said that New Zealand does not itself have the resources or the volume of litigation to warrant the establishment of a two-tier appellate system.

268. The right of appeal to the Judicial Committee makes available to New Zealand litigants a court of the highest calibre, at no cost to the New Zealand taxpayer. It is suggested that the New Zealand judiciary, because

of the inevitably limited numbers from which the judges must be drawn, cannot aspire to the standard of legal excellence found amongst the judges of the Judicial Committee.

269. The judges of the Judicial Committee, because they are removed from the local scene and local pressures, are likely to provide a greater measure of detachment; whereas New Zealand is a small nation with a small population so it may on occasions be difficult for judges to divorce themselves from local issues. In support of this argument it is often suggested that, particularly in recent years when judges from Australia and New Zealand have been sitting in the Judicial Committee, the quality of the judgments of the court has been of a very high order indeed, with the judges showing a real ability to understand New Zealand conditions and social policy. Frequently quoted examples in this connection are the decisions in *Haldane v. Haldane* [1976] 2 N.Z.L.R. 715 and *Frazer v. Walker and Others* [1966] N.Z.L.R. 331. Supporters of the appeal to the Judicial Committee suggest that much criticised judgments like *Wallis and Others v. Solicitor-General* [1903] N.Z.P.C.C. 23 are ancient history.

270. Sometimes linked with the above argument is the suggestion that the practice whereby New Zealand judges sit from time to time on the Judicial Committee provides for our judges the benefit of associating with other judges of the highest ability, thereby improving the quality of decisions of our own judges.

271. It is said that it is important to retain common law links and that so long as both the British and New Zealand common law continue to run on somewhat parallel lines (with New Zealand courts frequently referring to United Kingdom authorities), there is no reason to remove the right of appeal to the Judicial Committee. It is argued that this is not inconsistent with our national identity in that we use overseas expertise in many areas such as education, health, defence, economics. It is sometimes also suggested that the existence of the right of appeal preserves the unity of the Commonwealth, although this argument is of limited contemporary importance.

272. The cost of taking an appeal to the Judicial Committee, while high, does not necessarily greatly exceed the cost of taking an appeal to the Court of Appeal (if the counsel come from outside the Wellington area). The main difference in an appeal to the Judicial Committee is the air fare plus somewhat lengthier accommodation costs. It is said that, whatever the extra cost, this is justified by the value of the appeal and that the problem of cost could, in any event, be alleviated by more generous provision of legal aid for appeals to the Judicial Committee.

Arguments Against the Right of Appeal to the Privy Council

273. The existence of the right of appeal to the Judicial Committee has inhibited the growth of New Zealand law. There is a body of opinion which holds that until the New Zealand Court of Appeal is free to act in a completely autonomous manner, it cannot in all cases effectively develop New Zealand law for New Zealand conditions. This viewpoint has been expressed by a past President of the Court of Appeal* and he repeated his views to the Royal Commission. Some lawyers and individual citizens also took the view that the appeal to the Judicial Committee is inconsistent with our national identity and that it is important for the New Zealand law to be firmly rooted in the New Zealand and Pacific context.

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*McCarthy P. (1976) N.Z.L.J. 376 at 380.

274. The claim that a two-tier appellate system necessarily results in better justice is disputed by those who oppose retention of the right of appeal to the Judicial Committee. While acknowledging that it may not be practicable in the New Zealand context to provide a two-tier appellate system, opponents of the right of appeal take the view that by the time most cases involving an important legal principle reach the level of the Court of Appeal, there are two equally valid sides, with the decision in many cases really being a matter of social policy or judicial philosophy. It is suggested that in such circumstances, the final decision should preferably be made by a New Zealand court. It is also argued that a certain percentage of cases will always be reversed so that, in all probability, a three-tier appellate system would provide a similar percentage of decisions which were reversed in the final instance; and, in any event, there must be compromise between, on the one hand, perfect justice, and on the other hand, the cost and delay associated with continuing appeals. In relation to a two-tier system of appeal, opponents of appeals to the Judicial Committee point out that at the present time, decisions of the Court of Appeal in criminal cases are, for most practical purposes, final. Although our courts have paid considerable regard to the decisions of the United Kingdom courts in criminal matters, the Judicial Committee has not itself played any significant part in the development of our criminal law and normally declines to act as a court of criminal appeal. It is said that since we accept a single appeal in criminal cases, where the liberty of the subject is often at stake, it is difficult to contend that there should be two appeals in a civil case.

275. In relation to the quality of judicial talent, opponents of the right of appeal to the Judicial Committee tend to concede that, generally speaking, decisions of the Judicial Committee are of the highest calibre (although unfamiliarity with the increasing number of statutes which have no United Kingdom counterpart is a disadvantage). As against this, however, it is pointed out that judgments of our own Court of Appeal are of the highest standard and that scrutiny in the Judicial Committee should be unnecessary. It is also suggested that sound and uniform adjudication by judges whose social thinking is attuned to that of those whom they are judging is preferable to top quality in the strictly legal sense.

276. In relation to detachment from local pressures, opponents of the appeal to the Judicial Committee claim this to be a disadvantage, rather than a merit, and suggest that the very question of aloofness and inability to understand the New Zealand scene is one of the real criticisms of the Judicial Committee, which is not remedied by sending a New Zealand judge to London from time to time. It is also said that the inference that New Zealand Supreme Court judges are incapable of sufficient detachment is both unfair to the judges and incorrect, there being no reason to suggest that New Zealand judges are in any way open to criticism in this regard.

277. It is conceded there may be some benefit to New Zealand judges who sit on the Judicial Committee but opponents of appeal point out that like benefit can readily be obtained by judges who keep in contact with their English and other overseas counterparts through sabbatical leave, attendance at legal conferences, and other such means.

278. The argument based on the value of links with overseas opinions and the unity of the Commonwealth is said to be weak, inasmuch as most of the Commonwealth countries have now abandoned the Judicial

Committee. It is also urged that in so far as a special relationship exists between the United Kingdom and New Zealand, formal institutions are neither necessary nor sufficient for its preservation and that the entry of the United Kingdom into the European Economic Community will further diminish any such relationship. In this context, it is stressed by opponents of the right of appeal that there is no indication that any country which has abandoned the appeal would wish to reinstate it, or that the standard of jurisprudence in such countries has declined. It is urged that cross-pollination of views inevitably occurs today between all judicial systems.

279. Those who oppose retention of the right of appeal particularly stress the disadvantages of cost and delay. It is suggested that the cost of an appeal prices the great majority of New Zealanders out of the market and that only the Crown, substantial corporations, or wealthy individual litigants can sustain such an appeal. It was suggested that there are specific instances where litigants have been forced to compromise in the face of the threat of an appeal to the Judicial Committee. The Otago branch of the New Zealand Legal Association pointed out that some claim "the right of appeal is . . . an unnecessary luxury for the wealthy, and a denial of justice for the ordinary citizen".

280. We hope we have done justice to both sides of the argument in the above summary. We have endeavoured to state, in each case, the substance of the argument rather than enter into matters of detail. We should also mention that at the 1972 New Zealand Law Conference a paper was presented which lucidly dealt with many of the arguments.* Further discussion ensued at the 1978 New Zealand Law Conference and reports of this discussion will be available in due course. We think it appropriate to record that there is clearly a genuine difference of opinion and that there are meritorious points on both sides of the argument. Bearing in mind that, taken over all, the existence of the right of appeal to the Judicial Committee has been of real value to development of New Zealand jurisprudence, we are of the opinion that this right should not lightly be abolished, and that the sole criterion must be whether abolition of such appeals will be beneficial to New Zealand's judicial system in the widest sense.

The Constitution of the Court of Appeal in the Event that the Judicial Committee Remains the Final Appellate Tribunal

281. ***The function of the court*** The statistics provided for us make it clear that judges of the Court of Appeal have for some time past been carrying an unacceptably high workload. Indeed, of recent years, the workload has been intolerable in an appellate court. As a result, despite the judges' most strenuous efforts, a considerable backlog of cases has developed. As at September 1977 there were 104 criminal, 55 civil, and 3 miscellaneous appeals awaiting hearing, representing, in 1976 figures, something like 8 months of criminal work and a year's civil work. These arrears existed even though in 1976 the Court of Appeal sat on 139 days and disposed of 164 criminal appeals and 52 civil appeals. As a result of the pressure of work in the Court of Appeal, the Government passed the 1977 Judicature Amendment Act. This Act increased the number of judges (other than the President) from 2 to 3; enabled a single judge of the

*Haslam J. [1972] N.Z.L.J. at 542.

Court of Appeal to make certain orders; and made provision for temporary judges to be assigned to the Court of Appeal (any such appointment to be for a period not exceeding three months). This last provision expires after two years. The Amendment Act also provided that the Court of Appeal might sit in divisions: we recommend that provision be retained.

282. Although it is hoped that the Amendment Act will partly correct pressure of work and delays, it is at best an interim solution passed as an emergency measure. Cases coming before the Court of Appeal, both civil and criminal, have shown a steady growth, with the increase in numbers becoming more rapid over recent years. We agree with the Secretary for Justice that sitting time for each judge of the Court of Appeal should be about 120 days a year, amounting to a little over half the judge's available time. It is also necessary to make allowance for sabbatical leave, illness, and the occasional absence of a judge on other duties such as chairmanship of a Royal Commission or sitting on the Judicial Committee. We are anxious to see the Court of Appeal placed in a position where it can fulfil its proper role in our system, a role well summarised by the Secretary for Justice:

> The Court of Appeal has a place in the judicial system going beyond the mere correction of wrong decisions. Its unique role as I understand it is to act as a custodian of the spirit of the common law and to develop that law in a harmonious, consistent and rational way. This is of great importance even if for the time being New Zealand preserves the present right of appeal to the Privy Council. The number of such appeals are and are likely to remain few. If the appeal to the Privy Council is done away with the importance of the Court of Appeal becomes ever greater. It will require to become, as indeed in some measure it already has, an independent source of development of the law, contributing to other common law jurisdiction as well as receiving from them, preserving a unity of spirit and principle with others of the common law family while taking into account without inhibition the particular conditions, circumstances and values of New Zealand.
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> In order to achieve this the Judges of the Court of Appeal must not be wholly enslaved to the pressures of day to day work. If their decisions are to be of the highest quality they cannot afford to spend too much of their time sitting in court. They must have the opportunity to reflect, to consider and to discuss. They must have some leisure for reading in the law and indeed beyond it, over and above the needs of the particular case they are called on to decide. Moreover, not only should the judges of the Court of Appeal be lawyers of high quality, but the court should have that collegiate character that can come only if the same judges are sitting together over a substantial period.

283. ***The number of judges required*** We are agreed that, for the court to function in the above manner, a minimum of five permanent judges (together with the Chief Justice ex officio) is required at the present time. In this connection, differing views were expressed to us by past and present judges of the Court of Appeal and by members of the Bar who made submissions. These views were, however, expressed before the appointment of the fourth permanent judge to the court, and before passing of the Judicature Amendment Act 1977, as a result of which the court has recently sat in two divisions with the assistance of two Supreme

Court judges. Despite these measures the backlog of work has not been eliminated. As at April 1978 there were still 76 criminal, 57 civil, and 4 miscellaneous appeals awaiting hearing. Making full allowance for the fact that in early 1978 there was an exceptionally lengthy hearing of certain appeals arising out of one criminal case, we have nevertheless concluded that a permanent court of five is now required. We consider it vital that the Court of Appeal should not again be placed in the difficult position which has developed over the past few years. It should also be kept in mind that, so long as the appeal to the Judicial Committee is retained, it is desirable to enable Court of Appeal judges to sit regularly on the Judicial Committee and that the complement of Court of Appeal judges should be sufficient to permit this.

284. ***Temporary judges of the Court of Appeal*** Civil appeals. We are of the opinion that appointment of temporary judges to the Court of Appeal to hear civil appeals is inconsistent with proper functioning of the court and should be confined to truly extraordinary and emergency circumstances. This was the viewpoint both of the Secretary for Justice and the New Zealand Law Society. The Law Society in particular set out relevant reasons, and we record our entire agreement with what was said. We particularly point out the need for permanency and continuity, both of which aspects were referred to by a former President of the Court of Appeal.* We also consider that Court of Appeal judges should not sit in the High Court except in cases of emergency or other exceptional circumstances. For emergency purposes it appears necessary to retain appropriate power to appoint a High Court judge to the Court of Appeal, for example, when one of the regular judges is obliged to disqualify himself because of knowledge of the parties or the litigation. Temporary illness would be another reason.

285. Criminal appeals. Somewhat different considerations apply to criminal appeals. A Supreme Court judge suggested that criminal appeals might be heard on a peripatetic basis in each of the main centres with the court being composed of one judge of the Court of Appeal and two High Court judges (not, of course, being the trial judge). The judge pointed out that this would be of "double benefit" both to the Court of Appeal judges and to the judges of first instance. In his opinion, knowledge of the local area is important in relation to appeals. He also noted a further potential advantage in that the same counsel would appear before the Court of Appeal as appeared in the High Court, whereas at the present time in criminal cases different counsel frequently appear in the Court of Appeal. The matter having been raised, the Solicitor-General has informed the Commission that all Crown solicitors have been advised on more than one occasion to notify the Crown Law Office if they think there is particular reason for the counsel who conducted the trial to appear on the appeal. If practicable, arrangements would then be made for that counsel to appear. The Solicitor-General told us that not many such applications are made and he could not think of any case in recent years where the counsel who conducted the prosecution had been refused authority to appear on the appeal when he sought it.

286. The viewpoint of "double benefit" expressed by the judge in his submissions is supported by the Secretary for Justice, who suggested a similar system for criminal appeals (without advocating that they should necessarily be heard in centres outside Wellington). The Secretary for

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*Turner P. (1973) N.Z.L.R. at 322.

Justice also considered it desirable to make provision for any important case to be heard before the permanent judges of the Court of Appeal and that if a major question of law emerged in the course of an ordinary appeal, the procedure of the court should be flexible enough for the appeal to be re-argued before the permanent Bench, if this appeared desirable. For a variety of reasons, these views did not meet with the approval of certain other judges. In particular, it was suggested that hearing criminal appeals in such a manner might lead to inconsistency and that the presence of one permanent Court of Appeal judge was not sufficient to guard against this. In addition, it was suggested that such a procedure might induce an incorrect public belief that the Court of Appeal was weighted in favour of upholding the decision at first instance. There are also problems in connection with sittings of the court outside Wellington (paragraph 292).

287. On balance we prefer the view expressed to us by the New Zealand Law Society and the Criminal Law Reform Committee that it is normally preferable if only one judge from the High Court joins the Court of Appeal for the hearing of a criminal appeal. All the evidence which we have from overseas sources indicates that this procedure is of "double benefit" to both the Court of Appeal and the High Court, and we accordingly recommend that it should be followed when appropriate in the future. If this is done, we do not consider it necessary to constitute a criminal division of the Court of Appeal. On the contrary, we think it desirable for all judges of the Court of Appeal to sit regularly upon criminal appeals in order to bring to those appeals the required breadth of judgment.

288. In relation to appointment of High Court judges to the Court of Appeal for hearing criminal appeals, it appears desirable to avoid any inference that the Court of Appeal can be influenced by appointment of a particular trial judge. For that reason, the President of the Court of Appeal should have some say in the appointment (as we understand happens under the present system) and we recommend that the relevant provisions of the 1977 Judicature Amendment Act should be retained, with such amendments as may be necessary. It will also be important, if the court sits in divisions, to ensure that there is no tendency for the divisions of the court to develop different policies or attitudes. This may best be achieved by regular rotation of the judges, which will also assist in preserving the collegiate aspect of the court.

289. Finally, we mention that one way of saving substantial judge time in relation to criminal appeals may be the apointment of a suitably qualified master who would carry out such time-consuming tasks as consideration of applications for legal aid. It appears to us that a master could assist the judges of the Court of Appeal in a variety of ways, with his work always subject to control and direction by the President of the court.

290. ***Appointment of the President of the Court of Appeal*** The New Zealand Law Society suggested to us that the most senior member of the Court of Appeal should not automatically become the President. In making this submission the Law Society emphasised it was not "contending that the principle of seniority should be entirely discarded" rather that the practice "should not become so firmly entrenched as to become the invariable rule". While we agree it is vital for the President of this court to possess the ability to form the court into an effective unit, we consider it unlikely that any judge appointed to the court would lack this capacity. We also see considerable merit in a convention whereby the senior member becomes the President, although we appreciate that

unforeseen or unusual circumstances might necessitate occasional departure from this convention.

291. ***Appointment of judges to the Court of Appeal*** We agree with views expressed to us that appointments should continue to be made mainly from the High Court Bench. Although there may be occasions when it is desirable to make an appointment direct from the Bar, if an outstanding candidate is available, we see these occasions as relatively rare. Generally, wide experience as a judge at first instance should be a prerequisite for appointment to the Court of Appeal.

292. ***Sittings outside Wellington*** As already mentioned, suggestions have been made that the Court of Appeal should sit outside Wellington on a peripatetic basis. In the past this has happened very infrequently. We are of the view that administrative efficiency dictates the need for the court to sit for the most part in Wellington. We agree, however, that from time to time it is desirable for the court to sit in other main centres as happened recently when a complex series of appeals required appearances by a number of counsel from the Auckland area. In this event, adequate library facilities for judges and counsel are desirable.

293. ***Appeals to the Judicial Committee: Amendments required*** Civil appeals. If the right of appeal to the Judicial Committee remains, the present monetary limit should be abolished. Instead of replacing the existing limit with a higher figure, we favour the replacement of appeals as of right with appeals by leave of the Court of Appeal; a similar system to appeals from the English Court of Appeal to the House of Lords. The Judicial Committee would also retain the right to grant special leave. The Court of Appeal should have the ability to impose appropriate conditions, particularly as to costs.

294. Criminal appeals. As a reflection of the foregoing view, we consider there should be modification of the right to appeal in criminal matters. We suggest the Court of Appeal should be permitted to give leave in criminal matters on a similar basis to leave in civil cases (thereby avoiding in most cases the expense of a preliminary petition to the Judicial Committee).

295. As a corollary to these suggestions, we consider that provisions relating to legal aid for appeals to the Judicial Committee should be liberalised. On the assumption that only substantial claims or difficult matters of law are likely to proceed to the Judicial Committee, it is desirable that a litigant should not be driven to the point of bankruptcy in order to pursue or defend an appeal. In such circumstances we consider legal aid could be granted with reasonable liberality. We have not endeavoured to define suitable limits, and would leave this to consideration of the Legal Aid Board. We also refer to our later recommendations regarding a Suitors' Fund (paragraphs 942 et seq.).

296. Finally, we mention a possible innovation submitted by a leading barrister to amend the rules to permit the Court of Appeal to certify on the application of either party that the appeal should be "a New Zealand judge appeal", in which event a New Zealand judge would automatically sit in the Judicial Committee (obviously not being a judge who had heard the appeal in New Zealand). We considered this to be an interesting suggestion but, on reflection, have concluded that it would involve considerable practical difficulties and might also be anomalous.

The Constitution of the Court of Appeal in the Event that it Becomes the Final Appellate Tribunal

297. Much that we have said of the Court of Appeal in the event that

the Judicial Committee remains the final appellate tribunal is also relevant if the Court of Appeal becomes the final appellate tribunal and we do not repeat such matters.

298. ***A two-tier system of appeals?*** It must be remembered that New Zealand is a country of small population: as a result there are great practical difficulties in creating a two-tier appellate system if the right of appeal to the Judicial Committee is abolished. By way of example, we mention the cost involved in constituting a completely new final court and the strain of manning the same with five judges who would hear only a very limited number of appeals; possibly only five to ten per annum, assuming a growth in the number of appeals (in each of the last two years there have been four appeals and this number is an increase over previous years). These difficulties raise squarely for decision the value of, or need for, a two-tier appellate system (it is interesting to note that for some time certain Australian State appeals have proceeded direct from State courts to the Judicial Committee in only a one-tier appeal).

299. We have concluded that if a decision is made to abolish the appeal to the Judicial Committee, it will be so difficult as to be impractical to create a completely new final court (or, alternatively, a completely new Court of Appeal). With a view to meeting the problem, the Secretary for Justice mentioned a possible appeal from the High Court to a full court of the High Court with a further right of appeal to the Court of Appeal. He suggested such double appeals could be limited to cases where an unusually important legal issue arose or a previous decision of high authority was in question. We have given careful consideration to this proposal and have concluded it is not desirable to reintroduce into our system the type of appeal abandoned when the permanent Court of Appeal was established in 1958. We do not, however, see any objection to a full court of the High Court sitting in those cases where such a court is now constituted (for example, contempt of court).

300. We also point out that, whether or not New Zealand wishes to retain the appeal to the Judicial Committee, there may come a time when such appeals cease to be available to us. It would therefore seem wise to use the intervening period to structure our court system to enable the best possible solution to be implemented in due course. Although at present we consider a single appeal would have to be accepted in many instances, this situation could well change as New Zealand's population and legal profession increase in numbers. If, as the result of recommendations made elsewhere in this report, the District Courts' jurisdiction is increased, with the High Court adopting more of a supervisory role, it may happen that in many cases a two-tier appeal will be possible. An appeal from the District Courts to a three-man Bench of High Court judges and thence to a five-man Court of Appeal might prove of value in cases which are complex or involve an important point of law. The difficulty will be in providing a two-tier system for cases which originate in the High Court, and to this we cannot see any present alternative to a single right of appeal, if the appeal to the Judicial Committee is abolished in the near future.

301. One future possibility may be a regional or Pacific court. We do not necessarily oppose formation of some form of regional or Pacific court, but see no practical possibility of this at present. Should a proposal for such a court eventuate, we believe it must be investigated with great care if it is not ultimately to lack the advantages of the Judicial Committee but have manifest disadvantages of its own. It was also suggested to us that, by arrangement with other countries having a similar common law

background, it might be possible to make provision for judges from those countries to sit from time to time in the New Zealand Court of Appeal, where their knowledge and expertise would be of value. There are practical difficulties in such a proposal: we think it preferable for our judges to continue to have regard to decisions of courts in other countries, rather than bring the judges to our courts.

302. ***The number of judges required*** We consider that should the Court of Appeal become the final appellate tribunal for New Zealand, it is essential that five permanent judges should be available to hear important appeals. Often it will be sufficient for the appeal to be heard by three judges. The decision in this connection could initially be made on an administrative basis, but the parties should have the right to make application for a hearing before a court of five. On rare occasions it may be necessary for a three judge Court of Appeal to determine (at any stage before final decision) that a point of law of unexpected importance has arisen, requiring an adjournment and re-argument before a five judge court (including the three judges who originally constituted the court). Assuming that a five-man court is required, it will be necessary to have a complement of seven Court of Appeal judges (together with the Chief Justice ex officio) to make allowance for the time required for writing reserved decisions, illness, sabbatical leave, and other such matters.

303. ***The role of the Chief Justice and the President of the Court of Appeal*** Some consideration may also need to be given to the respective roles of the Chief Justice and the President of the Court of Appeal. It appears to us that at present these roles (whatever the name given to them) should be kept distinct, with administration of the Supreme Court remaining under the supervision of the Chief Justice, who should be appointed with this aspect of his work in mind. If our recommendations for a Judicial Commission are accepted, the Chief Justice may in future be less involved in detailed administrative matters but, as chairman of that Commission, he will have an even more important and central role. Traditionally, the Chief Justice has also been spokesman for the judiciary in relation to the Government; the person regarded throughout the country as head of the judiciary, able to keep in close touch with the public and the legal profession because of his wide-ranging duties both as an administrator and as a judge of first instance, especially in major criminal trials. It may be arguable that the President of the Court of Appeal should be the Chief Justice, but the present role of the Chief Justice is well understood and we incline to the view that both this role and the title are best left with him as at present.

Conclusion

304. In conclusion, we reiterate our opinion that the right of appeal to the Judicial Committee should not be abolished until an enlarged appellate court of at least five judges (together with the Chief Justice ex officio) is working effectively in New Zealand, with the confidence of the legal profession and the general public. We also express our agreement with the view of the Secretary for Justice that judges sitting in the Court of Appeal must not only be learned in the law but should also be keenly aware of the social effects of their decisions so that they reflect the prevailing social attitudes of the community in their judgments and thus keep the law (so far as a court can) in harmony with the needs and aspirations of the people. We believe that only so long as the court fulfils this function will it retain the confidence of the people. We also believe it

essential to ensure that cases on appeal are dealt with in a dispassionate and carefully considered manner, and that a two-tier appellate system is a desirable ideal. Against these needs, however, there must be balanced the need for speedy and inexpensive judicial decisions. Perfect justice (if there is such a thing) may be sought at too great a price. We believe that our system must continue to enable justice to be done without unnecessary delay and that appellate rights which are too refined or too extensive may ultimately lead to the breakdown of the system. In this regard, we commend to the Rules Committee a review of the Court of Appeal Rules, particularly in relation to cost and delay. By way of example, we question whether it is really necessary to require preparation of a printed case on all civil appeals.

Recommendations

Right of Appeal to the Judicial Committee of the Privy Council

1. The right of appeal to the Judicial Committee should not lightly be abolished. The sole criterion must be whether the abolition of such appeals will be beneficial to the New Zealand judicial system.

2. In any event the right of appeal to the Judicial Committee should not be abolished until an enlarged appellate court of at least five judges, together with the Chief Justice ex officio, is working effectively in New Zealand with the confidence of the legal profession and the general public.

3. Bearing in mind that the time may come when appeals to the Judicial Committee cease (for whatever reason), any intervening period should be used to structure our court system to enable the best possible appellate system to be implemented in due course.

The Constitution of the Court of Appeal in the Event that the Judicial Committee Remains the Final Appellate Tribunal

4. The Court of Appeal should consist of a President and four other members, together with the Chief Justice ex officio; that is there should forthwith be an increase of one member.

5. The Court of Appeal should be able to sit in divisions, both criminal and civil.

6. For civil appeals, High Court judges should not, except in cases of emergency and other unusual or special circumstances, be appointed as temporary judges of the Court of Appeal.

7. For criminal appeals, judges of the High Court should join the Court of Appeal. Normally one High Court judge should join the court for any given case: he should be selected by the Chief Justice after consultation with the President of the Court of Appeal.

8. Normally, the senior member of the Court of Appeal will become the President thereof.

9. Normally, wide experience as a judge at first instance should be a prerequisite for appointment to the Court of Appeal.

10. Administrative efficiency requires the Court of Appeal to sit for the most part in Wellington.

11. There should be no monetary limit on appeals to the Judicial Committee. Both civil and criminal appeals should be by way of leave of the Court of Appeal, with the Judicial Committee retaining the right to grant special leave. Legal aid should be granted with reasonable liberality.

The Constitution of the Court of Appeal in the Event that it Becomes the Final Appellate Tribunal for New Zealand

12. For cases originating in the High Court it is impracticable to create a two-tier appellate system at the present time.

13. Wherever practicable, endeavours should be made to enable a two-tier system to operate. This may be possible in a significant number of cases when the jurisdiction of the District Courts is increased.

14. For important or difficult cases it is essential that the Court of Appeal should consist of five judges, which will render it necessary to have a complement of seven judges of the Court together with the Chief Justice ex officio.

THE HIGH COURT

305. It was common ground in submissions that an examination of the place of the High Court in our judicial system is required. Both the New Zealand Law Society and the Department of Justice submitted that this court should fulfil a more substantial appellate and review function than it presently performs. We accept that this court should be freed from the task of handling the more routine matters, jurisdiction for which could be transferred to the proposed District Courts. It is not suggested that the High Court should cease to be a court of original jurisdiction, but we consider that one of its principal functions should be the oversight of lower courts and tribunals; the review of their decisions; and the upholding of the rule of law, the freedom of the individual, and basic principles of law and justice. It follows that the High Court should be primarily concerned with more important litigation. Civil cases, whether in contract, tort, or some other branch of law which involve large sums of money or important questions of law or principle should continue to be heard in the High Court. We think there is a great deal of force in the Law Society's suggestion that the High Court's jurisdiction in respect of criminal jury trials should generally be restricted to more serious charges, remembering that jurisdiction should extend to lesser offences whenever there is a good reason for the trial to be heard in the High Court. For this reason the Commission urges particular flexibility in handling criminal jury trials. The High Court also has a vital function in the area of administrative law. We consider that this role will assume increased importance in years to come. We make certain recommendations later in Part III covering transference of a large part of matrimonial and divorce law to the District Courts (Family Division), but we recognise the value of the submissions made by the Law Society and several of the judges, that the District Courts should not be given exclusive jurisdiction in this respect. The Department of Justice considered that the District Courts should have this exclusive jurisdiction over proceedings within their jurisdiction, though the power to transfer appropriate cases to the superior court should be retained. Our proposal for a Family Court considers these competing arguments under the section relating to the District Courts.

Specialisation

306. The relevant item of our terms of reference reads as follows:

> 3(b) The degree of specialisation on the part of judicial officers that is desirable and practicable in the conduct of the business of the Courts.

This subject attracted a number of submissions which we found to raise issues rather more complex than we at first anticipated. The submissions

evidenced sharp divisions of opinion and it is clear that it is possible to put forward arguments both for and against a greater degree of specialisation. Generally speaking, judges and magistrates are quite strongly opposed to a greater degree of specialisation (with certain qualifications concerning particular types of work). On the other hand, those members of the public who made submissions on this matter were almost unanimously in favour of a greater degree of specialisation. Individual members of the legal profession expressed differing views, but we have the impression that the New Zealand Law Society submissions, which advocated greater specialisation coupled with flexibility, accurately reflect the view of the majority of members of the profession.

307. One difficulty may be that the term "specialisation" is somewhat imprecise, meaning different things to different people. For that reason we consider it appropriate to define the meaning which we place upon the term. Our discussion of the need for "specialisation" under the above term of reference is limited to a consideration of the extent to which judges should deal exclusively or principally with particular classes of litigation or fields of law (this, we apprehend, being the meaning of the question asked). There is a wider issue which is of concern to the public; that is, the degree to which the judicial system should take particular account of the specialised needs of different groups and races. We have endeavoured to deal with this question in paragraphs 253, 870 et seq. Nor do we here refer to the creation of divisions in the courts and the need for new specialised courts, these topics being dealt with elsewhere in our report. In our opinion, the principal factors which affect the desirability and practicability of specialisation are the size of our country and its judiciary, together with the degree of specialisation which at present exists in the legal profession. It is clear that the question cannot be considered in static terms, and that the tide is running towards a greater degree of specialisation. We therefore commence our discussion by noting that any recommendations must be considered in the above light.

308. ***Family law*** It would appear desirable, if there are to be District Court judges who specialise to a very real extent in family matters, for there to be judges who similarly specialise in the High Court. We are of the opinion that judges of the High Court need to have experience in dealing with family cases if they are to act as appeal judges on appeals from the District Courts. This is one of the reasons why we consider it important to ensure a reasonable number of family law cases are removed to the High Court under the relatively liberal provisions we have elsewhere suggested. Moreover, some judges show an aptitude for family work and we consider that those judges, on an administrative basis, should be allocated the family work wherever it is practicable to do so.

309. ***Administrative law*** At the present time there is, in the Supreme Court, a degree of specialisation in relation to the Administrative Division. Here again, we have received varying submissions ranging from, on the one hand, those seeking abolition of the division to, on the other hand, those seeking an even greater degree of specialisation. Submissions favouring a greater degree of specialisation have gone as far as urging the creation of a new court of record to be called the Administrative Court. This submission, which was made by several practising lawyers, raises issues of a far reaching nature. To determine the questions involved we would need to consider and review all the arguments which were canvassed at the time the Administrative Division was created (some of these arguments are mentioned in our summary of the history of the

Administrative Division, paragraphs 92 et seq.). We have not heard adequate evidence on these issues because they fall outside our terms of reference. We therefore record that we cannot deal with these matters in this report. No doubt the issues involved will be kept under continuing review by the Public and Administrative Law Reform Committee.

310. Assuming that the Administrative Division is retained in its present form, there are a number of matters which require consideration. The New Zealand Law Society has pointed out that, when the creation of the Administrative Division was proposed by the Public and Administrative Law Reform Committee in 1968, the expectation was that a greater degree of specialisation and consistency would result. The New Zealand Law Society continues to support the view expressed by this committee, and favours further moves towards specialisation in this area of the law. Thus it is suggested that the provisions of s.25(2) of the Judicature Act (under which the Chief Justice may assign judges to the Administrative Division) are not fully in accord with the aim of specialisation, that assignments should be made by the Governor-General, and that administrative lawyers would best be appointed to the Bench direct from practice. It is also suggested that the limit of four judges imposed by s.25(2) should be abolished, and that all applications for prerogative writs, declaratory judgments, or injunctions against a public authority which involve a question of administrative law should automatically be referred to the division (this last suggestion also being supported by the Secretary for Justice in his submissions to us). Finally, it was suggested by the New Zealand Law Society that the Chief Justice's ability to refer appeals to judges not assigned to the division should be exercised only where a judge of the division could not reasonably be made available for the hearing of the appeal.

311. These recommendations of the New Zealand Law Society conflict with other recommendations which we have received, particularly from the judiciary. It has even been suggested that the Administrative Division is unnecessary. Then again, the Hamilton District Law Society, in disagreement with the New Zealand Law Society, has suggested to us that the flexibility inherent in the present system for the Administrative Division, and in particular, the power given to the Chief Justice to appoint judges from outside the division, has proved valuable in avoiding unacceptable delays.

312. On the above issues, we record our views as follows:

(a) We do not consider it is necessary for administrative judges to be appointed directly from the ranks of those specialising in that field at the Bar, although we accept this may on occasions be desirable. Any judge so appointed should have the requisite ability to carry out all the duties of a judge of the High Court.

(b) We believe that orderly and consistent development of administrative law is fostered by a real degree of specialisation. We accordingly support the concept of the Administrative Division and consider that the number of judges assigned to the division should be adequate to ensure that administrative law cases are heard by judges specialising in that work. For this reason we agree that the limitation in s.25(2) of the Judicature Act 1908 should be removed. As we have mentioned elsewhere in our report, we consider that judges should be assigned to the division by the Chief Justice on the recommendation of the Judicial Commission. We consider that provided the assignment is on the recommendation of the Judicial

Commission, this is preferable to appointment by the Governor-General. The ability of the Chief Justice to appoint judges from outside the division to hear an administrative law case in special circumstances should be retained, but should only be exercised in special circumstances, for example, to avoid unacceptable delay or expense.

(c) The issue which we have found the most difficult to resolve is whether all applications for prerogative writs, declaratory judgments, or injunctions against a public authority involving a question of administrative law should be heard solely by judges of the Administrative Division. This suggestion is strongly opposed by many judges who hold that their jurisdiction in relation to the prerogative writs is an essential and vital part of the jurisdiction of every judge. While we accept the force of this argument we also believe, as we have said, that the orderly development of administrative law is best fostered if cases having an administrative law content are dealt with by specialist judges. We have therefore concluded that, while all judges should retain their jurisdiction in relation to the prerogative writs, it is preferable for such cases to be directed where practicable to judges of the Administrative Division. This would require consequential amendment to s.26(1)(c) of the Judicature Act 1908.

(d) The tendency to ensure that appeals on matters of law, and, in suitable cases, other final appeals from administrative tribunals go to the Administrative Division of the High Court should be fostered. We consider that a specialist division of the High Court is well equipped to appreciate and administer the policy, spirit, and intent of the various Acts creating the numerous tribunals, while at the same time ensuring a fair and consistent development of the law. We believe the High Court has a vital and important role to play in this regard. We appreciate that, to some extent, this may involve the court in matters of policy as well as law, and that in theory there are some risks involved. We believe, however, that the protection of the citizen is of paramount importance and that the successful operation of the Administrative Division to date has demonstrated how well the judges are able to cope with the problems.

313. ***Other litigation*** In relation to other divisions of the Supreme Court, there is also a very considerable conflict of view on specialisation. It has been pointed out to us that specialisation may affect the legal system in a number of ways, and that a proper degree of specialisation can enhance the respect which the community gives to the court. The case for specialisation was perhaps best put by the New Zealand Law Society, who pointed out that more lawyers today, whether by deliberate choice or otherwise, are working and claiming expertise in narrower and more closely defined fields of law. The New Zealand Law Society takes the view that it is both inevitable and desirable that this greater degree of specialisation should extend to the High Court. The Society stressed the gains in efficiency and proficiency which specialisation brings; pointed out that at present some highly competent lawyers refuse judicial appointment (or are not considered for such appointment) because they work only in defined areas of the law; and also drew attention to the converse situation, where judges find themselves called upon to handle work with which they are not conversant. The Society suggested that, rather than creating formal divisions, the approach which should be

followed was for judges having a known expertise in a particular field, to be selected on an administrative basis for the hearing and determination of matters arising in that field. The Society considered that no definite divisions of the Supreme Court need be created, particularly as this might exacerbate the difficulties already encountered in circuit centres.

314. Other facets of the issue were raised by a number of judges, and also by the Otago District Law Society. The case against over-specialisation was perhaps most strongly put by one of the Supreme Court judges, who said:

> Throughout several submissions I have detected a cry for specialisation. In my view specialisation is to be avoided at all costs. All the work done by Judges and Magistrates relates to the problems of citizens. The whole of our training from the time we enter law school is directed at the marshalling of facts, acquiring an understanding of difficult fact material and ascertaining the law in order to apply it to the facts.

The judge then pointed to the manner in which specialist witnesses tend to succumb to notions of their own infallibility and suggested that this ultimately becomes the fate of the specialist judge. Drawing on his own experience at the Bar, where he had specialised in particular fields of law, the judge stressed that no-one should be appointed to the Bench if he or she lacks the ability to comprehend the more difficult branches of the law. He concluded his submission by saying:

> In my view if we have a separate Family Law Division, a separate Commercial Causes Division, a separate Crown Court doing nothing but crime, the quality of justice will decline. It follows that I do not approve of the special position of the Administrative Division to which one particular Law Reform Committee continually recommends the reference of appeals—now even appeals from the Disciplinary Committee of the profession.

Likewise, another judge stated:

> Although in New Zealand there is certainly some growth of specialisation at the Bar, it is, in my view, nowhere near the point of development where the English system is called for. I believe that many possible appointees of worth would decline appointment if, for the greater part of their Judicial lives, they were condemned to preside over one kind of dispute.

315. Similar sentiments were expressed by the Otago District Law Society who said:

> The District Society has some reservations about the submission made by the N.Z.L.S. on the subject of specialisation in the Supreme Court. It is obviously true that no lawyer can nowadays hope to master all aspects of the law and that the tendency toward specialisation among lawyers will increase. It does not follow that the attributes required of a Judge are developed by a career devoted to a narrow field of practice, yet, if the argument for more judicial specialisation is adopted, the specialist judges will naturally be appointed from the ranks of the specialist lawyers . . . (The New Zealand Law Society) suggested that the development of the law to meet the changing needs of society through the vigour and perception of the Judges is likely to be facilitated through greater specialisation. With respect, the District Society is inclined to the view that the most

vigorous and perceptive judgments are likely to emanate from judges whose sound understanding of society and its needs has been built up on a broad framework of experience through a wide range of practice. The role of specialist lawyers is an important one but technical expertise should not be confused with the art of judgment.

The District Society's concern that specialisation should not be carried too far is influenced by the practical constraints of the circuit system. . . . If there are areas where more specialised judicial attention is required they are probably the areas of Commercial, Equity, and Matrimonial/Family law. We do not agree that the field of Criminal law requires judicial specialisation; the experience of the District Society has been that many judges who have had little experience of criminal trials before appointment are as competent to preside over criminal trials as those with much more experience. The main legal problems in this field are in the law of Evidence, the principles of which are familiar enough to all judges, of whatever background.

Finally, we also record the submission of Hamilton District Law Society which referred in particular to the problems of the smaller centres and said:

> We do not accept as a solution to this problem that the specialisation policy should be adopted in Auckland, Wellington and perhaps Christchurch, and the rest of the country should operate as at present. We strongly believe that this Commission should not permit one system of justice in the metropolitan centres and a different system elsewhere. Equality before the law must be a reality. Unless, therefore, the separate divisions can be set up in a way that would ensure that their services would be available equally expeditiously in the provincial centres as they would be in the metropolitan centres, then we believe the concept should be rejected.

316. As we said at the outset, the issues are many sided. We regard the move towards greater specialisation as inevitable, and, in the form we indicate, as desirable. In this context, we point out that specialisation to a reasonable degree appears to be accepted as advantageous in most judicial systems. We emphasise the words "to a reasonable degree", since there is also evidence that over-specialisation is not advantageous. We consider the Secretary for Justice summed up the situation well when he said:

> In the past New Zealand has been a small and not particularly complex community without much need for judicial specialisation.
>
> There has moreover been little specialisation within the legal profession itself, except perhaps with criminal work in the Supreme Court which has always tended to be concentrated in a few hands. The prevalence of "general practitioners" in the legal profession has reduced both the need and the opportunity for specialisation in judicial work.
>
> Both these situations are changing. Not only are many more lawyers now practising solely as barristers, but there has been an increasing tendency for practitioners in the major centres to specialise in particular areas of law. Nonetheless I do not think we have yet reached the stage where further formal specialisation within any of our courts is appropriate. Greater specialisation is likely to occur as

> the law and the legal profession develop greater sophistication, and the time may come when it should be put on a regular basis. Meanwhile, it can be left to develop naturally in an informal fashion. This can be aided in larger centres by the appointment of Judges and Magistrates with a variety of professional backgrounds. It is also an argument for avoiding, where practicable, one or two Judge Courts. Coupled with a wise policy of allocating judicial officers by whoever has that responsibility, this could secure much of the benefit of specialisation while preserving flexibility.

317. In our view, it is appropriate to foster specialisation in the above manner. A reasonable degree of specialisation should be encouraged wherever practicable on an administrative basis, so that we use our judicial talent effectively and efficiently, bringing expertise to bear where it is most required. We do not see it as desirable to create, at present, separate civil, criminal, equity, commercial, family, and administrative divisions (apart from the Administrative Division in its present form); though these divisions may well become desirable in the future. However, we see no reason why a judge with an aptitude for a particular type of work should not spend a greater proportion of his time on that work, provided this does not place an unfair burden on his colleagues. Flexibility is obviously desirable while the population and number of lawyers remain at their present level. The needs of circuit and smaller centres will also require to be considered carefully. We suggest, for example, that on an administrative basis it should be possible to arrange for a judge with special expertise to visit a circuit area to try a case which appears to require such expertise. As far as practicable our system should be reasonably uniform, with no one part of the country appearing to be better served than any other.

318. We think it appropriate to add a particular word concerning commercial causes. The New Zealand Law Society submitted that there is a need for more specialised handling of commercial causes. It referred to the Commercial Court now established under the Administration of Justice Act 1970 in the United Kingdom, as part of the Queens Bench Division. It was said to us that, in New Zealand, the twin evils of delay and expense in hearing commercial matters cause frequent complaints from businessmen who divert their disputes to arbitration. These reasons, together with the complexity of cases, led to the formation of a commercial list in England. We also mention that commercial causes in New South Wales are governed by the Commercial Causes Act 1903-1965. In our country, the Contracts and Commercial Law Reform Committee in 1974 recommended that special provision should be made for the speedy determination of commercial causes. Submissions supporting the creation of special rules for commercial causes were not favoured by the Secretary for Justice. He said:

> We believe that some efforts must be made to satisfy the demand of the commercial community for ready access to the courts. However we are not persuaded that the claims of this section for speedy and informal justice are any more meritorious than those of other sections of the public. In our submission, the answer must lie in the creation of a procedure to enable any class of action to be speedily brought on for hearing where appropriate.

Although the Secretary's view is attractive, it may be difficult to devise procedures which can be applied in practice to all classes of case. While it

is obviously desirable for the courts to have the machinery available to deal speedily with all cases which require an urgent determination, these cases will often be of a commercial nature. In commercial cases there may also need to be special procedures of a simple nature, coupled with power on the part of the court to abbreviate interlocutory procedures without working injustice. Moreover, commercial cases often raise issues of considerable complexity and difficulty. Speedy determination of such cases would almost certainly be assisted if they are assigned to judges with commercial experience. Speed would also be assisted if persons similar to the United Kingdom's official referees are available. The English Commercial Court has worked so well that we find it hard to believe that the establishment of some special procedures for commercial cases in New Zealand would not be advantageous.

319. We also draw attention to one other possible change, in the creation of a lengthy causes list. We understand that this procedure has been successful in Australia, particularly in relation to complex cases where one judge is assigned to the case from the outset and deals with all interlocutory and other matters.

320. It goes without saying that prompt determination of issues is desirable throughout the whole contract field. We believe the new Code of Civil Procedure will help in this respect. It may also well prove possible to apply rules adapted to commercial causes to all classes of contract cases.

Recommendations

1. The present Supreme Court should be re-named "High Court" to form part of a Supreme Court consisting of the Court of Appeal and a High Court.
2. The limitation on the number of judges assigned to the Administrative Division contained in s.25(2) of the Judicature Act 1908 should be removed.
3. The Chief Justice, on the recommendation of the Judicial Commission, should assign judges to the Administrative Division but he should retain his power to make temporary appointments to that division.
4. While all High Court judges should retain their jurisdiction in relation to the prerogative writs, it is preferable for such cases to be directed, where practicable, to judges of the Administrative Division.
5. The tendency to ensure that appeals on matters of law and, in suitable cases, other final appeals from administrative tribunals to the Administrative Division of the High Court, should be fostered.
6. While it is not desirable to create separate divisions of the High Court (apart from the Administrative Division), a reasonable degree of specialisation should be encouraged wherever practicable on an administrative basis.
7. The establishment of special procedures for commercial cases would be advantageous.

Criminal Business

321. ***Jury trials*** We are satisfied that at the present time there is an insufficient number of judges to cope with the increasing volume of all business in the Supreme Court. In addition, an increased volume of work at the lower court level and expansion of the jurisdiction and volume of work of the Administrative Division of the Supreme Court will cause appellate and review work to increase in quantity as well as importance. The statistical information we have included in Part II demonstrates a

substantial increase in judge time so far as criminal trials are concerned. There has also been a steady increase over the years in civil actions. It is time that some solution was found. We consider it can now be said that a disproportionate amount of Supreme Court judges' time is being devoted to criminal trials. This conclusion does not denigrate the importance of criminal work, but highlights the fact that other equally important Supreme Court work is being unduly deferred to the detriment of the parties: it is generally the law-abiding citizen who pays the highest proportion of taxes which enable our legal system to function. The Report of the Committee on Court Business (1974) recorded that, in the years 1971-1973, over 80% of a judge's time was spent sitting in court. Later information from at least one judge who had kept careful records reveals that this figure may now be in excess of 85%. We consider such a figure is far too high a proportion of a judge's working time.

322. The Law Society agrees that the long-term answer cannot be to appoint more and more judges to cope with the increasing workload of the court, although it is satisfied that enlarging the Supreme Court Bench to 25, as suggested, would not damage the status or prestige of this court or its judges. We recommend that the maximum number of Supreme Court judges that can be appointed under the Judicature Act 1908 should be increased from 22 to 25. Although we believe this increase is necessary to deal with the present workload, the full complement of 25 may not need to be maintained in the future. We consider the real solution is (to adopt the words of one of our criteria) best use of judicial talent. This would mean reallocation of the workload of the High Court and the District Courts so that judicial attributes match case importance. The Commission members who travelled overseas were satisfied that the number of judges with an equivalent status and function to a Supreme Court judge in New Zealand is far higher per head of population.

Recommendation

The maximum number of Supreme Court judges that can be appointed under the Judicature Act 1908 should be increased from 22 to 25.

323. Being agreed there is an urgent need to change the system over criminal jury trials, we now turn to examine the various proposals.

324. ***Crown Court or intermediate court*** In a memorandum submitted on behalf of the Supreme Court Judges the then Chief Justice, Sir Richard Wild, reminded the Commission that the problem of keeping court work running smoothly requires ceaseless attention. He mentioned that about ten years ago the judges effected a number of improvements in administration, the possibilities of which were alluded to in the Report of the 1962 Committee on the Criminal Business of the Supreme Court. Notable amongst these improvements were abolition of traditional quarterly hearings in the main centres, provision of continuous criminal sittings in Auckland, arrangement of a more flexible system of sittings in the provincial centres, and institution of a ready-list system for civil cases. Sir Richard Wild said that these changes were welcomed by the practising profession and the results, particularly in despatch of criminal work, were quite dramatic. He gave examples of certain prosecutions where the total period of time elapsing from the actual commission of the offence, covering the police enquiries, the preliminary hearing, and the trial, right down to the jury's verdict and sentence, was less than six weeks. The Chief Justice said that in his opinion the despatch of criminal work in this country could not be surpassed elsewhere. We think this is a valid

comment. He mentioned that despite these improvements, the overall efficiency which the judges strove to maintain was jeopardized by a new development: the swelling volume of criminal trials brought about partly by a world-wide phenomenon of increasing crime and partly by a newly accepted policy of liberally granted legal aid, which meant that many offenders who would formerly have been dealt with summarily by a magistrate elected trial by jury in the Supreme Court, as they are entitled to do if liable to imprisonment exceeding three months. Sir Richard gave the Commission figures from the weekly returns sent to him between 1971 and 1976 demonstrating the increase of work in the five main centres of New Zealand (Auckland, Hamilton, Wellington, Christchurch, and Dunedin). We produce these figures as Table 27. The really significant fact is that in these five centres the total number of criminal jury trials conducted in the Supreme Court jumped from 432 in 1974, to 596 in 1975, and to 615 in 1976. There were equivalent increases for the whole of New Zealand (Table 3). The Chief Justice made three points to the Commission:

(i) The pressure on the Supreme Court is too great. Despite the unceasing and devoted efforts to maintain their record the judges are steadily losing ground.

(ii) It is the increase in criminal prosecutions, particularly in the lesser cases, that is the root of the problem. It is quite wrong that the Supreme Court should be cluttered up with crime of comparatively minor importance while ordinary citizens are deprived of ready access to the court.

(iii) If the Supreme Court were relieved of the lesser criminal prosecutions it would, with its present establishment, be able to conduct all its other work with proper despatch.

Sir Richard then submitted that there were several possible solutions. We quote him as follows:

(a) A continuing increase in the establishment of the Supreme Court. At first sight this is an obvious solution. But it is necessary to consider the consequences of continuing this policy. When the Court of Appeal was set up in 1957 the full establishment of the judiciary was fixed at 14, being the Chief Justice and 13 Judges. The 13 was increased to 14 in 1959 and to 15 in 1961. It was held at 15 until 1969 when, with the establishment of the Administrative division, it was increased to 16. Then to 17 in 1972 and to 19 in 1974 and to 21 in 1976. This is an increase of over 50 per cent. in 19 years.

The Judges generally and successive Ministers and many leaders in the profession have long held the view that increases in the membership of the Court must be very carefully controlled. This goes beyond the mere matter of preserving the quality and the status of the Court and its Judges. It is a question of ensuring the proper and most advantageous use of the human resources available. To illustrate the point, take a hospital which, because of an increase in the urbanisation and industrialisation of the area it serves, is required to treble its emergency and accident department. It does not need necessarily to treble its complement of skilled surgeons. What it must do first is to identify the nature of the change and alter its system accordingly, adapting the qualified

human resources to the new requirements. So, in regard to our Courts, the pressures mentioned call for the same kind of approach. It is a matter of changing the structure to fit the nature of the work demanding attention.

(b) Restriction of right of trial by jury. On first impression this also appears a logical step but in so far as it would involve curtailment of long established rights it presents obvious difficulties. It is noteworthy that, while a Criminal Law Bill recently introduced in the United Kingdom provided for offences of theft of a value below £20 and for criminal damage, except arson, to be entirely summary offences triable without a jury in the Magistrate's Court, that proposal has since been dropped. Moreover, the report of Mr. Justice Speight's committee showed that the practical effect of such a change here would be minimal.

(c) Vesting jurisdiction for trial by jury in the Magistrate's Court. As to this suggestion there are two obvious difficulties:

(i) It would simply not be practicable, or indeed necessary, to provide the staff, accommodation and administrative machinery to enable trial by jury to be conducted in every place where Magistrates sit.

(ii) It is no disrespect to the Magistrates as a group to say that some do not have (though some do have) the necessary experience and aptitude to preside at a trial by jury. It has been said that since every Magistrate has to consider both the law and the facts in forming and giving his decision on a summary prosecution he already has the experience to preside over a trial by jury. Despite the apparent logic of this the Judges know from hard experience and the Law Reports show that conducting a trial and giving a proper summing-up to a jury is a very different matter from giving a conclusion of one's own. Nor would it be right to attenuate the very important safeguards in trial by jury on indictment by vesting jurisdiction to preside in some 50 Magistrates. They were simply not chosen to carry out that function.

To confer the jurisdiction permanently on a few selected Magistrates would virtually be to establish a new Court which is the solution the Judges put forward four years ago.

(d) Crown Court. There has been much misunderstanding in the legal profession as to what this involves. The essence of the proposal as envisaged in the report of Mr Justice Speight's committee is that the criminal jurisdiction of the Supreme Court would be vested in the Crown Court of which the judges would be all the Judges of the Supreme Court together with such number of Crown Court Judges as are from time to time required. Those latter would be selected by promotion from the Magistrates Court or appointed from the Bar. Four or five would be required to start the system, stationed probably in Auckland and Wellington but circuiting as required. With our circuit system working as flexibly as it does, the allocation of cases to Judges would be a straightforward administrative matter but, broadly speaking, Supreme Court Judges would always preside over murder, manslaughter, aggravated robbery, rape and the most serious drug charges, and Crown Court Judges over the others. Committal for trial, the calling of juries, office administration, court rooms, and the conduct of the trial itself, would continue just as now.

(e) Intermediate Court. Such a Court would be established on the general pattern of the District Courts in the States of Australia, with jurisdiction to conduct trial by jury of the less serious criminal cases, and with an appropriate civil and domestic jurisdiction.

From his enquiries, the then Chief Justice was able to tell us that a majority of the judges did not favour increasing the establishment of the Supreme Court. They did, however, favour the formation of some type of Crown or intermediate court to conduct trial by jury of lesser criminal offences. They were not in favour of vesting jurisdiction to conduct trial by jury of lesser offences in all, or some, of the magistrates.

325. As the hearings progressed in front of us, it became clear that the term "Crown Court" meant different things to different people when applied to the New Zealand situation. To the 1974 Committee on Court Business (as mentioned by the then Chief Justice) it meant a division of the Supreme Court presided over by Supreme Court judges and "such other special judges as are from time to time appointed, to be called Crown Court Judges". This Crown Court would exercise the criminal jurisdiction of the Supreme Court. Crown Court judges would travel on circuit but would not hear the most serious cases; these would be reserved for a Supreme Court judge sitting in the Crown Court. Appointments would be from the magistracy and the Bar, and promotion could occur to the Supreme Court. In answering questions, the then Chief Justice informed us that some other judicial work as a form of variety would be desirable. The Commission agrees that a balanced workload is desirable and this sentiment has been echoed by many other organisations or individuals who made submissions to the Commission. Furthermore, restricting a judge exclusively to criminal work might make it difficult to attract suitable appointees. It seemed to the Commission, with all respect, that when the Chief Justice made this statement he was in effect suggesting the creation of an intermediate court because he considered that the Crown Court judges who were not Supreme Court judges should have a limited civil jurisdiction up to a certain value, in addition to doing certain divorces. Apart from the judges' views on this topic, some support for the establishment of a Crown Court came from submissions presented by the Police Department and individual barristers.

326. We see disadvantages in the proposal in that it would widen the gap between the Supreme Court and the Magistrates' Courts and thereby downgrade the magistracy. We think this would be a retrograde step. Secondly, because of the improbability of the Crown Court operating in all centres (for practical reasons), invidious distinctions might result. None of the historical reasons which led Lord Beeching to recommend a Crown Court for England, in our opinion, exist to any extent here. Not the least of the differences is the wide jurisdiction and the standing of our magistrates. With all respect to arguments to the contrary, we think it illogical to deprive some of our magistrates of an extended criminal jurisdiction when their present civil jurisdiction is greatly in excess of that possessed by County Court judges in the United Kingdom, who were granted an extended criminal jurisdiction as Circuit judges under the Beeching scheme.

327. The Crown Court in England therefore does not constitute a relevant precedent. Primarily, however, we consider that a Crown Court would immediately be seen as an intermediate court between the Magistrates' Courts and the High Court. Far from bridging the gap between those two courts, the gap would be widened and this would, we

believe, have a serious effect on the morale of the magistracy. Nothing we have seen overseas would cause us to alter this view. Lowering the public esteem for the Magistrates' Courts would be most unfortunate for it is these courts which must continue to be responsible for handling the bulk of the criminal work in this country. The Magistrates' Executive informed us it was definitely opposed to any possible intermediate or Crown Court system. It favoured the New Zealand Law Society's proposal which we later examine.

328. Apart from strong opposition to the Crown Court proposal from the New Zealand Law Society, several District Law Societies, and the Department of Justice, to which the Commission must give due weight, we also consider that when measured against the criteria for reform which we have enunciated, the proposal is unconvincing. First, it is not suitable to conditions in New Zealand in that the factors which led to setting up the Crown Court in England do not apply. Secondly, the establishment of a Crown Court in addition to Magistrates' Courts and the Supreme Court in some centres could not be justified economically. We say this because, undoubtedly, with the addition of civil work proposed for it, it would amount overall to an intermediate court requiring additional staffing and facilities. Thirdly, in looking to public service we agree that establishment of a Crown Court would not improve the services provided by the Magistrates' Courts. As the Secretary for Justice submitted:

> Once established it is not unreasonable to fear that new jurisdictions would, over a period of time, accrue to a Crown Court. It would tend to develop a life of its own. If this occurred, and in my opinion it is not a fanciful notion, the jurisdiction and status of the District Court would be correspondingly adversely affected.

Fourthly, we consider the best use of judicial talent can be made in a more flexible system, which also bears on the criterion of efficient administration. Fifthly, the proposal lacks the simplicity of the present three-tier system.

329. While rejecting the Crown Court proposal as such, we later indicate certain of its features we have seen operating in the United Kingdom, which can usefully be adopted without the creation of another tier of courts.

330. It follows that the Commission also rejects the notion of any intermediate court to deal with lesser crime and to have some civil jurisdiction. In this respect the Commission also agrees with submissions of the Criminal Law Reform Committee. Because at an early stage of our hearings we were fortunate to have discussions with a former supervising stipendiary magistrate of the South Australian court, the Commission members when in Adelaide closely examined the intermediate court system which operates in that State. We also observed the operation of intermediate courts in other Australian States. In New South Wales the maximum civil jurisdiction is $20,000; in Victoria, $12,000; in Queensland, $10,000; in South Australia, $20,000; in Western Australia, $10,000. From these figures it will be seen that the civil jurisdiction of the Australian intermediate courts is in excess of that presently vested in the Magistrates' Courts of New Zealand. However, when making our comparisons with Australia, if we remove the personal injury action (abolished in New Zealand), none of the intermediate courts in Australia exercises an overall jurisdiction in excess of the civil jurisdiction we propose for reconstituted Magistrates' Courts in this country. There are

other factors particular to the Australian situation which in our opinion are not valid for New Zealand: first, the qualifications of those who preside in the summary courts, and, secondly, the concentration of the population. In several States great reliance is placed on the use of lay persons and career public servants to dispose of the bulk of the work in the summary jurisdiction. Neither of these groups possesses the same qualifications or experience as the New Zealand magistrates. Generally speaking, the Australian population is concentrated in large cities. There are relatively few substantial centres outside the State capitals. The first of these population factors rendered establishment of an intermediate court desirable; the second made it practical. On the other hand, this country's Supreme Court sits in 18 towns and cities, and the Magistrates' Courts in 91.

331. Although it was suggested that an intermediate court could be restricted to the main centres, we consider that uniform justice would only be achieved if the court sat throughout the country so that the same quality of justice was available to all. We also mention the additional cost which would be involved in establishing a further tier of courts. Later in this report we deal with the proposal for a unified court, and we note in this context that many common law jurisdictions are moving towards unification, particularly in the area of administration. We were able to observe that the trend is strongly against any proliferation of courts and tentatively towards fusion of existing courts. This was particularly noticeable in Canada.

332. Proponents of an intermediate court argued that because there are three categories of criminal offences, three levels of courts and judges are required. While we have divided criminal offences into three categories, it is difficult to see how the intermediate category (electable offences) can be said to require an intermediate court. Electable offences are either tried summarily or before a jury: they form a separate category only in so far as they may be either one or the other at the option of the accused.

333. For these reasons we think introduction of an intermediate court in New Zealand would be a retrograde step. It would also carry with it many of the disadvantages we consider flow from the Crown Court proposal and we reiterate that an intermediate court, like the Crown Court, would undoubtedly downgrade the Magistrates' Courts.

334. ***The Department of Justice's proposal*** The department believes that public confidence in criminal jury trials would best be maintained if they continued to be heard in and under the aegis of the Supreme Court. To relieve Supreme Court judges of their present heavy burden, the department recommended that a sufficient number of suitably qualified District Court judges should be appointed to preside in the Supreme Court over criminal jury trials, other than in respect of purely indictable offences. These trials would concern:

(i) *Electable offences:*
summary offences carrying a liability of more than 3 months' imprisonment where the offender elected jury trial;
indictable offences triable summarily where the offender elected jury trial; and

(ii) *Hybrid offences:*
indictable offences which would otherwise be triable summarily but where the prosecution had laid the charge indictably.

335. The department submitted that this solution would have numerous advantages because it would contain in one forum all criminal

jury trials, with the attendant administrative benefits. It was suggested that public confidence in the system would be maintained, as trials would take place in a Supreme Court setting. The need for a further tier in the court structure would be avoided. District Court judges appointed to sit with juries would widen their experience. In the large metropolitan centres a panel of such judges would be available to sit in rotation. It was suggested that a sole resident District Court judge in a provincial centre should preferably be appointed to sit in another circuit, when presiding over jury trials. The department suggested that a regional court administrator (a new appointee whose functions we later discuss), in consultation with the Supreme Court judges and the regional District Court judges, would allocate District Court judges to sit with juries as the need arose. It was further submitted that District Court judges presiding over criminal jury trials in the Supreme Court should have the same jurisdiction in imposing sentences as would a judge of the Supreme Court. We know that this is the position that obtains overseas, in that District Court judges sitting with juries in their own jurisdiction (as in Australia and Canada), or as Circuit judges in the Crown Court (in the United Kingdom), are able to impose the sentence prescribed by law. (So far as summary hearings are concerned, the department proposed that the District Courts would exercise the criminal jurisdiction currently exercised by the Magistrates' Courts.) Appeals from criminal jury trials heard by a District Court judge would lie direct to the Court of Appeal, but appeals from the District Court itself would lie to the High Court, and a further appeal with leave, on questions of law, to the Court of Appeal. We make the obvious comment that in his own court the District Court judge is a judge of fact as well as law, but in the proposed jury jurisdiction the jury would have the responsibility of finding the facts.

336. We must say that some members of the Commission were at first attracted to this proposal. It has the immediate advantages of ostensibly avoiding another tier in the court structure and of continuing in one setting all criminal jury trials. It also has the advantage of flexibility for the allocation of work which we consider to be a very important feature: the courts could adapt to variations in the caseload very simply and effectively. Furthermore, with District Court judges sitting in the High Court, a collegiality, which would benefit both courts, would develop. We should add that in many respects it is a similar type of operation to the Crown Court system in the United Kingdom. In London, for example, 12 metropolitan magistrates take turn as Circuit judges in the Crown Court system, returning in due course to their normal magisterial duties.

337. Pervading a great many of the submissions we heard was the objective of up-grading the Magistrates' Courts. As we have indicated, we endorse that aim. We consider that no effort should be spared to make the new District Courts strong, autonomous, effective units. We have seen overseas, more particularly in Australia and Canada, that where the District Courts are autonomous and where they have been up-graded in their jurisdictions, they attract considerable legal talent and in some cases a number of Queen's Counsel preside as judges in those courts. This Commission looks forward to the day when persons with similar qualifications accept appointment to the District Courts of New Zealand. We have observed at first hand, not only through discussions with District Court judges but with members of the Bar and court administrators in Australia and Canada, the standing and respect that those judges enjoy. To us, the department's solution has the appearance of a relatively short

term expedient; moreover, given an inexorably increasing criminal caseload it can reasonably be expected that the demand for District Court judges presiding over jury trials would increase, and the occasional would tend to become permanent, thus creating an intermediate tier of judicial officer with an adverse effect on the status of the lower court. Despite the most resolute intention to the contrary, the department's solution could well develop into a Crown Court or at least exhibit some of the features of a Crown Court. The department itself criticised the Crown Court proposal.

338. By contrast, we agree that the New Zealand Law Society's solution proposing that the District Courts should hear lesser jury criminal trials involves a significant long-term change in the structure of the courts. It provides for the development of local courts capable of future expansion in this country with its relatively scattered population. In other words, the proposal meets the test of suitability for New Zealand conditions. Looking ahead, we consider there will be centres other than those in which criminal jury trials are at present held, that is, which are not Supreme Court centres, where lesser criminal offences should be heard by juries, with a consequent saving in expense and inconvenience to those members of the public involved. We mention as examples Tauranga and Mount Maunganui with a combined population of 48,000, and Upper Hutt with a population of 35,000; two possible areas where jury courts could be arranged.

339. We deal next with the suggestion that commissioners and recorders could be appointed from the Bar to serve on a part-time basis and relieve the High Court judges of some of the criminal jury work. The New Zealand Law Society submitted there was nothing significantly different in the Department of Justice's proposal detailed above, from the concept of commissioners or recorders, except that in the former case appointees would come from the District Courts. Commissioners, recorders, and District Court judges hearing certain criminal cases would all effectively be part-time, temporary Supreme Court judges. While, as we have mentioned, there is the precedent of stipendiary magistrates sitting as Circuit judges in the Crown Court in London, and also acknowledging that commissioners and recorders have been part of the English legal system for many years, nevertheless we think that public confidence in New Zealand's court system would be weakened if temporary or part-time appointments were introduced. As to the view expressed by the department that public confidence in criminal jury trials would best be maintained if they continue to be heard under the aegis of the Supreme Court; we say, first, that it is just as plausible, and no more persuasive, to argue that confidence would be weakened by confusion over a system which takes judges from one jurisdiction and temporarily puts them in another. Secondly, there could equally be confusion because minor criminal offences were heard in the Supreme Court but civil cases involving substantial sums of money were not. Finally, we observe that each court is entitled to its proper status. We think that can best be achieved by enabling the best qualities of each set of judges to be seen and heard in the courts to which they are appointed.

340. ***Commissioners or recorders*** The New Zealand Law Society informed us that in 1975, it tentatively considered the possibility of appointing lawyers or magistrates as commissioners or recorders to hear criminal jury trials. It said this proposal was made solely in an effort to find an immediate solution to the pressure of criminal work in the

Supreme Court. It did not, however, support the idea from a long-term point of view. The Society made it clear to us that it could see no place for either commissioners or recorders in the future structure of the New Zealand courts. It was also suggested by a senior judge that selected magistrates might preside over criminal jury trials as commissioners of the Supreme Court. It seemed to us that this proposal was little different from that of the Department of Justice. From the Bar came the further suggestion that we should consider the use of recorders in the way they function in the United Kingdom. The Barrowclough Committee specifically considered such a proposal in 1962-1965. The recorder is a part-time judge who may sit on the Bench for a period and then resume practice at the Bar. The New Zealand Law Society considered that this proposal would have the disadvantages of being detrimental to the image and standing of the magistracy and of creating potential embarrassment at the Bar because a lawyer might not feel comfortable pressing an issue with a colleague knowing that he could shortly be in a position of judicial influence over him. Being a part-time appointment, it would downgrade the administration of the criminal law, and finally, the Society thought it would be undesirable and impracticable in the New Zealand situation. We do not favour the use of commissioners or recorders.

341. ***A criminal division of the High Court*** We heard several interesting proposals from the Criminal Law Reform Committee. This committee, which is chaired by the Solicitor-General, has as its members representatives of the Bar, the Government, the universities, and the police. The committee submitted that the time has come to establish a separate Criminal Division in the High Court. They contend common experience indicates the more skilled a person becomes in a particular field of endeavour, the more quickly he can do the work involved. It was said that because of the size of our population and the volume of criminal business, specialisation in this area is now a practical possibility. The committee considered that increased familiarity with the criminal law and current decisions should make the task of the specialist judge easier, and more rapid decisions on procedure and legal questions should cause criminal trials to flow more quickly. The committee acknowledged the danger (to which we have already referred) of complete specialisation without a degree of variety in other fields, but suggested that if counsel of experience and skill in the criminal law could be assured of that variety, appointment to the Bench would become more attractive than the present system by which judges are required to exercise their jurisdiction in every field from probate in solemn form, to patents, copyright, and the intricacies of judicial review of administrative decisions.

342. On this argument, the contrary view was expressed by a former President of the Court of Appeal. He considered, as a general rule, New Zealand's judges should not be appointed because they had special knowledge in some particular field. It was his opinion, which we respectfully adopt, that people of good experience and sense were required, and he was sure that wide experience and wide education were more important than knowledge in a special field. The judge added, " 'The rarest form of wisdom, which is misnamed common sense', is in a large part the product of experience and it is important that people should be selected for appointment who have evidenced that sort of basic principle of common sense".*

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*The Rt. Hon. Sir Alfred North.

343. After hearing cross-examination, and having regard to the criteria we have adopted, we are not in favour of the Criminal Law Reform Committee's proposal. As we have stated, we consider that judicial attributes should be matched to case importance and difficulty, and we prefer the solution that High Court judges should be substantially relieved of lesser crime. As noted of other proposals, New Zealand's scattered population would make it difficult to provide a judge from the proposed Criminal Division for virtually every session in every small town. We reiterate that proposals made elsewhere in this report for some criminal jury trials to be conducted in District Courts and for a greater degree of flexibility in administration, should, in our opinion, afford a better solution than the creation of a specialist Criminal Division.

344. ***Special summary procedure*** The Criminal Law Reform Committee usefully reminded us of both the value of jury trial and certain disadvantages in time taken, cost, inconvenience to jurors, and delays in procedure. The committee sought to rationalise the whole question of right to jury trial with a specific aim of removing relatively minor matters from the Supreme Court, which has traditionally been thought of as the forum for major crime. The committee suggested that perception of the relative importance of some offences (and therefore of the appropriate forum for trial) has been affected by changing social attitudes to imprisonment as an appropriate sanction, and by the effects of inflation on monetary thresholds governing maximum sentences for crimes such as theft and receiving. It further argued that imprisonment, when imposed, is a total invasion of an individual citizen's liberty, meriting the compensatory right to jury trial, even if the offence involved is relatively minor.

345. The committee considered various possibilities such as a major revision of penalties prescribed by the Crimes Act and other relevant statutes, also heavier penalties for second and subsequent offences, in an effort to limit availability of jury trials and so direct the Supreme Court's attention more fully to major matters. It was felt that both these measures fell short of a solution in that they could unduly limit the court's discretion in sentencing, or produce anomalous results.

346. The committee's solution proposed that for electable and summary offences (paragraph 78) where the defendant is liable to imprisonment, the prosecution should evaluate each case and decide whether to prosecute before a judge and jury or to use a special summary procedure before a magistrate. The suggested criterion on which such a decision should be based was whether, on the prosecution's assessment of the case, including the accused's previous criminal history, he faced any real prospect of being sentenced to imprisonment if convicted. The proposal was that if prosecution was completed in the Magistrate's Court by this special procedure the accused could not be sentenced to imprisonment. The committee suggested, however, that if a magistrate hearing such a case considered that circumstances potentially warranted imprisonment, he could, at any time up to the end of the prosecution case, decline to deal with it by the special procedure. The defendant would then be asked to elect whether he wished the hearing to continue in the Magistrate's Court by the ordinary procedure, or to be tried by a judge and jury. The committee also suggested that in certain limited circumstances, the defendant should have the right to apply for trial by jury even when the prosecution had commenced proceedings by way of the special summary procedure, for example, where a conviction for theft of a relatively small

sum of money could lead to specially grave consequences for the person concerned. It was further proposed that a lower court should have the power to direct that the special summary procedure should be applied even though the prosecution had chosen to bring the charge under the ordinary procedure.

347. Any proposal designed to relieve the Supreme Court of comparatively minor criminal trials deserves careful consideration. In theory, the committee's proposal would afford a measure of relief by removing from the Supreme Court those cases where a sentence of imprisonment was not seriously in contemplation. Any reduction of caseload by this means would be cancelled by a massive increase in the number of jury trials because all those electable offences otherwise triable summarily if the defendant so chose, but where the prosecution considered imprisonment a likely sentence, would be withheld from trial before a Magistrate's Court for trial before a judge and jury; also those summary cases where defendants are liable for the sentence of three months' imprisonment or less, since loss of liberty is again involved. The number of additional cases which would come before the Supreme Court under such a system would obviously be large: analysis of statistics supplied in the committee's submission gives an approximate figure for 1975 of 6,000 additional trials.

348. There are further unsatisfactory aspects of this proposal. One point needing clarification was whether, as the Criminal Law Reform Committee stated in their proposal, ordinary summary trial of electable offences would disappear, or whether this would remain, with the special procedure as an additional option. The committee's chairman confirmed the latter position was preferred.

349. The proposal also involves consideration of a person's previous convictions as a factor in determining mode of trial. Reference to an accused's criminal history is not normally permitted until a jury has considered its verdict. With one or two exceptions such as disqualified driving and bookmaking (and these have created their own procedural problems), the fact of previous convictions has no relevance to an accused person's right to elect trial by jury. Under the committee's proposal it is not inconceivable that the jury, observing the minor nature of the charge, might deduce that the accused had a history of convictions.

350. Revision of certain statutes would also be necessary. Of the 1,346 persons sentenced in the Magistrates' Courts in 1976 to sentences of three months' imprisonment or less, a substantial portion would have been charged with summary offences for which they are not presently entitled to the right to elect jury trial, for example, driving with excess blood alcohol, disorderly behaviour, first offences of driving whilst disqualified, and breaches of probation and periodic detention orders. Allowance should also be made for charges of these kinds which resulted in acquittal. Furthermore, sentences of probation and periodic detention (residential or non-residential) may only be imposed when the person charged is liable to imprisonment. The place of periodic detention in the penal system has been stated as an alternative to imprisonment and it involves substantial invasion into the liberty of the person charged. If it is intended that sentences of probation and periodic detention continue to be available under a special summary procedure, a revision of penal policy and of the relevant sections of the Criminal Justice Act would be required.

351. It is also relevant to point out that the effect of the special summary procedure would be to bring cases considered by the

prosecution to involve no risk of imprisonment within the definition of "minor offences". Elsewhere in this report we have recommended that these might be presided over by justices of the peace. Under the committee's proposal, outlined above, where a hearing has been commenced under the special summary procedure, a magistrate may decide on the evidence as it proceeds that the special procedure is inappropriate and that imprisonment ought to be considered, thus reversing the decision of the prosecution. We believe that such a decision should not be delegated to justices of the peace as it could be under the special procedure.

352. We believe that an important objection to the committee's proposal is the extension of power it gives the prosecution to choose the forum and mode of trial. We note that certain safeguards are suggested, such as the right of a defendant to apply for jury trial on a matter the prosecution has commenced by way of the special procedure, and the discretion of the court referred to in the preceding paragraph. In our view, however, the power of the prosecution to determine, at least initially, the forum and mode of trial should be reduced rather than extended. We agree with the conclusion reached by the James Committee in England that in the absence of a separate prosecuting authority wholly independent of the police (for example, a Procurator Fiscal as in Scotland), it is undesirable that the authority which has investigated the offence, apprehended the accused, and decided what offence he should be charged with, should also decide the place and type of trial. There should be no suggestion that the prosecution might in any way pre-empt the sentencing function of the court. We would also comment that while senior police officers and Crown prosecutors may well have the experience to assess the likelihood of a prison sentence in a particular case, other prosecuting authorities may not be so competent or experienced in this field. Also, in arrest cases the prosecution might have little time to decide which procedure to adopt. The Deputy Commissioner of Police has pointed out that the duty officer may have little more than the circumstances of the offence and the defendant's criminal history to assist him. While the proposal makes provision for a limited opportunity for review of this decision when the matter comes before the court, this in turn would only add to the workload of the District Courts.

353. Some features of the proposal seem likely to lead to delays in completing the hearing of cases. For instance, the hearing of a case under the special procedure might be well advanced when the possibility of a prison sentence becomes apparent. This could mean that witnesses would be sent away, to return on another occasion for a preliminary hearing, and yet again for the jury trial. We have come to the conclusion, therefore, that while the proposal would remove some trials of relatively minor matters from the jury lists and would afford a more realistic basis for determining which trials should go to a jury, the merits of the scheme are outweighed by its demerits, and the suggested change has not been shown to be necessary or desirable.

354. We finally note one solution considered and not pursued by the committee, which we think is worthy of further study. We refer to the suggestion that the monetary thresholds beyond which a person becomes entitled to elect the forum of his trial for crimes such as theft, receiving, and false pretences should be adjusted to allow for the effects of inflation. In itself, this may remove only a small number of trials from jury lists but it was submitted it would revise outmoded provisions. As we elsewhere set

out, we do not consider this limit should be revised, at least until the effect of our other proposals has been assessed.

355. ***Unified Court*** The general submissions we received concerning the need for a unified court are dealt with elsewhere. In so far as these bear upon the criminal business of the courts, we consider that the recommendations we are making meet that need. The more flexible the total administration of the courts becomes, the greater unity is achieved. Some want to achieve it administratively; some want to create a different type of structure. Our criminal procedure is already unified to a substantial extent in that every criminal matter is commenced in the Magistrates' Courts by way of filing an information. The steps which have to be taken to dispose of that information are then specified in our procedure. There must inevitably be widely differing specific procedures for dealing with a parking offence and murder, and they must be channelled to the appropriate place.

356. ***New Zealand Law Society proposal*** The prime suggestion of the Law Society for criminal work of the High Court is that the proposed District Courts should be given jurisdiction to hear criminal jury trials of lesser offences. While conceding that the simplest way of handling present problems of court congestion in New Zealand would be to allow someone else, whether from the Bar or from the Magistrates' Court Bench, to preside over criminal cases in the Supreme Court, the Society's proposal was intended not merely to provide a solution for problems of the next decade, but to devise a basic structure to carry forward for many years to come. The Society is strongly motivated to ensure that all people in all areas receive the same justice and are not disadvantaged. There is also the key problem of endeavouring to ensure that the Magistrates' Courts are not downgraded. The Society's scheme would obviously relieve the present burden on High Court judges and simultaneously up-grade what will be the District Court Bench. The enlarged jurisdiction of the lower court frees the High Court to fulfil its more appropriate superior functions. We consider the scheme would be more readily adaptable than others proposed to meet future expansion and developments. We have earlier indicated our preference for giving the new District Courts complete autonomy wherever possible. For these reasons, we consider the forum in which a District Court judge presides with juries should be the District Court itself rather than the High Court (although, as a matter of practical expediency, the same courtroom may often be used).

357. ***The Commission's recommendation*** While we concur in the choice of forum, we do not agree with all the other submissions of the Law Society on the jurisdiction to be exercised by District Court judges. We accept as fundamental the submission that purely indictable offences should be tried in the High Court. We do not think that the jurisdiction of District Court judges with juries should cover only certain electable crimes. We prefer the Department of Justice's proposal that the judge should be entitled to preside in his court over all criminal jury trials other than for purely indictable offences. We have carefully perused the nature and type of offences which fall into the two categories of indictable and electable. Statistical information confirms the submission that only a small proportion of electable offences has attracted sentences in excess of three years' imprisonment: as we have previously mentioned, a sample taken by the Department of Justice in the year 1976 showed that only 3% (9 persons out of 299) received a sentence in excess of a magistrate's jurisdiction of three years (Table 14).

358. Our recommendation, therefore, is that District Courts should be given jurisdiction to hear all electable crimes. Some judges of that court will therefore sit with a jury. We think such judges should be selected by the Appointments Committee of the Judicial Commission. While the Law Society conceded that not all present magistrates would be suited to preside over jury trials, we consider the required number may be found from within their ranks and from new appointees. We consider that as with their counterparts in District Courts overseas, our District Court judges who sit with a jury should have jurisdiction to impose the full sentence prescribed for the particular offence, that is, the same jurisdiction a judge of the High Court would have if he were dealing with the same offence. (So that those who peruse this report may have a clearer understanding of the classification of offences as summary, electable, and indictable, we produce Appendix 1.)

359. In achieving our recommendations on the way a District Court judge will be given jurisdiction, either with or without juries, we have not been persuaded by any single proposal from any particular quarter. The Commission has been able to gather a synthesis of what we consider the better and more practical ideas. The Law Society suggested there should be a limit placed on the District Court's jurisdiction for electable crimes, having regard to the maximum sentence prescribed for any offence. At present, if a magistrate considers the sentence might be in excess of his jurisdiction of three years, the accused person is committed for sentence to the Supreme Court. It was said to us that that three years could be made five, seven, or ten years as the Commission thought fit; the Department of Justice, on the other hand, placed no limit on sentencing for a District Court judge sitting with a jury other than the sentence prescribed for the offence. It did propose that the District Court judge sitting without a jury should exercise the current criminal jurisdiction of the Magistrates' Courts. We have not found this an easy matter to resolve because of potential anomalies concerning the appropriate forum for appeal but we think the best solution is to propose that the sentencing jurisdiction of District Court judges sitting with a jury should be that provided by statute for the crime. We consider appeals in this class of case against conviction or sentence should go directly to the Court of Appeal. On the other hand, we have decided to recommend that when District Court judges sit without a jury, the maximum sentence should remain at three years' imprisonment and any appeal should lie to a single judge of the High Court. In accordance with the desirability of increasing District Court judges' jurisdiction over a period of time, we think that after three years, the Judicial Commission should review the sentencing limits of District Court judges sitting without a jury. Should the sentencing jurisdiction be increased beyond three years' imprisonment, we recommend that appeals against conviction and sentence, where the sentence is in excess of three years' imprisonment, should then go direct to the Court of Appeal.

360. We have mentioned anomalies earlier. We need only point out that a District Court judge sitting alone may, at the election of the accused, try a serious crime and the appeal, under our proposals (or at present), goes to the High Court; whereas on another occasion he might, at the election of the accused, try a lesser criminal offence with a jury and the appeal, under our proposal, would lie to the Court of Appeal. We have given anxious thought to the apparent difficulties, and bearing in mind the criteria we have set ourselves, we conclude it is desirable for our

permanent appellate court to be entrusted with overall supervision of directions to juries and, likewise, the reviewing of lengthier sentences.

361. ***Allocation of cases between High Court and District Courts*** Although the Crown Court system in England provides for a High Court judge to refer what would be an indictable case in New Zealand for hearing by a Circuit judge, and we were urged to adopt such a provision, we believe that the legislature has reserved indictable offences for the highest trial court in the land to reflect the serious nature of the particular offence. We also recommend that the High Court should be able to grant leave to an accused person whose charge is within the jurisdiction of the District Courts to have his case tried in the High Court. The grounds might well be that an important point of law is involved, or that the facts are exceptionally complicated, or that a matter of widespread public concern is in issue. Like the members of the Beeching Commission, we are not disposed to specify the criteria precisely, but considerations which could be expected to influence a decision towards a trial in the High Court include those referred to in a practice direction by Lord Widgery L.C.J. dated 14 October 1971, namely:

(i) the case involves death or serious risk to life (excluding cases of dangerous driving, or causing death by dangerous driving, having no aggravating features);
(ii) widespread public concern is involved;
(iii) the case involves violence of a serious nature;
(iv) the offence involves dishonesty in respect of a substantial sum of money;
(v) the accused holds a public position or is a professional or other person owing a duty to the public;
(vi) the circumstances are of unusual gravity in some respect other than those indicated above;
(vii) a novel or difficult issue of law is likely to be involved, or prosecution for the offence is rare or novel.

We also think it may prove administratively expedient for a High Court judge to try certain electable offences; for example, when the judge is on circuit with his scheduled programme completed earlier than anticipated because of settlements or pleas of guilty, and a jury, counsel, and witnesses are readily available to hear an electable trial awaiting hearing.

362. Therefore, in accordance with the proposed administrative structure for the courts, we recommend that cases should be allocated to either a High Court or a District Court judge sitting with a jury in the following manner:

(a) *Indictable offences:* All cases in this category will be committed for hearing before a High Court judge.
(b) *Electable offences:* Cases of this nature would normally be committed for trial before a District Court judge sitting with a jury but, in accordance with the special criteria already stated, if the prosecution, the defence, or those responsible for committing the accused for trial take the view that the case should be tried by a High Court judge, then the regional court administrator shall consult a High Court judge for directions. We recommend that the High Court judge should not refuse the transference without hearing counsel or the accused in person. Examples of the type of offence where the prosecution might seek a hearing before a High Court judge would be a case of dealing with controlled drugs under the Misuse of Drugs Act 1975 or dealing with narcotics under the

Narcotics Act, 1965, both of which offences carry up to 14 years' imprisonment. (A simple solution would be to make serious drug offences indictable.)

363. We also point out that our proposal avoids a new administrative section, District Court jury trials being handled as part of the existing administration. We consider that the provision of courtrooms or court facilities for District Court jury trials is presently economically feasible. It is expected that when new District Courts are constructed, full facilities for jury trials will be incorporated in the design. It will be possible to adapt some older Magistrates' Court buildings as they fall due for reconstruction or renovation: other existing courtrooms could be suitably modified with a minimal amount of work (we refer, for example, to the Tauranga courthouse). In many registries, existing Supreme Court courtrooms could be used for jury trials for the High and District Courts. (Dunedin affords an example.) This is a matter which can be decided administratively. We believe that Christchurch presents no real problem as the senior judge for that area has informed us that flexibility in the use of jury courtrooms can be arranged. Perhaps the only two places that need special consideration at present are Auckland and Wellington. With the former, we have inspected the facilities in Princes Court: there are jury courtrooms available which could be used by the District Court judges, leaving the jury courtrooms in the High Court for the High Court judges. We envisage one jury roll for both courts: this is the position overseas. Likewise, in Wellington, we have inspected the Magistrates' Court building and consider the courthouse could be converted to accommodate juries. We refer in particular to the courtroom which was previously the Arbitration Court.

364. All the above matters to do with allocation of cases illustrate one of our prime concerns that successful operation of our proposed court structure will largely depend upon close co-operation of the regional judges or list judges who are responsible for administration, in conjunction with the regional court administrators.

365. Having considered all the proposals, we would make the following recommendations:

Recommendations

1. All indictable offences should be heard in the High Court.
2. Jury trials for electable offences should no longer be exclusively heard in the High Court but substantially in the District Courts.
3. Jurisdiction to preside over jury trials of electable offences in the District Courts should be exercised by selected District Court judges specially recommended for that purpose by the Judicial Commission.
4. High Court judges should be empowered to hear electable offences.
5. Where a High Court judge is of the opinion that an electable offence should be tried in the High Court, he should be empowered to so order.
6. Where the parties apply to have an electable offence tried in the High Court, the High Court judge should not order trial in the District Court without giving the parties an opportunity to be heard.
7. District Court judges sitting with a jury should be empowered to impose the sentence prescribed by law, and in such cases appeals would lie direct to the Court of Appeal.
8. District Court judges sitting without a jury should, until a review is carried out by the Judicial Commission, be restricted to imposing a sentence of no greater than three years' imprisonment.
9. In all other respects, appeal procedures will remain unaltered.

366. ***Majority verdicts*** It has been a fundamental principle of New Zealand law that the jury's verdict should be unanimous in a criminal trial. Appearing before us, the Police Department initially suggested that the time had arrived to follow the new English practice of allowing for 10:2 or 11:1 verdicts, if the jury had at least two hours for deliberation, or any longer period the court thought reasonable having regard to the nature and complexity of the case. Under s.13 of the Criminal Justice Act 1967 (U.K.), the verdict need not be unanimous if:

(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and
(b) in a case where there are ten jurors, nine of them agree on the verdict.

There is also the provision that a court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict. So, although an Englishman may be convicted by a majority he is able to assume that, if he is acquitted, the decision has been unanimous.

367. The Police Department received some support from the New Zealand Law Society and a minority of the Supreme Court judges. The Law Society stated that it was not strongly of the view that the unanimity rule should be preserved. It would be prepared to entertain majority verdicts on the basis of an 11:1 verdict for either a conviction or an acquittal. However, the Society was strongly of the opinion that, if introduced, a majority verdict of 11:1 should operate for an acquittal because if 11 out of 12 jurors are not convinced beyond reasonable doubt of an accused person's guilt then it would be wrong to require him to face trial on a second occasion. It was said that in such a situation the Crown case would have failed to fully establish the allegations and that it was hard to see any justification for the expense and trauma of a second trial. In contrast to the views cited above, the Department of Justice and the Criminal Law Reform Committee submitted that, in the absence of any clear evidence on the need for a change, the unanimity rule should stand.

368. Bearing in mind that any reform we recommend must be either necessary or desirable, we will now proceed to examine evidence and arguments in more detail. First, we record the number of disagreements leading to re-trials. It appears that the national average from 1974-1976 was approximately 4.7% of the total number of trials. We have been informed that over half of the re-trials following a disagreement in the first trial did not result in a finding of guilty. These re-trials were mainly necessary in Auckland and Wellington. In Auckland, for the years 1969 to 1977 inclusive, there were 1,559 trials producing 122 disagreements, viz. 7.8%.

369. We have studied a report on the English system* and we have considered the arguments for and against majority verdicts in an excellent article by D. M. Downie†. Several Australian States have also broken with the tradition of unanimity. The main reasons advanced for change in the United Kingdom were to check the abuse of the jury system by corruption of jurors, or attempts to corrupt; and to reduce the frustration and waste which is caused when a jury is prevented from reaching agreement by the perversity of one or two jurors‡. It was claimed that, in an age of highly organised crime, there was evidence of bribery and

*"Criminal Justice Act", A. Samuels (1968) 31 M.L.R. 16, p. 24.
†"And Is That the Verdict of You All?", D. M. Downie (1970) 44 A.L.J. 482.
‡Parl. Debs.—Commons, 5th Series, Vol. 738, p. 203.

intimidation ("nobbling") of jurors leading to disagreements in important cases involving professional criminals ("the big fish"). Complaints had been made by judges, barristers, and the police.

370. The opposition to majority verdicts in England was equally strong. It was pointed out that the evidence of "nobbling" was infinitesimal; six cases in three years in London and five cases in the provinces over a similar period. Also, the number of disagreements was few. The opponents argued that the unanimity concept had been of immense value in promoting public confidence in English criminal justice and that to sacrifice this in the absence of overwhelming need for change was unforgiveable.

371. Recently, the Home Office in the United Kingdom informed us of the number of persons who, on any one or more of the charges on an indictment, were, respectively:

Year	Found Guilty after Pleading Not Guilty	Found Guilty by Majority Verdict	Column 3 as Percentage of Column 2
1968	5 747	444	7.7
1969	5 650	470	8.3
1970	6 886	627	9.1
1971	7 059	697	9.9
1972	8 273	479	5.8
1973	12 589	859	7.0
1974	13 132	680	5.0
1975	14 831	855	6.0
1976	15 182	1 793	12.0

We were given this information subject to the caveat there is reason to believe the figures for the years preceding 1976 may not be wholly accurate.

372. We have not been supplied with compelling evidence from this country that supports the proposal for majority verdicts. Indeed, following an article that appeared in the "New Zealand Herald" of 24 August 1977 titled "Jurors Facing Underworld Intimidation", the Assistant Commissioner of Police at Auckland wrote to the registrar of the Supreme Court at Auckland stating that his enquiries had failed to disclose any interference with the judicial system, either intimidation of jurors or of witnesses. No specific examples of "nobbling" have been given us but it is fair to acknowledge that some judges, the police, and certain prosecutors are uneasy concerning jury interference by organized crime, especially involving drugs. It is this lack of actual, cogent evidence of intimidation that causes us not to recommend a change at the present time. We of course recognise the other categories of dissenting juror mentioned by the Secretary for Justice—the occasional eccentric, the stubborn, the intransigent, or the prejudiced, who take delight in disagreeing; but the majority of judges in this country have accepted that occasional disagreement must be expected and may be evidence of a conscientious performance. It is obviously hard to establish the precise numbers who vote one way or another on a jury that disagrees.

373. We have not found this a simple issue to resolve. While it is wise to look at other systems, we must measure the proposal against the criteria we have set ourselves. As Lord Devlin has said:

> The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient was overruled. Since no-one really knows how the jury works or indeed

can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.*

On the other hand, it is said that the unanimity principle should not command blind acceptance. Elsewhere in this section we have urged more careful checks upon lists of jurors in order to render the challenge process more effective. We therefore say that, should there be proof that organized crime in this country induces jurors to hold out for verdicts of not guilty, or should the percentage of disagreements substantially increase, then would be the time for law reformers to consider abolishing the rule of unanimity. We recommend no change at present.

374. ***Reserve jurors*** We have earlier referred to the provisions of s.374(3), (4) and (5) of the Crimes Act 1961 in paragraph 149 of this report. This section enables a criminal trial to proceed with fewer than 12 jurors in specified circumstances. The Commission members who travelled overseas learned that in certain countries provision was made for reserve jurors. Either on application of the Crown or the defence, or on the judge's own motion, especially where there were long complex trials, up to three reserve jurors are sworn in and sit alongside the jury panel. In the event of illness, death, or other reasons which would prevent the panel from continuing the trial and which might otherwise have rendered the trial void, one or more of the reserve jurors takes part in the deliberations of the jury from that point on. Some Australian judges we interviewed were very much in favour of this provision. In Perth, Western Australia, reserve jurors were provided for in a 1975 amendment to the Juries Act. Up to three reserve jurors are sworn in if the trial judge decides they are needed; they sit in or beside the jury box and listen to the evidence; they stay with the other jurors during adjournments and, if necessary, replace ill jurors in the order which they were called; they are discharged when the jury retires to consider its verdict.

375. The New Zealand Law Society representatives saw some advantage in the proposition but in light of the views adopted by the Society on the issue of majority verdicts, did not make any positive recommendation. The Commission then took the opportunity of referring this matter to the judges, a majority of whom did not support the proposal for additional jurors. The judges considered that s.374 of the Crimes Act 1961 should be broadened so that it applied "at any stage of the trial". We also think that s.374(3) should be further amended to apply not only to the death of a juror's wife or a member of his family but the death of a member of his wife's family as well. For example, a juror should be entitled to attend the funeral of his mother-in-law. On the whole we do not think the evidence is sufficiently compelling to alter the law to make provision for reserve jurors. We think we can substantially achieve the same effect by the suggested amendments to the Crimes Act.

Recommendations

1. Section 374(3) of the Crimes Act should be broadened by deleting the words, "If, before the jury retire to consider their verdict", and substituting the words, "If, at any stage of the trial", etc.

2. Section 374(3) of the Crimes Act should provide for the discharge of a juror where his wife or a member of his family or a member of his wife's family is ill or has died.

376. ***Crown's right to stand aside jurors*** Both the prosecution and the

*Hamlyn Lectures, "Trial by Jury", 55, p. 57.

defence have, pursuant to ss.120-122 of the Juries Act 1908, the right to six peremptory challenges. Both the Crown and the defence have an unlimited challenge for cause, pursuant to s.363 of the Crimes Act 1961. The Crown has an additional power under s.363(7) of the Crimes Act 1961 to stand aside any number of jurors. The Department of Justice's submissions suggested abolition of the latter power. The history of the right is stated in Adams "Criminal Law and Practice", 2nd Ed. p.753 para. 2947 as follows:

> The right of the Crown to stand jurors by first arose in practice after an Act of the year 1305 had abolished a previously existing right of the Crown to challenge peremptory to an unlimited extent—a right which enabled the Crown to prevent a trial and keep the accused in prison . . . In England the Crown can still challenge only for cause having at no stage any right of peremptory challenge . . . The right of the Crown to stand jurors by is additional to its right of peremptory challenge given in New Zealand.

In *R. v. Bourke* (1901) 19 N.Z.L.R. 335, C. A. Connolly J. at 339, questioned whether it had been intended to leave the Crown with the power to stand aside, once it had been given the power of peremptory challenge. However, the other members of the Court of Appeal did not regard the two powers as inconsistent, nor did they suggest that the power of peremptory challenge made the power to stand aside either superfluous or unfair. The position has remained undisturbed ever since. It has been said that an advantage of the right is that the Crown exercises the power where otherwise a challenge for cause might be made and thus avoids delays in the drawing of a jury *(R. v. Greening* [1957] N.Z.L.R. 906, 914). The department's objection is that the Crown's right to stand a juror aside may suggest to the accused that the Crown has a greater opportunity to influence composition of a jury. This particular submission was supported by several barristers who are prominent counsel in the criminal field.

377. During our hearings, we were told that the Crown's power under s.363(7) of the Crimes Act 1961 to stand jurors aside was often utilised to avoid embarrassment to disqualified jurors by challenging for cause. We were also told by Crown prosecutors from larger cities that the justification for the continued right to stand aside would be better understood if the system of selecting jurors were examined. The Commission accordingly invited representatives from the Police Department, the Department of Justice, the New Zealand Law Society, and the Wellington Crown prosecutor, to consider the problem. In due course they presented us with a paper and we thank those who took part in its preparation. In addition, the Solicitor-General gave us his views of the proposal to abolish the stand aside procedure.

378. Before turning to the present system of selecting jurors, we observe that s.5 of the Juries Act 1908 established four categories of persons who are not qualified to be jurors:

(a) any one who is not a British subject;
(b) any one who has been convicted of an offence punishable by death or by imprisonment for a term of three years or more;
(c) any one who is an undischarged bankrupt;
(d) any one who is of bad fame or repute.

We were informed that categories (a) and (c) do not often arise, but (b) occurs consistently. The Solicitor-General submitted that if a better system of selecting the panel of jurors could be devised, then categories (a), (b), and (c) could well be dealt with before the panel was settled.

Until now, however, the police have been the only organization possessing the information on previous convictions which would enable category (b) to be purged from the panel. Contrary to certain views expressed, we were informed that the only information available to the Crown prosecutor is a jury list on which are marked the names of jurors whose names are similar to those of persons with recorded convictions, particulars of which are supplied. In fact, these jurors may have unblemished records. It was submitted that the only way presently available to ensure categories (a), (b), and (c) are excluded from a jury is exercise of the power to stand aside. It was also said that category (d) represents a particular difficulty whatever is done, as it involves a partially subjective judgment, evidence might be necessary to establish what is alleged, and that the power to stand aside is preferable to a hearing for such a purpose, as the jury should be empanelled wholly in public.

379. In the course of our enquiries we were informed that reasons for standing aside by Crown prosecutors include: previous convictions of a sufficient significance; at the request of defence counsel to conserve his challenge; the avoiding of an impasse where a juror fails to respond to his name; the situation where a juror before taking his seat says he knows the accused or complainant (this could well save a defence challenge); when a judge suggests that the Crown might stand aside a juror; finally, for the reasons that would prompt counsel to challenge.

380. We summarize the present system of selecting jurors as follows. Prospective jurors are selected by ballot from electoral rolls within each of the 17 jury districts. These main lists are drawn up in the year following each general election. (We were told that in 1976 the Government postponed this task for 12 months for economic reasons. It was expected that the total number of prospective jurors on these lists would be in the region of 150 000, of which only 20%-25% would actually sit on a jury.) These prospective jurors are sent a notice from the Department of Justice advising them of their selection as prospective jurors. This notice provides such people with sufficient information to enable them to indicate their eligibility and qualification to sit on a jury. The rolls are then prepared by the jury officer and copies are sent to the sheriff who in turn sends one to the police (s.19 (3) Juries Act 1908). The lists are finalised at a public meeting in each district, at which time any citizen may attend and object to the inclusion of any name on the list, on the grounds that that person is not qualified or is not liable to serve as a juror. Prior to 1961 the lists were vetted by the police but the increase in size of rolls and the heavier pressures on the police have made this neither possible nor practicable. Not only would individual jury panels have to be re-checked for each Supreme Court session to ensure that persons on that panel had not been disqualified by reason of conviction since the main lists were prepared, but the physical vetting of the main lists would involve approximately 4 000 hours of computer time plus the administrative work necessary to strike the disqualified persons from the lists. About six weeks prior to each Supreme Court session, a jury panel is balloted from the jury list and those persons summonsed for jury service. This panel varies in size from district to district, but normally numbers between 150 to 200 persons. A copy of this panel is immediately made available to the police in advance of its availability to accused or their counsel. The panel is checked by the police and the results handed to the Crown prosecutor. There is no provision in the Juries Act 1908 to vet the jury panels prior to the jury summonses being sent out, with the result that disqualified jurors must either be challenged for cause or stood aside by the Crown prosecutor.

381. The special committee that helped us consider the problem of standing jurors aside also informed us that the question of more reliable checking was studied. It is understood that jurors' dates of birth will be available for vetting purposes by 1980-81. This will lessen the problems in matching jurors to several possible criminal histories. The committee further informed us that because of difficulties involved in vetting jury lists the only reliable method of preventing disqualified jurors being summonsed for jury service was to vet the individual jury panels immediately prior to the jury summonses being prepared. Such a check would enable the sheriff to strike from the list any person who was disqualified by reason of previous convictions and thus prevent such persons being called for jury service. Vetting jury panels at this stage is common to both the Australian States of Victoria and South Australia. The question of which department should be responsible for the vetting was considered by representatives of the Police Department and Department of Justice but agreement could not be reached in the time available, although the basic premise that juror vetting should be completed before jury summonses are sent out is accepted. Further negotiations will continue in the near future. One difficulty is that computer checking will not isolate disqualifications under s.5 (c) or 5 (d) of the Juries Act 1908 and therefore the police would continue to undertake these checks.

382. As we have stated, there is no present provision in the Juries Act to enable jury panels to be checked before the summonses are posted out to the jurors. We consider an amendment to the Juries Act 1908 is required to enable:

(a) the necessary enquiries as to the qualification of any person on the jury panel to be made before the jury summonses are prepared;
(b) the sheriff to strike out any name for the jury panel if he was satisfied that that person was not qualified in terms of s.5 of the Juries Act 1908 to serve on a jury;
(c) any person to provide sufficient proof as required by the sheriff to establish whether such a person was in fact disqualified.

Having observed that the problem of disqualified jurors being summonsed for jury service may be remedied in due course, the matter of the Crown's right to stand jurors aside was further considered by members of the committee but they were divided on the issue.

383. The Police Department shares the view of the Auckland and Wellington Crown prosecutors that no amendment should be made to the Crown's power to stand aside jurors. Nearly every judge of the Supreme Court supports retention of the right. In turn, the Council of the New Zealand Law Society has invited us to be cautious in any approach to abolition as it seems there could be advantages (to both sides) in retaining the right. We think from the wide enquiries we have made that the present system is reasonably fair and effective and there is no significant dissatisfaction. Indeed, it can be said that in most parts of New Zealand, Crown prosecutors use the right to stand aside sparingly and perceptively. We were told by the Solicitor-General that he suggests issuing a standing instruction to Crown solicitors to ensure that this continues, namely:

(a) when asked by the defence, to stand a juror aside for good reason;
(b) to use the power to stand aside for alleged bad character with discretion;
(c) not to stand aside more than six jurors for reasons which would ordinarily come within the category of peremptory challenge;

(d) to remember that the Crown is concerned to empanel a jury of people who would ordinarily reflect the current attitude of the community without trying to ensure that it is composed of people from particular groups or likely to reflect particular attitudes favourable to the prosecution: in other words to ensure that the jury empanelled is one in keeping with the words the registrar uses to address a jury upon an arraignment, "The accused has put himself upon his country, which country you are".

384. We support this suggestion. We also recommend that the Juries Act 1908 should be amended to allow any jury panels to be checked by either the Department of Justice or the Police Department so that disqualified persons may be deleted from the panel before prospective jurors are summonsed. Because the present system has the appearance of unfairness, we think at the stage when the Department of Justice has the means to provide a list of properly qualified jurors, the whole position should be reappraised with a view to making a change. We have also considered the suggestion that a trial judge should be empowered to direct that a particular juror should not take his seat on the jury. There is authority of the Court of Appeal that a judge has such a power to be exercised judicially when the circumstances are such that a fair trial cannot be had if the particular juror is allowed to become one of the jury to try the case (*R. v. Greening* supra).

Recommendations

1. The Juries Act 1908 should be amended to allow any jury panels to be checked by either the Department of Justice or the Police Department so that disqualified persons may be deleted from the panel before prospective jurors are summonsed.
2. The sheriff should be empowered to strike out any name for the jury panel if he is satisfied that that person is not qualified in terms of s.5 of the Juries Act 1908 to serve on a jury.
3. At a future stage when the Department of Justice has the means to provide a list of properly qualified jurors, the position should be reappraised with a view to abolishing the stand aside procedure.

JURY SERVICE

385. We received several submissions from both national organisations and individuals over the selection, instruction, duties, exemption and disqualification of jurors. We offer brief comment on several issues.

386. ***Exemption and disqualification*** The National Council of Women urged that women have the same terms for service or exemption as men. More specifically they sought repeal of s.6 (2A) of the Juries Act 1908. That repeal has now occurred and save for a parent, or a person in the position of a parent, who has the continuous responsibility for the day-to-day supervision of a child under the age of six years and who notifies the jury officer or sheriff in writing that he or she does not wish to serve as a juror, men and women are on an equal footing.

387. It was further suggested that the number of occupations exempted from jury service was too wide and, as a result, a true cross-section of the community is seldom involved. Full-time teachers were mentioned as an example. But teachers generally might have to leave classes of as many as 30 pupils unattended for perhaps several days. Even with the use of relieving teachers, programmes could be disrupted. Having given the matter careful consideration, we make no recommendation for any change of exempted classes.

388. We were informed by several organizations, including the New Zealand Federation of University Women and the National Council of Women, that their country members were disappointed the limit of 15 miles for the jury district from which the jurors' list is prepared had recently been extended to only 30 kilometres. Several persons told us that people in the country would welcome the opportunity to play a fuller part in the life of the community. They considered the new limit was still unrealistic in this motorized age and it should be abolished, subject to the right of anyone who resided more than 30 kilometres from the court to have automatic exemption by advising the jury officer in writing. We realise there are geographical distinctions: 30 kilometres from the Dunedin or Hamilton courts would include a large proportion of rural land, but the same could not be said of Auckland or Wellington. If, however, Otahuhu or Upper Hutt courts were authorized to have jury sittings, then a wider spread of people from rural or semi-rural areas would result. Although mindful of the standing of those organisations making submissions on this point, we think it is premature to recommend a change. We consider that, generally speaking, the present limit of 30 kilometres does provide a fair range of choice of persons and occupations. We would also observe that some juries deliberate until late at night when public transport may not be available. If our recommendation for District Courts sitting with juries is accepted, there will need to be an appraisal of the places where jury trials are held. Any extension of the jury court to new places will mean more persons will be enrolled as jurors, including more from rural areas.

389. ***Information for jurors*** The suggestion was made that jurors would be helped by an informative leaflet being sent with the notice to prospective jurors. In fact this procedure has been carried out for several years. A document published by the Department of Justice, styled "Information for Jurors" is sent. It has a great deal of useful material. Indeed, it answers several other criticisms of the system and clearly tells jurors the exact nature of their duties. Most of the suggestions for improvement made to us are covered by the questions and answers in the leaflet.

390. ***Rape cases*** There was a strong feeling among members of the National Council of Women that there should always be women on a jury in a rape trial. We have made enquiries from Supreme Court judges on this topic. Apart from one area where the jury roll was defective, we were informed that it has been very rare in recent years, to have an all-male jury. As more women are eligible for jury service, more should be on juries.

391. ***Notice of selection as a juror*** We were also told that the wording on the jury form is unsatisfactory; many classes of people are listed under the heading "may be exempt" while a very few are said to be "disqualified". It was submitted that the difference should be made quite plain between those who may claim exemption as of right by virtue of their occupation and those who are disqualified along with the criminals, the mentally defective, those over 65, and those residing too far away from the courthouse. We have perused the form which is styled "Notice of Selection as a Juror". It informs the addressee that he or she has been selected by ballot from the electoral rolls as a representative juror and that every person between the ages of 20 years and 65 years who is of good fame and character and who resides in New Zealand is liable and qualified to serve as a juror within the jury district in which such person

resides. The notice then records that certain men and women are disqualified or may be exempted from jury service and that if the person comes within those descriptions he or she is asked to complete a reply portion and return it to the jury officer within one month. On the back of the form are 26 classes of person who shall be exempt. We think item 14 could need correction. It refers to registered nurses " . . . employed full time in any public or private school". The word "hospital" should be substituted for "school". Those persons not qualified to serve are also recorded. They incude "anyone who is of bad fame and repute". We find this subjective test a little difficult to impose on an individual, but no doubt it is policed by the challenge procedures in court. Overall, we consider that the form is satisfactory, except that on the front page the words "may claim exemption" do not reflect the wording of the statute and should read "are exempted".

392. ***Spouses of jurors*** We were asked to consider whether the occupations of the husbands of women jurors should be recorded on the jury lists. We do not favour this proposal. First, it would tend to make women appear subservient to their husbands and not persons in their own right. Secondly, the list would not state whether husband and wife were separated. Thirdly, it would be necessary, equitably, for a working wife's occupation to be given alongside the name of her husband when his name is on the list. For these reasons, we consider that those concerned with any such matter should be left to make their own enquiries.

393. ***All-Maori juries*** Before leaving the topic of jury service, we record a proposition made to us that there should be a return to all-Maori juries. Apart from our belief that Maori opinion is against all-Maori juries, we do not consider that the Maori people should be singled out as a class requiring special treatment under our system of justice. There are many people from Pacific islands and elsewhere who should receive similar treatment if this argument is valid. This we think would undoubtedly create a divided society and cause insuperable administrative and other problems. By way of example we mention the difficulty of accurately determining race or group membership; the problems which arise as a result of sub-groups (for example, Maori tribes or the various national groups which comprise the United Kingdom); problems created by joint trials where defendants are of different ethnic groups; and so forth. In our view, what can and should be done, is to see the Maori people occupy a due proportion of the jury rolls. Since there are only two electoral rolls, one for "Europeans" and one for Maori people, identifying other minority groups by electoral roll is impossible.

TRIAL WITHOUT A JURY

394. In the Magistrates' Courts a person accused of an electable offence may choose to be tried without a jury. A similar choice is sought for those charged with indictable offences, namely, trial before a High Court judge without a jury. We heard submissions on this point from the Criminal Law Reform Committee and certain members of the New Zealand Bar. Some members of the Commission examined the effectiveness of overseas systems which allowed accused persons to elect trial before a judge of the High Court without a jury. In one province of Canada this right applied to all cases, but other provinces excluded murder and certain offences we shall classify. No specific submissions on this topic were made by either the New Zealand Law Society or the Department of Justice.

395. It is accepted that in New Zealand most offenders are dealt with by magistrates. Of all the persons who had the right to be tried before a jury in 1976 (but excluding drug offences), only 2.2% elected trial in that way. We were told, however, that there are some highly complicated cases where the trial has lasted several weeks or, indeed, months. Company frauds or commercial conspiracy cases are examples. This form of "white collar" crime, though rare in New Zealand, does take a great deal of time if heard before a judge and jury. The ordinary risks of illness or death could mean that a jury must be discharged and a new trial ordered, for a jury cannot continue with fewer than 11 persons sitting, unless the accused consents. It is also possible that a complicated case may result in jury disagreement with much expense to all concerned. These factors respectively bear on the issue of the use of reserve jurors, particularly for this type of trial, and also on the debatable question of majority verdicts, where these might prevent a new trial if the jury is 10:2 or 11:1 for conviction or acquittal. Both these issues have received our detailed consideration above.

396. Those who supported the proposal for judge alone trial put their case this way. First, as we have already stated, an accused may elect trial before a magistrate for some quite serious offences: why not before a judge of the High Court? Secondly, little civil jury work remains in the High Court: most civil actions are before a judge alone. Thirdly, provided the choice remains with the accused, it is argued that he should be able to have his trial before a judge without a jury where there are difficult or technical questions of law or the facts may be exceptionally involved. Fourthly, as we were told in other countries, some "white collar" crime renders the judge's directions to the jury and the jury's comprehension of the intricacies of company law, an exceptionally difficult task.

397. In Australia, the Chief Justice of New South Wales supported the idea of judges sitting alone, more particularly for "white collar" crime. He considered that matters of this description were unintelligible to the majority of juries, particularly when not provided with a transcript. Such trials may be unnecessarily protracted and make considerable inroads into jurors' private lives. The Chief Justice of New South Wales thought he would like to see a High Court judge sitting with two assessors but not two District Court judges, as this would only constitute a legal hydra and add nothing to the expertise of the presiding judge. In other parts of Australia we spoke to judges who had had experience of "white collar" crime. They commented on the difficulties for a trial judge and for juries. In the United Kingdom, the former chairman of the Industrial Court now presiding over the Commercial Court, was strongly in favour of the abolition of juries for "white collar" crime. He had reservations, however, as to whether it was right for one man to decide a major issue of guilt. He also considered that assessors from the business community might prove to be an advantage. He further considered that both the prosecution and the defence should have the right to object to trial before a judge alone where there are accused jointly indicted. The main assistance we received in our researches came from Canada. Under federal law, at the option or election of the accused, a choice may be made between trial before a judge and jury or before a judge or magistrate without a jury. Except in Alberta, certain offences are excluded from the option: they are, for example, murder, treason, hijacking, bribery of judicial officers, or conspiracy (limited to murder, treason, and hijacking); s.427 of the Criminal Code R.S.C. 1970 of Canada. The Province of Alberta stands on a separate

footing. There is no class of offence that is excluded from judge alone trial in that province. We learned of the safeguard that on any crime carrying five years' or more imprisonment the Crown may require that the trial should be heard before a judge and jury. There is also provision that in cases in which there are joint indictments or conspiracy charges, the Crown should be heard as to the forum. It seems desirable to us that if any one of several joint accused wants a jury trial, unless it is a proper case for severance, then the trial should be before a jury. We would emphasise that the proposal does not mean any lessening of an accused's right to elect trial by jury. It is **his choice** for trial before a judge alone.

398. The Criminal Law Reform Committee suggested that it would not be appropriate to inhibit the accused's right to trial by judge alone on the authority of the Attorney-General (as in Canada): they would prefer that the Crown should be represented by individual Crown prosecutors and be entitled to be heard on any application for trial by judge alone. The decision would be made by the presiding judge. We were told that in Canada the tendency is for accused persons to choose trial by judge alone.

399. These are the opinions and submissions on which we had already formed our views in favour of the proposal. It was perhaps propitious that while we were compiling this report, the Court of Appeal delivered its judgment in *R. v. Jeffs and others* (Court of Appeal, 28 April 1978). This was a case which occupied a great deal of time of the courts and the jurors concerned. In his concluding remarks, the President said:

> This brings us to the end of a task which has demanded our exclusive attention for a period of three months. As a Court of three Judges we have enjoyed many advantages which were not shared by the members of the jury who tried the case in the Supreme Court. Unlike the jury we have had constant access to the transcript of the evidence which, as we earlier noted, comprises nearly 1800 pages. On hearing the appeals, in order to follow counsels' arguments we had constantly to compare passages in the notes of evidence with material in the exhibits and to study these and ask clarifying questions. These exhibits actually copied for the purposes of the appeal were contained in some 11 volumes, each of about 500 pages. Even with the advantages of being able to peruse the notes of evidence and ask counsel questions and with easier access to the exhibits than was enjoyed by the jury, we found this process as difficult as it was time consuming. The jury's problems would have been immeasurably greater and we are very conscious of that fact. We add that one of the matters currently under study by the Royal Commission on the Courts is whether trial by jury is an effective machinery for trying the sort of issues that arose in the present case. Our own difficulties have left us in no doubt that this is a question deserving of full consideration.
>
> It may be that some way can be found of permitting trial by Judge alone, either at the election of an accused person or by special order the Court.

400. We would reiterate that in making our recommendations we are not removing the basic and fundamental right of trial by jury; we are providing persons accused of indictable offences with an option. Many accused will no doubt continue to use their right of trial by jury; if our proposal is accepted, others may, in what could at first be special categories of cases, exercise their choice for a trial by a judge alone. While

we recognise that trial before a jury is one way of ensuring lay participation in the administration of justice, we as a Commission are required to look at any proposal that is said to be necessary or desirable to secure the just, prompt, efficient, and economical disposal of the business of the courts. It seems to us that this suggestion satisfies all those criteria.

Recommendations

1. Except as provided hereunder, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.
2. The Crimes Act 1961 should be amended to permit accused persons charged with indictable offences (excluding treason, piracy, hijacking, murder, accessory after the fact to any of those offences, attempting to commit those crimes other than murder, or a conspiracy to commit any of those crimes) to elect trial before a High Court judge sitting without a jury.
3. In any case where the accused elects trial before a judge alone, the Attorney-General may apply to a High Court judge for the trial to be before a judge and jury.
4. If any one of several accused jointly indicted elects trial by jury, then unless it is a proper case for severance, the trial shall be before a judge and jury.

Civil Business

401. We consider that the High Court should exercise an original jurisdiction substantially equal to the Supreme Court's present jurisdiction, namely, "all judicial jurisdiction which may be necessary to administer the laws of New Zealand". In framing our proposals we have given full consideration as to whether certain classes of civil work should be transferred to the District Courts. We have decided to recommend that company law and the law of bankruptcy, which can produce extensive and difficult problems, should stay in the High Court. The same considerations influenced us over trusts, wills and administration of estates, and jurisdiction under the Property Law Act 1952 and the Land Transfer Act 1952. Although we heard some submissions to the contrary, we have also decided to recommend that matters under the Family Protection Act 1955, the Public Trust Office Act 1957, the Charitable Trusts Act 1957, the Law Reform (Testamentary Promises) Act 1949, the Estate and Gift Duties Act 1968, and the Inalienable Life Annuities Act 1910, should appropriately be heard in the High Court. These recommendations are, of course, subject to the proposed withdrawal of original jurisdiction in the field of matrimonial and family law from the High Court and placing that in the District Courts. More explicitly, the High Court would lose its original jurisdiction under the Guardianship Act 1968, the Matrimonial Proceedings Act 1963, and the Matrimonial Property Acts 1963 and 1976. Furthermore, we think that, subject to any right of removal, those cases which fall within the jurisdiction of the District Courts should be excluded from the High Court, except where a right of trial by jury is allowed.

402. ***Jury trials*** We consider that all civil jury trials should be held in the High Court. The exercise of the right to civil jury trials in the High Court has been diminishing with the abolition of personal injury trials. In 1960, civil jury trials accounted for 35.75% of the total civil actions heard. By 1976, after three years of the operation of the Accident Compensation Act 1972, the number had fallen to 12.65% of the total. In terms of total

Supreme Court sitting time, in 1976, civil jury trials comprised 6.23%. As we have already mentioned, however, between 1973 and 1975 there has been a 100% increase in actions arising other than from personal injury.

403. The Department of Justice submitted that because of the greater length and cost of jury trials with little real advantage from that forum to the parties in the bulk of cases, and having regard to the abolition of actions for personal injury, the time is opportune to review the right to jury trial in civil cases. The test it proposed is that of Lord Denning in *Ward v. James* [1966] 1 Q.B. 273 at 295, namely, whether the case involves a person's honour or integrity or one or other party must be deliberately lying. On this basis, the Department of Justice suggested that appropriate cases for civil trial by jury should simply be defamation, malicious prosecution, false imprisonment, and fraud cases. The department mentioned that some commentators would include professional negligence, but it submitted the inclusion of this class of action would be illogical and arbitrary as there is no distinction between professional negligence and other cases where the defendants' standing in their profession, trade, or calling is in question. The example given is whether or not a person has performed at a competent level, as in the collapse of a bridge due to faulty design, where difficult questions may arise involving the standards of a profession and the case thus seems to be more suitable for a judge than a jury. The department further suggested that the threshold figure for jury trials should be re-appraised, as the level of $1,000 has remained unchanged for several years. When questioned, the Secretary for Justice indicated that under his proposal a plaintiff would have a right to bring a defamation action before a jury in the High Court where the amount claimed was under $10,000. He also considered that while the threshold figure of $1,000 was too low, he would be loath to increase it beyond $5,000.

404. The New Zealand Law Society sees no need to review or alter the right to trial by jury in civil cases and wishes to see the present rights retained. It agrees, however, that no civil jury trials would take place in the District Courts. It is our opinion that, bearing in mind the small and decreasing number of civil actions heard before a jury and the even smaller number in England (where judge alone trials account for over 98% of all trials), the adoption of the department's recommendation on the type of action that should be heard before a jury would have little if any real impact on the number of jury trials. It is at least arguable that because civil juries at present award damages, their retention is justified on the grounds of maintaining conformity with prevailing social attitudes, for example, in areas such as nuisance claims. Again, so far as increase in the monetary threshold (at present $1,000) is concerned, it seems to us that the figure would need to be increased substantially to have any real effect on the workloads of the courts. Also, cases where the plaintiff sought judicial exoneration rather than monetary damages might well be excluded. We therefore recommend that the present right of trial by jury in civil cases should be retained and that there should be no alteration in the threshold. Should it later appear that the number of civil jury cases is causing a strain on the system, the position can be reviewed.

405. We have not made a complete study of all matters that are intended to be tried before a jury, but we would caution that if a Family Court is established, s.68(1) of the Matrimonial Proceedings Act 1963 would need to be considered. That section reads:

> (1) Where any question of fact arises in any proceedings under this

Act, the Court may, if it thinks fit, direct the truth thereof to be determined by the verdict of a jury:

The Commission is not aware that this section has ever been invoked in the Supreme Court. As the District Courts will have no civil jury trials, we recommend that s.68(1) be repealed.

406. ***Commercial causes*** The New Zealand Law Society submitted that there is a need for more specialised handling of commercial causes. We have dealt with this topic under the section on specialisation (paragraph 318).

407. ***Administrative Division*** In Part II we have set out in some detail the history and structure of this division of the High Court. Our views concerning the future of the Administrative Division are contained in the section on specialisation (paragraphs 309 et seq.).

Appellate and Review Function

408. We consider that the High Court should continue to exercise the jurisdiction presently vested in the Supreme Court in overseeing the work of the lower courts and tribunals and in maintaining the application of the rule of law to the administration.

409. Appeals from District Courts in civil and family cases will lie to the High Court and with a further appeal (with leave) to the Court of Appeal. Although appeals from the Family Court will generally lie to a single High Court judge, in special circumstances an appeal may be brought, with leave, to a court comprising two High Court judges and one Family Court judge.

Recommendations

1. The High Court should exercise an original jurisdiction substantially equal to the Supreme Court's present jurisdiction, subject to the transferring of jurisdiction in the field of matrimonial and family law to the District Courts.
2. No civil jury trials should be held in the District Courts.
3. The present right of trial by jury in civil cases in the Supreme Court should be retained in the High Court.
4. Section 68(1) of the Matrimonial Proceedings Act 1963 should be repealed.

THE DISTRICT COURTS

410. One of the most distinctive features of the submissions from the New Zealand Law Society and the Department of Justice was the common approach to many issues that fall under our consideration. Not the least of these, as we have already mentioned, was the proposal, with which we readily concur, of giving adequate recognition to the standing of the Magistrates' Courts and stipendiary magistrates by changing the titles to "the District Courts" and "District Court judge" respectively and giving the new court an increased jurisdiction. We consider that the formal title of a judge of this court should (as in other Commonwealth District Courts) be "His Honour Judge . . ." or "Her Honour Judge . . .". If the judge was a Queen's Counsel on appointment he or she should also retain that description. Bearing in mind the views we shortly express concerning the appropriate role of the District Courts, our preference is that in court the judges should be addressed as "Judge" or "Madam" or "Sir".

411. We were impressed with the District Courts in other countries where we understand such courts have proved both necessary and desirable in a court structure. Before we proceed to outline our proposals for District Courts more fully, we must emphasise that our aim is not radical transformation of the Magistrates' Courts; we seek to increase the respect for, and the responsibilities of, these courts but wish them essentially to remain the people's courts. We are anxious to avoid precipitate change and hope that our suggestions for administrative improvements in all the courts will permit overall flexibility in dealing with workloads. We are also vitally concerned that relieving the burden of High Court work should not pressure the District Courts: shifting problems from one place to another does not solve them. We advert to this matter elsewhere.

JUDGES

412. ***Chief District Court Judge*** There is no statutory provision for the appointment of a Chief Magistrate, but to make a relevant comparison, it is unquestioned that the Chief Justice of the Supreme Court fills a necessary as well as a ceremonial function: on occasions he is appointed administrator of the Government or acts as Deputy Governor, as well as being titular head of the Judiciary; he is spokesman for the judges; he is the person through whom the Government deals with the Judiciary as a whole and the Judiciary deals with the Government; he allocates judges to particular centres and has a responsibility for the efficient and expeditious disposal of Supreme Court business. If our recommendation for creation of the District Courts is accepted, there will be a Bench with at least 65 judges, presiding in many centres throughout the country. They will be responsible for dispensing with the bulk of judicial work in areas more widely scattered geographically than those in which the Supreme Court judges either reside or visit on circuit. At present, administrative functions of the type the Chief Justice performs in his court are carried out for the Magistrates' Courts by the Minister of Justice or the Secretary for Justice; in recent years some regional administration has also been vested in groups of magistrates. Although the system has worked moderately well, we agree that control over judges should preferably not be exercised by the holders of political or executive office. We were also informed of a deficiency in the means for dealing with magistrates who, by their conduct, whether in or out of court, have exceeded the limits of discretion and propriety and who may be bringing discredit on the administration of justice. It is acknowledged that in certain cases the Minister of Justice has intervened, but we are of the opinion that these quasi-disciplinary functions would more properly be performed, in the first instance, by a senior District Court judge rather than by a Minister of the Crown. The Secretary for Justice told us that in the absence of a Chief Magistrate, Ministers and Secretaries for Justice have generally conferred with the chairman of the Magistrates' Executive but he has no authority over his fellow magistrates.

413. We are satisfied that a strong case has been made out for a constituted head of the judges of the District Court and recommend accordingly. We discuss the method of appointment under the section on appointment of judges (paragraph 673).

414. ***Functions of the Chief District Court Judge*** The Chief Judge should be a member of the Judicial Commission and would assume overall responsibility for the efficient utilization of judicial resources in the

District Court Bench. He should have authority to assign judges to sit in particular areas. He would be the judicial link with the Government concerning conditions of employment and service of his judges. He would, as a member of the Judicial Commission, represent his large number of judges on the Appointments Committee, on the Study Programme Committee, and on the Administration Committee, or he would recommend another District Court judge to act for him on any of those committees. He would also, as we have indicated, be the person to whom complaints about the conduct of District Court judges were referred by the Secretary of the Judicial Commission. Implicit in all the foregoing, however, is the importance of recognising that he is a working judge and that he continues to sit in court for most of his time. We recommend that on appointment, the status of the Chief District Court Judge should be recognised by a greater salary and allowance than other District Court judges. We also recommend that the Chief District Court Judge shall hold that office so long as he holds office as a judge but, with the approval of the Governor-General, he may resign his office as Chief Judge without resigning his office as a District Court judge. When we deal in a separate section with the administration of the courts, we emphasize the importance of close liaison and relationship between the Chief Justice, the Chief District Court Judge, and the Chief Court Administrator. We have seen how effective this triumvirate has been in other countries.

415. ***Senior Family Court Judge*** If our proposal for a Family Division of the District Courts is accepted, we consider it vital that a Senior Family Court Judge should be appointed for the Family Court. He would work in close consultation with the Chief District Court Judge and be subject to his final directions. Primarily he must be responsible for the functioning of the Family Court. His appointment should be made in time for him to establish the division from the outset. He also, in our view, should have his position reflected in his salary. We recommend that the Senior Family Court Judge should hold that office so long as he holds office as a judge but he may, with the approval of the Governor-General, resign his office as senior judge without resigning his office as a District Court judge.

416. ***List Judges*** Under the section dealing with administration of the courts we indicate that, as matters exist at present in New Zealand, certain regions should be established for purely administrative purposes. As with the High Court, each District Court region would have a list judge responsible for organization of the judges within his area, for co-ordinating relief and assistance where necessary because of illness or pressure of business, and for carrying out under delegation any general responsibilities of the Chief District Court Judge in that region. We expect that creation of a regional list judge will lead to a greater measure of local responsibility and will provide a means of liaison with representatives of Government services and District Law Societies. We agree with the Secretary for Justice that there is no need for statutory provision in the creation of such regions since this would tend to rigidity; it would seem to us that New Zealand could conveniently be divided at present into four areas for both the High Court and the District Courts.

417. When considering various methods of appointing a list judge for the District Courts, the possibilities suggested were that he could be elected by the body of judges within his region, that he could be appointed by the Chief District Court Judge, or by the Attorney-General after consultation with the Chief District Court Judge. Having regard to the method of appointment of list judges of the High Court, we would

recommend that the list judges in the District Courts should be appointed by selection of the Chief District Court Judge after consultation with the other judges in the region. We recommend that he or she would normally hold office for a period of a minimum of two and not more than three years. As the Secretary for Justice said, this term of appointment would allow assessment of how the arrangement was operating, and what modifications, if any, are needed. A list judge may well be re-appointed. We also recommend that the list judge should be appointed on the basis of administrative ability rather than seniority.

418. ***Assignment Judge*** To complete this section, we have also had to examine the effect of s.9 (2) of the Magistrates' Courts Act 1947 which provides that where two or more magistrates are stationed in the same town, the magistrate who is senior by length of service shall be responsible for the administrative co-ordination and the allocation of work between the magistrates in that town. We do not favour retaining this statutory provision. We suggest that this person be called the "assignment" judge. He would be appointed by the Chief District Court Judge. The appointee should be agreed upon by arrangement between the judges concerned; failing agreement, the Chief District Court Judge should make the decision. Subject to the overall direction of the list judge for that region, the local appointee would assume the function of assigning the judges to the courts in that district, bearing in mind the need to equalize each judge's duties. These appointments should also be reviewed after a limited period of, say, three years.

419. In making all these recommendations we do not consider that either the list judge or the assignment judge for a locality should assume any seniority over other judges. They were described to us in England as being a type of "super-adjutant"; that is how we would like to see them regarded in New Zealand since they would merely hold administrative appointments for a particular period to assist the Chief District Court Judge in co-ordinating and directing the work of the judges in their particular regions. Put another way, the assignment judges would work in consultation with the list judge; the list judge would work in conjunction with the regional court administrator and the list judge of the High Court for that region. The list judge would be responsible to and governed by any directions given by the Chief District Court Judge.

Recommendations

1. The Magistrates' Courts should be re-named "District Courts" and the present stipendiary magistrates should become District Court judges.
2. A Chief District Court Judge should be appointed. His status should be recognised by a greater salary and allowances than other District Court judges.
3. The Chief District Court Judge should hold office so long as he holds office as a judge but, with the approval of the Governor-General, he may resign his office as Chief Judge without resigning his office as a District Court judge.
4. A Senior Family Court Judge should be appointed. He should hold office so long as he holds office as a judge but, with the approval of the Governor-General, he may resign his office as senior judge without resigning his office as a District Court judge.
5. In each region established for administrative purposes there should be a list judge to be responsible for the organisation of the judges within

his region, co-ordinating relief and assistance where necessary and carrying out under delegation the responsibilities of the Chief District Court Judge; the appointment to be for a period of three years and to be on the basis of administrative ability rather than on seniority.

6. Where two or more District Court judges are stationed in the same town, an assignment judge should be appointed by the Chief District Court Judge. The appointee would assume the function of assigning the judges to the courts in that district; the appointment to be reviewed after a limited period of, say, three years.

Specialisation

420. For a general statement of principles on specialisation, we refer to the treatment of that topic under the High Court (paragraphs 306 et seq.). Specialisation in the District Courts is a less complex issue.

421. ***Family cases*** In relation to family matters, a degree of specialisation has existed in theory, both in relation to Children's Courts and domestic courts. Specialisation has not existed in practice because almost all magistrates for the last 30 years have been appointed to exercise the jurisdiction in relation to Children's Courts. Similarly, under the Domestic Proceedings Act 1968, warrants have been issued to almost all magistrates. The principal reason is that nearly all magistrates have circuit or relieving work, so that exclusion of the family jurisdiction proves extremely inconvenient.

422. In so far as a new Family Court is concerned, there is general agreement in all submissions that a degree of specialisation is essential, but beyond this general agreement there is no consensus of opinion. Thus, certain submissions urged that it is essential for Family Court judges to deal solely with this type of work (provided that their personality and training have equipped them to do so). In this connection it is said that with better ancillary services in Family Courts, many of the petty disputes are dealt with before the case reaches the judge, whose task is thereby made the more attractive. On the other hand, it is urged, especially by those nurtured under our present system, that a continuous diet of family cases is intolerable and ultimately warping to the personality.

423. These issues are discussed in considerable detail in the section of our report which deals with the Family Court (paragraphs 534 et seq.). We have concluded that by no means every person is suitable for appointment as a judge of a Family Court, and that such judges will need to be both carefully chosen and trained. On balance, we incline to the view that judges in the Family Court should not deal solely with family cases. Like judges in criminal cases, the judges of a Family Court require to have the widest possible knowledge of human experience, and a very great degree of sympathy and understanding. We think it likely that these qualities are fostered by a wide judicial experience. We would suggest that most judges in the Family Court should spend approximately 80% of their time on family cases, with the balance being spent on all other types of litigation. This recommendation may need to be reviewed once the Family Courts have been in operation for an appropriate period and in any event should not be applied as an inflexible rule.

424. ***Criminal cases*** As we have mentioned in the section of our report dealing with the jurisdiction of the District Courts, we consider that certain judges of those courts should be warranted to conduct criminal jury trials. For the reasons we have previously given we do not consider

that such judges, or any other judges of the District Courts, should devote their whole time to criminal work.

425. ***Administrative cases*** The Commission received submissions from several barristers practising extensively in the field of regional and district planning which emphasized the specialist nature of that work. Some suggested that, because decisions of the Town and Country Planning Appeal Board can be of major importance to local bodies and other parties concerned, and sometimes involve very large sums of money, the appeal board should have equal status with the High Court or be made a division of that court. Others suggested that District Court judges should preside over a designated specialist division of that court dealing with matters relating to land usage. The Valuer-General made submissions regarding the functioning of the Land Valuation Court and land valuation committees, emphasising particularly his concern that consistency in interpretation should be maintained between the committees in the various districts.

426. Our terms of reference did not direct us to investigate these matters. Our concern with administrative tribunals is limited to the extent to which they are, or should be, inter-related with the ordinary courts; and to whether any improvement to the prompt, efficient, and economical disposal of the business of those courts could be achieved by the establishment of a closer relationship between the two.

427. Under the Town and Country Planning Act 1977, which took effect on 1 June 1978, the Appeal Board became the Planning Tribunal consisting of three divisions, each to be presided over by a magistrate. The Land Valuation Proceedings Amendment Act 1977 substituted land valuation tribunals for land valuation committees, and provided that tribunals, to be chaired by magistrates, should be established on a district basis. It was specifically provided that a member may hold office concurrently as a member of two or more tribunals. Because the Planning Tribunal and the land valuation tribunals both deal with matters relating to land usage, we consider that the chairmen of the planning tribunals should become chairmen of the land valuation tribunals established within the area where they normally exercise planning jurisdiction. We do not, however, consider it necessary at this stage to create an administrative division of the District Courts.

428. We agree that the work of the Planning Tribunal is of great importance; some of its decisions can have far-reaching effects on the policies of local authorities, and therefore directly or indirectly on the whole of society. We consider it inappropriate, however, that the Planning Tribunal should have equal status with the High Court for the basic reason that appeals from the tribunal on questions of law lie to the Administrative Division of the High Court.

429. Many of the applications which come before land valuation tribunals are not opposed and only require formal consent. We consider that the registrar of the District Court in which such applications are filed should be given authority to deal with these matters.

430. The two magistrates who are presently chairmen of the Town and Country Planning Appeal Boards have, from time to time, exercised jurisdiction in Magistrates' Courts, thus affording welcome assistance in those courts and at the same time gaining some relief from an uninterrupted diet of planning appeal work. They have expressed the wish that this flexibility should be continued.

431. ***Other litigation*** In relation to all other litigation in the District

Courts, we are of the opinion that it is important for these courts to remain the people's courts, and that in this context, justice is likely to be rendered best by judges with the broadest possible experience. We therefore consider that the general work of the District Courts should be shared amongst the judges. Within this framework, we do not see any objection to the assignment, by way of administrative decision of the Chief Judge in any given area, of particular cases to particular judges. It is obviously sensible, if a judge has a special area of expertise, to endeavour to see that such expertise is used where it can be of value. Beyond that level, we think it is unnecessary to introduce specialisation in the District Courts.

Recommendations

1. A degree of specialisation in family cases is essential but Family Court judges should not deal solely with family cases. It is suggested that most judges in the Family Court should spend approximately 80% of their time on family cases with the balance spent on all other types of litigation. This recommendataion may require to be reviewed and should not be applied as an inflexible rule.
2. Those District Court judges who are warranted to conduct criminal jury trials should not devote their whole time to criminal work.
3. Land valuation tribunals should be presided over by those District Court judges who have been appointed chairmen of planning tribunals.
4. Registrars of District Courts should be authorised to deal with unopposed applications to land valuation tribunals.
5. The general work of the District Courts should be shared amongst the judges, but within this framework there is room for assignment of particular cases to particular judges who have a special expertise.

Criminal Jurisdiction

432. ***Jury trials*** Under our proposals for the criminal business of the High Court, we have recommended that the new District Courts should be vested with the power to sit with juries for electable crime. As a consequence, certain recommendations for the District Courts have appeared under the section dealing with criminal business of the High Court, but for clarity we repeat those recommendations under this section. Although some persons told us they were concerned that not every magistrate should be given a warrant to sit with juries, they did acknowledge that some possessed the necessary experience and aptitude. The Department of Justice also agreed that there was a sufficient number of magistrates qualified to preside over jury trials in a Supreme Court setting. The magistrates themselves have confidently stated to us that some of their number would be able to sit with juries. As we have stated, we consider that some judges of the District Courts should be selected to sit with juries. They should be recommended for appointment by the Judicial Commission. As well, there will be new appointees to the District Courts whose experience in criminal work may well commend them to the Judicial Commission for appointment. We are hopeful that the Chief District Court Judge will be of great assistance to the Judicial Commission over appointments to his Bench and in recommending the best use of his judges' individual talents. We believe that appointment to the District Court Bench will be an attraction to various lawyers to spend part of their time in the criminal jury jurisdiction, the Family Court, or on civil actions. Ability to sit with a jury should not be required of all appointees.

433. ***Summary trials*** As we have said when dealing with proposals for the criminal work of the High Court, we recommend that meantime (for, say, three years) the District Courts should exercise the summary jurisdiction currently exercised by the Magistrates' Courts.

434. As stated, we repeat for continuity recommendations already made in the High Court section, in relation to the District Courts:

Recommendations

1. Jury trials for electable offences should no longer be exclusively heard in the High Court but substantially in the District Courts.

2. Jurisdiction to preside over jury trials of electable offences in the District Courts should be exercised by selected District Court judges specially recommended for that purpose by the Judicial Commission.

3. District Court judges sitting with a jury should be empowered to impose the sentence prescribed by law, and in such cases appeals would lie direct to the Court of Appeal.

4. District Court judges sitting without a jury should, until a review is carried out by the Judicial Commission, be restricted to imposing a sentence of no greater than three years' imprisonment.

5. In all other respects appeal procedures will remain unaltered.

In addition, we make the following recommendation:

6. For summary trials the District Courts shall exercise the crimina jurisdiction currently exercised by the Magistrates' Courts.

435. ***Minor proceedings*** As the Commission's hearings progressed it became increasingly apparent that one of the major impediments to prompt and efficient disposal of the business of the Magistrates' Courts is the sheer volume of work of a relatively minor nature which has to be dealt with in that jurisdiction. In some places, notably in Auckland, the amount of paper work involved in processing minor traffic offences has grown to the point where it has become unmanageable. One of the reasons for setting up this Commission was to try to find ways of reducing the excessive workload of the Supreme Court. The urgency of this problem has been apparent throughout the sittings of the Commission and an obvious answer is to transfer some of the work from the Supreme Court to the reconstituted District Courts. The proposal to bring certain classes of criminal jury trials within the ambit of the District Courts would assist to some extent. We have also recommended establishment of a Family Court to deal with practically all family law matters, including much of what was previously done in the Supreme Court. While these moves will afford relief to the Supreme Court, they will also have the effect of accentuating an already grave problem in the lower jurisdiction. Evidence given before us has made it clear that Magistrates' Courts in general are already grossly overloaded or under-manned, and delays in obtaining fixtures for defended matters are far greater than they should be in a court of summary jurisdiction. Thus we were presented with the fact of a mass of work, the physical size of which was formidable and which, at least at present, must be decided through the court processes. While other problems confronting us may have been of far greater legal significance, none presented quite the same difficulties so far as the actual physical handling of the work was concerned.

436. Minor breaches of traffic regulations largely make up this mass of work. In New Zealand, driving licences can be obtained at 15 years of age, a not insignificant fact in this context. When the Department of Justice

compared rates of offending in New Zealand with those in England and Wales in the course of its submissions, it tended to suggest New Zealanders compared unfavourably with their counterparts in the United Kingdom. One result of the younger age at which licences may be obtained in New Zealand is a higher ratio of cars and drivers to population in this country: we suggest such points should be kept in mind when comparing rates of offence for different countries.

437. While most minor offences arise under traffic laws, the courts are also called on to deal with a wide variety of other violations of statutes, regulations, and by-laws for which the maximum penalty is a fine. These occupy an appreciable proportion of lower court time. The problem is compounded still further by the number of small claims which are filed in the civil jurisdiction of the Magistrates' Courts. There seems to be general agreement that many of these do not require to be afforded the full panoply of the law in presentation to, or in resolution by, the court. Collectively, these matters occupy a disproportionate amount of time in our courts. They constitute a real burden on clerical staff and contribute in large measure to the critical situation being experienced in some of our court offices.

438. In its second set of submissions to us, the New Zealand Law Society addressed itself to the problem of the volume of minor work and suggested this work could be dealt with by:

(a) small claims tribunals;
(b) registrars with extended powers;
(c) practitioners appointed to exercise the powers conferred on registrars;
(d) the infringement fee procedure scheme;
(e) the minor offence procedure;
(f) justices of the peace continuing to exercise the jurisdiction in minor offences which they do at present.

The Society submitted that all this work should be carried out under the administration of the District Courts. The Society went on to make some submissions on points of principle in these terms:

> . . . work which is considered "minor" because of the relatively small amount involved, or the relatively minor penalty which might be imposed, or because the work is of a routine nature should not, for those reasons, be thought to be outside the scope of a District Court Judge's responsibilities. These relatively minor or routine matters are frequently vitally important to the parties involved and the Society continues to believe it is important that, so far as is possible, they should receive the attention of qualified legal personnel.
>
> In making this point the Society does not consider that it is being inconsistent with the attitude it has adopted in respect of the Supreme Court. It has sought to recast that Court as a superior Court and proposed that certain matters presently within its jurisdiction be transferred to the District Court with the objective of making the best use of the talent available on that Bench. But the District Court would remain the "local Court" and the "peoples' Court" and the Society does not consider that it would be a waste of judicial talent for judges of that Court to occasionally deal with more minor or routine matters. If such matters require, as the Society believes, the advantage of judicial qualification and experience, they should have that advantage.

The Society therefore rejects the notion that work deserving of qualified judicial attention can be exempt from that attention simply because it might be described as minor or routine. It rejects the notion that, as the upper jurisdiction of a judicial officer increases, the work at the lower level of his jurisdiction should come to be regarded as "beneath" his station and concern. Everyone in any walk of life must to a greater or lesser extent, do things which they would consider minor or routine. So it must be within the judicial system.

The Society believes that the standing of the existing Magistrates' Court will be upgraded by extending and increasing its jurisdiction in the manner which it has proposed and by reconstituing it as the District Court. It does not believe that it is necessary to remove the so-called minor or routine work to yet another jurisdiction or that leaving such matters within the jurisdiction of the District Court will damage its status. This will be set primarily by the upper level and scope of the enlarged jurisdiction. Small Claims Tribunals, Justices of the Peace, Registrars exercising extended powers and the other means of disposing of minor offences . . . are required, not so much to make the workload of the District Judge more palatable, as to obtain a more "prompt, efficient and economical disposal of the Court's business".

439. ***Standard fine procedure*** In its submissions, the Department of Justice outlined the standard fine procedure and developments which led to its being superseded by the minor offence procedure. The standard fine procedure was introduced in 1955 by s.21 of the Summary Proceedings Act. Its application was limited to very minor traffic offences where the penalty did not exceed a fine of $100. Under this procedure, the magistrate ordinarily sitting in the court town, or, where there were two or more magistrates, the senior magistrate, was authorised to fix fines for the various offences. The department described the procedure as useful but limited in its application. In our opinion, no valid reason has been advanced why this system should not be greatly extended in either its original form or as a modification of the minor offence procedure to which we shall refer presently. Either way, its usefulness would be greatly enhanced.

440. ***Infringement fee procedure*** In 1968 the first of the infringement fee schemes was introduced. These were established under the Transport Act 1962 and were initially confined to offences relating to the overloading of heavy motor vehicles and breaches of by-laws governing parking of vehicles. In 1971 certain speeding offences were brought within the infringement fee procedure. The basic purpose of the new procedure was to try to remove certain types of traffic offences from the ordinary court process. Scales of fees graduated to meet the extent of the speeding, or overloading, or over-parking were fixed by the enforcement authority and promulgated by statutory regulation or the appropriate means. A motorist who committed an offence covered by this scheme would be issued with a notice setting out particulars of the offence and the amount of the prescribed infringement fee. If the fee remained unpaid after a given date he could be summonsed for non-payment of the fee.

441. We consider this is an appropriate way of dealing with offences for which scale fees can be fixed in advance. It is most important, however, that the offender retains the right to have the charge against him determined by the court in the ordinary way. We note that, in 1974, the

Transport Act was amended to make provision for the infringement fee scheme to be extended to all traffic offences other than those carrying liability to imprisonment. We are advised by the Department of Justice that, to date, no offences other than those mentioned earlier of overloading, parking, and speeding have been made the subject of the necessary ministerial direction, but such a direction, if only in respect of non-driving offences, could remove up to 180 000 prosecutions annually from the court process. We would, however, express reservations over whether the infringement fee procedure is appropriate for all traffic offences other than those carrying a liability to imprisonment. For instance, the degree of culpability in a charge of careless driving or a breach of the right-hand rule can vary from a minor error of judgment to something bordering on dangerous driving. In matters of this kind it is not really practicable to predetermine the amount of penalty which should be levied by way of traffic infringement fee. Furthermore, such offences would also render the motorist liable to disqualification from driving. We believe that matters of this kind should remain in the discretion of the court where all the circumstances can be considered.

442. The Secretary for Justice also drew our attention to s.43 of the Transport Act which requires all speeding infringement fees received by an enforcement authority to be paid into the public account. This means that local body traffic authorities (and there are still several local bodies operating their own traffic enforcement) do not receive this money as they do under the ordinary summons procedure. Understandably, therefore, they do not use the speeding infringement system but continue to initiate their prosecutions through the court process. Under the Public Revenue Act 1953 (s.109), a local authority or public body may receive the fine imposed on any prosecution brought by that authority or body, less 5% of the fine which is retained by the enforcing court as a servicing fee and paid into the public account. The Secretary for Justice estimated that should these local bodies choose to use the speeding infringement procedure, a further 20 000 prosecutions could be diverted from the court process immediately.

443. ***Minor offence procedure*** This procedure came into force on 1 January 1975. It is set out in s.20A of the Summary Proceedings Act 1957. It was designed to provide a more acceptable procedure for offences that could be described as minor. The Act defines "minor offences" as those that do not carry liability to imprisonment or to a fine in excess of $500. We think this is an excellent scheme, incorporating worthwhile innovations. Perhaps the most significant of these is that the minor offence notice received by a defendant includes a short summary of the facts alleged against him. When he receives his notice, he is able to decide whether he agrees with the facts as set out or whether he wishes to contest the matter. If he chooses to plead guilty he may do so by letter and avoid the necessity for appearing in court. He may also write to the court setting out any factors he wishes to be taken into account in mitigation of the offence. He may, if he chooses, simply accept the circumstances as set out in the notice without writing to the court. If he does that, no further proof of those facts is required from the prosecution. Only when he pleads not guilty are witnesses required to attend to give evidence in court. This step in the procedure represents a major improvement so far as traffic officers in particular are concerned. With an ordinary summons, or when the standard fine procedure was in operation, when a defendant took no steps in relation to the summons he received, the officer who had detected the

offence was required to attend court and give what was known as formal proof, that is, evidence on oath of the circumstances of the offence. In most Magistrates' Courts, this meant that on traffic court days a procession of traffic officers might have to line up to give this purely formal evidence when they could have been more usefully performing their ordinary traffic enforcement duties.

444. In its submissions the Department of Justice said:

> The main criticism (of the minor offence procedure) from a practical point of view is that this scheme has absorbed the very minor traffic offences previously handled by the standard fine procedure. Although these form a relatively small proportion of prosecutions brought under the minor offences scheme they nevertheless demand judicial time, whether that of Magistrates or Justices of the Peace, that was not previously required.

It seems to us that this comment is only partially correct. It is true that offences previously dealt with by the standard fine procedure have been absorbed in the minor offence scheme but these form such a small proportion of minor offence prosecutions that they are of minimal significance. The real thrust of criticism should be directed to the fact that all minor offences, including the few which were dealt with by way of standard fines, are now dealt with under the new procedure and, while a very considerable saving of time has resulted for prosecution officers and witnesses, the amount of time required of magistrates or justices of the peace and court staff is greatly increased. Far from saving the time of the court, an already difficult situation is exacerbated.

445. From the submissions we have heard and from our examination of the position, we have concluded that some aspects of the minor offence procedure can, with advantage, be developed further. While we recognise that simplified procedures are to be encouraged and welcomed, we do not forget the right of a defendant to have his case heard in court. We agree with the submissions of the Department of Justice that a much closer examination has to be made of some matters presently brought before our courts but which do not really belong in the criminal justice system: the overdue library book and some minor parking offences presently taking up time and increasing paperwork in our courts immediately spring to mind. We believe, however, that this problem must be attacked on a very broad front and ways found to deal with a variety of minor breaches of the law independently of the courts. Faced with exactly the same problem where rapidly growing workloads of minor offences threatened to cause a collapse in court procedures, some quite drastic remedies have been adopted in other parts of the Commonwealth. One example, which might well be followed here, is that of British Columbia where speeding offences were taken out of the court system altogether and dealt with by automatic imposition of demerit points. Repeated offending quickly led to loss of driving licences. Members of the Commission were told that in Vancouver and Queensland this system had had a salutary effect on general traffic behaviour and particularly, as one might expect, on speeding. One apparent disadvantage of decriminalising speeding in this way is that the large sums previously recovered from fines no longer find their way into the consolidated fund or the coffers of the local body responsible for the prosecutions. When the total cost of collecting these monies is taken into account, however, and also the wider implications of an almost impossible yet still increasing strain on the court system, loss of revenue may be a small price to pay for results achieved.

446. We have not been supplied with information from which we could compile a list of matters presently being brought before the courts which could properly be dealt with in other ways. We recommend that, as a matter of urgency, the Department of Justice, through its Planning and Development Division, should take steps to relieve the courts of minor prosecutions which need not be brought there. We are confident that this could considerably relieve overloading at the lowest end of the scale. Now that the minor offence procedure has had time to settle down, we believe its many good points should be used as a framework onto which can be grafted the desirable aspects of the standard fine procedure and, where applicable, the infringement fee scheme. We appreciate it is not proper or just to attempt to fix a standard penalty for each offence without regard to the circumstances in which that particular offence was committed. We mentioned earlier the inappropriateness of fixing a standard fine to cover all careless driving charges. We nevertheless recommend that the old standard fine procedure should be revived and grafted onto the infringement fee procedure in every case where the nature of the offence makes it practicable to do so. In other words, while the standard fine procedure previously in force was limited to a narrow segment of traffic offences, we recommend that it should be enlarged to include all offences (traffic and other offences) in respect of which it is reasonable to fix a standard penalty. In our view, however, fixing of the amount of the penalty ought to be done by the court or courts. At present this is done by regulation which effectively means that the department responsible for drafting the legislation, and/or advancing it as a matter of policy, and later for enforcing it through its enforcement officers, also has the function of determining what penalty should be paid by those who offend. There is a fundamental unsoundness about this proposition. A former senior magistrate proposed a system where the amount of standard penalty would be fixed in each district after a hearing before a magistrate. His suggestion was that the senior magistrate should hear submissions from enforcement authorities and organisations representing motorists and other road users and, in light of those submissions come to a decision on the appropriate penalty for each offence. In his view, the scale could be revised from time to time as required. There could be requests for revision from the enforcement authorities, if they thought that course appropriate. It is our view that if greatly extended use were made of the old standard fine scheme with that scheme enlarged, adapted, and grafted onto the infringement fee procedure, this would make a major impact on the mass of work to be disposed of in the lower jurisdiction. We anticipate that the volume of offences remaining to be dealt with under the minor offence scheme would be greatlv reduced.

447. The Department of Justice also submitted that use of justices of the peace in disposing of the bulk of minor prosecutions must be considered. The department pointed out that the definition of minor offences permitted a clear distinction within the criminal jurisdiction of the court. It said that, in many centres, justices of the peace are currently dealing with these offences; and with the training scheme at the Technical Correspondence Institute, supported by practical training given in districts, it is hoped that most offences falling within the minor offence scheme would eventually be heard before justices. Although not advocating a separate division of the District Courts for disposal of minor offences, the department suggested that there should be an administrative arrangement to enable these offences to be handled at a lower level within

the court structure. They did not accept that the hearing of these offences calls for the qualifications and experiences of a District Court judge, any more than Supreme Court judges should be called upon to preside over trials for what are relatively minor crimes. The department expressed confidence that trained lay judicial officers have the capacity to deal with all prosecutions that fall within the broad definition of minor offences, subject to direction by the District Court judge should a local circumstance dictate the need for some modification. We are in general agreement with these observations. We take the view that, provided justices of the peace have sufficient training, and provided the local District Court judge (or, where there is more than one, the senior District Court judge in an area) is satisfied as to the fitness and suitability of justices of the peace, there is no reason why they should not be permitted to do this work. We think it is most important, however, that provision should be made for a readily available appeal to, or review by, a District Court judge when cases are heard by justices of the peace.

Recommendations

1. The Department of Justice, through its Planning and Development Division, should take urgent steps to relieve the courts of minor prosecutions which can be dealt with elsewhere.
2. The standard fine procedure should be enlarged to include all offences (traffic and other offences) in respect of which it is reasonable to fix a standard penalty: the amount of the penalty should be fixed by the courts.
3. The best features of the standard fine, infringement fee, and minor offence procedures should be amalgamated to ease the pressure on the time and facilities of the courts and on the court staff.
4. Justices of the peace who meet the requirements of the senior District Court judge in the area should be permitted to hear minor offences.
5. When cases are heard by justices of the peace, an appeal to, or review by, a District Court judge should be readily available.

Civil Jurisdiction

448. It was common ground before us that upon a change from magistrate to "judge" and from Magistrates' Courts to "District Courts", the new courts should exercise all the substantive jurisdiction in tort, contract, and Admiralty matters as the Magistrates' Courts now do. We also agree that having regard to the effect of inflation, and the calibre of the judges, the District Courts should have their financial limits increased from $3,000 to $10,000. The Family Court will, we propose, have unlimited jurisdiction as to the value of matrimonial property in dispute, subject to certain rights for the parties to have cases heard in the High Court.

449. For the reasons cited above, we recommend that Part III of the Magistrates' Courts Act 1947 should be amended to give corresponding increases in the limits for proceedings for the recovery of land. We recommend that the present rental figure of $2,000 in s.31(1) should be increased to $5,000 or, if no such rent is payable, that the value of the land in question does not exceed $50,000: the present figure is $25,000. There will need to be other consequential alterations to the Magistrates' Courts Act 1947. As we have already indicated, except where a right to jury trial exists or the case is one appropriate for transfer to the High Court, the

District Courts' jurisdiction should be exclusive. No-one, however, has suggested that the District Courts should have jurisdiction for jury trials in civil cases. We would not recommend it.

450. The Secretary for Justice reminded us that the Chattels Transfer Act 1924 provides for instruments defined in that Act to be registered in the Supreme Court and for various related applications to be made to that court. We agree that the registration function is administrative in nature and could be performed with advantage elsewhere, such as in the commercial affairs office of the Department of Justice or any other satisfactory place. Applications for extension of time, for rectification of instruments, and for an order for a memorandum of satisfaction to be filed, should in our opinion be heard and determined by a District Court.

451. In Part II we observed the anachronism of transferring certain proceedings from the Magistrates' Courts to the Supreme Court for the enforcement of a judgment (Wily's Magistrates' Courts Practice 7th Ed. 119-121). We recommend that this procedure should be abolished and that the enforcement provision remains within the jurisdiction of the District Courts.

452. ***Small claims tribunals*** At present these are a division of the Magistrates' Courts. We recommend they should become a division of the District Courts.

453. In the civil jurisdiction of the Magistrates' Courts, claims for small amounts of money take up a disproportionately large amount of time. It is usually uneconomic for lawyers to represent clients on these matters, and the whole exercise frequently fails to give satisfaction to anyone. This problem exists all over the world and many different solutions to it have been attempted. In essence, what is required is a forum where the parties to a dispute over a relatively small sum of money, which may be quite a large amount by the standards of one or both the parties, may receive a just and prompt resolution of the question at issue between them. The Department of Justice made references in its submissions to the Small Claims Tribunals Act 1976 and to the tribunals which had been set up at Rotorua, New Plymouth, and Christchurch under that Act. We were told by the department that the tribunals endeavour to effect a settlement by agreement; if this is not possible, then to make an award that is fair and just in all the circumstances. The Act requires the tribunal to determine disputes according to the substantial merits and justice of the case. In doing so, the tribunal must have regard to the law but is not bound to give effect to strict legal rights or obligations, or to legal forms or technicalities. The tribunal thus exercises an equitable jurisdiction. The Act provides for inquisitorial rather than adversary procedures, authorising the tribunal to seek out evidence itself or appoint an investigator to do so. Legal representation of the parties is prohibited and hearings are in private. Small claims tribunals may be presided over by a magistrate, or a referee who may or may not have legal qualifications but is otherwise suitably qualified by knowledge or experience. The tribunals have jurisdiction in contract, quasi–contract, and a very limited jurisdiction in tort, up to a limit of $500. We were told that the tribunals set up in the three centres mentioned were experimental and the department expressed the hope that they would be sufficiently established to enable the Commission to examine and report on them.

454. We recieved a number of other submissions on the topic of small claims, all favouring the establishment of special courts or tribunals of some kind. There were, however, some expressions of opinion directly

contrary to certain provisions of the Small Claims Tribunals Act. The more important of these are summarised in the submissions of the New Zealand Law Society, which reiterated views it had expressed previously and commented on them in these terms:

(1) The Society cautioned against excessive expectations for such Tribunals noting, inter alia, that claims that are small in amount are not necessarily simple to dispose of nor necessarily small in complexity.
(2) Concern was expressed at physical factors such as venue, time and place of sittings.
(3) The Society was opposed to lay Referees.
(4) The Society was strongly opposed to the exclusion of the legal profession from a right of audience.
(5) Hearings in private were criticised.

For present purposes, the only matter which needs elaboration is [that jurisdiction should be limited to $200], in respect of which the following quote from the Submissions which it made to the Statutes Revision Committee emphasises the Society's attitude:

". . . The Society cautions all concerned against expecting too much from this new institution. It is true that something of a gap has emerged in the working of our present legal system in respect of very small civil disputes. A citizen, often but not necessarily a consumer, may well feel aggrieved by the conduct of another, but be deterred from pursuing any claim by the prospect of the time, effort, and expense involved over a relatively small money sum. Likewise, although this seems to be less appreciated generally, a commercial concern may be reluctant to press recovery proceedings for a relatively small debt, however justifiable, against any show of opposition, due quite simply to the expense involved. The notion of a tribunal which would deal quickly, informally, and above all cheaply and conveniently with such small claims has an instant attraction. In practice, however, its supposed advantages may prove illusory. Small Claims Tribunals will be of substantial benefit to ordinary consumers only if they have widespread distribution, including locations in centres such as Porirua, Otara and Aranui, are prepared to sit outside normal working hours so that parties are not compelled to take time away from their employment or encounter child minding difficulties, have proper building and staff facilities, and sit frequently. Further, claims which are small in amount are not necessarily small in complexity, either factual or legal. As much factual research and consideration can be required on a claim by a housewife for allegedly defective repairs to a washing machine to the value of $70, as for a business concern in relation to allegedly defective repairs to a bulldozer to the value of $700. The attention and time devoted to a claim is not necessarily small simply because the claim is small. Further, people (particularly those unused to business affairs) will not necessarily take a reasonable and pragmatic attitude towards a claim simply because it is small in size. People have a way of being just as intractable over a small claim as a substantial claim, and will not necessarily be amenable to settlement suggestions simply 'because the amount involved is small', particularly if given the opportunity to explore the matter in their own time and without the prospect of heavy expense. Notwithstand-

ing these points, the Society considers the introduction of Small Claims Tribunals in a suitable form would be a progressive step. It merely cautions against excessive expectations, overly hasty introduction, and particularly against looseness in constitution and administration."

The Society concluded this part of its submissions by recommending that the operations of the small claims tribunals established as pilot schemes should be reviewed and considered as part of the overall structure of the courts. We are left in no doubt whatever that some forum where speedy and inexpensive determination of disputes is available is an essential part of the overall structure of our courts. We consider it imperative that the court system has sufficient in-built flexibility to vary procedures or rules of evidence to provide for the special needs of different types of courts. (We note with concern a developing tendency to create a multiplicity of tribunals for special purposes, for example, the motor vehicle disputes tribunal; these perform work which ought to remain within the courts.)

455. We are in general agreement with the principles and procedures of the Small Claims Tribunals Act, that if settlement by agreement is not possible, the tribunal shall make a fair and just award "according to the substantial merits and justice of the case, and in doing so shall have regard to the law, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities". We express reservations over interpretation of the phrase "have regard to the law". The law should never be brushed aside, nor the rights of any party fail to be fully considered. Proper evaluation of any legal principles involved in each claim is required, with due assessment of how these should be applied to the particular case. The Act provides for jurisdiction to be exercised by a magistrate or referee (a barrister or solicitor of at least three years' practice, or an otherwise appropriately qualified person). There is obviously no argument with small claims work being performed by a magistrate, or District Court judge. Lay referees would generally have difficulty in making decisions where questions of law arise.

456. We note, in this context, submissions from a justice of the peace and fellow of the Institute of Arbitrators, initially offered as a report to the Select Committee of Parliament when the Small Claims Tribunals Bill was before the House. This report concluded that adequate machinery already existed for dealing with small claims in the equity and good conscience provision of s.59 of the Magistrates' Courts Act, and ss.62 and 62A empowering magistrates to obtain assistance from referees or specialists in particular fields, but that these provisions were not fully utilised. This report also referred to the success of small claims courts which the author had studied in Manchester and Winchester, England, and in several centres in the United States of America. It was stated that in England, adjudication was by barristers, and in the U.S.A. "because of the complex nature of the small claims and that a very humane attitude is required, the very best Judges are appointed to Small Claims Courts". It should also be noted that in England the registrars of courts are qualified in law. In our opinion, small claims tribunals should normally be presided over by a person qualified in law, preferably with somewhat longer experience than the minimum of three years prescribed by the Act. We consider that this is especially important as the parties will not be represented by counsel. There may be some lay individuals with special training and qualifications who could do this work satisfactorily. For example, those who had undertaken the required study to qualify as

arbitrators might be acceptable for selection, especially if they had also completed the course for justices of the peace conducted by the Technical Correspondence Institute. There are, however, only four fellows of the Institute of Arbitrators in New Zealand.

457. At this point we must note an anomaly: under s.59 of the Magistrates' Courts Act, a magistrate's normal jurisdiction in equity and good conscience has an upper limit of $200 whereas the small claims tribunal has a limit of $500. The Department of Justice suggested that the equity and good conscience provisions of s.59 were no doubt intended to provide a means for dealing with small claims, but thought like "other 'simplified' procedures" this procedure "has been rendered virtually moribund". Our inquiries suggest otherwise and it is relatively common for magistrates to regret the $200 limitation which prevents them invoking s.59.

458. It did not prove possible for the Commission to examine the experimental small claims tribunals as closely as we had hoped. There are tribunals in Rotorua, New Plymouth, and Christchurch. The referee of the Rotorua tribunal has practised as a barrister and solicitor for many years. We understand that his tribunal has been a great success. With the complete co-operation of the legal profession, all civil fixtures in the Rotorua Magistrate's Court which come within the jurisdiction of the tribunal are transferred for hearing by the referee. The pressure on civil fixtures in the Magistrate's Court has virtually been eliminated. We recommend that the pattern established by the experimental tribunal at Rotorua should be adopted. Members of the Commission who travelled overseas were favourably impressed by the procedure for dealing with small claims in South Australia. These were disposed of in a division of the Magistrates' Courts: one magistrate supervised the work of this division on a full-time basis, and was assisted by another with hearing cases. Legal representation of the parties was not permitted. In effect, equity and good conscience was the keynote of the system.

459. The New Zealand Law Society has consistently argued that lawyers should have right of audience in any small claims forum. The basic refutation of this stand is cost. We do not deny possible complexity of specific cases brought before a small claims tribunal, nor the intense personal importance of their case to claimants, but many small claims would not be worth pursuing, even to victory, when measured against legal costs. We feel prohibition of legal counsel is reasonable if the tribunal is presided over by a District Court judge or a referee with adequate legal experience.

460. The privacy provision of the Act also merits comment. Supporters of this principle argue that the tribunal is not a court, but uses techniques of arbitration and conciliation in an informal way, to settle a purely private disagreement between two people, who may confer more freely in private. We consider that a very important principle is involved in this issue. In our view, disputes between parties should be resolved in courts, and although, with small claims, there are good reasons to relax some rules of procedure, the Act describes the tribunals as a division of the court in which they are established. It may well be true that some people may talk more freely if the hearing of a case is in private; possibly because there is no opportunity for those who know better to challenge their story. However, we believe that an experienced tribunal, with the ability to achieve the appropriate degree of informality, would have little difficulty in encouraging witnesses to speak freely, unless, of course, their reticence

stemmed from an unwillingness to be truthful and frank. We also see good reason for ensuring that some commercial practices are aired in public rather than in private, even though the amount of money in dispute may be small.

461. Finally, we think we should have proper regard to the opinion of the Rotoura referee, whose ability we have already acknowledged. He suggested that because of lack of publicity about the small claims tribunal, its benefits are not widely known, and the procedural requirements are not fully understood. We think it would be helpful if the Department of Justice produced a pamphlet incorporating these requirements and any other relevant information. We would commend perusal of the Queensland pamphlet in this regard.

Recommendations

1. Small claims tribunals should be established as a division of the District Courts.
2. The pattern established by the experimental tribunal at Rotorua should be adopted. We would expect that referees would normally be barristers or solicitors with substantial experience although some laymen with special qualifications could also be considered.
3. Section 25(1) of the Small Claims Tribunals Act 1976 requiring that proceedings be held in private should be repealed.

Appeals in Civil Cases

462. The present situation with regard to appeals from Magistrates' Courts in civil cases should continue. This would mean that appeals would be of right to the High Court, where the judgment or decision appealed against involved more than $500; and under that figure, would be with leave. A further appeal, with leave, would lie to the Court of Appeal on questions of law. We have recommended special procedures for appeals from the Family Court. These procedures will be detailed in the following section of the report.

Recommendations

1. The District Courts should exercise all the substantive jurisdiction in tort, contract, and Admiralty matters as the Magistrates' Courts now do.
2. The civil jurisdiction of the District Courts should be increased from $3,000 to $10,000.
3. The rental figure of $2,000 in s.31(1) of the Magistrates' Courts Act 1947 should be increased to $5,000 or, if no such rent is payable, where the value of the land does not exceed $50,000.
4. The District Courts shall have no civil jury trials.
5. Applications under the Chattels Transfer Act 1924 should be determined by the District Courts: the registration of instruments should be removed from the Supreme Court to the commercial affairs office of the Department of Justice or any other satisfactory place.
6. The enforcement of judgment proceedings by transfer from the Magistrates' Courts to the Supreme Court should be abolished and the enforcement provision remain within the jurisdiction of the District Courts.
7. Save for Family Division cases, the existing appeal provisions in civil cases should remain unaltered.

Family Jurisdiction

463. Our finding that a Family Court is now necessary and desirable in New Zealand is of sufficient importance to warrant consideration under a separate section. Suffice to say here that we recommend the formation of a Family Division of the District Courts that would take from the High Court its original jurisdiction under the Matrimonial Proceedings Act 1963, the Matrimonial Property Acts 1963 and 1976, the Guardianship Act 1968, the Aged and Infirm Persons Protection Act 1912, and the Mental Health Act 1969. We agree that if the principles of the Matrimonial Property Act 1976 are compared with the situation on death (as with the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949), the former jurisdiction also might be better vested in the High Court. We recommend that a Family Division of the District Courts should be formed.

Family Division of the District Courts

464. In New Zealand, as elsewhere, rapid, even bewildering forces of social change affect not only moral values but the very conditions of everyday life. The status of marriage is often under attack. New pressures are being exerted on family life. Some pessimists suggest that the family will cease to exist as an institution within a decade or so. We believe, however, that the family is vitally important to the future of our society; we trust that it will evolve in ways best suited to the changing times. It is capable of providing its members with a place and an identity in the community, of fulfilling a major role in socialising the children, and of offering stability in the relationship between a man and a woman.

465. Often family life fails to achieve these aims. Marriage breakdowns occur resulting in complex personal and legal problems. Different types of relationships, in which groups of people not previously regarded as families create social and sometimes legal obligations to each other, pose new questions for resolution by the courts.

466. Almost one third of the submissions made to this Commission concerned the topic of family law. All were agreed on the need for reform. We believe it both urgent and essential that a forum should be established which can respond adequately to the present and future needs of the family in New Zealand society. We conceive this forum for the resolution of conflicts affecting family life, to be a "Family Court". The Family Court will be shaped by the law administered in it. It would be an empty gesture to set up this new forum without also giving attention to substantive family law and the procedures required to implement it. We have taken into account the scattered nature of our population. Selection of personnel to serve the Family Court will be partly governed by availability of suitable candidates, and it may not be easy to provide the same degree of service to rural areas as to metropolitan centres.

467. Family law has been studied by commissions of inquiry in several countries in recent years. A most comprehensive report was prepared by the Ontario Law Reform Commission. When the Chairman and Deputy Chairman of this Commission visited Toronto last year, it was immediately apparent that some suggestions earlier submitted to us in New Zealand and some points on which we had reached tentative conclusions had already been considered by the Ontario Law Reform Commission and implemented in that province. The report of that commission and the interviews with judges, officers of the Attorney

General's Department, and others involved in the Family Court in Ontario were therefore of special interest. Similar comments would apply to visits made to Family Courts in British Columbia, Los Angeles, Hawaii, and Sydney. We gratefully acknowledge that in compiling this part of the report we have drawn extensively on material relating to these visits. We also acknowledge our indebtedness to those many dedicated and caring people, both lay and professional, who appeared before us and gave us the benefit of their experiences in the field of family law.

468. We propose to deal with the principles of a Family Court, turning to matters of detail only where it is important to elucidate the main issues. Obviously we cannot describe every detail of a Family Court; these matters will require separate consideration. We therefore suggest that a small working party should be set up immediately to prepare for introduction of the Family Court. Such a group should be given the opportunity to study in depth some of the Family Courts visited briefly by members of this Commission; especially those in Toronto, Vancouver, Los Angeles, Honolulu, Sydney, and Adelaide. The working party should be chaired by the senior judge of the Family Court; other members should include a judge-elect of the court, and the person appointed director of support services (positions we describe more fully later). A working party so constituted would greatly facilitate prompt establishment of an effective Family Court.

469. ***Central features of a Family Court*** There are certain features which have come to be associated with the concept "Family Court". These are:

(a) Although set apart from the main court structure, the Family Court should remain part of that system. Its function is to deal with those cases which are in some way concerned with the family situation.
(b) It should have specialist judges who are legally trained and qualified by personality, experience, and interest to decide matters and preside over all activities of a Family Court.
(c) Support services, including social workers, counsellors, and conciliators, should be available.
(d) Physically separate from other courts, the family courtroom should have comfortable fittings, intended to put the parties at ease.
(e) Strict adversary rules should be relaxed, as should the more traditional forms of dress and address so that, when cases have to be resolved in court, the hearing can be conducted in an atmosphere of relative informality. The aim of the court should be to help resolve problems with the co-operation of the parties, wherever that is possible, and with a minimum of disruption in all cases.
(f) The Family Court requires status, a comprehensive jurisdiction, and a sound judicial philosophy with judges and ancilliary personnel of high calibre.
(g) The court should be organised so that its responsibilities to the community are clearly delineated.
(h) Proper funding and best use of resources, including those already available in buildings and personnel, should be provided.

As the Secretary for Justice said, these features are found in existing or proposed Family Courts overseas. They are essential for a Family Court in New Zealand.

470. ***The present system*** Some groundwork for a Family Court has already been established with legislative provisions for appointment of

specialist magistrates and involvement of social workers and marriage guidance counsellors in family matters. The Domestic Proceedings Act 1968 introduced a new approach to family law and provided the machinery for improved procedure which, unfortunately, has not always been allowed the opportunity to function as effectively as it might. For instance, s.14 of that Act made provision for reference to conciliation on the request of either spouse. We understand that, at least in Wellington, very few applications have been made to the courts under this section. Yet a magistrate from that city with considerable experience in this field told us that he shared the philosophy behind the section and believed it could and should be made to work.

471. Apart from the opportunities for conciliation afforded by s.14, the underlying philosophy of the Domestic Proceedings Act 1968 is perhaps best seen in s.13, which reads:

> In all proceedings under this Act between a husband and wife, it shall be the duty of the Court and of every solicitor or counsel acting for the husband or wife to give consideration from time to time to the possibility of a reconciliation of the parties, and to take all such proper steps as in its or his opinion may assist in effecting a reconciliation.

472. The Commission has been supplied with a copy of the Wellington District Law Society's ruling dated 17 August 1977 on standards of conduct expected from its members under this section. That ruling reads:

> 14. The Council therefore considers that the effect of s.13 is as follows:
>
> (a) A solicitor must seriously explore the possibility of reconciliation, bearing in mind that it is for the Court, not for him or his client, ultimately to say whether an attempt or attempts at reconciliation are to be made or not: cp. s.15(1) (proviso); s.15(3).
>
> (b) A solicitor must advise his client that the client must make a serious effort towards reconciliation, and in particular must not advise his client of means to circumvent efforts towards reconciliation.
>
> (c) A solicitor should conduct himself in the preliminaries to proceedings and in the course of proceedings bearing the possibility of reconciliation in mind throughout.
>
> (d) By necessary implication a solicitor must advise his client and must conduct himself at all stages, wherever possible, so as not to discourage amicable settlement of the parties' differences.
>
> In the Council's view the above standards of conduct are also appropriate in matrimonial proceedings in the Supreme Court.
>
> Professional Misconduct
>
> 15. The Council takes the view that a departure from the above standards of conduct may amount to professional misconduct.

473. Evidence received by the Commission disclosed a wide range of interpretation and practice, even among lawyers who specialised in family law. We were told that the present legal aid provisions encourage litigation which might not otherwise take place; also that it was necessary for a solicitor to issue proceedings to get protection for his costs. Parties who might otherwise settle their disputes amicably were forced to go to

court to obtain legal aid and found themselves in an adversary situation, even when this was contrary to their wishes. We were also told that when preparing an application for a separation order, some solicitors set out full details of allegations made by a wife against a husband even though it was appreciated this might exacerbate prevailing hostility. It should not be necessary to recite all the details in support of the application in the initial document commencing the proceedings. These details should be brought out, if need be, at a stage of counselling or conciliation when a calmer atmosphere prevails. Some even suggest that legal details should not have to be spelt out unless and until a court hearing was actually in contemplation.

474. Two quite different but representative approaches were presented in the course of one day's hearing in Auckland. One conveyed a picture of a well-regulated domestic proceedings practice in which applications for various types of matrimonial relief were processed with maximum efficiency, but with little or no heed to early referral for conciliation when the first signs of marriage breakdown appeared. We accept that there are times when parties to a marriage wish only to have it ended as speedily and as efficaciously as possible. On the other hand, it was urged that current needs demand a different approach in which a lawyer who chooses to specialise in family court work equips himself, if not actually to participate in, at least to understand, conciliation processes. We sympathise with the latter view, given the complexities and unpredictability of contemporary family life. The conciliative intent of family law should be emphasised, and a Family Court should therefore be manned by a team with special skills and training, who can deal flexibly with human problems as they arise, relating the clients' particular needs to legal necessities.

475. ***Conciliation and reconciliation*** In emphasising conciliation it is important to distinguish between conciliation and reconciliation. Reconciliation is one possible outcome of conciliation interviews and discussions: conciliation itself is useful whatever the outcome. While reconciliation may be the ideal, in practical terms it is often unattainable. The gulf between the parties may have grown too wide or new relationships may forbid restoration of the previous family situation. Conciliation should concentrate on helping the parties rebuild some degree of relationship so that they can at least discuss rationally any matters arising out of the break-up of the marriage. In a calmer frame of mind, they may be able to work out arrangements for the welfare of the children in a way that minimises injury to them.

476. The Domestic Proceedings Act 1968 provided for appointment of specialist magistrates to deal with matters arising under that Act; also that only those magistrates who held the appropriate warrant should exercise domestic jurisdiction. In practice, however, it was found necessary to warrant almost all magistrates, primarily to meet the needs of smaller circuit courts.

477. The present system, whereby the family jurisdiction is split between the Supreme Court and the Magistrates' Courts, provides an opportunity for harrassment by cross-filing applications under different jurisdictions. For instance, an application for a separation order and related orders concerning possession of the matrimonial home, filed in a Magistrate's Court, can be parried or delayed by filing a petition for divorce in the Supreme Court. Such a ploy can involve substantially heavier costs for the party who wishes to have the matter disposed of in

the Magistrate's Court. A spouse who has sufficient economic resources can use the court system as an additional and unfair weapon with which to oppress the other spouse.

478. It is fundamental that the family as a unit should be dealt with as an organic whole. We cite the lucid argument of the eminent American jurist, the late Dean Roscoe Pound:

> It has come to be recognised that the work of independent agencies treating the controversies that arise in the course of family relations needs to be unified. To maintain an elaborate system of independent tribunals and agencies, each with limited jurisdiction, endeavouring to adjust the relations and order the conduct of several parties . . . is wasteful of public funds and of private means, wasteful of the time and activity of both parties and the particular judicial or administrative or private social agencies to which resort must be had.

Pound objected vigorously to several courts dealing piecemeal, and often simultaneously, with difficulties in the same family. He deplored such lack of system and its results:

> Treating the family situation as a series of single separate controversies may often not do justice to the whole or to the several separate parts. The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts.

479. ***Court or social agency?*** Clearly, work in family law has an extra dimension. This has given rise to a debate over whether a Family Court should function as a court of law or a social agency. Both points of view, and several intermediate shades of opinion, have been expressed before the Commission. The Ontario Law Reform Commission had to consider the same problem and these are its findings:

> There are those who feel that Family Courts must be first and foremost courts of law, and not social agencies. . . . Supporters of this view feel that Family Courts should be seen to do justice, that is, they should administer justice publicly, and in accordance with established legal principle and precedent. Family law problems nearly always involve a dispute of facts, an invasion of privacy and a highly charged emotional atmosphere. Only if the Family Court functions as a court of law can the "kernel of truth" be separated from the "chaff of imagination, prejudice and falsehood"; can inquisitorial techniques be minimised; and can the rights of the parties concerned be adequately protected. The gravity of the issues that come before a Family Court demand an impartial judge, and strict adherence to accepted legal procedures.
>
> Others feel that what distinguishes the Family Court from all other courts is its social purpose, and that its proper function is to find social solutions to the problems that come before it. Supporters of this view believe that the primary function of the Court is to reconcile families, and that if the Court operates on a strictly legal basis, the very nature of the adversary system will harden attitudes between the parties making voluntary adjustment and reconciliation much harder to achieve. They are convinced that what is required is an informal, paternalistic approach, so that the parties can be encouraged to talk about their problems, and make up their own minds as to what is best.

There exists today a conflict between the two approaches and this conflict has serious repercussions for the efficient and uniform administration of family law. While it is not possible to state categorically where the lines are drawn, it is possible to state that generally the conflict is most apparent in the methods adopted by social workers and the methods adopted by lawyers. If the two methods are pursued vigorously, the conflict inevitably becomes irreconcilable.

The answer to this problem, of course, is clear. It is not, or should not be, a question of adopting one theory or another. By their very nature Family Courts have a two-fold function, judicial and therapeutic, and there is room for both theories to operate. Indeed, each complements the other in the rather special context of a Family Court. The question really is how to incorporate the best of both approaches into the procedure of the Family Court. One of the tasks that confronted the Commission was to examine this question and to make recommendations on how best, in our view, this can be accomplished.

480. We agree with the Ontario Law Reform Commission on the two-fold function of Family Courts; also that the question to be resolved is how to incorporate the best of both approaches into the procedure of our Family Court.

481. ***Laymen in the Family Court*** We received a number of submissions, such as those of the Family Law Reform Association, proposing that Family Courts might become something like the lay panels set up under the Children and Young Persons Act 1974. That association stated:

> We believe the Family Court should consist of a Chairman, who may be drawn from any discipline of life, plus two members, one of whom shall be a chartered accountant and the other a stable experienced person not necessarily legal, with a separate representative to watch over the interests of the children.

We do not think a lay panel treating social problems should be transplanted into family law. It would seem an inappropriate use of social workers' special training to involve them at the time of final decision. They would be better employed in counselling or conciliation before the matter (or so much of it as remains unresolved) comes before the court; they may also continue their role at a later stage.

482. Interpretation and application of the statutes and other sources of family law raise legal questions, the resolution of which requires legal training and experience. Issues such as custody of children, maintenance, and the division of matrimonial property are of crucial importance to the parties. If family disputes were decided simply on what seems fair, in the subjective view of a lay panel, it would seem almost inevitable that an unequal and arbitrary application of the law would result. We believe that courts are the appropriate forums for decision-making in family law cases. In the Family Court, as we envisage it, every effort will be made to resolve suitable matters by conciliation, before the need for a hearing is reached. A hearing by the court will be necessary only when the parties have not been able to settle all their differences and need a third party to determine matters still in dispute. The court will then make its decision, after hearing the facts, according to the law. All the normal safeguards of the judicial process are preserved: the dispassionate examination of evidence

properly adduced in the court, regular procedures which promote an orderly and fair hearing, and legal representation whenever necessary or desirable. For these reasons, we do not see any merit in appointing lay referees: this merely substitutes a non-legally trained judge for one who is trained. We would also mention here those several submissions urging us to move entirely away from the use of a court, even to the extent of abandoning the present structure and title. We cannot agree.

483. We believe it better to provide Family Courts with non-legal techniques and personnel as part of their support service than to give legal authority to non-judicial agencies. We do not question that some non-legal people are as well, or better, equipped to deal with the emotional problems of family dissolution as a judge or lawyer. Our view is that lay counsellors and social workers should assist the parties to consider and possibly resolve matters in dispute; if a hearing proves unnecessary they will have assisted the parties and the court in a very substantial fashion. It is common experience overseas that where preliminary conferences between the parties and counsellors are held, emotions are defused, dialogue is established, and an atmosphere of reason prevails.

484. The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way, the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable.

485. ***The place of the Family Court*** Although a substantially separate entity, the Family Court should be firmly rooted in the general court system. We have previously suggested this court's unique balance of judicial and therapeutic concern for the community it seeks to serve, which implies, in turn, specialised ancillary and administrative services not required by any other court. A Family Court should be free to develop a coherent approach to its task, a judicial philosophy best suited to contemporary social needs. Where to locate this very specialised court is obviously an important decision.

486. Some submissions urged that a Family Court should have completely separate existence at Supreme Court level or above, as in Australia; others suggested a Family Division of the Supreme Court; others a Family Division of the District Courts, or a separate entity at that level. Clearly, if the Family Court were made a division of, or of equal standing with, the Supreme or High Court, it would have a high status.

487. In our view, possibly the most important requirement of a Family Court is to be readily accessible to all who wish to use its services; in particular, to deal with urgent matters. The District Courts meet this requirement better than the High Court; the High Court will sit only in metropolitan areas and main provincial centres whereas the District Courts will extend into smaller provincial towns. Accessibility and cost are closely related: the Family Court should function as simply and inexpensively as possible. The proposed District Courts meet these requirements.

488. We heard suggestions that if certain family law matters such as divorce, at present heard in the Supreme Court, are removed to a Family Court, this would downgrade proceedings in the eyes of litigants and the public generally. We do not agree. For example, much of the more substantial work on which divorce petitions are later based takes place in

the Magistrates' Courts. Other important matters such as adoptions, are heard in the Magistrates' Courts, while custody applications may be commenced in either the Magistrates' Courts or the Supreme Court, at the choice of the applicant. In our view, there is no logical basis for the present allocation of work between these two courts. Gathering all family law matters into one court is logical and more simple to administer. We believe the District Courts are the most appropriate courts of original jurisdiction in family law. We have therefore recommended the creation of a Family Division of the District Court: for the sake of brevity we refer to this division as "the Family Court"

JURISDICTION

489. In our opinion, the Family Court should exercise a wide jurisdiction in relation to the family including matters covered by the Domestic Proceedings Act 1968, the Guardianship Act 1968, the Matrimonial Proceedings Act 1963, the Adoption Act 1955, the Matrimonial Property Acts 1963 and 1976, the Marriage Act 1955, the Status of Children Act 1969, and the Domestic Actions Act 1975. The jurisdiction at present exercised under the Children and Young Persons Act 1974, both under its care and protection provisions and relating to offences by children and young persons, should pass to the Family Court. We would also include matters covered by the Mental Health Act 1969, the Alcoholism and Drug Addiction Act 1966, and orders for treatment under the Health Act 1956. Protection orders under the Aged and Infirm Persons Protection Act 1912 and the Minors' Contracts Act 1969 would also seem appropriately placed under the new court's jurisdiction.

490. We further recommend that the Family Court should have jurisdiction to hear criminal matters arising within families, such as inter-spousal assaults, parent-child assaults, incest, and abduction; provided that the court should be free, of its own motion or on the application of prosecution or defence, to transfer the matter to the ordinary courts for hearing.

491. Our reasons for gathering these matters under the jurisdiction of a Family Court are mainly self-evident: that cases involving separation, divorce, maintenance, paternity, custody, access, and adoption should be included is generally accepted. We later elaborate our view that matters presently dealt with in the Children and Young Persons Court belong in the Family Court. Matters arising under the Health Act, the Mental Health Act, and the Alcoholism and Drug Addiction Act customarily fall under "miscellaneous applications" in most Magistrates' Courts. In fact, they frequently have a family background and in any event require the sort of services a Family Court is equipped to provide. For example, an application by one spouse for a reception order in respect of the other under the Alcoholism and Drug Addiction Act or the Mental Health Act, may prove to be a disguised request for help with a breaking marriage.

492. ***Matrimonial property*** Submissions to the Commission revealed sharply divided opinion over whether matters relating to matrimonial property should be exclusively within the jurisdiction of the Family Court. One well supported view held that questions relating to the matrimonial home should be dealt with by the Family Court. Divergent views appeared when the property under consideration was of substantial value or included business assets, for example, farms or professional practices.

493. Some submissions suggested that cases involving important principles of law or complex facts, such as *E v. E* [1971] N.Z.L.R. 859

and *Haldane v. Haldane* [1975] 2 N.Z.L.R. 715, should be commenced in the High Court. It was also submitted that authoritative judgments interpreting some of the provisions of the Matrimonial Property Act 1976 will be needed before it becomes possible for solicitors to advise their clients adequately in this field. We heard arguments citing jurisdiction in civil cases, which is determined by fixed monetary limits, and suggesting the same principle could be applied to matrimonial property. The Department of Justice, however, opposed Family Court jurisdiction being limited by monetary level. The Secretary for Justice expressed his personal view when giving evidence:

> For my own part these property arrangements are very much part of the separation or dissolution of a marriage and are sometimes the matters that concern people most. If this jurisdiction is not vested exclusively for the most part in the Family Court we will have this split again.

He was referring to the split which can force parties to seek orders relating to one aspect of the marriage break-up in a Magistrate's Court while having to go to the Supreme Court for other orders.

494. ***Exclusive jurisdiction*** An obvious reason why all family legal problems should be brought to the one court, at least initially, is to eliminate opportunities for harassment by cross filing of applications under different jurisdictions.

495. The Department of Justice and a majority of the Council of the New Zealand Law Society expressly rejected the idea of concurrent jurisdiction in their submissions to us. We have previously noted the qualification that some practitioners would make in regard to matrimonial property. A number of Supreme Court judges expressed a wish to oversee at least some of this work; we also record that these judges would welcome the opportunity to hear other family law cases at first instance.

496. ***Complex and difficult cases*** Once constituted as we have sought to describe it, the Family Court would rapidly acquire expertise in its specialised field; expertise that would further modify and develop the court's own philosophy and practical strengths. We are confident that such a court would soon be competent to handle all but the most difficult matters. We recognise, however, the need to make provision for cases of unusual complexity. We recommend that the Family Court should have exclusive original jurisdiction, with provision for removal of cases to the High Court on the application of one party, or when referred by a Family Court judge. We would recommend that, at least initially, such leave should be liberally granted. We also point out that when one of the parties to a marriage has died, it may be desirable for matters of matrimonial property to be removed to the High Court since we consider that cases concerning the law of wills and succession (including family protection and testamentary promises) should remain in the High Court. In our view, practical considerations make it impossible to reach a strictly logical or fixed division of matrimonial work between the High Court and the District Courts.

497. ***Wills and succession*** We have received submissions that as questions arising under the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955, and as matters relating to interpretations of wills and administration of estates generally, all involve families, these should fall within the jurisdiction of the Family Court.

Although there is a certain validity in this line of thought, we take the view such matters should remain in the High Court, and recommend accordingly. From hearing all submissions, we think the consensus is that questions involving the living should in general be dealt with in the Family Court, while administration of deceased estates and interpretation of wills should remain within the jurisdiction of the High Court. Although it is not within our terms of reference, we comment that it is obviously imperative to continue the substantive law reforms introduced in the matrimonial property field by dealing with the law of succession, family protection and testamentary promises so that the rules relating to family law are welded into a coherent whole.

498. ***Appeals*** Just as it is important to eliminate or drastically reduce any fragmentation in hearing matters of family law at first instance, so it is important to ensure review by appeal is readily available. It is desirable that such review should be by courts, or divisions of courts, familiar with special considerations applicable in the Family Court. Some foreign systems provide a special appeal court for family cases; others treat family law appeals no differently from other appeals. What happens elsewhere appears to be governed more by pragmatic considerations than by theoretical justifications.

499. Matters now heard in the Magistrates' Courts, which we propose to place in the Family Court, are presently reviewable on appeal in the Supreme Court by a single judge. The appeal is usually reheard on notes of evidence under the provisions of s.115 of the Summary Proceedings Act 1957. We accept that, as the Department of Justice submitted, the right of appeal by way of one rehearing on questions of law and fact in family law proceedings should be freely available. Appeals on questions of law only should be able to proceed further to the Court of Appeal, and (with leave) to the Judicial Committee of the Privy Council. We recommend that these provisions continue.

500. Concerning constitution of the appellate court, the Department of Justice indicated an initial attraction to the view that there should be a special family appeal court. The department suggested that if a specialist judge made the decision at first instance, it was logical to have the case reheard by another specialist body. An appeal court comprising two Supreme Court judges, drawn from judges designated as Family Appeal judges, and one Family Court judge, was proposed as a possibility. Because there is often a large area for judicial discretion in family cases, rehearing before three judges would prevent the appeal seeming to be the substitution of one judge's view for that of another.

501. We recognise logistical problems in such a suggestion. Assembling a court so constituted, in areas outside the main centres, would present real difficulties. Some of the relatively routine matters on which appeals might be lodged, such as conviction for failure to pay maintenance, or some minor matters in the Children and Young Persons section of the court, would not warrant calling a multiple court together. Conversely, it seems reasonable to anticipate that appeals from a specialist court on matters of this kind would be limited in number, and that most appeals would tend to be substantial. A reasonable compromise would seem to lie in providing a right of appeal in all cases from the Family Court to one judge of the High Court, but reserving the right for either party to apply to a judge of the High Court for leave to have the appeal heard by a special appeal court comprising two High Court judges and one judge from the Family Court. We recommend accordingly.

502. ***Custody and guardianship*** Appeals on custody, guardianship, and related matters brought under the Guardianship Act 1968, have constituted an important exception to general rules governing appeals. When first enacted, s.31 of the Act provided that all appeals relating to custody, guardianship, or access, except those upon questions of law, should be reheard in the same way as the original hearing. In 1970 this section was amended to give the Court of Appeal discretion to hear the whole or any part of the evidence. No such discretion in these matters was given to the Supreme Court, although discretion for appeals in general, in almost identical terms, was already to be found in s.119 of the Summary Proceedings Act 1957. Section 23 of the Guardianship Act provides that where any matter relating to custody, or guardianship of, or access to, a child is in question, the court shall regard the welfare of the child as the first and paramount consideration.

503. ***Majority opinion*** Most lawyers and judges would agree that custody and access cases are among the most difficult. Although it is expected that a Family Court, with its specialist judges, will be of a high standard, we consider, along with the New Zealand Law Society, that it is desirable to retain the present statutory requirement that custody and access cases should be heard afresh on appeal. Parliament at one stage decided that even the Court of Appeal should be similarly required to hear the evidence afresh, but this is now discretionary for that court.

504. We appreciate the force of the arguments in the minority opinion, especially those relating to saving of time, patching up of cases, and the strain on parents and children. But the paramount consideration is the welfare of the child. In our opinion, in custody cases, there is no substitute for a thorough and independent enquiry by the High Court with that court hearing the evidence and observing the demeanour of the witnesses, particularly the parents. This outweighs all other considerations.

505. We recommend that s.31 of the Guardianship Act 1968 relating to appeals in custody and access cases should remain unchanged.

506. ***Minority opinion*** (J. D. Murray, S.M., and R. M. King) Custody and access cases are amongst the most difficult types of litigation. The outcome is of very great importance to the children involved. That a hearing has become necessary usually indicates that difficult negotiations have been attempted but have failed; and that, in consequence, emotions of some or all of those involved are running high. Emotional and legal factors can blind parties to the truth; they sometimes give false evidence which they may convince themselves is true, and genuinely believe it to be so. We were informed that in some cases parents with genuine love for their children pursue an appeal because they are completely convinced it is in the children's best interests that they do so. Unfortunately, it is also true that some parents appear to have scant regard for the real welfare of the children, and treat them as chattels or pawns in a game in which points are scored off each other through the children. It is not uncommon for this type of parent to go to great lengths to achieve his or her wishes in the situation, with little apparent thought for the children. A parent who has been unsuccessful at one hearing may present a very different picture at a rehearing: sometimes the second version is untrue, manifestly so to anyone involved in the first hearing.

507. Where rehearing proceeds as for an original hearing, determined parents may take the opportunity to fabricate evidence and repair gaps or defects in the first hearing, or to rehearse the witnesses so that they may give a much improved performance at the second hearing. Unfortunately,

the provisions in the present Act can be construed to mean that an appellate judge in the Supreme Court should not even read either the evidence given, or the judgment pronounced, in the Magistrate's Court. This can mean that matters which might otherwise serve to warn the appellate judge of the appellant's tactics may not be brought to his notice; what ought to be an earnest attempt to serve the children's best interests can become something of a contest with the children as the prizes. In any event, the appellate court may be deprived of the trial judge's reasons for his judgment and his comments on the credibility of witnesses.

508. It is most important that an optimum degree of stability should be achieved for the children as quickly as reasonably possible after the trauma of breakdown in their former family life. It is obviously desirable that finality is reached without delay in custody litigation so that past unpleasantness can be allowed to fade from the children's memories. A rehearing as for an original hearing keeps unpleasantness alive and impedes recovery. Complete rehearing may also involve calling evidence from one or more psychiatrists not previously involved as witnesses and the child or children having to undergo further psychiatric examination. In *Epperson v. Dampney* [1976] 10 A.L.R. 227 the Chief Justice of New South Wales, Sir Laurence Street, said:

> It is the recognition by judges of the undesirability of normal, healthy children being thus placed on the emotional dissecting table with all the strains upon their love and loyalties for their respective parents, that leads judges to discourage the tendering of medical evidence where no question of ill health arises.

In that case, two "healthy normal children" had been subjected, in the space of eight months, to no less than five interviews in professional chambers belonging to the father's child psychologist or the mother's psychiatrist.

509. Generally, except for cases under the Guardianship Act 1968, an appeal by way of rehearing is determined on the notes of evidence recorded at the original hearing. There is usually provision, as in s.119 of the Summary Proceedings Act referred to earlier, for the appellate court to rehear the whole or any part of the evidence in its discretion. Inadequacy of the record of evidence is one reason which might lead the appellate court to exercise its discretion in favour of rehearing evidence. We understand that the practice adopted by Supreme Court judges on custody and access appeals varies considerably. As we have said above, some do not wish to read either the evidence or the judgment given at the first hearing. Some prefer to adopt the earlier evidence and hear any fresh evidence, subject to appropriate limits. Some attach considerable weight to interviewing the children. Others rarely avail themselves of the opportunity to do so.

510. In Canada, the Ontario Law Reform Commission expressed the view that, because of improved record-keeping techniques, "the trial de novo is an anachronistic relic of frontier days" and that "the raison d'etre for the trial de novo exists no longer, even in the context of the Provincial Courts (Family Division)". This commission also commented that "increasingly, and regrettably, the hearing in the Provincial Court (Family Division) is being regarded as a preliminary hearing". Appeal procedures are not intended to permit a party to present a case carelessly, secure in the knowledge that he or she will have the opportunity, as of right, to make a better attempt in the hearing on appeal. In England, where custody matters are heard by lay justices, the appeal to the Family

Division of the High Court is heard on the notes of evidence, although the Family Division can send the case back to a differently constituted Bench of lay justices for rehearing. Our own Law Society, in the course of its submissions regarding concurrent jurisdiction, had this to say:

> Finally, it means that the credibility of the parties may be challenged twice over whereas it is preferable that the issues of fact be disposed of at the one hearing while reserving the parties a right of appeal to the Supreme Court . . . This must be read subject to the Society's view expressed in the previous paragraph that all custody and access matters, by their very nature, warrant a hearing de novo on appeal.

511. We have recommended that the Family Court should be presided over by specialist judges, with professional support services attached, and have emphasised the active participation of the parties in the conciliation process. Given the proposed Family Court's constitution, expertise, and high standing with the community, we would expect that litigants would be more ready to accept its decisions, and the number of appeals would tend to fall away. A court specialising in this type of work would be better equipped to judge custody cases than one called on to deal with them infrequently. Moreover, in many custody and access cases the litigants' respective claims are almost in equilibrium. In such a situation, the presiding judge has to make what he believes the right decision, recognising that someone else might take a different view.

512. It will be seen that the Commission was faced with widely divergent views and practices on this very important topic. The welfare of the child is the first and paramount consideration when any matter relating to custody or access is in question. That principle applies equally to initial hearings, procedural matters, or questions on appeal. The minority of this Commission considers that appeals on custody, guardianship, and access should lie in the same manner as other matters heard in the Family Court: that is, to a judge of the High Court, pursuant to the Summary Proceedings Act; or, with leave, to a special appeal court comprising two High Court judges and one Family Court judge. The minority considers that the parties should have the right to apply to a judge of the High Court for the whole or any part of the evidence to be reheard; or for further evidence to be received, if in the opinion of that court it may further the welfare of the child.

513. ***The Children and Young Persons Courts*** In commenting earlier on the principle that the family unit should be treated as an organic whole, we anticipated the question of relocating the Children and Young Persons Courts. We were urged from several quarters to bring juvenile courts within the proposed Family Court; arguments well summed up in the submission of a magistrate:

> From Juvenile Court to Family Court is a natural transition. For it is a commonplace that for successful treatment of a child in trouble it may be essential to work with the whole family and that delinquency, child neglect, and matrimonial difficulties may be simply different facets of a larger family problem. It is this concept of the family as a social unit that underlies the basis for a family court. Much delinquency and other social ills are traceable to the inadequacy and breakdown of families. To treat incidents separately may not do justice to the whole. A pre-sentence report from a social welfare officer may reveal a need for marriage guidance. If the children are in trouble the parents are in trouble. Both require help. Instead of jurisdiction being fragmented between several courts it should be

consolidated in a single court, dealing with children, parents, husbands and wives. For this reason I believe that interspousal assaults of a minor nature should be referred from the criminal court to the family court. Like truancy such assaults are often the storm warning signals. The problems are so inter-related that there should be an integrated system and in the smaller centres defended care and neglect cases should be reserved for hearing by the Magistrate from the family division.

On the other hand, the Department of Justice suggested that Children and Young Persons Courts should not be disturbed, at least for the time being, as they were developing their own philosophy and expertise in dealing with children. The department said:

> As we previously indicated there is some force in the argument to include care, protection and control proceedings in particular in the jurisdiction of any Family Division. However initially any Family Division will, to put it colloquially, have its hands full. As we have said the Children and Young Persons Courts seem to be developing well and our inclination at this stage is to leave them intact with their existing jurisdiction and function. This should, however, be a question for careful consideration once any Family Division has been established and had an opportunity to fully develop. We would however expect that as far as practicable Judges of any Family Division would in the meantime preside in the Children and Young Persons Court.

The Department of Social Welfare also adopted a hesitant attitude to incorporation of the Children and Young Persons Courts into a Family Court structure. That department recommended establishment of a Family Court to exercise all jurisdiction in family law, with the Children and Young Persons Courts as a separate division. In the course of later questioning, the Director-General of Social Welfare said his views were not fixed and he would be quite happy with any arrangement which incorporated both courts in the one setting. The Assistant Director-General of Social Welfare expressed his wish that the Children's Boards established under the Children and Young Persons Act, which were functioning well, should be permitted to operate without interruption for approximately three years then be subjected to a critical review.

514. We do not believe that inclusion of Children and Young Persons Court work would overload the proposed Family Court. On the contrary, the court would be severely handicapped if work with children and young persons were excluded and its operations limited to divorce, maintenance, access, and matters specifically relating to the breakdown of marriage. A Family Court functions at something well below full potential and effectiveness when restricted in such a way: the real justification for its creation is that it should have the facility to look at larger problems of which the matter immediately before it may be only symptomatic. To take one example, it is commonly believed that truancy or anti-social behaviour on the part of a child may be that child's way of expressing, perhaps unconsciously, a sense of deprivation because of parental problems. The Department of Justice has itself suggested that judges of the Family Court might be expected to preside in the Children and Young Persons Court "in the meantime".

515. We believe much would be gained by bringing matters arising under the Children and Young Persons Act into the full perspective

offered by a Family Court. We recommend accordingly.

516. It was also suggested by a group of committees representing the Maori people that social workers officially attached to the local Maori committees should be given a statutory right to be present at all sittings of the Children and Young Persons Court. In support of this request, they stated that Maori parents are often too shy to make their views heard without the moral support of a capable and experienced person of their own culture. We note that s.23(e) of the Children and Young Persons Act 1974 provides that any representative of a social welfare agency who has a direct interest in the case before the court shall be entitled to be present at such proceedings.

517. ***Consent to marry*** Under the Marriage Act 1955, as amended by the Status of Children Act 1969, persons under 20 years of age who wish to marry and are unable to obtain parental consent may apply to a magistrate for his consent. Particular circumstances are considered and result in cases being dealt with in differing ways. A referral to marriage guidance counsellors is common, but counsellors are not always available. Pregnancy is frequently a reason for a young couple seeking to override parental resistance and obtain the court's consent. It is generally accepted that youthful marriages, especially if pressured by pregnancy, tend to be unstable.

518. In California, mandatory pre-marital counselling is a prerequisite to the Superior Court order granting permission to marry for all persons under 18 years. Health certificates are also required. The court does not provide the counselling: this is available through counselling resources in the community. Among the topics covered in four scheduled counselling sessions are employment (including continued working by the wife-to-be), living arrangements, money management, education plans (if any), interpersonal compatibility, parental relationships, sexual information, child care, reform motivation (if present), forced marriage situation (if applicable), changing values, and post-marital counselling. The couple are encouraged to evaluate their emotional, economic, and social readiness for marriage and to establish the kind of marriage relationship that will help them to grow as individuals and as a family. At the conclusion of the counselling sessions, the couple meet with a court counsellor for a final interview, following which this counsellor makes a recommendation to the judge regarding the couple's readiness for marriage.

519. A similar approach would be desirable in this country. The New Zealand Marriage Guidance Council could carry out the role performed by the community counselling resources in Los Angeles County. We cannot estimate what rate of success might be achieved, but we believe more attention should be given to preparing people for marriage. It is reasonable to assert that the community will benefit from a programme of mandatory pre-marital counselling for persons under 18 who wish to marry. We recommend that where either party to a proposed marriage is under 18 years of age, or under 20 years of age and parental consent to the marriage is withheld, then the couple must participate in a period of pre-marital counselling and obtain the consent of a judge of the Family Court before the marriage can proceed.

JUDGES OF THE FAMILY COURT

520. Specialist judges are essential to a Family Court. By this we mean judges who are genuinely interested in family law as it affects every

member of the family; who are temperamentally suited to the work; with, preferably, substantial practical experience in this field, and willingness to undertake continuing education by way of study or refresher courses. The Family Division of the District Courts should be manned by judges especially appointed to it, sitting mainly in the centres of greater population but readily available to sit in court buildings or whatever suitable accommodation is available in smaller centres on a peripatetic basis. The concept of a peripatetic court has been given statutory recognition by the Magistrates' Courts Amendment Act 1974.

521. So that urgent matters are not delayed, it may prove necessary for all District Court judges to exercise some Family Court jurisdiction. For instance, it would be desirable for a District Court judge visiting a country town on circuit to have jurisdiction to deal with urgent applications concerning a child, or under the Health Act and the Mental Health Act. We would emphasise, however, that such powers should be exercised sparingly, and that the earlier expedient of issuing the relevant warrant to all members of the Bench should not be repeated. Details in this matter could be made the subject of a practice direction.

522. We have previously recommended appointment of a Chief District Court Judge. We also recommend the appointment of a Senior Family Court Judge to lead the Family Court. He or she would be responsible, at the administrative level, to the Chief District Court Judge, with whom he would function in close co-operation. He would have a central role in developing the ethos of the division and in ensuring that its status and operations continued at the highest possible level. His main responsibility would be to maintain careful watch on operations of the Family Court. He would participate as a member of the Judicial Commission in recommending judges for appointment to the Family Court, and would be responsible for the family law content of continuing education programmes. He would also be responsible, in conjunction with regional Family Court judges, for making the work and objectives of the Family Court known to the public. His or her first task would be to prepare for the introduction of the Family Court.

523. We have been given a variety of opinions on the desirability of judges sitting exclusively in a Family Court. Some have insisted that because of the nature of the work, a judge should serve for relatively short periods in this jurisdiction, before being afforded relief by way of change. Others say they find no difficulty in concentrating on family matters.

524. From the evidence we heard and our own observations, we concluded a great deal would depend on the temperament and interests of the judge concerned, and on whether there was sufficient variety within the programme of the court. If a Family Court is established having the wide jurisdiction we recommend, we see no real difficulty in ensuring that specialist judges are given sufficiently varied work within the limits of the court itself. Nevertheless, we think it desirable that these judges should have jurisdiction to hear criminal or civil matters, as well as family court matters, in order that they might maintain adequate breadth of interest and experience. We recommend accordingly. While Family Court judges would not normally be called on to exercise an extensive jurisdiction in these wider fields, such an arrangement would enable their services to be used with greater flexibility. Personal preference should be considered, but we suggest as a guide that approximately 20% of their time (one day per week, or one week in every five) could be given to matters outside the Family Court.

525. Selection of the right judges is essential to success of the proposed Family Court. Submissions from the Department of Justice tended to favour appointment directly to the division, rather than assignment from the District Courts. We think it undesirable to place any restriction of this kind on the selection process; rather we would wish to ensure that those most suitable are appointed, whether already members of the Bench or not.

526. We cannot presently estimate how many judges would be required to man the Family Court. Obviously, a sufficient number should be appointed to meet the immediate needs of the new combined jurisdiction of that court. Future requirements, including annual and long-service leave, should not be overlooked. The volume of business the Family Court might expect to handle would be the sum of domestic work; what is now covered by the Children and Young Persons Courts; also miscellaneous family matters at present heard in the Magistrates' Courts; together with divorce and other proceedings transferred from the Supreme Court. This may seem a considerable workload. We would confidently predict, however, that if the Family Court is developed in the way we have recommended, time spent in hearing cases will be reduced considerably by effective conciliation. Counselling will be directed to achieving amicable settlement of conflicts, or to negotiating terms of a subsequent formal agreement by previous consent, with a counsellor's help. If the court had only to hear a residue of unresolved matters, or to formalise arrangements worked out under conciliation, court hearing times might be substantially reduced. Agreements reached by conciliation would be more likely to be honoured by the parties and less likely to need judicial time for procedures of enforcement or variation.

527. ***Judicial control*** The judiciary should have ultimate control over both the judicial and therapeutic functions of the Family Court. We recommend that the support services of an individual court centre should be subject to day-to-day supervision by the local Family Court judge, working closely with his registrar and with the counsellors, psychiatrists, lawyers, social workers, and others responsible for providing area support services. If more than one Family Court judge sits in a centre, the Senior Family Court Judge should nominate one judge to undertake this supervisory responsibility. In making his selection, the senior judge should have regard to administrative abilities and qualification for the particular task, rather than length of experience only.

528. A Family Court's dual legal and therapeutic role means that a judge may be involved in a particular case, or with a single individual, in different ways. A child who is made a State ward may need continued help as time goes on, perhaps especially in foster care situations. A deserted wife may need more counselling after separation and maintenance orders made in her favour, or may have to seek enforcement of these orders through the court. There should be a close partnership between the judge and the support services at his disposal.

THE COUNSELLING FUNCTION

529. The Los Angeles Conciliation Court (functionally, a Family Court) emphasises the value of having the disputing parties actively help in negotiating terms of agreement with the advice of trained counselling staff. If the parties recognise their suggestions are embodied in a formal agreement, or that it is made with their help and consent, it is more likely to be readily acted upon. The first director of this court's Family

Counselling Service stresses the positive reinforcement of having such counselling services backed by what he calls the constructive use of authority:

> Our experience has shown that the use of authority can facilitate the process of short-contact marital counselling. By virtue of the court sitting, the conciliation counsellor becomes a powerful authority figure in the eyes of the client, using a blend of persuasiveness and authority as the situation requires. Clients often equate authority with strength, particularly those for whom authority has great meaning. The Court becomes the strong figure on which they can lean when the home situation is in a state of turmoil and crisis.

The Los Angeles Conciliation Court also places much importance on the fact that the first invitation to participate in conciliation goes out in the name of the court over the signature of the supervising judge of that court.

530. The Los Angeles Conciliation Court also offers a useful perspective on divorce: it speaks of a "dissolution triad" of social, emotional, and legal divorce. Divorce is more than mere legal severance. Many individuals need counselling at the time of divorce to enable them to adjust their relationships with other family members, relations, friends, or the community at large. The cost to the community in ill health, physical or emotional; possible anti-social behaviour; loss of earning or productive power, in a recently divorced person under stress should be obvious. Nevertheless, we consider that certain sections of the community, including members of the legal profession, have not sufficiently moved away from the earlier "fault" concept in divorce legislation, in spite of a change in community attitudes embodied in the Domestic Proceedings Act 1968. We have mentioned the conciliative intent of this Act previously. Many still hold the view that a divorce court should make those orders required by the evidence to terminate the marriage and settle ancillary matters on a purely legal basis. Legal divorce often stops short of human need.

531. We believe the community should think of all family law matters, such as divorce, in broader terms than has been the custom. We think the community generally would have much to gain from a Family Court incorporating well co-ordinated counselling services. Close association with the community is obviously a necessity. The pilot projects in Surrey and Richmond, British Columbia, regard community education and liaison as essential to the work of their Unified Family Court. To that end, a Family Court Committee has been set up to establish an effective link with the community served by the court. This committee is responsible for ensuring that specific needs of the community are met by the court, that the programmes of the court are made freely available, and that the necessary community resources which the court can call upon are available without duplication. We recommend that Family Court committees should be established in New Zealand wherever the Senior Family Court Judge thinks appropriate.

532. ***Support services*** It is critical to the Family Court's success to have appropriate support services:

> If the Family Court system . . . is to be improved significantly, it is not sufficient merely to recommend that the Court be endowed with a comprehensive jurisdiction embracing all family law matters, and that its structure be changed to enable it to accept that new jurisdiction. While such reforms are crucial they are not enough, in

themselves, to achieve our objectives of a Family Court which responds adequately to society's demands. Such measures are directed towards improving only the judicial aspect of a Family Court's function. Equally important is the therapeutic aspect of its function, and it is to this matter that we now turn our attention.

Neither the effectiveness of the Family Court, nor its importance to the community can be measured simply in terms of specific questions litigated. The measure of a Family Court system must also be judged by its ability to cope with family social problems, both present and potential. In order for the Family Court to be of service to the community in this capacity, it must be equipped with a variety of support services. It is in the area of its therapeutic function that the distinctive character of a Family Court lies, and it is in this same area that the validity of the paternalistic approach to family problems is to be found, rather than in the area of its judicial function.

Thorough knowledge and the proper utilisation of the Court's support services on the part of the Family Court Judges are the factors that set the Family Court apart from all others.

(Ontario Law Reform Commission)

The lack of adequate services is a major weakness of our present system.

533. The Family Court should be established throughout New Zealand, but economic factors and lack of manpower may prevent full provision of support services at all court centres: this should not result in those people needing the help of the Family Court having to forego full support assistance because they do not live in a large urban centre. (We do not think pilot schemes appropriate because these artificially limit initial benefits of the scheme to people living in the chosen area, and because we are already convinced of the need for a Family Court.) We suggest that reasonably uniform coverage of the whole country can be achieved if support services are organised regionally with referral staff at each court centre.

534. ***Director of support services*** We also see a need for a national director of support services who would oversee the administrative work necessary to maintain uniform support services throughout New Zealand and who would generally supervise these services. Given the nature of the services under the director's responsibility, some background in behavioural sciences would be desirable, though this position is essentially administrative. The appointee would become a direct link between central administration of the Family Court and all those manning its support services. We envisage his duties as including:

(a) working closely with the Senior Family Court Judge in formulating, implementing, and reviewing support service policies;
(b) recruiting, organising, and placing support service staff;
(c) establishing effective liaison with regional court administrators and court registrars;
(d) co-operating with community and private agencies, including volunteer groups; also with different departments of State;
(e) any other tasks which become apparent as the Family Court continues to grow and develop.

535. While it is desirable for most support personnel to be members of the Family Court staff, this will not be feasible, at least to begin with. Indeed, in some specialised fields, professional help would continue to be

obtained on a referral basis. It is important that the director of support services can ensure required help is available; either through members of the Family Court staff, other Government departments, local authorities, volunteer agencies in the community; or on referral to appropriate individuals or services. At the same time, these volunteer agencies, whose personnel and activities are consonant with the aims of the court, and whose services the court proposes to utilise, should be accorded official recognition.

536. The kinds of service coming under the director's responsibility should include administrative services, family counselling services, and a family advocate service, all of which we will describe in more detail. Obviously regional or local variations will occur in the relative emphasis placed on these services, or even in the nature of the service itself: we are suggesting guidelines only.

537. ***Administrative services*** Efficient registrars, deputy registrars, office and clerical staff will be required for smooth and effective operation of the Family Court. While sensitivity to the special needs of persons using this court is also desirable, interest in, or direct knowledge of, the court support services should not be a prerequisite for employment as this would unfairly limit career and advancement opportunities of present or future staff. While some court staff with special interest in the Family Court might choose to work largely within that court's administration, administrative and office work would remain part of general work of this kind in the Courts Division.

538. ***Family counselling services*** We received a number of valuable submissions on this topic, and examined the matter in some depth on overseas visits. A soundly structured, adequately staffed family counselling service is essential to the Family Court's success. The reasons for counselling services given by Chief Judge Andrews of the Ontario Family Court are compelling and we cite them in full:

(a) to re-unite families and enable them to function on an improved basis;
(b) to explain the legal rights and responsibilities of the parties each within the family unit;
(c) to ease the emotional stress of the parties so that, at least, they may continue to function in society, however minimally;
(d) to act as a source of referral to agencies for lengthy counselling or financial counselling, etc.;
(e) to continue contact and support throughout legal action, if such is entered;
(f) where needed, to continue contact following legal action and provide counselling to overcome feelings of bitterness, hostility, guilt, failure, etc., which frequently follow a marriage break-up;
(g) to provide counselling to ensure that the children of the marriage have a maximum of security and a minimum of hurt through the conduct of their parents.

539. In our view, the main thrust of all work in the Family Court should be to provide help when it is needed—at the point of crisis. In some places overseas the vital benefits which a Family Court could bring to the community were not being realised, largely because counsellors were too busy obtaining background material for, and writing reports on, custody cases for the court. We would not wish to minimise the importance of those reports, but the need for them might be avoided altogether if more help were available at critical periods in the family relationship. Family

counselling services have two somewhat different functions to perform, though there must be some degree of overlapping; these two aspects might be described as the reception centre and the conciliation branch of the total counselling service.

540. (a) ***Reception centre*** We compare this part of counselling work to that performed by an accident and emergency centre at a public hospital. Frequently, reception would be the first point of personal contact with any court. It would usually be a time of crisis for one or more of those involved. Ideally, the counselling service of the Family Court would come to be regarded by the public as a place of first resort when advice and help are needed to cope with serious family problems.

541. Sometimes there is a need for the service to go out to those who need it. In Surrey, British Columbia, for instance, the counselling service of the Family Court has for some years been working in close co-operation with the police on what is called the police/counsellor project. Counsellors work an eight-hour shift till midnight every night, except Tuesday and Wednesday; and accompany the police in patrol cars ready to go where their services are needed. They are often able to assist in resolving problems in homes where the police have been called to deal with domestic disputes. Sometimes they succeed where police uniforms appear to raise barriers. Counsellors can be of value in these cases because they are able to give more time to them than the police. On other occasions they assist the police by taking children found roaming the streets at night to their homes, where they may discuss matters with their parents. A somewhat similar pattern has been developed by the Departments of Police, Social Welfare, and Maori Affairs, and others in the "J" (Joint) team approach in this country. We are informed by the police that domestic disputes and child problems are increasing. We consider that Family Court counsellors should be available for an extended "J" team approach.

542. The reception centre of the Family Court counselling service should have three main functions. First, it should define the problem or problems. For example, a deserted wife may urgently need housing or protection, a job, medical help, financial or legal advice, or any other kind of assistance; or a parent may suddenly be faced with having to go to court with a child who has been committing offences. Many people do not know where to seek help and are often ignorant of what remedies may be available. It is our view that they should be able to turn to the Family Court counselling service for guidance. We would go a step further, and say that this counselling should not be restricted to those who have actually encountered legal problems, but should be available to those who feel some aspect of their family lives is threatened, and who want help. The second function the reception centre should perform is classification of the problem. This would lead naturally to the third; that of referral of the party or parties to the conciliation branch of the court, or to the appropriate departmental or community agency. If it is immediately apparent that lengthy marriage guidance counselling is required, referral to a properly accredited marriage guidance counsellor would seem most appropriate. The goal should always be to avoid litigation and encourage discussion and resolution of the problem by the parties themselves. There will be some cases where it is clear to the counselling service that legal action is necessary. If so, then legal remedies should be explained and possible consequences explored, with the party or parties completely free at all stages to choose what course of action to adopt.

543. (b) ***Conciliation*** The idea of conciliation is not new to New Zealand. Statutory provision for voluntary conciliation before commencement of other proceedings, and compulsory conciliation unless dispensed with by the court, already exist. However, these provisions have not been fully utilised in practice. We have already drawn attention to the semantic confusion between conciliation and reconciliation. While the family counselling services in the Family Court should always be alert to the possibility of reconciliation, and should refer the matter to an outside agency if such a possibility presented itself, assistance with reconciliation or long term counselling in New Zealand is best left to the Marriage Guidance Council, whose counsellors have special training in this field. We believe the whole conciliation process offers a most fruitful opportunity for lay persons to make their special contribution. For instance, in cases involving division of matrimonial property, chartered accountants might offer real assistance when conciliation is being undertaken. Or again, when the custody of children is under consideration, an interchange of views between child psychologists, social workers, and parents in a conciliation rather than adversary context might be of real value.

544. The conciliation branch of the counselling service of the Family Court should concentrate on attempting to settle specific issues by agreement, with the aim of avoiding recourse to trial. We expect, for instance, that determination of the amount of maintenance to be paid would seldom have to go beyond the conciliation branch, except for formal approval by the court. Likewise, we expect that in custody cases, the conciliation process would provide a forum where all concerned could work for agreement upon some, if not all, matters in dispute. Above all, we would expect that during conciliation, the parties could suggest terms acceptable to them to be incorporated in a document which would then be an agreement in reality and not just in name. In our opinion, this approach could be of particular value in custody cases, especially if it were emphasised before or during the first conciliation conference, that the party granted custody of children had a corresponding duty to afford access to the other spouse. The parties should each be required to indicate what they would propose as reasonable access if they were the party having custody and what they would expect if they were exercising rights of access.

545. In conclusion, we would emphasise again the central purpose of the Family Court, namely the provision of a non-adversarial way of settling disputes. That aim has been incorporated in many family courts in North America and Australia, and we suggest it should be central to any family law system in New Zealand. There will always be cases where conciliation will not result in full agreement and disputed matters will have to be resolved in court by the proven adversary method. We are confident that an efficient Family Court with properly developed counselling and conciliation services will greatly reduce the number of cases which actually go to trial.

546. (c) ***Personnel*** Counselling staff employed by the family court must be of the highest calibre. There will be some degree of overlap between reception and conciliation personnel: the distinction relates to difference of function, not to quality of the staff member. Quality is of primary importance.

547. The Los Angeles Conciliation Court makes a Master's degree in one of the social sciences with a minimum of five years supervised

practical work prerequisite for appointment. There are good reasons for setting and maintaining high standards. We would add dedication and deep concern for humanity to academic attainment, in describing our ideal. Suitably qualified persons should be encouraged to take up this work, with normal public service career opportunities.

548. (d) ***Costs*** A properly functioning Family Court counselling service should make substantial savings in legal costs and administration expenses possible. Lawyers consulted privately or by legal aid should spend less time in this field, and less time should be required for defended hearings in court. We would hope for better compliance with orders made after conciliation, and less need for enforcement or variation procedures. Such savings would counterbalance the costs of setting up counselling services.

OFFICIAL GUARDIAN

549. At several points in this report we stress the importance of ensuring that interests of children are adequately safeguarded. Because we believe the same concern must be shown for all who are under some form of legal disability and who might thereby lack access to advice and representation, we recommend that a new office of official guardian should be created. The appointee should be a barrister or solicitor of not less than seven years' standing. The holder of this office would be charged with the responsibility of protecting the rights of all those who cannot help themselves. This would involve active participation in the Family Court, but duties would extend into other areas as well. In a later section we refer to special needs of intellectually handicapped persons as they reach adult years. We believe that the appointment of an official guardian would be of very great benefit to people such as these.

550. Members of the Commission who visited Toronto were greatly impressed with the work of the official guardian and his staff. His primary duty is to protect the rights and interests of minors residing in the province of Ontario (persons under 18 years of age), but his responsibilities extend to others considered to be suffering legal disability: persons who through mental incompetence cannot manage their own affairs (other than those detained in psychiatric hospital and under the Public Trustee's care), or persons who cannot protect their legal rights because their whereabouts are unknown.

551. The office of official guardian was created within the Ministry of the Attorney General of Ontario in 1881. The official guardian may bring an action on behalf of a minor if no other person is ready or willing to do so; or in like circumstances, may defend an action on behalf of a minor. He is a lawyer who has complete authority to represent the civil rights of children under the age of 18 years. On appropriate occasions he has sued Government departments when the rights of children required it. His duties are derived from a variety of statutes dealing with children, including those governing divorce, custody, rights of inheritance, awards of compensation for accidents, adoption, the control of money won by minors in lotteries or the like, and indeed all matters affecting the welfare or interests of children. The prime concern of the official guardian is the best interests of the child he is representing. Sometimes this involves complex considerations as, for example, when he is called on to represent a girl who is the subject of proceedings to make her a State ward, and who is also the mother of a baby being considered for adoption.

552. Often, complex estate and tax matters are resolved at pre-trial conferences in his office with other lawyers and beneficiaries. We were told that because the official guardian and his staff regularly appear in court as counsel for the children whose interests they represent, and are widely respected, they are frequently consulted in matters relating to children in general. They do not receive remuneration from the parties other than such costs as may be fixed and ordered by the courts in a particular case. They therefore attain a degree of independence which places them in a unique position within the adversary system.

553. The present official guardian in Toronto commented that children have recently been granted new recognition as people with legal rights. It is now his responsibility to ensure that each case where a decree in divorce is sought, and where there are children of the marriage, is thoroughly investigated. When this procedure was first introduced in 1950, social workers from the 50 Children's Aid Societies in Ontario prepared the reports. When the new Divorce Act came into force in 1968, a special study was undertaken to determine how best to handle continuing increase in the demand for reports for the courts, relating to divorce and custody matters. The time and work involved, the constant pressure on all concerned, and the high costs were all recognised as creating heavy demands; but despite these factors, the importance of the reports was considered so great that a new method of interview was devised. Assessments were to be carried out by social workers under the official guardian to ensure that each case was investigated; he could then certify that there were no problems relating to custody, maintenance, access, or education of any of the children. Where this screening process alerted the official guardian to the need for an in-depth personal investigation, this would be carried out by his staff or his agents.

554. We believe that as 1979 has been designated the "International Year of the Child", it is appropriate that we should give special prominence to the rights of children and others who may not be able to protect their own interests. We received several submissions urging consideration of a Bill of Rights for Children. Principle 2 of the United Nations Declaration of the Rights of the Child states:

> The child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.

Among material received by the Commission was a comprehensive report of the Steering Committee on a Bill of Rights for Children, prepared for the Christchurch City Council. Although the scope of that report extends considerably beyond the terms of reference of this Commission, there are several areas of common concern. While we do not consider it within our terms of reference to offer any opinion on the necessity for a Bill of Rights for Children, we consider it desirable that the general principles of the United Nations Declaration set out above should receive official recognition and active support: to some extent these principles are embodied in s.4 of the Children and Young Persons Act 1974 which defines "the interests of the child or young person as the first and paramount consideration . . . ". In setting out what we consider to be the basic rights for children, we have arrived at a synthesis taken from a variety of sources, including our own views on this matter. The official

guardian would try to protect these rights by appropriate action in each specific case:

(a) The right to be treated as an interested and affected person (and not as a pawn or chattel of either or both parents).
(b) The right to that home environment which will best guarantee an opportunity to grow into mature and responsible citizens.
(c) The right to the day-by-day love, care, discipline, and protection of the parent having custody.
(d) The right to know the non-custodial parent and to have the benefit of that parent's love and guidance, through provision for adequate access.
(e) The right to a positive and constructive relationship with both parents, with neither to be permitted to degrade the other in the mind of the child.
(f) The right to the most adequate level of support that can be provided by the best efforts of both parents.
(g) The right to the same standard of education that the child would have if the family unit were not broken.
(h) The right to periodic review of custodial arrangements and child-support orders as the circumstances may require.
(i) The right to recognition that children involved in a divorce are disadvantaged parties and that the law must take affirmative steps to protect their welfare.

FAMILY ADVOCATE SERVICE

555. The courts increasingly recognise the importance of adequately safeguarding the legal rights of children. Legal aid is granted in appropriate cases for young offenders appearing in Children and Young Persons Courts, and duty solicitors are available. It is now common practice to appoint counsel to act for children where their interests may be in conflict with those of other parties. In divorce or custody cases, it is often not enough that counsel for the parents or parent may also be instructed to represent the children; if not actually in conflict, the interests of the parties may be quite distinct. By overseas standards, we could do more. The family advocate system of the Family Court in Surrey, British Columbia, which has now been in operation for four years, commended itself to members of this Commission.

556. The family advocate is always available to intervene on behalf of a child, to give legal advice, to provide legal assistance in a family crisis situation, and to attempt to resolve issues in the best interests of the child and the family. This attempt begins when the child first comes to the Family Court and continues through counselling and conciliation efforts. If the matter is to be heard, the family advocate will instigate investigatory reports so that the hearing can proceed expeditiously with an independent body of evidence and due note of all relevant or admissible material. Basically, the family advocate is a court officer who would be available to consult and advise the child, the family, court counsellors, relevant Government departments or agencies, and the Bar; and would also be available for consultation by the Bench.

557. The present family advocate in Surrey is a woman, trained in both law and commerce. She is responsible to the Deputy Attorney General

(equivalent to New Zealand's Solicitor-General). She interviews all children coming before the Family Court, and must protect their rights and interests. She may prepare a report on children the subject of a custody case, where a social worker has already done so; this is not seen as duplication of effort but as a proper attempt to protect the children's legal rights and to ensure their independent representation. She may act for the Superintendent of Child Welfare, or conversely, defend the child's interests if these were seen to be in conflict with those of the Superintendent. Where necessary or desirable, the family advocate will brief counsel to represent a child. Some family advocates in British Columbia have said that when parents accept that their child is represented by independent counsel to protect that child's best interests and ensure a fair hearing, there is a strong probability of resolution without court hearing in family cases; "The position of Family Advocate does not stop the games that some parents (and lawyers) tend to play, but it minimises them".

558. Members of the Family Law sub-committee of the Auckland District Law Society said they saw much merit in the way the family advocate operated in British Columbia. They understood the family advocate's function as representing the interests of children whenever necessary, with responsibility, in appropriate cases, to refer the children to legal practitioners and social agencies associated with the Family Court. They further envisaged that the family advocate would have the task of engaging legal representation whenever required in much the same way as is presently done by registrars of Magistrates' Courts when counsel are assigned to cases. They also saw the family advocate acting as a bridge between the social services and the legal profession.

559. In our opinion, family advocates carrying out these functions would assist the operation of the Family Court. They should be qualified lawyers, and special training for their role would be necessary. This could initially be met through the training programmes to be arranged by the Senior Family Court Judge for all those engaged in the new Family Court. The family advocate should become something of a specialist in Family Court procedures, although we would not expect an appointee to remain in the position for a long period of years. The appointment of family advocates should relieve the need to provide duty solicitors for Children and Young Persons Court matters. We do not see family advocates as taking over the role of independent counsel for children, and we would expect the present practice of appointing counsel to continue whenever appropriate.

560. The duties to be performed by family advocates fall within the field of responsibility we envisage for the official guardian. It seems logical, therefore, that they should be members of his staff, seconded by him to the Family Court. This would amalgamate those features of the Ontario official guardian and the British Columbia family advocate which are most suited to New Zealand's needs.

561. It is not possible at this stage to forecast accurately how many family advocates should be appointed. As with other support services, such appointments should be made on a regional basis. The official guardian, in consultation with the director of support services, should determine the numbers needed.

562. We suggest that the official guardian and his staff, including family advocates, should constitute a special office to be known as the Official Guardian's Office, under the control of the Attorney-General.

ADDITIONAL SUPPORT SERVICES

563. Other support services we think should be available to the Family Court, but not built into its structure, include legal, enforcement, clinical, accountancy, and probation services. We shall comment on each in turn.

564. ***Legal service*** All persons coming to a Family Court should be able to obtain legal advice and representation. In divorce cases, where changes to substantive law are proposed, we comment that if fewer cases are contested under the new laws, and if proposed Family Court conciliation techniques prove effective, then costs in divorce cases should diminish and it would seem anomalous to exclude divorce cases when legal aid is available for most other matters in Family Court. While some individuals may not wish to consult a lawyer, we think they should be encouraged to do so. All draft agreements reached in conciliation should be referred to the parties' lawyers for legal approval before these are signed.

565. In certain Family Court cases where public interest is involved, as distinct from the interests of the parties themselves, there is provision for the Solicitor-General to intervene. We believe any matters of this kind should be dealt with by the official guardian, discussed above. Currently, in care and protection cases, presentation can become the responsibility of persons not qualified in law, such as social workers or police officers. Such persons have occasionally both prosecuted the case and given supporting evidence. We understand there is a growing practice to engage the Crown prosecutor for these cases. We consider that, generally, experienced counsel should be instructed when any child is seriously at risk, and that care and protection cases should be presented by counsel. If Family Court conciliation is effective and many cases do not proceed to a hearing, those which do are likely to be complex or highly charged emotionally; effective legal representation would obviously be most important in any such cases.

566. ***Enforcement service*** In most instances, the Department of Social Welfare has some interest in orders for maintenance in domestic proceedings. Often a wife has been paid an emergency benefit pending resolution of her position, or she may be in receipt of a deserted wife's benefit. In a high proportion of cases, the court is faced with, on the one hand, an applicant wife in receipt of benefits sufficient to meet the living expenses for her and the children of the marriage; and on the other, a husband whose income is not sufficient to cover his own living costs and the amount his wife is receiving from the Department of Social Welfare. The best the court can do in these cases is to determine how much the husband can reasonably contribute towards the amount of the benefits she is being paid, recognising that the difference will be met from Social Welfare funds. Somewhat similar considerations apply where maintenance orders are made in conjunction with paternity applications. Cases where the Department of Social Welfare is not involved at all, and where questions regarding maintenance concern only the parties, do not reach the courts very often.

567. We believe, therefore, that proceedings for enforcement of maintenance orders, where the applicant is in receipt of a benefit, should be initiated by the Department of Social Welfare. Here again, we emphasise that such proceedings should be presented by a legally qualified person. At present the defendant is liable to imprisonment if the charge of wilful disobedience of an order of the court is proved. In practice, the alternative sentence of periodic detention is being used with increasing frequency. This enables the defaulter to retain his earning capacity and meet his financial obligations, while having his spending

opportunities at weekends curtailed. Furthermore, while serving a sentence of periodic detention he is making some contribution to the welfare of the community where a prison sentence costs society the amount of his upkeep. In its submissions to this Commission the Department of Social Welfare expressed the opinion that:

> Imprisonment is an inappropriate penalty for enforcement of an obligation to pay, although it is noted that the Australian Family Law Act 1975, while removing imprisonment as a penalty for non-payment of maintenance, provides for imprisonment for contempt where a defaulter fails to attend the Court for an examination of his affairs, or breaches an order made to prevent dissipation of property or the wasting of assets.

Under our Domestic Proceedings Act 1968, a defendant becomes liable to imprisonment not so much as enforcement of an obligation to pay, but for wilful disobedience of an order of the court. In practice, as we have said, he is more likely to be sentenced to periodic detention than imprisonment.

568. While the responsibility for commencing enforcement proceedings should rest with the Department of Social Welfare, we believe, when the proceedings are heard, officers of that department should be witnesses and not advocates. We also believe that enforcement action should be taken promptly. If weeks or months slip by between the making of an order, and any steps being taken to enforce it, there is a real possibility that the person against whom the order was made may get himself into a position, by accident or design, where his ability to meet the amount of the order is seriously affected.

569. In its submissions, the Department of Social Welfare indicated it was increasing the use of attachment orders against wages of those obliged to pay maintenance. We were told that when attachment orders were made promptly after making the initial order, the prospect of recovering the money was greatly enhanced. It is, of course, well known that attachment orders may be frustrated by the simple expedient of changing employers. The department suggested that an improvement could be effected if a provision similar to s.210 of the Land and Income Tax Act 1954 were available in such circumstances That section authorises the Commissioner of Inland Revenue, by notice in writing, to require any person to deduct from any amount payable by that person to the taxpayer such sum as may be specified in the notice. At present, if a person changes employment to avoid payment under an attachment order, a further order is required in respect of the next employer, if indeed that person's name is known. The Commission agrees with the department that when the amount of the maintenance obligation has been fixed by the court a further order to enforce payment should not be necessary. Notice in writing to any employer, specifying an amount not exceeding the amount of the maintenance order, should suffice. We recommend that provision should be made accordingly.

570. It is important that questions of maintenance come before the Family Court at an early stage so that the obligation to maintain children may be established, even though an interim order may be all that is appropriate at that stage. In the past, maintenance payments have often been avoided because no interim order was sought; by the time the matter came to be heard by the court the husband had either spent the money, or taken on other financial responsibilities, or perhaps disappeared without trace. We recognise, of course, that the time of initial separation, or perhaps desertion, is a time of crisis: at this point it is not surprising if

emotions overrule reason. This is a time of particular sensitivity and a vital stage in the counselling process. It is, in our view, imperative that the influence of the Family Court and its counselling services should be available at this point.

571. In its submissions, the Department of Social Welfare referred to delays in obtaining maintenance orders, and suggested a simplified procedure for securing these orders. It was suggested that the department itself could fix interim maintenance by an order *nisi* challengeable by the payer in the Family Court. We believe that making orders of this kind is the function of a court. It is not the function of the Department of Social Welfare to fix the amount of an order. When the Commission questioned the department's officers they agreed that existing provisions of the Domestic Proceedings Act relating to interim orders, made provision for the very thing the department's suggestions sought to achieve. Under these provisions, an interim order can be made by the court when proceedings are first commenced.

572. We have been informed that in 1977, the department introduced a pilot scheme in some centres, stemming from Domestic Purposes Benefits requirements, and providing for parties to negotiate and enter into maintenance agreements to meet the Department of Social Welfare criteria, under the supervision of a departmental officer or a marriage guidance counsellor. In providing for early referral to a counsellor, we consider the scheme is an excellent one, but where fixing of maintenance is involved, we believe that surveillance by the court should not be by-passed. Even in Los Angeles where staff counsellors are highly qualified and experienced, the terms of a maintenance agreement must be approved by the court before it takes effect as an order. It is too easy in the tension of a crisis period for one party or the other to agree to anything in order to be free of the stress-producing situation.

573. We have noted above a certain reluctance to accept the philosophy of the Domestic Proceedings Act 1968, and to make full use of the procedures it provides. We repeat: that Act set New Zealand well on the road towards a Family Court and the benefits to the community that can flow from that source. We trust it will be possible to implement our recommendations regarding a Family Division of the District Court without delay, so that functions which belong within the court, including its support services, may receive the expert treatment they merit and require; and so that some temporary expedients resorted to in the difficult situation of the last few years may not have to be repeated.

574. ***Clinical services*** We were initially doubtful whether clinical services should form part of the Family Court's operations, or be readily available on a consultative basis; looking particularly to practising psychologists, psychiatrists, general medical practitioners, and social workers specialising in family problems. The contribution which such specialists could make to the Family Court would be substantial, especially when dealing with behaviour problems in children, custody and access cases, and like matters. Consultants would need to be readily available in certain crisis cases. Evidence presented to the Commission, and what we observed of such practices overseas, also indicate division of opinion on whether specialists in the mental health field should be members of staff or available on a consultative basis. We were greatly assisted on this point by the submissions of the Psychiatric Advisory Committee of the North Canterbury Hospital Board, and the Working Party on Forensic Psychiatry, one of its sub-committees. Submissions

made by the Wakari (Dunedin) Community Liaison Group were also very helpful. These groups emphasised the need for a high level of co-operation between the courts and proposed forensic psychiatry services: we fully endorse that opinion. We have already referred to the need for a highly-trained and experienced counselling service as an integral part of a Family Court. We consider that a clinical service should be substantially different from a counselling service. The primary purpose of a clinical service would be to provide diagnostic and treatment referrals for those exhibiting behaviour problems, or whose mental or emotional health required such attention.

575. We can see advantages in having experts in this field on the staff of a Family Court, especially where availability is concerned, and perhaps in the development of expertise in a particular class of work. We believe, however, that if it should appear to a Family Court after appropriate consultation that detailed examination of the mental health of some person is required, or that a person appears to be in need of treatment for mental illness, then the appropriate course is referral to a specialist clinic or centre.

576. In the past, difficulties have arisen in some centres through lack of adequate liaison between courts and psychiatric services. Sometimes these difficulties involve inadequate security at mental hospitals when prisoners are referred there for examination and report. Some psychiatrists have complained that their time is wasted providing reports on prisoners for trial or sentence who are not mentally ill, when that time could be more profitably employed helping legitimate patients. To some extent this is a manpower problem: there are not enough specialists, in some fields, to do all the things being asked of them. Many frustrating difficulties could be dissipated with better communication so that professionals in different fields can understand each other's problems and work towards a solution.

577. ***Accountancy*** A Family Court would also benefit by having the professional services of a chartered accountant readily available to it on much the same basis as professionals in psychiatry. In a number of centres, accountants are giving assistance through budget advisory services. While a family counsellor could readily acquire sufficient knowledge and experience to help a couple prepare an adequate budget for their family finances, it would be helpful to know that an expert was available if needed. He could also train counsellors and other court staff in this aspect of their work. In other areas, too, the assistance of an accountant could prove valuable. For example, in a conciliation conference, he could advise on what effects would follow certain divisions of financial interests in real and personal property, when competing claims for matrimonial property have to be decided.

578. ***Probation Service*** We consider it is important that the probation service should be associated more specifically with the Family Court than it has been with the Children and Young Persons Courts. Difficulties in this area were adverted to by the Auckland probation officers in their submissions to the Commission. For instance, in terms of s.36(j) of the Children and Young Persons Act 1974, when dealing with a young person who has attained the age of 15 years, the court may enter a conviction and order that he be brought before a Magistrate's Court for sentence or decision. The officers complained that on occasions young persons have been placed on probation, or given a sentence involving a period of probation, for example, in detention centre, without having been seen by a probation officer.

579. This complaint draws attention to a grey area which is of real importance in dealing with young offenders. The Commission has heard several points of view in submissions regarding the age (at present 17 years) at which young persons should cease to come within the jurisdiction of the Children and Young Persons Courts. Some would raise that age to include 18 year-olds; others would lower it to 16 years; others again would make leaving school the point where a young person had to accept adult responsibility. We believe the level presently fixed is appropriate, having regard to the flexibility afforded by s.36(j) referred to above.

580. We do appreciate, however, some of the difficulties experienced by probation officers. Given the present volume of offending by youths in the 15-18 year group, we see considerable value in establishing a special juvenile branch of the probation service and linking it with the Family Court; perhaps especially the counselling services of that court. Probation officers specially selected to serve in a juvenile branch, and trained accordingly, could make a real impact on those who consider themselves too old to receive help from a social worker whom they or their parents may still be inclined to look upon as a child welfare officer, his title under the previous Act. We were informed that local Maori committees are anxious to play their full part in helping their own young people. Probation officers would find value in developing or extending communication with these groups. Generally speaking, the probation service is more in touch with the industrial and employment world, and this could be of benefit to the 16 year-old who has left school and who may offend out of boredom. We therefore recommend establishment of a juvenile branch of the probation service to function in co-operation with the Family Court.

DEPENDENT ADULTS

581. The Commission received substantial submissions from the New Zealand Society for the Intellectually Handicapped drawing attention to special needs of dependent and intellectually handicapped persons in the exercise and protection of their individual rights and welfare. These submissions were presented by the New Zealand physician who is world president of the International League of Societies for the Mentally Handicapped. While there are legal procedures for protection of the property of the handicapped and dependent, no adequate provision has been made for protection of their personal rights, especially when they attain adult age.

582. The Commission was told that as a result of changes in professional and community attitudes, many handicapped people are now spending the greater part of their adult lives in the community at large. Not being committed patients in mental hospitals, they have the same rights and duties as other persons and at the age of 20, are no longer under legal guardianship of their parents. Many, however, need a varying degree of continued guidance and supervision in decisions affecting their lives.

583. Until the intellectually handicapped person reaches the age of 20 years his parents are normally his legally recognised guardians, and may continue to provide this guardianship by tacit consent after he reaches 20 years of age, but without legal authority. Problems can arise if the intellectually handicapped person is enticed from the home, or wishes to leave the home, when this is clearly undesirable. Where the New Zealand

Society for the Intellectually Handicapped has care of an intellectually handicapped person, either at one of its services or in a residential unit, it faces a similar problem.

584. The Commission was also told of problems experienced by some probation officers dealing with probationers who, though they could not be termed mentally ill, are significantly below average mental ability. Mentally retarded children may attain adult age without normal adult capacities. One probation officer pointed out that there is really no special place for a "40 year-old child", unless he or she needs total care in an institution. Many do not need total care, but do need a measure of support and protection. The probation officer expressed concern that too many only find this in penal institutions. With some marginally handicapped persons, it may be open to argument whether behaviour which has brought them before the court indicates criminal intent or inability to sufficiently comprehend acceptable standards of conduct.

585. There are a considerable number of intellectually handicapped persons, both in the community and in institutions, who are effectively abandoned. Some were committed to institutions at birth and have never seen their parents because medical advice given at the time (which we were told is no longer supported) prevented young parents from seeing such babies for fear of becoming attached to them. Sometimes parents have died, or are too old or ill to maintain continuing interest. The next of kin are either not interested in the welfare of their relative, or live overseas or far from where the intellectually handicapped person resides. The personal rights and welfare of the intellectually handicapped in these circumstances are seriously at risk and dependent on the goodwill of those who have their custody. The society is concerned, in specific cases of which it is aware, that no steps can effectively be taken by any organisation or person to correct neglect and abuse of the rights of the intellectually handicapped person concerned.

586. The underlying philosphy in provision of services for the handicapped and dependent should be that such people have a right to the least restrictive measure, wherever any intervention in their freedom is required, either to assist or protect them. The society's submissions gave a detailed and sensitive summary of the philosophy behind existing Government and community programmes for the intellectually handicapped, of the law relating to such persons, and of research carried out here and overseas in this field. The society concluded that:

> . . . the handicapped and dependent need varying levels of supervisory guardianship according to the degree and nature of their handicap;
>
> (a) To obtain for them the benefits of the rights to which they are entitled in welfare benefits, medical and dental services, education and job training. Too often these rights are lost by default because the handicapped and dependent do not know of these rights or do not know how to exercise them.
>
> (b) To protect the handicapped and dependent from infringement of their personal rights in law and business dealings and as a consequence of medical, educational and psychological experimentation in such matters as surgery, operant conditioning, and other techniques of behaviour modification.
>
> (c) To ensure that the quality of life and pattern of social and recreational activity of the handicapped and dependent is not unnecessarily subject to the convenience or whims of those who have their custody.

(d) To safeguard the basic principle that in the supervision and care of the handicapped and dependent those having responsibility for guardianship should be separate from those having responsibility for their supervision and maintenance. Where the same person or body holds the responsibility for both, there is a potential conflict of interest.

(e) To act as a monitor, auditor or ombudsman in respect of those who have responsibility for the handicapped and their property. The Society is aware of cases where those with custody appear to be retaining an intellectually handicapped person in a home primarily to gain access to the intellectually handicapped person's income entitlement and to be preventing the intellectually handicapped person attending programmes for training and education which could substantially advance their personal development.

(f) To ensure that an appropriately qualified guardian is appointed. An understanding of mental retardation and the needs of those so afflicted can be acquired only from special training in the field or from a considerable period of working with the intellectually handicapped. Few doctors, teachers, psychologists or social workers have this background. The power of the Court to appoint special guardians would ensure that the person or body appointed would be suitable with no conflict of interest.

(g) Under the law at present there is no specific provision for any person to have a continuing interest in the intellectually handicapped person over 20 years of age and watch over their legal rights and be able to initiate legal proceedings to enforce rights where claims such as those under the Accident Compensation Act, Family Protection Act, etc., arise.

587. The society asked the Commission to recommend to the Government that the court be empowered to grant orders of guardianship or trusteeship of handicapped adults, in degree and extent, according to the circumstances and need of the handicapped person, after consultation with specialist advisers. The society suggested the following provisions should be applied to any scheme of guardianship:

(a) The court should be empowered to grant varying degrees of guardianship according to the needs and circumstances of the handicapped. This form of guardianship should not be entrusted to any person having responsibility for the provision of residential care, education, training, or employment for the handicapped or dependent person.

(b) Full guardianship should be reserved for those judicially determined to be incapable of making routine day-to-day decisions, and found to be incapable of basic self-care and management.

(c) Partial guardianship or trusteeship should be granted when, in the opinion of the court, certain matters only in regard to the person or estate of a handicapped person require the protection of a guardian or trustee.

(d) Guardians appointed would need to satisfy the court of their suitability for appointment.

(e) Categories of guardianship should include a relative or friend

acting voluntarily; an individual other than those above with special qualifications and experience, who would be paid for this service; a properly incorporated charitable trust such as the Trusteeship Scheme of the New Zealand Society for the Intellectually Handicapped which has as its main objective provision of such a guardianship role.

(f) Application for guardianship should be filed in the nearest Family Court to where the dependent handicapped person usually lives. Notice of the hearing should be given to all affected, and the ward himself, the nearest relative, the proposed guardian or trustee, or the person in charge of the unit in whose charge the individual might be. The proposed ward should be consulted on his attitude to the application and may oppose it if he wishes.

(g) The court should be provided with expert advice similar to Social Welfare reports in custody proceedings. These reports would cover the social circumstances of the individual, his organic disabilities, and his intellectual rating. The order should extend no further than the proved evidence of dysfunction.

(h) The court should also order that the guardian's report to the court at stipulated intervals, and power should be given to remove or replace a guardian.

588. The Commission wholeheartedly supports the views expressed by the New Zealand Society for the Intellectually Handicapped. We see the society's proposals to protect the rights of dependent adults by appointment of a legal guardian as being wholly appropriate to the functions and procedures we envisage for a Family Court. Since this section of our report was drafted, we have received a copy of a proposed Dependent Persons Bill, which incorporates a great deal of the submissions made to us on this topic. In particular, this document proposes an office of public advocate which is in most respects analagous to the official guardian we have recommended.

ADMINISTRATION OF FAMILY COURTS

589. In recommending that a Family Division of the District Courts should be established, we envisage that Family Courts with necessary support services will be set up in the larger centres to serve both urban and surrounding provincial areas; business in provincial or rural areas will be attended to on a circuit or peripatetic basis, whichever is most suitable to the area. There could be some value in visiting country towns on a set timetable, say, on a date falling between ordinary court sittings. This would assist in keeping those appearing in the Children and Young Persons section of the Family Court from coming into contact with persons in attendance at any other court, thus ensuring compliance with the Children and Young Persons Act. It would also facilitate making of fixtures and hearing of cases. Furthermore, if our recommendation that Family Court judges should be authorised to exercise general jurisdiction in District Courts is adopted, urgent matters could be attended to in circuit courts without having to await the next visit of the District Court judge.

590. Submissions have been made that the courts should be ready to go to the people in suburban areas, rather than insisting that those having

business in the courts should travel to central court facilities. This view was put forward by the Salvation Army in one of the first submissions received, and it was repeated in varying forms by several other groups and individuals at later hearings. The Salvation Army's submission on this point urged that the court should be situated where it is readily accessible. They pointed out that some people spend up to one and a half hours, sometimes with small children, travelling to attend court. While these observations were directed to courts in general, clearly they are especially relevant to the Family Court.

591. Arranging for a court sitting in a suburban church hall or other premises not normally used for court purposes, raises problems for all concerned. These would probably fall most heavily on administrative staff who would have to arrange the venue, ensure that all furniture and equipment was on hand, transport relevant court files and provide safe custody for them, and cope with all the many other details that would require attention in such an operation. Court facilities arranged in such a way could so obviously be make-shift that they would not really be suitable. This criticism has already been levelled at certain temporary premises. We also received submissions that some of those having business in the Family Court might prefer to travel into a city centre thereby maintaining anonymity and privacy without the embarrassment of being seen attending court in their own suburb and community. On this matter, there is room for different opinions; those who serve the community through the courts, including lawyers, social workers, and court staff, should constantly assess services provided in their particular locality. Timetable changes in suburban transport services, for instance, can potentially inconvenience mothers with young children who may have to travel some distance to a court. We think it inappropriate for us to lay down specific guidelines beyond saying that Family Courts must be readily accessible to those who need them. To that end, they should be able and ready to go where their services are needed; either on a regular schedule as for circuit courts, or on an ad hoc basis to meet particular circumstances.

FAMILY COURT ACCOMMODATION

592. We observed a consensus view in submissions that wherever possible, family matters should be dealt with in buildings or rooms physically separated from criminal courtrooms. This principle has been widely adopted in recent years, especially since the Domestic Proceedings Act 1968 resulted in a different emphasis being placed on procedures in domestic courts. So far as Children's Courts are concerned, it was expressly stated in the Child Welfare Act 1925 that these should be kept separate from other courts, unless that course was not practicable. The Children and Young Persons Act 1974 continued and reinforced that requirement. Implementation of this policy has presented problems, especially for the court administration staff. Suitable accommodation is not always available where it would be of most use. The aim of keeping Children's Court matters separate from the ordinary courts has to be weighed against the quality of accommodation available.

593. So far as we are aware, even the most recently designed court buildings do not incorporate all the physical features needed for an ideal Family Court. Very few have adequate waiting rooms and the basic facilities which ought to be available for persons having business in these courts. We discuss this matter in greater detail in connection with court

buildings in general, but it is appropriate at this point to assert that parties to proceedings in the Family Court ought to be afforded as much privacy as possible.

594. Some excellent Family Courts have recently been designed in different parts of the world. One of the best examples known to the Commission is the Juvenile Court in Adelaide. Each of the three courtrooms in that court is pleasantly furnished, and each has waiting rooms and facilities for parties and witnesses adjacent to it. A pedestrian subway under the building provides access to all the courtrooms, enabling children to reach them without having to pass through areas where the public are gathered. One feature which displayed imagination and sensitivity was a small anteroom through which parents and children might pass as they left the courtroom, and where parent and child might compose themselves, with a social worker or counsellor acting as hostess, if required, before they left the building to return to the outside world. We mention these features of the Juvenile Court in Adelaide simply to illustrate some architectural ideas which can readily be incorporated in Family Courts, and which can contribute substantially towards achieving goals sought. Availability of finance will, of course, determine what facilities can be provided initially; but we believe it important that we should establish desirable goals, even though these are not immediately attainable.

595. It is not suggested that physical features of a Family Court should be standardised. Even if this were desirable, too much will depend on what buildings are available. We do recommend certain basic requirements to be included in all places used as Family Courts, whether newly-designed buildings or older premises adapted for the purpose. Our recommendations are that, wherever practicable, the Family Court should be in a separate building from the general courts, or in a separate part of the court building with separate entrances. Except for less frequently used Family Courts, and we refer to these presently, a reception area (with a welcoming and well-informed receptionist), waiting rooms, toilets, interview rooms, pram and wheelchair access, and child-care facilities are essential.

596. Proceedings in the Family Court are of great importance to the parties, and we believe a proper balance between the formal and the casual, in both conduct of proceedings and physical surroundings, should not be difficult to achieve under the guidance of carefully selected judges. The physical features of the Family Court should reflect the nature and purpose of that court as a place where people can be helped to resolve their family problems in a just and humane manner.

597. With Family Courts established in the main centres of population, the smaller provincial towns will be served by visits by the court on a peripatetic basis. The acquisition of premises in these towns for Family Court purposes may present real difficulties. It would be quite uneconomic to secure premises and equip them, even to the minimum standards, if they were only to be used at infrequent intervals. Notwithstanding the general principles referred to above, in some places existing court buildings might have to be used. This would presuppose that the Family Court visited these towns on days when the ordinary courts were not sitting. In other places, it may be possible to obtain the use of suitable church or community buildings which could be adapted for use as Family Courts. In some areas mutually acceptable arrangements have been made with Borough and County Councils for the use of

otherwise infrequently used rooms for court purposes. In our view, multiple use of public buildings in this way is to be encouraged wherever practicable.

CHILDREN'S BOARDS

598. In the course of submissions on family law matters, Children's Boards, established under the Children and Young Persons Act 1974, were the subject of a good deal of comment. In general, the comments were favourable. The concept of Children's Boards received unanimous approval as did the principle that the boards should comprise representatives of the Departments of Police, Social Welfare, and Maori Affairs, together with a local resident drawn from a panel of no more than six such residents.

599. We heard some criticism that boards in different areas were not consistent with each other in their methods and that some were dominated by the police representative. We feel that these objections will disappear as members of the boards become more familiar with their duties, and as the boards themselves establish their own procedures. It may be desirable, as was put to us in one submission, that guidelines should be drawn up for operation of these boards. It is not necessary to make any specific recommendation on this point. We prefer that as little restraint as possible be placed on Children's Boards at this stage, in order that they may develop their potential and thereby keep children out of court. An interchange of ideas between individual boards as they develop could, however, be of great benefit. This would be the responsibility of the Director-General of Social Welfare. There was also criticism that in some districts the panels were not sufficiently representative of the whole area. For instance, we were told that the Children's Board in Whangarei lacked effective representation from the Kawakawa district. We were informed that boards often did not include a representative of the ethnic group of the child whose case it was considering, and it was alleged that this placed the child at a disadvantage.

600. A representative of the Neighbourhood Law Office in Auckland stated that although he had some misgivings, he felt that Children's Boards were working well. He suggested that where appropriate, there should be greater representation from people of the Pacific islands, with a Maori and a Pacific island representative on each board. Clearly, the intention of the Act which established these boards was to represent the community by a local resident on each Children's Board: no doubt, to assist the boards to appreciate and understand local circumstances and, where appropriate, attitudes. We were informed that the number of different ethnic groups with which the court may have to deal has risen so sharply in recent years that, even if it were intended that the panel of six residents should all be of different origin, they would not cover all the ethnic minorities involved. In some parts of New Zealand there is a greater range of ethnic groups: in other areas the problem is so small it is of no significance.

601. Reservations have also been expressed on the desirability of having local or ethnic representation on every Children's Board, on the grounds that it could be embarrassing to the child (and his or her interests are to be regarded as paramount) to find a neighbour, or even a relative, on a board considering his or her case. Some think that the requirement of confidentiality is placed in jeopardy, at least in the eyes of the child. It is relevant to note that the Youth Aid Panels in South Australia are limited

to two people, a member of the police and a social worker. The view is firmly held there that a larger panel would make it very difficult to establish empathy with the child and the parents, and the main object of the panel or board approach would therefore be stifled. We see real strength in this point of view and therefore would be opposed to any suggestion to increase the size of Children's Boards. The present composition of four members might well be too large. We would certainly not wish to make it larger.

602. We were impressed by the genuineness of the people who addressed us on this topic. We recognise the need to ensure that the panel of names is widely representative of the whole community in the Social Welfare district served by the board, both geographically and in ethnic terms. The prime qualification for placement on the panel must, of course, be suitability; especially in character and integrity. The boards are empowered to make whatever preliminary inquiries into each case they think fit, and may call for reports they think necessary. It may be desirable to obtain reports from local Maori committees, where these are functioning, as was suggested to us by some Maori groups. Some thought that the age limit of 14, above which children cease to be dealt with by Children's Boards, should be raised to 16. In our opinion, especially having regard to the fact that children may leave school when they are 15, the age limit prescribed is appropriate and we do not favour any alteration. On reflection, therefore, we consider that the provisions of the Children and Young Persons Act relating to Children's Boards are wide enough to meet the points raised before us. We would, however, endorse the views expressed before us that the nature of the work done by Children's Boards, and their potential value to the community, ought to be made more widely known through avenues such as parent-teacher associations and other meetings of people who are concerned about the quality of life in our society.

Recommendations

1. A Family Court should be established as a division of the District Courts, manned by judges specially appointed to it, sitting mainly in the centres of greater population but readily available to sit in court buildings or other suitable accommodation in smaller centres on a circuit or peripatetic basis.

2. A working party should be set up immediately to prepare for the introduction of the Family Court. The working party should consist of the Senior Family Court Judge, a judge elect of that court, and the director of support services.

3. The Family Division of the District Courts should be given exclusive, original jurisdiction in all family matters including those covered by:

Adoption Act 1955
Aged and Infirm Persons Protection Act 1912 (protection orders)
Alcoholism and Drug Addiction Act 1966
Children and Young Persons Act 1974
Domestic Actions Act 1975
Domestic Proceedings Act 1968
Guardianship Act 1968
Health Act 1956 (orders for treatment)
Marriage Act 1955
Matrimonial Proceedings Act 1963

Matrimonial Property Act 1976
Mental Health Act 1969
Minors' Contracts Act 1969
Status of Children Act 1969

and any other matters which may from time to time be considered appropriate.

4. The Family Court should be given jurisdiction in criminal matters arising within families, with provision for the court or the parties on application to remove cases to the ordinary courts.

5. Family Court judges should have jurisdiction to hear civil and criminal cases in the District Courts, but their primary work would be in the Family Court. Other District Court judges should have jurisdiction in the Family Court in urgent matters.

6. Especially complex cases should, with the leave of a Family Court judge, be transferred to the High Court for hearing.

7. Matters relating to wills and administration of estates should remain in the High Court.

8. In general, existing appeal rights should continue with there being one appeal to the High Court by way of rehearing on questions of law and fact; and for appeals on question of law only to the Court of Appeal, and, with leave, to the Judicial Committee of the Privy Council.

9. Right of appeal from the Family Court to one judge of the High Court should continue in all cases, but reserving the right to either party to apply to a judge of the High Court for leave to have the appeal heard by a special court comprising two High Court judges and one Family Court judge.

10. (Majority) Section 31 of the Guardianship Act 1968 relating to appeals in custody and access cases should remain unchanged.

11. Where either party to a proposed marriage is under 18 years of age, or under 20 years of age where any consent required for the marrrage is withheld, then the couple must participate in a period of pre-marital counselling, before obtaining the consent of a judge of the Family Court after which the marriage can proceed.

12. The day-to-day operation of the support services in each Family Court should be under the general supervision of the local judge of the Family Court, or, where there is more than one, the judge nominated to do so by the Senior Family Court Judge.

13. Adequate administrative services should be provided for the Family Court through the Courts Division of the Department of Justice.

14. Counselling services should be established as an essential feature of the Family Court.

15. A director of support services should be appointed.

16. Greater use of counsellors and social workers in "J" teams should be encouraged.

17. An official guardian should be appointed to represent all those who may be under some form of legal disability.

18. The official guardian should be represented in the Family Court, and in other courts as required, by family advocates.

19. Legal advice and representation should be available to all those who come to the Family Court. Parties whose interests are, or may be, divergent should be separately represented.

20. The Department of Social Welfare should refer all parties seeking domestic purposes benefits to the Family Court.

21. The payment of maintenance orders may be enforced by the

Department of Social Welfare giving notice in writing to the employer by whom the subject of the order is for the time being employed, specifying an amount not exceeding the amount of the maintenance order to be deducted from wages.

22. A juvenile branch of the probation service should be established to function in co-operation with the Family Court.

23. As a general rule, the Family Court should be physically separate from the ordinary courts.

24. The rights of dependent adults should be safeguarded in the Family Court by the making of orders of guardianship or trusteeship of handicapped adults, in degree and extent, appropriate to the needs of handicapped persons.

Justices of the Peace

603. Item 3(g) of the terms of reference reads:

> 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.

604. The Commission was greatly assisted by detailed submissions presented by the Royal Federation of New Zealand Justices' Associations (Inc.) which canvassed the historical background, made comparisons with practices in other parts of the Commonwealth, and offered suggestions for future involvement in the courts by justices of the peace. The federation emphasised the paramount importance of selection and training as prerequisites to justices of the peace functioning successfully on the Bench.

605. We have heard arguments both for and against the use of justices of the peace in our courts system. The Department of Justice was in favour of maintaining and extending lay involvement, taking the view that the community at large appeared to welcome some level of participation by laymen in the judicial process. We were told that both the present and the previous Government had made grants to the federation to assist their training programmes, thus giving tangible recognition of their support for lay involvement in the courts, and that departmental approval had been demonstrated in co-operative ventures undertaken with the federation and its member associations.

606. The department declared its support for lay involvement both as a matter of principle and for practical convenience. As a principle, lay involvement in the judicial system was commended because, like the jury trial, it gives the citizen a part to play in the administration of the law, and helps "to allay suspicions in the ordinary man's mind that the law is a mystery which must be left to 'professionals' and that it has little in common with justice as the layman understands it". Furthermore, lay involvement allows for greater community representation. As for the practical aspect, our attention was drawn to the difficulty of finding sufficient persons with the necessary qualifications, experience, and personal characteristics for appointment as additional magistrates, if justices of the peace were not used. (We are not convinced of the latter point, although there are clear indications that the salary offered and other conditions of magistrates' employment are not sufficient to induce lawyers of the appropriate calibre to leave private practice.) The

department made the further point that the talents of practitioners qualified for magisterial appointment would be largely under-employed presiding over hearings currently well handled by justices of the peace, and that this would be an uneconomic use of qualified professional personnel.

607. The New Zealand Law Society in its submissions expressed strong opposition to any extension of the jurisdiction presently being exercised by justices of the peace. They pointed out that while certain sections of the Police Offences Act give jurisdiction to two justices of the peace, in practice this was seldom exercised, and that currently, justices were dealing only with traffic offences not involving the possibility of imprisonment, bail and remand hearings, and preliminary hearings of indictable offences. ("Minor offences" which by definition do not involve imprisonment would have to be added to that list.)

608. The Society specifically opposed extending the powers of justices of the peace to enable them to consider defended hearings, particularly where the possible penalties included a term of imprisonment, but recognised that there might be cases where, because a magistrate was not available, justices might be employed to ensure that a charge against an accused person was dealt with promptly. The Society also expressed reservations over the existing powers of justices of the peace to disqualify drivers on conviction for traffic offences, because of the serious hardship which could result in some of the more complex cases. The notion that because certain classes of work involve a relatively insignificant amount of money, or because the maximum penalty prescribed is small or the matter might be regarded as purely routine, these are unworthy of the attention of properly qualified judicial personnel, was expressly rejected by the Law Society. On the other hand, the department submitted that to have District Court judges presiding over matters in which justices of the peace have demonstrated their competence would be an uneconomic use of qualified professional personnel: in our view, these conflicting points of view must be kept in equilibrium, so far as that is possible.

609. ***Present contribution by justices*** Probably the most cogent practical argument in favour of maintaining the use of justices of the peace in the courts is the fact that for several years in Auckland, and for lesser periods in other centres, they have dealt with a very large volume of offences at the lower end of the scale. We were given different estimates of the court hours which would otherwise have to be worked by magistrates, and of the numbers of additional magistrates who would have been required if the justices of the peace had not done this work. We were left with the impression that these calculations did not make sufficient allowance for the fact that an experienced magistrate, sitting alone, would deal with a much greater volume of cases than two relatively inexperienced justices of the peace who must confer with each other as the hearing proceeds and before each decision is reached. We were also told that the minor offence procedure reduces the through-put of cases in comparison with former procedures. Nevertheless, it is clear that without the contribution of justices of the peace, the problems of the Magistrates' Courts would be very much greater.

610. ***Appointment*** While selection in general is not strictly within the Commission's terms of reference, we were impressed by the federation's view that the standing of the commission of the peace must first be strengthened and confirmed before attention is focused on selection and training for court work of justices of the peace. In its submissions the

federation proposed:

> a new system of appointment of Justices whereby all nominations are carefully screened by a non-partisan body having regard only for suitability of the nominee to serve and the need for more appointments. If the Commission of the Peace is to fulfil its proper purpose—and that purpose only—then swamping of the institution with unnecessary appointments must be discontinued: use of the appointment to confer a junior honour must be eschewed: favouritism must be seen to be completely absent: an age limit at appointment must be strictly enforced: greater emphasis should be placed upon the appointment of younger persons: each nominee must be fully aware of, and accept the conditions of training and service before being considered for appointment: and ex-officio appointments should be abolished.

611. We agree with the federation's suggestion that a justices' appointments committee should be established to make recommendations to the Minister of Justice. We think that committee 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' association concerned. Such a committee merely formalises what is presently done in a less formal way. We do not consider it appropriate for us to detail what steps should be followed in the nomination procedure, but we approve the suggestion that each nominee should be required to indicate willingness to undertake all duties attached to the office. The nominee should also indicate assent to being listed under "Justices of the Peace" in the yellow pages of the telephone directory. The federation has suggested that those nominated should also be required to declare their readiness to undergo a course in justices' judicial duties, if needed: we do not consider such an undertaking necessary. It has to be borne in mind that a substantial proportion of justices of the peace are appointed to serve rural areas, and they would not be called upon to serve in courts: some of these rural appointees may later retire to an urban area, but the number who do so would not be significant.

612. The proposed committee could also perform a useful function by dealing with complaints about justices, and the situation which arises on those rare occasions where it is necessary to persuade or direct a justice of the peace that he should not longer exercise judicial functions. At present, the few cases of this kind are dealt with in an informal way by the senior magistrate. It would be helpful if the proposed justices' appointments committee were authorised to remove the name of a justice from the list of those available for court work, where that step was considered necessary.

613. ***Community representation*** We further consider that special efforts should be made to ensure effective community representation by involving more persons from minority ethnic groups. Our attention has been drawn to the fact that, of the justices of the peace who preside in court, 91.4% are males of European extraction, 7.9% are women, and 0.7% are Maori. Without evidence one way or the other, we may speculate that under-representation of women or the Maori people may be attributable to a general lack of awareness of the opportunity for community service provided by the commission of the peace; or because service as a justice entails too great a loss of income, especially for a person with dependants; or because the prospect of training, either for judicial or ministerial duties, may be too daunting for those with limited formal schooling long since

concluded. Whatever the reasons for such imbalance in community representation, it is undesirable; we hope that by bringing it to the attention of minority ethnic groups, the churches, employers' representatives, members of Parliament, and other interested parties, corrective action may be taken. Serving as a justice should not become the prerogative of those who can afford it.

614. ***Ontario scheme*** Members of the Commission who visited Toronto last year were especially interested in a scheme in operation in Ontario, in terms of which, selected justices of the peace who wished to do so were given the opportunity to undertake special training courses under the direct supervision of the senior Provincial Court judge. When they could satisfy this judge of their fitness to do so, they were permitted to sit on the Bench, in some cases full-time and in some cases part-time. These justices were paid for their services: we would emphasise that their selection and training were strictly supervised by the senior Provincial Court judge. When the representatives of the Royal Federation of New Zealand Justices' Associations were invited to comment on this matter at the resumed public hearings of the Commission, they reiterated their views that the federation did not look with favour on justices of the peace receiving payment for sitting in court. In general, the Toronto practice received little support from those to whom it was mentioned at the Commission's hearings. We note with interest, however, that in a report received on the operation of the small claims tribunal in Christchurch, the two people appointed as referees are both active members of the Justices of the Peace Association: both are employed full-time as referees, that is, five days each week, and are paid for their services. This situation is analogous to the Ontario scheme.

615. We consider that there may well be a future place for the practice observed in Toronto of appointing lay justices who have been selected by the Chief Provincial Court Judge and given special training under his guidance, to serve in a part-time or full-time paid capacity. We were told that people from many 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 their experience grew, they could receive up to Can.$20,000 in salary. It seems to us that the training programme established through the federation's efforts would blend well with the Toronto concept. We recommend, therefore, that the utilisation 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 Royal Federation of New Zealand Justices' Associations would no doubt also wish to examine this matter.

616. ***Petty Sessions proposal*** The federation urged us to establish a Petty Sessions Court under the Magistrates' Courts, presided over solely by specially selected and trained justices operating within prescribed limits simply and clearly defined by statute, and under the plenary jurisdiction of magistrates. In support of this proposition, the federation made detailed submissions setting out the history of their long involvement in the judicial process in New Zealand and the reasons why that involvement should continue and be developed. They laid particular emphasis on the judicial training course currently available to restricted numbers of justices of the peace, through the New Zealand Technical Correspondence Institute, and the ninth edition of the Manual for Justices of the Peace*. The federation expressed its confidence that within a short

*Revised in 1977 by B. H. Blackwood, S.M.

time it should be possible to stipulate that only graduates from the correspondence course shall be considered for selection for judicial service. We were also told of the federation's plans for practical judicial training.

617. There seemed to be general agreement among those who made submissions on this topic that the jurisdiction of justices of the peace should be held at the present level with the extent to which that jurisdiction is exercised being determined by the senior District Court judge in the area. Present jurisdiction includes presiding over a limited range of defended hearings, and despite concern expressed by the Law Society on this point, we consider (provided the method of review of which we later speak is introduced) we should not turn the clock back and insist that all defended matters now heard by justices of the peace should be heard by District Court judges.

618. The representatives of the justices themselves informed the Commission that they inclined towards exclusion of custodial sentencing in the present circumstances, but did not wish to commit themselves further until a revised Police Offences Act appeared. It is recognised that sentencing a person to imprisonment or preventing him from driving a motor vehicle may involve complex legal and social questions, irrespective of the length of time it is intended that the penalty should operate. Some lawyers who addressed us considered these questions should not be left to part-time, legally unqualified and relatively inexperienced laymen to decide, no matter how well-intentioned they may be. To do otherwise, it is said, is to place public confidence in the law in jeopardy. In general terms we support this view. We consider that training is essential if justices of the peace are to exercise such jurisdiction, and we would therefore prefer the local assignment judge not to give jurisdiction of that sort to inexperienced and untrained justices of the peace.

619. We do not support the federation's proposal for a Petty Sessions Court as we think it is undesirable to create a fourth tier in the structure of our court system. We consider that justices of the peace should function in a division of the District Courts. The theme of flexibility is repeated at several points in this report, and it is appropriate in the present context as well. We believe it is important to retain flexibility in the procedure for hearing minor offences. Some of these may involve important principles of law or be of special significance to society even though they are "minor offences" by definition. It is desirable that a simple procedure should be available to enable cases such as these to be brought before a District Court judge for hearing, on the application of either party, or by the justices themselves declining jurisdiction. We would not favour, therefore, establishing a Petty Sessions Court in which justices of the peace exercise exclusive jurisdiction.

620. We recommend that justices of the peace should be authorised to exercise jurisdiction in District Courts in respect of minor offences which, by definition, are summary offences for which the defendant is not liable on conviction to a sentence of imprisonment or to a fine exceeding $500. We further recommend that justices of the peace continue to exercise jurisdiction in remand and bail applications as at present, and also continue to preside over preliminary hearings of indictable offences.

621. ***Correspondence course*** We note the one-year judicial correspondence course commenced in 1977 and applaud the initiative taken by the federation in this field. While acknowledging the best of motives, we question whether such a course (supplemented by some intended

practical training) is not both too much and too little. As their powers are at present defined, justices exercise limited judicial discretion and some of the formal training set out in the course material presented to us could be held to be substantially superfluous to their needs; conversely, if their powers were to be extended to any marked degree, the training and experience, in the view of many, would be quite inadequate.

622. The Royal Federation of New Zealand Justices' Associations very wisely recognises that completion of the correspondence course does not of itself signify that any of their members is ready to preside in court. In material they supplied to us setting out proposals for practical judicial training, they reminded their members that, as well as those who had completed the academic course, they were seeking justices who by personality, outlook, stability, availability (in time), and judicial qualities were fitted for Bench duties. The Commission has other reservations concerning the effectiveness of the Technical Correspondence Institute training scheme. It is asking a great deal of men or women who may have spent most of their life as builders, or factory workers, or in any one of a wide variety of businesses, callings, or trades, to undertake a training course and a few practical training sessions and then sit in court at infrequent intervals, with the knowledge and experience necessary for making judicial decisions. We anticipate that some justices might fit into this work relatively easily, but others of different temperament might find it extremely difficult to do so. Nevertheless we consider it desirable that in future justices performing judicial duties should have completed the correspondence course.

623. ***Justices' clerks*** If justices were to be given an enlarged jurisdiction (which we do not favour) in order to assist further in disposing of the court's business, this enlargement of powers would have to be subject to such conditions as:

(a) the presence in their court of a qualified legal assistant;
(b) their having received sufficient theoretical and practical training to be able to apply the law to the demands of justice in the cases that come before them;
(c) if the English pattern were to be adopted, their generally presiding in groups of not less than three.

Of these factors, the first is by far the most crucial; it is the key to the lay magistrates' system in the United Kingdom. Any comparison with the English practice which does not give due prominence to the most important role of justices' clerks is of little value. In the English system, whenever justices of the peace preside in the Magistrates' Courts, they have qualified advisers in legal matters available to them in the person of the justices' clerk. The clerks' function is to rule on points of law as these arise at any time while the courts are sitting, and to attend to procedural matters in general. For the most part, justices' clerks are full-time members of court staffs, although where the court sits at less frequent intervals, a local solicitor, sometimes quite senior in status, acts as justices' clerk on a part-time basis. Some of the more senior justices' clerks, who have supervisory responsibility for a large area, receive a salary equivalent to that of a County Court judge.

624. The suggestion was made to the Commission that career opportunities might be developed within the Department of Justice for young lawyers to serve the two-fold purpose of absorbing graduates from law schools who could not obtain employment, and building up a corps of solicitors who could eventually assume the duties of justices' clerks. At

present, there are no qualified court staff to undertake this work, and even if it were possible to recruit sufficient numbers immediately, they would need training and experience before they could become justices' clerks. Another facet of this matter is discussed elsewhere in this report, in the context of the desirability of having legally qualified registrars (paragraph 789). The present attitude of the Department of Justice, as it was outlined to us, is that if some future movement is made towards the employment of legally qualified personnel in the courts administration, they could undertake advising justices on the law. This is viewed, however, as a side benefit, and not as something inherently justifiable.

625. We do not consider it feasible to establish a corps of justices' clerks in New Zealand, at present or in the foreseeable future. Indeed, it has been suggested that if people could be found with the ability to fulfil that role, better use of their talents might be made in a judicial capacity, as judge or master.

626. ***Selection for court duties*** The Secretary for Justice drew attention to s.6 of the Justices of the Peace Act 1957 which provides that the summoning of justices when they are required is the function of the registrar of every Magistrate's Court. He expressed the strong view that summoning should remain the responsibility of the registrar. He was not in favour of delegation of this function to local Justices of the Peace Associations, although he said he was certainly in favour of close co-operation between the registrar and the local associations. We agree with the Secretary for Justice on these points.

627. Now that the justices themselves have taken such strong initiative in the matter of training for judicial duties, a new aspect of the question is emerging concerning whose names should be placed on the list from which the registrar summons the number of justices required. We have already noted with approval the federation's suggestions that prerequisites for selection to undertake duties on the Bench are attributes such as personality, outlook, stability, availability, and a judicial approach; and to these should be added satisfactory completion of the judicial correspondence course. We consider that the responsibility for determining whether the name of any justice should be approved for court duties should rest with the senior District Court judge for the court in question. We expect that he would consult with the registrar of the court, and also with the registrar of the local Justices of the Peace Association, before making his decision. To that extent, evaluation of suitability for judicial duties might be considered a function of the justices' appointments committee, although the final decision on suitability would rest with the District Court judge.

628. ***Review by District Court judges*** Because we are unlikely, in the foreseeable future, to have an officer comparable with the justices' clerk of the English system, we consider it is essential to provide that matters dealt with by justices of the peace are reviewable by way of rehearing by a District Court judge. We are aware that in some jurisdictions, for example, South Africa, where summary offences are dealt with by lay magistrates without the benefit of justices' clerks or their equivalent, the practice is for the papers relating to all such matters to be automatically reviewed by a District Court judge. We do not consider such a system to be a necessary or desirable part of our proposal. We consider a readily available right of review by a District Court judge adequately meets the position. We think this procedure should be kept as simple as possible so that both costs, and the time involved for all concerned, are kept to the

practical training) is not both too much and too little. As their powers are at present defined, justices exercise limited judicial discretion and some of the formal training set out in the course material presented to us could be held to be substantially superfluous to their needs; conversely, if their powers were to be extended to any marked degree, the training and experience, in the view of many, would be quite inadequate.

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minimum. We hope that such a provision would go some distance towards meeting the objection of the New Zealand Law Society to any defended matters being heard by justices of the peace.

629. The federation sought approval in its submissions for a practice which had grown up in Auckland, where justices faced with unfamiliar questions of law would informally seek advice from one of the magistrates. It was suggested that this practice should be formalized. Since that submission was presented, a Supreme Court judge at Auckland has held that the procedure in question was wrong. We need make no further comment on the point.

630. ***Age of retirement*** We have referred to the desirability of ensuring the widest possible representation of the community among justices performing judicial functions. In that context we mentioned particularly the small proportion of women and people of minority ethnic groups among justices. It is also desirable that more appointments should be made at a younger age. It is generally recognised, we believe, that the average age of justices performing judicial duties is higher than it should be.

631. In England, provision was made in 1941 for the creation of a supplemental list (as opposed to an active list) where any justice who "from age, infirmity or any like cause was unable to deal properly with his judicial functions" could be placed. In 1949, an Act was passed providing for the retirement of justices from the Bench at age 75, and from the Juvenile Court Panel on reaching 65. Further changes have successively lowered the age of retirement to the supplemental list to 70; the Juvenile Court Panel age remaining at 65. The supplemental list is reserved for those who have reached retiring age, or who have been compelled to retire through ill health, or who have moved from one commission area to another after five years' service. (Here, as in England, a justice of the peace is appointed to meet an existing need in a specified area.)

632. The federation suggested that, initially, no justice over the age of 75 years should be permitted to exercise jurisdiction in the Petty Sessions Court they proposed, and that the age should be reduced annually till it reaches 72—the age of voluntary retirement from the Bench set out in s.7(a) of the Justices of the Peace Act 1957. However, we believe the supplemental list, as established in England, should be adopted in New Zealand, and recommend accordingly.

633. So far as retiring age is concerned, we have recommended elsewhere in this report that for all future appointments of judges, the age at which they may retire should be 65, with provision to continue as supernumaries. We suggest that similar considerations should apply in respect of justices of the peace. We recommend, therefore, that 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 their retention on the active list until age 70, subject to an annual review by the justices' appointments committee. So far as existing justices are concerned, we recommend that they move to the supplemental list on attaining the age of 70 years, or at any time after reaching 65 years if they so desire.

634. ***Allowances for justices*** On the question of allowances to justices for out-of-pocket expenses, we were told that this was a sensitive area in which there was considerable disagreement among justices themselves. In England, four classes of allowances are paid for judicial services, including

special payments where the justice suffers financial loss greater than that met by the ordinary attendance, travelling, and meal allowances. In New Zealand, we were told that meagre allowances of bus fares and a cheap lunch (if the service runs into the afternoon) may be claimed by justices; but in some places the "pin-pricking" nature of the reimbursement procedure is regarded as offensive. We were also told that all justices guard the principle of voluntary unpaid service to the community very jealously, and they have no wish to see it sullied by demands for payment for services rendered. We recognise and commend the high ideals which have prompted that stand, but we consider that other important principles are involved. As we indicated earlier, we believe that improved community representation in the ranks of justices is required. We would not wish to inhibit the availability of family men in, say, factory work, because they could not afford the financial sacrifice involved. We believe it would be wrong in principle to support a system where only retired, or self-employed persons, or those with independent means could make themselves available for judicial service. We recommend that 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 a special payment to reimburse the person concerned for any loss of wages. We note that the Department of Justice has already supported such an allowance in its submissions.

635. ***Mode of address*** It may be appropriate to refer at this point to modes of address which should be used when justices preside in courts. Elsewhere we have suggested that we should abandon archaic words and trappings with no modern significance. In keeping with that general approach, we see no reason to retain reference to "Your Worship" or "Your Worships". In our view, "Madam" or "Sir" would be adequate and appropriate when addressing justices of the peace sitting on the Bench.

636. ***Summary instalment orders—supervisors*** Our attention was drawn to a scheme whereby justices of the peace are making themselves available, through their local associations, for appointment by Magistrates' Courts as supervisors of summary instalment orders. We are aware that numbers of justices have been engaged in related activities in budget advisory service work in different centres. We commend those who are serving the community in this way, and would add that the supervision of summary instalment orders made by the courts is, in our view, an excellent avenue of service for justices of the peace who have the appropriate background and experience.

637. ***Official prison visitors*** One of the matters raised by the New Zealand Howard League for Penal Reform was what they described as "the need for a new way for prisoners to air their grievances". The league recognised that, looked at objectively, these grievances may be serious or trivial, real or imaginary. For the prisoner, however, every injustice he suffers, or believes he suffers, is of grave importance, and the league points out that resentment can quickly become disproportionate to the original feelings of injury. It was acknowledged by the league that a prisoner has the opportunity to make an official complaint to the superintendent, and even to a magistrate, but some prisoners regard themselves as victims of the establishment and therefore do not expect a sympathetic hearing from any officials who had part in the processes which led to their imprisonment. It was said that prisoners urgently need someone entirely independent of the administration in whom they can confide. That

person, it was suggested, should be familiar with prison conditions and competent to present the matter effectively to the superintendent. At present, magistrates pay official visits to prisons for two separate purposes, one being to receive complaints from prisoners; the other being to deal with charges for breaches of discipline brought under the Penal Institutions Act 1926. It has been suggested that it is inappropriate for these two functions to be carried out by the same person.

638. We recommend that selected justices of the peace (who are not involved in sitting in court), or other private individuals, could fill the role of "prison visitor" most effectively and make a valuable contribution to the administration of justice. By doing so, they would relieve District Court judges of that task, which is quite time-consuming where those prisons situated away from centres of population are concerned. The selection of official visitors for this work could be made by the justices' appointments committees nearest to each of the prisons.

Recommendations

1. 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.

2. 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.

3. The justices' appointments committee should be authorised to remove the name of a justice from the list of those available for court work.

4. Special efforts should be made to ensure more effective community representation among justices of the peace.

5. The Chief District Court Judge, as a member of the Judicial Commission, should investigate the utilisation of lay justices as in Ontario.

6. Justices of the peace should be authorised 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.

7. 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.

8. 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.

9. Matters dealt with by justices should be readily reviewable by way of rehearing by a District Court judge.

10. 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.

11. 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.

12. Justices of the peace should be selected as official visitors by the justices' appointments committees to receive complaints from prisoners.

THE JUDICIARY

639. What place should the courts occupy in the society of the future? In his opening paper, the Secretary for Justice said that "the essential function of the Courts is to declare the law of the land and to settle disputes between citizen and citizen and between citizen and the State". Implicit in this statement is the independence and integrity of the judges who must see to it that the individual citizen's rights and liberties are guaranteed from the arbitrary interference of the Government or the State. The Act of Settlement 1701, freed judges from control by the Executive. Sections 7 and 13 of the Judicature Act 1908 provide that a judge's commission shall continue in full force "during good behaviour" until the judge attains the age of 72 years, and s.8 provides for an address from the House of Representatives before the Queen may remove or suspend him from office. A safeguard against diminution of his salary is contained in s.10. The rates of salary are provided for by s.3 of the Judicature Amendment Act 1970 which, like its forerunners, provides for payment without further appropriation, the purpose being to deprive Parliament of the opportunity to debate the judiciary on the annual estimates. Similarly, the Standing Orders of the House prohibit members from using unbecoming words about any judge and from referring to any matter on which a judicial decision is pending. The practical effect of all these provisions is that a judge, once appointed, is thenceforward secure from Government interference.

640. We received several submissions reminding us of the place which the Supreme Court should hold as one of the three arms of Government. None of these submissions suggested any conflict between the Courts and the Executive or the Courts and Parliament save on the issue of the order of precedence which we mention elsewhere (paragraph 1059). It has long been recognised that while Parliament is the supreme law-making body, it is imperative that judges must be free from interference and above suspicion of influence by the Executive. In his memorandum to the Commission, Sir Richard Wild said:

> It is this basic feature of his office and the principle of judicial independence to which it gives effect that marks out the constitutional position of a Judge and distinguishes his office from all others in the community including that of Members of Parliament, Ministers of the Crown, and the Prime Minister. Officials generally are accountable to the executive government. Judges are not. In a broad sense they are servants of the public but they are not public servants. 'Not merely', as Sir Francis Bell pointed out (*Scott,* op. cit., 163), 'are they free from any direction of the Crown; they are bound by their oaths to deny the right of the Crown to direct them.'

In accordance with the role of an independent third arm of government, New Zealand judges have from time to time reviewed the exercise of executive power, have curtailed certain decisions of local government, have upheld the rights of the private citizen by protecting him from unjustified arrest or his property from wrongful seizure, and have extended the area of liability of a local authority to citizens.

641. We deal elsewhere with the suggestion that the jurisdiction of the High Court judges to issue prerogative writs should be transferred to the four Administrative Division judges. Most judges strongly resist any curtailment of this right. This power, which has been possessed by High Court judges from a very early period in the history of the common law, is, as Holdsworth has said, the best possible illustration of the principle of the supremacy of the law, and of the position of judges as the guardians of that principle. This jurisdiction when stated in modern terms really rests on the principle that, because the exercise of certain prerogative powers raises justifiable issues, the legality of their exercise must be determined by the judges as questions of law, even against the Crown.

642. In our opinion, the independence of the judiciary is of such value to our society, as the only real bulwark against arbitrary exercise of power, that any erosion of judges' independence must be resisted.

A Judicial Commission

643. The administration of justice is a costly process. The best allocation of judicial manpower is a management dilemma. Patterns of organisational responsibility should be developed to fit the unique place that the judicial system fills in our society. In other words, our courts should be well run. Who should run them? We have considered several possibilities.

644. Should it be the Government? The principle of an independent judiciary inherited from British constitutional law has no limitations. The Government has no right to apply external pressures to the court system, and does not, either by assigning judges to hear particular cases or in any way influencing their decisions. There are, therefore, certain restraints placed on the Government which mean it cannot entirely run the courts.

645. Should it be the judges? This may sound well in theory, as the judges occupy a focal point in the court system; but the prime duty of a judge is to hear cases and not to administer. In our opinion, although a judge has authority to control his court and all those who attend it, either as counsel, staff, parties, jurors, police, or witnesses, it must be recognized that judges cannot operate independently of management restraints. Judges, generally speaking, lack management training and many are not suited to deal with management problems. They are not appointed because of managerial talents nor are they necessarily supported by court staff with the progressive approach to management problems found in the business world. So, while it is easy to assert judicial independence, it is quite impracticable to suggest that judges alone should run the courts.

646. Should it be both the Government and the judges? Should the Government be responsible for administering the courts and the judges be left purely to adjudicate? The answer, in our opinion, is not a simple one. Although convenient, the distinction between administration and adjudication is not always clear in practice. The two functions may well come into conflict when responsibility is ill-defined. In our opinion, the present system shows the results of that conflict. Elsewhere we specifically refer to delays in hearings for civil cases, high staff turnover and shortages,

poor resources and facilities, and out-dated equipment and organisational methods.

647. We consider it is both necessary and desirable that the courts should be managed by a single authority, representative of those groups who have a prime interest in the administration of justice. This authority would exercise unified control over case-flow and the day-to-day administration of the courts. In fact we see such duties as its prime function. It was repeatedly emphasised to us in our travels overseas that administration of the courts is the key problem which requires to be solved. Administrative problems can only be solved by co-operation of all concerned. This administrative body should, in our view, possess additional functions including making recommendations for appointment to the Bench, arranging study and refresher programmes for judges, and providing the means of dealing with complaints against them. These other functions are each the subject of separate terms of reference and are dealt with more fully later in the report. We can say, however, that the Secretary for Justice, the New Zealand Law Society, and the Hamilton District Law Society suggested a similar body for some of the above functions.

648. We would name this authority "the Judicial Commission". We propose that its chairman should be the Chief Justice. Other members would include a Supreme Court judge and the Chief District Court Judge representing their Benches. In addition, we consider that both the Solicitor-General and the Secretary for Justice should be appointed to represent the Government. We also recommend the appointment, for a three-year term, of two members nominated by the New Zealand Law Society and appointed by the Governor-General. For purposes of continuity, we think the Law Society members should not serve precisely concurrent terms.

649. A striking feature of submissions to this Commission was the interest in the courts shown by many sections of the public. Although we do not consider it would be desirable to appoint laymen to the Judicial Commission, because the contribution which any layman could make would necessarily be limited, we do believe it is essential for the views of the public to be heard. To cater for this, and indeed to take advantage of the interest which the public have demonstrated, we believe that consumer monitoring of the court system should be encouraged (paragraph 807). It is recommended that consumer groups should report to the Judicial Commission. We consider it is essential that the Judicial Commission should be a closely knit group and we think our proposed membership will achieve that purpose. The Secretary for Justice and the Solicitor-General, as well as the two Law Society representatives, should be sufficient to represent the wider public interest.

650. In the section on court administration we have recommended the appointment of a Chief Court Administrator. We consider that he should also be appointed Secretary of the Judicial Commission. Although, as we state, he is ultimately responsible to the Secretary for Justice, he will need to work closely with the Judicial Commission and especially the Chief Justice. We have seen this practice used to advantage overseas.

651. In addition to the functions already described, the Judicial Commission would have a monitoring and recommendatory operation. At other points in this report we suggest further matters which could come within the purview of the Judicial Commission. By way of example, we mention assessment of the Family Court and the distribution of criminal

and matrimonial work between the High Court and the District Courts. The Judicial Commission should review the sentencing jurisdiction of District Court judges sitting without a jury. Wherever possible, the commission should supervise the implementation of such of our proposals as are incorporated in a new Courts Act and formulate new proposals of its own. One of the most important functions of the Judicial Commission will be to ensure that there is regular consultation between the Chief Justice, the Chief District Court Judge, and the Chief Court Administrator who, as we have elsewhere said, will be the key triumvirate in the administration of justice: it is only through a flexible co-operation of judges and administrators that the courts can be run efficiently.

652. The Judicial Commission should, wherever practicable, promote uniform procedures and rules, and standardisation of court forms and documents. The composition of the commission makes it ideally suited for this purpose. It may well be that one Rules Committee will prove sufficient for the High Court and the District Courts: this is a decision best left to the commission itself.

653. In order that Parliament and the public might be regularly informed of the operation of the courts, thus in part continuing the function of this Royal Commission, it is recommended that the Judicial Commission reports to Parliament annually. It is appreciated that the annual report of the Department of Justice always includes a section on the courts, but in our opinion, the information that should become available to the Judicial Commission would more appropriately be presented as a separate report, dealing especially with the problems referred to by this Commission.

654. Although the problems associated with divided responsibility should lessen or disappear with a Judicial Commission, the Government would still maintain its overall responsibility and authority with regard to the administration of justice. It would achieve this by its powers of appointment of judges; by its control of all court finances and the employment of court staff; and by the power to legislate over all matters affecting the courts.

Recommendations

1. A Judicial Commission should be established to consist of:
   - The Chief Justice (chairman)
   - A Supreme Court Judge
   - The Chief District Court Judge
   - The Solicitor-General
   - The Secretary for Justice
   - Two members nominated by the New Zealand Law Society and appointed by the Governor-General
2. The Judicial Commission should exercise unified control over case-flow and the day-to-day administration of the courts.
3. The Judicial Commission should, in connection with judges, have the power to recommend appointments, arrange study and refresher programmes, and provide the means of dealing with complaints.
4. The Chief Court Administrator should be Secretary of the Commission.
5. The Judicial Commission should report to Parliament annually.

Appointment of Judicial Officers

655. This section of our report deals with the qualifications, methods of appointment, and promotion of judicial officers, in relation to High Court and District Court judges. A detailed description of methods of appointment and removal and the conditions of office of judges and magistrates is outlined at paragraphs 117 and 126 et seq.

656. ***Qualifications*** General agreement was apparent that there is no need to make any major alteration to the legislative provisions governing qualifications for appointment of judges of the High Court or the District Courts. We agree with the Secretary for Justice that the wording of qualification for appointment as a magistrate (seven years' *standing* as a barrister or solicitor; Magistrates' Courts Act 1947 s.5(3)(a)) should be brought into line with the stated qualification for appointment as a High Court judge (seven years' *practice* as a barrister or solicitor; Judicature Act 1908 s.6). The Secretary for Justice suggested that the word "practice" may itself require interpretation. In our view, the requirement should be the holding of a practising certificate rather than continuous and active practice because the latter might possibly eliminate otherwise suitable people. We consider, however, that it would be very rare for anyone to be appointed who has not been actively in practice. The definition should obviously be wide enough to include Crown employees (for example, the Solicitor-General) and academic lawyers who also practise in the courts. We are of the opinion that the requirement of seven years' practice should remain. The period spent in practice should be in New Zealand, and we agree with the Secretary for Justice that no-one should be appointed to judge New Zealanders unless he or she has a good knowledge, acquired by experience, of New Zealand life, customs, and values. At the present time there is power to appoint to the High Court Bench barristers or advocates of not less than seven years' practice in the United Kingdom. We are told that no such appointment has been made for over 80 years. We consider the power to be anomalous and recommend that the appropriate part of s.6 of the Judicature Act should be repealed. One other method of appointment which has not been used for many years is that which permits a legally qualified person to be appointed to the Magistrates' Court Bench after a period of court service (Magistrates' Courts Act 1947 s.5(3)(b)). In the light of the recommendations which we make concerning registrars, we do not consider that this latter power should be abolished. Although there are at present no legally qualified registrars, we would not like to see this avenue of appointment closed. In summary, then, we accept that the present qualification requirements have stood the test of time and provide a basis for appointment which has the confidence of the profession and the public. Apart from the one exception concerning court registrars, we are of the opinion that appointments to both the High Court and District Court Benches should continue to be made, as they traditionally have been, from the practising profession. Under New Zealand conditions we do not see that it would be desirable to create either an elective or a career judiciary (later in this section we make certain comments concerning judicial promotion).

657. ***Methods of appointment*** It is generally agreed that the existing methods of appointment have worked well and we doubt whether any different procedure would have resulted in better appointments. It may therefore fairly be urged that any proposal for change should be scrutinised with care, and certain of the judges have expressed strong opposition to any change (for example, the comments made in an address

to the Wellington District Law Society*). Of recent years, however, there have been some areas of dissatisfaction. Thus, in relation to the High Court, it has been suggested to us by a number of persons (including some present Supreme Court judges) that a wider degree of consultation would be desirable. This observation would apply equally to the Magistrates' Courts. In relation to the latter court, the Secretary for Justice in his submissions pointed out some of the difficulties which he has encountered and suggested it should be asked whether, in all the circumstances, too great a responsibility is placed upon him.

658. We have given considerable thought to the best method for selecting judicial officers in the future. We agree that selection of members of the judiciary is of such vital importance that every effort must be made to ensure the selection process is the best one possible, for, "however good the law is, if a judge is appointed who ought not to have been made a judge, then everything is wrong" (Lord Gardner, former Lord Chancellor of England). This applies with particular force when judicial appointments are being made at a comparatively young age. We think it important, too, that the constitutional issues should not be overlooked. While the tradition of impartial and non-political appointments to the Bench is firmly established in New Zealand, the present method of appointment is not itself a safeguard. As head of the Executive, the Governor-General acts on the advice of his Ministers who may be (though we make no suggestion that they ever have been) influenced by political considerations. Only when a judge is appointed do the provisions in respect of tenure of office, removal, and fixing of salaries give statutory recognition to the principle of independence, so that there is, at least in theoretical terms, scope for political influence in the making of judicial appointments. We accordingly agree with the suggestion of the Secretary for Justice that it may then be considered desirable to "reinforce and enhance the practical application of the principle of independence at the point of judicial appointment". Moreover, because of the number of appointments to be made, it appears to us that there is some risk that the existing system (especially in relation to the District Courts) will run the risk of breakdown. It also appears desirable to have one system for all appointments.

659. For the above reasons we have concluded that an Appointments Committee of the Judicial Commission should consider all judicial appointments. The use of a Judicial Commission for this purpose was advocated in a number of submissions made to us. A similar suggestion was also made by the New Zealand Law Society which commended the establishment of an appointments advisory committee. In opposition to the Judicial Commission proposal, the suggestion was made that members of a commission could be open to lobbying. Given the calibre of the members we later suggest, we see no risk of this. In any event, if there is such a risk, it must also exist under the present system. We are fortified in our conclusion by the knowledge that, as recently as July 1977, the Chief Justice of Australia publicly stated his view that the time had been reached for such a commission to be appointed in Australia.

660. The membership of the Judicial Commission is of crucial importance, it being essential to provide a balanced viewpoint in making appointments. In this context, we have had regard to the view expressed by a Supreme Court judge in his previously mentioned address that, while

*Mahon J. (1974) N.Z.L.J. at 257.

judges are well placed to observe the forensic ability and legal knowledge of counsel who appear before them, they will not necessarily be aware of those other qualities of personality, temperament, judgment, and integrity, which are essential for a good judge. We consider it important that membership of the commission should not be overweighted with judges and that there should be strong representation of practising lawyers who are likely to know best in their contemporaries those personal attributes which are above all requisite for a judge. In his submissions to us, the Secretary for Justice suggested that the appointment of judges should be considered by a commission, and said:

> The first question is the scope and function of such a Commission in respect of the selection and appointment of judicial officers. I do not propose that the form of their appointment should change. Judges of the High Court should continue to be appointed by the Governor-General in the name and on behalf of Her Majesty—Judicature Act s.4(2). District Court judges should be appointed by the Governor-General. The formal recommending authority should be (as now) the Prime Minister in the case of the Chief Justice, the Attorney-General in the case of other judges of the Court of Appeal and the Supreme Court, and the Minister of Justice in the case of District Court judges. There is not much logic in this division of function, but it is traditional and there seems insufficient reason to change it.

We agree generally with the views of the Secretary for Justice, except that we consider the Attorney-General should be the recommending authority for all judges and masters (other than the Chief Justice of the High Court whose appointment, in view of his constitutional responsibilities, should still be recommended by the Prime Minister). We also consider that the Chief Justice, on the recommendation of the Appointments Committee of the Judicial Commission, should make assignments to the Administrative Division of the High Court; with the proviso that he should retain his power to make temporary appointments to that division without reference to the commission.

661. It would be for the Government to request the Judicial Commission to submit names for judicial appointment. As we have previously mentioned, the Chief Justice should be chairman of the Judicial Commission and we think he should be chairman of the Appointments Committee except when his successor is under consideration; in order to avoid any appearance of nepotism in such circumstances, the Chief Justice should be replaced by the senior High Court judge. We consider that the remaining members of the Appointments Committee would normally be the Chief District Court Judge; two members appointed by the Government on a non-political basis, such as the Solicitor-General and the Secretary for Justice; and two members nominated by the New Zealand Law Society, appointed by the Governor-General. We envisage that when particular appointments are under consideration the membership might change; for example, if a judge of the Court of Appeal is to be appointed, the President of that Court should be co-opted as a member of the committee. On other occasions a particular person or persons might be consulted virtually automatically; for example, the senior Administrative Division judge when an appointment is being made to that division, or the Senior Family Court Judge when an appointment is being made to the Family Court. A particular problem would arise if the Solicitor-General was a member of

the Appointments Committee and was also under consideration for appointment as a judge. He would then no doubt stand down from the Appointments Committee being replaced by another suitable representative of the Government.

662. In making the above recommendations we have suggested a committee which should have a good knowledge of the persons and the qualities required for appointment. The question of whether or not there should be lay representation on the Appointments Committee troubled us. Although in principle lay representation is desirable, it is difficult to envisage how lay people would really be able to assist, inasmuch as they cannot have, or obtain, real knowledge of the potential appointees. It may be possible to consider (as did the Justice Sub-committee Report on the Judiciary published in London in 1972) appointment of, or consultation with, highly trained and experienced personnel officers, skilled in selection procedures. Even so, we doubt whether a lay person would be able to make much contribution. As the Secretary for Justice suggested, the idea of involving laymen in such decisions may be no more than an attempt to meet fashionable demand. The public interest may ultimately be best represented and protected by the Government's final control of appointments. In our suggested membership of the Appointments Committee, we have limited the Government's appointees to two because we envisage the Government would not be obliged to accept any particular person recommended by the commission through the Appointments Committee; that is, the Government of the day, while being unable to appoint a person whose name had not been referred to the commission, would be entitled to refuse acceptance of a name or names put forward and to refer other names to, or request further nominations from, the commission. An additional advantage of such procedures is that the Government need not be inhibited from appointing a politically active person as a judge when approval by the Appointments Committee ensured there could be no suggestion of political reward in such an appointment.

663. We would not like to see the Appointments Committee bound by strict procedural rules and would prefer to leave it to the Judicial Commission to govern its own procedures with relative flexibility; the very flexibility of our present system has been a great advantage. We expect that members would employ the widest degree of consultation compatible with confidentiality. As with the present system, the need for confidentiality will present some problems and members of the Appointments Committee would be obliged to exercise utmost discretion. We think it desirable to ensure, possibly on an informal basis, that membership of the Appointments Committee of the commission, with the exception of the Chief Justice and the Chief District Court Judge, does not remain static over long periods. Power should not remain in too few hands for too long, and even a wide degree of consultation may not entirely remove the possibility of personal prejudices.

664. In some countries a commission member must formally renounce any judicial aspirations. We do not see this as necessary, although we would expect it to be rare for a current member of the Appointments Committee to be appointed to judicial office. We would not, however, wish to rule out such a possibility; for example, if the Chief Justice were to leave office unexpectedly and a current Law Society appointee to the committee was a person who should obviously be considered. Nor would we wish to rule out a procedure whereby suitable names are put forward

to the committee. We see no reason why the Appointments Committee should consider only the appointment of High Court and District Court judges and masters. Provided the membership of the committee is suitable, it could consider all appointments of a judicial nature, including those required for statutory tribunals (where the appointee must hold legal qualifications). We suggest that the Minister in charge of the department in question should, wherever practicable, refer such appointments to the commission.

665. We consider a most important function of the Appointments Committee will be to ensure a good mix of appointees is obtained. We have in mind that women should be provided with completely equal opportunities for appointment; also that there should be no suggestion that people of particular ethnic origin have preference. In saying this, we do not suggest that other than the best candidates should be appointed. What is essential is that our society and our system of legal training should provide adequate opportunity for all types of people to enter the profession so that the committee is able to choose from appointees truly representative of our community. In so far as we can judge the emerging social trends, we consider it vital to establish a judiciary where both sexes and a wide cross-section of our ethnic community are represented.

666. ***Temporary appointments*** We devote a special section to temporary judicial appointments because they have been the source of considerable controversy and difficulty in the past. It is convenient to distinguish two types of temporary appointment:

(a) There is the "temporary" appointment of a High Court judge upon the basis that the appointment will duly become permanent. This practice has been followed from time to time when appointment of a permanent judge appears desirable but there is a full complement of judges in terms of the Judicature Act. Such an appointment is made permanent as soon as the number of judges falls below the maximum permitted by the Act. We recognise a constitutional issue is involved, in that it is important to have the maximum number of judges fixed by statute so there is no possibility of a Government appointing a large number of judges to "stack" the High Court Bench. Nevertheless, it is unsatisfactory that the constitutional requirement should result in a need for temporary appointments of judges who are to become permanent. This has been a source of criticism for many years, both from the judiciary and the profession. In our opinion, such appointments derogate from the office, may create the false impression with the public that the judge is appointed on a trial basis, and are inimical to the independence of the judiciary. We are of the view that every endeavour should be made to keep the permitted complement of judges, in terms of the Judicature Act, at a level sufficiently in excess of the existing Bench of judges to enable additional appointments to be made from time to time, without any need to have recourse to such temporary appointments.

(b) While it is recognised that there is need for limited power to appoint temporary High Court judges in emergency situations, we have received a number of submissions expressing concern at the way in which temporary appointments are presently made. This concern was particularly emphasised by the Auckland District Law Society (several recent temporary appointments having been made in an endeavour to deal with arrears of work in Auckland). Certain of the

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(b) While it is recognised that there is need for limited power to appoint temporary High Court judges in emergency situations, we have received a number of submissions expressing concern at the way in which temporary appointments are presently made. This concern was particularly emphasised by the Auckland District Law Society (several recent temporary appointments having been made in an endeavour to deal with arrears of work in Auckland). Certain of the

ideas and approaches. We are of the view that the appointment should be made by the Governor-General on the advice of the Attorney-General after recommendation by the Judicial Commission. If the Judicial Commission has not been formed, the first appointment would be made by the Attorney-General after consultation, particularly with District Court judges.

Recommendations

1. Qualifications for appointment as a Supreme Court or District Court judge should be seven years' practice as a barrister or solicitor of the Supreme Court of New Zealand.
2. The portion of s.6 of the Judicature Act 1908 relating to barristers or advocates of the United Kingdom should be repealed.
3. The present provision permitting a legally qualified person to be appointed to the Magistrates' Court after a period of court service should be retained in relation to the District Courts.
4. The Attorney-General should be the recommending authority for all judges other than the Chief Justice, whose appointment should be recommended by the Prime Minister.
5. An Appointments Committee of the Judicial Commission should be created with a membership of six. The six members would normally be: the Chief Justice as chairman, the Chief District Court Judge, two members appointed by the Government, such as the Solicitor-General and the Secretary for Justice, and two members nominated by the New Zealand Law Society and appointed by the Governor-General.
6. The Government should request the Judicial Commission to submit names for appointment of judges to the High Court and the District Courts. Where appropriate, all other appointments of a judicial nature should also be referred to the Appointments Committee of the Judicial Commission.
7. After retirement, judges should be eligible to serve as supernumary judges as recommended by the Judicial Commission.
8. Temporary appointments of judges should be reserved for truly emergency situations.
9. Judges of the District Courts should only be appointed to the High Court in exceptional circumstances.
10. Appointment of the Chief Justice should be offered to the person best equipped for the position either from the Bar or the Bench.
11. The Chief District Court Judge should normally be appointed from the existing District Court judges.

Conditions of Service

674. The importance of ensuring that judicial office will always be attractive to the best of the legal profession is obvious. A judge does not apply for appointment, nor does he negotiate the terms of his appointment. He is appointed by the State to fill an important public office and he should be entitled to take it for granted that Parliament will, from time to time, make adequate provision for his remuneration and pension. It has traditionally been regarded as unacceptable for a judge to participate either during or after his term of office, in commercial or mercantile pursuits. Non-contribution towards pension might be looked on as the State's recognition that specially qualified lawyers move into an arm of government which denies them any further alternative

employment. Both adequate remuneration and pension should be provided by Parliament; not simply in return for service rendered, but in recognition of the State's obligation to those who, at the invitation of the Government, leave the practice of their profession to hold judicial office until the prescribed retiring age. Bearing in mind the drop in income which frequently accompanies judicial appointment; the long-term prospect of financial security at a level commensurate with the judicial office, both before and after retirement, is an attraction which must be maintained, if the most suitable persons are to accept appointment.

675. Seventy years ago, the salary of a judge was nearly three times that of the most senior public servant. Today, the salary of a judge is fixed a little higher than, and in relation to, that of the Secretary to the Treasury. The magistrates' salaries since 1973 have been fixed at the same rates paid to Grade IV permanent heads of Government departments. Judicial salaries are exceeded by many incomes in the legal profession, commerce, trade, and industry. Relativity of salaries is obviously a complex and sometimes a delicate question. An important distinction between State servants and judges relates to the judge's early experience: top civil servants usually obtain their actual work training within the State services at State expense. They have the continuous support of similarly trained staff who share decision-making. A judge has years of private practice behind him, with minimal expense to the Crown: he has sole responsibility for his judgments which must be declared in public and are frequently scrutinised by the news media. As the Assistant Secretary to the Treasury said to us, "It is difficult to see the relationship between the salary of a judge and the salary of a Permanent Head". These factors should be remembered in establishing a judge's salary, as should the basic and vital need to attract men and women of highest calibre to the position of judge, both in the High Court and District Courts. We quote Sir Richard Wild:

> . . . over the past two years there have for the first time been distinct indications that worthy men are unwilling to accept judicial appointment because of the inadequacy of remuneration.

The New Zealand Law Society expressed a like concern, and noted that justice suffers when suitable members of the Bar are unwilling to accept judicial appointment because of the financial sacrifice involved. The problem is not confined to New Zealand. The British Prime Minister has recently stated that Lord Elwyn-Jones, the Lord Chancellor, had told him he would find it difficult to secure men of experience and mature judgment for vacancies on the High Court Bench if the recommendations of the Top Salaries Review Body, chaired by Lord Boyle of Handsworth, were not implemented in full.

676. The present salary of a Supreme Court judge is $31,648. By comparison, the salaries of judges in Queensland and New South Wales (August/September 1977) were:

	Salaries		Allowance		Percent of District Court to Supreme Court Judges	
	Qld $A	N.S.W. $A	Qld. $A	N.S.W. $A	Qld. %	N.S.W. %
Chief Justice	61,010	*	3,170	*		
Supreme Court judges ...	52,590	47,250	2,120	2,100		
Chief District Court judge...	48,390	42,525	3,170	2,100	92	90.0
District Court judge ...	46,290	39,030	...	2,100	88	82.6

* o information.

The Premier of Queensland received $A50,520. The salary of the Queensland Auditor-General was $A38,999. While these absolute rates have no direct meaning unless considered in relationship to the general scales of remuneration between Australia and New Zealand, they have some relevance as they bear on each other. In Queensland, a Supreme Court judge's salary is 35% more than that of the Auditor-General; and in New South Wales, the salary of a Supreme Court judge exceeds the average salary of permanent heads of Government departments, fixed by the Public Service Board, by 27%.

677. The Magistrates' Executive told the Commission they are deeply concerned that the present conditions of service fail to attract practitioners of sufficient calibre to fill long-standing vacancies on the Magistrates' Court Bench. These views were supported by the Hamilton District Law Society which said:

> . . . salaries are tied to the Civil Service Salary Scale and as a consequence have lost their relativity to earnings within the profession. Until this situation is remedied, we believe that efforts to up-grade the District Court to the level necessary, are doomed to failure.

Several members of the Bar also referred to this problem. Any lowering of standards in order to fill vacancies is unthinkable.

678. On accepting appointment to either Bench, a suitably qualified practitioner is likely to experience a substantial lowering in income, added to which may be the expense of moving to a new centre, changing residence, and transferring his children to new schools. He will inevitably weigh his own and his family's position should he take up the appointment as a judge or magistrate, against the lifestyle they currently enjoy. It was unusual in earlier decades for a man to be appointed to the Bench when he still had the responsibility of a young family: this is no longer so.

679. Expressions of widespread concern led the Commission to seek the advice of Mr D. H. Tudhope, a leader in industry with wide experience and interests in oil, chemicals, pastoral activities, insurance, and banking. His assessment of what would be an appropriate salary for members of the judiciary, compared with other leaders of the community, based on the assumption that only the best candidates are good enough for appointment to the Bench, was as follows:

> No business house could expect to "buy in" a new member for its management team at age 45 on such terms as are offered to judges unless his salary, pension, plus retirement gratuity package were made up to equality with others, bearing in mind that he had achieved his skills for the future from unconnected past performance . . . all appointees should be kept "whole" in their remuneration package compared with other leaders in the community . . . It is realised that in the past judges' salaries have been coupled to that of the most senior Treasury officials in the civil service, but this really is an anomaly ae such senior civil servants have the advantage of a full career plus full pension rights rather than the past career without which a judge could not perform his duties . . . The current salary of $30,590 paid to the judges is only a portion of the total package and certainly this is "light" by at least one third to the package of leaders on their initial appointment in the business world . . . Judges should receive a higher salary than that operating for the senior levels of the civil service by not less than one third rising to 50%.

Mr Tudhope confined his comments mainly to Supreme Court judges, but his observations would apply to magistrates. Indeed, he said, "Relativity of salaries between Supreme Court Judges and Magistrates would be maintained by pro-rata increases".

680. ***The future position*** The former Chief Justice, when speaking for the judges, said:

> It might well be better if salaries were removed from the straightjacket which surrounds the public service and accorded the flexibility that would follow if it were subject to determination by the Higher Salaries Commission.

This suggestion was supported by the Magistrates' Executive and by the New Zealand Law Society. The Higher Salaries Commission Act has since been amended to make this suggestion possible. We welcome the change.

681. According to the Secretary to the Treasury, the key criterion in deciding salaries and other conditions of service in any occupation is whether they are sufficient to attract and retain persons of suitable calibre. He also said:

> much less weight should be attached to other criteria which may be suggested from time to time, such as historical relativities with other particular occupations or groups.

We wholly accept these views of the Secretary to the Treasury, and commend all the above considerations to the Higher Salaries Commission, in their next review of judicial salaries.

682. ***Relativity between High Court and District Court judges*** As at 1 January 1978, the salary of a Supreme Court judge was 37.1% more than that of a magistrate. With the proposed raising of status of a magistrate to a District Court judge, and with the increased jurisdiction we propose for the District Courts, we consider that the differential should be reduced to 33⅓%, or, to put it another way, a District Court judge's salary should initially be 75% that of a High Court judge. This relativity may further alter when the new District Courts have achieved the full status and jurisdiction we propose for them.

683. There should also be a degree of relativity established between the salary of a District Court judge and the salaries of judges of other courts, such as the Arbitration Court, and members of statutory tribunals such as the Planning Tribunal, having regard to the nature of the work performed by such courts and tribunals. With the High Court having the power to review the decisions of other courts and statutory tribunals, the differential between the salary of those presiding in such jurisdictions and the salary of High Court judges should bear some relation to that between High Court and District Court judges.

684. Salary levels, however, are only part of the total remuneration package necessary to attract practitioners of the required intellectual capacity and experience to accept judicial appointment. In our opinion, the package should also include a retirement pension as well as an untaxed allowance for the cost of robes, books, and many other incidental expenses.

685. ***Age of retirement*** The statutory retirement age of 72 for judges is out of line with the generally accepted retirement age for most public offices, the civil service, and the business community. A judge has to serve for 20 years before becoming entitled to the maximum pension of two-thirds of his salary at date of retirement. Under the present

superannuation provisions, it is possible that a judge may remain in office when he can no longer competently perform his full share of the work in order to improve his superannuation entitlement. Earlier retirement would not only conform to the pattern in other walks of life but would be beneficial to the judge and the judicial system. Under the Magistrates' Courts Act 1947, a magistrate must retire at age 68 though there is provision for the Governor-General to remove him from office in certain circumstances before that age. The Magistrates' Executive told us:

> The general pace and pressure of work in the Magistrates' Courts has increased substantially in recent years and it is essential that a Magistrate be able to give of his best every hour of his judicial career. Concentration and standards cannot be relaxed at any time.
>
> The maintenance of a high standard of judicial determination until age 68 may, in some cases, become difficult.

686. We consider it is not in the public interest for a judge or magistrate to stay in office to preserve a right to a retiring allowance. Bearing in mind the lowering of the retiring age in the public service to age 60 for all those appointed after 1 August 1964, and the growing trend in the business community to lower retiring ages, we recommend that the normal retiring age for High Court and District Court judges should be 65, with appropriate provision for earlier or later retirement. We suggest that, with his consent, the retiring age of a judge may be extended beyond 65 on the recommendation of the Judicial Commission; such later age should then become his normal retiring age. Provision for early retirement should also be made for a judge who has reached 60 years of age or more and who has completed 15 years' service, provided that, where the service at the date of early retirement exceeds 15 years, the normal retiring age should be reduced to below 65. Judges and magistrates already in office, who were appointed with the expectation that they should continue until age 72 or 68 respectively, should receive special consideration to ensure that they are not disadvantaged or that they do not lose any existing rights without appropriate compensation.

687. ***Pension*** A pension scheme, non-contributory, and providing a retiring allowance for the judge, with an adequate payment on his death for his widow and dependant children, would be an attractive part of a remuneration package. It would compensate for any financial disruption to the judge's affairs on accepting office. The offer of judicial appointment may come without warning and, upon acceptance, immediately faces the legal practitioner with a major reconstruction of his financial affairs. The present superannuation allowance does not compensate for this upheaval, and in addition, that benefit has to be paid for at a high rate of contribution, substantially out of the tax-paid portion of a reduced income. The annual amount paid into the superannuation fund ranges from $2,000 approximately for a magistrate, to $2,500 for a Supreme Court judge. This is far in excess of the allowable deduction for income tax purposes and further reduces the real income of judges and magistrates. In addition, because of the unsatisfactory benefits available to judges' and magistrates' widows in the early years after appointment, if they are to protect their wives and families it becomes necessary for them to continue with heavy life insurance. The annual allowance for each dependant child is fixed at $78 per annum. This is less than the current allowance for a dependant child of a woman on the widows' benefit. Sir Richard Wild, in his memorandum to the Commission, has said:

This whole question is overdue for complete review: the Judges in New Zealand being in an infinitely worse position than their colleagues in Australia and the United Kingdom.

We were informed that until 1964 the judges belonged to a non-contributory scheme: a retirement allowance provided by the Government of the day for a judge's service. It was the same as in Australia and England.

688. The legislature, by carrying forward the non-contributory scheme of the Supreme Court Act 1882 into the Judicature Act 1908, and by improving it in the 1913 and 1920 Amendments, and repeating it in the Superannuation Amendment Act 1955, made a non-contributory pension part of the structure of the remuneration for judges. The judges contributed nothing towards their pensions but no provision was made for their widows. The principle that superannuation should be contributory for all Government employees was established in the early 1900s; by the Superannuation Act 1948, without any increase in contributions, the provision for widows of civil servants was introduced into the scheme. Widows were then allowed part of the contributor's pension, with a prescribed minimum. This substantial improvement, at no extra cost to the contributor, for the wives of civil servants was made without any provision for the wives of judges. When provision was made for the wives of judges in 1955, it was on an optional basis; the Superannuation Amendment Act 1964 made judges' contributions towards the superannuation fund mandatory as well as providing an annuity for the judge's widow. To avoid any suggestion that this mandatory contribution was unconstitutional on the grounds that it was tantamount to reducing the judges' salaries during their terms of office, it was coupled with an increase in salary of $700 per annum. If that increase had been given solely to cover the contributions, the judges would have been no worse off; this proposition was negated by granting the magistrates a proportionate increase in salary to preserve the relativity between the two Benches. The relativity in gross salaries was preserved, but as the judges' salaries were now reduced by an 8% contribution to the superannuation fund, the magistrates, whose pension had always been provided by contribution to the Government superannuation fund, were relatively better off.

689. It was submitted to us that the delay in extending provisions for widows into the judges' scheme was harsh treatment, and the manner of providing for their widows in 1964 amounted to a substantial downgrading of the remuneration structure of the Supreme Court Bench. No specific decision to withdraw the non-contributory benefit for the judge himself has ever been announced by the Government. It seems to have been assumed that contribution was introduced in the process of making provision for the widow of a judge. Under the present superannuation provisions for Supreme Court judges, a judge is not entitled to any retirement allowance at all, save on special medical grounds, unless he has served 10 years and has reached the age of 60. He must remain in office for 20 years to reach his full superannuation entitlement of two-thirds retiring salary. One of the most unsatisfactory features is that after 10 years' service, a judge is entitled to only six twenty-fourths salary by way of superannuation: four of the years do not count. By comparison, in Australia, a judge who has served 10 years and reached the age of 60 is entitled to retire on a 60% pension, with his widow being entitled to half of that. When calculated on the 1978 salary scale in New South Wales, this means that a judge would retire on about

$A30,000 per annum: in New Zealand, a judge of the same age and also having served 10 years in an equivalent jurisdiction, would retire on $7,900 per annum. The New Zealand judge would have made contributions while the Australian judges' scheme is non-contributory.

690. The superannuation allowance for a magistrate is based on one thirty-sixth of salary at the date of retirement for each year of service, with a maximum of two-thirds of retiring salary after 24 years' service. Few magistrates reach a full two-thirds pension: to do so, they would need to be appointed at age 44 and work until the maximum age of 68. We consider it should be possible for most judges and magistrates to reach a full pension upon completion of a shorter period of service. One judge told us:

> The pressure of judicial work is now such that judges should be able to retire on full superannuation after 15 years. The ability to retire after that period of time is as good for the system as it is for the judge. The system would then get the best of what the judge had to offer during the best 15 years of his judicial life and prevent him from getting into a position where he became predictable and set in his ways. It would also encourage the judge to retire when he felt he would like to do so rather than have him clinging to office when he was no longer able to bear his full stint of the work load solely because he was unable financially to retire.

691. We do not think that retiring allowances of judges and magistrates should be provided by a contributory superannuation scheme which fundamentally is designed to provide a benefit after a full career in the public service. It seems to us that there can be no effective actuarial basis for determining a contributory scheme because of the smallness of the group, the differing ages on appointment, the varying lengths of service, and the fact that most appointments are made late in the working life. We have been told that of the 25 judges who have left the Bench in the past 25 years, no fewer than 13 have died in office. Representatives of the Treasury stated:

> It is difficult to be very dogmatic about actuarial calculations in respect of Judges for the simple reason it is such a very small group . . .

692. In our opinion, a non-contributory pension scheme is both necessary and desirable. We recommend it should provide High Court and District Court judges with a basic benefit of a two-thirds pension at age 65, after not less than 15 years' service (reduced pro rata for fewer years of service, but with a minimum pension of 25%, and appropriate adjustment for earlier or later retirement). There should also be adequate provision for widows' benefits and allowances for children of deceased High Court and District Court judges. The widow's benefit in the case of a judge who dies after retiring at his normal retiring age, or in office, or following retirement due to total and permanent disablement (where the widow was his wife at the time of such normal retirement, death in office, or total and permanent disablement) should be a pension for life at half the rate of the judge's entitlement, provided, however, that the minimum pension to the widow should be not less than 15% of the judge's final salary. The entitlement of, or in respect of, a judge who dies in office or retires due to total and permanent disablement should be calculated as if the date of such an event was his normal retiring date (for example, a judge who dies in office at age 55 with 10 years' service would have an

entitlement of ten-fifteenths of a 66.66% pension from which his widow would be entitled to a pension of 22.22% of his salary at death). The allowance for each dependent child should be 1% of the judge's final salary. All the above pensions should be adjusted in relation to increases in the cost of living. We consider that where a judge is forced to retire because of ill health, the Judicial Commission should have the power to recommend to the Governor-General the level of pension required to compensate for the financial disruption caused by relinquishing a successful legal practice and taking up appointment.

693. We appreciate that on a change from a contributory to a non-contributory scheme, those who have contributed over a period of time may be thought unjustly treated by losing any right to capitalise part of their entitlement. The right to capitalise, which magistrates but not judges presently have, is, we believe, recognised by Treasury to be an anomaly unfair to judges. We think this anomaly should be removed. We consider that on a change from a contributory to a non-contributory scheme it would be desirable, in fairness to both judges and magistrates, to permit an appropriate degree of capitalisation. There is also the complication that the Government Superannuation Fund holds contributions from, and in respect of, existing judges and magistrates. It may be appropriate that such funds could be applied toward payment of the benefits proposed.

694. ***Provisions for earlier or later retirement*** Where a judge has completed 15 years of service and reached 60 years of age, provision should be made for him to retire on a two-thirds pension, payable from the normal retiring age of 65. If a judge wishes the pension to be made payable from a date earlier than his 65th birthday, it should be actuarially reduced. A further adjustment should be made where service at retirement prior to age 65 exceeds 15 years. This may be accomplished by reducing the "normal" retiring age of 65 years to a lower age by deducting one half-year for each half-year of completed service in excess of 15 years (but not so as to reduce the normal retiring age to below 60 years of age). For example:

Age at Appointment	Adjusted Retiring Age	Years of Service	Calculation of Adjusted Retiring Age
35	60	25	Nil
40	60	20	Nil
42	61	19	65 –(19–15)
44	62	18	65 –(18–15)
45	62½	17½	65 –(17½–15)
46	63	17	65 –(17–15)
48	64	16	65 –(16–15)
50	65	15	65 –(15–15)

The full two-thirds pension would be payable upon retiring at the adjusted age without any actuarial adjustment. However, should a judge retire with more than 15 years' service after reaching age 60, but before reaching his adjusted retiring age, the pension should be payable from the date of his adjusted retiring age and if required earlier, should be subject to actuarial adjustment (for example, a judge at 61 with 17 years' service would be entitled to a pension payable from the adjusted retiring age of 63). Where a judge has his term of office extended beyond 65, we see no need to increase the basic pension rate, except as such additional service may bring his total years of service towards, or up to, 15 years. To re-state

our general recommendation: provided he has completed 15 years' service, he should be entitled to a two-thirds pension on retirement (with a pro rata reduction for lesser periods of service, but with a minimum pension of not less than 25%).

695. ***Allowances*** A judge receives a tax-free allowance of $400 per annum to cover the cost of his judicial dress and robes, textbooks, periodicals, subscriptions, and donations. This has not been increased since 1974, but the price of legal textbooks, the cost of providing judicial dress and robes, and other expenses, continue to rise. In addition, we think a judge should receive an allowance towards the cost of running his car, entertainment (including when on circuit), Law Society functions, functions organized for official and overseas visitors, club subscription, conference expenses, and such like. Mr Tudhope in his report said:

> Bearing in mind status and standing in the community, (tax free allowances) should be at least $1,200 per annum with a higher figure actually being more appropriate.

696. We recommend that realistic allowances should be granted to both High Court and District Court judges. A percentage of salary, adjusted as between the two Benches, would provide an allowance which would be eligible for cost of living increases to the same extent as the judge's salary.

697. ***Provision for leave*** We consider that the current provisions concerning leave for judges and magistrates should remain unchanged in all respects. We consider these provisions are vital, given the nature of the work judges are expected to carry out.

698. In conclusion, taking into account the special responsibilities and conditions of judicial office, we recommend that a remuneration package should be provided made up of salary, allowances, and pension, sufficient to attract the required number of experienced and competent High Court and District Court judges to enable the courts to function efficiently.

Recommendations

1. We invite the Higher Salaries Commission to ensure that the remuneration of judges, made up of salary, allowances, and pension, should be sufficient to attract the required number of suitable High Court and District Court judges to enable the courts to function efficiently.
2. A District Court judge's salary should be 75% that of a High Court judge.
3. The salaries of judges of other courts and of the members of statutory tribunals should be related to the salaries of High Court and District Court judges.
4. The normal retiring age for High Court and District Court judges should be reduced to 65 with appropriate provision for earlier or later retirement.
5. A non-contributory pension scheme should provide High Court and District Court judges with a retiring benefit of a two-thirds pension at age 65, with not less than 15 years' service (reduced pro rata for fewer years of service but with a minimum pension of 25%).
6. The retiring age of a judge, with his consent, may be extended beyond 65 on the recommendation of the Judicial Commission: provided he has completed 15 years' service, he should be entitled to a two-thirds pension with pro rata reduction for lesser periods of service, with a minimum pension of not less than 25%.

7. A judge who has reached 60 years of age or more and who has completed 15 years' service should be entitled to retire on a two-thirds pension payable from the normal retiring age of 65, with appropriate adjustments, from an earlier date.

8. Judges or magistrates already in office should not be disadvantaged or lose any existing rights by the lowering of the retiring age to 65.

9. The widow's benefit in the case of a judge who dies after retiring at his normal retiring age, or in office, or following retirement due to total and permanent disablement, should be a pension for life at half the pension entitlement applicable to the judge but with a minimum pension of not less than 15% of the judge's final salary.

10. The allowance for each dependant child should be 1% of the judge's final salary.

11. Where a judge is forced to retire because of ill health, the Judicial Commission should have power to recommend to the Governor-General the level of pension to be paid.

12. All pensions should be adjusted in relation to increases in the cost of living.

13. A tax free allowance should be granted to High Court and District Court judges to cover the cost of judicial dress and robes, entertainment, textbooks, periodicals, subscriptions, donations, and car expenses.

Number and Allocation of Judges

699. Item 3 (c) of the terms of reference reads as follows:

> The manner in which the number of judicial officers required to dispose of the business of the various Courts and divisions is determined, the manner in which those officers are allocated to the various places where sittings of the Courts are held, and what person or body should perform this function.

Section 4 (1) of the Judicature Act 1908 determines the number of judges of the Supreme Court including those appointed to the Court of Appeal. Section 5 (2) of the Magistrates' Courts Act 1947 fixes the number of stipendiary magistrates. Increases to these numbers are made by the Government on the advice of the Solicitor-General, for judges, and the Secretary for Justice, for magistrates. In practice, these recommendations are often preceded by representations from the Chief Justice, or magistrates, or the New Zealand Law Society, or District Law Societies. If appointment of a Chief District Court Judge is approved, he might be expected to represent the viewpoint of his judges.

700. We suggest that the Judicial Commission would be the appropriate body to make any recommendation for increases in the number of judges to the Government, in the person of the Attorney-General. (The Solicitor-General and the Secretary for Justice will both have a voice on the Judicial Commission.)

701. The Government, through the Minister of Justice, has ultimate responsibility for the provision of court resources, and we accept that the final decision where courts are to sit must rest with the Government. We would hope, however, that any decision would be assisted by representations from the Judicial Commission.

702. The third question raised in the term of reference relates to the manner in which judges are allocated to the places where court sittings are held. Two decisions are involved. The first is whether a place designated as a court should be served by a resident judge or by a judge on circuit

from another place. At present the Chief Justice makes this decision for the Supreme Court; and the Minister of Justice, pursuant to s.9 (1) of the Magistrates' Courts Act 1947, decides for the Magistrates' Courts. If our proposal for appointing a Chief District Court Judge is accepted, for reasons of uniformity, he might be expected to make this decision for the District Courts. However, bearing in mind the necessity for judicial independence and the public interest as represented by the Executive, we think the Judicial Commission should decide whether a particular court should be presided over by a resident High Court or District Court judge as the case may be, or by a judge on circuit. In this way the wishes of the Government will be expressed by the Secretary for Justice and the Solicitor-General; the judges of both Benches will be represented; and the New Zealand Law Society can put its view. The second decision, which follows the first, concerns the allocation of individual judges to the places where the sittings of the court are held. Because this decision may affect the discharge of the adjudicative function, it can only be made by the judiciary. We therefore recommend that the allocation of individual judges to particular courts should be the responsibility of the Chief Justice in the case of the High Court, and the Chief District Court Judge in the District Courts. Under the section dealing with administration we recommend the appointment of list judges who will assign judges to cases, in co-operation with the regional administrators and court registrars.

Recommendations

1. The Judicial Commission should hear representations and advise the Government, through the Attorney-General, as to the number of judges.
2. The Government, through the Attorney-General, should decide the maximum number of judges for the District Courts, and for the Supreme Court.
3. The Government, through the Attorney-General, should decide where court sittings are to be held, after hearing representations from the Judicial Commission.
4. The Judicial Commission should be responsible for deciding whether a court is presided over by a resident judge or by a judge on circuit, for both the High Court and the District Court.
5. The Chief Justice should be responsible for assigning individual judges to preside in the High Court. The Chief District Court Judge should be responsible for assigning individual judges to preside in the District Courts.

Power to Investigate Conduct of Judges

703. Term 3 (e) of our terms of reference reads as follows:

> Whether, and if so in what circumstances, there should be a power to investigate the conduct of judicial officers and, if so, what person or body should exercise that power and in what manner.

In considering the issues raised by this term of reference it is helpful to repeat the existing statutory provisions relating to the power of removal:

(a) *Judges of the Supreme Court* The commissions of the Chief Justice and other judges continue during good behaviour: s.7 Judicature Act 1908. Any judge may be removed from office and have his commission revoked upon the address of Parliament: s.8. If

Parliament is not sitting, the Governor-General may suspend any judge from office until the conclusion of the next ensuing session: s.9.

(b) *Stipendiary Magistrates* A magistrate may be removed by the Governor-General for inability or misbehaviour: s.7 Magistrates' Courts Act 1947.

We understand the distinction in procedure is an historical one and follows the English legislation which distinguishes between judges of the High Court and County Court judges.

704. ***Removal of judges of the High and District Courts*** As the Secretary for Justice pointed out in his submissions, the provisions for removal of judges by the Legislature were devised as a protection against the power of the Executive at a time when the judges and Parliament were in alliance against what they saw as the encroachment of the Royal prerogative. Constitutional changes since the 17th century, particularly the development whereby, for practical purposes and in ordinary circumstances, the Executive has control of the Legislature, may have weakened the constitutional protection. Moreover, in the case of magistrates, even the safeguard of the intervention of the Legislature is absent. In order to ensure independence of the judiciary, it was suggested to us that formal rules should be laid down to establish the grounds or principles upon which a judge may be removed. This was seen as desirable even though, for at least the last 60 years, the possibility of removing a Supreme Court judge has not been in issue. The possibility, though unlikely, must be recognised, even if only on grounds of infirmity.

705. We think the problems and uncertainties relating to removal of judges are well discussed in "Judges on Trial", Shimon Shetreet (1976) at pages 404 et seq. Although his conclusions are directed to the English situation, we agree that the law and custom relating to removal of judges "is frequently uncertain and involves many controversial issues"; that it is unlikely the issues will be resolved in judicial decisions; and that it is desirable to resolve them by a comprehensive statute. We consider the statute should provide for removal only, and **not** for discipline short of removal (for reasons to which we later refer). This statute should effectively provide for, indeed, enhance, the principle of judicial independence; it should adequately protect a judge's right to be heard in his own defence; it might possibly provide for some appeal or review of any decision to remove a judge. The provisions of the Canadian Judges Act of 1971 (which we produce as Appendix 2) might be of assistance to any draftsman of this legislation. We stress our opinion that the principle of judicial independence lies at the heart of any such legislation. The Canadian Judges Act provides that certain judges themselves form the council which considers any question of removal. We see this as desirable. Wherever we refer to judges in the foregoing, we necessarily include masters.

706. ***Investigation of the conduct of judges (short of removal)*** In considering proposals for investigation of misconduct not sufficiently grave to justify removal, our starting point was again that any changes must not derogate from the principle of judicial independence. It is universally recognised that any procedure for enquiring into judicial conduct raises difficult and sensitive issues. All the judges and magistrates who made reference to this aspect of our terms of reference were opposed to introduction of formal procedures or a constituted body for investigation of the conduct of the judiciary. In a submission directed to

the independence of the courts, a Supreme Court judge made certain observations which a number of the other judges indicated as having their entire support. The judge stated:

> In this country where the number of judges is limited, no need has been demonstrated for such a body and the setting up of such a body now would be entirely unwarranted. The establishment of such a body would threaten the independence of the judiciary and erode an independence which extends as far back as 1701. It would make judges subject to complaints by all manner of malcontents. Inevitably, a judge has on occasions to say things and make findings which offend those against whom they are made. A judge may often not be able to find in favour of one party without finding on some issue of credibility against the other. A judge in passing sentence may have to pass strictures on the convicted person or his associates or his family. If what he says is to be the subject of complaint, a Judge's life may well become intolerable, and few persons may be expected to leave the independence of the Bar to accept the risks of judicial office. The best way in which the actions of judges can be disciplined is by the courts remaining open to the news media and to the public. As Lord Atkin said in *Ambard v. Attorney General for Trinidad and Tobago* [1936] A.C. 322 and 325:
>
> > Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.
>
> Today, 40 years on from the time when those remarks were made, one might add and "disrespectful" . . .

We recognise the validity of such comments, both in principle and in relation to practical problems. We accept the necessity of protecting judges from any form of unwarranted complaint: some unsuccessful litigants seek a scapegoat and may be inclined to blame anyone but the right person. We also recognise that judges appointed under our system are in a completely different position from judges appointed under an electoral system.

707. In our view, the principal problem at present concerning complaints of judicial misconduct is the difficulty of complaining about relatively minor events, which nevertheless raise important issues. A complaint in such circumstances could have disproportionate effects. We consider that the difficulty of doing anything effective in such cases (without being compelled to make the issue into something much greater than it should have been) has resulted in a degree of public concern. Although complaints about members of the judiciary are from time to time made to District Law Societies, neither the profession nor the public is necessarily aware that this course is open to them, or that it may lead to any positive steps being taken by a Law Society. Indeed, it is probable that Law Societies are relatively slow to act in such matters, and are then uncertain of what action should be taken. When grievances are not remedied, the likelihood is that they are ventilated to friends and neighbours, to the detriment of the system.

708. The Secretary for Justice informed us that his department does from time to time receive what appear to be genuine complaints about behaviour of members of the judiciary, although these have in the main related to the magistracy. He pointed out that no satisfactory answer can now be given to the complainant, even where the number of complaints, or the facts as known, suggest the grievance may be well based. In his

view, the administration of justice, and still more its image, suffer accordingly. Specifically in relation to magistrates, the Secretary for Justice has indicated that there have been several cases over the last 25 years where the ability or the conduct of the magistrate has been the subject of responsible and repeated criticism.

709. In the light of the above matters, and bearing in mind that we live in an age when many institutions and their value are subject to questioning and criticism, we concluded that we must give most careful consideration to adoption of a definite, formal procedure for dealing with complaints, even if such a procedure was primarily to serve as a safety valve. We approached our consideration of the problem on the basis that any proposed procedure must enhance the principle of judicial independence and ensure an effective mechanism for screening unjustified complaints. In considering appropriate procedures, we rejected any notion of an ombudsman as the person to consider matters relating to judicial conduct. We record our indebtedness to the Chief Ombudsman who made very helpful submissions to us. He pointed out that the Ombudsmen Act 1975 may be invoked for investigation of the conduct of officers and employees in the Department of Justice (or other departments). Since 1962, the ombudsman has exercised a wide jurisdiction to investigate administrative faults and errors. We refer in more detail to this jurisdiction in the section dealing with administration of the courts. The Legislature, however, has been most cautious concerning any extension of the ombudsman's powers which would involve the ombudsman in matters already within the jurisdiction of the courts. The Chief Ombudsman indicated that he would not advocate any change in this basic approach; we agree with his opinion. Although ombudsmen in Sweden and Finland, for example, have jurisdiction over the judiciary, it is now seldom exercised. We do not consider such jurisdiction to be appropriate in the New Zealand context, where our history and constitutional development are so different.

710. Two specific proposals were made to us, one by the New Zealand Law Society, and one by the Secretary for Justice. The New Zealand Law Society submitted that the Society had a role in relation to complaints concerning judicial conduct, but that this role should be narrowly defined. It was suggested the Society should be prepared to receive and screen complaints against members of the judiciary, and where thought appropriate, to bring the complaint to the attention of a suitable committee, which would have power to deal with the matter in a number of ways (not necessarily through imposition of any heavy sanction).

711. The Secretary for Justice put forward an alternative and more detailed proposal:

> The introduction of procedures for receiving and considering complaints about judicial officers must obviously be done with great care and circumspection. They should be limited in scope so that where normal court procedures by way of appeal or review provide an adequate remedy they should be used. They should be capable of screening out the merely disgruntled or malicious complaint. They should be formulated in such a way as not to interfere with the impartial and fearless approach to decision making which is required of judges. There should be no suggestion that the judiciary is under supervision. Nor should any procedures limit the law that gives protection or indemnification to judicial officers.

The Secretary for Justice drew attention to Canadian law, in particular, the Judges Act of 1971 (to which we have previously referred). This Act established a Canadian Judicial Council, one of the council's functions being to deal with complaints and allegations concerning the conduct of federal judges. The council is composed entirely of judges and has a two-fold function: it is required to commence an enquiry on whether a judge should be removed from office, if the Federal Minister of Justice or any provincial Attorney General requests it to do so; and the council is further authorised to investigate and report upon any complaint or allegation made in respect of a judge. In relation to the work of the Canadian Judicial Council, the Secretary for Justice referred us to an extract from a paper, prepared by the Government of Canada, and presented at the meeting of Commonwealth Law Ministers in 1977. In referring to the provision for enquiry by the Judicial Council this paper said:

> The change in procedures for dealing with matters of judicial conduct has been very salutary. It has removed the executive Government from direct involvement in such cases except until such time as it has a report from the Council which indicates the need for use of the ultimate sanctions of the Government or Parliament. At the same time it has brought the judiciary very directly into the process of judicial self discipline which is so essential to preserving its integrity and independence. The Council has recognised the onus that this responsibility entails. It must investigate fairly any complaint it receives so as to avoid any appearance of seeking to protect a member of the judiciary from legitimate complaints. At the same time it must protect a Judge from unfair criticism and ensure his individual independence as a Judge. In sum it has brought about a far healthier relationship between the judiciary and the executive Government in matters of judicial conduct.

712. The Secretary for Justice suggested that a Judicial Commission would be an appropriate body to exercise jurisdiction in New Zealand concerning complaints against judges. His proposal was that the Chief Justice should act as chairman of the commission: if he was of the opinion that any complaint concerning conduct of a judge of the High Court or the Court of Appeal might have substance, or if it appeared to him that the ability of any judge to carry out the duties of his office might be impaired, he would refer the matter to the Judicial Commission, consisting for that purpose of any three members of the Privy Council residing in New Zealand who hold, or have held, judicial office. Likewise, complaints of inability or misbehaviour made against a District Court judge should be referred by the Chief Judge to the commission, comprising for this purpose the Chief Justice, the senior puisne judge (or some other judge designated by the Chief Justice), and the Chief District Court Judge. Where any such matter was so referred, it should then be investigated, and a report made to the Chief Justice or the Chief District Court Judge respectively. Any action taken upon such complaint, and any recommendation, might be reported to the Attorney-General. In the case of a complaint against the Chief Justice himself, it would be appropriate for the initial enquiry to be carried out by the President of the Court of Appeal.

713. As will be seen, the proposal made by the Secretary for Justice covers both removal and discipline short of removal. We have previously dealt with the issues concerning removal. In relation to complaints

relating to conduct not justifying removal, the proposal has the attraction of preserving a relatively informal approach. Having given this proposal considerable thought, we finally reached the conclusion that serious objections are possible. As we view the matter, the proposal might not improve upon the present informal system, and lacks the safeguards of a formal system. By way of example we mention:

(a) The proposal does not provide any adequate screening mechanism. If there is not some way of filtering out unwarranted complaints we think it possible that the Chief Justice would be required to consider a large number of unjustified or irrelevant complaints. The sole purpose of a complaints procedure in relation to judicial conduct is to provide the opportunity for genuine complaints concerning misconduct on the part of judicial officers to be reviewed by a suitable person or body. It is essential to exclude from such complaints, any which are merely attempts by dissatisfied litigants to obtain a further review of the case, or to vent upon the judge their dissatisfaction with the decision.

(b) The proposal does not provide any right for the judge about whom the complaint is made, to have his viewpoint put forward and to be heard in his own defence. No doubt the three Privy Councillors would be scrupulous in ensuring that this was done, but we think it would be a very great departure from normal principles to place a judge in a position where he could have his conduct adversely reported upon, without having any formal and specific right to be heard, and without any right of appeal or review. There could be a risk of real injustice, whatever the calibre of the review committee.

(c) The proposal does not greatly advance the position from that which at present pertains: for practical purposes, the avenue of approach usually taken in the past in relation to complaints has been for the Chief Justice or the senior magistrate in the area, or, on occasions, a retired judge, to investigate the matter, and if necessary discuss the complaint with the judge or magistrate concerned and, again if necessary, report to the Minister of Justice. We doubt whether the embellishments suggested by the Secretary for Justice would result in any substantial change.

714. In the light of the above, we reached the conclusion that an attempt to refine the present informal system of dealing with complaints is not desirable and that the alternatives are either to leave the present situation unchanged (subject to two recommendations which we later mention), or to embark on a formal procedure in which the rights of the judges and the rights of the public are clearly defined. We do not consider that present evidence justifies the introduction of formal procedures. The principal difficulty with the current system is lack of public knowledge of the way in which a complaint considered justified can be brought forward. We propose to make a recommendation designed to remedy this. Should our recommendation prove inadequate, and should it become apparent that a formal procedure is necessary, we consider the most appropriate procedure is an investigatory one with satisfactory safeguards along the lines of the Canadian legislation.

715. The first recommendation which we make concerns the need for a publicly known procedure through which justified complaints can be brought forward. The problem, as we have already mentioned, is the need to eliminate any unjustified complaint from consideration. We consider it

would be appropriate for all complaints to be referred initially to the Secretary of the Judicial Commission. The complainant would be required to make the complaint in writing and any complaint which did not relate to misconduct would be rejected by the Secretary. This, at least in some cases, might be an onerous task because complaints may have a semblance of justification even when they come from people whose views are warped or wrong. Where the complaint appeared to have justification, the Secretary would refer the matter to the President of the Court of Appeal, if the complaint concerned the Chief Justice; the Chief Justice, if the complaint concerned a judge of the High Court or the Court of Appeal, or a master; and the Chief District Court Judge, if the complaint concerned a District Court judge. A similar system could be evolved for complaints regarding chairmen of other tribunals. We consider this procedure would ensure a definite and known avenue through which complaints could be channelled, without in any way impinging upon the independence of the judiciary. It would allow the present informal procedures to continue to operate. In this connection, we have noted that even in countries with formal procedures, informal methods are frequently pursued to deal with complaints (Shetreet, "Judges on Trial" at p.415).

716. We make a second recommendation which, we believe, would be of particular value. We consider that the Judicial Commission should have power to recommend that a judge should be permitted to have a period of leave of absence on his full salary, and to retire on a full or partial pension, even if he has not served for the requisite period to enable such a pension to be granted. In relation to retirement, there have possibly been occasions in the past when a judge or magistrate has remained on the Bench for longer than desirable in order to ensure that he obtained appropriate pension rights. We have in mind that on future rare occasions there may be judges who should retire for reasons of ill health but whose financial circumstances render this impossible without payment of a higher pension than their strict entitlement. Such circumstances would usually, but not necessarily, happen towards the end of a judge's career. Ill health would include any form of mental impairment. We mention, in relation to this proposal, that a similar result would be partially achieved on acceptance of our recommendation elsewhere in this report for shortening the period of service before the attainment of full pension rights.

717. In sum: we consider that a formal procedure for dealing with judicial conduct (short of dismissal) should only be considered if there is clear evidence it is essential. If a formal procedure is to be introduced, it appears to us that the Canadian provision is the most satisfactory. Even then, we would wish to see enquiries made concerning the way in which the Canadian provision relating to investigation and report (as distinct from removal) has worked in practice.

718. Finally, we mention the question of judicial immunity. As we earlier noted (paragraph 123), Supreme Court judges are exempt from all civil liability for acts done by them in the exercise of their judicial functions, even if they act corruptly, maliciously, oppresively, or without jurisdiction *(Thompson v. Richardson* [1925] N.Z.L.R. 749, *Nakhla v. McCarthy* [1978] 1 N.Z.L.R. 291, *Sirros v. Moore and Others* [1975] Q.B. 118). Magistrates have a more limited protection (paragraph 127) and it is appropriate to consider whether in the light of any new status and responsibility as District Court judges they should be granted the degree of immunity thought appropriate by Lord Denning in *Sirros v. Moore and*

Others (supra); that is, that they should be protected against all personal actions for damages when acting judicially in the bona fide exercise of their office, even where they may be mistaken in fact or ignorant in law. In this connection, we have been told that the present limitations regarding indemnity are of some concern to our magistrates.

719. We have concluded that it would be both in the public interest, and in the interests of District Court judges, if they were granted a complete right of indemnity (but not immunity) without the need to seek a certificate from a High Court judge. We therefore recommend that s.197 of the Summary Proceedings Act 1957 should be amended accordingly.

Recommendations

1. The law and custom relating to the removal of judges should be embodied in a comprehensive statute; such statute should provide for removal only, and fully protect the principle of judicial independence.
2. All complaints concerning the conduct of judges (short of removal) should be made in writing and referred to the Secretary of the Judicial Commission.
3. Complaints which might be justified should be referred by the Secretary of the Judicial Commission to the Chief Justice, the President of the Court of Appeal, or the Chief District Court Judge as appropriate.
4. The Judicial Commission should have power to recommend to the Governor-General that a judge should be permitted to have a period of leave of absence on full salary, and to retire on full or partial pension, even if he has not served for the period requisite to enable such a pension to be granted.
5. Section 197 of the Summary Proceedings Act 1957 should be amended to dispense with the requirement for a certificate from a High Court judge as a prerequisite to indemnity.

Conferences and Refresher Courses

720. Item 3(j) of our terms of reference reads as follows:

> Whether it is desirable to hold conferences and refresher courses for judicial officers of the various courts and divisions and, if so, the nature and extent of such courses.

721. ***The present position in New Zealand*** By convention, judges and magistrates are presumed to know the law, but the law is constantly changing. The task of keeping up with these changes is time-consuming. Every two or three years since 1949, the magistrates have met to consider domestic matters such as their working conditions and the organisation of the courts, and on occasions to make recommendations to the Government on amendments to laws which they consider are not working properly. Whenever a number of judges gather on such occasions as law conferences, they will usually arrange an informal meeting among themselves. In recent years the Chief Justice has organised conferences for the judges in which a wide variety of topics are discussed. Such conferences are sometimes arranged to coincide with the magistrates' meetings and are often followed by a joint seminar on sentencing.

722. On appointment, judges are given a booklet containing information on sentences imposed by judges in recent years. The Department of Justice keeps that information up-to-date. The new judge or magistrate equips himself as best he can by means of self tuition and informal discussions with his colleagues. The extent of information

required naturally varies according to the appointee's experience in practice. Inter-disciplinary contacts on a formal basis are virtually non-existent and occur usually on social occasions, at ad hoc conferences or seminars, or by virtue of membership of such bodies as the Prisons Parole Board. Indeed, the judicial members of that board attach much value to its educative function. We also mention the system of publication of recent cases. All Supreme Court judgments considered by their authors to be of significance are sent to Butterworths, the legal publishers. Catchlines of decisions prepared by the judges' clerks are also sent to all judges. On the basis of the cases and catchlines received by Butterworths, the "New Zealand Law Reports", "Current Law", "Recent Law", and the "National Business Review" case reports are published. Copies of judgments received are sent by Butterworths to a Wellington magistrate who then sends copies of the decisions relevant to the Magistrates' Courts to each Magistrate's Court centre.

723. ***Suggestions for the future*** Schemes which aim to provide information for judges must be distinguished from training programmes which exist in some continental jurisdictions with career judiciaries. In surveying the main criticisms of its consultative working paper, the (United Kingdom) Working Party on Judicial Training and Information* commented:

> It is said that "training" implies that there are "trainers" who can train people to be judges, and so long as this concept is capable of influencing the thought of those concerned with the provision of "judicial training" this must, despite all protestations to the contrary, represent a threat of judicial independence; that those of the stature and experience to fit them for appointment as judges will resent the implication that they need to be "trained"; and moreover, that the public image of the judge must be impaired if the public are told that he is required to undergo a period of "training" on appointment.

We believe an informed judge is likely to be a better judge, particularly where sentencing is concerned. There are, however, many other areas where information is needed. By way of example, we mention that District Court judges who are selected to sit with juries may welcome some assistance, especially with techniques for presiding over a jury trial and summing up to a jury. We envisage that this assistance could be arranged on a regional basis, organised locally, but under the supervision of the Judicial Commission.

724. Because of limited resources and the relatively small size of our judiciary, much reliance will continue to be placed on the accumulation of experience and individual self-tuition. The need to ensure that judges have the time and the resources to keep abreast of developments in the law and related subjects is thus apparent. Self-tuition and experience always have been, and no doubt always will be, the main sources of judicial learning and aptitude. However, they are not adequate for all purposes and, where practicable, should be supplemented.

725. We received few submissions under this term of reference, but three matters were readily discernible. First, the organisation of any judicial study programme should primarily be the responsibility of the judiciary. The Secretary for Justice commented:

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*Home Office, 1976.

> I do not envisage that the responsibility for developing any such programme to be that of the Department of Justice. The department may be able to give practical help in providing facilities and services, but the development and management of any programme ought not to be handled by a branch of the Executive Government. The area might be one over which the Judicial Commission we propose could exercise some oversight.

Secondly, some concern has been voiced over real or apparent inconsistencies in practice and procedure between different judges and magistrates. In particular, there is criticism of different sentences imposed for the same or similar offences. We were told that in large part such criticism is founded upon incomplete reporting which fails to mention the characteristics of the particular offence or offender that distinguish the case from others in the same general category. We favour regular sentencing conferences. Sentencing exercises are not just a search for an appropriate penalty, but are useful in helping participants to identify the relevant facts, and the weight that should be placed on each in arriving at an appropriate sentence. Such exercises might usefully be combined with a discussion as to the value of probation reports and the manner in which they are prepared, the theory, range, and legal basis of sentencing, and related matters. There is considerable scope for the participation of others involved in the sentencing process and the penal system in such an exercise. Thirdly, in a multi-ethnic society, and with a disproportionate number of offenders coming from particular ethnic groups, it is important that judges are aware of the limitations of their own cultural backgrounds. If the judge is ignorant of the cultural background and expectations of those whom he sentences, he is unlikely to achieve his own expectations from the sentences he imposes. What may then be in jeopardy is public confidence in the courts and justice itself.

726. In our recommendations which follow, we have been particularly helped by reference to the findings of the working party in the United Kingdom and discussions with its chairman, the Rt. Hon. Lord Justice Bridge. In August 1976 the working party produced a consultative working paper. Although we have not seen the final report, we have read the draft of a chapter which deals with the main criticisms of the working paper. The working party concluded that existing courses for judges were inadequate. It particularly suggested a three to four week course for those judges who had no previous sentencing experience. It considered that the course should include sentencing law in practice, penal theory, information for sentencing, practical implementation of sentences, and criminology. The working party did, however, observe that it was essential that the programme must not appear to threaten or undermine the independence of the judiciary. We do not think the programme we suggest would in any way represent a form of indoctrination.

727. We have observed as well that the Canadian Judicial Council is enjoined by its constituting statute to establish periodic conferences of (provincial) Chief Justices and seminars for the continuing education of judges. We understand that the Canadian Judicial Council has developed a programme of three-day seminars for newly appointed judges.

728. Because the background of knowledge and experience which they bring to their office varies greatly, and because of the relatively few judicial appointments that are made in any one year, we do not think that formal courses for new appointees to the Bench are practicable in this country. We therefore believe that provision should be made for

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individual study programmes tailored to the needs of the particular judge. We consider that a period of at least two weeks should be set aside after appointment, to enable a judge to familiarise himself with the nature of the judicial function. Subjects might include judicial ethics, the conduct of civil and criminal trials, sentencing, chambers practice, pre-trial procedure, the conduct of family law proceedings, directions to juries, and other matters. In any event, such a course should include cultural differences as they affect the court process. It would be desirable for new appointees to the District Courts to spend at least one month attached to a larger court where the new appointee could acquire the day-to-day knowledge of routines and procedure with the assistance of experienced judges of those courts. Although the Judicial Commission should have overall responsibility for judicial study programmes, we think that the specific content of an individual's programme is a matter best left for the new judge and the Chief Justice, or Chief District Court Judge, or Senior Family Court Judge, as the case may be, to work out. Obviously, discussions with experienced judges and others involved in the court system and visits to prisons, periodic detention centres, and other penal institutions would be valuable. Time should also be allowed for the judge to bring himself up to date with those areas of the substantive law with which he may have had little experience in practice. Judges should be capable of rapid self-education.

729. We believe there is a continuing need for the provision of information to judges, and that this might best be achieved by bringing together members of the judiciary for regular conferences. This would enable judges to be brought up to date with developments in, and related to, their field; and would enable an exchange of views among those who serve in the courts. The overall responsibility for judicial conferences should, in our opinion, repose in the Judicial Commission. It may not be possible for the commission to undertake the practical organisation of judicial conferences, but it would obviously formulate policy and determine the general content of the conferences. It may also be desirable to involve persons with experience in educational methods, particularly relating to the needs of highly educated and responsible professional people. The universities are well equipped from the point of view of general educational experience and in the development of appropriate subject matter to assist with such programmes.

730. Because it is desirable that conferences should be held regularly, and because of the difficulty of holding a conference attended by all or most of the judges, we suggest that such conferences could be organised on both a regional and national basis. One advantage of regional conferences, particularly where participation is not limited to members of the judiciary, is that contacts made have a continuing value. We would envisage conferences taking several days, which would allow informal but often valuable discussions outside the working period and greater flexibility in arranging the programme.

731. A national conference, attended by a reasonable proportion of the judiciary, should be held annually. Not every judge would be expected to attend each year. Like the regional conferences, we see the benefits as enabling the judiciary to keep up to date and in promoting an exchange of views. Such conferences would also help to achieve a greater consistency in practice and procedure and provide an opportunity for the administration and performance of the courts to be analysed. In conformance with our earlier recommendation that the courts should

adopt principles of modern court management, we believe that the individual experiences of the judges in running the courts could, with advantage, be combined and shared at the national conference. The participation of court administrators should also be sought in planning the proceedings and in taking part in the proceedings themselves. Others concerned with the courts and the penal system, such as social workers, the police, prison officers, psychiatrists, and criminologists could also be involved.

Recommendations

1. The Judicial Commission should be responsible for schemes whereby new appointees to the Bench receive assistance and advice concerning all aspects of the judicial function, particularly sentencing and cultural differences.
2. All judges should visit penal institutions soon after their appointment and from time to time thereafter.
3. The Judicial Commission should arrange regular regional and national conferences of judges of the High Court and the District Courts to consider and discuss problems common to the exercise of judicial responsibilities. At such conferences there should be sentencing exercises and involvement of experts in various fields.
4. The Judicial Commission should devise ways and means of ensuring that information about comparative sentences and other useful reports are circulated to all judges.

Judges' Associates

732. The judge's associate has a dual role. She performs the duties of private secretary, with the requisite high standard of stenographic skills, as well as being personal assistant to the judge to give him maximum relief from all avoidable matters of detail and routine. By contrast, in Australia, the judge is assisted by a team of people in and out of court comprising his associate, who performs the duties of private secretary and acts as clerk of the court where her judge is presiding; his tipstaff, who precedes him into court and acts as messenger; four court reporters and three typists, when a running transcription of the evidence is required. In New Zealand, the associate is responsible for a completely accurate record of the evidence in the Supreme Court. She also records in shorthand (sometimes backed by a tape recorder) the judge's oral judgments, sentences, and summings-up. Unlike Hansard reporters or court reporters in other countries, no provision is made to "spell" the associates, who have to concentrate on the proceedings and maintain a fast typing speed for hours on end. Such duties impose a strain on the physical and mental resources of the associate and require that she has the best equipment and conditions to carry out this important task. Several judges, when speaking to the Commission, stressed that the onerous nature of the work of associates demanded better pay, conditions, and equipment.

733. ***Conditions of service*** The position of judge's associate was formerly carried out by law students as a "stepping stone" in the career of the young lawyer, but since the beginning of World War II these positions have been held by women. With growing pressure of work in the Supreme Court, the position has become most demanding: despite the importance of the work performed, this position is not accorded the recognition it deserves. One judge expressed the view that lay people would not

appreciate the extent to which the judge relies on his associate or the tremendously difficult life they have. When the salary of judges' associates was determined six years ago it was equated with that of a supervising shorthand typist in the public service. An inspection of the position description of associate to a judge of the Supreme Court, prepared for this Commission, shows that as well as being private secretary, recording evidence in court with complete accuracy for immediate use, and typing judgments, the associate accompanies the judge on circuit, making all arrangements, including operating an imprest account to cover travel bookings and official expenses (Appendix 3). This position description also fairly demonstrates that the work is wider in scope, and demands a greater degree of personal effort and dedication, than the position of a supervising shorthand typist in a Government department. Another judge is of the opinion "the work of an Associate under pressure such as we now endure will be matched by very few personal secretaries if any".

734. It is apparent that unless positive steps are taken to up-grade the salary of this position, suitable appointees will be attracted elsewhere and the judges will not receive the assistance they require.

735. In Queensland, where court reporting was inspected in some detail, Hansard reporters are paid the same rate as court reporters. Four court reporters, plus three typists, are used for each court, whereas in New Zealand the same function is performed by one associate. The case for substantially increasing the New Zealand associates' salary to something at least comparable with New Zealand Hansard reporters is indisputable.

736. Once every five years a judge is granted six months' sabbatical leave. During this period, the associate has either to look for temporary employment or accept a fill-in job with the Department of Justice, not necessarily according to her qualifications, and usually at a lower salary. The question of employment for associates during their judges' sabbatical leave has been raised by a number of people appearing before the Commission, and we consider the present treatment unjust and in need of review. A judge told the Commission that he has twice been on sabbatical leave and on neither occasion was his associate offered employment by the Department of Justice. We recommend that any associate who has completed at least 12 months' service, and intends to resume duties at the finish of the judge's sabbatical leave, should be granted a period of leave on full pay and after that period, should be employed as a "floating" associate for the remaining time involved, with responsibility to the senior judge at either Auckland or Wellington. This would assure the associate of employment at the same level and would assist the judges and other associates with their heavy workload. Considering the associates' calibre and the service they perform, it seems reasonable that, as well as the salary adjustment mentioned above, they should be provided with continuous and appropriate employment.

737. ***"Floating" associates*** Apart from the Court of Appeal, there are presently 11 judges in Auckland, 7 in Wellington, and 3 in Christchurch. Taking Wellington and Christchurch together, there would be 11 associates in Auckland and 10 in Wellington/Christchurch: a situation where a floating associate should usually be available in each area. Although associates do not normally require supervision, a floating associate could perhaps be responsible to the senior judge in either Auckland or Wellington, in order that co-ordination is maintained and her services are best utilised. It is important that she is kept fully occupied and her duties clearly defined. We outline these duties in Appendix 4.

Recommendations

1. The position description of judge's associate should be compared wth that of Hansard reporters and the salary of associates adjusted accordingly.

2. Judges' associates should be provided with continuous and appropriate employment during the period of sabbatical leave of the judge. During this time, the associate (subject to having completed at least 12 months' service) should be granted a period of leave on full pay and thereafter be employed as a floating associate.

Judges' Clerks

738. The Commission received several submissions on the subject of judges' clerks or judges' research assistants. Apart from hearing the views of several judges, the prime submission was from the chairman of the Council of Legal Research Foundation (Inc.).

739. For some years, until 1978, one judges' clerk has been appointed in Auckland, Wellington, and Christchurch. This year there have been additional appointments in Auckland and Wellington. A clerk's duties, as we understand them, are to assist the Supreme Court judges primarily in legal research, but also in the detailed sifting and assembly of factual material in more complex cases. The role of the clerks is by and large determined by each judge who wishes to make use of their services. We were informed that some judges seek the assistance of the clerks in many aspects of the judicial process whereas other judges rely upon the clerks only to research points of law. Clerks also have an administrative function in that they are required to maintain the Judges' Libraries.

740. Although the situation has improved, it will be seen at once that the allocation is disproportionate to the number of judges involved in the various centres: two clerks for 11 Auckland judges, two clerks for 11 Wellington judges (including the Court of Appeal judges), and one clerk for the three Christchurch judges. The submission has been made that there should be three research assistants in both Auckland and Wellington, with any further increase in number to be recommended by the Chief Justice.

741. We accept such appointments should be adequately remunerated and conditions of employment, accommodation, and such matters should be closely considered. Clerks should be responsible to the senior judge in each centre, and we therefore consider that appointments should be made by the senior judge in the area concerned.

742. We consider that the salary should be at least that paid to a qualified barrister and solicitor of equivalent experience, bearing in mind that the appointee is selected for his or her special skills and academic performance. Looking ahead, as the numbers in this position grow, we think there should be adequate typing, photocopying, and stationery facilities made available. Because of the particular relationship we see existing between the research assistants and their judges, we do not consider that they should be treated as part of the staff of the court's office but should be directly responsible to the judges themselves. We consider that the position should be for no more than two years, bearing in mind it may take a little time before the assistant shows his usefulness. A person should not be excluded as a research assistant because he has already had some practical experience in the law.

743. The experience requirement for solicitors prior to entering practice on their own account, whether as partners or sole practitioners, is at present governed by s.22 of the Law Practitioners Act 1955. Before entering practice, a person must have had, during the five years immediately preceding the date of his so doing, at least three years' legal experience in New Zealand, either in the office of a barrister or solicitor or firm of solicitors in active practice, or in the legal branch of a Government department. We are aware that the Law Society has promoted a new Law Practitioners Bill. We understand that clause 54 of the draft Bill replaces the existing s.22 and prescribes the minimum experience for solicitors and barristers before they may enter practice. The new clause brings within the scope of the expression "legal experience", legal work in:

(a) the office of a barrister or solicitor or firm of solicitors in active practice; or
(b) a Government department; or
(c) the office of a local authority or body corporate.

The clause also requires at least five years' legal experience in New Zealand during the eight years immediately preceding the relevant date, including not less than 12 months' experience since enrolment in the office of a solicitor or firm of solicitors. There are provisions for dispensation.

744. We have set out this matter at some length because we hope that if clause 54 is enacted in its draft form, judges' clerks would come within its scope, as persons employed by the Department of Justice.

745. The Commission would like to think that the appointment is a prestigious one applied for by the most capable graduates. Overseas experience in this connection indicates that judges' clerks or research assistants are eagerly sought after by established legal firms.

Recommendations

1. The use of judges' clerks should be continued.
2. Any increase in their numbers should be recommended by the Chief Justice.
3. Appointments should be made by the senior judge of each region for a maximum of two years.
4. Time spent as a judges' clerk should count towards the period before a barrister or solicitor may practise on his own account.
5. Judges' clerks need not hold a practising certificate while they perform these duties.

COURT ADMINISTRATION

746. Item 7 of the terms of reference reads:

> The administrative procedures and the organisation and the management of the several Courts and divisions, including the places appointed and the frequency and times of sittings for the dispatch of business and the arrangement of the business thereof.

Court Management

747. In 1971 Chief Justice Burger of the United States Supreme Court said that "the challenges to our system of justice are colossal and immediate and we must assign priorities . . . I would begin, by giving priority to methods and machinery, to procedures and technique, to management and administration of judicial resources even over the much-needed re-examination of substantive legal institutions".

748. We see the problems of court administration lying at the heart of our terms of reference. Never before have the public and the legal profession shown such an acute interest in this aspect of court reform. Lord Beeching's range of reforms called for an efficient administrative staff organised on a unified basis and directly responsible to the Lord Chancellor, who was answerable to Parliament. Our present administrative structure already has the basic body: we think it needs more life breathed into it. We repeat what the Secretary for Justice said to us:

> In truth, if we want to do justice according to law in a complex modern society it is not enough to ensure that our Judges are skilled, fair and assiduous. The need to recognise that good management freed from any restraints imposed by tradition, is almost as important. The doing of justice through the courts is a business and like any other business it is in danger of failing unless it is efficient.
>
> Certainly in a society acknowledging the rule of law the courts as institutions are not *just* a business. But far from diminishing the importance of management, their very uniqueness creates special management problems. In the face of current pressures we will neglect at our peril the need for administrative reforms relevant to the particular nature and needs of the courts. Yet this is not to be achieved simply. The operation of the courts is a complex process which involves Judges, lawyers, administrative staff at both the national and local level, litigants, the public, and many others. There is no conventional hierarchical structure which will permit the application of classical management and organisational theory, although no doubt many management principles and ideas offer useful guidelines and may be adapted.

749. In this country, as in other common law jurisdictions, the first signs of stress in the court systems appear in the form of trial delay. We must devise more efficient and sophisticated methods of coping with increased caseloads in all of our courts. We would adopt the following principles of modern court management:

- to ensure parties are advised of fixtures at a reasonable time in advance;
- to keep trial pressure on so that cases will settle;
- to set the case for a definite time and hold to it;
- to have the judges ready and willing to hear the case in order to dispose of cases.

750. We have already dealt extensively with proposals which should rationalise caseloads in the High Court and District Courts and take some work out of the criminal area altogether. Before the Government is asked for more money to run the courts, it must be demonstrated not only that the present sum allocated is matched by value of the service provided, but that future, higher allocations would be justified. Modern management techniques should be applied. As a start, we judge it both necessary and desirable that appropriate research and planning facilities should be provided to monitor the capacity and serviceability of existing resources and procedures, and to assess developmental trends and future demands. We think it is important that the judicial system should take much more cognizance of the people who use it and should ensure that the system is constructed for their benefit. We welcome the announcement of the Secretary for Justice in the Department of Justice 1977 Annual Report, when he proposed he would set up a Planning and Development Division.

751. We found a great many helpful guidelines in the approach taken by both the Beeching Commission and the Ontario Law Reform Commission. Developments in Ontario leave executive responsibility for court administration in the hands of the Attorney General, and at the same time, maintain processing of the caseload as the sole responsibility of the judiciary. There is controversy over what should be the area of court administration assigned exclusively to the judiciary*: administrators and judges have a complex, interdependent relationship. No disagreement exists as to who should be ultimately responsible for actual assignment of judges to particular cases or courtrooms: that is solely a question for the judiciary.* Indeed it is said that no administrative decision on case-flow management can be successfully implemented without the active support of judges in the courtrooms. Only the judge is vested with the necessary power to exercise control over the actions of lawyers, police, jurors, and witnesses involved in specific cases before the court over which he presides.†

752. We believe that to maintain the quality of justice it will be essential to develop court administration as a specialist area of management. Selected court staff, in our opinion, should be trained in overseas methods of court management. We think, for example, that the proposed Chief Court Administrator could be sent with advantage to a course in court management in the United States of America; he could attend the Australian Administrative Staff College in Melbourne; and could also find it profitable to spend some time with the Chief Executive Officer of the New South Wales Supreme Court. The operation/control rooms we saw in the Royal Courts, London, are also well worth study. This officer could then undertake training regional court administrators and court staff. In every country we visited it was emphasised that policy should be established by group deliberation but administered by individuals acting in consultation with those who will be affected.‡ It was accepted without question that modern court systems depend on dedicated non-judicial personnel operating within a well-defined chain of command and directly responsible to the court system itself.** We have earlier referred to the delicate balance that must be kept between judges and administrators. It is vital that each understands the responsibilities and functions of the other. In our recommendation for the appointment of list judges, we see that balance being preserved by the list judge having final responsibility for allocation of cases. On the other hand, the administrative officer must ensure that all judges are given time and proper facilities to carry out their functions.

753. ***Regional Court Administrators*** We adopt with some enthusiasm the proposal of the Secretary for Justice for the new office of regional court administrator. We think the country should be divided into four areas with regional offices established in Auckland, Hamilton, Wellington, and Christchurch. These administrators (who could be called circuit executives, court managers, or another suitable title) would need to have their functions defined with considerable care so that they would have appropriate powers to achieve their role without being able to interfere in

*"The Judge and Court Administration", Professor G. D. Watson, International Bar Journal, Nov. 1977.

†Ontario White Paper on Courts Administration, Ministry of the Attorney General, Ontario, 1970.

‡Professor Hazard, reporter for the Commission on Standards of Judicial Administration.

**"Court Administration", I. R. Scott (1976) 50 A.L.J. 30.

the operation of individual courts. They would need to co-ordinate the organisation of sittings and administrative servicing. We recommend that they run a central office which would provide a service to all participants in each case: this service would assist lawyers to avoid conflicts in their schedules and to avoid the necessity for unnecessary adjournments. The administrator's responsibilities would include:

(a) consulting with the list judges for the region on the allocation of work to the judges in the region;
(b) controlling the allocation of fixtures and courtrooms;
(c) caseload evaluation;
(d) improving co-ordination between the main and the provincial court centres;
(e) reducing backlog and delay;
(f) relieving judges, where possible, of administrative chores;
(g) carrying out training schemes;
(h) deploying staff to meet sudden or pressing needs;
(i) watching over the general level of efficiency of the court offices in the area;
(j) maintaining relationships with the legal profession, the public, the police, and other groups concerned with the court process (such as Friends at Court);
(k) dealing with Government agencies;
(l) keeping under review accommodation needs and the provision of services;
(m) collecting statistics and, where computers are installed, supervising data processing.

754. Having outlined only some of the duties of this important office, we summarise by saying that regional court administrators would be exercising, by way of delegation, many of the powers now exercised by the Head Office of the Department of Justice. It follows that the individual staff of each court in the region, including the registrar and his deputies, would be responsible to the regional court administrator for the efficient running of their particular court. He in turn would be responsible to the Secretary for Justice, through the Chief Court Administrator in Wellington. We consider that, because of the specialist nature of their duties, the regional court administrators will need a grading greater than that of a registrar at a major centre; and, if suitable appointees are not available within the department, they will need to be appointed from outside the present ranks of the Department of Justice. We strongly recommend that the importance of this new position merits a salary which will attract the best possible applicants. We consider that appointing at least some persons outside the public service to these positions would benefit the new system by providing differing viewpoints and relevant alternative experience. With the Secretary for Justice, we think the appointment of regional court administrators would be an important step in making the administration of the court system more rational, uniform, and effective. It may well be desirable for these persons to be housed in offices apart from any particular court because they will be charged with co-ordinating the work of all the judges and the courts in their area.

755. We met several of these court administrators overseas. The circuit administrator for the South-Eastern circuit in England (the largest circuit because it includes London) and the Chief Executive Officer of the Supreme Court of New South Wales were both lawyers. These two officers control nearly 5000 people. They saw their function in broad terms as

providing a framework in which judges can function conveniently and efficiently. They thought it was essential to establish a good relationship with the judges. Five out of six circuit administrators for England and Wales are legally qualified.

756. The Chief Court Administrator will have several roles. First, he will be responsible for organisation of the court business in what may be described as the Wellington region. Secondly, he would co-ordinate the overall administration with the three other regional court administrators and would be responsible to the Secretary for Justice to provide administrative assistance to the courts. Thirdly, he should, in our opinion, be a person suitable for appointment as Secretary of the Judicial Commission, in which capacity he would have a particular responsibility to the Chief Justice and the Chief District Court Judge. The nature of his other duties means that he would likewise have responsibility to those persons in connection with administration of the courts. In our opinion, he would need to be a person of sufficient stature and ability to gain the confidence of the judges, the regional court administrators, and the staff of the courts. Essentially he must have administrative and management skills of the highest order. We think his salary and grading should reflect those qualities.

757. ***List Judges*** Having recommended a system of regional court administration, we consider it desirable for more efficient running of the courts that regional administrative judges, styled "list judges", should be appointed. We make the comment that many judges do not wish to be closely involved in administrative matters but that some judges in the region must be responsible for consultation and liaison between the judges and the professional regional court administrator. As we have said, inspection of other systems overseas led us to the ineluctable conclusion that success or failure in managing court business depends on a delicate balance being achieved between the administrative and adjudicative functions. We believe there is considerable scope for improvement in this country in this respect.

758. Accordingly, we recommend that the Judicial Commission creates an appropriate number of regions (we suggest four) for the administration of the High Court and the District Courts.

(a) *High Court* The Chief Justice should appoint a High Court judge in each region with the style of list judge; this judge should be responsible for administering the co-ordination and allocation of work among judges in the region. The Chief Justice should make the selection after consultation with other High Court judges in the region. We prefer the description "list" rather than "administrative" judge to avoid any confusion with the Administrative Division of the High Court. We think the appointment should be for a minimum of two but not more than three years so that the Chief Justice will be able to review the performance of the persons concerned. A list judge may well be re-appointed. The list judge would generally carry out, under delegation, the responsibilities of the Chief Justice in that region for smooth running of the courts. He would be subject to final directions by the Chief Justice. He would work very closely with the list judge of the District Court for the area and with the regional court administrator so that the arrangement of work between the two jurisdictions, more particularly in jury criminal work and matrimonial cases, may be efficiently managed. It is recommended that appointments of list

judges should be made on the basis of administrative ability rather than of seniority. As with the presiding judges in England, they should be a source of authority and advice but should spend a substantial amount of their time in court.

(b) *District Courts* In the section relating to District Courts (paragraphs 412 et seq.), because of the specific terms of reference (3(d)), we proposed the appointment of a Chief District Court Judge, a Senior Family Court Judge, list judges, and assignment judges. The scope of the duties of list judges of the District Court are referred to under that section. We envisage that the list judges of the District Court will have similar functions to those of the High Court list judges. They will be selected by the Chief District Court Judge. We would again emphasise the necessity for co-operation with the list judges of the High Court and the regional court administrators.

759. ***Liaison*** In our opinion, it will be necessary for list judges of both courts and the regional court administrator to meet relatively frequently so that they can best ensure efficiency in case-flow management. Depending upon the availability of judges in their particular jurisdictions (as so frequently happens in the United Kingdom), list judges and regional court administrators would be able to deploy judge power in a way that matched judicial attributes to case importance. Thus, High Court judges could be requested to sit and hear electable crime with a jury, the more particularly if pressures on a District Court are such that it is not coping with backlogs of work, or where it is desirable under the suggested practice direction referred to in paragraph 361. As a general principle, High Court judges should have a reasonable proportion of their time occupied with criminal jury work. As we have mentioned in the sections on that topic, a great deal can be done to achieve the type of specialisation required for New Zealand conditions by administrative means.

760. A group of barristers submitted that all the existing courts named in the terms of reference of this Commission; other courts, such as the Maori Land Court, the Arbitration Court, the Workers' Compensation Court; and all the statutory tribunals which exercise appellate jurisdiction should be incorporated into, and administered through, a single court system. Administrative tribunals as such do not fall within the purview of the terms of reference, other than in relationship to the Administrative Division of the Supreme Court. Likewise, the Maori Land Court does not fall within the terms of reference, nor do the Arbitration Court or the Workers' Compensation Court. But from an administrative point of view, it was suggested that the very lack of unification of all courts and tribunals under a single structure was in part responsible for delays in the present judicial system. As an example, it was mentioned that in some smaller Supreme Court circuit towns, counsel might be expected to attend either in succession, or at the same time, hearings before the Supreme Court, the Magistrate's Court, and statutory tribunals: all these fixtures might be made for a period of, say, three weeks, at the end of which the Supreme Court judge and the tribunals would depart to return, perhaps, in three months' time. We were informed that there was no real liaison between the various groups. We see a partial solution to problems of this nature in the appointment of the regional court administrator. The right balance between convenience and economic use of time and court resources should be maintained. We would hope that the regional court administrator would communicate with those who are responsible for fixtures for

statutory tribunals and other courts to ensure that the overall flow of cases in the judicial system would be constantly monitored. Indeed, it would be expected that the secretaries of the various tribunals should consult with the regional court administrators to minimise clashes with fixtures. We believe that effective court administration will go a considerable distance towards meeting the aims of those who advocate a completely unified court structure (paragraphs 997 et seq.).

761. Although the ultimate assignment of judges to cases and circuit work should rest with the list judges, the regional court administrators should be given full freedom to develop their own administrative talents and ideas. They would keep under review the daily sittings of the courts and caseloads and advise the list judges of when and where action should be taken. Consultation with the Law Societies is essential: we would envisage that practical steps would be taken to implement this.

762. We also hope that the two list judges and the regional court administrator would continually evaluate the effectiveness of the courts in their region in administering justice. May we repeat: this group should be in a unique position to recommend changes in the organisation, operation, or procedures of the courts. We conclude this part of the report by saying that we have been impressed, in our overseas study, by the close professional relationship that the regional (or circuit) administrator has with the presiding judge or list judge as well as with the individual judges in the area. If there are to be regular conferences of judges, we have seen clear demonstration of the desirability of the regional court administrator attending where administrative policy is under discussion.

763. ***Court recording*** We suggest that court reporters, other than associates of High Court judges, should be under the supervision of the regional court administrator. He should make assignments on a scheduled basis to support the needs of particular courts by ensuring that the requirements of each judge are met and that transcripts required by the court, the Bar, or the public are expeditiously provided. The whole subject of recording of evidence appears under a separate heading at the end of this section (paragraphs 809 et seq.).

764. ***Computers*** In our opinion, courts with a sufficiently large workload should have access to a centrally located computer system capable of multiple indexing, jury selection, and case scheduling. We are told that computerised scheduling of functions would minimise caseload delays; we have observed that jury selection by computer is used in many jurisdictions overseas. A not inconceivable development might be the computerised production of transcripts of proceedings in criminal and civil trials (paragraphs 819 et seq.). In the future, computerised records could be made simultaneously available to people at different locations by projection on cathode-ray screens: a judge with a screen on his bench or in his chambers could instantly obtain information.

765. In saying this, we must acknowledge that the Department of Justice has moved into the computer age: there are a number of computer terminals already established in court buildings throughout the country with information being fed into the Wanganui computer centre. The use of data processing/computer systems adds to the responsibilities of registrars and their staff. We were informed that court staff of middle to senior grading have been appointed as regional computer officers in seven court regions throughout the country. Some extra allowance has been paid to these persons, who undertake their ordinary court duties as well. The position should possibly be made full-time; that will be a matter for the Secretary for Justice to consider.

766. ***Court staff*** We were told that over recent years substantial administrative and procedural changes have been made in our courts with two main aims of increased overall efficiency in handling court business and enhanced consideration of persons coming before the courts. Administrative changes, such as the use of mechanical aids and multi-type business forms, have been introduced to assist court staff, maintain efficiency, and hold costs. Recently developed procedures such as the minor offence scheme and fines enforcement were also intended to help expedite court work generally, but, in fact, have added to the duties of court staff. These changes, together with other developments, such as provision of legal aid and a duty solicitor, are all part of the continuing and laudable effort to better inform any individual coming before the courts of his legal rights, and to ensure he will be treated with respect and fairness. We were told that, unfortunately, cost and efficiency gains from administrative changes have not counterbalanced additional work resulting from procedural changes. Furthermore, the courts have absorbed other business not reflected in available volume of work figures such as administering legal aid, bailiffs' duties taken over from the police, and providing information for the Wanganui computer centre system. Constraints which the state of our economy necessarily imposed on the whole of the State services have placed a heavy burden on the administrative staffing of the courts.

767. It is quite apparent to us that the Department of Justice faces a real problem in retaining its better qualified personnel: we have been told of a heavy staff turnover. It appears that many staff members who obtain a legal qualification do not remain in the employment of the department. We accept that, generally speaking, the officers of the department have responded loyally to demands made upon them but it is clear to us that it has become increasingly difficult for court staff to meet deadlines for court sittings and then to carry out follow-up actions with reasonable promptness after those sittings. A graph prepared for us (produced as Graph 9) demonstrates the growth in court work measured against increases in staffing. This graph indicates the volume of business in the Magistrates' Courts since 1960 under the headings of criminal prosecutions commenced and items filed and relates these to the total court staff during that period. We were told that as at 31 March 1960, 40% of the staff had less than seven years' experience, whereas at 1 January 1975 this figure had risen to 65%.

768. We received a number of submissions from various organisations and individuals pointing to delays, criticising unsatisfactory conditions in the court offices, and suggesting the application of modern management techniques. It seems obvious to us that rapid staff turnover must inevitably aggravate these problems of delay and other dissatisfactions. But to gain a full appreciation of the issue we consider we have to look at administration of the justice system in even broader terms. If the size of our police force, the Ministry of Transport, and local authorities' traffic staff is increased, or if a more vigorous prosecution policy is adopted, then it follows there will be an increase in the volume of prosecutions which will have an immediate impact on the court system. To illustrate; the total population increase during 1976 was less than 1% but in that same year, the volume of prosecutions increased by 13.3% and the rate of prosecutions per 1000 of mean population rose from 113.58 to 129.81, or a 12.5% increase.

769. The Commission received comprehensive submissions from the Court Officers' Group. This group represented the Courts Division, consisting of some 700 executive and clerical officers. (We deal with the function of registrars under a separate section.) On the aspect of administrative procedures, members of this group told us they were concerned that some functions of the court as they knew them had virtually been closed down in order that urgent work and cases involving the liberty of the citizen might be completed. Fairly harsh criticism of a bureaucratic system was made. An example given referred us to the domestic proceedings area where for 60 years or more, all relevant work was administered with the help of at most a dozen forms; now, with the new Domestic Proceedings Act, there are 96 forms provided, with what was said to be a complicated and repetitive system of servicing and processing the documents. The group also criticised the minor offence procedure as being a top-heavy, unworkable method, inexorably grinding the work in the cash and fines enforcement sections to a halt. The court officers claimed that a high percentage of minor offences originate with traffic charges laid by local authorities: they submitted that the courts have become little more than a revenue producing agency for local authorities in this regard. The court group strongly recommend that consideration should be given to extension of the infringement fee procedure to include all minor non-driving offences, thereby removing such matters from the ambit of the courts except in cases where defendants wish to defend the charges. The court group is also concerned that justices of the peace who sit daily at Auckland and who would deal with many defended minor traffic cases and thousands of minor offences each month, bear an intolerable burden with no real expense to the Department of Justice.

770. We think it desirable to plan for a solid core of experienced men and women on court staffs. By comparison, in New South Wales there are 180 courts staffed with some 1000 staff. All the staff of those courts may do law examinations and this is the aim of many: indeed, court officers are actively encouraged to study law and administrative techniques. Because many of the court staff in New South Wales are based outside the city, a number take correspondence courses in law run by Macquarie University. The majority sit the Admission Board examinations which are prepared for by way of evening lectures and tutorials. However, a number of these qualified staff are subsequently appointed to the Magistrates' Bench. Submissions made to us in New Zealand were directed to the appointment of qualified lawyers as court staff, on the basis that there have recently been law graduates unable to find employment in legal practices. We think the whole judicial system demands well-trained and efficient court staff and that the principle of extra remuneration for legally or other qualified personnel should be encouraged. We also expect that court officials would continue to be trained to provide a courteous and helpful attitude to members of the public. They should also be familiar with management techniques.

771. We were told that the present morale of court officers is not high, the principal cause being erosion of job satisfaction. It is said, for example, that although it is commendable for defendants to have their cases heard as quickly as possible through the minor offence scheme, the effect for court staff has been to remove the tedium from the courtroom itself to the court office. One witness before the Commission described the mundane work involved in the thousands of minor offence cases being handled by

the courts as tremendously disheartening to court staff: although the scheme may have released the police and traffic officers from attending courts, that very release has enabled the officers concerned, freed from court attendance, to generate more prosecutions. Again, a considerable time is taken up with the processing of legal aid applications, an area where there has been a sharp increase in demand. We were told that the accounting procedures to be followed for collection and payment of fines are complex and add to the burden of court staff. We hope that the Planning and Development Division will bear all these various comments in mind and that this division will investigate some of the criticisms made by the court group.

772. ***Complaints against court staff*** Complaints against members of the courts staff should be made, as at present, to the court registrars as controlling officers. In the event of the complaint remaining unresolved, or where it concerns the actions of a registrar, the matter would be dealt with by the regional court administrator. The Chief Court Administrator would handle complaints concerning the Wellington region and complaints referred by, or concerning, regional court administrators. Court administrators and court staff would ultimately be responsible to the Secretary for Justice and the State Services Commission in the normal manner.

773. Instances may arise in which citizens who have complained to the regional court administrators or the Chief Court Administrator, will be dissatisfied by the answers given by one or other of those officers and will expect to have an independent agent to whom they can apply for further consideration of their grievances. The independent agent most appropriate to handle these situations is the ombudsman. His function is to receive complaints relating to matters of administration directed against agencies of central Government and local authorities. The agencies coming within his jurisdiction are named in the Schedule to the Ombudsmen Act 1975 and include the Department of Justice.

774. The Chief Court Administrator, on the basis of a number of complaints, may make a recommendation to the Judicial Commission designed to secure a change in policy or practice to remedy administrative defects disclosed by such complaints. Where a complaint against the court administrative structure has been investigated by the ombudsman, he may make a recommendation for modification of a practice or rule if called for. Any such recommendation may be addressed through the Chief Court Administrator to the Judicial Commission or to the Secretary for Justice, depending on the nature of the recommendation. Before formulating such a recommendation, it would obviously be desirable for the ombudsman to have access to any advice tendered by the Chief Court Administrator to the Judicial Commission concerning the matter, although the ombudsman would not have jurisdiction to investigate decisions made by the Judicial Commission itself. In this regard, the position of the Judicial Commission would be directly analagous, from the point of view of the ombudsman's jurisdiction, to the position of a Minister of the Crown or to the council of a local authority, neither of which is within the jurisdiction of an ombudsman but whose department and staff respectively are within the jurisdiction of an ombudsman. That jurisdiction extends to the right to investigate recommendations made by departments and officers thereof to Ministers or local authorities.

Place of Sittings

775. In making a decision on where sittings should be held and where court buildings are situated, we accept that a balance must be struck between convenience to the public, the provision of necessary services, and practical matters such as staffing. Changes have been taking place. The Supreme Court now sits in a new building at Rotorua, and in the courthouse at Whangarei. Over the years some Magistrates' Courts have been closed and others opened: for example, new Magistrates' Courts have been opened at North Shore and Henderson in the Auckland area. As we said in the foreword to this report, the time available to us has not enabled the Commission to make a thorough assessment of where it is necessary or desirable to have courthouses throughout New Zealand, bearing in mind changing patterns in population and methods of travel. We consider that the Planning and Development Division should be well situated to undertake this exercise: no doubt that division will work in harmony with the list judges and the regional court administrator for each of the four regions in New Zealand. The Planning and Development Division should also decide the optimum court size desirable in New Zealand in terms of either judicial or administrative capacity. We expect this division will carefully investigate the courts that are operated on a part-time basis with a view to recommending whether they should be either closed or opened on a full-time basis.

776. We consider the courts, particularly the District Courts, should remain geographically close to the people. We agree with the Secretary for Justice that, having regard to the criteria we have set ourselves, it would be neither suitable for New Zealand conditions nor economically feasible that all District Courts should carry full civil, family, and criminal jury jurisdiction. Experience gleaned from overseas countries indicates that the most efficient use of resources is directed towards supplying facilities which are reasonably accessible to the bulk of the population. On the other hand, well defined communities should, generally speaking, have full court facilities. Purely as examples, we mention again that Tauranga could provide jury facilities for its District Court but we would not expect that all the metropolitan District Courts in Auckland would need them. In an endeavour to be helpful to the Planning and Development Division, and because of the extent of submissions we have heard upon the subject, we comment on the principles which we were told have been taken into consideration in the past when examining the need for retention of court services. Those are:

(a) where a court is more than 40 miles from any other court, then its services ought to be retained unless the volume of business is small or relatively small and shows a decreasing trend;
(b) where a court other than a court of substantial size, such as Hastings, is near another court and public transport services are adequate, then it should be closed even though the volume of work might be rising.

We accept those principles as valid. We consider that our criterion of economic feasibility may well cause the Planning and Development Division to recommend closing courthouses in some very small centres. In the submission made by the Magistrates' Executive the magistrates listed some 19 courthouses which they suggested could be closed. We do not propose to comment on that submission as we have not heard from local bodies and other interested parties.

777. The Department of Justice reminded us that in 1974, a scheme for what have been termed "peripatetic" courts was provided for by s.4A of the Magistrates' Courts Act 1947. That section reads:

> (1) Where any civil or criminal proceedings are pending in any Court the party issuing the proceedings may, or if the proceedings are to be defended, or if a Magistrate had directed either generally or specifically that the attendance of a party is required, then any party may, apply to the Court for the proceedings to be heard at any other convenient place . . .
>
> (2) If a Magistrate is satisfied that in all the circumstances as between the parties the proceedings could be more conveniently or fairly heard or continued to be heard at some place, other than in a Court appointed under this Act, and that suitable accommodation for a hearing at such place is available the Magistrate shall, unless for special reasons relating to the particular proceedings he directs otherwise, make an order . . . that the proceedings be heard or be continued to be heard at a sitting of the Court held at that other place . . .

The intention of the department when devising this scheme was operational flexibility and that, provided suitable accommodation was available, the court would consider places convenient to the parties. Support for this legislation came from the Magistrates' Executive who considered that sittings of their court could take place in borough council chambers or in similar existing facilities in any town. They in turn suggested a review of priorities to see whether it is necessary to maintain a courthouse in places where other facilities could be used for infrequent sittings of the court. Although we heard some criticism of its practicality we consider the scheme is sound in concept as it permits flexible use of judicial and administrative resources, gives service to the public, and is suitable for New Zealand conditions. The opposing argument is that court buildings should be specialist premises which are permanent and complete in their facilities. The Court Officers Group submitted that it is impracticable to set up a court in make-shift premises without back-up staffing, adequate rooms, documents, stationery, statutes, regulations, textbooks, proper equipment and furnishings, and satisfactory waiting rooms.

778. The problems we have mentioned largely relate to the District Court areas. There are, however, some anomalies so far as the Supreme Court is concerned. Although the places where it sits are reasonably well spread geographically, we observe that the Supreme Court at Blenheim serves a population of approximately 34 000, projected to reach 40 000 by 1991; whereas the Tauranga area, where there is no Supreme Court, has a population of approximately 63 000, projected to reach 84 000 by 1991. Investigation of the type of work that goes to the Blenheim Supreme Court indicates that, if the District Courts proposal with its extended jurisdiction is accepted, the amount of Supreme Court business for Blenheim will not be large. The sitting time of the Supreme Court amounted to only 9 days in 1976. There were 4 civil trials, 57 undefended divorces (which would move into the Family Court), 5 criminal trials (which would mostly go to the District Court), and 12 appeals. Other examples of sitting times in the smaller Supreme Court centres in 1976 are:

Gisborne	17 days
Greymouth	10 days
Timaru	6 days

We accept the submission of the Secretary for Justice, and accordingly recommend that, once the jurisdiction of the High Court and the District Court is settled following our report, there should be a careful assessment of the business of the High Court and the various places where (as the Supreme Court) it now sits. We expect that the Judicial Commission would be consulted before any moves to open or close courts were made.

Frequency and times of sitting

779. We have already recommended that the dates of sittings and who shall preside over them should be determined by the Chief Justice or, in the case of District Courts, the Chief District Court Judge, after consultation with the regional court administrator. The list judges will deputize for the Chief Justice and Chief District Court Judge on a regional basis.

780. Pursuant to s.52 of the Judicature Act 1908, the date of the sittings of the Supreme Court throughout New Zealand is decided by the Chief Justice and two other judges, acting at least twelve months in advance of the programme. Although the Minister of Justice is required to give his approval to the regular sittings of the Magistrates' Courts, a magistrate effectively determines the date of sittings in his court or circuit, again, usually for twelve months ahead. We have been told that the practice of pre-determined circuit sittings in both jurisdictions makes adjustments difficult to achieve. The same criticism has been voiced to us in other countries. Court time is allocated well before the nature of the cases for hearing at any particular sitting is known, or the real extent of the workload established. Another disadvantage is that if the circuit business for a session is not concluded, what remains must be adjourned until the next visit, which may mean several months' delay. Criminal business is given priority over other matters, no doubt because in many cases the liberty of the subject is involved; it is nevertheless very galling to the civil litigant in commercial and family cases to be put off time and again, and to take second place to the criminal work. We believe that the system of list judges and regional court administrators will be an improvement in providing flexibility and in obviating the rigid priorities that have been traditional.

781. There are two suggestions concerning circuit work for the High Court which we think worthy of consideration. First, wherever possible, circuit judges should continue sitting at the places they visit until the available work set down for hearing is completed. List judges and regional court administrators should be able to devise a system whereby counsel would know that only matters that were going to trial would be set down, and that when the circuit judge arrived in their area counsel must be ready to proceed. As we have said, sitting dates determined long in advance may not provide sufficient flexibility for best use of judicial and administrative resources. We think the list judges may be able to organise matters so that there is adequate notice for counsel in the circuit towns, say, six weeks in advance of fixtures, and also to provide that the judge will remain on that circuit until he completes the work set down. Secondly, we believe that High Court lists should be arranged to provide that judges returning from circuit should have no fixtures allotted to them for two or three days in the following week in their base towns. We consider this suggestion would make more efficient use of a judge's time: he could deal with decisions reserved during circuit duties while the facts were fresh in his mind, or at least review the evidence and reach his

conclusions on the facts. We think the existing practice (forced on many judges by the present workload) of putting off consideration of reserved decisions for several weeks or months is grossly inefficient: judges who have to consider matters after a lapse of time must virtually repeat the whole process of finding the facts and deciding the law. Both in relation to circuit work and work in their base town, judges should have sufficient time to write reserved judgments: this may require a surplus of judge capacity.

782. A great number of submissions related to the apparent inability of the courts to organise their affairs without inconvenience to persons who must attend. The court registrars were alert to this criticism when they made their submissions to us. They said in past years the courts commanded respect, but that respect must now be earned. They submitted that the first requirement in this regard is proper court accommodation, manned by a competent staff who have the time to be helpful and kind. They also mentioned specific accommodation problems: that the civil legal aid scheme requires special meeting places for committees, and that legal aid generally has added to the work space and storage requirements. The Children and Young Persons Act requires special courtrooms, as does family litigation. Suitable areas have had to be found for duty solicitors and computer machinery. Accommodation is regularly required for examination of civil debtors, evidence before the registrar, and examinations of fines debtors. All these are management requirements which should be considered as part of administrative reform.

783. In making our recommendations for improving court administration we realise that, behind every judge who sits in his court, there are many persons engaged in servicing that court. The workflow of the courts is inexorable. There will always be offenders and there will always be civil litigation. There will always be a necessity for those engaged in the business of the courts to meet strict time deadlines. Hence we say again, court management and administration are at the forefront of the reforms proposed by this Commission.

Recommendations

1. Modern principles of court management should be adopted.
2. It is desirable that list judges should have ultimate responsibility for allocating judges to cases.
3. For administrative purposes, the country should be divided into four regions with regional offices established in Auckland, Hamilton, Wellington, and Christchurch.
4. A regional court administrator should be appointed to each region to organise the sittings of the courts in his region after consultation with the list judges; and provide administrative servicing. The Wellington regional court administrator should be appointed Chief Court Administrator.
5. Regional court administrators should be responsible to the Secretary for Justice through a Chief Court Administrator who should be, as well, Secretary of the Judicial Commission.
6. In each of the four regions list judges should be appointed. They should be responsible for administering the co-ordination and allocation of work between judges in their region. The Chief Justice should select list judges for the High Court; the Chief District Court Judge should select for the District Courts. Appointments should be made on administrative ability rather than on seniority.

7. List judges and the regional court administrator should regularly meet to ensure efficiency in case flow management.

8. Court recording systems should be supervised by the regional court administrator.

9. Greater use of computers for multiple indexing, jury selection and case scheduling should be considered.

10. Court staff should be encouraged to gain appropriate qualifications.

11. Once the new jurisdiction of the High Court and the District Courts is settled, there should be an assessment of where sittings should be held and where court buildings should be situated.

12. When the various courts should sit and who should preside over the sittings should be decided by the Chief Justice and the Chief District Court Judge or their list judges deputed for that purpose, and consultation should take place with the regional court administrators.

13. Where possible, judges on circuit should remain to complete the work set down for their visits.

Registrars and Masters

784. We have already adverted to the role of registrars of the several courts under Part II of this report. We have found it necessary to investigate in considerable detail the work which registrars at present carry out. This work was helpfully summarised for us by both the Secretary for Justice and the Court Officers Group in their submissions. We subsequently sought the assistance of the registrar of the Magistrates' Court at Wellington, who prepared for us a full and detailed summary of the work at present carried out by registrars, together with a schedule of all Acts with which court officers must be conversant. This material is too voluminous to publish as part of the report. We consider, however, that the detailed research carried out is of permanent value and should be available to those concerned in the future with the scope of work done by registrars. We have therefore preserved this material as part of the records of the Commission. We also note the need to accurately define existing tasks which registrars and their deputies are entitled to perform. It was suggested by the Court Officers Group that there are a number of anomalies, for example, in relation to the work which deputy registrars do in the absence or unavailability of a registrar.

785. Two questions relating to registrars are comprised in item 6 of our terms of reference. It is convenient to deal with each question separately. The first is: whether and to what extent it is proper or desirable and practicable that registrars perform judicial functions.

786. In considering this question, it is necessary to bear in mind that under our present system registrars perform three distinct functions: administrative, managerial, and judicial. Logically, the administrative and managerial functions might be expected to be kept separate from the judicial function and in an ideal system this would probably be so. We received several submissions to this effect, the main reasoning in such submissions being promotion of administrative efficiency (the same person not necessarily being equipped to carry out both administrative and judicial functions).

787. The judicial work which registrars now carry out is both varied and extensive and provides considerable relief for judges and magistrates. The removal of such work would require major changes which on the evidence before us we do not consider justified. Notwithstanding occasional criticism of registrars' work in the judicial field, we accept that

such work has normally been well done. This is evidenced by the very limited number of occasions when decisions of registrars are changed, on review by a judge or magistrate. There is, however, evidence that registrars now have more than sufficient work to cope with. It appears also that there are difficulties in recruitment and retention of court staff so that, from a practical point of view, if registrars are to have any extended jurisdiction to carry out judicial functions, steps will need to be taken to render employment of court staff and promotional opportunities more attractive.

788. If present conditions remain unaltered, we believe there is a real risk that staff shortages, uncomfortable and awkward physical surroundings, and cumbersome administrative procedures will tend to erode the good standards achieved by registrars. In this context, we mention that in one of the least congenial registries, six graded officers resigned during a recent 12 month period. We were also told that 70% of the Courts Division staff have had less than five years' experience and that the last registrar to be legally qualified left the Courts Division in 1964. It appears that the Courts Division is one of the few avenues of public service where an ambitious officer is no longer expected to engage in some form of tertiary education. We are aware that grading of certain registrars has recently been reviewed but it appears to us there is still a very great need to improve conditions of service in the Department of Justice. The Secretary for Justice has suggested to us that in busier District Courts, registrars might be given power to grant adjournments, deal with applications for offenders' legal aid, relieve District Court judges from some licensing functions, and in the future, formally adjudicate upon undefended divorces if divorce procedures are simplified. We do not see these extensions as practicable under present circumstances. Moreover, we are concerned at any increase in the jurisdiction of registrars without some comparable increase in the standard of training required.

789. The Secretary for Justice has advised us that his department is studying the development of formal courses in relevant legal subjects which future court officers who wish to secure promotion to senior positions will be required to complete. The implementation of these courses would obviously be desirable, even from the point of view of training registrars to carry out their present judicial functions. Without having full details of the courses we do not offer any final opinion. We incline to the view that the judicial functions which registrars currently exercise should not be extended (apart from dealing with unopposed applications to the land valuation court, to which we have referred elsewhere) unless there is a requirement that registrars exercising such functions have some legal qualification. In saying this we do not suggest that a legal degree is the most appropriate training for a person carrying out administrative and managerial roles: we simply make the point that if registrars are to have a wider judicial role we consider that some form of legal training is essential to exercise such a role. We do not think this qualification should necessarily be a law degree; the course which the Secretary for Justice has proposed may be sufficient. We appreciate that, until such time as the training scheme has become fully effective, it may be necessary to use the services of registrars with long practical experience but no legal qualifications. Our views regarding all the above apply to both the High Court and the District Courts.

790. The second term of reference relating to registrars is as follows: whether the appointment of legally qualified officers of any court to

exercise subordinate judicial functions would be desirable, practicable, or convenient. As the Secretary for Justice indicated to us, this question contemplates an office akin to that of a master in England. (For convenience we use the name master although it is not imperative for that name to be used in New Zealand.) It appears clear that the office of master has been developed with considerable success in the United Kingdom, Canada, and Australia. In those countries, masters relieve judges of the High Court of a significant segment of judicial work. Masters are essentially judicial officers, not public servants, and the manner of their appointment, their status, and salary reflect this. Consistent with this view of their work, the Beeching Commission recommended that such administrative functions as masters had should be removed from them. No doubt because of the relief which masters are able to give to overworked judges and magistrates, the creation of such an office was seen as desirable in a number of submissions which we received. It also appears the creation of such an office would have the support of the judiciary. Moreover, the New Zealand Law Society advocated a similar office, though suggesting it should be combined with that of registrar, and open only to legally qualified appointees.

791. In view of the success of this office overseas, and the real need to relieve judges of work, especially judges of the District Courts whose jurisdiction will be increased if our proposals are accepted, the appointment of masters appeared to have attractive possibilities. However, both the Secretary for Justice and those court officers who made submissions to us strongly opposed introduction of an office of master. The Secretary for Justice suggested that statistical evidence of the work at present carried out by judges or magistrates, but possibly able to be delegated to a master, indicated there was not sufficient work available to sustain even one master for the whole of New Zealand, let alone, for example, in Auckland. The Secretary for Justice stated he was convinced it is premature to consider appointment of a master or any other such subordinate judicial officer until the department's new scheme for training registrars is implemented; after this stage, the situation could be reviewed in the light of experience. The court officers agreed with this view and also stressed the difficulties involved in training and retaining legally qualified staff.

792. Such strong views have given us considerable pause for reflection. We also have been somewhat limited in our ability to research the matter. Nevertheless, it appears to us that there are a large number of judicial functions which could be delegated to masters. By way of example we list the following work which at present is done by magistrates:

(a) the licensing of motor vehicle dealers, secondhand dealers, sharebrokers, and auctioneers;
(b) considering applications for offenders' legal aid and allocating scales of payment;
(c) authorising the enforcement of unpaid fines;
(d) considering numerous applications under the Sale of Liquor Act for a variety of permits and extensions;
(e) visiting prisons for disciplinary purposes;
(f) considering applications for writs of arrest of absconding debtors in civil and domestic matters;
(g) considering applications for and issuing search warrants;
(h) approving contracts or compromises by infants.

Likewise, in relation to the High Court, a master could well attend to such matters as:

(a) many interlocutory applications including certain injunctions, applications for approval of compromise, appointment of guardian ad litem, directions for service;
(b) applications for offenders' legal aid;
(c) applications under the Trustee Act 1956, for example, for approval of trustees actions, the exercise of powers not contained in the trust deed;
(d) many of the applications now made in relation to grant of probate and administration;
(e) applications for leave to serve out of a jurisdiction;
(f) serving as referee on inquiries as to assessment of damages.

793. The Supreme Court Rules Revision Committee has provided in the new Code for a summary judgment procedure. We think that this reform will be effective both to identify, and dispose of without trial, actions in which there is either no defence or a sham defence. We consider that masters could control this procedure and thus save judges' time.

794. All the evidence overseas indicates there is great scope for the use of a master. The many duties which masters perform in England are well summarised in the 4th edition of Halsbury's Laws of England Vol. 10 at para. 937 et seq. We do not set out these duties in detail but we do specifically mention that the line between the judge's functions and those of the master is kept intentionally a little vague so that judge and master may work as a team without technical barriers. In addition to extensive use of masters in the United Kingdom, the office, as we have previously mentioned, has been transplanted with success into other jurisdictions. Members of the Commission who travelled overseas observed that in cities of a similar size to Auckland, for example, Adelaide, there was sufficient work for two or three masters. Having reviewed both the potential work available for masters in New Zealand, and the extent of the work which they carry out in other jurisdictions, we have concluded that it must be worth endeavouring to implement the office in New Zealand. As an example, we think there is very real scope for a master to carry out the vetting of offenders' legal aid in all courts. We believe this function should at least be supervised by a judicial officer because the decision to grant aid, even if it is subject to review, may require the exercise of a considerable degree of judgment (particularly if an assessment has to be made of the merits of the defence). A master and his staff play a vital role in this work in relation to criminal appeals in England. Mindful, however, of the statistics produced by the Secretary for Justice (which in his view indicate insufficient work for masters in New Zealand), we recommend that the office of master should initially be introduced in Auckland and Wellington. In Auckland, we suggest one master should be appointed in the High Court and one in the main District Court. In Wellington, we suggest appointment of a master whose combined work would cover the High Court and the Court of Appeal. We expect that the performance of these masters would be carefully assessed by the Judicial Commission.

795. We think a master's qualifications should be the same as those for a High Court or District Court judge, that is, seven years' practice as a barrister or solicitor of the High Court. In making this recommendation, we do not overlook the impossibility of appointing masters from existing court staff or registrars, there being none who are legally qualified. Nor do

we overlook the view of the Secretary for Justice that it would be extremely difficult, for a number of practical reasons, to implement a career structure for legally qualified staff. However, if such a structure could be implemented, we think it would greatly increase the attractiveness of employment in the Department of Justice. As an interim measure, we consider it would be possible to appoint masters drawn from members of the legal profession, perhaps those who are close to retirement. We have had submissions from several solicitors who indicated their belief that such appointments would prove attractive, provided the remuneration was reasonable. Every care must be taken to ensure appointment of masters would not in any way downgrade the office of registrar since we consider that the work of registrars is vital to successful functioning of our court system.

Recommendations

1. Registrars should continue to perform their present judicial functions but these should not be extended until an appropriate training scheme for court staff is introduced, such training scheme to include legal studies.
2. The office of master should be created initially in Auckland (one for the High Court and one for the main District Court) and in Wellington (one to serve both the Court of Appeal and the High Court).
3. A master should possess the same legal qualifications as a High Court judge.
4. The Judicial Commission, after a reasonable time, should assess the effectiveness of the office of master.

Supervision of Proceedings

796. Item 5 of the terms of reference reads:

> Whether, and if so, to what extent, the Courts or any of them should exercise greater supervision over the progress of proceedings and the making of appropriate interlocutory orders, and what judicial officer should exercise such supervision.

This term did not attract many submissions. From our own knowledge, and from our observations overseas, we surmise that there are several reasons for this lack of response:

(a) The existing rules of our Supreme Court Code of Civil Procedure, if properly and efficiently used (both by plaintiffs and defendants), are reasonably satisfactory. There is additionally a growing practice, at least in Auckland, whereby an application under Rule 250B (which enables the court to order an early hearing) is used to provide inter alia a timetable laid down by the court for the various interlocutory proceedings leading up to a firm date of trial. No doubt the rules in the new Code, at present in the course of preparation, will further improve the position. Although the proposed rules are subject to approval, we are informed that the new s.15 will introduce two procedures to enable 'omnibus' directions to be given by the court. Rule 286 should be particularly useful in breaking deadlocks or overcoming obstructive or delaying tactics in interlocutory matters. Rule 287 enables directions to be given to facilitate the course of the trial. We understand the Rules Revision Committee, after full consideration, decided against compulsory conferences but that sub-clause (5) of rule 287 authorises the court to convene a conference on its own initiative.

The assistance of a judge in negotiations for settlement may be secured under sub-clause (6) but this judge is disqualified from presiding at any subsequent trial.

(b) Personal injury litigation which formerly produced a heavy volume of work in New Zealand will soon disappear as a result of the Accident Compensation Act 1972. In overseas jurisdictions, where considerable attention has been given to pre-trial procedures, the best method of dealing with personal injury litigation has loomed large. In New Zealand at present, it may be premature to embark upon any radical changes until the type and extent of civil litigation is clarified following the demise of the personal injury action.

(c) Overseas efforts to find a solution to the problems involved in supervising progress, by and large, appear to demonstrate that the problem is intractable. The extensive literature which we have considered (primarily concerning the summons for directions in the United Kingdom and various pre-trial conference procedures in the United States of America) indicates that most of the procedures introduced have not fulfilled the bright hopes originally held of them. Our impressions in this regard were generally confirmed by the enquiries made by members of the Commission who travelled overseas.

797. We therefore approach our consideration of the extent to which the courts should exercise greater supervision over the progress of proceedings, bearing in mind the above matters. We also record that several barristers of very considerable experience suggested the courts have been too slow to cut a path through procedural tangles and that, with pressure of work, it is not enough to leave the prompt disposal of cases wholly with counsel.

798. The most detailed discussion of the issues raised by this term of reference was provided by the Secretary for Justice, who pointed out that the justification for any procedures which enable the court to exercise greater supervision or control must be that these are necessary in the wider public interest for efficient and economical operation of the court system. He also pointed out that most such procedures overseas are directed almost exclusively to civil litigation and that there appear to be quite different justifications and needs for family and criminal litigation. It is convenient, as the Secretary for Justice suggested, to discuss the matter under the three heads.

799. ***Civil jurisdiction*** The statistics provided us indicate that in former years (and it should be borne in mind that the situation may change as personal injury litigation is phased out), of all the cases actually commenced in the Supreme Court, approximately 25% only were set down for trial and of that 25%, only 40% actually proceeded to trial. As a whole, a little over 10% of the actions originally commenced are heard in court. In the Magistrates' Courts, detailed statistics are not available; but in 1976, of the 150 000 plaints filed, only 2059 proceeded as defended cases. Moreover, in 62% of Supreme Court actions in 1976, a statement of defence was filed, but other than interlocutory applications, no further steps were taken: 25% of the cases that do not proceed to hearing have interlocutory applications filed. These average 1.5 per case; the majority relate to applications for the appointment of a guardian ad litem and motions for approval of compromise. A further 25% have no action taken on them after the issue of a writ. In the samples taken by the Department of Justice it was found that the average number of interlocutory

applications in respect of actions going to trial was one (this does not include interlocutory matters issued as a matter of course, for example, orders for discovery).

800. The above information is important when consideration is given to whether or not greater control is necessary over the conduct of civil proceedings and, if so, when such control should be commenced. As the Secretary for Justice pointed out, there are at least three possible stages when the court might commence active control: at the inception of the proceedings; at the point when proceedings are complete; at the time the proceedings are set down for trial. We agree that active control at the inception of proceedings is unnecessary and, in view of the number of cases which settle, would generate a large amount of additional work, often without serving a useful purpose. Indeed, intervention at this stage could sometimes be counter-productive and would add to the expense of the parties in all cases.

801. It is at the stage when the pleadings are completed that procedures have been introduced in a number of overseas jurisdictions. As previously mentioned, our enquiries have not produced evidence that such procedures have either greatly increased court efficiency, or the speed, or rate of settlement. The Secretary for Justice also informed us that he had reached a similar conclusion as the result of his enquiries. He accordingly took the view, with which we concur, that under the circumstances at present pertaining in New Zealand, interlocutory steps in civil proceedings should be left in the hands of counsel. Impetus to complete the procedural requirements and to set the action down is best provided for by a system where there is a virtual absence of delay once the action is indicated as ready for hearing. Particularly from our enquiries in Auckland, we are satisfied that one principal reason for over-loaded fixture lists is that counsel are aware there is a great delay between the time when application for a fixture is made and the actual granting of a date of hearing. This encourages setting down of cases to "get in the queue", without proper consideration of settlement or any real preparation for hearing. There is little point in counsel preparing cases for trial before setting down when a greater part of preparation will be wasted because of delay.

802. However, the Secretary for Justice did suggest there could be merit in a procedure imposing a limitation on the period between commencement and setting down. Any application to set down outside that period would then require to be on motion, with evidence from the solicitors for both parties citing reasons for the delay. The Secretary for Justice also suggested some sanction in the area of costs. In this context, the former Chief Justice, Sir Richard Wild, suggested a system of strict time limits for the completion of all interlocutory matters. We agree that these suggestions are attractive, but are concerned that if such procedures are strictly administered, serious injustice can result, with the interests of the parties suffering because of the deficiencies or delays of the lawyers. In the interests of justice, we consider it would be better to provide an automatic review of all cases at a date one year after the filing of proceedings. We envisage that counsel and, wherever practicable, the parties, should be required to attend before the court which would then consider the progress of the action. It might be possible for this review to be conducted by a master or registrar with his decisions, if any, being placed before a judge if required by either party.

803. Once an action has been set down for hearing, we agree that the court should assume overriding control. It is essential that a hearing should be assured within a reasonable time of setting down and that, prior to the action being set down, the necessary procedural steps have been taken and settlement discussed. This, however, does not prevent last minute settlements and we appreciate that in a significant number of cases the parties may not be prepared to make a settlement until the door of the court is reached. If, however, too many cases settle at a late stage, this presents real difficulties in scheduling cases for hearing, with a consequent waste of time on the part of all involved. With these problems in mind, the Secretary for Justice suggested a solution we for our part recommend: that a system should be tried where soon after application is made for a fixture, counsel and, wherever practicable, the parties, are required to appear before a judge (if possible this should be the judge to whom the hearing would be assigned but otherwise another judge, or a master, or a registrar) to confirm the state of the action, and discuss the nature and likely duration of the trial and any outstanding issues. The Secretary for Justice suggested that this process would not be a demanding one, if fixture procedures operated effectively, and would have a double benefit in that it would impose a constraint on counsel in their decision to seek a fixture and it would clear the way for trial itself or promote final settlement at an early point. We think it important for the parties to be present unless their absence is excusable (by reason, for example, of distance from the court). At the pre-trial meeting, a firm date of hearing could be given which would not be subject to change other than for extenuating reasons. In provincial centres where there is no resident High Court judge, a conference concerning an action in that court could be chaired by a District Court judge or possibly a registrar or senior practitioner.

804. In the above discussion we have not differentiated between the High Court and District Courts because we are of the view that similar considerations apply to both jurisdictions. To meet several submissions that wherever possible, there should be identical procedures and rules in the High Court and the District Courts, we would hope that when the new High Court Rules are gazetted, early attention will be given to their adaptation to the District Courts. We have also noted the passing of the 1977 Judicature Amendment Act which provides for pre-trial conferences in the Administrative Division of the Supreme Court. In view of the differences of opinion over the effectiveness of pre-trial conferences, we believe that it would be wise to wait and assess the success or otherwise of the conferences permitted in the Administrative Division before the introduction of such pre-trial conferences in any other civil jurisdictions.

805. ***Family Court proceedings*** Different considerations apply to Family Court matters. In the Family Court, there will be considerable interaction between the court, social agencies, and the parties. In the circumstances, the court is required to accept a controlling and co-ordinating function at an early stage. This could to some extent be achieved by the issue of regular practice notes by the Senior Family Court Judge, coupled with overriding supervision by the judges. The co-operation of all those involved with the court will be required. Different procedures may be required for different categories of case in the Family Court, but we would agree with the view of the Secretary for Justice that the essential aspect of court control and co-ordination in this jurisdiction is that it should be pervasive.

806. ***Criminal trials*** With the criminal business of both courts, it is important that trials should take place at the earliest possible date. Moreover, care must be taken to ensure that any persons who are in custody pending trial are not detained for longer than is necessary. This may mean that trials for such people should be given priority over trial of those who are not in custody. At the present time, both in the Magistrates' Courts and in the Supreme Court, there is a good degree of co-operation between the prosecuting agencies, the court, and the legal profession. If this co-operation continues we do not envisage the need for any new supervisory procedures in relation to criminal trials.

Recommendations

1. Within a short period after application is made for a fixture, counsel and, wherever practicable, the parties, should appear before a judge, master, or registrar to confirm the state of the action.
2. There should be an automatic review of all civil cases at a date one year after the filing of proceedings. Counsel and, wherever practicable, the parties, should attend the court for this review.
3. The Rules Committee of the District Courts should as soon as possible consider the adaptation of the new High Court Rules to those courts.

Consumer Monitoring

807. A number of thoughtful submissions advocated the need for a legal services commission to take over supervision of the operation of the courts and the provision of criminal and civil legal aid. We accept that consumer monitoring of the legal system is most desirable. The individual members of our Commission have benefited enormously from listening to and learning about the views of those who use the legal system. In our already overregulated society we hesitate, however, to suggest the introduction of a watchdog to watch the Department of Justice, which should itself be carrying out the monitoring of the system. We were also told by the Secretary for Justice that he proposes to develop a research unit, although it appears that it will be, because of lack of funds, on a very small scale.

808. In our opinion, what is necessary is the formation of simple boards or committees on a district basis. These boards should be charged with the presentation of an annual report to the Department of Justice and the Judicial Commission dealing with all consumer aspects of the system. Each board could well be composed of a lawyer, a layman, and a court officer, and should be required to make enquiries from users of the system. Any suggestions about the operation of the courts should be directed to the board. Coupled with the use of such boards is the need for the Department of Justice to keep the operation of the courts under constant review. What is required is to keep up the stimulus given by this Royal Commission so that the court system is not allowed to stagnate, but continues to change and develop.

Recommendations

1. Boards or committees should be formed on a district basis to deal with all consumer aspects of the system.
2. Such boards or committees should report annually to the Department of Justice and the Judicial Commission.
3. The Department of Justice should keep the operation of the courts under constant review.

Recording of Evidence

809. The recording of evidence in court is an important component of any trial. The efficiency with which the recording is carried out can vitally affect the proceedings and smooth functioning of the court. We agree with the Secretary for Justice who said:

> We believe the essential features in any system for recording evidence of Court proceedings to be: (a) accuracy of the record; and (b) speed of availability of the transcript.

We would add that, with modern developments, any system should be kept constantly under review.

THE PRESENT SYSTEM

810. ***Supreme Court*** In the Supreme Court evidence is directly recorded onto the typewriter which means the notes of evidence are available to the judge and counsel, page by page, as they are typed during the course of the trial. The typing is done by the judge's associate, who accompanies the judge into the Supreme Court, and types the entire record of evidence in every case heard by him. This typescript forms the permanent record of the case.

811. The method used in the Supreme Court is probably the cheapest method, and the transcript is immediately available to judge and counsel. This is a very real advantage and some say an outstanding feature of the New Zealand system, but it means the proceedings have to be conducted according to the pace of the typing. The record is available for examination and correction (when necessary) while evidence is fresh in everyone's mind and there is no delay in awaiting transcripts for appeal purposes. The disadvantages are that witnesses may be upset by the interruptions to change typewriter paper and by requests to adapt their pace of speaking to the pace of the typewriter. In addition, typewriters are noisy and distracting to participants. The proceedings are undoubtedly slowed by this method. All of these complaints could be partly remedied by installation of better quality typewriters, sound resistant typewriter cabinets, and a system of continuous stationery.

812. The New Zealand Law Society in their submissions summarised opposing viewpoints expressed by barristers concerning the present system:

> . . . a number of barristers believe that the more sedate pace of proceedings in the Supreme Court is beneficial to the conduct of a case. Counsel have more time in which to frame questions and both counsel and the Judge, or Judge and jury, have a greater opportunity to digest the witnesses' answers. There is opportunity for reflection. Repetition, it is also claimed, is much less likely with a consequential saving of time. By the same token witnesses, particularly those being cross-examined, are spared the relentless pressure of questions put without pause, and are therefore in a better position to do justice to their evidence . . . Yet other barristers are prepared to deny that these advantages are as real as claimed. They say that the pace at which a case is conducted is primarily a matter for the presiding judge; that there is no evidence of counsel or witnesses being at a disadvantage by virtue of the speed at which evidence is taken in the Magistrates' Courts or before tribunals or commissions of inquiry [where it is taken in shorthand]; that, if anything, witnesses are more upset by the need to slow down the presentation of their narrative, by

the intermittent interruptions which take place when the Judge's Associate changes the paper in the typewriter and by the not unknown terse intervention of Judges frustrated in their endeavours to persuade witnesses to speak at a pace their Associates can manage. Severe or unfair methods of cross-examination not allowing a witness the opportunity to think or fully answer the question is again seen as a matter for the presiding Judge to control. These counsel assert that although the immediate availability of the transcript of evidence can be useful it is not imperative and that its usefulness does not outweigh the advantages of ensuring that the pressure on the Courts is relieved and the Courts made a more agreeable place for litigants and witnesses. They point out that it is an advantage which counsel in a number of overseas jurisdictions do without. Finally, they claim that lawyers, including those who have as a matter of practice utilised the prompt availability of the transcripts more than others, will quickly adjust to a new method of having the evidence recorded.

813. ***Magistrates' Courts*** In Magistrates' Courts direct recording onto a typewriter is used for taking of depositions in preliminary hearings and sometimes for the recording of evidence in the Domestic Proceedings Court. For other cases in the Magistrates' Courts, the evidence is recorded by shorthand writers and is typed back only if there is an appeal against the decision of the court. If, however, shorthand writers are not available, some magistrates use tape recorders, or simply take their own notes in longhand. Shorthand and typing is performed by shorthand typists from the typing pool at the Magistrates' Courts.

THE ALTERNATIVES AVAILABLE

814. The Commission has received a number of reports on equipment and has viewed at first hand new equipment available in New Zealand, as well as methods of court reporting used in the different States of Australia and in England. These methods fall into four categories:

(a) use of shorthand writers
(b) use of shorthand machines
(c) use of word processing machines
(d) use of sound recording.

815. ***Shorthand writers*** Evidence recorded by a team of shorthand writers is a fast and efficient method of court reporting. An experienced shorthand reporter, actually present in the courtroom, can produce a very accurate transcript because she is able to ignore repetition, clarify inaudible statements or indistinct pronunciation, and deal with the language difficulties of people who speak English imperfectly or with an accent. Because the notes have to be transcribed, they are not available immediately. Shorthand writers employed in court need to be trained to take a very fast speed (150 words per minute as a minimum). In Australia they are very highly paid. In 1977, the rate in Queensland for a senior reporter after 16 years' service is $A78 per day, and she is only one of a team working on any one day in a court. Recruitment and training is important if a team of sufficient size is to be available. Shorthand writers were used in Auckland for a recent lengthy trial. The total cost of wages was $140 per day compared with $30 per day under the present system. Investigation of the number of pages of transcript produced each day indicates that the saving in sitting time was not as great as expected.

816. In Queensland, the Department of Justice has established within the department a Court Reporting Bureau, administered by the chief court reporter, to provide shorthand writers for the courts. This bureau employs 67 court reporters (male and female) to service all the courts of higher jurisdiction in the State, including the Supreme Court and Royal Commissions. The bureau has its own recruitment and training scheme. Commencing salary for reporters is $A10,820 per annum rising to $A20,207 per annum after 16 years' service. Under the Queensland system, Hansard reporters are drawn from the senior reporters of the Court Reporting Bureau, the salary scales for both services being the same. There is advantage in the Parliamentary and court reporters having the same training and salary, as poaching from one service to the other is avoided. A fairly high proportion of the shorthand written is transcribed ("running transcription"), with the record available to the judge and parties by the end of the day, usually soon after the court rises. The evidence is taken down in shorthand and transcribed by dictating to a typist, or, for less urgent work, by dictating into a tape recorder. A full team to provide running transcription comprises four reporters and three typists, but this can vary according to the case. Queensland judges are of the opinion that the service provided by the Court Reporting Bureau is very good. A similar system operates in New South Wales and South Australia. Shorthand writers are provided for the Family Courts of Australia by the Commonwealth Reporting Service. Contrary to the State practice, these shorthand writers type back their own notes.

817. To summarise, the advantage of this system is that a very accurate record can be obtained because the shorthand writer is actually present in court, but there is a delay while the notes are being transcribed. Servicing the courts with teams of reporters in this way is efficient but costly.

818. ***Shorthand machines*** Shorthand machines are manual and portable; they are silent and can be used with a minimum of physical effort by the operator. The shorthand is recorded on paper tape and transcribed by a typist reading from the shorthand characters. The cost per machine is approximately $400 in New Zealand and they require very little maintenance. This system is widely used for court reporting in the United States of America. It is also used in South Australia, Victoria, and New South Wales. It has the advantage that paper tapes provide a permanent record which can be transcribed at any time by a trained reader. Typists can be trained in about one month (full-time) to transcribe the tapes, without learning the whole system.

819. Machine shorthand with associated computer print-out, Computer Aided Transcription (CAT), is already in use in some courts in the United States of America, and several court reporting bureaux in Australia are interested in the development of this system. Canberra, for instance, is planning to set up a course in 1978 at the Canberra College of Advanced Education, to teach computer-compatible shorthand to students in a court reporting course.

820. It must be remembered that this is basically another system of shorthand, enabling an exceptional operator to achieve a greater speed than written shorthand, and where one operator can work effortlessly for long periods. In Canada, to pass the examination for a court reporter, a machine shorthand writer must be able to accurately record 175 words per minute. Some writers achieve 200 words per minute. These machines are available in New Zealand but there are few trained operators, and to introduce the system would involve setting up a training scheme. For a

mechanical shorthand writer, the training period is six months full-time to attain a speed between 110 and 140 words per minute; and 18 months or more to reach the speed necessary for court reporting.

821. We consider the long-term advantages of setting up a training scheme in New Zealand for computer compatible shorthand should be investigated, and developments that would enable transcript to be produced by computer print-out from machine shorthand should be kept under close review.

822. ***Word processing machines*** These are electronic machines with a typewriter keyboard. Material is recorded through the keyboard onto magnetic cards, tapes, or cassettes. The evidence could be typed on the keyboard of the word machine in the courtroom, but because of the noise, the printing-out process would have to be undertaken in a room apart from the court, with a supervisor constantly in attendance to collect and distribute the print-out to the court, or courts, as it was produced. The nature of the magnetic recording allows the text to be erased and re-recorded and also allows for changes and corrections to the original typing. This is a very great advantage for some types of work but has no advantage for court reporting as the recording of evidence is a continuous process with little time or need to make alterations, let alone by a complicated machine process.

823. With a word processing machine there is no pause for change of paper. This, with other automatic features, speeds up the typing process and removes some of the annoyances to the witnesses and parties caused by the present system. Members of the Commission have seen a demonstration of a word processing machine which was tested in the Auckland Supreme Court to record evidence in several cases in a live situation. An associate told us she found it easier and faster than any machine she had previously used. We do not find this surprising in view of the equipment at present provided. She explained it was not as noiseless as expected and one annoying feature was a delay of five to 15 seconds when the printing-out process was set in motion, thus causing a break in proceedings in the court. A visual memory machine has been used by a member of the Commission staff over a period of weeks and while it is silent and very fast, we do not consider it suitable for the courtroom. We understand another type of word processing machine is shortly to be installed in the Wellington Supreme Court on a trial basis. We are sure the only way to test the effectiveness of such machines for the recording of evidence is to use them over a period of weeks in the work situation for which the machine is being considered. Health aspects of operating visual screens for long periods should also be investigated. Machinery installed in court must be 100% reliable as equipment failure could lead to loss of testimony and delays.

824. One important consideration in the purchase of equipment is the standing of the supplier, who should be well-established and able to offer reliable support including supply of parts, service, and maintenance during the whole of the life of the equipment. Cost is another factor which must be taken into consideration. The word processing machine is only another form of typewriter and yet the cost is many times greater than that of a good typewriter. Very great improvements would have to result from the installation to warrant the additional expenditure.

825. ***Sound recording*** A number of individuals appearing before us recommended the use of tape recorders in the Supreme Court and members of the Commission travelling overseas investigated this method

in Australia and England. Reports on the use of tape recorders in the courts in Canada and Alaska were also studied. With this system, the court is wired for sound with fixed microphones in front of the judge, the clerk of the court, counsel, the witness, the foreman of the jury, and in some cases a roving microphone is available. The proceedings are continuously recorded onto a tape recorder in the courtroom, with the clerk of the court or a monitor keeping a log, so that speakers and passages can be identified and portions of the tape replayed if necessary. The monitor has to completely understand the machine he is monitoring and have enough confidence to ask the judge to halt proceedings where malfunctioning of the machine or noise in the courtroom is interfering with the recording. The monitor also adjusts the volume from each microphone where necessary.

826. The tape recording system installed in the Royal Courts of Justice in London was described to us as an excellent system but more recently we have been told that although this is the preferred system, provision of daily transcript has been discontinued because of expense. The present delay in obtaining a record of the evidence for appeal purposes is nine months, and members of the Commission who inspected the installation were not impressed with what they saw.

827. Tape recorders are extensively used in the Australian District and Magistrates' Courts, in the High Court of Australia, and some Supreme Courts. Tape recorders have been installed for future use in the new Supreme Court in Sydney. In Alaska, sound recording is the exclusive method of preserving the record of proceedings in all Courts of Record in the State, and according to the report prepared for the National Center for State Courts in Denver, Colorado, judges and lawyers of Alaska are generally agreed in preferring this system.

828. The specific example of a system in use for some 10 years may be of interest. Tape recorders are installed in all 16 Magistrates' Courts in Brisbane and three mobile units are available for circuit towns serviced from Brisbane. There are four machines in each court, fitted in a console, with a member of the court staff monitoring the machine and keeping a log of the proceedings for the purpose of playback in the courtroom and for the use of typists in identifying who is in the witness-box or who is questioning the witness. One machine runs for eight hours and provides the master tape of proceedings, one machine is used for playback during a hearing, and two machines are used to provide tapes for transcription. These tapes can run for 15 minutes, are changed every 10 minutes, and sent to the typing service for transcription, if transcription is required. A 10-minute tape takes 30 to 40 minutes to type. There are 30 typists employed to transcribe the tapes for the 16 courts. There is difficulty in recruiting staff for this work, but a full complement is maintained. This work can be done on a part-time basis and is therefore suitable for married women with school-age children. Once having been recruited audio typists are specially trained to work in units, with five typists to a supervisor. The standard of their work appears to be high, and transcriptions can be available within an hour of the court rising for the day. Audio typists transcribing tapes require special temperament and intelligence to distinguish voices and to assess what has happened in the courtroom. This is more difficult than typing ordinary dictation. They are required to be proficient in spelling and to have a high order of intelligence and general knowledge. The court employs three technicians to maintain and service the tape recorders. In the event of a breakdown

the court adjourns while the technician installs a replacement machine. Spare machines should always be available. The courts in Brisbane were all inside courtrooms fitted with acoustic tiles to cut down extraneous noise.

829. A similar system is in operation in the courts in New South Wales. At the Parramatta court complex, the transcription typists also act as monitors, which completely involves them in the process, adds interest to the job, and, because they are aware of the difficulties associated with careless monitoring, ensures that the work is carefully carried out. Typists also act as monitors in Canberra.

830. In Canberra, sound recording is used in the Supreme and Magistrates' Courts. For the Supreme Court, identical tape recorders are installed in the transcription room connected by land line from the courtroom. They are used to produce short tapes from which the typists transcribe. Seven typists are required for each courtroom (two monitoring and five typing) to produce daily transcripts. When the court rises at 4.15 p.m. (the usual hour), the transcript is normally ready by 5 p.m. In the Magistrates' Courts no daily transcripts are required. The machine is monitored in the courtroom and a log kept for the purpose of play-back and to help typists who may later be called on to produce transcript for appeal purposes or when an accused is committed for trial in a higher court.

831. In Australia it is stressed that quality machines are of paramount importance. The equipment used in New South Wales, Canberra, and Queensland, is of broadcasting quality. In Alaska, the machines are merely adapted from those used for general commercial purposes: the equipment, which is subject to frequent breakdowns, was purchased by lawyers and administrators, not electronics technicians. For that reason, State officials were influenced by equipment salesmen and were unable to exercise an independent and informed judgment on the quality of machines offered them. Alaska has now appointed an electronics technician to offer advice on purchase and installation of equipment.

832. When selecting new equipment it is important to ensure an available support and back-up service for the lifetime of the system. The annual recording tape cost varies with machines and is a most important consideration when assessing the type of machine to be installed. The length of time tapes are to be retained before re-use is also an important decision, as this can produce substantial savings. Australian officials are convinced that the efficiency of the system depends on how the tape is transferred to paper and this they consider an administrative problem. We were told that the New South Wales Magistrates' Court administration is geared to use the sound recording system for the next 30 years. The system is obviously efficient and although less costly than producing transcript by shorthand writers, it is still expensive.

833. The cost could be considerably reduced if the luxury of daily transcripts in all proceedings was dispensed with and transcripts provided only when an appeal is lodged, or for some other special reason. Against this must be measured the delay necessary to produce appellate transcripts. Another cost saving would be achieved if appeal papers contained only material relating to the disputed issues; for example, the testimony of a single key witness, the evidence relating to damages, certain rulings and evidence, or the judge's instructions to a jury. A rule of the British Columbia Court of Appeal is "to exclude from the appeal book all documents and notes of evidence that are not relevant to the subject

matter of the appeal or necessary for its decision". In England and Alaska facilities are available for counsel to listen to a tape before ordering a transcript. This helps cut down the volume of typed material sent to an appellate court.

834. To summarise the advantages of this method, we re-state that a witness is able to speak in his or her normal speaking voice and proceed at normal conversational pace. Everything that is said in the courtroom is part of a permanent record on a master tape and the tapes can be replayed as often as necessary to check the accuracy of the finished transcript. Not all tapes have to be transcribed. The accuracy of an interpreter's translation can be independently checked as the original words of the witness are preserved on the tape as well as the translation. If a recording is listened to by a reviewing judge rather than reduced to the form of a written transcript, it preserves some of the "demeanour evidence" which was present in the original proceedings but which ordinarily escapes an appellate court. In the District Court in Alaska tapes are practically never transcribed. Instead, when an appeal is taken from a judgment in the District Court, it goes to a single judge of the Supreme Court who listens to the tape and makes his decision. However, there are also disadvantages. Extraneous noise may obliterate part of what is said and it is lost for ever. Indistinct or inaudible words may be wrongly transcribed, completely altering the meaning, and there can be difficulty in separating voices, but most such problems should be avoided if proper checking procedures are in operation. Equipment failures undetected at the time of recording can lead to loss of testimony. Users of tape recorders have learned, to their dissatisfaction that even a sophisticated multi-channel recorder will record only the sounds that reach its recording heads. If a person speaks inaudibly or in a garbled manner, or if distracting foreign sounds muffle a voice, or two or more speak at once, the tape recorder will not stop the proceedings. The spoiled portion will be lost for ever and the transcriber may be unable to unravel the jumble of noise from the tape recorder. However, a good monitor should be aware if any of the above disadvantages occur. Proceedings can be halted and the evidence repeated if the monitor has doubts about the clarity of the recording.

SYSTEMS FOR THE FUTURE

835. In considering the best method for recording of evidence for New Zealand, we must first comment on immediate transcription of the evidence. We have been told this is the outstanding feature of the present system but some lawyers assert that, while an immediate transcript can be useful, it is not imperative. We are mindful, however, that without it judges and counsel would have to take their own notes in long-hand and we consider that an immediate transcript has very great advantages.

836. Whatever system of court reporting is used, there are several improvements to courtrooms which should receive urgent attention. The acoustics of the court are extremely important and every effort should be made to improve these and to eliminate extraneous noise. Windows should be double-glazed when excessive traffic noise makes it difficult to hear. Other desirable changes to absorb echoes and reduce the noise level would include carpeting, acoustic tiles or panels on walls and ceilings, and heavy curtains.

837. In our opinion, the most efficient and satisfactory system of recording evidence is by a team of shorthand writers actually present in the court, with the shorthand (either manual or machine) being

transcribed by typists to provide a record of the evidence, soon after the court rises for the day if this is necessary. To adopt this method for New Zealand would require training schemes to provide teams of highly skilled shorthand writers in all High Court centres.

838. The next best system, in our opinion, is sound recording, with a set of high quality tape recorders installed in each courtroom to record the evidence for play-back or transcription by a team of audio typists. In this way, the evidence can either be stored on tape or transcribed the same day if necessary. To install this system would require consultation with an independent electronics engineer to investigate and assess equipment available. The experience in Alaska proves that commercial quality tape recording machines are not suitable for this type of work. Extensive use in Australia indicates that broadcasting quality sound equipment is essential. Audio typists of the required temperament, vocabulary, and intelligence would also have to be recruited and trained, as inexperienced, average typists will not produce good transcript. Sound recording would be particularly appropriate for the District Courts as immediate transcript is rarely necessary in that court and evidence could remain stored on tape until required for appeal purposes. To assess this system, we suggest a pilot project with high quality sound recording equipment and audio typists, to service the High Court and one District Court room in Christchurch. Although the use of sound recording would not require the present attendant shorthand writer, the recording machine would have to be responsibly monitored. The standard of monitoring would be important to cover the possibility of the appeal judge dispensing with the transcript and reviewing the evidence directly from the tape from the District Court. If sound recording was installed in Christchurch, the associates of judges sitting in the High Court there would be released from typing the evidence. If so, it may be appropriate, as occasion permits, for the judge's associate to act as clerk of the court where the judge is presiding.

839. Our third choice would be retention of the present system with improved equipment. Although we have not been persuaded that word processing machines are any better than high quality typewriters for the recording of evidence, we think all types of electronic typewriters should be thoroughly tested for efficiency and reliability, as they become available, to determine whether they are suitable for court work.

840. The introduction of any new system such as sound recording, teams of shorthand writers, or word processing will take time. Training schemes will have to be set up to provide skilled personnel necessary to operate the system. Equipment will have to be assessed, purchased, and installed. While any such programme is being carried out it is important that the present system is made more efficient by outlaying a comparatively small amount of capital expenditure on better equipment, and by recognising the skills of the judges' associates and the typists with increased remuneration. Improved equipment should include:

(a) *Electric typewriters* of the quality and durability to withstand days of almost continuous use in the courtroom. The fastest electric typewriter on the market is the only machine capable of meeting the average associate's maximum speed and increasing her output in the court. One such machine has been installed in the main courtroom in Wellington, and associates who have used this first-class machine in court rarely need to interrupt the flow of evidence and can even pause to listen on occasions to softly spoken counsel or witnesses, before proceeding to record. One

associate estimated an increase in output of 25% in court, when using this particular typewriter, compared with those usually provided by the Department of Justice; her observations are supported by one of the judges. We consider that quality typewriters, the same as the one in the main courtroom in Wellington, should be provided as a fixture in all High Court rooms throughout New Zealand and also in the associate's room at each High Court. These machines are not portable. Transporting typewriters on circuit damages the machines, is costly, and causes inconvenience. A high quality typewriter is an essential piece of equipment for every associate and even if word processing machines were provided, each associate needs a high quality typewriter as well. Universal use of the same machine would provide continuity of equipment for the associates, whether at their headquarters or on circuit, with obvious advantages. Savings in time for all concerned, judges, counsel, witnesses, jurors, police officers, and court staff would also reduce costs, providing ample justification for the capital outlay involved. One of the objections to the installation of these typewriters has been that servicing was not available nationwide, but our enquiries established that servicing would be available in all but five of the smaller Supreme Court centres, which would be serviced from nearby towns. One spare machine, in case of breakdown, should be held by the registrar in Auckland, Wellington, and Christchurch. The present source of annoyance of having to break proceedings while the typist changes paper in the typewriter should be removed by provision of continuous stationery, as for computer print-out.

(b) *Sound resistant typewriter cabinets* in use should be re-designed and replaced. Typewriter noise is troublesome with all makes of typewriter and appropriate steps should be taken to reduce it to a minimum for courtroom work. The suppliers should be made aware of the problem and asked to provide the maximum sound-proofing upon an order being placed for the installation of their machines on a nationwide basis. The design of the sound resistant cabinets should not be such that reducing the noise in the court has the effect of increasing it around the associate, making it difficult for her to hear what is being said. The design should also take into consideration the importance of the associate having a clear and uninterrupted view of the witness and counsel.

(c) *Microphones* have been installed in the witness-box in many courtrooms and are of great assistance when correctly used. The need to produce an overall better result from microphones should be kept constantly under review and improvements in positioning, type, and use should be introduced as soon as tests show they will be advantageous. Wherever microphones are in use, volume controls should be provided for judge, jury foreman, counsel, and associate.

(d) *Copying machines* should be available to all associates. The New Zealand Law Society, in making submissions said:

> Every effort should be made to see that they (Associates) are provided with the equipment and facilities which are regarded as essential in most professional and commercial offices.

Judges' associates are required to type judgments with numerous carbon copies, but typewriters are no longer built to produce fair copy of the up to 12 or 14 copies required of some judgments, which may extend into 30 pages and occasionally considerably more (a recent Auckland judgment was more than 200 pages). The time wasted in inserting multiple numbers of carbons and correcting typing errors is significant and it is generally

considered to be an uneconomic method of obtaining a number of copies of a document.

841. ***District Courts*** We have received no submissions suggesting that the current methods of recording in the Magistrates' Courts should be changed, but in the proposed District Courts it seems obvious that in jury trials the method of recording evidence should be the same as used in the High Court. This means that selected shorthand typists from the typing pool at the District Court or specially recruited shorthand typists may have to be trained as jury court reporters to take evidence verbatim onto a typewriter for jury trials in District Courts. As in the High Court, if this system of recording evidence is to be acceptable to the judge, counsel, and the public, the standard of the work must be high. The equipment (typewriters, sound resistant typewriter cabinets, and microphones) should be the same as that recommended for the High Court and the importance of the work should be recognised by paying the typists an adequate "in court" allowance. The present $1.23 per day "in court" allowance is not sufficient to attract typists of the required calibre and we recommend a substantial increase. As recording evidence in a jury court is something of a unique skill, it may be desirable for an experienced judge's associate, in co-operation with the supervisor of shorthand typists in the District Court, to provide the necessary training. Jury reporters should, where possible, work on a pool system as presently exists for other shorthand reporters and typists in the Magistrates' Courts. These reporters should "spell" one another and no typist should be asked to continue typing evidence in court for more than one and a half hours without a break.

842. The Magistrates' Executive in their submissions considered that a personal secretary should be assigned to each magistrate. While we recognise that personal secretaries would provide an ideal service, it has not been demonstrated to us that the need for such service presently exists. Our enquiries indicate that a personal secretary to a magistrate or District Court judge would find that her time was not fully occupied and this could present administrative problems as well as needlessly increasing costs. We do, however, accept that secretarial assistance should be readily available to District Court judges and suggest this should be provided from the typing pool at the court. To maintain secretarial assistance and court reporting services it may be necessary for the numbers in the typing pools to be increased.

843. ***Conclusion*** We believe that the provision and maintenance of equipment and personnel to provide an accurate record of the evidence in our courts is so complicated that a special section of the Department of Justice should be set up to supervise the service in co-operation with the Chief Court Administrator. To keep the system operating efficiently would involve keeping up to date with technological advances in equipment, consulting with independent electronics engineers to assess the advantages, replacing existing equipment as necessary, initiating training schemes, supervising the standards of reporting, and promoting professionalism among the court reporting staff.

844. Improved equipment will not succeed unless highly skilled and experienced shorthand typists are available:

(a) to take the evidence in shorthand;

(b) to type the evidence onto a typewriter; or

(c) to type the transcription from sound recording equipment.

Unless shorthand typists with shorthand and typing speeds of 150/90

words per minute respectively or audio typists with the required temperament and other attributes of intelligence and vocabulary are available, no system will function satisfactorily. For this reason we consider court reporting should be recognised as a profession and that training programmes should be initiated and maintained in conjunction with the Department of Education or other educational bodies so that sufficient personnel of the required calibre are under training and coming forward to service the courts in future. The salary scale should be appropriate for the skill and training required.

Recommendations

1. If the aim is to provide the best system of court reporting for New Zealand, we set out what we consider the most efficient and satisfactory systems in order of preference:
   (a) the taking of evidence by a team of shorthand writers with continuous transcription: this would be the most expensive;
   (b) the use of sound recording, also with continuous transcription: this is also expensive;
   (c) the present system of direct recording onto the typewriter.
2. Pending a decision on the system to be adopted in New Zealand, improved equipment as follows should be purchased forthwith to make the present system more efficient:
   (a) highest quality electric typewriters in all jury courts, in all judges' associates' offices, and for the use of typists recording evidence in the jury courts of the District Courts;
   (b) specially designed soundproofed boxes to house these typewriters in the courtrooms;
   (c) photocopying machines;
   (d) sound amplifying systems in all courts and improvements to existing systems.
3. Continuous stationery for typing evidence should be provided.
4. To evaluate sound recording as a possible system of court reporting for New Zealand, a pilot project could be set up in the High Court, and in one of the courtrooms of the District Court, in Christchurch. This will involve consultation with electronics engineers, installation of high quality equipment, and employment of teams of audio typists.
5. As judges' associates are released from typing the evidence, the task of acting as clerk of the court where the judge is presiding may be added to their duties.
6. All word processing systems should be thoroughly tested before discarding this equipment as unsuitable for the courts.
7. The method of recording evidence in the jury courts of the District Courts should be the same as that used in the High Court.
8. Additional shorthand typists should be employed in the District Courts to provide skilled typists to take evidence in the jury courts, and to provide secretarial assistance for District Court judges.
9. The daily "in court" allowance for shorthand typists in the District Courts should be substantially increased.
10. A special section of the Department of Justice should be set up to supervise the court reporting service for all courts in New Zealand.
11. Training programmes should be initiated and maintained to train shorthand typists and audio typists in the special skills necessary for court reporting.

12. The long-term advantages of setting up a training scheme for computer compatible shorthand should be investigated and kept under close review.

13. No unnecessary transcript should be ordered for appeals.

RELATIONSHIP BETWEEN THE COURTS AND THE PEOPLE

845. Item 8 of the terms of reference reads:

> The relation between the Courts and officers thereof and persons who attend the Courts as applicants, or as parties to any proceedings, or as witnesses, or jurors, or otherwise and the extent to which changes in the facilities and administrative procedures of the Courts are necessary or desirable to meet the convenience of such persons.

846. An appearance in court is often a completely new and sometimes unnerving experience. For the litigant it is usually of great importance whether it concerns his money, his freedom, or his personal relationships; but for all those coming to court, whether as litigant, witness, or juror, intimidating buildings and courtrooms, legal language, and even the pace of proceedings can be bewildering. It is not unknown (particularly on a plea of guilty in the Magistrates' Courts) for a defendant to leave the dock needing an explanation of what has happened. Because court procedures are so familiar to court staff, they may unwittingly appear indifferent or officious to the public. People coming to court for the first time need the help of calm, competent staff to help allay any fears, or explain any matter which may seem unclear. Special training programmes in public relations should be provided for all court staff dealing with the public.

Information for the Public

847. There should be a prominently placed information desk in the entrance to every court building, manned by staff of the right disposition, properly trained to answer queries and direct people who have business in the courts. Where the building is multi-storeyed, there should be an information board on each floor, by the lift, giving the floor plan and location of the courts and facilities. Where necessary, these notices should be multi-lingual. As far as practicable, a complete list of the business of the day, the parties, and the courtrooms, should be in the hands of the receptionist on duty so that queries can be competently dealt with. In buildings with many courtrooms, there could be merit in employing roving information officers to help people in need of directions. In the experience of Commission members who travelled overseas, it was usual for reception and other court staff to wear uniforms for easy recognition. It is our opinion that present deficiencies in these areas can be rectified in our existing court buildings and such improvements should be incorporated into plans for all future buildings.

848. In one Magistrate's Court, the Prisoners Aid Society provides a court welfare officer whose duties include dealing with language problems and enquiries concerning the duty solicitor and legal aid. In five other Magistrates' Courts around the country, the Friends at Court are in attendance Monday to Friday to offer help to people confused by court procedures. This voluntary organisation, started in Christchurch some years ago, has now spread to the other main centres. Their role is supportive and they aim to befriend people in stressful situations: at the same time, they remain anonymous and offer no advice. The value of their

work and that of other voluntary social welfare organisations, such as the Salvation Army, Nga Tamatoa, and like groups, is that we have, in the words of the Friends at Court at Dunedin, "ordinary people dealing with ordinary people". We hope these organisations will actively encourage representatives of different ethnic groups to join in their work and we note that Auckland and Wellington Friends at Court have already taken a step in this direction. There will always be a need for services such as these; they should be commended and encouraged; but their work should be in addition to, not in place of, a good information service provided by the court.

849. There is also a great need for more information to be given to people before they appear in court. The Department of Justice is aware of this need and is attempting to see that those appearing before the court receive information about their rights. The following procedures have already been introduced but action in this area needs to be constantly reviewed and expanded:

(a) Persons brought before a court on arrest now receive a copy of the information laid against them. We recommend that, wherever possible, the charge should be framed in simple language.
(b) Under the minor offences procedure, the summary of facts upon which the prosecution relies, and a notice setting out as simply as possible a defendant's rights and responsibilites, is being provided.
(c) Information about the duty solicitor scheme accompanies every summons issued in respect of an offence carrying a liability to imprisonment.
(d) Most court forms invite the recipient to get in touch with his solicitor or the registrar of the court, should he require any advice or help.
(e) A series of pamphlets has been published giving details of the legal aid scheme. They have been translated into Maori, Cook Island Maori, Niuean, Tongan, and Samoan.

The Department of Justice has also advised us that, in co-operation with the Department of Education, the Ministry of Transport, and the Police Department, it is working on a "law related programme" for teaching in schools. We do not doubt the need for such educational programmes to be developed and introduced into the schools; we suspect that many children and adults in New Zealand have an inaccurate or distorted impression of court proceedings. We hope this "law related programme" will be available in 1978 to all children at all levels and will be repeated annually with suitable changes and modifications. It would also be helpful to the public if a series of short television programmes were developed on the structure and function of the New Zealand courts.

850. In its turn, the New Zealand Law Society has also recognised the need for fuller guidance of those seeking advice on legal matters and has published a series of pamphlets for distribution by lawyers and legal advice bureaux, as well as initiating a number of other services. Those pamphlets issued include: "Guide for Court Witnesses" (also in six Polynesian languages); "Twelve Simple Ways to get the Best Value from your Lawyer"; "Making a Will"; "Lending and Borrowing Money on Mortgage"; "Marriage at Breaking Point?". Those in preparation include: "If you are Arrested"; "Disputes with Neighbours"; "Landlord and Tenant"; "Responsibilities of a Trustee"; "Town Planning and You"; and "Buying a House".

Service to the Public

851. ***Duty solicitor scheme*** The duty solicitor scheme was piloted by two District Law Societies in 1972. They manned the Magistrates' Courts in their area with local solicitors on a voluntary basis out of a sense of public duty. This led to establishment of the duty solicitor scheme in 1974, and District Law Society committees are now responsible for recruiting solicitors and arranging their attendance on a roster basis each day at the courts. The scheme is financed by the Government, but the rate of payment is so low that legal firms are heavily subsidising the scheme. The scheme is not perfect but it has proved itself successful in that basic and immediate legal advice and representation has been available to those who otherwise would have faced the court without legal assistance. Operation of this scheme rests on the ability of the District Law Societies to recruit solicitors, arrange rosters, and organise its operation generally.

852. ***Citizens' Advice Bureaux*** Free legal advice services provided by the Law Societies have been developed throughout New Zealand, in conjunction with Citizens' Advice Bureaux. As far back as 1970, the Auckland District Law Society inaugurated a free legal advice service in conjunction with the first New Zealand Citizens' Advice Bureau, opened at Ponsonby. Over 2500 people have received free legal advice from this bureau and there are now over 100 lawyers voluntarily contributing their time and skills in evenings and weekends at 16 separate free legal advice services in Auckland alone. These lawyers also contribute to local communities by giving talks and preparing leaflets and information sheets on legal rights. A more recent innovation by the Law Societies has been to set up legal advice services in several of the prisons; the possibility of doing the same thing on a trial basis in a psychiatric hospital is receiving consideration.

853. ***Neighbourhood Law Office*** In September 1977 the New Zealand Law Society established a pilot Neighbourhood Law Office in the suburb of Grey Lynn, Auckland. The concept of a Neighbourhood Law Office is of a friendly place located among the people it aims to serve, with the opportunity to identify and assess the particular needs of that community. The New Zealand Law Society provided $10,000 from its own funds and this, together with help from the Auckland City Council and various charitable trusts, enabled the pilot scheme to operate for a year. The Government recently announced approval of a grant of $10,000 and a subsidy on a dollar-for-dollar basis up to a further $10,000 towards the cost of running the Grey Lynn Neighbourhood Law Office for another year. We were told by the New Zealand Law Society that the office is staffed by a full-time lawyer who is assisted by a community worker, a typist-receptionist, another lawyer and law students working part-time on a voluntary basis. In its short period of operation, there has been a good response from the local community. While the scheme is organised and administered by the Auckland District Law Society, a community advisory committee comprising local people assists in defining the Neighbourhood Law Office's priorities and will enable it to keep in close touch with the local community. In addition to undertaking a wide range of legal work (not conveyancing, estates, or commercial law), the Neighbourhood Law Office is instituting community education programmes in factories and schools and plans to run programmes on legal rights and the obligations of the citizen. We received a number of submissions advocating the establishment of Neighbourhood Law Offices in working class communities, and we commend the Auckland District Law Society for the service they have initiated.

Appointments System

854. The Commission has heard many complaints, particularly in relation to Magistrates' Courts, about the practice of calling all persons to appear at court at 10 a.m., and about the length of time people are kept waiting. Having everyone arrive at 10 a.m. causes overcrowding at the courts, and some litigants and witnesses are kept waiting for hours for their case to be heard. It is a system wasteful of time and money for counsel, litigants, and witnesses.

855. The Magistrates' Executive told us they acknowledge public criticism of court sittings commencing at 10 a.m.: many of the magistrates had tried earlier commencing times, but the experiment was unsuccessful. The Commission recognises that the time between 8.30 a.m. and 10 a.m. is generally utilised by judges and magistrates for sentencing of persons, chambers applications, arguments of law before trial, making fixtures, disposing of part-heard cases, and miscellaneous applications. Likewise, counsel almost invariably make extensive use of the time available early in the day to attend to matters relevant to their cases.

856. This problem is common to many countries, and members of the Commission travelling overseas were interested to observe techniques for dealing with case scheduling. In Australia and Canada, for instance, systems have been introduced where the convenience of the public and the efficiency of the judicial system have been better balanced. The solution for Ottawa's court of first appearance is as follows: the court starts daily at 8.30 a.m.; between 8.30 a.m. and 9.15 a.m. two justices of the peace dispose of overnight cases of public intoxication and disturbing the peace; at 9.30 a.m. the presiding judge commences the regular court, when all counsel attend to enter guilty pleas or to set trial dates immediately after pleas are heard. Counsel can dispose of their business in this court quickly and efficiently and be ready to proceed with a fixture in another court by 10 a.m. without causing delays there. Cases are set for a specific time in a specific courtroom. Although the Crown and defence counsel are consulted for estimates of time to be taken, as well as with respect to the number and kind of witnesses, the final estimate is made by the court clerk whose experience enables him to be reasonably accurate. Cases set for a half-day or less are specifically set for 10 a.m. or 2 p.m., either alone or with other cases. This avoids the accused, defence counsel, and witnesses remaining in attendance all morning when their case is not called until the afternoon. Where a judge scheduled to sit is freed through a last-minute guilty plea, the failure of an accused to appear for trial, or for some other reason, the court clerk is informed. He may then transfer a case from another list which is slightly overloaded with the result it is rare for a list not to be completed.

857. We understand that similar procedures are operated in some Magistrates' Courts in New Zealand, at least in respect of fixtures. In certain courts, for example, some fixtures are allocated to begin at 10 a.m., some at 11.30 a.m., and some at 2.15 p.m. We have been told that at the Otahuhu Magistrate's Court, a fixture system worked well for a time, but at Auckland, where it was tried out in the Domestic Proceedings Court for a period of about a year, it was unsuccessful. We were told by the Magistrates' Executive it proved unworkable mainly because it was difficult to accurately assess the time each case would take; and because counsel were often required in another court and could not be present at the appointed time. The Magistrates' Executive noted that if firm times are given when fixtures are made, considerable hearing time is

wasted if those fixtures do not proceed to hearing. Nevertheless, we think it should be possible, with goodwill on all sides, to devise a workable system. We note that a substantial saving to the Government in the cost of legal aid, and to the litigants not on legal aid, could be effected by introduction of a fixture system; we think the cost aspect must be kept in mind when advisability of change is being considered.

858. Generally, we consider a system of appointments is desirable in the interests of all those who use the courts: there may be merit in distinguishing between certain classes of litigation as more or less susceptible to appointments at set times, or otherwise. We therefore recommend that, where the practice is to call everyone to court at 10 a.m., strenuous efforts should be made to devise a flexible system to more fully accommodate public needs. In implementing an appointments system, the various problems and difficulties in different classes of litigation in both the High Court and District Courts should be borne in mind. We would expect scheduling to be carried out by the regional court administrators, after consultation with the list judges and, of course, representatives of the District Law Societies.

Night Courts

859. There were a number of submissions calling for court hearings to be held at night to avoid loss of earnings and to more fully utilise present court buildings. A limited survey by the Department of Justice was carried out during the fortnight 4-15 April 1977. The department sent a letter, together with a reply-paid card, to all persons who were being summonsed to attend a Magistrate's Court during that period. A total of 1725 notices were sent out, but only 200 cards were returned. Of those 200, 132 favoured sittings either between 5-7 p.m. or 6-9 p.m. As far as the 1525 who did not reply are concerned, it may be assumed that they did not read the notice, or are quite happy with the present situation, or had no particular views, or, at least, do not advocate a change to allow for "after hours" sittings.

860. Five courts in New South Wales sit in the evenings to deal with traffic summons cases, but we did not receive the impression, while in Sydney, that this experiment was as successful as anticipated. In Tasmania, plea courts have recently been introduced on a trial basis in two large country courts: these plea courts commence at 5 p.m. before justices of the peace, and are provided for cases where the first appearance of a defendant is for plea only. Defendants are not arbitrarily summonsed to appear at a night court; they are given a choice of appearing at a day court if that is more convenient. The purpose of the night court is to make it possible for defendants to avoid the loss of salary or wages by having to appear for plea only during the day-time and this experiment is proving successful.

861. The Department of Justice survey did not establish public demand for evening sittings in New Zealand. However, the department considered that a further survey over a more comprehensive range of court business should be carried out to ascertain whether there is any public demand for court hearings outside normal sitting hours. From the information now available to us, we are not persuaded to recommend a change; this is a subject which should be kept under review by the Judicial Commission.

Court Office Hours

862. Supreme Court offices are at present open between 10 a.m. and 1 p.m. and between 2 p.m. and 3 p.m., whereas the Magistrate's Court offices open from 10 a.m. to 4 p.m. In both courts we see a need for the information desk to be manned for a longer period, certainly from 9 a.m., to answer queries from people coming to the courthouse before the court starts sitting. If the information desk is not manned, the general public is often left without necessary assistance.

863. We have also received submissions from probation officers throughout the country asking for the court office to be open outside working hours for the payment of fines by people who do not operate cheque accounts. To assist such people, we suggest that in the larger centres, provision should be made with requisite security for the cashier to be on duty at the court one evening a week (preferably Thursday) to receive payment of monies owing.

Interpreters

864. It is of the utmost importance that a defendant understands clearly all that is being said to, and about, him. Similar considerations apply to a witness. We are convinced, from the representations made to us, that interpreting services should be available whenever there is doubt that proceedings are understood by an accused or a witness. We have also been told that statements made in court by Maori and Pacific Island people asserting that they understand English must be accepted with caution, since some individuals may not be sufficiently conversant to express themselves in English, or to understand fully what is said to them. The Department of Maori Affairs drew our attention to the fact that many Maori youths have an English "idiom" of their own: their standard of comprehension of English is such that an interpretation service is necessary.

865. The language a defendant speaks should be determined if possible before he appears in court. In many cases the police will have first contact with a person and, where they are dealing with someone who has an inadequate knowledge of English, it should be relatively simple for the police to give advance warning to the court that the services of an interpreter will be required. Interpreters should also be available for interviews with duty solicitors and probation officers.

866. Where the parties are not knowledgeable in the language being used, the whole responsibility for the correctness of the translation falls on the interpreter. For this reason, qualifications of court interpreters must be of an high order. Before being employed in the court, interpreters should undergo special courses so that they are familiar with court procedure and legal terminology and are able to provide an accurate two-way translation of what is being said. Such persons are unlikely to be available in large numbers, and we consider their initial training is of considerable importance. It is obviously impossible to have interpreters speaking all the necessary languages instantly available at every court: the main need is for Maori and Polynesian languages. Unfortunately, very few people are capable of speaking a wide variety of Polynesian languages. We suggest that the Department of Justice must endeavour to recruit to the courts division, those who can translate above a minimum standard of proficiency in the various Polynesian languages or dialects, the numbers and standards being determined from time to. time by consultation

between the department and representatives of Polynesian groups. Examinations conducted by the Department of Maori Affairs to licence interpreters for work in the Maori Land Court could prove a useful guide in establishing standards of interpreting.

867. Finding and training suitable interpreters is not the end of the problem. Ideally, interpreters should be employed at the courts where they are needed, but, since there would not be sufficient work to keep them fully employed, they would need to assist with other work at the courts. This might not appeal to many persons otherwise suitable for employment as interpreters. It might also create administrative difficulties, and problems in relation to salary scales and prospects of promotion. The alternative is to use part-time interpreters (possibly on a panel basis) who are employed in other jobs, but we are informed that this also creates considerable problems, particularly in relation to availability of an interpreter when he is required for any given case.

868. The problems involved are obviously difficult to solve; yet there are continuing complaints that defendants fail to understand what is happening in court because of language difficulties. We consider that the Department of Justice will have to tailor its solutions to meet specific conditions: in some large courts, permanent interpreters may be possible; in others, part-time (but suitably trained) interpreters may be the best that can be achieved. Any solution will prove costly, but justice demands a solution should be attempted. It may be necessary to make interpreters' skills part of the qualification for an administrative career and to ensure that these qualifications are reflected in salary scales and promotional prospects. The long term solution is, of course, to ensure that all our citizens are able to speak and understand English as well as their own language. The provision of interpreters is but one example of the cost involved in administering a society where all the citizens do not have an adequate knowledge of the principal language.

The Maori and Other Ethnic Groups

869. Our discussion of this subject is directed to the Maori and other Polynesian groups because it was from these groups we received submissions. We record, however, that our remarks apply in principle to all minority groups.

870. Our attention has been drawn to the judicial functions performed by a Maori committee in a south Auckland suburb some years ago (under the powers given by the Maori Welfare Act 1962). The chairman of the Auckland District Maori Council believes that, given both official and community support, the system has potential for diverting minor and first-time offenders away from the courts. We therefore think a pilot project would be an appropriate step, in some part of the Auckland District Maori Council's jurisdiction. If the project were successful, ways and means might then be found to apply the principles in other areas and possibly to other minority groups. We caution, however, that such experiments must be subject to careful control and supervision. We have also been informed that the present weight of Maori opinion is that Maori committees, even though statutory bodies, are inherently unstable: their personnel change in triennial elections or the committees go into recess for a variety of reasons, for example. A further weakness is that though Maori in name and aspirations, their effectiveness in social control is heavily dependent on the threat of State sanctions, the police and the courts in particular. Nevertheless, groups can be effective in situations where ties

between individual members are based on some meaningful reciprocity and where, as a consequence, exclusion from membership and from the continuing benefits of giving and receiving is the ultimate punishment; and where, too, the act of exclusion itself results in loss-of-face for an offender.

871. Traditionally, and in some rural tribal areas today, the group would be the kin group or clan (possibly with some extensions into urban areas). Increasingly in urban non-tribal areas the group would be a peer or interest group; for example, a gang, a football club, a church, or cultural group, or a student club. The problem in any given case would be to identify the offender's primary group and to see if it could be used in any way to perform a corrective and rehabilitative function. It is at this point that Maori community officers (Department of Maori Affairs), voluntary community workers (honorary welfare officers, Maori wardens, and others), and group elders or leaders could be consulted, possibly through the probation service, in relation both to sentences and rehabilitation. By the same token, these groups (traditional or other), the statutory Maori committees, and Maori Women's Welfare League branches could prove invaluable in publicising the purposes and processes of the law and the costs of offending. Such Maori organisations have their counterparts among other ethnic groups and Polynesian people which could serve as mediating links between the authorities and those most at risk in offending, a link that seems desirable, given the extent of the cultural gulf between some minority groups and the wider New Zealand society. We believe official recognition of such organisations is needed. We think it much wiser to use organisations representing minority groups on the above basis than to endeavour to create special courts for minority groups.

872. ***Recruitment to the Department of Justice*** We commend the attempts made by the Department of Justice to recruit Maori and other Polynesian people to all levels of the department. Determined efforts must be continued. The responsibility for more equal representation should, however, be shared by all agencies concerned with education and welfare, as well as by Maori and other Polynesian people themselves.

873. ***Involvement in the legal profession and the judiciary*** This subject did not loom large in Maori submissions and the following extract from the evidence of the Auckland District Maori Council (a body representing the largest Maori population of any district in the country) would convey the majority view:

> . . . the racial origin of the judicial officer seems to be quite irrelevant . . . the present selective system of obtaining judicial officers only from the outstanding practitioners is the correct one . . .

A careful balance has to be struck between the present tendency to an over-production of law graduates and, at the same time, the need to recognise that the Maori and Polynesian community should be adequately represented in the law schools so that in due course there are suitably trained Maori or Polynesian lawyers who are capable of judicial office. This may involve, at least in the short term, a deliberate policy of encouraging Maori and Polynesian people to undertake legal studies.

The Oath or Affirmation

874. It was submitted to us by the Secretary for Justice:

> It is not too much to assert that not infrequently the administration of

> the oath is a gabbled farce, almost unintelligible to the uninitiated and answered with little comprehension of the consequences . . . it would be far better to require a witness simply to promise to tell the truth with a clear statement of the consequences should he make a false statement.

We do not see any need to change the wording of the customary oath or affirmation but more care may need to be taken in the way it is administered.

875. The Department of Justice said a witness is entitled to make an affirmation or swear in a form acceptable to his particular religious persuasion, but that no-one troubles to tell him this. Witnesses have the right to make an affirmation rather than take the oath if they so desire: we consider whatever form is used, the oath or affirmation should be administered clearly and deliberately so that the witness is aware of the seriousness of the undertaking he makes.

Legal Language

876. Legal language can place a lay person who does not understand it at a disadvantage; his incomprehension may create a sense of injustice. There is a distinction between legal words or phrases used because of the precision of their meaning and those which are merely "jargon"; barristers should always attempt to keep the meaning of what they are saying readily comprehensible to their clients and others in the court room. Where Latin words or phrases are used for precision or to avoid ambiguity, some explanation may be necessary for the parties. We question whether any purpose is served today by retention of such formal expressions as, "in your own recognisance", "estreat", "puisne", "subpoena duces tecum", or similar terminology which is often not understood by lay people. Likewise, otiose language such as, "I crave leave to humbly refer to my previous affidavit", should be avoided.

877. The Ontario Law Reform Commission, commenting on what it described as "the ancient and anachronistic terminology of the courts", said:

> . . . the courts are not the private domain of judges and lawyers. They exist for the people and in a very real sense belong to the people. That their functions should be clearly understood and accepted by the people . . . is surely beyond dispute.

To this end, we recommend that the New Zealand Law Society and the Council of Legal Education make it clear to their members and students at the law schools that unnecessary use of legal jargon is to be avoided when dealing with clients, witnesses, and jurors.

Wigs and Gowns

878. ***Majority opinion*** The wearing of gowns is a tradition formally set down in England in great detail in the Judges Dress Rules of 1635; the robes worn by judges today are little changed from those prescribed at that time. The wig was subsequently added when wigs became a universal fashion in head-dress for gentlemen and although this fashion of wearing wigs ceased towards the end of the 18th century, wigs have continued to be worn as the recognised head-dress of judges and counsel in England and the many countries maintaining institutions derived from England.

In the rest of Europe, however, the wig was abandoned by judges and counsel when wigs ceased to be worn as a general fashion. We think it well to remember:

> Robes and uniforms are not so much symbols as a language of their own. The robes of the judges, part mediaeval, part Tudor, part Stuart, part eighteenth Century, speak of a continuity of development of responsibility. They clothe the individual with the corporate authority of the law. They remind him that he is not an isolated individual acting for himself alone, here today and gone tomorrow, that his task is not a mere matter of whim or fancy but is one which, in the light of history, is weighty with the centuries . . .*

879. In "Current Topic" (1972) 46 A.L.J. 309, we read:

> Distinctive dress for those pursuing callings and occupations in our community is a commonplace—members of the services, clergy, academics, police, mayors, . . . The retention of distinctive attire for barristers is at least as soundly based. Putting aside the pejorative imputation that barristers cling to their dress merely as a symbol of status and imagined superiority, the most substantial ground for change would be that their dress has the effect of intimidating the honest witness. (If it does, it has presumably at least an equally disconcerting effect upon the liar.) But, in any case, this is to substitute appearances for substance; whether a witness is intimidated will depend upon a multitude of circumstances of which the conduct of counsel and judge will be the most important. Going to court for a layman is a a fearsome business, not because of what barristers wear but because of the very nature of the proceedings.

880. Perhaps the whole argument was summed up by the Rt. Hon. Sir Victor Windeyer, writing in the Australian Law Journal (1974) 48 A.L.J. 394:

> Robes and gowns have for centuries been the distinctive dress of lawyers—not only in courts of common law, but also in varying patterns in countries of the civil law. They are an accompaniment of a heritage of customs and culture that is part of the civilisation of Europe. The adoption of any new form of fancy dress is not easily justified. But the abandonment of a traditional costume is a very different matter, and the onus lies heavily upon those, who suggest this to justify their proposal.
>
> Today a prejudice is thought to be justified by expediency apparently newly discovered. It is said that forensic garments overawe and terrify witnesses and lead to injustice. This, unproved as a generalisation, meets an opposing opinion; men, it is said, are more likely to speak the truth when they are sworn to do so, and required to answer in circumstances that are grave and stern, and may be for them awesome, than in conditions of easy informality and unconstraint . . . The observance of old forms and customs is not simply a conservative adherence to usage. It is more: for it is a manifestation of the continuity of the law of the land. The present is visibly linked with the past, as a firm base from which the development and the form of the law can proceed in response to new social needs.

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*Topolski's Legal London. (Text by Francis Cowper, said to be Legal Historian of Gray's Inn.)

881. The Department of Justice in their submissions made a plea for the abandonment of wigs and gowns in the Supreme Court, saying, "They are an unnecessary relic of the past and such utility as they have is . . . greatly outweighed by their alienating effect on lay people who appear in Court". They went on to ask, "would it not be sufficient if a Judge in the Supreme Court was simply robed, counsel and registrar being in normal attire". On the other hand, the New Zealand Law Society said, "The views of the legal profession are divided and the Society is quite unable to estimate the number falling into one or other camp".

882. We do not find, as has been stated, that there is a tendency for other Commonwealth countries to dispense with wigs and gowns. In at least two of the older Commonwealth countries, members of the Commission observed an increasing tendency to mark the status of judicial officers with appropriate gowns and the addition of coloured sashes.

883. We have not seen convincing demonstration that wigs and gowns worn by judges or counsel are inhibiting the course of justice and we are unconvinced that these trappings add to the general feeling of trepidation some people have when they attend court. We think wigs and gowns should be retained where traditionally worn by judges of the Court of Appeal and the High Court. With the proposed change from the Magistrates' Courts to District Courts we recommend that it should be normal practice for judges of that court to wear a simple black gown. As far as counsel are concerned, it has been traditional, when appearing in the Supreme Court or Court of Appeal, to wear wigs and gowns. The arguments for and against such practice seem evenly balanced. The majority of the Commission recommends that wigs and gowns should be retained by all personnel in the High Court and Court of Appeal as at present, and that a simple black gown should be worn in the District Courts by the presiding judge. It is recognised, however, that circumstances might make occasional departure from this practice appropriate in the District Courts. We do not recommend that counsel or the registrar robe in the District Court.

884. ***Minority opinion*** (J. H. Wallace, Q.C.) In the scale of matters before the Commission legal dress is not a major topic. It is also liable to generate argument based more upon emotion than a consideration of the real issues. Nevertheless the garb of judges and lawyers is of importance, not merely in relation to the image of the law, but also because of the effect it may have on the quality of justice.

885. The submissions made to the Commission indicate that both the public and the legal profession are divided over the desirability of wigs and gowns. I accordingly accept that the burden lies upon the proponents of change. I also accept that dignity and formality are vital to the dispassionate, fair, and humane administration of justice. When, however, a substantial segment of the community believes that legal dress is so outmoded as to be counter productive of the above aims, then in my opinion the time has come for change. By far the greatest dissatisfaction centres upon wigs. They are not only outmoded and in our climate uncomfortable, but frequently look ridiculous because of the relatively long hair now worn by counsel of all ages and both sexes. Therefore, in the High Court and the Court of Appeal, I would abolish wigs and bands for counsel and court staff while retaining the gown, both for its links with tradition and its advantages as a formal, dignified and uniform mode of dress. For judges of the High Court and the Court of Appeal, I consider

that wigs would best be used only on ceremonial occasions. Any decision in that regard I would, however, leave to the judiciary.

886. In relation to the District Courts, there is general agreement that counsel and court staff should not wear wigs or gowns. For my part, I think the most desirable atmosphere would be attained if District Court judges in all jurisdictions, including the Family Court, were likewise not robed. In view, however, of the observations of the two members of the Commission who travelled overseas, I would not oppose their opinion that District Court judges should wear a gown.

Facilities for Jurors

887. Considerable importance is attached to the right of trial by jury in our judicial system, yet jurors are not given the consideration their contribution warrants. They perform a public duty, often at some inconvenience to themselves, and they deserve better treatment than they receive at present. Several submissions referred to the lack of information provided to prospective jurors and suggested that a written notice setting out their duties should be sent out with the jury summons. We referred this to the Department of Justice who advised that a leaflet, "Information for Jurors—Your Questions Answered", has been in use for several years. This should enable jurors to have some idea of what is required of them when they arrive at the court. Jurors should not be left to stand in corridors while they are waiting to go into court, nor should they continue to stand while the empanelling process is being carried out. Jurors should be directed to a comfortably furnished assembly room. The three members of the Commission who looked at court buildings in Australia were very impressed with the jury assembly rooms provided there. We consider such a jury assembly room would provide the registrar in his role as sheriff, or a senior member of his staff, with a place to meet the jurors and indicate their duties; put them at their ease; describe the lay-out of the building and the position of the cloakrooms; explain the procedure for swearing-in, balloting, the system of challenge and stand-aside; and discuss arrangements for their payment. Jurors should also be advised that if they are balloted for a case in which the accused is known to them, they should make this fact known to the court crier or registrar immediately and before being sworn as a juror.

888. We were told of the procedure adopted in South Australia by the sheriff, where, after he has welcomed the jurors in the assembly room and explained what is required of them, he administers the oath to each individually. This binds jurors for the whole period of their jury service. The sheriff then divides the jurors into groups by ballot and each group is conducted to the appropriate court by a court officer. We would like to see this procedure adopted in New Zealand, with the jury panel called for 9.30 a.m. on the first day of attendance.

889. The suggestion made to us by the Police Department, and supported by others, that jurors should not be guarded by the police but by members of the court staff specially appointed for that purpose meets with our approval; supervising staff should be drawn from that group of uniformed court staff previously referred to.

890. Jury deliberations, often lengthy, should be conducted in surroundings that are as congenial as possible. The provision of comfortably furnished rooms adjacent to each jury court, with facilities for refreshments and separate toilets, should be given priority.

891. We consider that fees for jurors need to be kept under regular review but we comment that there is some element of public service in being a juror. Rather than completely compensating people for their entire loss, which may cast a very heavy burden upon the State or the private litigant, we think it preferable to put the figure at a reasonable level, leaving it to the registrar to make an appropriate adjustment in any case of hardship. In Australia, the fees vary between the States from $A8.25 for half a day, up to $A30 per day. If a juror suffers loss of earnings greater than this figure, the actual loss, with a ceiling as high as $A50 in one State, may be claimed, provided proof is supplied: in addition, the jurors are entitled to travelling expenses and meals or meal allowances.

Witnesses

892. It is common knowledge that witnesses are often apprehensive when attending court. Counsel who intend to call a witness should ensure that the witness is kept fully informed of procedure and the time when his evidence is required. Witnesses need a comfortable place to wait near to amenities such as toilets, telephone, and, if possible, refreshments. The witness should be allowed to sit in a witness-box large enough to accommodate two people, to allow for cases when an interpreter is required. There should be a bench at the front of the witness-box, wide enough to hold papers or documents needed by the witness. The witness-box should also be fitted with a microphone.

893. Several individuals and groups pointed out to us the degree of fear instilled in the mind of a witness to a serious assault, particularly one involving a gang or a rape case, when names and addresses are given in open court. The matter was taken up with the Commissioner of Police who has now set out a procedure to be followed by police officers and Crown prosecutors which will avoid witnesses being embarrassed or unnecessarily inconvenienced through their addresses being revealed.

894. We also consider fees for witnesses should be regularly reviewed, bearing in mind that considerations applicable to jurors also apply to witnesses. In Australia, witnesses' fees tend to be at about the same level or slightly higher than jurors' fees.

895. There is no doubt that an appointment system for cases would reduce complaints by people who are required to take time off from their normal occupation to come to court as witnesses. Under the present system, they can be required to wait for lengthy periods, which is not only frustrating but uneconomic.

Buildings

896. From the evidence we have received and our own observations, it is apparent that the present situation regarding court buildings is far from satisfactory. Many court buildings have become woefully inadequate and are either in need of replacement or substantial up-grading. We are convinced that better court buildings are essential if justice is to be properly administered and if the public is to maintain its respect for the courts. This immediately poses a problem, as good court buildings are expensive. However, if the situation is to be remedied, an increased vote for buildings will have to be made from the public purse for some years to come. We think there is considerable force in the statement made to us that the quality of justice depends on the amount of money society is prepared to spend on it.

897. From figures supplied to us showing the appropriations for capital works for courthouses over the past 18 years, the amount spent has been considerably less than the appropriation. For the years ended 31 March 1976 and 31 March 1977, the appropriations of $2,000,000 and $1,910,000 were underspent by $890,000 and $837,000 respectively. We were told the causes lay in contracts being let later than expected because of planning delays, and in slower than expected progress on the Court of Appeal building and the Christchurch court administration building. With the run-down state of many of the court buildings and with so much needing to be done, it would seem that over this period a very low priority has been given to capital works on courthouses for the Department of Justice.

898. Forward planning is of the utmost importance, as design of court buildings ideally calls for a special study of overseas developments, which is then adapted to New Zealand requirements, and to the needs of the people using the buildings. Unfortunately, the delays between the drawing-board stage, letting of a contract for construction to commence, and the completion of the building, especially where construction is delayed for any reason, can cover a period of years during which time the original design may need review. We hope the matter of delays will be carefully watched. For instance, we understand that plans for the Christchurch Supreme Court were so far advanced in 1975 that it was then said to be too late for major changes, based on overseas observations, to be incorporated.

899. We regard it as essential that the design of proposed court buildings should be available at all stages of planning for perusal and comment by persons using the courts, for example, the judiciary, the Law Societies, the court staff, and the public. New court buildings should be designed so that they are capable of expansion and always having in mind the needs of the people using them. At present, in most of the larger centres, the court buildings appear to the public as a confused maze, crowded with litigants, lawyers, jurors, and witnesses, where there is neither privacy nor comfort. Courts are not always under the same roof and this causes inconvenience and inefficiency; though, as a special forum, the Family Court should be physically separated from courtrooms where criminal cases are heard. Finally, we emphasise that provision should be made for full security of buildings and their contents. There is no doubt that far more consideration for the comfort and convenience of the staff and the public is necessary, when designing new buildings or up-grading old ones.

900. ***Family Court*** In the main centres of population, Family Courts should either be established in separate buildings or in a part of the court building removed from the criminal courts and with a separate entrance and facilities. These facilities should include a reception area, waiting rooms, interview rooms, telephones, toilets, and a room where refreshments can be obtained and children can be attended to and cared for. In provincial towns, arrangements will have to be made for suitable premises and facilities to be available when the Family Court judge and support staff visit the town on circuit. In some places, the existing court building will be preferable to any alternative accommodation in the town. Community buildings, the Borough and County Council chambers may be suitable; but whatever venue is chosen, the special function and needs of the Family Court must be of paramount importance.

901. ***Courtrooms*** Courtrooms, wherever possible, should be situated in the interior of the building to eliminate traffic noise, to allow for separate

and private access by the judges, and to provide a separate entrance for jurors to keep them from mingling with the witnesses and the public. The acoustic quality of courtrooms should be of a high standard so that nothing that is said becomes lost or confused. Courtrooms should be comfortable with carpeted floors and upholstered chairs to provide a calm, quiet atmosphere where parties and witnesses are put at their ease. While we do not advocate that the judges' bench should be raised unduly above the floor of the courtroom, we accept that it is essential for the judge to have clear lines of sight to all persons in the courtroom. For this reason, the bench needs to be raised by a number of steps from the floor, with the witness-box also raised above the floor of the courtroom so that, when sitting, the witness can be seen by the judge, counsel, jurors, and the person recording the evidence. In the new Supreme Court building in Sydney, opened at the beginning of 1977, the floor of the courtroom is stepped, one step up to the table used by the clerk of the court and the court reporter, two steps up to the witness-box, and three steps up to the bench. It is also helpful if the jury-box and area for the public is tiered, as was the case in Sydney. If courtrooms are situated above ground floor level in any building, even if only two storeys high, lifts need to be provided for access by the public. Access to the court should be by ramp, rather than by steps, to allow entrance by persons disabled or in a wheelchair. Ramps would also allow access of book trolleys, used for easy transportation of books from the library to the courtroom bench. Although the courtrooms for the Family Court should not be rigidly formal, the judge's bench must be raised sufficiently above the floor for him to be able to see all parties seated in front of him. The furnishings should be such as to provide a restful atmosphere where people with family problems will not be overawed by their surroundings.

902. Good courtroom design should include the following facilities not always provided in New Zealand courts: good lighting, heating, and air conditioning; a bench in the witness-box for spreading papers (preferably hinged to provide a greater area if necessary); display boards for use by counsel or witnesses for sketching or exhibiting plans, and a screen for showing slides or film; reasonable accommodation for members of the news media.

903. Other facilities which are necessary in any court complex are:

(a) *Judge's chambers* These should be located away from areas used by the public and within easy access of the courts, whether by lift or passage-way. The judge's chambers should have a pleasant aspect, be roomy and comfortably furnished, and each should have its own toilet facilites. In the High Court, an office for the judge's associate should adjoin and have a connecting door to the judge's chambers. Sufficient accommodation should be included in the planning of new buildings to allow for the number of judges to increase.

(b) *Interview rooms* These should be furnished with a table, chairs, and a telephone for lawyers and duty solicitors to interview their clients. It is very difficult for counsel, and unnerving for his client, to have to discuss a case in crowded corridors, or on the footpath outside the court building, or in the carpark adjacent to the court. Suitable interview rooms are also needed for the use of welfare and probation officers.

(c) *Waiting areas* Several waiting rooms or areas are essential, comfortably heated when necessary, with sufficient seating for the numbers attending the courts. In Australia, long, gallery-like waiting areas outside the courtrooms are used, with a simple system of high-

backed seating to provide a degree of privacy and solitude, where necessary: to achieve similar conditions would make it desirable to have more than one waiting room serving a court, if these rooms are to be of smaller size. In a Family Court, several interview and waiting rooms are essential.

(d) *Toilets and washrooms* These should be easy to locate on each floor, with some in each building suitable for use by persons confined to a wheelchair.

(e) *Jury assembly and deliberation rooms* These have been referred to earlier (paragraph 887).

(f) *Holding cells* These must be secure, clean, and hygienic. They should be adequate for the maximum amount of time prisoners are likely to be held there. Specially designed lifts for transporting prisoners from the cell area to the courts would reduce the number of police officers necessary to guard the prisoner.

(g) *Law libraries* A pleasant area should be provided, suitably furnished, and large enough to house the books belonging to the library and to allow for future additions.

(h) *Offices* We have observed that in many of the court buildings office accommodation is quite inadequate for the number of staff employed. Overcrowding and poor working conditions do little to assist the staff in the efficient operation of their duties and their relationship with the public.

904. We realise that such a programme for court building can only be carried out over a period of years but the most pressing aspect to be considered is speedy relief of present inconveniences. The need for this heavy programme of expenditure seems to have arisen from past inadequacies; the first remedial steps may have to include modifications and additions, temporary or permanent, to tide things over until new buildings are completed. There can be no escape from the mounting cost of past neglect.

Recommendations

1. In a prominent place in the entrance to every court building there should be an information desk, manned from 9 a.m. each morning.
2. Uniforms should be worn by court reception staff.
3. Special training programmes in public relations should be provided for court staff.
4. Participation of members of voluntary social welfare groups in the work of the courts is commended and should be encouraged.
5. As much information as possible about their rights should be available and placed in the hands of people coming to court.
6. Educational programmes need to be developed for school children and the general public on the structure and function of the New Zealand courts.
7. The present practice of calling everyone to court at 10 a.m. should be reviewed and a greater flexibility introduced, where possible, by allotting varying times for fixtures during the day.
8. The Judicial Commission should keep under review public demand for court hearings outside normal sitting hours.
9. In the larger centres, arrangements should be made for a cashier to be on duty at the court office one evening a week (preferably Thursday) to receive payment of monies owing.
10. Interpreters' and translators' skills should be recognised as an addditional qualification for an administrative career in the Courts Division of the Department of Justice; these skills to be reflected in salary

scales and promotional prospects. Interpreters should be recruited and trained in court procedures and legal terminology, and should be able to provide an accurate translation between English and the other language and vice versa.

11. The police should give advance warning to the court that the services of an interpreter will be required. Interpreters should, where practicable, be available for interview with duty solicitors and probation officers.

12. Maori, Polynesian, and other ethnic community organisations could play a valuable part in the correction and rehabilitation of minor and first offenders: we recommend that a pilot project in some part of the Auckland Maori District Council's jurisdiction should be commenced; and we further recommend that community groups should be consulted, preferably through the probation service, with regard both to sentences and rehabilitation of offenders.

13. A determined effort should be made to recruit people from all minority groups to all levels of the Department of Justice.

14. It is essential for the wellbeing of our society to provide opportunities for, and encourage people from minority groups to join the legal profession.

15. The oath or affirmation should be administered clearly and deliberately so that the person taking the oath or affirming is aware of the seriousness of the undertaking he has given.

16. The use of plain English is to be encouraged in court. Wherever possible, charges should be framed in simple language.

17. (Majority) Wigs and gowns should be retained in the High Court and the Court of Appeal as at present, and a simple black gown should be worn in the District Court by the presiding judge.

18. Fees for witnesses, jurors, and interpreters should be kept under regular review.

19. Jurors should be afforded better facilities and treatment which should include:

(a) provision of adequate seating in areas where they are required to wait;
(b) an introduction by the registrar in his capacity as sheriff, or a senior member of his staff, and clear instructions on their duties;
(c) supervision by specially appointed, uniformed members of the court staff.

20. Buildings:

(a) Court building design should be constantly under review. Where delay occurs between the design and construction stage, building should not proceed until investigation determines that the design is as relevant to the current requirements of the court, as when it was first conceived.
(b) Comments on the design should be sought, at an early stage of the planning, from the users of the court buildings.
(c) The comfort and convenience of staff and the public should be given proper emphasis in new court building design.
(d) A building programme should be drawn up by the Department of Justice with the objective of up-grading or replacing all court buildings in New Zealand.

Up-grading should include provision of:

(i) adequate reception facilities in all court buildings;
(ii) information boards, large and distinctive enough to attract attention, giving the lay-out of each floor,

with the position of the courts and facilities thereon (multi-lingual where necessary);

(iii) adequate toilets and washrooms for staff, lawyers, jurors, litigants, and witnesses, with access for disabled persons;

(iv) redesigned witness-boxes to allow for the witness (and an interpreter where necessary) to sit; also a place for spreading papers and documents;

(v) public telephones;

(vi) interview rooms;

(vii) better office accommodation to reduce overcrowding and poor working conditions;

(viii) better waiting areas;

(ix) ramps to all courtrooms to allow access of disabled persons and book trolleys;

(x) better lighting, heating, and air-conditioning where necessary;

(xi) the Family Courts should be provided with a room where children can be attended to and cared for, as well as all of the above features (with the exception of (iv) witness-boxes).

New buildings should include all of the above, as well as the following features:

(i) a jury assembly room;

(ii) jury deliberation rooms with toilets attached;

(iii) lifts to all courts above ground floor level;

(iv) adequate interview rooms for duty solicitors, other lawyers, probation and welfare officers;

(v) comfortable waiting areas with sufficient space for litigants, witnesses, and others, to have a degree of privacy;

(vi) good courtroom acoustics;

(vii) holding cells adequate for the maximum amount of time prisoners are held there.

THE LEGAL PROFESSION

905. Item 4 of the terms of reference reads:

> The obligations and responsibilities of barristers and solicitors to the Courts and to their clients to aid in securing the just, prompt, efficient, and economical disposal of the business of the Courts.

This subject attracted a number of submissions. Some of these were constructive; some were in the form of complaints about the conduct of lawyers over litigation, particularly in matrimonial matters; and some related to transactions and advice away from the courts. Some individuals who had already sought the assistance of District Law Societies and/or the New Zealand Law Society, and even the Minister of Justice or the Attorney-General, came to us in the hope that we might be able to resolve their particular difficulties. During the course of our hearings, as a result of assistance from the New Zealand Law Society, we were able to resolve some of the problems and refer others for investigation. We hope we listened patiently to all that was said to us. We do, however, agree with the submission of a member of Parliament, based on her experience in her electorate and elsewhere, that complaints made to her against lawyers were not usually of neglect or negligence but frequently demonstrated a lack of communication. She gave us several examples involving her

constituents. In the main the complaints were from women, immigrants, or Maori people. She described these persons as being often inarticulate, badly organised, suspicious, and unfamiliar with the legal system. In another part of this report, we have suggested improvements in the public relations field between the courts and the people. We heard from the "Friends at Court" their suggestion that some lawyers need better training in human relationships. We do know that the New Zealand Law Society has been anxious to improve this communication problem. It has issued pamphlets for the general public. But pervading most of the submissions and matters we heard was the comment that, all too often, pressure of time results in some lawyers adopting too clinical an approach to their clients. We repeat the words of a former President of the New Zealand Law Society:

> If we are to retain the confidence of the public, our integrity must be unquestionable, our service to the community public spirited, and our efficiency recognisably high.

Earlier we have referred to efforts that have been made to "personalise" the law in the form of Neighbourhood Law Offices and Citizens' Advice Bureaux. We shall subsequently refer to the provision of legal aid in its criminal and civil aspects, the use of duty solicitors, and the question of whether we should have public defenders. We think we should also advert to legal education and the necessity for ensuring that lawyers are a specially trained and disciplined body of men and women. It is unquestionable that the legal profession must be subject to, and must strongly enforce, a proper standard of professional conduct in order to justify public confidence.

906. Against the above background, we turn to the main submissions received on this issue of the obligations and responsibilities of lawyers. For on this issue of the obligations and responsibilities of lawyers. For its part, the Department of Justice did not see this item of the terms of reference as opening up a general line of inquiry into the virtues and demerits of the legal profession, its conventions and practices, and the service its members gave to clients. The New Zealand Law Society, on the other hand, felt obliged to cover the matter in some depth. We pointed out in the foreword to this report that the whole issue is the subject of separate commissions of inquiry in the United Kingdom and New South Wales. We bear in mind that the qualifying words in the terms of reference are to examine the role of the lawyer as that affects the just, prompt, efficient, and economical disposal of the business of the courts. We shall first consider a lawyer's duty to the courts.

Duty to the Court

907. In its submissions, the New Zealand Law Society has faithfully recorded what we understand to be the main rules of proper professional conduct in relation to the court. They have taken these rules in the main from Sir Thomas Lund, *Guide to the Professional Conduct and Etiquette of Solicitors* (1960); *A Guide to the Professional Conduct of Solicitors* (1974) issued by the Council of the Law Society (U.K.); and also para. 6.6 of the *International Code of Ethics* (1956). A lawyer must never deceive the court or withhold information which the court is entitled to have before it. He must always honour his undertaking and comply with an order of the court. A lawyer should always advance his client's interests before his own. He should be unremitting in his endeavours to assist his client rapidly and, if possible, without resort to litigation. He must not act dishonourably,

degrade himself, fight unfairly, lend himself to underhand or criminal activity, or descend to sharp practices in order to benefit his client or win his case. He should always observe in the spirit, as in the letter, the ethical rules of the profession by which the reputation of all lawyers has been built up and is safeguarded. He should always maintain due respect towards the court.

908. The former Chief Justice, Sir Richard Wild, and the Secretary for Justice made some criticism of lawyers in New Zealand for their failure to discharge their duty to the court, as well as to their clients, by using procedures and tactics to delay the final determination of a case. The New Zealand Law Society, while acknowledging that some delays attributable to counsel do occur, either because they are too busy or because they have conflicting commitments, nevertheless rose to a spirited defence of these attacks. The Society contended (and we think there is validity in the contention) that for the most part lawyers are desperately anxious to proceed with their clients' litigation but the main fault lay with the present system in which courts are over-loaded with a substantial backlog of litigation, both in the criminal and civil fields. On the other hand, certain registrars have informed the Secretary for Justice that a significant part of the delay in dispensing cases arose from factors within the control of solicitors and counsel, but over which the court had no real control. It is quite apparent to us the problem is much more serious in a large centre like Auckland. It was urged that more co-operation and liaison with registrars is needed on the part of the legal profession. We consider the appointment of regional court administrators and list judges (paragraphs 753 et seq.) will do a great deal to provide a framework within which counsel will be able to play their full part.

909. We recognise that the present delays in obtaining a civil fixture in Auckland are quite demoralising to lawyers and their clients. Experienced barristers have expressed the view that the backlog is a major contributing cause in allowing cases to "drift". We were also told of the acute position in Hamilton, where counsel set their civil cases down time and again and make little or no progress on the lists. With the delay being so great, the incentive for counsel to press ahead with a case can be seriously weakened. Counsel lose heart if on several occasions they must repeat their work on a particular case: there is also the additional expense to the client; another valid reason why modern business and management techniques should be applied to the courts. The Commission readily understands that many cases are settled at the last moment and accepts the Law Society's comment that late settlement is a phenomenon inherent in the system. We hope that with a more efficient administration, too many late settlements will be avoided. We do acknowledge that a case settled at the last moment can give a judge time to attend to his reserved decisions.

910. Earlier in this report we emphasised the importance of having sufficient judges to cope with the work. We think a number of reforms in the new draft Code of Civil Procedure will provide more effective sanctions to ensure that the deadline dates for litigation are met, and we consider the new summary judgment procedure, used with such effectiveness in the United Kingdom and New South Wales, will clear the lists of cases where there is no valid, or a sham, defence.

911. But the criticism of the legal profession does not end here. Some registrars mentioned the difficulty (which we think is acknowledged by the New Zealand Law Society) of the inexperience of certain members of

the Bar, more particularly those who practice in some Magistrates' Courts. We have been told that many newly qualified solicitors are unfamiliar with procedural requirements. This deficiency puts an increasing demand on court staff for advice and assistance, resulting in significant delays, work of poor quality, and complaints. There will always be inexperienced persons in any profession, but we suggest that the Law Society, the Council of Legal Education, and the universities must continue their efforts to improve the training and education of young lawyers in practical matters.

912. Apart from the Bar, criticism has been levelled at solicitors and their staff. Some registrars have said that the proportion of documents rejected as incomplete or inaccurate in their court offices can be as high as 30% or 40%. That problem only needs to be stated to reflect delay and inefficiency. Again, the Law Society, the Council of Legal Education, the Department of Justice, and the university law faculties should meet, discuss, and solve these problems. One would expect, in its general oversight of the courts, that the Judicial Commission would also have a real interest in improvement of the standards and efficiency of the work, both in the courts, and presented to the courts.

913. The Secretary for Justice commented specifically on the lawyers' part in programming court fixtures. We have seen from the statistical data that the setting down rules in the Supreme Court vary in their application from centre to centre. We are told that similar problems are equally manifest in the Magistrates' Courts in their civil and domestic jurisdiction. By way of example, in one of the largest of the Magistrates' Courts, 347 civil matters were given a fixture after a certificate from lawyers that matters were ready for trial, during the period 1 January to 30 June 1977. We were informed that, of these cases, 180 were adjourned at the request of one or other of the parties, and 43 were settled. Inaccurate or inappropriate setting down of cases renders a fixture system inoperative. As we have said, administration is at the heart of a good court system. A matter should not be set down until and unless it is completely ready for hearing. By the setting down time, all interlocutory steps should have been completed, the pleadings should normally require no amendment, the prospects of settlement should have been fully canvassed, and a trial should be the only solution. In saying all this we recognise the duty which a lawyer owes to his client to do everything he properly can, consistent with his instructions, to protect his client and advance his cause. There is, of course, an obligation to keep a client informed of the progress of a court case and give reasons for delay, if progress is slow.

914. Other than to highlight the criticisms both of the present court system and of lawyers and their staff who use it, we do not see any useful purpose in emphasising these matters any further. We simply comment that it is good for all of us to do some spring cleaning from time to time. We expect that the administrative and procedural reforms we refer to throughout this section will help clear the decks.

Obligations to Clients

915. Item 4 of the terms of reference is phrased in a way which requires us to consider the obligations and responsibilities of lawyers to their clients to aid in the disposal of the business of the courts. The New Zealand Law Society, again from authoritative sources, set out the recognised aspects of these duties: a lawyer should act with integrity and represent his client competently; maintain his client's interests zealously

within the bounds of the law and the ethical rules of the profession; avoid conflicting interests, influences, and loyalties; and preserve the confidence of his client. We accept the submission that counsel must be free from pressures which would impinge upon their independent judgment as lawyers. They should not feel obliged to subvert the interests of their clients. As Sir Thomas Lund* has said:

> The most important of all a lawyer's duties is to preserve his client's confidences. Lawyers are frequently placed in an embarrassing position where they are anxious to be frank with the court, their professional colleagues and others and above all to be fair to themselves as men of honour but, at the same time, are faced by this overriding duty to maintain that confidential relationship between lawyer and client which is summed up in the word "privilege". The public do not always realise that (i) the privilege is not that of the lawyer but their own; (ii) they can waive it and if they do the lawyer may, and in certain circumstances must, reveal even the most confidential information; (iii) otherwise, a lawyer may not make any disclosure at all of a privileged communication; and (iv) the duration of the privilege is for ever and privilege is not determined by the fact that proceedings have ended, that a retainer is withdrawn or even that the client has died. There are, however, as all lawyers know, certain categories of communications which are not privileged. Perhaps the one which creates the greatest problem for the profession arises from the rule of law that no privilege exists where a communication is made in furtherance of a fraud or crime even where the lawyer is ignorant of the criminal or fraudulent purpose for which his advice or assistance is sought.

Duty to the Public

916. Although not specifically within the terms of reference, we think it appropriate that the Law Society also referred to this duty. Sir Thomas Lund has said of this issue:

> The legal profession plays an essential part in the administration of justice and thereby in the maintenance of law and order, without which the social and business life of the country could not continue. Lawyers accordingly owe a duty towards the public generally to maintain the honour and dignity of the courts and of the profession and to assist in the efficient administration of justice. For this reason a lawyer must always do everything within his power to maintain the status and prestige of the profession itself and do nothing prejudicially to affect the confidence of the public in it.

The New Zealand Law Society also recognises a number of broad responsibilities which it seeks to discharge in the public interest. These are as follows:

(a) maintaining and promoting the integrity and competence of the profession;
(b) assisting to ensure that legal services are available to all sectors of the public;
(c) providing a public service in areas of special legal competence;
(d) assisting to facilitate and improve the administration of the law and the fairness and efficacy of the legal system.

*Former Secretary-General of the Law Society: Director-General of the International Bar Association.

Disciplinary and Complaints Procedures

917. Because we had a number of submissions directed towards disciplinary matters, we think it appropriate to refer to the disciplinary and complaints procedures of the New Zealand Law Society. Some lawyers fall below the standards of integrity and competence which are obligatory in the public interest. We think it appropriate to record the steps that the Society is taking to achieve proper standards in these areas. First, it actively involves itself in the legal and practical training of law students and in the continuing legal education of practising lawyers. Over recent years there has been an increasing number of seminars arranged for this latter purpose. In addition, disciplinary and complaints procedures have long existed to deal with errant lawyers and the complaints of clients. We were told that in 1975 the Society resolved to carry out a comprehensive review of the Law Practitioners Act 1955. We have seen some evidence of the investigations, reports, and discussions. A retired chief Parliamentary draftsman has been instructed to draft for submission to Parliament a new Law Practitioners Bill incorporating many amendments to the Act.

918. In 1976, at the instigation of the Attorney-General, the Public and Administrative Law Reform Committee issued a working paper on disciplinary and complaints procedures. It forwarded that report to the Law Society for comments. In turn, the New Zealand Law Society prepared its own comments and a lengthy submission for the assistance of the Law Reform Committee. We have read all these documents. We have now been supplied with the Law Reform Committee's report, "Discipline within the Legal Profession" presented to the Minister of Justice, May 1977. In October 1977 the Secretary-General of the New Zealand Law Society, writing in his own capacity, reviewed this paper. It appears there was substantial agreement between the Law Society and the committee on both lay participation in the disciplinary function and the treatment of complaints, and the need to separate the investigative and adjudicative functions of the Councils of the District Law Societies.

919. ***Lay members*** The principle of lay participation has been accepted by the New Zealand Law Society which, prior to the issuing of the working paper, had already invited the Government to appoint a lay member to its disciplinary committee. In other words, the Society decided to seek appointment of this lay member in advance of any outside recommendation to that effect. We understand that there will be provision in the new Law Practitioners Bill for this appointment. The lay member will apparently take a full part in all the hearings and deliberations of the disciplinary committee of the Law Society, and have an equal vote to that of other committee members; we understand that being a member of a body entrusted with the exercise of a judicial function, he would not be free to report to the Government or anyone else on the proceedings of the disciplinary committee.

920. ***Lay observer*** The Public and Administrative Law Reform Committee also recommended the appointment of a lay observer, or observers, to review the action taken by a District Law Society on the handling of complaints. Such complaints are dealt with in the District Law Societies, either by the full District Council, or special committees appointed for that purpose. It is clear that a large number of minor complaints occur because of defective communication or misunderstanding between lawyers and their clients. We were pleased to learn that the Law Society accepted a lay observer could perform a useful function in

respect of complaints. Those members of the Commission who travelled overseas waited on the Law Society in London. They were able to learn the manner in which the English lay observer performs his duties: he does not sit in on the hearing of the complaints, but acts as a person to whom dissatisfied complainants may go when they do not accept the decision of the Law Society. Of the many thousands of complaints that were heard last year in England, aproximately 300 went to the lay observer. We were told that only four cases involved a recommendation of any variation from the Law Society decision and in those four cases, criticism of the original decision was neither implied nor expressed. The lay observer reports annually to Parliament.

921. We were informed that one lay observer should be sufficient for New Zealand. So that he would be properly independent, he would be appointed by the Government and paid out of monies appropriated by Parliament. In effect, the lay observer is an ombudsman in relation to dissatisfied complainants to District Law Societies. His report to Parliament would become public at the will of Parliament.

922. It must also be acknowledged that the Auckland District Law Society, of its own initiative, and well in advance of the Public and Administrative Law Reform Committee report, had agreed in principle to appoint its own ombudsman or lay observer to whom dissatisfied complainants could refer. We have perused the "Lay Observer Rules" drafted by the Auckland Society. A former Cabinet Minister has been appointed to this post. We understand that his remuneration comes from the Auckland District Law Society itself.

Actions against Lawyers

923. A criticism we heard from some people was that they could not get one lawyer to sue another. The Commission is aware that this is untrue as a general statement. But to overcome an apparent difficulty, it seems to us the Auckland District Law Society has approached the matter in a practical fashion by having available the names of a number of lawyers who are willing to, and actually do, bring actions for negligence against other lawyers. We were told that the Auckland District Law Society indicates, whenever appropriate, that a complainant should seek independent advice, but should any difficulty be encountered in finding a solicitor to act, then the complainant should communicate with the Law Society.

924. We welcome these reforms as demonstrating that the New Zealand Law Society and the District Law Societies see that their responsibility is to act firmly in the public interest. Such an acceptance of responsibility coincides with the professional interest of the lawyers by ensuring that a professional body deals properly with complaints and discipline, and removes members of the profession who are unfit to practice. We consider that the steps taken can only enhance the standing and reputation of the law profession as a whole. We also consider that having the independent voice of a layman in respect of disciplinary matters, and a lay observer in the complaints field, significantly meets the public interest.

925. In another section of this report we have referred to other services provided by the legal profession, including the duty solicitor scheme and the pilot project of the Neighbourhood Law Office in Grey Lynn, Auckland. We think it right to record that the New Zealand Law Society and the District Law Societies additionally contribute in many other ways to maintaining the public interest and do not merely protect or promote

the interests of lawyers. As an example, we refer to the Auckland District Law Society which supports 20 committees concerned with improving procedures, practices, and the substantive law in a number of fields. This committee work is done for no, or nominal, remuneration. The Societies examine and report on new legislation and send their members out into the community to explain aspects of the law to interested groups. While accepting that they can do even better, the various Societies are anxious to make available as much information to the public as they can. We think these are very necessary attitudes, demonstrating that most members of the profession are concerned and responsible people.

Practical Training of Lawyers

926. This is a subject in which the New Zealand Law Society is acutely interested. One of the main problems is that, although today's new lawyers are said to have had a far sounder academic training than that received by their elders, at the stage the young lawyer first seeks employment he or she will generally have had no practical training other than in the final year at the university. Observers who went to the Australian Conference on Legal Education in 1976 were impressed with the schools for practical training of lawyers, established by the Law Societies in Sydney and Melbourne. The Australian establishments are funded by interest on trust accounts. The New Zealand Law Society has to date been unable, through lack of finance, to supply the necessary services. As a Commission, we know that medical students receive practical training at the public expense. We think, in the wider public interest, that those persons admitted as barristers and solicitors should be practically equipped to provide the service expected of them. Consideration should therefore be given to the use of public money, either channelled through the universities, or to special courses elsewhere, to meet the cost of lawyers' necessary practical education.

Continuing Education of Lawyers

927. The New Zealand Law Society and its constituent District Law Societies have, in recent years, fully recognised that the lawyer cannot allow his learning to stand still. The areas of need have been categorised as follows: (a) training for the recently admitted; (b) refresher courses; (c) instruction in recent changes in the law; (d) instruction in specialist topics not taught at the universities. Many District Law Societies are pursuing very active programmes for continuing legal education. We have read the report of the Working Party on Continuing Legal Education and we warmly commend it. We have been told of regular seminars where sometimes more than 300 practitioners attend.

928. The overall effect of all these activities should assist the prompt, efficient, and economical disposal of the business of the courts.

Legal Aid

929. It is important that the citizen should have access to the courts and obtain legal representation. Legal assistance can be made available for all, but the community must decide the extent to which it is prepared to pay for the ideal of equal justice. A former president of our Court of Appeal has recently said:

> But we are deceiving ourselves if we imagine that, whatever system of

justice we adopt, it can be made *perfect.* We cannot expect *ideal* justice in the Welfare State. Justice can be only as nearly perfect as is practicable, for the resources of the community are not infinite. If we are to preserve legal aid as an effective instrument of criminal justice, and if the legal aid cases are not to be permitted to continue to crowd out—as at present they are crowding out—the ordinary deserving litigant who may be entitled to a prompt hearing of his case, this can be done only by some radical surgery whereby the excesses to which criminal legal aid has now gone are excised, and a more healthy development of the whole system of justice is made possible.

If it is said that suggestions such as these run contrary to our previously-conceived ideas of justice, full and free for all, it could be replied: perhaps such ideas must be modified, if in the Welfare State we are not to be sternly confronted—as indeed we now are—with a situation in which unless some such restrictions are adopted, justice for *anyone* may become impossible.*

930. At present in this country, legal aid services are fragmented. They include aid in criminal and civil cases, the duty solicitor scheme, a neighbourhood law office, and the provision of legal advisors at Citizens' Advice Bureaux. The Law Society considers that all these schemes, with the possible exception of legal advice bureaux which are operated voluntarily and free of charge by District Law Societies, could come within the purview of one legal aid system.

931. We have not made a comprehensive study of legal aid, but we can record that we received several criticisms of the inadequacy of the scales of fees, especially for criminal cases. These criticisms came from both members of the public and the legal profession. We understand that the Minister of Justice has arranged for a review and that in the interim some increase has been authorized.

932. ***Criminal legal aid*** Because of this review, but recognising we have not heard all viewpoints on legal aid, we think we should record the substance of the Law Society's proposals for improvement. It is suggested that a decision over the granting of criminal legal aid should be administered by a body similar to the District Legal Aid Committee which controls civil legal aid. At present the decision is made by a judge or magistrate on the basis of information supplied by the applicant. We support the principle of granting aid in proper cases but we think there should be a thorough investigation before the defendant qualifies. The Law Society also considers that an accused person should have a reasonable choice of counsel rather than counsel assigned to him. As well, it is claimed there is no purpose in having three different scales of fees. Finally, it is argued that there is no sound reason why fees should be less for work in the criminal courts.

933. We think that in contrast to public defender schemes, a properly administered scheme for legal aid should allow for some choice of counsel. Because, generally speaking, there is more urgency over assigning counsel in criminal cases, there may be some difficulty in having legal aid administered by committees similar to District Legal Aid Committees. It seems to us, however, that it might well be practicable to take steps to combine, as far as possible, the present civil and criminal legal aid procedures (reserving always to the court the power of granting criminal legal aid in emergency circumstances). If at the same time a special legal

*"The Quest for Justice in the Welfare State" (F. W. Guest Memorial Lecture) the Rt. Hon. Sir Alexander Turner, September 1977.

aid office was provided in all major courts to receive applications and t channel them to the respective committees, or elsewhere as required (fo example, for investigation), this would provide a focal point for legal aic in much the same way as it is claimed a public defender does in some other jurisdictions. Should it be found that the suggestion that criminal legal aid be administered through a committee is impracticable, it may be that the masters whom we have suggested (initially) for Auckland and Wellington would be suitable persons in those places (as occurs overseas) to investigate and grant applications and, where appropriate, order contribution from the applicant.

934. Although we have not had submissions from the Department of Justice, we also consider that the use of three scales of fees is unnecessary. Seniority and experience and the importance of a particular trial can be given recognition under the present system.

935. ***Civil legal aid*** With the passing of the Legal Aid Act 1969, New Zealand joined other Commonwealth countries where the State makes legal aid more readily available for persons of small or moderate means. The usual level of remuneration is fixed by a legal aid committee which considers bills rendered by practitioners and, if necessary, has them taxed. Eighty-five per cent of the total bill is allowed; the profession, therefore, makes a direct contribution of 15% to the scheme.

936. Civil legal aid covers most legal services except divorce proceedings and legal advice. Although we understand that legal aid for divorces has been discontinued in the United Kingdom, the New Zealand Law Society believes that it is anomalous that proceedings leading up to divorce, such as separation cases, can qualify, whereas the actual dissolution does not. We know that major changes to the substantive law of divorce will soon be introduced into Parliament. It is expected that the procedures will be simplified and costs will be less. It will be for Parliament to decide whether legal aid should be extended to those who cannot afford a divorce.

937. Legal aid for advice up to £25 is available in the United Kingdom. We were told that the Legal Aid Board in this country drafted an amendment to its statute for the same purpose. Again, it is a matter for decision by the Government, having regard to the competing criteria of economic feasibility and the desirability of providing aid for those with limited means.

938. ***Corporate or unincorporate bodies*** A submission presented by the New Zealand Boxing Association (Inc.) drew attention to an area where we think some anomalies exist. The New Zealand Boxing Association, one of its affiliated local associations, and certain members of its council, were named as defendants in an action brought by a professional boxer claiming damages against them. The case eventually went to the Court of Appeal.

939. The plaintiff was granted legal aid but the defendants were ineligible. It was submitted that if legal aid is available to individuals, it should also be provided for corporate bodies whose financial situation may be equated. The Commission considered that there was merit in the suggestion and we decided to refer the matter to the Department of Justice and the New Zealand Law Society. In due course the Secretary for Justice reported that although it is correct that under the existing provisions of the Legal Aid Act a body of persons corporate or unincorporate does not qualify for legal aid, the Act does provide that the successful opponent of an aided opponent may apply to a District Legal Aid Committee for

payment by the Crown of the whole or any part of the difference between the costs (if any) actually awarded to him against the aided person in respect of the proceedings and those to which he would have been entitled, except for the provision limiting the liability of the aided person for costs. In considering such an application, the committee has regard to the conduct of the parties in the dispute, whether the costs of the action were unnecessarily increased by the conduct of the applicant or his solicitor or counsel, and the hardship that would be caused to the applicant if the costs were not paid by the Crown. Having regard to those matters, and to any report it may receive on the financial circumstances of the applicant, the committee may order payment to be made by the Crown. The question of availability of legal aid and the gains to a non-aided successful party, is something about which a solicitor should advise his client.

940. The Secretary for Justice also referred the matter to the Legal Aid Board which has now advised that it intends to make a detailed study of the proposal. We realise that ultimately any decision to extend legal aid must be a political one. We also note that in the United Kingdom the court has the power to award costs out of the legal aid fund to the unassisted party, where he would otherwise suffer severe financial hardship. We think we can take the issue a step further by our proposal for a suitors' fund.

941. We record our thanks to those responsible for taking prompt action.

Suitors' Fund

942. There have been several situations in the past where, for various reasons, it has appeared to be manifestly unjust that litigants of moderate means have been unfairly put to real expense. Such reasons would include, first, an appeal on a difficult question of law to the Supreme Court, Court of Appeal, or to the Privy Council; secondly, where proceedings are rendered abortive by the illness or death of the presiding judge, or because the jury cannot agree, or where a hearing is discontinued and a new trial ordered for reasons not attributable to the act, neglect, or default of any of the parties or the accused and his solicitor, or where criminal proceedings are adjourned by, or on behalf of, the presiding judge or the prosecution. Other examples appear in Australian legislation. We refer especially to the Suitors Fund Act 1964 of Western Australia. Under this Act a suitors' fund is established by the Treasury. It is funded by money from the Public Account at an amount equal to a levy imposed on all court processes. The levy is payable on any writ of summons in the Supreme Court or any plaint in the District Court. In New Zealand in 1976, there were 144 005 plaints filed in Magistrates' Courts, and 3 602 writs in the Supreme Court.

943. The fund, which is invested, is administered by a three-member board. Claims against the fund may be made, pursuant to the grant of an indemnity certificate or a costs certificate. Limits to claims are set from time to time in the legislation. A certificate may not be granted in favour of the Crown or a company that has a paid-up capital of a stipulated sum.

944. New South Wales has a similar scheme (see the Suitors Fund Act 1951 and the Legal Assistance and Suitors' Fund (Amendment) Act 1970), but the contributions to the fund are a percentage of the fees of court collected in any court, as fixed by the Treasurer.

945. Generally speaking, legal aid in this country is available to assist the needy; but the thrifty, provident citizen may have to use hard won savings to take part in some of the litigation we have described. We think,

in principle, provision should be made for a Suitors' Fund for New Zealand; the method of financing it should be investigated by the Department of Justice.

Public Defenders

946. A public defender is a salaried lawyer employed by the State. He acts for the defence of people who cannot afford to retain counsel in criminal proceedings against them. He is the opposite number of the Crown prosecutor or district attorney. The term, if not the concept, originated in California where the first public defender's office opened in 1914. Similar offices have been established in parts of Canada, the United States of America, and Australia. Several submissions to the Commission advocated a public defender for New Zealand.

947. In this country, those who cannot afford counsel may obtain assistance under the Offenders Legal Aid Act 1954 and/or from a duty solicitor. We were informed that generally, duty solicitors are limited to advice and representation in court only for matters ancillary to trial, but in Wellington, the duty solicitors may be engaged under the Offenders Legal Aid Act. Section 13A of the Criminal Justice Act 1954 provides that no-one may be sentenced to any form of detention, other than periodic detention, unless that person has had an opportunity to retain counsel.

948. In California, the Public Defenders Office is the only publicly financed form of legal representation. In Quebec, defendants may elect to be represented by the public defender or by private counsel under a legal aid scheme. The majority choose the former, who, being able to advertise, is well known and who usually makes the first contact with the defendant. In both places, the public defender is an employee of the State. In New South Wales, the public defenders are barristers in chambers. They are retained exclusively by the Government. In Ontario, a public defender scheme was expressly rejected by the Joint Committee on Legal Aid in 1965 and legal aid is provided through the private Bar.

949. Another variation suggested to us was the organization of public defenders in a manner similar to the organization of the Crown Solicitors Office in this country. Under this proposal, specified legal firms would be retained (exclusively in the larger cities) to provide legal representation for defendants in criminal cases. We are not aware of a similar scheme operating anywhere in the world.

950. In view of submissions to us, we made enquiries concerning the operation of legal aid and public defender schemes in New South Wales, Ontario, and Los Angeles.

951. ***New South Wales*** The Office of Public Defender in New South Wales was informally created in 1941 and not given statutory recognition until 1969. There are 13 barristers appointed as public defenders, four of whom are Queen's Counsel. They occupy chambers and are members of the Bar Association and subject to its ethical and disciplinary practices like any other barristers. By arrangement sanctioned under the Public Defenders Act 1969, they are retained exclusively by the Government to appear for persons to whom criminal legal aid is granted. They have salary and superannuation rights, and security of tenure, much like public servants, but in their professional operations they have the same independence from Government or bureaucratic control as have the judges. They have no right of private practice. Like the judges, they are appointed on the recommendation of the Attorney-General. The public defenders are usually briefed only in respect of indictable offences by the

public solicitors, but on rare occasions approval is given by the Commissioner for Legal Aid Services for private solicitors to instruct them. The Public Solicitors Office employs about 50 legal officers who, as well as briefing the defenders, represent legally aided defendants in the Petty Sessions Court and run a duty solicitor scheme. In 1976, the public defenders handled approximately 1500 cases, the majority before the District Court. The total cost of the office in the 1975-1976 financial year was $A400,000. This figure excludes the cost of running the Public Solicitors Office.

952. We were told that the cost of the public defenders was significantly less than would be the cost of a comparable legal aid scheme administered through the private Bar. We were also told that, although the Bar was generally in favour of the scheme, the opportunities for barristers to engage in criminal work had been severely reduced. The scheme was also criticised on the ground that it deprived the accused of his choice of counsel. It was suggested that the public defenders had better access to, and were in a better position to afford, scientific facilities.

953. ***Ontario*** In Ontario there is no public defender's office. A comprehensive civil and criminal legal aid plan, introduced in 1965, enables persons unable to afford a lawyer to engage counsel of their choice. Counsel are remunerated by the provincial government (with a subsidy from the federal government) at the rate of 75% of their total account. The total cost of the scheme in 1976 for both civil and criminal cases was Can.$25,000,000. The projected cost for 1977 was Can.$30,500,000. Administered by the Law Society, 65% of the province's lawyers participate in the scheme although in practice only about 40% actually undertake legal aid work. Under the scheme, duty solicitors are also provided for all courts. In Toronto permanent duty solicitors have been introduced on a trial basis. Also in Toronto, a neighbourhood law office has been established with funds provided by the Government and staffed by senior law students.

954. ***Los Angeles*** Established in 1914, the Los Angeles County Public Defenders Office today employs 574 persons, including 388 lawyers and 54 investigators. Public defenders appear in about 70% of the felony cases before the Los Angeles Courts. In 1976 the cost of the office was US$15,000,000. A further US$8,000,000 was paid to counsel outside the office. They are appointed by the public defender where the case involves a conflict of interest, for example, where there is more than one defendant. The test for eligibility is whether a competent private attorney would be prepared to represent the defendant in his present economic circumstances. Public defenders are appointed by the Board of Supervisors (roughly equivalent to a county council).

955. Members of this Commission who visited Los Angeles met the Senior Public Defender. They were told that although it would be desirable to have the same attorney representing a defendant at all stages of the trial process (arraignment and bail, preliminary hearing, trial, and appeal), this was logistically impossible. The public defender did not lodge an appeal unless there was a "good chance of success". The Senior Public Defender considered that the quality of representation furnished by the public defenders was as high as that provided by the private Bar, and that his office was more efficient. This was confirmed by a recent survey. The office experienced a low (10%) staff turnover, attributed to the good salary and superannuation provisions. Defenders were available 24 hours a day for suspects in police custody. The Senior Public Defender also said

that his office reduced the number and length of trials that come before the courts.

956. ***Public Defenders for New Zealand?*** Those suggesting a public defender for New Zealand claimed that this was the best system for providing legal representation for those who could not afford it. Implicit in those suggestions, and echoed in many other submissions, were criticisms of the existing legal aid scheme. However, even if that criticism is accepted (see below), that in itself does not necessarily establish the desirability of a public defender scheme. While it is possible that such a scheme could be cheaper than a reformed legal aid scheme, we are not persuaded it would be otherwise desirable.

957. The salary paid to a public defender would probably be smaller than the aggregate of the fees that would have to be paid to private lawyers engaged in individual cases. Although considerations of expense are unavoidably relevant to the question, expense should not be the only, or even the primary, consideration. The primary criterion must surely be quality. The person who can afford to retain counsel himself does not attempt to retain the cheapest lawyer when charged with a serious criminal offence. If quality is a proper criterion for the rich, then equitably it should be for the poor. However, despite the best intentions to the contrary, the great volume of cases with which a public defender would be concerned must tend to cause the individual defence to become perfunctory. Furthermore, it is said that the bureaucratic organisation of the office, the heavy demands made on a public defender, and the practical obstacles in the way of assigning counsel to individuals throughout all stages of the case, would detract from the traditional solicitor/client relationship, and probably to the detriment of quality.

958. We were asked to accept that because a public defender system is relatively easy to organise and control, it would lend itself to central, and therefore more efficient, organisation. Moreover, because a public defender would specialise in criminal work, it was suggested that he would be able to furnish a better defence than the ordinary lawyer who has to cover a much broader field of legal work. We recognise, however, that if the defence of accused persons was heavily concentrated in the hands of the public defender, the opportunities for private lawyers to act would be severely reduced. The attraction of a varied workload would thus be absent in the criminal sphere. To confine the bulk of criminal work to a few persons would be to equate familiarity with expertise.

959. One of the strengths of an independent legal profession is the diversity of its members. A legal profession that is, and is seen to be, independent of State control or influence, is one of the cornerstones of the Rule of Law and the preservation of human rights. We consider the submissions of Justice* to the Royal Commission on Legal Services (U.K. 1977) are apposite:

> . . . were we to have a National Legal Service which dispensed legal advice and assistance only to those who could not afford a private lawyer, we would be compounding the very mischief which we are seeking to mitigate. Instead of one law for the rich and another for the poor, we would have expensive private lawyers for the rich and cheap State-paid ones for the poor. It is the poor who most need protection from the State in all its protean aspects, and in such a system they would be least likely to get it.

*The British section of the International Commission of Jurists.

It can be safely stated that because the majority of criminal defendants are at present legally aided, the majority would similarly be eligible for the services of a public defender. Public defenders would regularly appear in court before the same judges and against the same prosecutors. We were told there is some risk that such relationships would become too familiar and lead to plea and sentence bargaining. Even if such a relationship did not exist, the impression might be created that it did. We think that in an adversary system, such an appearance must cause a loss of confidence in the independence of the defence.

960. It was suggested that a public defender would up-grade the status of the criminal lawyer who, according to one submission, is "all too often the unsung champion of the poor and oppressed and receives little recognition in this life". It was also suggested that because the Crown prosecutes a defendant who is presumed to be innocent until his guilt is established, the Crown should also defend him. In conformance with the principle of equality before the law, it is said that the resources of the State available to the prosecution should be matched in equal measure by resources available to the defence. While acknowledging this argument, we do not see that it follows those resources should be made available in the same manner as to the prosecution, that is, through a public defender scheme.

961. Another argument was that a public defender, as a State employee, would have equal access to the facilities of the Department of Scientific and Industrial Research (D.S.I.R.) for the analysis of forensic matters, a degree of access allegedly denied private counsel. The procedure for obtaining D.S.I.R. assistance and reports is laid down in a police instruction by the Commissioner of Police and agreed to by the New Zealand Law Society. It is incorporated as rule 4.17 of the Law Society's Code of Ethics subject to the proviso that:

> such agreement and recommendation to practitioners to adopt the general instructions cannot bind practitioners in the conduct of an individual case.

We reproduce this ruling as Appendix 5.

962. Public defenders would probably be under the control or supervision of a senior public defender who would be a public figure and his office well known. Proponents of a public defender scheme suggest two advantages flowing from these features: the accessibility of legal advice would be assured, and the public defenders would act as a "litmus paper—alerting the community to problems within its judicial and investigatory services".

963. Both the New Zealand Law Society and the Department of Justice have recently been engaged in the publication and dissemination of pamphlets designed to inform persons of their legal rights, the availability of legal aid, and the operation of the duty solicitor scheme. We believe that steps such as these and the operation of the duty solicitor scheme go a long way towards ensuring that persons appearing before the courts are afforded the opportunity to engage counsel.

964. We acknowledge that in some areas of Australia and the United States of America, there is evidence that the introduction of a public

defender scheme has been successful. It appears to have worked satisfactorily despite the theoretical argument against it that a State employee is defending an accused person who is being prosecuted by the State. On the other hand, there is also evidence that in other parts of America, the scheme has not been successful. In 1964, following the report of the Committee on Poverty and Administration of Federal Criminal Justice, the United States Congress specifically rejected a public defender system for the federal courts. We have reached the conclusion its success is very dependent on the funding, and its personnel. Bearing in mind both the merits and problems inherent in the public defender notion, we find it unsuitable for New Zealand conditions for the following reasons:

(a) We think it important that the defence of accused persons should not be substantially confined to a few lawyers. This has particular force in a country such as New Zealand where the population is widely distributed and there are many small centres.

(b) The present scheme of legal aid means that accused persons are represented by lawyers who are seen to be independent.

(c) There is no convincing evidence that inexperienced or inadequate counsel or bad legal advice are present to such an extent as to require the establishment of a new Government controlled system. We would, however, caution against frivolous defences or appeals which waste public funds.

(d) Even the introduction of a public defender system to private law firms, in our opinion, has not been shown to be necessary in the public interest.

(e) A public defender system would deny the poorer defendant the choice of counsel, whereas a properly administered scheme of legal aid should confer it.

(f) We agree with the Secretary-General of the New Zealand Law Society when he said:

> It is a reasonable supposition that it is easier for a Crown Prosecutor to identify himself with the interests of the State which is prosecuting, than it is for a public defender, a public servant, to identify himself with the interests of the defendant against the charges brought by the State.

Recommendations

1. Lawyers should be subject to, and enforce, a proper standard of professional conduct.

2. District Law Societies, with list judges and regional court administrators, should take part in decisions to manage case flow.

3. The New Zealand Law Society, the Council of Legal Education, the university law faculties, and the Department of Justice should confer over improvements in methods of practical training in advocacy and procedure.

4. Appointment of a lay member and a lay observer to participate in the disciplinary and complaints procedures of the legal profession is appropriate.

5. The existing criminal legal aid scheme should be reviewed. We consider that the scheme should allow for some choice of counsel.

6. When the grounds for divorce and the procedures are simplified, consideration should be given to extending civil legal aid. Aid for legal advice should be considered as well.

7. We recommend the establishment of a Suitors' Fund.

8 A public defender scheme is neither necessary nor desirable in New Zealand.

9. Legal advice and representation for defendants in criminal cases should be assured by improving the present legal aid and duty solicitor schemes.

McKenzie Advisers

965. In a submission, presented with those of the New Zealand Maori Council, it was said:

> The Amicus Curiae* concept should with suitable modifications be adopted in the normal Magistrates' Court to allow defendants the privilege of having a 'friend' to assist in the presentation of his case. This is perhaps more relevant in the extended family set up where an Elder or Minister can speak for the defendant whose ability to converse is limited or even where he is denied any permission to speak on other than informal occasions.

Three barristers, speaking in the context of lay participation, observed:

> We see no place for lay members in Courts. We believe there is room, however, for greatly extended lay rights of audience before a Court. In particular we believe there is room for lay or community comment upon matters pertinent to the decision to be made. We see no reason why a "best friend" should not be able to speak as to matters relevant, but not necessarily material, to a finding. Rules of evidence relevant to trial by laymen have little relevance to trial by a Judge.

Finally, in a private submission from a consulting engineer, it was suggested that the Rules of the Magistrates' Courts, for both civil and criminal actions, should permit a defendant to be assisted by a brother or parent, subject only to the requirement that such an advocate received no payment and that the standards required of professional advocates were adhered to.

966. In the course of its inquiries, the Commission learned that in England, lay or professional assistance has been held to be the absolute right of parties appearing in court and before statutory tribunals. Without in any way impinging upon the rights of the legal profession to represent persons, and be heard before a court, it has nevertheless been held that anyone, professional or lay, may attend a hearing as a friend of either party, and may take notes, and quietly make suggestions and give advice to that party. Such persons are generally known as "McKenzie Men" or "McKenzie Advisers" after the case of that name.

*A friend of the court: one who calls the attention of the court to some point of law or fact which would appear to have been overlooked: usually a member of the Bar.

967. *McKenzie v. McKenzie* [1970] 3 All E.R. 1034 was a matrimonial case. Proceedings commenced in 1965 but it was not until 1969 that the divorce was heard. The husband, by that stage, was not legally aided. However, he took an Australian barrister into court with him to advise and assist him but not to appear for him. The facts and issues in the case were extremely complicated and there were communication difficulties arising from the fact that the parties (who were from Jamaica) spoke rapidly and sometimes inaudibly. At the hearing, the trial judge ruled that the husband was not entitled to the assistance of the Australian barrister, who thereupon withdrew. On appeal, the husband (by then legally represented) submitted through counsel that the trial judge had wrongly prevented the barrister from assisting him. The Court of Appeal agreed. Lord Justice Davies said:

> [the barrister] was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of witnesses and, perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions as to the cross-examination of the wife and her witnesses . . . The Judge was in error in refusing to allow [the barrister] to give his advice and assistance to the husband.

The court ruled that it was up to the opposite party (in this case, the wife) to show that the denial of such assistance to the appellant had not prejudiced his case. Taking into account the length of the trial (ten days), the complexity of the case, and the unusual issues, and notwithstanding the fact that the husband was "a remarkably intelligent and astute person", and the fact that the trial judge and counsel for the wife "rendered every practical assistance to the husband", the court found that:

> In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of the assistance which he ought to have had. It is moreover, to my mind, in the public interest that litigants should be seen to have all available aid in conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.

Thus, in England, to quote from the headnote of the case:

> Any person, whether he be a professional man or not, may attend a trial as a friend of either party, may take notes, and may quietly make suggestions and give advice to that party.

We repeat that the *McKenzie* doctrine does not allow persons other than parties in a case, or counsel engaged by them, to address the court, or otherwise to act as their advocates. It is also emphasised that the assistance of a McKenzie adviser must conform to the standards of good behaviour required of all persons who appear in court.

968. Finally, while we see no need to make any recommendations on this topic, we nevertheless see three principal areas where the assistance of McKenzie advisers could prove beneficial:

(a) before statutory tribunals, particularly those where legal representation is excluded;
(b) in assisting young people before the courts;
(c) where a party to a hearing has a poor grasp of the English language, of court procedure, or is otherwise ill at ease or disadvantaged.

Legal Executives

969. The New Zealand Institute of Legal Executives Incorporated made submissions to us. The institute was incorporated on 1 May 1975 under the provisions of the Incorporated Societies Act 1908. The institute provides for three classes of person—members, associates, and fellows. We were told that the membership last year was 137 fellows, 62 associates, and 42 members or students. The necessary qualification for each category was, we understand, the subject of lengthy discussion with the New Zealand Law Society. "Members" are such persons in qualifying employment having attained the age of 18 years or, being under that age, having been in qualifying employment for a period of not less than six months preceding their application. "Associates" are such members of the institute as have attained the age of 25 years and been in qualifying employment for a period of not less than three years out of the previous five years, or four years out of the previous eight years immediately preceding their application to the council, and have undertaken such course(s) of instruction as may from time to time be prescribed or approved by the council or have been exempted therefrom by the council in accordance with the rules of the institute, and have passed the New Zealand Law Society's legal executives' examination or have been exempted therefrom by the council in accordance with the rules of the institute, and/or been accepted for enrolment as an associate of the institute by the council. "Fellows" are such associates of the institute as have attained the age of 30 years and have been in qualifying employment for an aggregate period of not less than ten years and have been an associate of the institute for five consecutive years prior to their application, and have been accepted by the council and satisfied their requirements as to fitness for admission as a fellow of the institute. We were informed that the employment that qualified members and fellows as such was full-time continuous employment, or, at the discretion of the council of the institute, regular part-time employment in a solicitor's office or barrister's chambers, in the Supreme Court or Magistrates' Courts offices, the Land Transfer Office, the Companies Registry, the legal department of any Government department, or the legal department of any company, corporation, or firm, or if the person is otherwise engaged in full-time or part-time legal work under the direction of a solicitor or barrister.

970. The New Zealand Law Society has for many years recognised the legal executive and has taken an active part in encouraging the development of the institute. The certificate of attainment system by the Law Society is, subject to exemptions of limited duration, a prerequisite for all members of the institute wishing to become associate members. This certificate can only be obtained after three years of part-time study, courses for which are available at most of the Technical Institutes (and

through correspondence courses) throughout New Zealand. The syllabus for the course is drawn up and supervised by the New Zealand Law Society which also conducts the examinations each year. It seems the examinations are such that they ensure the candidate has obtained practical experience and has acquired some knowledge of a restricted area of the law.

971. We were further informed that a questionnaire was issued to all members of the institute. It appears that 43% have between 10 and 14 years' experience, 37% between 15 and 24 years' experience, 12% between 25 and 34 years' experience, and 8% have 35 years' or more experience. Another factor is that some 28% of the fellows disclosed that they are involved in the areas of civil law, criminal law, and family law.

972. The submission put to the Commission was that these fellows would be able to assist in routine civil procedural matters in both the Supreme Court and the Magistrates' Courts. It was said that in order to reduce the pressure upon qualified practitioners, the following matters would be appropriately handled by legal executives:

(a) applications for unopposed adjournments in civil matters;
(b) appearance before registrars of the Supreme Court regarding taxation of costs (as occurs in the case of company windings-up);
(c) the obtaining of consents to the making of any orders not in dispute;
(d) the responsibility for taking oaths and declarations under the Oaths and Declarations Act 1957 and consents to adoption under the Adoption Act 1955.

973. The New Zealand Law Society indicated at the hearing that it would consider these matters. The Law Society was anxious to obtain the views of the principals of firms who employ legal executives. We have not been given that information. We would note, however, that s.16 of the County Courts Act 1959 (U.K.) (as amended) empowers the Lord Chancellor to direct that persons in the category of "giving assistance in the conduct of litigation to a solicitor whether in private practice or not" may address the court in any proceedings in a County Court or in such proceedings as are specified. We have read that the Lord Chancellor explained that the professional bodies have welcomed this section extending the existing rights of audience and that he would exercise his powers in a limited way to enable fellows of the Institute of Legal Executives who have been conducting litigation to appear themselves in formal matters. These were specified as unopposed applications for adjournment and applications for judgment by consent. The wording of the section gives far wider powers than the Lord Chancellor stated it was his intention to exercise.

974. The Commission considers that it has had inadequate submissions from the Law Society on this topic. Questioning by the Law Society proceeded on a basis that the suggested powers might well encroach on the traditional work of barristers and solicitors. We think this is an area where questions of principle are involved; for example, the extent to which a person who is not an officer of the court should have the right to audience before the court and to give assurances to the court.

975. We suggest it would be appropriate for the Law Society to consider the issue in the light of the Lord Chancellor's ruling, and we recommend accordingly.

Recommendation

The New Zealand Law Society should consider the proposed extended functions of legal executives in the light of the Lord Chancellor's ruling.

ASSOCIATED MATTERS

A Permanent Law Reform Commission?

> To call a halt to the process of legal change is impossible. The only question is whether the development of the law is to be systematic and adequate, or haphazard, tardy and out of tune with the realities of society and opinion.
>
> (The Hon. J. R. Hanan, 1965)

976. We received comprehensive submissions from a barrister in support of a permanent Law Reform Commission for New Zealand. We raised with him the question whether this topic came within our terms of reference. We are able to say we were convinced of its relevance on the submission that the most efficient system of courts in the world, with the most elaborate facilities, would count for nothing if the substantive law is out of date. A paper prepared by another barrister came to us only after our hearings had finished. Neither the Department of Justice nor the New Zealand Law Society raised the issue with us at any time. It may be that the topic was not considered by them as falling within our terms of reference although we believe the Law Society is at present considering the issue. Nevertheless, members of the Commission have formed a view on this matter. Therefore we record our opinion in the hope that it may be of some assistance to those who ultimately decide whether a Law Reform Commission is needed for New Zealand.

977. ***The present system in outline*** The present system of law reform in New Zealand consists of a Law Reform Council and five Law Reform Committees. New Zealand was one of the first countries to establish a law reform agency, the Law Revision Committee, in 1937. That committee, inspired by the Law Reform Committee established in England by Lord Sankey, was an attempt to bring together, in the work of improving the law, representatives of all the interests that could contribute to that goal. Chaired by the Attorney-General, the committee comprised a nominee of the Parliamentary Opposition, the chairman of the Statutes Revision Committee, the permanent heads of the principal legal departments of State (the Solicitor-General, the Law Draftsman, and the Secretary for Justice), representatives of the Law Society and of the university law faculties. The judiciary, by its own decision, did not take part in the work of the committee.

978. Towards the end of 1965, the Minister of Justice abolished the committee and constituted a Law Revision Commission and four Law Reform Committees. The impetus for these changes arose out of a feeling that the committee was too unwieldy, unsystematic, and inefficient. The

new commission would be "responsible for the oversight of the law reform programme . . . it would be the Commission's task to map out the territory, to decide priorities, to allocate particular items to standing committees, special committees or other bodies, and to review progress annually".* The role of the four Law Reform Committees, to which was added a fifth in 1971, would be to "consider suggestions . . . and they could request reports from sub-committees, individuals, or Government departments . . . (they) would make reports direct to the Minister of Justice and where suitable these reports should be published".†

979. The Law Revision Commission was, like its predecessor, found to be too unwieldy and in 1975 it was replaced by the New Zealand Law Reform Council. The chairman is the Minister of Justice; the Secretary for Justice and the Chief Parliamentary Counsel are also members, as is the Solicitor-General. The latter sits on the council as chairman of the Criminal Law Reform Committee, together with the chairmen of the four other Law Reform Committees. The council has met twice, once under the present Minister of Justice, and once under his predecessor. It appears that the real work of law reform is conducted by the committees and it is there that any analysis of the present system of law reform must concentrate.

980. ***The present system in operation: a summary of viewpoints*** The Law Reform Committees are "not merely standing committees of the Law Revision Commission (or its successor). They are autonomous bodies appointed by and directly responsible to the Minister of Justice. In fact for practical purposes, each Committee is essentially an independent expert commission, with defined areas of responsibility".‡ Even the briefest perusal of the membership of the committees is sufficient to indicate the wide representation of their constitution, ranging from legally qualified officers of the Department of Justice to leading practitioners and academics. To some, the exclusion of laymen is perhaps surprising, and the absence of a committee dealing with matrimonial law might also seem strange. Although they were eventually represented on the Law Revision Commission, neither the present council nor the committees includes members of the judiciary.

981. It has been suggested that the topics referred to the committees have mainly been matters of "lawyers' law". By this is apparently meant case law and legislation, which, over the centuries, has been developed almost exclusively by lawyers and which is regarded as too technical for laymen to handle. Although this seems to us to be a somewhat sweeping view, it is suggested that there are two reasons why "lawyers' law" is often the subject of consideration by the committees. The first is said to relate to the manner of referring topics to the committees. These are selected by the Department of Justice and referred on the Minister's recommendation. Thus the department, whose own research facilities are limited, particularly in areas requiring very specialised and technical legal research, is able to utilise the expert knowledge of the standing

*"The Law in a Changing Society", The Hon. J. R. Hanan (Dept. of Justice) (1965).
†Idem.
‡"The Machinery of Law Reform in New Zealand", J. L. Robson (Dept. of Justice).

committees. The second reason suggested is "the inevitability of part-time law reformers being limited in the number of subjects they can tackle and the way they can approach their task".* It is suggested that from this exclusive reliance on the part-time efforts of lawyers flow the majority of the defects in the present system.

982. For one reason or another, some of the work of the committees has been slow to reach the statute book. It is suggested that unless the areas of the law subjected to the committees' scrutiny are not worthy of reform, the failure of the Government to implement the reforms is a weakness in the present system. One of the strengths of the now defunct Law Reform Committee was said to be the "link between the Legislature, the Executive and outside interests . . . a most important and desirable feature that ought to be retained in any reconstruction of the machinery".† The founder of the Law Revision Commission saw a danger that a full-time law reform commission might become divorced from the ordinary political and administrative system‡ and in 1965 he said:

> To the extent that law reform in New Zealand has been inadequate the reasons (apart from the problems of finding time for the necessary legislation) include the lack of sufficient highly qualified staff, inadequate information as to the law and practice of other jurisdictions, and the limited time that the unpaid members of the Law Reform Committees can give to their work. For too long we have attempted to buy law reform on the cheap.§

Of the New York Law Reform Commission it has been said:

> It has sought to avoid recommendations on topics in which the primary question was one of policy rather than one of law . . . In its relationship to the Legislature, the Commission has been scrupulous in its recognition of legislative supremacy.¶

983. It is suggested that, in New Zealand, one defect of some of the law reforms introduced by Parliament is the failure to comprehend the impact which an isolated statute, or even amendment, may have upon that body of law, much of it seemingly unrelated, already existing. "While those responsible for formulating a scheme generally have some ideas about the machinery to work it, they often fail to visualise the impact of the scheme upon existing fields of law, largely because they have not succeeded in formulating adequately the basic concepts involved . . . It is clear that the part-time committee system is slow, simply because the members inevitably have their own professional duties in the forefront of their minds."** Of course, speed is not a criterion for judging the activities of law reform bodies because, as was recently said in relation to the English Law Commission, detailed research, extensive consultation, and prolonged and reflective deliberation are required. Those who suffer most

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*"Law Reform: A new Procedure for New Zealand", D. B. Collins (1976) N.Z.L.J. 441.
†Hanan, op. cit.
‡"Law Reform", the Hon. J. R. Hanan (1969) N.Z.L.J. 365.
§Hanan, op. cit., p. 16.
¶"New York Law Reform Commission", J. W. MacDonald (1965) 28 M.L.R. 1, p. 15.
**"A Rationale of Law Reform", H. R. Gray (1966) N.Z.L.J. 365.

under our system are said to be the self-employed, the practising lawyers. This has lead, according to one view, to the university and Government department members, by virtue of their greater regularity of attendance, exerting an influence on the committees more than proportionate to their numerical strength.* The burdens of a voluntary system certainly fall unevenly on the more public spirited. It has also been said:

> There is . . . a tendency to do too much in a piecemeal fashion; the courage to make a general attack on a wide front has at times been wanting. Indeed, by removing the worst sources of friction, successful improvements of detail may positively hinder a general reform.†

The most recent commentator on our law reform procedures lists seven disadvantages of the present system. The first, slowness, has already been alluded to. The other six are said to be:

(a) It is often impossible, within a day meeting, to reach any definite view as to the lines upon which the reform of a specific area of law should proceed. Often one or two members unavoidably miss a meeting. At the next meeting the problem has to be taken up again, almost *ab initio*. Some members will have forgotten the fruitful lines of approach tentatively advanced at the earlier meeting. Those who were then absent may have different ideas. In this respect the system is inefficient.

(b) Members of a standing law reform committee have expertise in some of the topics allotted to that committee, but not in others.

(c) On occasions, but not always, consideration of the existing law and its possible reform would benefit from the appointment of laymen to the committee, but this is not envisaged by the present system. In general, the membership of a committee needs to be constituted on more of an *ad hoc* basis, i.e. tailored to the topic under consideration.

(d) To cope with the work of drafting working papers and reports many committee members, including very busy practitioners, must undertake a considerable amount of writing. Often they simply do not have the time for this: it would be better if their input consisted of ideas and practical experience, leaving the writing of the reports to able full time law reform staff. Further, to the best of my knowledge, the final text of every report is at present placed before the full committee, and much valuable time is wasted on format and style—the usual disadvantages of "drafting by committee", mitigated often by strong chairmanship.

(e) The Law Reform Council, which has met twice since 1975, has few and comparatively undefined functions, and is unable to keep the entire law reform enterprise under effective review. It is not able to achieve a liaison between those engaged in reform and the Minister of Justice as effectively as could a full time Law Reform Commissioner. Similarly, it is not able to exert the pressure which is often necessary to ensure that proposals for reform find their way into the Government's legislative programme.

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*"Changing the Law", The Rt. Hon. Sir Alexander Turner (1966) N.Z.U.L.R. 404.
†"Law Reform in New Zealand", B. J. Cameron (1956) N.Z.L.J. 72 p. 107.

(f) Some committees have commissioned very useful research papers from LL.B.(Hons.) or LL.M. students. The writer of such a paper will probably have advanced suggestions of his own for reform of the law but, not being a member of the committee, is precluded from any effective dialogue with it, and has no chance to participate in the formulation of the final proposals.*

Despite what are claimed to be the weaknesses of the present system, it is agreed there are a number of strengths which ought to be retained in any revised machinery. Thus, in an essay on the Law Revision Commission, it was said:

> The involvement in the Commisson's work of upwards of fifty lawyers, drawn from the House of Representatives, the practisng profession, the judiciary, the Universities and the interested Government Departments, has made it possible to secure the advice of those who have specialised in the areas of law and administration being investigated.†

Judges and Parliamentarians, with the exception of the Minister of Justice, do not have a voice in the Law Reform Council. Neither group is represented on the committees.

984. Another alleged defect is the exclusion of laymen from the permanent committees. Sir Leslie Scarman, when chairman of the English Law Commission, said, "I do not think that the case for appointing members of other allied disciplines to the Law Commission has yet been made out"§ primarily because so much of the day-to-day work of the commission was concerned with legal research and drafting. However, once a description of the law had been established and the areas for reform identified, laymen would have "a vital part to play; they may well see injustices or anomalies not evident to the unaided eye of the lawyer".§ One New Zealand professor considers that the assistance laymen could give would depend on the topic. Thus they would be of little assistance in reforming the hearsay rule or the law of misrepresentation in contract but they might assist a committee considering the Administrative Division of the Supreme Court, and a businessman or public accountant would be of great benefit in any consideration of the law of chattels securities.

985. One characteristic of the present system that makes it attractive is that it is relatively cheap.

986. ***The English Law Commission***

> . . . now at last we have a body of men sitting in constant session whose one calling is law reform. The distinction between them and those who (however self-sacrificially) sit spasmodically and snatch, as it were, a day or a half day out of a busy life in Courts or the lecture room is immense.
>
> (Lord Edmund-Davies)

The English Law Commission was established in 1965. The chairman is a High Court judge. There are four other commissioners. All are "persons appearing to . . . be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a

*"Revised Law Reform Machinery—A Practical Proposal", D. L. Mathieson (abridged).
†"The Mechanics of Law Reform", J. F. Northey (1970) N.Z.L.J. 278, p. 279.
§"Inside the English Law Commission", the Rt. Hon. Sir Leslie Scarman (1971) 57 A.B.A.J.

university". Appointments are made by the Lord Chancellor for a term of five years, although there is provision for reappointment. The commission is enjoined "to take and keep under review all the law with which it is concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law". Topics may be chosen by the commission itself, referred by the Government or suggested by Government departments, lawyers, and other individuals and organisations. The Government may impose a veto on any inquiry which the Law Commission proposes, and has done so.

987. Once a topic is selected, a small team of commissioners and research staff are delegated to prepare a working paper, including information about the relevant law of other countries. The working paper (as amended) is discussed at length by the commission as a whole and then distributed to the press, lawyers, judges, and interested persons. Submissions and comment are invited, but the commission does not hold formal hearings. It is worth noting that both academic and practising lawyers have established special committees to deal with Law Commission papers. After an interval of perhaps six months to a year, the comments received on the working paper are considered, first, by a specialist team within the commission who, with or without a general consultation with the commission as a whole and depending on the tenor of the comments received, proceed to prepare a draft report. The latter, generally at this stage without an accompanying draft bill, is debated by the whole commission and sent back for any necessary amendments and the addition of a bill, which is supplied by parliamentary draftsmen attached to the commission, in consultation with the commissioners and their staff. The report, as presented to the Lord Chancellor, will not only outline the present law in the area covered by the report and set out the recommendations made, together with the implementing draft bill, but also deal in detail with the process of consultation, including the names of those consulted and (unless there is some problem of confidentiality) the views they have expressed. "The Law Commission sees the ultimate object of the elaborate process of consultation as assisting Parliament on matters of great technical detail which can seldom be adequately investigated in the course of Parliamentary debate."*

988. ***The Ontario Law Reform Commission*** Well known to members of this Royal Commission for its mammoth work on the Ontario Courts and a Family Court in particular, the Ontario Commission was established in 1964. The constituting Act must be one of the shortest of its kind anywhere, occupying only one page of the statute book. From that date to the time of its Tenth Annual Report (1976), the commission had published 52 reports resulting in something of the order of 36 Acts or amendments.

989. There are 14 full-time staff at the commission, including the chairman and counsel to the commission, three legal research officers with a status and salary equivalent to Crown counsel, and administrative and secretarial staff. Another lawyer assists the commission on a contractual basis. The five commissioners, who are part-time, keep the commission in touch with professional and other developments throughout Ontario.

*Scarman, op. cit., p. 869.

Some of the commission's work is conducted internally although it is not possible to undertake all projects in that manner. An example is afforded by the work on the Sale of Goods Act, for which a leading Canadian authority has been engaged under contract as project director, as well as a number of academic and practising lawyers. Up to 70% of the topics studied by the commission have been undertaken on their own volition, the remainder have been referred by the Attorney-General. The commission reports directly to the Minister. The standing and prestige of the Ontario Law Reform Commission is illustrated by the recent acceptance of the post of vice-chairman by the Chief Justice of Ontario, on his retirement from the Bench.

990. ***Law reform and the Legislature*** New Zealand law, based as it is on the unwritten English common law, is flexible, resting on fundamental principles of justice and right. Its flexibility has helped to make it enduring, but it is equally this quality which allows, and indeed requires, at times, revision to bring the law into line with modern conditions. Outmoded rules call for change and anachronisms need correction. The source of the common law is the decisions of the courts, past and present. The other source of law is the Legislature, embodied in the statute law. Benjamin N. Cardozo, one of America's most eminent jurists and an early advocate of a permanent law reform agency, said:

> Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.*

Of the Legislature's role in reforming outmoded, unjust, or incomprehensible laws, it has been said:

> . . . in order for the Legislature to act to change a law, it has had to know that a need existed. In order that it might know, it has had to be informed and assisted with expert, disinterested, responsible and systematic advice.†

This is the primary role of any law reform body, to assist the Legislature by providing advice on the areas of law that need reform, and by suggesting the manner in which those reforms might be implemented. Law reformers should be capable of detached and detailed study of a kind in which the Legislature, pressed for time and concerned with a multitude of other matters, cannot be expected to achieve. It is said that one of the ways in which a law reform commission may do this is to articulate the experience of the judiciary in the day-to-day running of the courts. Again, it is claimed that a permanent law reform commission is able to undertake wide ranging consultation and stimulate public debate, outside the political arena.

991. ***The need for independence*** There is a national Law Reform Commission in Canada, and most of the provinces have permanent law reform commissions.§ Scotland, Ireland, England, and the Australian States‡ also have permanent law reform agencies, as do many American States. Law reform bodies have also been established in many of the continental countries.

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*"A Ministry of Justice", Justice Cardozo (1921) 35 Harv.L.R. 113, 114.

†MacDonald, op. cit., p. 17.

§Quebec has an Office de Revision du Code Civil, and a permanent law reform agency has been proposed. The law reform commission in Nova Scotia is confined to statutory law.

‡There are 11 law reform agencies in Australia.

992. Earlier this year the Department of Justice established a Planning and Development Division. In Ontario, the Ministry of the Attorney General also includes a Policy Planning Committee. That body is concerned with the day-to-day reform of the law and problems within the competence of the Attorney General. It is not equipped for, nor would it be able to undertake, the long term and large scale projects that are the concern of the Law Reform Commission; its role is quite different. If the Ontario experience can be copied, then this new division would complement any law reform work carried out by a Law Reform Commission or the existing committees. We mention, however, that a former Secretary for Justice, when discussing the department's role in relation to the law revision committee, commented, ". . . It provides facilities for research and prepares papers for the assistance of the committees, but its role here has been severely limited by a shortage of qualified staff".* It is perhaps unlikely that the department could attract and retain staff of the requisite skill and experience required by a law reform commission. Sir Leslie Scarman has said:

> Convenient as it would be to incorporate the law reform agency within a Ministry of Justice, thereby assuring to it direct and influential access to the levers of power, we believe that this answer to the problem carries great dangers. It would deprive, under existing common law practice, the agency of any chance of including an active judge within its membership. It is unlikely that any law reform body which appeared to the public to be no more than a section of a department of state would enjoy the reputation of independence necessary for the health of a legal institution. This answer we would submit while attractive for the power it might confer on the agency, is unacceptable to us for the lack of independence in the formulation of its advice. Conversely, this solution might also create difficulties for the Minister, who might be regarded by his colleagues in Government or by the Legislature as a committed champion for the agency's proposals. Thus, his independence of judgment might also appear to be diminished.†

993. It has been suggested that any chairman of a proposed New Zealand Law Reform Commission should simultaneously be a judge of the Supreme Court, appointed for four years (or possibly three or five). Although the New South Wales statute specifically requires that the chairman shall be a judge or a retired judge of the Supreme Court, and then guarantees his term of office at least until the age of retirement, in our opinion the English provision is preferable. In England, the persons appointed to be commissioners must be suitably qualified either by the holding of judicial office, or by experience as a barrister or solicitor, or as a teacher of law in a university.

994. In the passage quoted above from Sir Leslie Scarman, great emphasis is placed on the independence of a law reform commission, both in appearance and fact. But it is also suggested that State servants with legal qualifications would be indispensible on the staff of the commission. "Here, without in any way assuming the responsibilities of advice, they are able to exercise great influence in maintaining close and cordial contacts with the Government and Legislature*" The departments of

*Robson, op. cit.
†Scarman, op. cit.

State are generally able to secure the reform of the laws that they administer. If a law reform commission, to use Cardozo's phrase, is to become "the caretaker of the private law", it would be desirable that one commissioner should be a representative of the practising profession. There may be difficulty in appointing busy legal practitioners to law reform commissions but elsewhere they appear to be prepared to serve for perhaps three to five years. The relationship of a law reform commission to the Bar is of no less importance than its relationship with Parliament and the courts. We were informed that the law reform commissions in Canada have continually sought the advice of practising lawyers and have made it clear that the profession generally has a very important role to play in the work of law reform.

995. It is of overriding importance to ensure that the machinery of law reform is widely representative of all facets of the public interest with no one person, such as the commissioner himself, being placed in a position of too great an influence.

996. We trust that this section of our report will assist those who ultimately make a decision on the desirability of creating a permanent Law Reform Commission. Conceding we have not heard full debate on this matter, we believe that a Law Reform Commission should be established in a form suitable for New Zealand. Whether or not any changes are made, we strongly recommend that there should immediately be made available to the Law Reform Committees increased assistance by way of research facilities and law drafting.

Recommendations

1. A Law Reform Commission should be established in a form suitable for New Zealand.
2. In the meantime, increased assistance for research facilities and law drafting should be made available to the Law Reform Committees.

Unified Court

997. Earlier in this report, in dealing with the criminal business of the High Court, we referred to the proposal for a unified court. There were several submissions presented to us all of which in essence contemplated one combined court for New Zealand. It was said that, while the proposals might be an over-simplification of a complex issue, many of the difficulties and delays at present experienced could be met by re-organisation of the courts. One suggestion was for a combined court with divisions: the Supreme Court as a High Court and the Magistrates' Courts as a lower court. Another suggestion was for a single hierarchy of courts discharging specialist functions; judges would be assigned to the various divisions which would include appeals, family, commercial, administrative, criminal, equity, and revenue.

998. We know that in New South Wales, for example, the High Court has several divisions to which specialist judges are assigned. In Ontario, the merger of the High Court of the Supreme Court with the County and District Courts was suggested. The Ontario Law Reform Commission rejected a merger because of the constitutional difficulties it raised and also because it considered that the roles of the two courts were essentially different and ought to be preserved. The Ontario commission concluded:

> We consider it essential to the court system in Ontario that there be a relatively small, highly competent group of trial judges to administer uniform and high quality justice over the most important criminal and civil cases in the province.

999. There was also a measure of support, in the submissions made to us, for a simplified structure with one registry covering all jurisdictions and one code of procedure for each division, whether the proceedings were at the High Court or District Court level, and still retaining the tiers or strata of jurisdiction within defined limits. Other proposals would support a one-court structure but would limit that support to the provision of a common registry, such as exists in certain provincial towns at present, and to provision of one simplified form of procedure.

1000. From an administrative and public access point of view, each of the above proposals could have many advantages. Thus, it was said that the public would deal with one court office with standardised forms and procedures; that the virtues of the lower court (simplicity, accessibility, and informality) would extend throughout the system; that a unified system would remove any suggestion there was one court for the rich and another for the poor; that it would enable a pooling of resources, such as administrative staff, buildings, and libraries, which would lead to a reduction in overheads and more efficient use of resources; that it would enable a more ready simplification of procedure.

1001. Three barristers made a particularly detailed joint submission on this topic. They suggested there should be a uniform and common procedure within the unified court system, and while there might be a need for distinction between the criminal and civil procedures, it was questionable whether even that was necessary. They suggested that the ordinary procedure would be for a party seeking assistance or relief from the court to file an application setting out in a simple way the nature of the application and the other parties involved: the document, together with a short notice, would be served on the interested parties who would have the right to file and serve a simple reply. It was submitted there was no reason why a similar standard form should not be used for appeal procedures. The simplified uniform procedure could be supplemented by specialist rules dealing with particular requirements and particular divisions. Further, it was submitted that a unified court system would enable the pooling of judicial talent which could then be allocated to the various divisions of the court in a manner best suited to the individual judge's temperament, ability, and experience. Formality in court dress, the method of enforcement, physical surroundings, and the adversarial nature of the proceedings could similarly be adapted to the needs of the different divisions. A unified court would reflect the trend towards specialisation within the profession and thus facilitate recruitment to the Bench. Lay involvement (including experts and assessors) would become more practicable within the specialised divisions. Finally, the simplicity of structure and procedure would command greater public acceptance and result in greater convenience for litigants in filing documents and having their cases heard. This submission was supported by an independent but similarly detailed submission from a Christchurch barrister.

1002. It cannot be doubted that the different roles of the various courts call for different judicial talents. However, in considering an appropriate court structure for this country, due regard must be had for geographical and demographical realities. If these are taken into account, provision would have to be made for different classes of judicial officers according to the concentration and specialisation of work in different areas. The end result would be a structure little different from the present. Moreover, while flexibility might be achieved by the adoption of a unified court, if all judges of the court were deemed to have the full and combined jurisdiction

of the present Supreme Court judges and magistrates, this could result in a lower standard of decision-making. Once certain cases are reserved for certain judges (or specialist or superior judges are introduced) the system begins to return to the form we have at present. It may also be doubtful whether the assignment of judges by administrative direction would be acceptable: we fear pressures would soon mount for a defined jurisdiction. It is also debatable whether any real saving in time would be achieved simply through having a single court. The Secretary for Justice submitted it would not be practical or conducive to a reduction in expense to provide that all court documents could be filed in the one registry; this would require small offices to be staffed with senior officers, many of whom would be under-employed. In opposition to a unified court, it was also submitted that there is a real danger that the procedure for all actions would be determined or influenced by what is required in the most important or complex cases, with excessive formality creeping in at the lower levels: a result less satisfactory than the present situation.

1003. Having considered all the above matters, we record that we are strongly aware of the attractiveness of proposals advanced for a unified court structure. Indeed, the objects which proponents of a unified court seek to achieve are, in many respects, entirely accepted by us. The real issue is one of means not ends. Thus we fully agree that it is desirable for our courts and their procedures to be relatively uniform, with the judges of all courts having a degree of standing and respect fully commensurate with the work which they do. Likewise, the more difficult cases should go to the most able judges. Many of our recommendations are directed to achieving those ends. We have concluded, however, that, while the system of courts in New Zealand must be treated as a unity, this unity does not render it desirable to fuse all courts into a single court: virtually all the benefits which would flow from a unified court can be achieved by methods which do not involve the possible disadvantages inherent in an endeavour to weld the courts of New Zealand into one single court. We strongly support integrated administration and, wherever possible, common procedures. Indeed, we consider administration of this country's courts is of such particular importance that we devote a separate section to this topic (paragraphs 746 et seq.). We firmly believe that economic and efficient disposal of court business and the avoidance of delay in bringing civil and criminal trials to hearing depends on setting up a unified administrative court service where the judicial and administrative functions work closely together for the best running of the courts.

1004. Finally, we mention that for some years the Rules Committee of the Supreme Court, through a special sub-committee known as the Supreme Court Procedure Revision Committee, has been in the process of completing the re-wording of the Code of Civil Procedure, with a view to simplifying the rules of court and eliminating outmoded procedures At the time of presentation of this report, the new rules are ready for consideration by the full Rules Committee. Prominent among the changes is the adoption of a single method for commencing any form of proceedings in the Supreme Court, except proceedings in Admiralty, or appeals from a Magistrate's Court or a statutory tribunal. This Commission expects that once the new High Court Code is promulgated, the District Courts Rules Committee will consider the extent to which the procedural reforms are suitable for the District Courts.

Proposal for Examining Magistrates

1005. A former Attorney-General in the condominium of the New Hebrides, where both French and English systems of law are administered, submitted to us that there were considerable advantages in the use of examining magistrates. After preliminary enquiries by the police, the magistrate takes charge of the investigation. He is assisted by judicial police who are sworn officers of the court. He personally travels to the scene of the inquiry, examines the suspect and other witnesses, takes their depositions, institutes searches and seizures, and himself evaluates the evidence against, and in favour, of the suspect, who may be represented by an advocate throughout the inquiry. As well, he can place the suspect in custody for a limited period, and can call for a scientific or technical report. Finally he decides whether a prosecution should follow.

1006. We were informed that these procedures produce a better quality of justice. It is a screening process and is effective, in that of those who do stand trial, a much greater proportion are convicted.

1007. We cannot recommend that this Continental system should be adopted for New Zealand. We do not consider that it offers any improvement in promptness or economy, nor do we have sufficient evidence to convince us it would be a more efficient system than our own. We also think it would be unacceptable for New Zealanders to have their judges take part in criminal investigations.

Written Statements—Evidence Prepared in Advance

1008. A thoughtful submission from a barrister who is the author of several articles on improving trial procedures as the means of determining matters of fact*, requires our consideration. He suggested that witnesses should be permitted to give their evidence by producing written statements. It is claimed that such a system includes these advantages:

(a) The witness is able to review his statement in a relaxed environment and to modify it so that it accurately records what he wants to say. Stress associated with a court hearing can be reduced.

(b) The record of events can be made promptly; memory fade is reduced.

(c) Pre-recording with the help of lawyers may be of assistance to the court by permitting poorly educated witnesses to compensate for inadequate vocabulary.

(d) There is opportunity to explore alternative possibilities by using comprehensive questionnaires.

(e) Pre-recording also enables the court to provide all parties with an adequate view of the relevant information and may significantly reduce the possibility of surprise.

(f) The court itself can study the evidence prior to trial and determine what further information it may require.

(g) By the publication of all information pre-trial, the probability of settlements is likely to increase, or at least the trial should primarily be restricted to amplification of written material and submission on essential issues.

(h) Witnesses used to giving viva voce evidence may unfairly present better "face validity" than a novice. Pre-recording should redress this imbalance.

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*"Disputes: A Careening", M. D. Malloy, (1974) N.Z.L.J. 302.

1009. The cumulative effect of these possibilities does indicate a need for examination of our procedures for placing evidence before the court. The new Code of Civil Procedure (if adopted) allows some scope for pre-recording of evidence. Though not compulsory, pre-trial conference provisions may reduce the adversary aspects of many cases. Affidavit evidence forms a considerable part of trial evidence, for example, in family protection and matrimonial property litigation, and is specially provided for in the Code of Civil Procedure upon any motion, petition, or summons (Rule 184). Parties may agree to the taking of evidence by affidavit in ordinary actions, or the Supreme Court may make an order for proof by affidavit for sufficient reason, even though there is no such agreement. The court may order the deponent to attend for cross-examination. We think there would be ready acceptance of pre-recording all evidence which would not be objectionable if given in answer to leading questions.

1010. Some of the arguments propounded we find quite compelling; others we have reservations about. It is obviously a large topic and one upon which it is not practicable for this Commission to make a recommendation. We think, however, that the matter does deserve more detailed consideration. We would envisage endeavours to try pre-recording in different classes of litigation, giving an opportunity to observe whether it does assist the witness; whether it creates problems in assessing credibility; whether it saves the time of the court, or, contrary to this immediate impression, in fact lengthens the hearing. Ways and means of how pre-recording can be tested should be considered by a committee of the Law Reform Commission, if established, or, if not, the appropriate law reform committee.

Scientific Evidence

1011. The New Zealand Law Society contends that separate facilities should be established in each of the main centres to enable the defence to obtain the help of expert investigators and analysts, not simply as a matter of covering expense, but to match the resources of the State that are open to the police and the prosecution. We have already referred to Rule 4.17 of the Society's Code of Ethics (paragraph 961). This rule governs defence access to the Department of Scientific and Industrial Research (D.S.I.R.) examinations. Guidelines were drafted by the D.S.I.R. in 1971 after consultation with the New Zealand Police and the New Zealand Law Society. These were incorporated in the Society's Code of Ethics issued in March 1976. (We reproduce rule 4.17 as Appendix 5.) We heard a number of submissions from forensic scientists, including some from private practice and others employed by the D.S.I.R. Several of the submissions were directed to one particular murder case which has attracted a great deal of publicity in recent years in this country. It is common ground that there have been great advances in science over the last 20 years. Certain scientists suggested that because of the adversary system it was difficult for a jury of non-scientists to assess the validity of scientific evidence and there was a real problem for jurors in absorbing the complexity of technical information. The suggestion was made from several quarters that a scientific ombudsman or specialist advisory committee should be established for the benefit of the judge and jury. Many issues have to be solved in court where the opinion of experts is in conflict. In our opinion, a specialist advisory committee would be of little assistance to a judge and/or jury. They have to listen to evidence given on both sides of the case, evidence that is tested by cross-examination, and

make up their minds which evidence they accept and which they reject. Cross-examination is one of the great weapons of truth. We do agree, however, that it is important for both prosecution and defence to have equal access to all scientific evidence so that crucial forensic analyses may be conducted. Legal aid may be necessary in appropriate cases.

1012. We think the Code of Ethics already referred to, if properly applied, meets many of the criticisms concerning scientific evidence. It is an interesting commentary that while the D.S.I.R. recommends that scientific evidence in certain cases be given by certificate rather than by the time-consuming attendance of scientists at court, other scientists (including some employed by the D.S.I.R.) submit that attendance for the purpose of cross-examination is essential. We think this is an issue where circumstances alter cases. We have been told that on most occasions when officers from the D.S.I.R. give oral evidence, their findings are accepted without question. It is for this reason that the D.S.I.R. favours some form of certificate as a suitable method to present evidence. This method is well recognised in the Food and Drug Act 1969, the Transport Act 1962, and, more recently, in the Misuse of Drugs Act 1975. The D.S.I.R. recognises that the introduction of the Summary Proceedings Amendment Act 1976 has lessened the need for court appearance by D.S.I.R. officers, but they submitted it is also appropriate to consider the provisions of ss. 9 and 10 of the Criminal Justice Act 1967 (U.K.) as a suitable means to further reduce unnecessary court appearances. We consider there is some validity in suggesting the giving of technical evidence by certificate, provided the parties consent and have the approval of the trial judge. We think these consents are necessary because, although the defence may accept the prosecution's certificate, either the judge and/or the jury may wish to ask questions concerning the information in it. The Commission is aware that in many criminal trials the defence is prepared to admit documents of this nature, or, pursuant to s.369 of the Crimes Act 1961, to make admissions of fact in order to dispense with proof thereof.

1013. The D.S.I.R. also suggests that production by scientists of "dangerously valuable bulk samples of illicit drugs" could be eliminated by appropriate police recording and sampling of drug seizures. The problem concerns the custody prior to, and after, the introduction of these samples as exhibits in court, and it is suggested the need for the "best evidence" in these cases should be re-examined. It is recognised that explosives are not acceptable as court exhibits and it was submitted that photographic evidence of a major illicit drug or narcotic seizure may suffice, provided samples from the seizure are entered as exhibits. If this was acceptable it is suggested that a court officer could attest to the photographic evidence taken before the seizure was destroyed. This procedure was commended to us, given the "street value" of some heroin seizures and also the bulk of some cannabis seizures. We think there is merit in both of these suggestions and we recommend accordingly.

1014. A further submission came from two senior scientists of the D.S.I.R., and was presented with the permission of that body. It is said that if a private analyst reaches a different opinion from that of the D.S.I.R., this information is not disclosed to the prosecution, prior to its introduction in evidence as part of the defence case. If new facets of the case are revealed, the D.S.I.R. scientist may be afforded the opportunity of presenting rebuttal evidence. This statement, in our opinion, should be qualified by the general rule that any matter upon which it is proposed to contradict the evidence-in-chief given by the witness, must normally be

put to him so that he may have an opportunity of explaining the contradiction; failure to do this may be held to imply acceptance of the evidence-in-chief. When facts are put to an expert witness in cross-examination, it can be very difficult to consider them fully and lucidly in the witness-box. Even when the expert is afforded the opportunity of presenting rebuttal evidence, the time available may be insufficient either to carry out more than a minimal amount of laboratory work or to consider inferences which may be drawn from these new laboratory observations. There is usually no time for additional work such as photographing exhibits, which may be advantageous in some cases. Senior D.S.I.R. scientists recommended to the Commission that if the defence offers new scientific evidence, and not simply a different scientific opinion from that of the Crown scientist, then the new evidence should be notified three days before being presented as evidence in court. If the defence is unable to give this required notice, then it should be mandatory that the Crown has the right to offer rebuttal evidence and has a reasonable time to prepare such evidence. While we think there is merit in the suggestion, it is difficult to impose time stipulations on the conduct of a trial. We would support the recommendation in principle but bearing in mind it is the trial judge who presides over the conduct of matters in his court.

1015. Overall, we think that if the guidelines laid down in Rule 4.17 of the Code of Ethics are followed, the present court procedures should be adequate for the presentation and appreciation of scientific evidence. We do, however, consider there is some force in the suggestion that those concerned with law reform should investigate the question of specialist and expert evidence, particularly researching the extent of the problems and of the solutions achieved in other countries and other legal systems. Our attention was also drawn to the fact that there is no register of scientific institutions, experts, equipment, and knowledge for forensic use in this country. We were told that some of our New Zealand scientists have world status in forensic fields but have not been called upon by either the prosecution or defence. We think these are further matters which a Law Reform Commission could properly investigate.

Recommendations

1. In criminal cases, both the prosecution and the defence should have equal access to scientific evidence, so that forensic analyses may be conducted.
2. Wherever appropriate, but only with the consent of the parties and the approval of a judge, scientific evidence may be given by certificate.
3. The procedure for producing illicit drugs as exhibits in bulk form should be examined with a view to changing the method to the production of a sample, subject to proper recording of the bulk.
4. If the defence offers new scientific evidence and not simply a different scientific opinion from that of a Crown scientist, wherever possible either adequate notice of the new evidence should be given, or the Crown should be given a reasonable time to prepare rebuttal evidence.

Combining Criminal and Civil Proceedings

1016. We received a number of submissions complaining that the courts do not place sufficient emphasis on compensation for victims of crimes, and that the legal processes through which such persons could pursue their own remedies are unnecessarily cumbersome. Compensation for

personal injury is now provided for in the Accident Compensation Act 1972. The 1974 amendment to that Act incorporated the relevant provisions of the Criminal Injuries Compensation Act 1963. The victim must now look to the accident compensation fund for compensation for personal injury. The right of action for damages for personal injury no longer exists. There remains, however, the question of compensation for damage to property. A court may order any person convicted of an offence to compensate the owner of property for damage arising out of the incident which gave rise to the prosecution. In such a case, the amount of damage has to be established to the satisfaction of the court, as any order made is enforceable as if it were a fine.

1017. Where such an order for compensation cannot be made, the person who has suffered loss may have the right to bring an action in the civil jurisdiction of the court, claiming damages. In such an action, it may be necessary to call the same witnesses who gave evidence at the hearing of the charges arising out of the incident. This can be a major source of annoyance or inconvenience to citizens who find themselves involved as witnesses simply because they happened to be in the vicinity when an accident occurred. Some of these persons find it difficult to appreciate why one court should have to hear evidence to determine whether a motorist was negligent when another court has already heard evidence from the same witnesses and convicted the defendant of careless driving. Some of those who made submissions to us described the situation as wasteful of the court's time, as well as the time of everyone else involved. It also adds to the costs of litigation. As the law stands, however, the fact of a conviction is not admissible in evidence in civil proceedings arising out of the same facts. If the conviction followed a plea of guilty from the defendant, the fact of the admission made by him would normally be admissible in subsequent civil proceedings.

1018. The implications of this matter have been carefully considered by the Torts and General Law Reform Committee of New Zealand in a report entitled "The Rule in Hollington v. Hewthorn" in 1972. That committee examined the application of the rule in civil cases in general, including defamation actions; also the admissibility of previous matrimonial findings in later civil proceedings, and the position regarding paternity orders and the findings of administrative tribunals. We are in agreement with the findings of that committee, whose main recommendation was that a conviction recorded in a New Zealand court should be admissible, under certain stringent conditions, in subsequent civil proceedings as evidence of the facts upon which that conviction was founded. We adopt the conclusions of that committee (except in so far as they include matters already dealt with by the Accident Compensation Act) and recommend that legislative effect be given to them. We consider, however, that while the changes suggested would be beneficial, a more radical approach is called for in this field to obviate the need for separate trials to resolve questions of criminal and civil liability. We have not had the benefit of any submissions on this topic from the New Zealand Law Society or the Department of Justice, but we consider that endeavours should be made to devise a procedure to facilitate the resolution of all issues in the one hearing, so far as that may be possible. We appreciate that this involves both complex and difficult issues and will require most careful consideration.

Recommendations

1. The principle of resolving criminal and civil liability in one hearing should be examined with a view to saving the time of the court, parties, and witnesses.

2. Implementation of the recommendation of the Torts and General Law Reform Committee in its report entitled "The Rule in Hollington v. Hewthorn" is supported.

Interim Injunctions

1019. The Otago Branch of the New Zealand Legal Association submitted that District Courts should be empowered to deal with certain remedies at present outside the jurisdiction of Magistrates' Courts. It specifically referred to interim injunctions and other interim equitable remedies. The notion of a District Court judge acting in effect as a deputy High Court judge is already accepted in Ontario.

1020. We think, in the wider public interest, there is merit in this proposal, especially in relation to centres where High Court Judges are not resident. We therefore consider the matter should be placed before the Rules Committees of the High Court and the District Courts. We would caution, however, that ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion (*Bates v. Lord Hailsham of St. Marylebone and Others* [1972] 3 All E.R. 1019, 1025). We also think that provision should be made for early review of any such interim orders made by a District Court judge.

Recommendation

The Rules Committees of the High Court and the District Courts should examine the extent to which, in urgent cases, jurisdiction of High Court judges may be deputed to District Court judges.

Bail

1021. It was submitted that, because refusal of an application for bail may be the subject of an appeal, the reasons for declining should be given in writing. Applications of this kind may be dealt with either in open court or in chambers and the decisions are usually oral ones. We see no reason why the decisions should not be recorded in shorthand or by other appropriate means and transcribed if required.

Recommendation

Reasons for declining bail should be recorded.

Police Summaries of Facts in Summary Prosecutions

1022. In submissions to the Commission, the Christchurch probation officers asked that "before a defendant pleads guilty or not guilty he should be given the police statement of facts and adequate time to read it". We invited the representatives of the Police Department to comment on this request. They replied that a summary of facts is a police document prepared by the police for police use. In many cases, especially with overnight arrests, the summary might be extremely brief, and prepared from only such material as was then available. It might well be incomplete. They were concerned that criticism might be directed at the police, without justification, because of the incompleteness of the summary. They were also concerned that disputes over facts should be

resolved by evidence properly presented in court and not "sorted out" by arrangement between the prosecutor and defence counsel. The police also commented that the defendant is fairly informed on the nature of the charges against him when he is provided with a copy of the sworn information, and if the appearance followed an arrest, the defendant would have been advised of the nature of the charges against him at the time of the arrest. They also contended that the duty solicitor or the defendants' own counsel could advise on remands, adjournments, legal aid, bail, and like matters without recourse to the police summary of facts, and that the defendants' own version of the facts should provide a sufficient basis for advice on the appropriate plea. If there was any doubt, the matter could be resolved on a "not guilty" plea. The police were concerned that if full disclosure was made in every case, this could be used by experienced defendants to their advantage by "arranging" their evidence to meet the material in the summaries. They also commented that no such disclosure is required from the defendant.

1023. The Secretary for Justice also raised the topic of summaries of facts when dealing with the minor offence procedure. He claimed that the provision of a summary of facts on which the prosecution relies, and a notice setting out as simply as possible a defendant's rights and responsibilities, had been widely welcomed as a major reform. He saw no reason in principle why it should not be extended to all criminal prosecutions, whether the defendant is appearing on arrest or on summons.

1024. We invited the Secretary for Justice to comment on the matters raised in the Police Department's letter. We were told that in practice there is usually some discussion between the prosecution and defence counsel about the nature of the charge and the evidence in support of it. He suggested that there should be a rule of law requiring the summary of facts to be available when the accused first appears in court. Mention was made of the procedure when an appeal is lodged against sentence following a plea of guilty. The summary of facts then becomes the part of the record which sets out the facts of the case. The Secretary for Justice pointed out that, while the accused now receives a copy of the information in arrest cases, and has always received a summons in non-arrest cases, these only contain those particulars required fairly to inform him of the substance of the offence with which he is charged. The particulars do not extend to the circumstances of the offence or the facts which it is proposed to give in evidence. He did not agree with the contention of the police that knowledge of the facts had no relevance to the duty solicitor or the accused's own counsel in advising on bail remands or legal aid. On the contrary, he suggested that knowledge of the facts was particularly relevant to such preliminary matters, and essential when advising on plea.

1025. We appreciate that the police would be faced with practical difficulties if they were required to make a summary of facts available when every accused first appeared in court. Clearly, in some cases, it would be quite impossible to do so. In the case of overnight arrests, for instance, inquiries might be far from complete. We also recognise some validity in the contention of the police that those who wished to tailor their evidence to fit the facts revealed in the summary would be assisted by the proposed procedure. On the other hand, in any case where the accused had the right of election, if he elected jury trial, he would then learn full details of the facts alleged against him through the preliminary hearing. Furthermore, the accused has been under no obligation to disclose

evidence he proposes to call, except under the provisions of s.347A of the Crimes Act 1961, requiring notice of intention to call evidence in support of an alibi.

1026. The subject is currently under consideration in England. In "The Solicitors' Journal" of 23 September 1977 Vol. 121 at p.624, it was said:

> The absence of any duty upon the prosecution in the magistrates' court to make pre-trial disclosure of witness statements has led to election, often unnecessary election, applications for adjournment, delay, irritation, ill-will, and injustice. The authorities have defended the position by arguing that the statements might contain irrelevant or unsuitable matter and would need editing, and anyway as a matter of practice disclosure is made to a reputable defending advocate.

In the Criminal Law Act 1977 (U.K.), power has been given to make rules requiring disclosure of facts and matters about which the prosecutor proposes to call evidence. Provision is made for exemptions in respect of different offences or classes of offences. To date, no rules have yet been promulgated under these new provisions.

1027. In our opinion, the present informal practice of disclosure by arrangement between the prosecutor and defending advocates greatly facilitates the disposal of the business of the courts, and should be encouraged and extended wherever possible. We recommend that the matter should be kept under observation with a view to introducing legislation when some of the practical difficulties in this area have been overcome.

Recommendation

In summary prosecutions it is desirable that the prosecution should provide the defence with a summary of facts upon which it relies. When the proposed rules in England have been in force for a sufficient time for their effectiveness to be evaluated, consideration should be given to introducing similar legislation to this country.

Revision of Penalties

1028. This is an important topic. It impinges on a number of other matters referred to elsewhere in this report: in consequence, we have found it necessary to repeat some references and observations in the following material.

1029. In relation to heavy Supreme Court workloads, one of the solutions considered, but not pursued, by the Criminal Law Reform Committee, was that monetary thresholds beyond which a person becomes entitled to elect the forum of his trial for crimes such as theft, receiving, and false pretences should be adjusted to allow for the effects of inflation. While such adjustment might remove only a small number of trials from jury lists, it would revise outmoded provisions. The Criminal Law Reform Committee also considered the possibility of revising all maximum penalties for each crime and every offence but concluded that this would not resolve the difficulty and, in any event, was not an acceptable solution. They reasoned, for instance, that alteration of many maximum sentences from imprisonment to a fine could inhibit a court in cases where, for one reason or another, imprisonment ought to be imposed.

1030. This matter was considered in depth by the Speight Committee in 1974. In the report of that committee, it was stated that there are a

number of offences which are usually dealt with by comparatively light penalties, such as a fine or probation, for which the accused often elected trial by jury. The committee pointed out that it was the appearance of such cases in substantial and increasing numbers which had been responsible for the setting up of that committee. The committee suggested that it would be desirable to remove the normal run of such cases from the jury trial system, while retaining the machinery for hearing the exceptional case in the Supreme Court. They proposed a dual system, under which such offences would normally be triable summarily, but a discretion could be exercised by the magistrate, of his own motion or after application by the accused, to decline jurisdiction and direct that the matter be proceeded with indictably, with consequent liability for a higher penalty. The committee emphasised that the discretion should be reserved to the magistrate and it should not be regarded as giving the prosecution a choice of forum, nor affording the accused a right of election. We would comment that if the accused is to be given a statutory right to apply for a jury trial in such circumstances, this would virtually amount, in practice, to a right of election. If such an application was made and refused, and the accused was convicted when tried summarily, he might find it hard to accept that he had had a fair trial and that justice was not only done, but was seen to have been done. We also mention that with the up-grading and strengthening of the Magistrates' Courts by the creation of the District Courts, it appears an appropriate time to revoke the provisions in the Summary Proceedings Act which give the prosecution the power to lay a charge indictably for an offence which would otherwise be electable. We consider that the accused should not be deprived of his right to elect summary trial in this way. If the matter appears to the court to be sufficiently grave, jurisdiction can be declined at any time prior to sentence.

1031. The Speight Committee recommended that maximum penalties should be reduced from whatever their existing figure, to three months' imprisonment on summary conviction in two classes of case. Their first category involved those cases commonly occurring in trials in the Supreme Court which could mainly be dealt with, without injustice, by way of summary trial only. It was suggested that such cases should comprise:

(a) all offences of dishonesty, viz. theft, receiving, obtaining by false pretences, credit by fraud, forgery of an instrument of specific value or uttering the same, where the amount in issue or the value of the property does not exceed, say, $200;
(b) unlawful interference with a motor vehicle;
(c) car conversion;
(d) indecent exposure;
(e) indecent act or performance for gain;
(f) unlawful sexual intercourse with a female under 16 where the offender is under 21;
(g) wilful damage.

The Speight Committee strongly recommended that these penalties should be reassessed. Secondly, the committee pointed out that there are a wide variety of offences, both in the Crimes Act, and in other statutes, where penalties of substantial imprisonment are prescribed as maxima but would never be imposed. Although cases under these statutes seldom, if ever, arose, and therefore did not inflate the numbers of relatively minor

jury trials, for the sake of consistency it was thought desirable to reduce the prescribed maximum penalties for them, while dealing with the first class of offences. These Acts include:

Animals Act 1967 s.21(4)
Births and Deaths Registration Act 1951 s.48
Building Societies Act 1965 ss.29, 30, 64, 70
Burial and Cremation Act 1964 s.56
Control of Prices Act 1947 s.26
Designs Act 1953 s.42
Distillation Act 1971 s.86
Electoral Act 1956 ss.130, 150
Friendly Societies Act 1909 s.75
Harbours Act 1950 s.247
Insolvency Act 1967 s.126
Land Act 1948 s.182
Land Drainage Act 1908 s.82
Local Elections and Polls Act 1966 s.56(2) and (4)
Magistrates' Courts Act 1947 s.116A
Marriage Act 1955 s.60
Merchandise Marks Act 1954 s.18
Money Lenders Act 1908 s.6
Municipal Corporations Act 1954 s.374
Naval and Victualling Stores Act 1908 ss.4, 5
Patents Act 1953 ss.25, 26, 105
Police Offences Act 1927 s.53A
Post Office Act 1959 ss.55, 56, 57, 58, 61, 62, 95, 97, 98, 99, 100, 102, 104, 108, 158, 232
Social Security Act 1964 s.127
Soil Conservation and Rivers Control Act 1941 s.154
Summary Proceedings Act 1957 ss.29, 181
Trade Marks Act 1953 s.70
Veterinary Surgeons Act 1956 s.22
Workers Compensation Act 1956 s.135

The committee commented that this list was selective and not exhaustive, and it had no strong views on the desirability of re-classifying these rarely encountered offences. The New Zealand Law Society had recommended to the Speight Committee a "review of the maximum punishment of certain crimes with a view to making certain crimes not punishable by imprisonment or limited to 3 months imprisonment".

1032. So far as this Commission is aware, no steps have been taken to implement this strong recommendation of the Speight Committee. In his submissions to us, the Secretary for Justice recommended that no change should be made to the present right to trial by jury. He referred to the concern which has been voiced from time to time that the Supreme Court is too much engaged with what is described as minor crime, and the solution sometimes given of limiting the right to jury trial. He urged that this "simplistic solution" should be strongly resisted. The Secretary for Justice also contended that the right to jury trial is too important to be lightly set aside and that there was little evidence that any substantial period of the time of judges is spent dealing with minor offences. He pointed out that less than 10% of all trials related to offences where the maximum penalty is one year or less (Table 15), and that he would be reluctant to classify an offence carrying 12 months or even six months' imprisonment as minor.

1033. The New Zealand Law Society in its submissions to this Commission indicated its acceptance that both a reappraisal of maximum penalties and a review of offences giving a right to trial by jury appear desirable in order to bring penalties and offences into line with modern conditions and thinking. The Society urged, however, that these reviews should not be carried out solely for the purpose of relieving the criminal workload of the Supreme Court. The department's rejection of the "simplistic solution" and recommendation that no change be made to the present right of trial by jury were, therefore, endorsed by the Society.

1034. Other submissions on this topic proposed that the maximum penalty for the offence should continue to be the criterion for determining the point at which the right to elect trial by jury should become available, but the prescribed penalties should be reviewed with the aim of reducing as many offences as possible to a maximum sentence of three months, where that was shown by current sentencing levels to be appropriate. To meet the case of the persistent offender who is not deterred by the maximum penalty of three months' imprisonment, an increased penalty was proposed, with consequent right of election, for subsequent offences within a period of, say, five years. Theft in general, false pretences, credit by fraud, and receiving stolen goods where the value of the property does not exceed $100, were suggested as offences which could appropriately be dealt with in this way. A further proposal was that some offences should be removed from the Crimes Act and incorporated as purely summary offences in the Police Offences Act, or preferably, in a new Summary Offences Act, to replace the Police Offences Act.

1035. We acknowledge the substance in the argument of the Law Society that major changes in the categories of offence, giving the right to elect between summary or jury trial, should not be made for the sole purpose of relieving the workload of the Supreme Court. Likewise we would not favour what the Secretary for Justice calls the "simplistic solution" of general revision of the right of election as a means of achieving that end. We believe that radical changes in this area are unnecessary and undesirable. Understandably, we have not been presented with any one means of solving all the problems in our court system. It would, however, be most remiss of us to reject any partial solution, just because that remedy was not, in itself, of major significance. In this report we are recommending a substantial number of small improvements to our court system and we believe their cumulative effect will be considerable. We are not impressed by arguments that, because a relatively small percentage of minor trials would be moved from the Supreme Court if monetary thresholds were updated or if maximum penalties were revised to more accurately reflect current thinking on penology, these exercises should not be undertaken.

1036. The most difficult aspect of this problem centres round offences carrying a maximum penalty of a short period of imprisonment, and therefore of minor importance to society in general, although potentially of very great moment to the person charged. The most critical area relates to offences of dishonesty.

1037. We believe there are a number of offences which could be removed from the Crimes Act and incorporated in a new Summary Proceedings Act to replace the Police Offences Act. We note with interest that the English Criminal Law Act 1977, which substantially followed the recommendations of the James Committee, made some offences solely triable summarily, although previously these had been electable; while

some offences which had previously been purely indictable became electable. One of the most significant categories of offence which previously carried a right of election was drinking/driving and allied charges, not involving personal injury or death. In 1975, 3000 such offenders elected trial by jury. Such offences have now been made summary only, as they are in New Zealand. On the other hand, a recommendation of the James Committee that thefts of property not exceeding £20 in value should be triable summarily only was rejected by the House of Lords. Theft, irrespective of the amount involved, has traditionally carried the right of election in Britain: the proposal would, therefore, have taken away the right to elect trial by jury in respect of property worth less than £20. The majority view of the House of Lords was that because questions of honour and reputation are involved, a person facing a charge of dishonesty, even though the amount involved might be small, should not have an existing right to elect trial by jury taken away from him. In New Zealand, a defendant charged with theft of property of less than $10 in value does not have the right of trial by jury: the figure of $10 has not been altered since 1908, although the value of money has changed significantly. If this matter rested on simple logic, therefore, all that would need to be done would be to apply the appropriate mathematical formula and decide on a new monetary threshold. However, we consider that the principle which influenced the House of Lords, as discussed above, should also be given proper weight in our situation, while recognising the differences in the background of our practice. In particular, we note that a major reason for establishing this Commission was the concern expressed by some Supreme Court judges that relatively minor crimes were contributing to an excessive workload in their courts: the proposals we have made for some of the less serious crimes to be tried by judges and juries in District Courts will alleviate that position and also, we consider, make it practicable to leave the threshold for offences of dishonesty at $10, despite changes in the value of money. We suggest, however, that the situation should be reviewed by the Law Reform Commission, if established, or, if not, the Criminal Law Reform Committee, after sufficient time has elapsed to make an assessment of the workload of the courts following implementation of our other proposals. We also believe that the review of the two classes of offences recommended by the Speight Committee should proceed on a similar basis, and we recommend accordingly.

Recommendations

1. The provision of the Summary Proceedings Act permitting the prosecution to lay an information in indictable form for an offence which would otherwise be electable, should be repealed.

2. No change should be made in the threshold for jury trial for offences of dishonesty at present, but the matter should be reviewed by the Law Reform Commission, if established, or, if not, the Criminal Law Reform Committee, after sufficient time has elapsed following implementation of our proposals.

3. The Law Reform Commission, if established, or, if not, the Criminal Law Reform Committee, should likewise undertake a review of crimes and other offences created by miscellaneous statutes which could be re-classified as summary offences.

Sentencing and Penal Policy

1038. Many questions in our terms of reference entailed assumptions about the circumstances which resulted in people coming before the courts, and perhaps even more, about the consequences of their having done so. Several submissions drew attention to the sentencing of offenders and indeed, the whole field of penal policy. These matters, generally speaking, are outside our terms of reference but the frequency with which they were raised at our hearings is clear evidence of interest and concern on the part of many responsible individuals and groups in the community.

1039. We acknowledge the submissions made to us by the president of the New Zealand Howard League for Penal Reform, not only for their own sake, but as being representative of the considerable number of references to this important subject. It is not within our competence, as limited by the terms under which we were commissioned, to evaluate the material on this topic. We confine ourselves to the observation that many of the suggestions put to us are eminently worthy of consideration, and we hope that an appropriate forum might be established where they can be presented and discussed.

1040. We have discussed one specific suggestion from the league regarding prison visitors in the section of our report dealing with justices of the peace (paragraph 638). Other more general topics raised by the league have been considered and included in other sections of the report.

Probation Reports

1041. The question was raised with us whether prosecutors should be given the opportunity to peruse pre-sentence reports prepared by probation officers. We were told by some probation officers that they regarded these documents as confidential to the court, and they would be reluctant to include certain background information about a prisoner which might assist the court in sentencing if that material became available to the police: details of past involvement with drugs and drug-users was mentioned as an illustration of this type of confidential information. It was suggested to us that police interest in a criminal trial virtually ceases when the verdict is reached and does not extend to the sentencing aspect.

1042. Representatives of the Police Department, on the other hand, emphasised the importance of ensuring that all information put before the courts, including that contained in probation reports, should be accurate. For some personal history, the probation officer has to rely on the defendant himself, with little or no opportunity for verification. Just as it would be unthinkable for the court to receive evidence from one party which was not disclosed to the other side, material relevant to sentencing should be available to the prosecution as well as to the defence, particularly if making it available was basically for the purpose of verifying the information supplied.

1043. While it may be true that in one sense the police have no direct concern with the quantum of sentence imposed, the position has changed in recent years since the Crown's right of appeal against a sentence was introduced. Those responsible for deciding whether to lodge an appeal would need to know details which led to the sentence imposed, including material in the probation report. It might also be judged desirable that the police officer in charge of a case should understand the reasons for the sentence imposed by the court.

1044. We were told that no difficulty has been experienced in the Supreme Court, as the practice has been to make a copy of the probation report available to the Crown prosecutor. One proposal that application could be made by the police to the court in respect of any particular report, and a suggestion that judges and magistrates should be alerted to the need for hearing oral evidence when material in the probation officer's report was alleged to be inaccurate both rather beg the question, as the need to peruse a particular report or to call evidence would not be apparent until the existence of the suspect information became known. Sometimes it may be impossible for a probation officer to verify some of the defendant's story, even if more time were available.

1045. When District Court judges conduct jury trials, we assume that the practice of giving Crown prosecutors the opportunity to peruse probation reports will continue. There would be some inconsistency in practice within the District Courts if a similar system were not adopted in summary trials. On occasions, when a plea of guilty has been entered there may be a dispute over some of the facts. In such cases it would, of course, be quite normal to resolve the matter by sworn evidence.

1046. While this matter is not strictly within our terms of reference, we have set out some of the salient points. We do not consider that we are called upon to make a specific recommendation; indeed, members of the Commission have divided views. The majority, while trusting that the police would not abuse any information obtained by them, believe that if the probation report was known to be available to the police, this must affect willingness of the accused to give information to the probation officer. The majority see no objection to the report going to counsel, but so long as the police remain the prosecuting authority in the District Courts it is considered preferable for them not to have access to probation reports, except where leave is granted by the court. However, we all hold the view that probation reports given to counsel for perusal in court should be returned to the probation officer at the conclusion of the proceedings.

Diversion

1047. Diversion uses the threat or possibility of conviction for a criminal offence to encourage an accused to agree to do something: he may participate in a rehabilitation programme designed to change his behaviour, or he may simply agree to make restitution to his victim. Diversion occurs after charges are laid and is therefore distinguishable from traditional police screening. It is invoked as an alternative to trial and a judicial finding of guilt, and is different from non-custodial sentencing. It involves a discretionary decision on the part of an official in the criminal justice system that there is a more appropriate way to deal with the particular defendant than to prosecute him. "Underlying diversion is an attitude of restraint in the use of the criminal law . . . The principle of restraint dictates that an onus be placed on officials to show why the next more severe step should be taken."*

1048. It is claimed that diversion:

(a) prevents excessive prosecutions;
(b) avoids the stigma of conviction yet, unlike screening, imposes a positive and constructive obligation on the offender;

*"Diversion", Law Reform Commission of Canada, Working Paper No. 7, 1975.

(c) avoids the necessity of formal proceedings, so that resources which otherwise would be used to process individuals through the criminal justice system are saved or deployed elsewhere (some programmes do, however, provide for court supervision; the court must consent to the individual being diverted and to charges being dropped after successful completion of the programme);
(d) allows treatment of offenders that would be difficult or impossible as sentencing alternatives;
(e) avoids delay that would otherwise result in the whole process taking an offender through overloaded courts;
(f) encourages community participation through community treatment programmes, whereby lay people assess, counsel, and supervise those diverted.

1049. Because diversion programmes were claimed to effect a significant saving in court resources and to reduce the caseload of the courts, we heard submissions on the topic. We also undertook preliminary research on the efficacy of diversion programmes overseas. While we do not propose to make a recommendation on this topic, we will outline some of the conclusions we have tentatively reached in our necessarily superficial examination of this complex area of penology.

1050. The initial enthusiasm which greeted diversion (a concept usually attributed to the President's Commission on Law Enforcement and the Administration of Justice (U.S.A. 1967) has since been tempered with caution. Coupled with a growing scepticism over the efficacy of existing rehabilitative measures, a school of opinion that diversion programmes are failing to produce the benefits claimed for them, and indeed may be positively counter productive, has emerged. On the other hand, there is an impressive body of opinion supporting the idea. We are not aware of any empirical study which conclusively supports or denies the advantages of diversion over traditional sentencing.

1051. Opponents of diversion say that it:

(a) encourages over-criminalisation and the use of criminal sanctions to deal with social problems;
(b) imposes involuntary sanctions without a judicial finding of guilt;
(c) does not effect an overall saving in the totality of criminal justice expenditure, and is not cheaper than court processing because the majority of divertees (those who would be convicted if they were prosecuted) would receive a non-custodial sentence; furthermore, diversion programmes include many people who would otherwise have been screened out of the system.
(d) The alleged flexibility of diversion programmes is an argument for a greater number of sentencing alternatives, not a reason for their avoidance.
(e) Case backlogs are better cured by allocating more resources to the courts rather than substituting an administrative process for the judicial function.

1052. Critics of diversion also suggest that the theory itself is inherently dangerous. One of the bulwarks of liberty in a free society is the limitation which the requirement of an impartial adjudication of culpability places upon the power of the State. It is said that where the availability of prosecution is substituted for the fact of conviction as the basis for punishment, that principle is violated. Founded on the ideal of rehabilitation, the rationale for diversion assumes that human behaviour has identifiable causes thus making possible the scientific control of

deviant behaviour and that, therefore, the criminal process should serve a therapeutic rather than punitive function.

1053. It is clear to us that diversion schemes must be kept under constant review. The information provided to us that persons diverted have a lower rate of re-offending than persons who pass through the traditional criminal justice system is inconclusive. We are mindful of the caution expressed by the Secretary for Justice when he said:

> . . . hasty adventures into reforms of this nature can have long standing and far reaching effects. While there are a number of schemes involving diversion at various stages in the criminal justice process in operation elsewhere a careful assessment of the procedures followed including safeguards would be necessary before any such scheme could be formulated for application here.

However, as the statistics reproduced in Part II of this report so vividly demonstrate, the steadily growing use of penal sanctions to effect compliance with social policies has resulted in a tremendous burden on the courts. Diversion schemes, and other developments overseas, have occurred in response to a similar situation. Whatever the merits of diversion, debate concerning its efficacy should not be allowed to obscure the fundamental problem. It has been said that if the trend towards the increasing use of the criminal law to deal with social problems continues unabated, it will result (if this has not already occurred) in the criminal justice system becoming debased, and its ability to deal with serious crime debilitated. We consider that two aspects of diversion particularly warrant closer scrutiny. Greater discretion vested in the prosecuting authorities as to whether or not to lay charges, with appropriate safeguards (including perhaps a prosecution department totally independent of law enforcement agencies), may be desirable to screen out cases before they come to court. But the extent to which it is acceptable to grant a concurrent power to require reciprocal undertakings from the alleged offenders, without a judicial finding of guilt, is open to question. We record that in another part of this report we have suggested that courts call upon community organisations, such as the New Zealand Maori Council, to assist in applying corrective and rehabilitative measures for minor and first offenders. The notion of requiring an offender to compensate his victim as an alternative to prosecution may, at first glance, have some merit. Schemes for amalgamating civil and criminal actions arising from the same factual situation also deserve close attention (paragraph 1018). Although the latter suggestion raises problems because of the differing standards of proof in civil and criminal cases and because of the contributory negligence aspect, further study may well establish a significant number of cases where problems of this nature can be overcome. Implicit in such schemes is the acceptance of the criminal law as the appropriate means of controlling socially deviant behaviour. It may well be that in many areas a more vigorous and radical approach is required, and that we should be seeking to restrain the heavy hand of regulation in favour of more persuasive systems of inducement and reward (the carrot, and not the stick). Such questions lie outside the terms of reference of this Commission, but we feel bound to allude to them, not only to record our appreciation to those who made submissions on the topic of diversion, but also to underline our concern over increasing recourse to the criminal law to effect changes in social behaviour.

Recommendation

The development of diversion schemes overseas should be kept under review and the suitability for New Zealand assessed.

Imprisonment for Debt

1054. Our attention was drawn to the provisions of the Imprisonment for Debt Limitation Act 1908. We were told the judgment summons procedure under that Act was intended to be superseded by summary instalment orders under the Insolvency Act 1967, but that the imprisonment procedure is still preferred. We understand a substantial period of judicial time could be freed if imprisonment for debt were abolished. To that limited extent, it falls within our terms of reference.

1055. Imprisonment as a sanction for unpaid accounts is an outmoded concept, especially in a society which encourages credit sales. We understand that imprisonment for debt was abolished in England by the Administration of Justice Act 1950, and that in Scotland, abolition took place long before that.

1056. If enforcement of judgments were to be made by summary instalment orders, or by orders attaching earnings without the threat of imprisonment, examination of debtors as to means could be carried out by registrars, as is now done in the fines enforcement procedure. There may well be a need to retain some final sanction against the contumacious debtor or the person who defies a court order requiring payment by instalments, or in some other manner. We think it is more appropriate, however, that such needs should be met by periodic detention or a similar type of punishment, rather than imprisonment. This would maintain the debtor's earnings during the week, and therefore his capacity to pay the debt. He would also contribute to the welfare of the community while receiving his punishment, rather than spend the time in prison at the expense of the taxpayer.

Recommendation

The provisions of the Imprisonment for Debt Limitation Act 1908 should be amended to provide for periodic detention as an alternative to imprisonment.

Children Remanded in Custody

1057. The Commission received a number of submissions regarding the detention of children in adult jails, while on remand awaiting trials. Although we did not conduct an inquiry into the circumstances of specific examples reported to us, we agree that, wherever possible, young people should not be remanded to adult jails. It may be pertinent to note, however, that some of those who complained about this matter in Auckland also informed us that it was not unknown for youthful offenders to state they were 17 years of age so that they would be remanded to Mt. Eden prison: one reason given was that smoking was permitted there.

1058. We observe that with the trend towards young persons appearing before our courts at a lower age level, it is important that if they have to be remanded in custody, those responsible should ensure they are kept separate from adult prisoners to the fullest extent possible. If that entails the building of secure premises specially for this age group then we consider it should be done.

Recommendations

1. Wherever possible, young people should not be remanded to adult jails.

2. If they have to be remanded in custody, those responsible should ensure they are kept separate from adult prisoners to the fullest possible extent.

3. Secure remand facilities for this age group should be provided wherever practicable.

Order of Precedence

1059. We record what Sir Richard Wild said on the Order of Precedence:

> There are from time to time some signs that the executive government plays down the role of the Courts and the position of the Judges. A striking example of this, deplored by many others in the community apart from the Judges themselves, was the action of the Prime Minister at the time in publishing a new Order of Precedence on 9 January 1974 which places the Judges below ordinary Members of Parliament. This was a reversal of the relative positions of the two groups as they had stood ever since an Order of Precedence was first established in New Zealand at the beginning of the century and it was all the worse because it changed the basis on which all the Judges had been appointed. In both Australia and Canada the Judges rank several places higher than Members of Parliament. In the United Kingdom, where the whole system began, Members of the House of Commons have no place at all on the Order of Precedence. This New Zealand demotion of their official status has been a matter of very deep concern to the Judges as being entirely contrary to established constitutional principle and practice and as amounting to a public downgrading of the Judiciary. It should be put right.

Tangihanga

1060. The submissions of the New Zealand Maori Council made reference to the duties of a coroner and to the difficulties sometimes experienced, particularly over weekends, in having bodies released for the formal observance of tangihanga. This matter was referred to the Secretary for Justice, and we have subsequently been advised that the Minister of Justice has authorised the department to establish a working committee to look into the matter. We understand that the department expects to hold an inaugural meeting within a short time of publication of this report.

The Regions

1061. We have earlier recommended that the country be divided into four regions for administrative purposes. We think that control should be exercised from Auckland, Hamilton, Wellington, and Christchurch. Each of the areas has its problems in varying degrees.

1062. ***Auckland*** Comprehensive submissions were received from the senior judge, the Auckland magistrates, the Auckland District Law Society, and several individuals. They all drew attention to the workload of the Auckland courts. In practically every field of court work there have been significant increases. In broad terms, at the time we saw the senior

judge, Supreme Court judge alone actions and criminal trials had doubled in numbers, and defended matrimonial motions had increased by 65% over a period from the end of February 1976 to the end of June 1977. Another analysis demonstrated that Auckland had half of the total of civil jury actions, judge alone actions, defended matrimonial motions, and criminal jury trials awaiting hearing throughout New Zealand.

1063. It is apparent that there are insufficient judges at present to clear the work in the area serviced by the Auckland Supreme Court. It is an area of rapid growth with the largest concentration of commerce, industry, and shipping in New Zealand. It also has a greater mixture of people, producing their own particular problems. Taking the Auckland area as that from Pukekohe in the south to Warkworth in the north, a district controlled by the Auckland Regional Authority, figures supplied by that authority show the population for the region in 1956 as 438 898 and for 1976 as 796 133, an 80% increase. Using the New Zealand Year Book, it is observed that the growth rate of all New Zealand over the period March 1956 to December 1975 was 44.7%, compared with the 80% rate for the Auckland region. In fact, one quarter of our country's population lives in the Auckland region. That there have been insufficient judges available to sit in Auckland appears from a summary taken from the weekly returns which the registrar of the court forwards to the Chief Justice. For the 45 weeks in which the Supreme Court sits each year, the average figures for availability of judges are as follows:

1974	5.3
1975	6.5
1976	5.5
1977	6.5

The figures are affected by circuit work, sabbatical leave, sickness, and the necessity to write reserved judgments. Although not exclusively, the Auckland judges customarily service Whangarei, Hamilton, Rotorua, and Gisborne. The growth in criminal trials has occurred mainly since the end of 1974. That growth particularly affects Auckland.

1064. The Government has recognised the Auckland problem by appointing additional judges to Auckland in 1976 and 1977. We think there is a need for further appointments to this area as the backlog of work remains at a very high level.

1065. Administration in the Auckland Supreme Court cannot be an easy matter. The courts are situated in three buildings, one of which is separated from the others by quite a considerable distance. We have inspected the courts. Some of the converted courts suffer from their small size and the disturbing traffic noise, with difficulties for counsel in access to law reports.

1066. ***Hamilton*** Detailed and thoughtful submissions were presented by the Hamilton District Law Society on many of the matters covered by our terms of reference. The Hamilton District Law Society's area embraces the Waikato, King Country, Taupo, Rotorua, and most, but not all, of the Hauraki Plains. The present population of Hamilton city is approximately 90 000. It is predicted to reach 100 000 by 1980 and 200 000 by the year 2000.* Hamilton can be described as the major inland city in New Zealand. It has an extensive and growing commercial and industrial life. We were given details of a number of substantial public

*Hamilton Area Study Report, May 1972, Hamilton City Comprehensive Development Plan 1974.

companies that have their head offices in Hamilton city: it is also a focal point for government administration in the central North Island, not only with territorial local bodies, but others such as the Waikato Valley Authority operating out of Hamilton. But this development is not purely confined to Hamilton. Rotorua is also a major commercial, industrial, and local government centre. It has within its court district the major commercial enterprises of New Zealand Forest Products at Kinleith and Tasman Pulp and Paper Company at Kawerau.

1067. Using demographic material from the Development Plan we have referred to, and the 1970 Year Book, and making adjustments up to April 1977, the Hamilton District Law Society estimated that the population of the Society's district was 280 000 at that time. Nearly 300 practising certificates were issued to lawyers in the Society's district for the year ended 31 December 1976. The Development Plan points out that a striking feature of the population structure of Hamilton city is its youthfulness. It was contended that the same characteristic could well apply to Rotorua and smaller centres such as Tokoroa. This characteristic may have some significance, not only in the burden of Magistrates' Courts' work, more particularly in the traffic prosecutions and matrimonial cases, but is a feature that may distinguish the Hamilton district from the Dunedin district. Rotorua, like Hamilton city, has a Supreme Court registry.

1068. The senior judge in Auckland analysed the workload in Hamilton for the period February 1976 to June 1977. Having seen those figures, it is clear to us that Hamilton has a large backlog of judge alone cases in the Supreme Court. It was submitted by the Hamilton District Law Society that the delays, dissatisfaction, and increased costs resulting from the unsatisfactory aspects of the present system can be no longer acceptable. It was demonstrated, for example, that most of the Rotorua Supreme Court sitting time is occupied by criminal cases. The Society reported to the Commission in detail on recent fixture experiences giving specific examples. We do not intend to cite any of the examples, but they are illustrative of the frustrations that the public and the legal profession have had to endure in Hamilton. Figures produced comparing the position in Rotorua and Hamilton of matters set down with matters heard in other centres, demonstrate that both these centres suffer severely in the comparison.

1069. The Hamilton District Law Society submitted there should be two resident judges stationed in Hamilton, servicing Gisborne, New Plymouth, and Rotorua as circuit towns. The total sitting days for Gisborne, New Plymouth, Rotorua, and Hamilton in 1976 were 260.5, compared with the New Zealand Supreme Court total of 2632.75. In other words, those four areas occupied about 10% of the sitting time, but it must be emphasised that in the case of Rotorua and Hamilton, the actual sitting time was substantially less than the time that would have been required to dispose of the business. We consider that a proper fixture system, the method of dealing with interlocutory applications, and general efficiency in administration, operate better where there are resident judges. We would therefore recommend that the Chief Justice gives consideration to stationing two resident judges in Hamilton to serve that centre together with Rotorua, Gisborne, and New Plymouth. In saying this, we understand there are possible transport difficulties between Hamilton and two of the other centres, but we are making our recommendations to cover a period many years ahead.

1070. *Court buildings in Hamilton and Rotorua* We were informed that in 1970, the Department of Justice recognised the need for a substantial addition to the Hamilton court facilities, and the planning of an additional court building was commenced. In 1972, on the understanding that the new court block would be available within four to five years, the Law Society moved its library and offices into a temporary building erected to the rear of the courthouse. It seems this building is now inadequate and is also unsafe for the storage of valuable books. We have, however, been informed that the Government has authorised preparation of working drawings for the new court block. Senior counsel appearing for the Hamilton District Law Society strongly criticised the facilities for the public and the court staff. We were told that many of the more promising staff members have resigned. A comparison was drawn between the paucity of the facilities made available for the administration of justice and the large, luxurious, and continually expanding buildings being erected at the site of the Waikato Hospital, including an up-to-date medical library which we were told was financed by the taxpayer.

1071. This Commission is conscious that many of our suggestions for reform will require an improved vote for the Department of Justice.

1072. The Rotorua courthouse, opened in 1973, services a very busy area. We consider that the building is already too small and Supreme Court sitting time allotted is inadequate. The Supreme Court sits for about 100 days in Rotorua. On those days there is only one courtroom available for the two magistrates.

1073. ***Wellington*** No submissions were directly made concerning the courts generally serviced by the Wellington judges and magistrates, other than a submission from a group of Lower Hutt practitioners. Over recent years it appears that the Wellington judges have not had a great backlog in the Wellington Supreme Court but this year there has been an increase in the number of judge alone actions awaiting hearing. The group of Lower Hutt practitioners mentioned there is no accommodation for prisoners in the upstairs courtroom other than a small cage in a recess at the top of the stairs. When the duty solicitor wishes to speak to a person in custody, he must speak through the grille in the presence of a police officer. There are complaints that the sound-proofing of the family court is inadequate; that it is often intolerably hot; and comments of people outside the courtroom can be heard in court. It was suggested that the Supreme Court should sit in a Lower Hutt court on a regular basis dealing with banco matters and undefended divorces. Our proposals for a Family Court should assist.

1074. The Wellington Magistrates' Court has recently undergone considerable renovations. The Commission was generally impressed with the standard of the new work. However, although there have been proposals and some plans prepared for a new Supreme Court complex, no doubt because of the economic situation, little progress has been made with them. Renovations which commenced in the Wellington Supreme Court stopped midstream because of lack of finance, leaving, at least temporarily, a most unsatisfactory situation in a number of respects. The Commission has inspected the Supreme Court premises. In our opinion, many aspects of the accommodation for judges, associates, court staff, and the public are inadequate.

1075. ***Christchurch*** We have already referred in paragraph 896 to the need for up-grading court buildings. Submissions from the Canterbury District Law Society emphasised the serious effect which inadequate

buildings have on the administration of justice in Christchurch, especially for the Magistrate's Court. It was acknowledged that work had begun on a major building programme which will eventually replace the present court premises. We saw the new administration block, under construction, and the Supreme Court, which sits in the converted art gallery. Although the courtrooms in the converted art gallery are generally adequate for the present, the facilities appurtenant to them are not. It is very clear to us that Christchurch needs its new court complex to be constructed as soon as possible.

1076. The Magistrate's Court consists of a main block with three courtrooms and magistrates' chambers. In the Provincial Council Chambers there are three further courtrooms and magistrates' chambers. Part of a nearby church was also used temporarily as a courtroom, primarily for the Children and Young Persons Court: that room is no longer available. The Canterbury District Law Society described the Magistrate's Court facilities as deplorable. Notwithstanding their historical interest, it is clear that the old council chambers and adjacent buildings are unsuitable as courts. The stone walls and floors, inadequate seating, heating, and toilet facilities, and lack of interview rooms for solicitors and their clients, contribute little to the administration of justice. We are, however, pleased to record that certain improvements have been effected since our visit in 1977. Considerable relief has been given to the Supreme Court staff and some of the Magistrate's Court staff by completion of part of the administration block; but while the building programme proceeds, alternative court accommodation must be arranged. We suggest that if the Family Court, which we have proposed, is moved to other premises, this may temporarily relieve some of the pressure on present court facilities: it appears, however, that other measures may also be required.

1077. *Timaru* The general tenor of submissions from the South Canterbury Law Society was to the effect that the 50 000 people in the South Canterbury area were well served by the courts. However, the Society referred to the inadequacy of the courthouse at Timaru. This building, which is now 100 years old, has a rather stark, unimpressive interior which gives a poor image of the law. The Society informed us that the Department of Justice has for several years promised to look into the matter. We understand that the Supreme Court and the Magistrate's Court use the same courtroom although there is another pleasantly furnished smaller room which is used as a domestic court. Under present arrangements it is usual for the magistrate to be away on circuit or sitting in the domestic court while the Supreme Court sits in Timaru. Our proposals should reduce the number of sitting days for the High Court in Timaru. We do not envisage any congestion in the use of courtrooms by the District Court and Family Court in the immediate future.

1078. *Dunedin* In submissions made to the Commission in 1977, the Otago District Law Society stressed the problems which had arisen since Dunedin ceased to have a resident judge. In 1970, the old established system of quarterly sessions of the Supreme Court was replaced by eight fortnightly sittings in each year. At the time, the Chief Justice announced that Dunedin would henceforth be served by judges travelling on circuit from other centres. Wellington and Christchurch judges have regularly presided in Dunedin; they have occasionally been supplemented by judges from Auckland.

1079. Problems which followed the change of system were described by the Society. These included delays in obtaining fixtures, undue pressure in the conduct of cases caused by limited time available, cases having to be left part-heard, delays in delivery of reserved decisions, and difficulty in having urgent matters considered. These issues had previously been raised with the Chief Justice, successive Ministers of Justice, and others, but the backlog of cases has continued to grow, and although efforts have been made to arrange extra sittings, these have not operated satisfactorily. Representations were made by the District Law Society for an additional four weeks' sitting time for 1977: there was difficulty in meeting this request due to pressure on judges in other areas.

1080. The Society acknowledged that because the loss of Dunedin's resident judge had popularly been regarded as a loss of status for the city and province, and for the profession, there had been a tendency to blame this change for the difficulties which had arisen rather than the abolition of the quarterly sessions and the increase in defended criminal jury trials. The Society said to us it was convinced that the answer did not lie in putting the clock back, but in ensuring that the system introduced in 1970 was improved to cope with the demands made of it. The Society acknowledged that not having a resident judge had led to "the benefit which the profession had experienced in having a variety of Judges presiding over the Court rather than the comparatively stultifying effect of appearing before the same Judge session after session, however admirable that Judge may have been and, happily, usually was". It was further stated that ". . . to the extent that the existence of a well-trained and stimulated Bar must be of benefit to the populace whom it serves, the introduction of the circuit system can be said to have been a success". Submissions from the Otago Branch of the New Zealand Legal Association referred to the "overwhelming concern . . . in Dunedin with regard to ready list matters in the Supreme Court" which was attributed to the lack of judges and judge sitting time in Dunedin.

1081. When the Chief Justice indicated recently that he intended to improve the administration of the Supreme Court by establishing four regions centred in Auckland, Hamilton, Wellington, and Christchurch, the Otago District Law Society sought, and was granted, permission to file further submissions in a memorandum to us. The Society expressed concern at the proposal that Dunedin would form part of a circuit administered from Christchurch. It stated that this was not merely a parochial objection, but arose from a fear that, despite good intentions, irresistible pressures would arise for Dunedin matters to be dealt with in Christchurch out of expediency. It was submitted that this tendency would slowly but surely erode the strength of the Dunedin Bar. The Society now considers that one, preferably two, judges should be stationed in Dunedin to take their part in the circuit roster along with the Christchurch-based judges. The Society considers that it is unjust and contrary to the public interest that Dunedin and Otago should not have a judge or judges based there as part of the circuit system, if Christchurch is to have judges stationed there. The following were said to be among the arguments which supported that point of view:

(a) Dunedin has been a place of residence for judges for at least as long as Christchurch;
(b) one tenth of the population of New Zealand lives south of the Waitaki River;

(c) 300 000 people live in Otago and Southland, compared with 455 000 in Canterbury and the West Coast;
(d) 6000 files (of all kinds) originated in the Supreme Court registries of Otago and Southland last year, compared with 10 250 in the registries of Canterbury and Westland;
(e) Otago University has the only law school in the country which is not situated in a Supreme Court centre with judges resident;
(f) the Dunedin court has excellent chambers which at present lie idle for most of the year;
(g) Dunedin should retain its strength in all tiers of the court structure after introduction of whatever changes are recommended by the Royal Commission.

Delays in obtaining fixtures, pressures to complete cases, delays in the delivery of reserved judgments, and cases having to be adjourned part-heard are symptomatic of one of the basic problems which this Commission was asked to investigate, namely, how to deal with grossly excessive workloads in our courts. It is probably cold comfort to Dunedin to be told that the problem is not limited to any one area.

1082. In recommending that two judges should be permanently resident in Hamilton, we recognise the suggestion for an equivalent establishment in Dunedin, but in our opinion, the two situations are not comparable. The circuit suggested for Hamilton has a present population as follows:

Hamilton Law Society District	280 000
Gisborne City	32 000
Taranaki (including New Plymouth, Hawera, Inglewood, Stratford, Waitara)	65 000
Total	377 000

According to the 1976 Census, the population of Otago and Southland was 297 807. In 1976 the number of sitting days for criminal jury cases for Hamilton, Rotorua, New Plymouth, and Gisborne was 96 compared with 55 for Dunedin, Invercargill, and Timaru. For the same year, the total sitting days for the Otago and Southland area were 125, compared with 260.5 for the proposed Hamilton circuit. In addition the evidence satisfies us that Hamilton has a growing backlog of judge alone cases. Besides these statistical comparisons, it is claimed that it is undesirable to have only one judge in residence in a city. We consider regular association with one another must improve the quality of work done by judges, who should not be required to remain for long periods in isolation. At present, Dunedin Supreme Court has 16 sitting weeks a year, but even if that allocation was increased, as requested, to 20 weeks, it would mean that for a resident judge to be properly occupied, he would need to be on circuit for more than half his time: this, in our opinion, is too demanding a programme for a judge. We think any decision on whether a resident judge, or judges, for Dunedin is desirable should be delayed until a reasonable time has elapsed to assess the effect of our proposals for relieving the High Court of a substantial part of its present work.

1083. For these reasons, we consider Hamilton has a case for resident judges but Dunedin at present has not. We are conscious of the independent and traditional background which has prompted the Otago District Law Society to re-open this issue, but we consider it would be premature to support the proposal. We suggest the Judicial Commission

should keep the issue of a resident judge, or judges, for Dunedin under regular appraisal.

Recommendations

1. There should be an immediate increase in the establishment of the High Court judges at Auckland.
2. The circuit region controlled from the High Court at Hamilton should comprise the areas at present served by the Supreme Courts of Hamilton, Rotorua, New Plymouth, and Gisborne. There should be two resident High Court judges in Hamilton for this purpose.
3. The Department of Justice should consider increasing the court facilities at the Rotorua courthouse.
4. Until the new court complex at Christchurch is completed, adequate alternative accommodation should be arranged.
5. The Judicial Commission should keep the issue of a resident judge, or judges, for Dunedin under regular appraisal.

ADDENDUM OF J. H. WALLACE, Q.C.

The views which follow are my own, although I believe they are to a large extent shared by other members of the Commission. There is not, however, unanimity concerning some of the matters to which I refer, and it is therefore preferable for me to express my views on an individual basis.

1. The Role of Laymen in our Courts

The need for greater public involvement In the complex society in which we now live, it is of great importance to maintain public confidence in the courts and the legal system. In our country, as in others, there are indications of some disillusionment with the judicial process and there is no longer an unquestioning acceptance of the role of the courts. This is in part due to a misunderstanding of the role played by the courts in protecting freedom under the law. If the courts cease to be recognised as the protectors of individual liberties, or come to be regarded as the preserve of the privileged or powerful, this would indeed be dangerous for us all. Once disrespect for the courts leads to disregard of their role, we will lose our protection under the law and ultimately our liberty. In the times that lie ahead, as we grapple with the problems inherent in modern societies, I foresee increasing difficulty in maintaining respect for the law unless strenuous efforts are made to show our citizens, both during their formal education, and even more importantly, in later life, the true role played by the courts. Likewise, law must be taught in schools and universities in a way which demonstrates its relevance and value to our society.

It is also important to remember the role of the courts in relation to constitutional issues. Having no written constitution, care is needed to ensure that we do not move from a society founded on legal control stemming from laws passed by Parliament, to a society controlled administratively under wide discretionary powers given to ministers or government officials who are not themselves subject to adequate control by either the courts or Parliament. This problem, which is by no means unique to New Zealand, has arisen not as the result of any evil intent on the part of legislators, but by reason of the difficulties which all law makers face in endeavouring to devise rules under which a modern society can be administered satisfactorily. Vigilance is needed to strike the right balance so that individual liberties are protected by appropriate legal control.

If we are to solve these problems, 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 judgment which is required. For that reason, 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".

My concern, and the need which I see as vital, is to involve laymen in the system so that the public may see that the law operates fairly and to

the advantage of the community. This generally proves to be a two-way benefit: not only do the public see that the law is operating fairly, but also the public is able to make a contribution to the system in the ways which I shall mention.

The present diminution in the role played by laymen As several submissions to the Commission have pointed out, the role of laymen in our system is diminishing rapidly. The last few years have seen the virtual demise of the civil jury. With the abolition of personal injury litigation, it seems that there will be very few civil cases which will proceed before a jury in future. These cases will probably be limited to actions for defamation, false imprisonment, and the like. There appears to be a tendency for even these actions to be tried before a judge alone, frequently for good practical reasons, including cost. In addition, the vast majority of criminal offences are now dealt with summarily without a jury. Although this Commission's proposals, if adopted, will introduce criminal jury trials into the District Courts, it is not envisaged that this will greatly increase the number of criminal jury trials. Even if it does, most criminal cases will still be heard before a judge alone. This tendency may well increase, particularly if defendants are given the option of choosing a judge alone trial in indictable cases.

Generally, therefore, the role of laymen has been, and is, steadily decreasing. As a result, I believe there is an increasing lack of understanding of the judicial process, its essential fairness, and its importance to individuals whether as a way of determining disputes between citizens or prosecutions by the State against citizens.

The future possibilities Our present Chief Justice, on the occasion of his swearing-in, stressed the need to preserve the rule of law. Indeed, the restrained and balanced approach required by the rule of law is, in my view, the only basis upon which we can found national unity. Many countries, including the United Kingdom, face a similar need, and I understand that when the two members of the Commission who visited England interviewed the President of the Commercial Court, he indicated his belief that the best way to counter the undermining of the rule of law is to encourage lay participation in the administration of justice. I believe that there are wide areas for both improvement and research in this regard. I do not suggest that the various matters to which I advert should all be explored at once. Nor need they be attempted on an irrevocable basis. It is arguable that in the past too much of our law reform has been done on the basis that a reform, when introduced, is irrevocable. There must surely be scope for trying some law reforms, either for a limited time (if it is important for the change to cover the whole country), or in particular areas (as for instance has been done with the small claims tribunals), or in a particular court. If then a change is successful, it can be continued or expanded. If it is a failure, little harm is done. In this context I refer to the following matters:

(a) *Use of juries* I accept the view, elsewhere expressed, that the criminal jury is, and has been, one of the great bulwarks of our freedom. It is true, however, that very little is known concerning the way juries work, and it seems desirable to me to re-examine the way in which we use juries. Thus it might well prove possible to determine whether 12 jurors are really necessary in all cases. I have in mind that smaller juries would result in considerable cost savings, and might, over all, encourage greater use of juries. Obviously, in serious cases, the fact that 12 minds have been brought to the same view provides powerful support for the justice of a

conviction. On the other hand, in less serious criminal cases, defendants might well be prepared to accept (at their discretion) a smaller jury.

In addition, in civil cases of a complex nature, the drawing of jurors at random has become increasingly difficult to support in the light of the problems inherent in such cases. Thus, in one submission a lawyer suggested:

> As an example of the suggested approach to jury organisation, let us assume that a statement of claim alleges fraud in a prospectus. The intended trial judge might decide on a review of the pleadings that the major issues could best be understood and tested by persons with experience in fields such as accountancy, the executive work of companies, and company law. In such a case, a Court officer could ask the Society of Accountants, the District Law Society and the Chamber of Commerce each to nominate a juror. A building dispute might involve expertise in construction materials, building technology, industrial processes, accountancy and design. In that case, five professional bodies might be approached for nominations.
>
> This approach should yield small juries. Protests by barristers should be limited to proposed jurors whose bias can be reasonably established.

It is not suggested that the above proposal is necessarily the best or only one. What is required is consideration and review of the jury system in order to determine how juries should best be used at the present time. In cases not requiring 12 jurors we may be able to maintain the advantages of our jury system without the cost at present associated with it.

(b) *Use of assessors* As an alternative to a greater use of juries, which to some extent runs counter to experience around the world, it may be practicable to consider a greater use of lay assessors. In New Zealand, this appears to have worked well in the Administrative Division of the Supreme Court, and the comments which the Commission has received from some judges indicate that the assessors have proved valuable. I believe that the presence of assessors is also valuable in maintaining public confidence, subject always to the proviso that the assessor must remember that the case is to be decided on the evidence and not on the assessor's personal views, if he has a particular field of expertise: for that reason, I would generally wish the judge to have the right of final decision. Another area where the use of assessors with a particular expertise might increase public confidence is in commercial cases or in other cases involving a considerable degree of scientific or specialised knowledge.

Again, lay assessors could be of value in criminal trials. It might well be possible to give persons who are charged with relatively serious crimes the choice of a jury trial, a judge alone trial, or trial before a judge and two assessors. In criminal trials, it would be of particular importance to determine whether the assessors were to have an equal vote with the judge on the issue of guilt or innocence (the assessors being in any event obliged to accept the judge's ruling as to the law to be applied). In cases where the defendant was a member of a minority group, assessors drawn from the same group could be of special assistance to a judge concerning cultural or other matters peculiar to the group. Similar considerations could apply to family cases.

It should, however, be pointed out that evidence given to the Commission by some overseas judges tended to throw doubt on the value of assessors (or laymen assisting the judge) in criminal and family cases.

Particularly in the family field, firm views were expressed that laymen are best used both before and after, but not in, the judicial process; the aim being to resolve as many issues as possible without recourse to a judicial hearing, but to have any essential hearing before a judge alone. For my part, I accept that view for family cases and I believe it may also be correct that laymen do not greatly assist the judge in reaching a decision in criminal cases. Indeed, from my observations as a barrister, I am satisfied that a judge understands a great deal more than the parties or witnesses sometimes give him credit for. Involvement of lay people on the Bench, however, can engender confidence in the fairness of the system, and as well, bring home to the laymen the very real difficulties of judging.

(c) *Use of para legal services* There are obviously wide opportunities to involve lay people in many forms of para legal work. In this connection, I do not refer simply to expansion of the existing services like the Probation Office, or even the more recent developments such as the Friends at Court. There remains considerable scope for the introduction of a large number of para legal services in connection with the Family Court and the Criminal Court. Such services in the family field would involve professional people, or those with special qualifications (such as trained marriage counsellors), and others who might have no special expertise but who could assist the court (such as members of a family or cultural group). Similar assistance could be provided in the criminal field, particularly after sentencing, but possibly also as part of the sentencing process. The more people involved, whether in relation to helping the court or the parties, the better. Many services could be provided on a voluntary basis without great cost, but those which cannot, must be paid for. Over all, efficient para legal services might well result in considerable cost saving. One carefully considered submission suggested the creation of a Lay Board to supervise all the above activities and, as well, to provide regular reports on improvements to the system. If this were implemented, the committees which we elsewhere suggest in relation to consumer monitoring (paragraph 808) would come under the supervision of the board. It is interesting to note that a Legal Services Commission with a similar role has been proposed in submissions to the Royal Commission currently enquiring into Legal Services in the United Kingdom.

(d) *Community Courts or Councils* A further area where lay participation in the system could be introduced is at the level below the District Courts. The Commission's report elsewhere makes reference to the role of justices of the peace. I have also expressed my opinion that it is necessary to ensure that all but the simplest matters are dealt with by trained judicial officers. This view, however, is not inconsistent with endeavours to develop community councils or courts. I believe that, with the right degree of experimentation and adaptation for New Zealand conditions, it could well be possible to establish small community councils or courts which would fill a valuable role, particularly in relation to minor criminal or quasi criminal matters. These courts could be complementary to, and possibly even developed in conjunction with, small claims tribunals. In this regard, I do not overlook the difficulty of establishing community courts in areas where the rapidly shifting population makes it almost impossible to develop a community. Nor do I overlook the risk that such courts can become "kangaroo" courts: to avoid this, the essential pre-condition is that all activities of such courts should be subject to automatic review of the District Court, if any party so desires. Such review, however, can be expensive and I would envisage community councils or courts

being encouraged to resolve disputes by persuasion and compromise. It might not even be necessary for the courts to have power to give a binding decision, so that the court's function would be merely to endeavour to effect a compromise, with the matter being passed promptly to the District Court if this was impossible. Given the right composition, community courts could also be of considerable assistance to members of minority groups. Such courts or councils could also assist the Probation Office in the supervision of sentences. Although the problems are considerable, it must be worth seeking for solutions at a local level with as much involvement of local people as possible.

2. Reduction in Cases coming before the Courts

I suggest much more emphasis should be placed on conciliation and arbitration. The cost of all forms of litigation to the State and the parties is high. Wherever possible that cost should be reduced or saved.

Civil Efforts need to be made to keep all but the intractable disputes out of the courts. Efforts also need to be made to keep out of the courts those disputes which are not suitable to be tried under the procedures which are available. At its simplest, this would involve a greater use of referees, that is, persons appointed by the court to dispose of factual or technical issues after a judge has decided the legal principles (which, it is interesting to note, is a feature of many overseas systems). Cost penalties could be used to encourage potential litigants to endeavour to compromise matters before issuing proceedings. In this connection, it might be possible to require pre-action conferences in some classes of civil litigation: care would need to be taken that this did not result in unnecessary cost increase or delay. Certainly, more use could be made of arbitral type procedures in suitable cases, possibly under the aegis of the court. Arbitration is obviously of particular value in a case which involves complex technical issues. The arbitrator in such a case can be chosen for his special expertise and need not be a qualified lawyer, provided any legal issues can be resolved by a court if necessary. Preferably, the arbitrator should have some training for his task, such as that provided by the Institute of Arbitrators. Suggestions for greater use of arbitration were made by several laymen, and were supported by at least one Supreme Court judge.

Criminal The rising tide of criminal cases (including traffic and various minor quasi criminal offences) already threatens to engulf our system. If we continue to prosecute people at an increasing rate there is a real risk that the courts will be submerged. It is not enough to await a predicted fall in the rate of criminal offences (which appears to be likely in the late 1980s as a result of our population trends). Questions of penal policy are not within the Commission's terms of reference, yet they clearly impinge to a very great extent upon the successful operation of the courts. While many criminal offences, particularly of a serious kind, must be dealt with by way of prosecution, study of the available statistics leads to the conclusion that our present laws require the prosecution of far too many of our citizens. This is not a matter for which the police or other prosecuting authorities are either to blame, or responsible. They are simply carrying out the obligations placed upon them.

The problem created is intractable, and there is no simple solution. A many sided approach is needed, not the least of the needs being to educate the public. It may be impossible to move fast, but a start could be made in family and alcohol related problems. I also consider, as is mentioned

elsewhere in our report, that it is important to investigate solutions which give greater discretion to the prosecuting authorities as to whether or not a person is to be charged. In view of the excellence of our police force, it is possible that a wide discretion could be exercised by suitably trained police officers; but if there are doubts about this, it would be desirable to give consideration to the introduction of a special prosecuting body (as in Scotland) or prosecution boards. If a prosecuting body is established, care must again be taken that delay is not introduced into the system. Other avenues of approach may lie in endeavours to combine, where possible, the civil and criminal process, and also in a greater emphasis on compensating the victims of crime. Although it is no doubt difficult to institute and enforce any satisfactory process of compensation to the community or restitution to the individual, there must remain considerable room for this in many instances. More stress on the value of restitution, and the role of the police in achieving, in suitable cases, a solution without prosecution, might tend to arrest the vicious circle which often prevents people from approaching the police for assistance in connection with problems encountered by them or their families.

Prosecuting more and more people, especially for relatively minor crimes, is plainly not achieving a solution to our problems. Greater emphasis must be laid upon the social measures required to prevent crime and upon remedying the consequences of criminal actions. There is a special need for more funds to be made available for investigation concerning penology and sentencing. There is much to be learned overseas (particularly from relatively small countries with problems not dissimilar to our own); much to be gained by exploring the causes and consequences of crime; and in the long run, much to be saved in terms of cost and distress.

3. **The Number of Judges**

The above matters have a considerable bearing on the number of judges we will require in future. If we do not take steps to control the situation, we will develop a society where many of the citizens, for one reason or another, find themselves before the courts in civil or criminal litigation, and too many are employed either as police, lawyers, or judges (to say nothing of those employed in the ancillary services required). In particular, we will require a great increase in the number of judges. It is a somewhat frightening reflection on the Beeching Report that the number of judges which that commission predicted has already been vastly exceeded. In a small country like New Zealand, a severe problem must arise in due course if our legal profession is expected to provide a large number of judges of the High Court and the District Courts. I believe that we should keep the judges of the High Court relatively restricted in number so that the appointees are of the highest calibre. Similar considerations apply to the District Courts, although to a lesser degree. Coupled with the need to limit the number of judges, the need exists to ensure that the High Court retains a wide supervisory and general jurisdiction. Important matters affecting the rights of citizens should preferably come before the ordinary courts, and should never be outside their supervisory jurisdiction. It cannot be said too often that the tendency to move matters outside the courts is undesirable, unless what happens outside the courts remains subject to appropriate review and correction by formal (but prompt) legal process, where the rights of all concerned are

protected. Therefore, while wishing to see a reduction in some of the classes of case coming to the courts, I would also wish to ensure that wide supervisory and review powers remain with the courts, so that we hold firmly to a society where the rule of law is paramount.

The opportunity presented by this Royal Commission is all too rare. Until now, the working of our courts has not really been considered on an over all basis. Nor is the opportunity likely to recur in the near future. Yet it is vital to ensure that our system is kept under continuing review and I would end with a particular plea that this should be done.

Summary of Recommendations

THE COURT OF APPEAL

Right of Appeal to the Judicial Committee of the Privy Council

1. The right of appeal to the Judicial Committee should not lightly be abolished. The sole criterion must be whether the abolition of such appeals will be beneficial to the New Zealand judicial system. (Paragraph 280)

2. In any event, the right of appeal to the Judicial Committee should not be abolished until an enlarged appellate court of at least five judges, together with the Chief Justice ex officio, is working efffectively in New Zealand with the confidence of the legal profession and the general public. (Paragraph 304)

3. Bearing in mind that the time may come when appeals to the Judicial Committee cease (for whatever reason), any intervening period should be used to structure our court system to enable the best possible appellate system to be implemented in due course. (Paragraph 300)

The constitution of the Court of Appeal in the event that the Judicial Committee remains the Final Appellate Tribunal

4. The Court of Appeal should consist of a President and four other members, together with the Chief Justice ex officio; that is, there should forthwith be an increase of one member. (Paragraph 283)

5. The Court of Appeal should be able to sit in divisions, both criminal and civil. (Paragraph 281)

6. For civil appeals, High Court judges should not, except in cases of emergency and other unusual or special circumstances, be appointed as temporary judges of the Court of Appeal. (Paragraph 284)

7. For criminal appeals, judges of the High Court should join the Court of Appeal. Normally one High Court judge should join the court for any given case: he should be selected by the Chief Justice after consultation with the President of the Court of Appeal. (Paragraphs 287, 288)

8. Normally, the senior member of the Court of Appeal will become the President thereof. (Paragraph 290)

9. Normally, wide experience as a judge at first instance should be a prerequisite for appointment to the Court of Appeal. (Paragraph 291)

10. Administrative efficiency requires the Court of Appeal to sit for the most part in Wellington. (Paragraph 292)

11. There should be no monetary limit on appeals to the Judicial Committee. Both civil and criminal appeals should be by way of leave of the Court of Appeal, with the Judicial Committee retaining the right to grant special leave. Legal aid should be granted with reasonable liberality. (Paragraphs 293–295)

The constitution of the Court of Appeal in the event that it becomes the Final Appellate Tribunal for New Zealand

12. For cases originating in the High Court it is impracticable to create a two-tier appellate system at the present time. (Paragraphs 298, 299)

13. Wherever practicable, endeavours should be made to enable a two-tier system to operate. This may be possible in a significant number of cases when the jurisdiction of the District Courts is increased. (Paragraph 300)

14. For important or difficult cases it is essential that the Court of Appeal should consist of five judges, which will render it necessary to have a complement of seven judges of the court together with the Chief Justice ex officio. (Paragraph 302)

THE HIGH COURT

15. The present Supreme Court should be re-named "High Court" to form part of a Supreme Court consisting of the Court of Appeal and a High Court. (Paragraphs 261, 305)

16. The limitation on the number of judges assigned to the Administrative Division contained in s.25(2) of the Judicature Act 1908 should be removed. (Paragraph 312)

17. The Chief Justice, on the recommendation of the Judicial Commission, should assign judges to the Adminstrative Division but he should retain his power to make temporary appointments to that division. (Paragraph 312)

18. While all High Court judges should retain their jurisdiction in relation to the prerogative writs, it is preferable for such cases to be directed, where practicable, to judges of the Administrative Division. (Paragraph 312)

19. The tendency to ensure that appeals on matters of law and, in suitable cases, other final appeals from administrative tribunals to the Administrative Division of the High Court, should be fostered. (Paragraph 312)

20. While it is not desirable to create separate divisions of the High Court (apart from the Administrative Division), a reasonable degree of specialisation should be encouraged wherever practicable on an administrative basis. (Paragraph 317)

21. The establishment of special procedures for commercial cases would be advantageous. (Paragraph 318)

22. The maximum number of Supreme Court judges that can be appointed under the Judicature Act 1908 should be increased from 22 to 25. (Paragraph 322)

Criminal Business

23. All indictable offences should be heard in the High Court. (Paragraph 357)

24. High Court judges should be empowered to hear electable offences. (Paragraphs 361, 362)

25. Where a High Court judge is of the opinion that an electable offence should be tried in the High Court, he should be empowered to so order. (Paragraphs 361, 362)

26. Where the parties apply to have an electable offence tried in the High Court, the High Court judge should not order trial in the District Court without giving the parties an opportunity to be heard. (Paragraph 362)

27. Section 374 (3) of the Crimes Act should be broadened by deleting the words, "If, before the jury retire to consider their verdict", and substituting the words, "If, at any stage of the trial", etc. (Paragraph 375)

28. Section 374 (3) of the Crimes Act should provide for the discharge of a juror where his wife or a member of his family or a member of his wife's family is ill or has died. (Paragraph 375)

29. The Juries Act 1908 should be amended to allow any jury panels to be checked by either the Department of Justice or the Police Department so that disqualified persons may be deleted from the panel before prospective jurors are summonsed. (Paragraphs 382, 384)

30. The sheriff should be empowered to strike out any name for the jury panel if he is satisfied that that person is not qualified in terms of s.5 of the Juries Act 1908 to serve on a jury. (Paragraphs 381, 382)

31. At a future stage when the Department of Justice has the means to provide a list of properly qualified jurors, the position should be reappraised with a view to abolishing the stand aside procedure. (Paragraph 384)

32. Except as provided hereunder, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury. (Paragraph 400)

33. The Crimes Act 1961 should be amended to permit accused persons charged with indictable offences (excluding treason, piracy, hijacking, murder, accessory after the fact to any of those offences, attempting to commit those crimes other than murder, or a conspiracy to commit any of those crimes) to elect trial before a High Court judge sitting without a jury. (Paragraph 396)

34. In any case where the accused elects trial before a judge alone, the Attorney-General may apply to a High Court judge for the trial to be before a judge and jury. (Paragraph 398)

35. If any one of several accused jointly indicted elects trial by jury, then unless it is a proper case for severance, the trial shall be before a judge and jury. (Paragraph 397)

Civil Business

36. The High Court should exercise an original jurisdiction substantially equal to the Supreme Court's present jurisdiction, subject to the transferring of jurisdiction in the field of matrimonial and family law to the District Courts. (Paragraph 401)

37. The present right of trial by jury in civil cases in the Supreme Court should be retained in the High Court. (Paragraph 404)

38. Section 68 (1) of the Matrimonial Proceedings Act 1963 should be repealed. (Paragraph 405)

THE DISTRICT COURTS

39. The Magistrates' Courts should be re-named "District Courts" and the present stipendiary magistrates should become District Court judges. (Paragraph 410)

40. A Chief District Court Judge should be appointed. His status should be recognised by a greater salary and allowances than other District Court judges. (Paragraphs 412–414)

41. The Chief District Court Judge should hold office so long as he holds office as a judge but, with the approval of the Governor-General, he may resign his office as Chief Judge without resigning his office as a District Court judge. (Paragraph 414)

42. A Senior Family Court Judge should be appointed. He should hold office so long as he holds office as a judge but, with the approval of the Governor-General, he may resign his office as senior judge without resigning his office as a District Court judge. (Paragraphs 206, 415)

43. In each region established for administrative purposes there should be a list judge to be responsible for the organisation of the judges within his region, co-ordinating relief and assistance where necessary and carrying out under delegation the responsibilities of the Chief District Court Judge; the appointment to be for a period of three years and to be on the basis of administrative ability rather than on seniority. (Paragraphs 416, 417, 419)

44. Where two or more District Court judges are stationed in the same town, an assignment judge should be appointed by the Chief District Court Judge. The appointee would assume the function of assigning the judges to the courts in that district; the appointment to be reviewed after a limited period of, say, three years. (Paragraphs 418, 419)

45. A degree of specialisation in family cases is essential but Family Court judges should not deal solely with family cases. It is suggested that most judges in the Family Court should spend approximately 80% of their time on family cases with the balance spent on all other types of litigation. This recommendation may require to be reviewed and should not be applied as an inflexible rule. (Paragraph 423)

46. Those District Court judges who are warranted to conduct criminal jury trials should not devote their whole time to criminal work. (Paragraph 424)

47. Land valuation tribunals should be presided over by those District Court judges who have been appointed chairmen of planning tribunals. (Paragraph 427)

48. Registrars of District Courts should be authorised to deal with unopposed applications to land valuation tribunals. (Paragraph 429)

49. The general work of the District Courts should be shared amongst the judges, but within this framework there is room for assignment of particular cases to particular judges who have a special expertise. (Paragraph 431)

Criminal Business

50. Jury trials for electable offences should no longer be exclusively heard in the High Court but substantially in the District Courts. (Paragraphs 357, 358)

51. Jurisdiction to preside over jury trials of electable offences in the District Courts should be exercised by selected District Court judges specially recommended for that purpose by the Judicial Commission. (Paragraph 358)

52. District Court judges sitting with a jury should be empowered to impose the sentence prescribed by law, and in such cases appeals would lie direct to the Court of Appeal. (Paragraphs 358, 359)

53 District Court judges sitting without a jury should, until a review is carried out by the Judicial Commission, be restricted to imposing a sentence of no greater than three years' imprisonment. (Paragraph 359)

54. In all other respects appeal procedures will remain unaltered. (Paragraphs 358, 359)

55. For summary trials the District Courts shall exercise the criminal jurisdiction currently exercised by the Magistrates' Courts. (Paragraphs 359, 432)

56. The Department of Justice, through its Planning and Development Division, should take urgent steps to relieve the courts of minor prosecutions which can be dealt with elsewhere. (Paragraph 446)

57. The standard fine procedure should be enlarged to include all offences (traffic and other offences) in respect of which it is reasonable to fix a standard penalty: the amount of the penalty should be fixed by the courts. (Paragraph 439)

58. The best features of the standard fine, infringement fee, and minor offence procedures should be amalgamated to ease the pressure on the time and facilities of the courts and on the court staff. (Paragraph 446)

59. Justices of the peace who meet the requirements of the senior District Court judge in the area should be permitted to hear minor offences. (Paragraph 447)

60. When cases are heard by justices of the peace, an appeal to, or review by, a District Court judge should be readily available. (Paragraph 447)

61. Small claims tribunals should be established as a division of the District Courts. (Paragraph 452)

62. The pattern established by the experimental tribunal at Rotorua should be adopted. We would expect that referees would normally be barristers or solicitors with substantial experience although some laymen with special qualifications could also be considered. (Paragraphs 456, 458)

63. Section 25 (1) of the Small Claims Tribunals Act 1976 requiring that proceedings be held in private should be repealed. (Paragraph 460)

Civil Business

64. The District Courts should exercise all the substantive jurisdiction in tort, contract, and Admiralty matters as the Magistrates' Courts now do. (Paragraph 448)

65. The civil jurisdiction of the District Courts should be increased from $3,000 to $10,000. (Paragraphs 448, 449)

66. The rental figure of $2,000 in s.31(1) of the Magistrates' Courts Act 1947 should be increased to $5,000 or, if no such rent is payable, where the value of the land does not exceed $50,000. (Paragraph 449)

67. The District Courts shall have no civil jury trials. (Paragraphs 402, 449)

68. Applications under the Chattels Transfer Act 1924 should be determined by the District Courts: the registration of instruments should be removed from the Supreme Court to the commercial affairs office of the Department of Justice or any other satisfactory place. (Paragraph 450)

69. The enforcement of judgment proceedings by transfer from the Magistrates' Courts to the Supreme Court should be abolished and the enforcement provision remain within the jurisdiction of the District Courts. (Paragraph 451)

70. Save for Family Division cases, the existing appeal provisions in civil cases should remain unaltered. (Paragraph 462)

Family Court

71. A Family Court should be established as a division of the District Courts, manned by judges specially appointed to it, sitting mainly in the centres of greater population but readily available to sit in court buildings or other suitable accommodation in smaller centres on a circuit or peripatetic basis. (Paragraphs 463, 466, 487)

72. A working party should be set up immediately to prepare for the introduction of the Family Court. The working party should consist of the Senior Family Court Judge, a judge elect of that court, and the director of support services. (Paragraph 468)

73. The Family Division of the District Courts should be given exclusive, original jurisdiction in all family matters including those covered by:

Adoption Act 1955
Aged and Infirm Persons Protection Act 1912 (protection orders)
Alcoholism and Drug Addiction Act 1966
Children and Young Persons Act 1974
Domestic Actions Act 1975
Domestic Proceedings Act 1968
Guardianship Act 1968
Health Act 1956 (orders for treatment)
Marriage Act 1955
Matrimonial Proceedings Act 1963
Matrimonial Property Act 1976
Mental Health Act 1969
Minors' Contracts Act 1969
Status of Children Act 1969

and any other matters which may from time to time be considered appropriate. (Paragraphs 463, 488, 489, 491, 514, 515)

74. The Family Court should be given jurisdiction in criminal matters arising within families, with provision for the court or the parties on application to remove cases to the ordinary courts. (Paragraph 490)

75. Family Court judges should have jurisdiction to hear civil and criminal cases in the District Courts, but their primary work would be in the Family Court. Other District Court judges should have jurisdiction in the Family Court in urgent matters. (Paragraphs 521, 524)

76. Especially complex cases should, with the leave of a Family Court judge, be transferred to the High Court for hearing. (Paragraph 496)

77. Matters relating to wills and administration of estates should remain in the High Court. (Paragraph 491)

78. In general, existing appeal rights should continue with there being one appeal to the High Court by way of rehearing on questions of law and fact; and for appeals on question of law only to the Court of Appeal, and, with leave, to the Judicial Committee of the Privy Council. (Paragraph 499)

79. Right of appeal from the Family Court to one judge of the High Court should continue in all cases, but reserving the right to either party to apply to a judge of the High Court for leave to have the appeal heard by a special court comprising two High Court judges and one Family Court judge. (Paragraph 501)

80. (Majority) Section 31 of the Guardianship Act 1968 relating to appeals in custody and access cases should remain unchanged. (Paragraphs 503, 504)

81. Where either party to a proposed marriage is under 18 years of age, or under 20 years of age where any consent required for the marriage is withheld, then the couple must participate in a period of pre-marital counselling, before obtaining the consent of a judge of the Family Court after which the marriage can proceed. (Paragraph 519)

82. The day-to-day operation of the support services in each Family Court should be under the general supervision of the local judge of the Family Court, or, where there is more than one, the judge nominated to do so by the senior judge of the Family Court. (Paragraph 524)

83. Adequate administrative services should be provided for the Family Court through the Courts Division of the Department of Justice. (Paragraph 537)

84. Counselling services should be established as an essential feature of the Family Court. (Paragraphs 532, 533)

85. A director of support services should be appointed. (Paragraph 534)

86. Greater use of counsellors and social workers in "J" teams should be encouraged. (Paragraph 541)

87. An official guardian should be appointed to represent all those who may be under some form of legal disability. (Paragraphs 549, 562)

88. The official guardian should be represented in the Family Court, and in other courts as required, by family advocates. (Paragraphs 559, 560)

89. Legal advice and representation should be available to all those who come to the Family Court. Parties whose interests are, or may be, divergent should be separately represented. (Paragraph 564)

90. The Department of Social Welfare should refer all parties seeking domestic purposes benefits to the Family Court. (Paragraph 570)

91. The payment of maintenance orders may be enforced by the Department of Social Welfare giving notice in writing to the employer by whom the subject of the order is for the time being employed, specifying an amount not exceeding the amount of the maintenance order to be deducted from wages. (Paragraph 569)

92. A juvenile branch of the probation service should be established to function in co-operation with the Family Court. (Paragraph 580)

93. As a general rule, the Family Court should be physically separate from the ordinary courts. (Paragraph 592)

94. The rights of dependent adults should be safeguarded in the Family Court by the making of orders of guardianship or trusteeship of handicapped adults, in degree and extent, appropriate to the needs of handicapped persons. (Paragraphs 587, 588)

Justices of the Peace

95. 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. (Paragraph 611)

96. 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. (Paragraph 611)

97. The justices' appointments committee should be authorised to remove the name of a justice from the list of those available for court work. (Paragraph 612)

98. Special efforts should be made to ensure more effective community representation among justices of the peace. (Paragraph 613)

99. The Chief District Court Judge, as a member of the Judicial Commission, should investigate the utilisation of lay justices as in Ontario. (Paragraph 615)

100. Justices of the peace should be authorised 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. (Paragraphs 619, 620, 617)

101. 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. (Paragraph 619)

102. 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. (Paragraph 627)

103. Matters dealt with by justices should be readily reviewable by way of rehearing by a District Court judge. (Paragraph 628)

104. 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. (Paragraph 633)

105. 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. (Paragraph 634)

106. Justices of the peace should be selected as official visitors by the justices' appointments committees to receive complaints from prisoners. (Paragraph 637)

THE JUDICIARY

Judicial Commission

107. A Judicial Commission should be established to consist of:

The Chief Justice (chairman)
A Supreme Court Judge
The Chief District Court Judge
The Solicitor-General
The Secretary for Justice
Two members nominated by the New Zealand Law Society and appointed by the Governor-General. (Paragraph 648)

108. The Judicial Commission should exercise unified control over case-flow and the day-to-day administration of the courts. (Paragraph 647)

109. The Judicial Commission should, in connection with judges, have the power to recommend appointments, arrange study and refresher programmes, and provide the means of dealing with complaints. (Paragraph 647)

110. The Chief Court Administrator should be Secretary of the Commission. (Paragraph 650)

111. The Judicial Commission should report to Parliament annually. (Paragraph 653)

Appointment of Judicial Officers

112. Qualifications for appointment as a Supreme Court or District Court judge should be seven years' practice as a barrister or solicitor of the Supreme Court of New Zealand. (Paragraph 656)

113. The portion of s.6 of the Judicature Act 1908 relating to barristers or advocates of the United Kingdom should be repealed. (Paragraph 656)

114. The present provision permitting a legally qualified person to be appointed to the Magistrates' Court after a period of court service should be retained in relation to the District Courts. (Paragraph 656)

115. The Attorney-General should be the recommending authority for all judges other than the Chief Justice, whose appointment should be recommended by the Prime Minister. (Paragraph 660)

116. An Appointments Committee of the Judicial Commission should be created with a membership of six. The six members would normally be: the Chief Justice as chairman, the Chief District Court Judge, two members appointed by the Government, such as the Solicitor-General and the Secretary for Justice, and two members nominated by the New Zealand Law Society and appointed by the Governor-General. (Paragraphs 659–661)

117. The Government should request the Judicial Commission to submit names for appointment of judges to the High Court and the District Courts. Where appropriate, all other appointments of a judicial nature should also be referred to the Appointments Committee of the Judicial Commision. (Paragraphs 661–664)

118. After retirement, judges should be eligible to serve as supernumary judges as recommended by the Judicial Commission. (Paragraph 668)

119. Temporary appointments of judges should be reserved for truly emergency situations. (Paragraph 668)

120. Judges of the District Courts should only be appointed to the High Court in exceptional circumstances. (Paragraph 669)

121. Appointment of the Chief Justice should be offered to the person best equipped for the position either from the Bar or the Bench. (Paragraph 672)

122. The Chief District Court Judge should normally be appointed from the existing District Court judges. (Paragraph 673)

Conditions of Service

123. We invite the Higher Salaries Commission to ensure that the remuneration of judges, made up of salary, allowances, and pension, should be sufficient to attract the required number of suitable High Court and District Court judges to enable the courts to function efficiently. (Paragraph 680)

124. A District Court judge's salary should be 75% that of a High Court judge. (Paragraph 682)

125. The salaries of judges of other courts and of the members of statutory tribunals should be related to the salaries of High Court and District Court judges. (Paragraph 683)

126. The normal retiring age for High Court and District Court judges should be reduced to 65 with appropriate provision for earlier or later retirement. (Paragraph 686)

127. A non-contributory pension scheme should provide High Court and District Court judges with a retiring benefit of a two-thirds pension at age 65, with not less than 15 years' service (reduced pro rata for fewer years of service but with a minimum pension of 25%). (Paragraph 692)

128. The retiring age of a judge, with his consent, may be extended beyond 65 on the recommendation of the Judicial Commission: provided he has completed 15 years' service, he should be entitled to a two-thirds pension with pro rata reduction for lesser periods of service, with a minimum pension of not less than 25%. (Paragraphs 686, 694)

129. A judge who has reached 60 years of age or more and who has completed 15 years' service should be entitled to retire on a two-thirds pension payable from the normal retiring age of 65, with appropriate adjustments from an earlier date. (Paragraph 692)

130. Judges or magistrates already in office should not be disadvantaged or lose any existing rights by the lowering of the retiring age to 65. (Paragraph 692)

131. The widow's benefit in the case of a judge who dies after retiring at his normal retiring age, or in office, or following retirement due to total and permanent disablement, should be a pension for life at half the

pension entitlement applicable to the judge but with a minimum pension of not less than 15% of the judge's final salary. (Paragraph 692)

132. The allowance for each dependent child should be 1% of the judge's final salary. (Paragraph 692)

133. Where a judge is forced to retire because of ill health, the Judicial Commission should have power to recommend to the Governor-General the level of pension to be paid. (Paragraph 692)

134. All pensions should be adjusted in relation to increases in the cost of living. (Paragraph 692)

135. A tax free allowance should be granted to High Court and District Court judges to cover the cost of judicial dress and robes, entertainment, textbooks, periodicals, subscriptions, donations and car expenses. (Paragraph 696)

Number and Allocation of Judges

136. The Judicial Commission should hear representations and advise the Government, through the Attorney-General, as to the number of judges. (Paragraph 700)

137. The Government, through the Attorney-General, should decide the maximum number of judges for the District Courts, and for the Supreme Court. (Paragraph 700)

138. The Government, through the Attorney-General, should decide where court sittings are to be held, after hearing representations from the Judicial Commission. (Paragraph 701)

139. The Judicial Commission should be responsible for deciding whether a court is presided over by a resident judge or by a judge on circuit, for both the High Court and the District Court. (Paragraph 702)

140. The Chief Justice should be responsible for assigning individual judges to preside in the High Court. The Chief District Court Judge should be responsible for assigning individual judges to preside in the District Courts. (Paragraph 702)

Power to Investigate Conduct of Judges

141. The law and custom relating to the removal of judges should be embodied in a comprehensive statute; such statute should provide for removal only, and fully protect the principle of judicial independence. (Paragraph 705)

142. All complaints concerning the conduct of judges (short of removal) should be made in writing and referred to the Secretary of the Judicial Commission. (Paragraph 715)

143. Complaints which might be justified should be referred by the Secretary of the Judicial Commission to the Chief Justice, the President of the Court of Appeal, or the Chief District Court Judge as appropriate. (Paragraph 715)

144. The Judicial Commission should have power to recommend to the Governor-General that a judge should be permitted to have a period of leave of absence on full salary, and to retire on full or partial pension, even if he has not served for the period requisite to enable such a pension to be granted. (Paragraph 716)

145. Section 197 of the Summary Proceedings Act 1957 should be amended to dispense with the requirement for a certificate from a High

Court Judge as a prerequiste to indemnity to District Court judges. (Paragraph 719)

Conferences and Refresher Courses

146. The Judicial Commission should be responsible for schemes whereby new appointees to the Bench receive assistance and advice concerning all aspects of the judicial function, particularly sentencing and cultural differences. (Paragraph 728)

147. All judges should visit penal institutions soon after their appointment and from time to time thereafter. (Paragraph 728)

148. The Judicial Commission should arrange regular regional and national conferences of judges of the High Court and the District Courts to consider and discuss problems common to the exercise of judicial responsibilities. At such conferences there should be sentencing exercises and involvement of experts in various fields. (Paragraphs 729–731)

149. The Judicial Commission should devise ways and means of ensuring that information about comparative sentences and other useful reports are circulated to all judges. (Paragraph 723)

Judges' Associates

150. The position description of judge's associate should be compared with that of Hansard reporters and the salary of associates adjusted accordingly. (Paragraph 735)

151. Judges' associates should be provided with continuous and appropriate employment during the period of sabbatical leave of the judge. During this time, the associate (subject to having completed at least 12 months' service) should be granted a period of leave on full pay and thereafter be employed as a floating associate. (Paragraph 736)

Judges' Clerks

152. The use of judges' clerks should be continued. (Paragraphs 741, 742)

153. Any increase in their numbers should be recommended by the Chief Justice. (Paragraph 740)

154. Appointments should be made by the senior judge of each region for a maximum of two years. (Paragraph 741)

155. Time spent as a judge's clerk should count towards the period before a barrister or solicitor may practise on his own account. (Paragraph 744)

156. Judges' clerks need not hold a practising certificate while they perform these duties. (Paragraph 744)

COURT ADMINISTRATION

Court Management

157. Modern principles of court management should be adopted. (Paragraphs 748, 749)

158. It is desirable that list judges should have ultimate responsibility for allocating judges to cases. (Paragraph 752)

159. For administrative purposes, the country should be divided into four regions with regional offices established in Auckland, Hamilton, Wellington, and Christchurch. (Paragraphs 753, 758)

160. A regional court administrator should be appointed to each region to organise the sittings of the courts in his region after consultation with the list judges; and provide administrative servicing. The Wellington regional court administrator should be appointed Chief Court Administrator. (Paragraph 753)

161. Regional court administrators should be responsible to the Secretary for Justice through a Chief Court Administrator who should be, as well, Secretary of the Judicial Commission. (Paragraphs 650, 754, 756)

162. In each of the four regions list judges should be appointed. They should be responsible for administering the co-ordination and allocation of work between judges in their region. The Chief Justice should select list judges for the High Court; the Chief District Court Judge should select for the District Courts. Appointments should be made on administrative ability rather than on seniority. (Paragraphs 757, 758)

163. List judges and the regional court administrator should regularly meet to ensure efficiency in case flow management. (Paragraphs 758, 759, 762)

164. Court recording systems should be supervised by the regional court administrator. (Paragraph 763)

165. Greater use of computers for multiple indexing, jury selection and case scheduling should be considered. (Paragraph 764)

166. Court staff should be encouraged to gain appropriate qualifications. (Paragraph 770)

Place of Sittings

167. Once the new jurisdiction of the High Court and the District Courts is settled, there should be an assessment of where sittings should be held and where court buildings should be situated. (Paragraphs 775, 776, 778)

168. When the various courts should sit and who should preside over the sittings should be decided by the Chief Justice and the Chief District Court Judge or their list judges deputed for that purpose, and consultation should take place with the regional court administrators. (Paragraphs 779, 780)

169. Where possible, judges on circuit should remain to complete the work set down for their visits. (Paragraph 781)

Registrars and Masters

170. Registrars should continue to perform their present judicial functions but these should not be extended until an a appropriate training scheme for court staff is introduced, such training scheme to include legal studies. (Paragraphs 787—789)

171. The office of master should be created initially in Auckland (one for the High Court and one for the main District Court) and in Wellington (one to serve both the Court of Appeal and the High Court). (Paragraphs 132, 794)

172. A master should possess the same legal qualifications as a High Court judge. (Paragraph 795)

173. The Judicial Commission, after a reasonable time, should assess the effectiveness of the office of master. (Paragraph 794)

Supervision of Proceedings

174. Within a short period after application is made for a fixture, counsel and, wherever practicable, the parties, should appear before a judge, master, or registrar to confirm the state of the action. (Paragraph 803)

175. There should be an automatic review of all civil cases at a date one year after the filing of proceedings. Counsel and, wherever practicable, the parties, should attend the court for this review. (Paragraph 802)

176. The Rules Committee of the District Courts should as soon as possible consider the adaptation of the new High Court Rules to those courts. (Paragraph 804)

Consumer Monitoring

177. Boards or committees should be formed on a district basis to deal with all consumer aspects of the system. (Paragraph 808)

178. Such boards or committees should report annually to the Department of Justice and the Judicial Commission. (Paragraph 808)

179. The Department of Justice should keep the operation of the courts under constant review. (Paragraph 808)

Recording of Evidence

180. If the aim is to provide the best system of court reporting for New Zealand, we set out what we consider the most efficient and satisfactory systems in order of preference:

(a) the taking of evidence by a team of shorthand writers with continuous transcription: this would be the most expensive;
(b) the use of sound recording, also with continuous transcription: this is also expensive;
(c) the present system of direct recording onto the typewriter.

(Paragraphs 835–839)

181. Pending a decision on the system to be adopted in New Zealand, improved equipment as follows should be purchased forthwith to make the present system more efficient:

(a) highest quality electric typewriters in all jury courts, in all judges' associates' offices, and for the use of typists recording evidence in the jury courts of the District Courts;
(b) specially designed soundproofed boxes to house these typewriters in the courtrooms;
(c) photocopying machines;
(d) sound amplifying systems in all courts and improvements to existing systems.

(Paragraphs 811, 840)

182. Continuous stationery for typing evidence should be provided. (Paragraph 811)

183. To evaluate sound recording as a possible system of court reporting for New Zealand, a pilot project could be set up in the High Court, and in one of the courtrooms of the District Court, in Christchurch. This will involve consultation with electronics engineers, installation of high quality equipment, and employment of teams of audio typists. (Paragraph 838)

184. As judges' associates are released from typing the evidence, the task of acting as clerk of the court where the judge is presiding may be added to their duties. (Paragraph 838)

185. All word processing systems should be thoroughly tested before discarding this equipment as unsuitable for the courts. (Paragraph 823)

186. The method of recording evidence in the jury courts of the District Courts should be the same as that used in the High Court. (Paragraph 841)

187. Additional shorthand typists should be employed in the District Courts to provide skilled typists to take evidence in the jury courts, and to provide secretarial assistance for District Court judges. (Paragraphs 841, 842)

188. The daily "in court" allowance for shorthand typists in the District Courts should be substantially increased. (Paragraph 841)

189. A special section of the Department of Justice should be set up to supervise the court reporting service for all courts in New Zealand. (Paragraph 843)

190. Training programmes should be initiated and maintained to train shorthand typists and audio typists in the special skills necessary for court reporting. (Paragraph 844)

191. The long-term advantages of setting up a training scheme for computer compatible shorthand should be investigated and kept under close review. (Paragraph 821)

192. No unnecessary transcript should be ordered for appeals. (Paragraph 833)

THE COURTS AND THE PEOPLE

193. In a prominent place in the entrance to every court building there should be an information desk, manned from 9 a.m. each morning. (Paragraphs 847, 862)

194. Uniforms should be worn by court reception staff. (Paragraph 847)

195. Special training programmes in public relations should be provided for court staff. (Paragraph 846)

196. Participation of members of voluntary social welfare groups in the work of the courts is commended and should be encouraged. (Paragraph 848)

197. As much information as possible about their rights should be available and placed in the hands of people coming to court. (Paragraph 849)

198. Educational programmes need to be developed for school children and the general public on the structure and function of the New Zealand courts. (Paragraph 849)

199. The present practice of calling everyone to court at 10 a.m. should be reviewed and a greater flexibility introduced, where possible, by allotting varying times for fixtures during the day. (Paragraph 858)

200. The Judicial Commission should keep under review public demand for court hearings outside normal sitting hours. (Paragraph 861)

201. In the larger centres, arrangements should be made for a cashier to

be on duty at the court office one evening a week (preferably Thursday) to receive payment of monies owing. (Paragraph 863)

202. Interpreters' and translators' skills should be recognised as an additional qualification for an administrative career in the Courts Division of the Department of Justice; these skills to be reflected in salary scales and promotional prospects. Interpreters should be recruited and trained in court procedures and legal terminology, and should be able to provide an accurate translation between English and the other language and vice versa. (Paragraph 866)

203. The police should give advance warning to the court that the services of an interpreter will be required. Interpreters should, where practicable, be available for interview with duty solicitors and probation officers. (Paragraphs 865–868)

204. Maori, Polynesian, and other ethnic community organisations could play a valuable part in the correction and rehabilitation of minor and first offenders: we recommend that a pilot project in some part of the Auckland Maori District Council's jurisdiction should be commenced; and we further recommend that community groups should be consulted, preferably through the probation service, with regard both to sentences and rehabilitation of offenders. (Paragraphs 870–871)

205. A determined effort should be made to recruit people from all minority groups to all levels of the Department of Justice. (Paragraph 872)

206. It is essential for the wellbeing of our society to provide opportunities for, and encourage people from minority groups to join the legal profession. (Paragraph 873)

207. The oath or affirmation should be administered clearly and deliberately so that the person taking the oath or affirming is aware of the seriousness of the undertaking he has given. (Paragraph 875)

208. The use of plain English is to be encouraged in court. Wherever possible, charges should be framed in simple language. (Paragraph 877)

209. (Majority) Wigs and gowns should be retained in the High Court and the Court of Appeal as at present, and a simple black gown should be worn in the District Court by the presiding judge. (Paragraph 883)

210. Fees for witnesses, jurors, and interpreters should be kept under regular review. (Paragraphs 868, 891, 894)

211. Jurors should be afforded better facilities and treatment which should include:

(a) provision of adequate seating in areas where they are required to wait;
(b) an introduction by the registrar in his capacity as sheriff, or a senior member of his staff, and clear instructions on their duties;
(c) supervision by specially appointed, uniformed members of the court staff.

(Paragraphs 887–889)

212. Buildings:

(a) Court building design should be constantly under review. Where delay occurs between the design and construction stage, building should not proceed until investigation determines that the design is as relevant to the current requirements of the court, as when it was first conceived.

(b) Comments on the design should be sought, at an early stage of th planning, from the users of the court buildings.

(c) The comfort and convenience of staff and the public should be give proper emphasis in new court building design.

(d) A building programme should be drawn up by the Department o Justice with the objective of up-grading or replacing all cou buildings in New Zealand.

Up-grading should include provision of:

(i) adequate reception facilities in all court buildings;

(ii) information boards, large and distinctive enough t attract attention, giving the lay-out of each floo with the position of the courts and facilitie thereon (multi-lingual where necessary);

(iii) adequate toilets and washrooms for staff, lawyers jurors, litigants, and witnesses, with access fo disabled persons;

(iv) redesigned witness-boxes to allow for the witness (an an interpreter where necessary) to sit; also a plac for spreading papers and documents;

(v) public telephones;

(vi) interview rooms;

(vii) better office accommodation to reduce overcrowdin and poor working conditions;

(viii) better waiting areas;

(ix) ramps to all courtrooms to allow access of disabled persons and book trolleys;

(x) better lighting, heating, and air-conditioning where necessary;

(xi) the Family Courts should be provided with a room where children can be attended to and cared for, as well as all of the above features (with the exception of (iv) witness-boxes).

New buildings should include all of the above, as well as the following features:

(i) a jury assembly room;

(ii) jury deliberation rooms with toilets attached;

(iii) lifts to all courts above ground floor level;

(iv) adequate interview rooms for duty solicitors, other lawyers, probation and welfare officers;

(v) comfortable waiting areas with sufficient space for litigants, witnesses, and others, to have a degree of privacy;

(vi) good courtroom acoustics;

(vii) holding cells adequate for the maximum amount of time prisoners are held there.

(Paragraphs 896–904)

THE LEGAL PROFESSION

213. Lawyers should be subject to, and enforce, a proper standard of professional conduct. (Paragraph 905)

214. District Law Societies, with list judges and regional court administrators, should take part in decisions to manage case-flow. (Paragraphs 908, 909)

215. The New Zealand Law Society, the Council of Legal Education, the university law faculties, and the Department of Justice should confer over improvements in methods of practical training in advocacy and procedure. (Paragraphs 911, 912, 925)

216. Appointment of a lay member and a lay observer to participate in the disciplinary and complaints procedures of the legal profession is appropriate. (Paragraphs 918–922)

217. The existing criminal legal aid scheme should be reviewed. We consider that the scheme should allow for some choice of counsel. (Paragraphs 933, 934)

218. When the grounds for divorce and the procedures are simplified, consideration should be given to extending civil legal aid. Aid for legal advice should be considered as well. (Paragraphs 936, 937)

219. We recommend the establishment of a Suitors' Fund. (Paragraph 945)

220. A public defender scheme is neither necessary nor desirable in New Zealand. (Paragraph 964)

221. Legal advice and representation for defendants in criminal cases should be assured by improving the present legal aid and duty solicitor schemes. (Paragraphs 933, 934, 963)

222. The New Zealand Law Society should consider the proposed extended functions of legal executives in the light of the Lord Chancellor's ruling. (Paragraph 975)

ASSOCIATED MATTERS

Law Reform Commission

223. A Law Reform Commission should be established in a form suitable for New Zealand. (Paragraph 996)

224. In the meantime, increased assistance for research facilities and law drafting should be made available to the Law Reform Committees. (Paragraph 996)

Scientific Evidence

225. In criminal cases, both the prosecution and the defence should have equal acess to scientific evidence, so that forensic analyses may be conducted. (Paragraph 1011)

226. Wherever appropriate, but only with the consent of the parties and the approval of a judge, scientific evidence should be given by certificate. (Paragraph 1012)

227. The procedure for producing illicit drugs as exhibits in bulk form should be examined with a view to changing the method to the production of a sample, subject to proper recording of the bulk. (Paragraph 1013)

228. If the defence offers new scientific evidence and not simply a different scientific opinion from that of a Crown scientist, wherever possible either adequate notice of the new evidence should be given, or the Crown should be given a reasonable time to prepare rebuttal evidence. (Paragraph 1014)

(b) Comments on the design should be sought, at an early stage of the planning, from the users of the court buildings.
(c) The comfort and convenience of staff and the public should be given proper emphasis in new court building design.
(d) A building programme should be drawn up by the Department of Justice with the objective of up-grading or replacing all court buildings in New Zealand.

Up-grading should include provision of:

(i) adequate reception facilities in all court buildings;
(ii) information boards, large and distinctive enough to attract attention, giving the lay-out of each floor, with the position of the courts and facilities thereon (multi-lingual where necessary);
(iii) adequate toilets and washrooms for staff, lawyers, jurors, litigants, and witnesses, with access for disabled persons;
(iv) redesigned witness-boxes to allow for the witness (and an interpreter where necessary) to sit; also a place for spreading papers and documents;
(v) public telephones;
(vi) interview rooms;
(vii) better office accommodation to reduce overcrowding and poor working conditions;
(viii) better waiting areas;
(ix) ramps to all courtrooms to allow access of disabled persons and book trolleys;
(x) better lighting, heating, and air-conditioning where necessary;
(xi) the Family Courts should be provided with a room where children can be attended to and cared for, as well as all of the above features (with the exception of (iv) witness-boxes).

New buildings should include all of the above, as well as the following features:

(i) a jury assembly room;
(ii) jury deliberation rooms with toilets attached;
(iii) lifts to all courts above ground floor level;
(iv) adequate interview rooms for duty solicitors, other lawyers, probation and welfare officers;
(v) comfortable waiting areas with sufficient space for litigants, witnesses, and others, to have a degree of privacy;
(vi) good courtroom acoustics;
(vii) holding cells adequate for the maximum amount of time prisoners are held there.

(Paragraphs 896–904)

THE LEGAL PROFESSION

213. Lawyers should be subject to, and enforce, a proper standard of professional conduct. (Paragraph 905)

214. District Law Societies, with list judges and regional court administrators, should take part in decisions to manage case-flow. (Paragraphs 908, 909)

215. The New Zealand Law Society, the Council of Legal Education, the university law faculties, and the Department of Justice should confer over improvements in methods of practical training in advocacy and procedure. (Paragraphs 911, 912, 925)

216. Appointment of a lay member and a lay observer to participate in the disciplinary and complaints procedures of the legal profession is appropriate. (Paragraphs 918–922)

217. The existing criminal legal aid scheme should be reviewed. We consider that the scheme should allow for some choice of counsel. (Paragraphs 933, 934)

218. When the grounds for divorce and the procedures are simplified, consideration should be given to extending civil legal aid. Aid for legal advice should be considered as well. (Paragraphs 936, 937)

219. We recommend the establishment of a Suitors' Fund. (Paragraph 945)

220. A public defender scheme is neither necessary nor desirable in New Zealand. (Paragraph 964)

221. Legal advice and representation for defendants in criminal cases should be assured by improving the present legal aid and duty solicitor schemes. (Paragraphs 933, 934, 963)

222. The New Zealand Law Society should consider the proposed extended functions of legal executives in the light of the Lord Chancellor's ruling. (Paragraph 975)

ASSOCIATED MATTERS

Law Reform Commission

223. A Law Reform Commission should be established in a form suitable for New Zealand. (Paragraph 996)

224. In the meantime, increased assistance for research facilities and law drafting should be made available to the Law Reform Committees. (Paragraph 996)

Scientific Evidence

225. In criminal cases, both the prosecution and the defence should have equal acess to scientific evidence, so that forensic analyses may be conducted. (Paragraph 1011)

226. Wherever appropriate, but only with the consent of the parties and the approval of a judge, scientific evidence should be given by certificate. (Paragraph 1012)

227. The procedure for producing illicit drugs as exhibits in bulk form should be examined with a view to changing the method to the production of a sample, subject to proper recording of the bulk. (Paragraph 1013)

228. If the defence offers new scientific evidence and not simply a different scientific opinion from that of a Crown scientist, wherever possible either adequate notice of the new evidence should be given, or the Crown should be given a reasonable time to prepare rebuttal evidence. (Paragraph 1014)

Combining Civil and Criminal Proceedings

229. The principle of resolving criminal and civil liability in one hearing should be examined with a view to saving the time of the court, parties, and witnesses. (Paragraph 1018)

230. Implementation of the recommendation of the Torts and General Law Reform Committee in its report entitled "The Rule in Hollington v. Hewthorn" is supported. (Paragraph 1018)

Interim Injunctions

231. The Rules Committees of the High Court and the District Courts should examine the extent to which, in urgent cases, jurisdiction of High Court judges may be deputed to District Court judges. (Paragraph 1020)

Bail

232. Reasons for declining bail should be recorded. (Paragraph 1021)

Police Summaries of Fact

233. In summary prosecutions it is desirable that the prosecution should provide the defence with a summary of facts upon which it relies. When the proposed rules in England have been in force for a sufficient time for their effectiveness to be evaluated, consideration should be given to introducing similar legislation to this country. (Paragraph 1027)

Revision of Penalties

234. The provision of the Summary Proceedings Act permitting the prosecution to lay an information in indictable form for an offence which would otherwise be electable, should be repealed. (Paragraph 1030)

235. No change should be made in the threshold for jury trial for offences of dishonesty at present, but the matter should be reviewed by the Law Reform Commission, if established, or, if not, the Criminal Law Reform Committee, after sufficient time has elapsed following implementation of our proposals. (Paragraph 1037)

236. The Law Reform Commission, if established, or, if not, the Criminal Law Reform Committee, should likewise undertake a review of crimes and other offences created by miscellaneous statutes which could be re-classified as summary offences. (Paragraph 1037)

Diversion

237. The development of diversion schemes overseas should be kept under review and the suitability for New Zealand assessed. (Paragraph 1053)

Imprisonment for Debt

238. The provisions of the Imprisonment for Debt Limitation Act 1908 should be amended to provide for periodic detention as an alternative to imprisonment. (Paragraph 1056)

Children Remanded in Custody

239. Wherever possible, young people should not be remanded to adult jails. (Paragraph 1057)

240. If young people have to be remanded in custody, those responsible should ensure they are kept separate from adult prisoners to the fullest possible extent. (Paragraph 1058)

241. Secure remand facilities for this age group should be provided wherever practicable. (Paragraph 1058)

The Regions

242. There should be an immediate increase in the establishment of the High Court judges at Auckland. (Paragraphs 1063, 1064)

243. The circuit region controlled from the High Court at Hamilton should comprise the areas at present served by the Supreme Courts of Hamilton, Rotorua, New Plymouth, and Gisborne. There should be two resident High Court judges in Hamilton for this purpose. (Paragraph 1069)

244. The Department of Justice should consider increasing the court facilities at the Rotorua courthouse. (Paragraph 1072)

245. Until the new court complex at Christchurch is completed, adequate alternative accommodation should be arranged. (Paragraph 1076)

246. The Judicial Commission should keep the issue of a resident judge, or judges, for Dunedin under regular appraisal. (Paragraph 1083)

Table 1

MAGISTRATES' COURTS

TOTAL CHARGES BEFORE THE COURTS

Year	Males	Females	Total	Rate per 1000 mean population
1960	117 061	7 735	124 796	52.50
1961	126 030	8 925	134 955	55.60
1962	140 992	9 918	150 910	60.73
1963	147 101	10 759	157 860	62.23
1964	168 940	13 694	182 634	70.54
1965	186 696	14 506	201 202	76.35
1966	207 344	17 044	224 388	83.63
1967	234 415	22 736	257 151	94.22
1968	252 597	28 622	281 219	102.03
1969	230 634	22 656	253 290	97.96
1970	216 312	22 503	238 815	84.54
1971	239 662	27 113	266 775	92.01
1972	233 988	27 533	261 521	89.67
1973	266 583	32 516	299 099	100.41
1974	293 728	37 464	331 192	108.80
1975	309 589	40 997	350 586	113.58
1976	353 062	51 464	404 526	129.81

Source: Justice Statistics

Table 2

MAGISTRATES' COURTS

TOTAL CHARGES: TRAFFIC

Year	Males	Females	Total	Percentage of traffic offences against total charges before the courts
				%
1960 ...	77 628	5 265	82 893	66.4
1961 ...	85 393	6 000	91 393	67.7
1962 ...	96 720	6 851	103 571	68.6
1963 ...	102 332	7 271	109 603	69.4
1964 ...	123 994	9 680	133 674	73.2
1965 ...	141 018	10 838	151 856	75.5
1966 ...	159 210	13 027	172 237	76.8
1967 ...	181 747	17 927	199 674	77.6
1968 ...	194 452	22 650	217 102	77.2
1969 ...	171 903	17 059	188 962	74.6
1970 ...	163 294	16 169	179 463	75.1
1971 ...	183 151	19 987	203 138	76.1
1972 ...	174 368	20 019	194 387	74.3
1973 ...	204 539	24 527	229 066	76.6
1974 ...	227 643	28 784	256 427	77.4
1975 ...	234 751	29 945	264 696	75.5
1976 ...	268 563	38 641	307 204	75.9

Source: Justice Statistics.

Table 3

PERSONS INDICTED IN NEW ZEALAND

Year	Persons indicted	Persons indicted as percentage of total persons charged in Magistrates' Courts
1960	378	0.37
1961	434	0.39
1962	387	0.31
1963	437	0.34
1964	380	0.25
1965	427	0.25
1966	398	0.21
1967	443	0.20
1968	454	0.19
1969	414	0.20
1970	366	0.19
1971	394	0.18
1972	459	0.22
1973	481	0.20
1974	631	0.24
1975	807	0.29
1976	801	0.24

Source: Justice Statistics.

Table 4

MAGISTRATES' COURTS

PERSONS WHO ELECTED TRIAL BY JURY

Year	Persons who elected trial by jury*	Persons who elected trial by jury as percentage of persons charged with offences with the right to election†
1960	312	5.4
1961	344	5.9
1962	337	5.1
1963	378	5.6
1964	306	4.5
1965	346	4.3
1966	292	3.3
1967	319	3.1
1968	344	3.1
1969	324	2.9
1970	259	2.1
1971	315	2.4
1972	331	2.4
1973	320	2.2
1974	428	2.8
1975	581	3.2
1976	541	2.6

*Excludes those indicted with purely indictable offences; includes drug offences.
†Includes:

(1) all offences against the person except those which are indictable only offences and except common assault, if laid under the Crimes Act;
(2) all offences against property except wilful damage and trespass;
(3) all forgery and currency offences;
(4) rogue and vagabond offences;

excludes drug offences.

No distinction is made in Justice Statistics between possession of a narcotic (a summary offence) and supplying, etc., a narcotic (an offence with the right of election). If drug offences with a right of election were included in these calculations, the percentage of persons who elected trial by jury in recent years would be smaller because of the increase in this type of offence.

Source: Justice Statistics.

Table 5

MAGISTRATES' COURTS

COMMITTAL FOR TRIAL BY JUSTICES OF THE PEACE OR MAGISTRATE BY FINAL DISPOSITION

Final disposition	1976 J.P.s %	1976 S.M. %	Total %
Guilty	75.0	80.3	75.7
Not guilty	18.2	11.5	17.4
Not guilty but insane	1.3	6.6	2.0
Section 347 (1) Crimes Act[1]	3.1	...	2.7
Section 347 (3) Crimes Act[2]	1.8	1.6	1.8
Section 345 Crimes Act[3]	0.3	...	0.2
Section 42 Criminal Justice Act[4]	...	...	...
Stay of proceedings	0.3	...	0.2
Section 39J Criminal Justice Act[5] ...	...	...	...
Section 48A (1) Criminal Justice Act[6] ...	...	...	...
Absconded	...	...	...
Died	...	...	...
Referred to Children's Court	...	...	...
Total	100.0% (388)	100.0% (68)	100.0% (449)

[1]Judge may direct that no indictment be presented, or that the indictment not be proceeded with, of his own motion or on the application of prosecutor or accused, after hearing both the prosecutor and accused.
[2]Judge may in his discretion at any stage of the trial direct that the accused be discharged.
[3]Court may quash count in indictment on the ground that it is not founded on the evidence disclosed in the depositions.
[4]Court may discharge offender without conviction or sentence.
[5]Court may, on conviction, commit a mentally disordered defendant to hospital.
[6]Court may order detention and treatment of alcoholic or drug addict on conviction.

Source: Department of Justice research sample.

Table 6

MAGISTRATES' COURTS

CIVIL ACTIONS

Year	Plaints entered	Total amount sued for ($000)	Judgments entered or final order of court
1960	81 185	6,296	49 499
1961	92 383	7,394	54 226
1962	108 698	8,924	60 537
1963	112 692	9,520	66 663
1964	115 902	9,444	69 016
1965	112 813	11,526	69 690
1966	118 976	10,991	67 805
1967	128 518	12,351	73 508
1968	127 517	13,781	81 155
1969	115 018	12,708	71 435
1970	113 108	12,930	68 160
1971	120 388	15,326	75 035
1972	132 036	20,126	77 057
1973	115 305	19,662	70 267
1974	125 192	24,117	75 951
1975	144 938	29,924	79 663
1976	144 005	33,851	84 388

Source: Justice Statistics.

Table 7

SUPREME COURT

PERSONS WHO ELECTED TRIAL BY JURY

Year	Persons who elected trial by jury*	Persons who elected trial by jury as percentage of persons charged with offences with right to election*	Persons tried with drug offence in Supreme Court (not included in two preceding columns)
1960 ...	312	5.4	0
1961 ...	344	5.9	0
1962 ...	337	5.1	0
1963 ...	378	5.6	0
1964 ...	306	4.5	0
1965 ...	344	4.4	2
1966 ...	291	3.3	1
1967 ...	319	3.1	0
1968 ...	342	3.1	2
1969 ...	322	2.9	2
1970 ...	256	2.1	3
1971 ...	304	2.3	11
1972 ...	311	2.3	20
1973 ...	303	2.1	17
1974 ...	394	2.6	34
1975 ...	471	2.6	110
1976 ...	454	2.2	87

*Both columns exclude drug offences as no distinction is made in Justice Statistics between possession of a narcotic (a summary offence) and supplying, etc., a narcotic (an offence with the right of election).

Source: Justice Statistics.

Table 8

SUPREME COURT

PERSONS INDICTED FOR OFFENCES WITH A RIGHT OF ELECTION (e), WITH PURELY INDICTABLE OFFENCES (i), OR WITH BOTH (e + i)

	1968	1972	1973	1974	1975	1976
	%	%	%	%	%	%
e	79.5	70.3	67.2	70.5	72.4	69.9
i	12.1	18.0	19.0	17.2	15.0	21.3
e + i	8.4	11.7	13.8	12.3	12.6	8.8
Total	100.0% (332)	100.0% (400)	100.0% (411)	100.0% (470)	100.0% (554)	100.0% (531)

Source: Department of Justice research sample.

Table 9

SUPREME COURT

PERSONS INDICTED FOR OFFENCES WITH A RIGHT OF ELECTION (e), WITH PURELY INDICTABLE OFFENCES (i), OR WITH BOTH (e+i)

All Supreme Courts: 1 January 1977 to 30 June 1977

	e	i	e+i	Total
Auckland	142	12	19	173
Blenheim	1	1	...	2
Christchurch	36	14	2	52
Dunedin	8	...	2	10
Gisborne	2	1	...	3
Greymouth	...	1	...	1
Hamilton	12	2	1	15
Invercargill	9	2	2	13
Napier	9	2	2	13
Nelson	3	2	1	6
New Plymouth	5	7	2	14
Palmerston North	18	1	...	19
Rotorua	11	5	...	16
Timaru	1	1	...	2
Wanganui	9	1	2	12
Wellington	46	10	5	61
Whangarei	4	2	...	6
Total	316	64	38	418
Percentage	75.6	15.3	9.1	100.0

Source: Department of Justice survey.

Table 10

SUPREME COURT

NUMBER OF PERSONS COMMITTED FOR SENTENCE

Year	Males	Females	Total
1960	72	3	75
1961	60	...	60
1962	50	1	51
1963	42	5	47
1964	35	2	37
1965	53	3	56
1966	56	1	57
1967	50	2	52
1968	68	3	71
1969	56	5	61
1970	119	7	126
1971	147	5	152
1972	156	9	165
1973	151	12	163
1974	77	5	82
1975	83	7	90
1976	112	6	118

Source: Justice Statistics.

Table 11

AVERAGE TIMES BETWEEN STAGES OF CRIMINAL TRIALS

Average time (in weeks) per trial

Year	From first Magistrate's Court appearance to committal	From committal to trial	From last day of trial to sentence*
1968 ...	5.3	8.7	1.8
1972 ...	5.4	6.0	2.2
1973 ...	5.8	6.8	1.8
1974 ...	7.7	7.4	2.5
1975 ...	7.9	8.1	1.9
1976 ...	7.2	8.1	2.5

*Includes only cases where court has a further decision to make; excludes acquittals, section 347 discharges, etc.

Source: Department of Justice research sample.

Table 12

SUPREME COURT

PERSONS INDICTED WITH PURELY INDICTABLE OFFENCES

Year	Persons indicted with purely indictable offences	Persons indicated with purely indictable offences as percentage of total persons indicted
		%
1960	66	17.5
1961	90	20.7
1962	50	12.9
1963	59	13.5
1964	74	19.5
1965	91	21.3
1966	106	26.6
1967	124	28.0
1968	110	24.2
1969	90	21.7
1970	107	29.2
1971	77	19.5
1972	128	27.9
1973	161	33.5
1974	203	32.2
1975	226	28.0
1976	268	33.5

Source: Justice Statistics.

Table 13

SUPREME COURT

SELECTED OFFENCES AS PERCENTAGE OF TOTAL INDICTMENTS

Offence	1970	%	1971	%	1972	%	1973	%	1974	%	1975	%	1976	%
Wounding, etc., with intent ...	11	3.0	13	3.3	14	3.1	27	5.6	35	5.5	41	5.1	32	4.0
Aggravated robbery	9	2.5	1	0.3	27	5.9	22	4.6	20	3.2	41	5.1	57	7.1
Burglary	54	14.8	54	13.7	57	12.4	48	10.0	61	9.7	75	9.3	89	11.1
Theft	53	14.5	62	15.7	58	12.6	49	10.2	69	10.9	82	10.2	83	10.4
Receiving	26	7.1	36	9.1	35	7.6	36	7.5	42	6.7	68	8.4	66	8.2
Fraud and false pretences ...	13	3.6	10	2.5	26	5.7	18	3.7	23	3.6	19	2.4	32	4.0
Conversion	8	2.2	8	2.0	8	1.7	8	1.7	4	0.6	10	1.2	5	0.6
Drug offences	3	0.8	11	2.8	20	4.4	17	3.5	34	5.4	110	13.6	87	10.9
Total number of indictments ...	366		394		459		481		631		807		801	

Source: Justice Statistics.

Table 14

SUPREME COURT

SENTENCE IMPOSED ON PERSONS CHARGED ONLY WITH OFFENCES WITH A RIGHT OF ELECTION

	1968	1972	1973	1974	1975	1976
	%	%	%	%	%	%
3 months or less	2.3	1.8	0.7	0.9	1.0	1.7
3.1 month–12 months ...	17.8	16.0	19.2	14.5	16.2	16.7
1.1 years–3 years ...	15.5	21.7	12.0	11.5	12.2	15.0
3.1 years–7 years ...	1.1	1.1	1.8	1.8	4.0	2.7
Over 7 years	0.8	..	..	..	0.2	0.3
Borstal training/detention centre	2.7	1.1	5.1	2.4	2.5	2.0
Periodic detention ...	1.9	6.8	4.0	8.2	8.6	10.7
Probation	6.1	5.7	9.8	11.5	8.6	7.7
Fine	8.3	10.7	11.6	9.7	10.2	14.4
Section 347, stayed, etc. ...	12.9	10.3	9.1	17.5	7.7	5.7
Not guilty	25.4	20.2	21.3	18.1	23.4	19.4
Other	4.9	4.6	5.4	3.9	5.2	3.7
Not known	0.3	..	..	...	0.2	..
Total	100.0	100.0	100.0	100.0	100.0	100.0
	(264)	(281)	(276)	(331)	(401)	(299)

Source: Department of Justice research sample.

Table 15

SUPREME COURT

SENTENCE PRESCRIBED FOR PERSONS CHARGED WITH ELECTABLE OFFENCES

Maximum penalty prescribed (most severe per person)

	1968	1972	1973	1974	1975	1976
	%	%	%	%	%	%
3.1 months–12 months ...	10.5	6.2	6.8	8.5	3.8	7.2
1.1 years–3 years ...	3.9	6.2	4.9	13.4	11.1	5.1
3.1 years–5 years ...	9.6	8.0	9.7	7.4	5.0	5.1
7 years...	24.7	28.3	28.2	22.1	24.5	27.9
10 years	32.5	22.5	20.2	15.5	18.0	18.6
14 years + life	18.8	28.8	30.2	33.1	37.6	36.1
Total	100.0	100.0	100.0	100.0	100.0	100.0
	(332)	(400)	(411)	(470)	(552)	(531)

Source: Department of Justice research sample.

Table 16

SUPREME COURT

APPEALS LODGED IN SUPREME COURT UNDER SUMMARY PROCEEDINGS ACT

Result of appeal	1973 No.	1973 %	1974 No.	1974 %	1975 No.	1975 %	1976 No.	1976 %
Allowed	229	28.2	369	36.5	262	24.8	348	31.5
Withdrawn	23	2.8	110	10.9	27	2.6	28	2.5
Dismissed including abandoned ...	559	69.0	532	52.6	769	72.6	729	66.0
Total	811	100.0	1 011	100.0	1 058	100.0	1 105	100.0
Appeals lodged as percentage of Magistrates' Courts convictions	0.4%		0.4%		0.4%		0.4%	

Source: Justice Statistics.

Table 17

SUPREME COURT

CIVIL ACTIONS

Year	Actions commenced	Amount claimed ($000)	Tried by judge alone	Tried by jury
1960	2 162	10,552	248	138
1961	2 201	9,878	278	128
1962	1 891	10,670	286	144
1963	2 008	10,948	256	141
1964	1 967	10,598	241	106
1965	2 183	14,699	296	98
1966	2 555	21,861	296	89
1967	2 952	22,607	273	166
1968	2 976	22,833	340	157
1969	2 935	27,900	279	133
1970	3 273	30,955	362	114
1971	3 849	37,164	393	120
1972	3 903	44,691	349	108
1973	3 865	50,548	292	100
1974	4 571	70,629	340	71
1975	5 056	86,159	396	71
1976	3 602	70,274	435	63

Source: Justice Statistics.

Table 18

SUPREME COURT

NATURE OF CIVIL CLAIMS

Nature of claim	1973 No.	1973 %	1975 No.	1975 %	1976 No.	1976 %
Family protection, interpretation of will, testamentary promise, declaratory judgment	147	8.5	156	6.8	157	9.7
Injunction, mandamus, certiorari, prohibition, application for review ...	53	3.1	67	2.9	102	6.3
Defamation	29	1.7	40	1.7	29	1.8
Personal injury	862	49.7	858	37.2	234	14.5
Contract, other tort	609	35.1	1 139	49.4	1 050	65.0
Transfer proceedings from Magistrates' Courts (section 43, section 45)	12	0.7	14	0.6	11	0.7
Transfer from Magistrates' Courts for execution	21	1.2	33	1.4	33	2.0
Total	1 733	100.0	2 307	100.0	1 616	100.0

Source: Department of Justice research sample.

Table 19

SUPREME COURT

PERCENTAGE OF CIVIL CLAIMS SET DOWN FOR HEARING AND PERCENTAGE HEARD

Nature of claim*	1973 Percent set down	1973 Percent heard	1975 Percent set down	1975 Percent heard	1976 Percent set down	1976 Percent heard
Family protection, etc.	56.5	81.9	28.8	62.2	13.4	47.6
Injunction, etc.	32.1	88.2	37.3	88.0	32.4	92.9
Defamation	20.7	50.0	35.0	35.7	3.4	100.0
Personal injury	32.3	57.5	17.6	41.5	10.8	39.6
Contract/other tort	21.9	23.8	9.7	13.3	10.3	0.0
Transfer from Magistrates' Courts	33.3	75.0	14.3	50.0	9.1	0.0
All Claims	28.8	49.5	16.2	40.6	12.0	43.8

*Transfers from the Magistrates' Courts for execution, bill writs, and default judgments are not included in this table.

Source: Department of Justice research sample.

Table 20

SUPREME COURT

(CIVIL)

TIME BETWEEN FILING OF WRIT, ETC., AND SETTING DOWN

Time	Family protection	Injunction	Defamation	Personal injury	Contract tort	Total
			1973			
	%	%	%	%	%	%
3 months or less	5.4	44.5	...	9.6	14.0	11.5
3.1–6 months	17.6	11.1	16.7	25.1	26.9	24.2
6.1–9 months	21.6	11.1	33.3	12.8	21.1	17.7
9.1–12 months	20.3	22.2	33.3	15.0	10.5	14.4
Over 12 months	35.1	11.1	16.7	37.5	27.5	32.2
Total	100.0	100.0	100.0	100.0	100.0	100.0
	(74)	(9)	(6)	(187)	(171)	(451)
			1975			
	%	%	%	%	%	%
3 months or less	21.0	20.0	14.3	19.5	25.9	22.8
3.1–6 months	23.7	40.0	28.6	31.7	25.9	28.0
6.1–9 months	23.7	10.0	7.1	15.9	24.1	20.6
9.1–12 months	15.8	20.0	28.6	24.4	16.3	19.0
Over 12 months	15.8	10.0	21.4	8.5	7.8	9.6
Total	100.0	100.0	100.0	100.0	100.0	100.0
	(38)	(10)	(14)	(82)	(166)	(311)
			1976			
	%	%	%	%	%	%
3 months or less	36.8	57.1	100.0	29.2	32.3	33.8
3.1–6 months	36.8	14.3	...	41.6	43.5	41.1
6.1–9 months	10.5	28.6	...	25.0	19.2	19.2
9.1–12 months	10.5	...	...	4.2	4.0	4.6
Over 12 months	5.4	...	...	...	1.0	1.3
Total	100.0	100.0	100.0	100.0	100.0	100.0
	(19)	(7)	(1)	(24)	(99)	(151)

N.B.—Because of the small total number of cases in some categories, the percentages must be interpreted with great caution. Transfers from the Magistrates' Courts for execution, bill writs, and default judgments are not included in this table.

Source: Department of Justice research sample.

Table 21

SUPREME COURT

PERCENTAGES OF CASES HEARD AND SETTLED OF ALL CASES DISPOSED OF IN 1976 AND 1977

	Percent heard		Percent settled or withdrawn	
	1976	1977	1976	1977
Actions:				
Auckland	31.9	35.2	68.1	64.8
Wellington	63.1	64.5	36.2	35.5
Christchurch	33.8	34.5	66.2	65.5
Divorce:				
Auckland	97.2	98.6	2.8	1.4
Wellington	99.8	98.8	0.2	1.2
Christchurch	97.6	98.0	2.4	2.0
Originating summons:				
Auckland	62.0	57.9	38.0	42.1
Wellington	95.5	100.0	4.5	....
Christchurch	80.0	91.7	20.0	8.3
Defended motions:				
Auckland	63.6	59.8	36.4	40.2
Wellington	95.5	92.8	4.5	7.2
Christchurch	72.2	64.3	27.8	35.7
Criminal trials:				
Auckland	76.0	65.9	24.0*	34.1*
Wellington	83.1	81.5	16.9*	18.5*
Christchurch	95.9	89.7	4.1*	10.3*
Appeals:				
Auckland	81.6	81.5	18.4	18.5
Wellington	99.0	98.5	1.0	1.5
Christchurch	87.3	91.4	12.7	8.6

*Or dealt with other than by trial, for example, plea of guilty, stay of proceedings filed, or section 347 discharge.

Source: Department of Justice survey.

Table 22

SUPREME COURT

RELATIVE WORKLOADS AT AUCKLAND, WELLINGTON, AND CHRISTCHURCH FOR PERIOD 4 FEBRUARY 1977 TO 1 JULY 1977

	Set down	To be heard		Already heard		Backlog to be heard		
	1	2	3	4	5	6	7	8
Actions:								Days
Auckland	453	145	25.0	45	7.8	100	17.2	43.0
Wellington ...	140	89	27.0	40	12.1	49	14.8	31.1
Christchurch ...	85	29	13.8	20	9.5	9	4.3	7.3
Divorce:								
Auckland	1 093	1 062	183.1	920	158.6	142	24.5	0.7
Wellington ...	429	428	129.7	339	102.7	89	27.0	1.4
Christchurch ...	377	368	175.2	335	159.5	33	15.7	0.8
Originating summons:								
Auckland	46	29	5.0	11	1.9	18	3.1	1.9
Wellington ...	20	19	5.8	14	4.2	5	1.5	1.2
Christchurch ...	20	16	7.6	11	5.2	5	2.4	1.4
Defended motions:								
Auckland	321	204	35.2	73	12.6	131	22.6	18.1
Wellington ...	140	134	40.6	77	23.3	57	17.2	10.3
Christchurch ...	104	75	35.7	45	21.4	30	14.3	5.7
Criminal trials:								
Auckland	212	161	27.8	91	15.7	70	12.1	29.0
Wellington ...	64	53	16.1	44	13.3	9	2.7	4.9
Christchurch ...	66	63	30.0	35	16.7	28	13.3	22.6
Appeals:								
Auckland	326	266	45.9	198	34.1	68	11.7	..
Wellington ...	158	131	47.3	131	39.7	25	7.6	..
Christchurch ...	140	96	58.1	96	45.7	26	12.4	..
Totals:								
Auckland	2 451	1 867	322.0	1 338	230.7	529	91.2	92.7
Wellington ...	951	854	266.5	645	195.3	234	70.8	48.9
Christchurch ...	792	647	320.4	542	258.0	131	62.4	37.8

Explanation:

Column 1—Total work set down to 1 July 1977 (including that already set down at 4 February 1977).
Column 2—Estimate of number of these cases actually to be heard.
Column 3—Total cases to be heard per judge (based on average number of judges sitting per court: Auckland, 5.8; Wellington, 3.3; Christchurch, 2.1).
Column 4—Cases already heard in 1977.
Column 5—Cases already heard per judge.
Column 6—Cases yet to be heard.
Column 7—Cases yet to be heard per judge.
Column 8—Judge days required.

N.B.—The J.B.L. trial has been excluded.

Source: Department of Justice survey

Table 23

COURT OF APPEAL

CRIMINAL CASES: APPEALS AGAINST SENTENCE AND/OR CONVICTION

Year	Number filed	Granted (i)	Refused (ii)	Totals (i) and (ii)
1958	51	10	41	51
1959	82	13	69	82
1960	99	25	74	99
1961	94	11	83	94
1962	97	12	85	97
1963	106	13	93	106
1964	78	13	65	78
1965	84	10	74	84
1966	96	12	76	88
1967	84	16	66	82
1968	112	14	94	108
1969	89	14	72	86
1970	105	18	86	104
1971	119	10	101	111
1972	138	17	85	102
1973	122	19	130	149
1974	112	18	83	101
1975	155	27	105	132
1976	202	42	122	164
1977	210	52	116	168

Source: Court of Appeal records.

Table 24

COURT OF APPEAL

SITTING DAYS

Year	Days on which court sat	Type of business			Days on which the Chief Justice sat on court	Days on which another judge sat on court
		Criminal	Civil	Other		
1958	84	29½	40½	16	8	13
1959	93	19½	66½	7	...	19
1960	106	36	63½	6½	5	75
1965	112	30	77½	4½	5	45
1970	119	51	68	...	7	116
1974	124	48	57½	18½	16	95
1975	133	58½	49	25½	31	57
1976	133	74½	44	14½	6	40

Source: Court of Appeal records.

Table 25

COURT OF APPEAL

CIVIL CASES

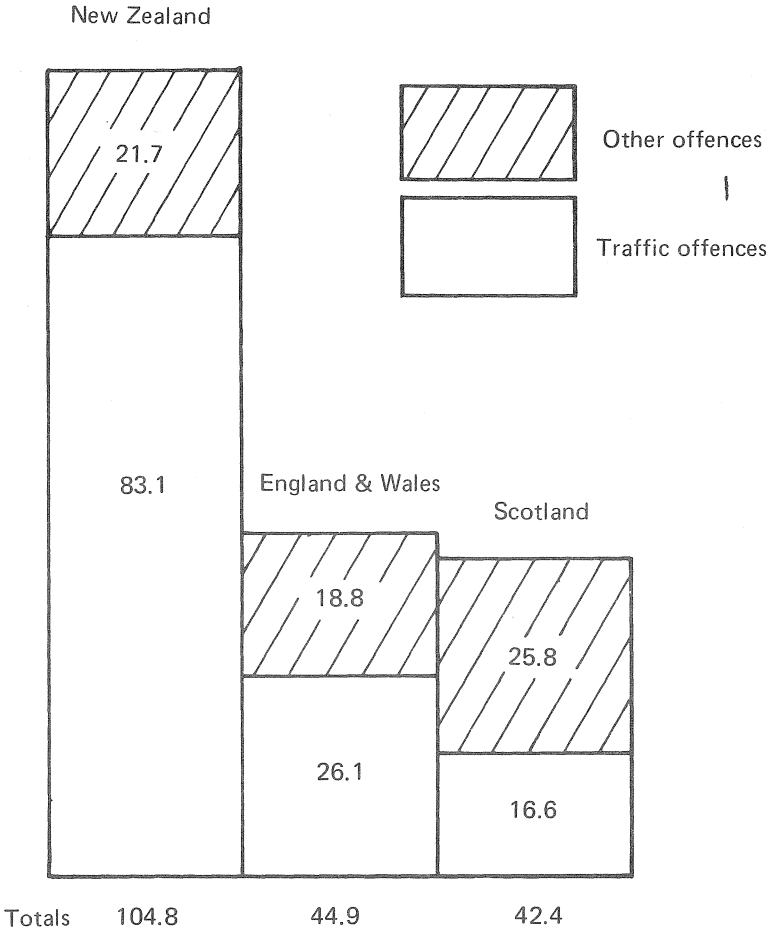
Year	Filed	Allowed	Dismissed	Totals	Withdrawn*
1958	50	13	18	31	...
1959	51	10	28	38	...
1960	65	10	29	39	...
1961	44	11	33	44	...
1962	56	11	45	56	...
1963	60	17	43	60	...
1964	59	17	21	38	...
1965	66	16	28	44	...
1966	51	14	20	34	...
1967	43	12	29	41	...
1968	64	15	26	41	...
1969	72	14	32	46	...
1970	82	19	32	51	1
1971	98	24	24	48	...
1972	80	24	30	54	4
1973	116	15	53	68	6
1974	92	23	49	72	11
1975	105	31	47	78	7
1976	131	24	28	52	7
1977	164	23	34	57	7

*Included in "Dismissed" figures.

Source: Court of Appeal records.

Table 26

PERSONS PROCEEDED AGAINST IN MAGISTRATES' COURTS IN NEW ZEALAND, ENGLAND AND WALES, AND SCOTLAND, PER 1000 POPULATION 1976



In New Zealand the density (number) of persons per vehicle is 2.3. In the United Kingdom (England, Wales, Scotland) the density of persons per vehicle is 3.6.

In New Zealand the minimum driving age is 15 years. In the United Kingdom the minimum driving age is 17 years.

Table 27

SUPREME COURT

CASES ACTUALLY HEARD IN THE FIVE MAIN CENTRES 1971–76

Type of case	1971	1972	1973	1974	1975	1976
Criminal trials	333	392	380	343	505	485
Appeals—conviction	244	201	245	233	303	344
Appeals—sentence	488	472	502	410	510	447
Appeals—domestic proceedings ...	...	...	...	101	124	149
Judge and jury civil actions... ...	101	92	82	58	53	49
Judge alone actions	239	212	203	207	266	246
Civil appeals from magistrates and tribunals	106	86	84	64	62	60
Originating summonses	115	95	101	92	91	87
Motions defended	449	450	466	476	518	589
Cases stated	31	28	43	29	38	54
Defended divorces	68	80	87	87	90	69
Undefended divorces	2 912	2 984	3 271	3 672	4 145	4 117
	5 086	5 092	5 464	5 772	6 705	6 696

GRAPHS 1–9: NOTES

These graphs show the projected court load for the years 1976–96 according to the sentence prescribed, and should be read together with paragraphs 235 to 242.

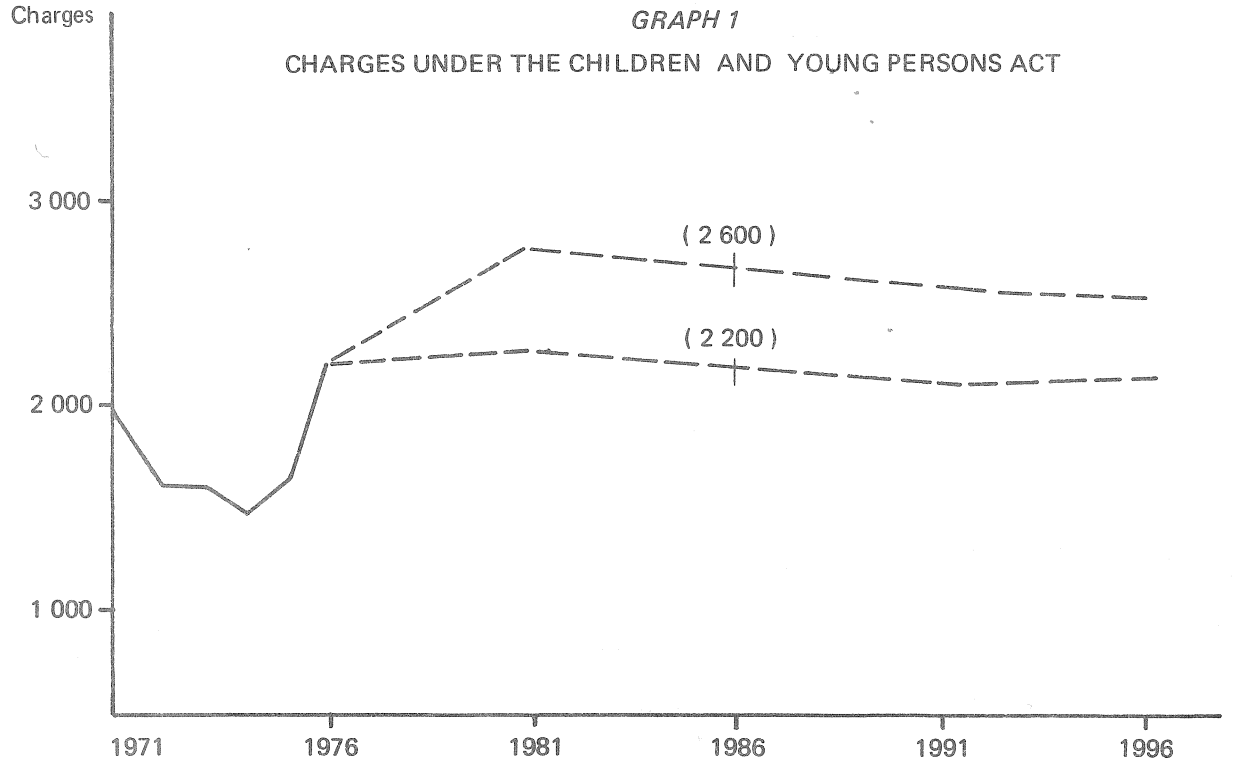
The figures in brackets on the graphline refer to the projected number of charges for the year 1986.

Regression of the log of court load on the variables used showed a greater normality of residual than did linear regression but the variability of prediction tended to be higher. Linear regressions have the advantage that they directly use the natural concept of rate per thousand and in the case of good estimation will show the total court load as a direct sum of the contributions of different race-age classes. Less hurried work on the data will explore singular solutions and Poisson models with means linear in the race-age classes with positive coefficients.

The use of past records to forecast the future in a field such as justice is rendered more dubious than usual by the degree of control that has been used in the past to alter the series when it developed undesirable properties. An implicit assumption of the forecasting is that the same level of control will apply in the future, although the trend of the forecasts may well suggest more fundamental steps are necessary.

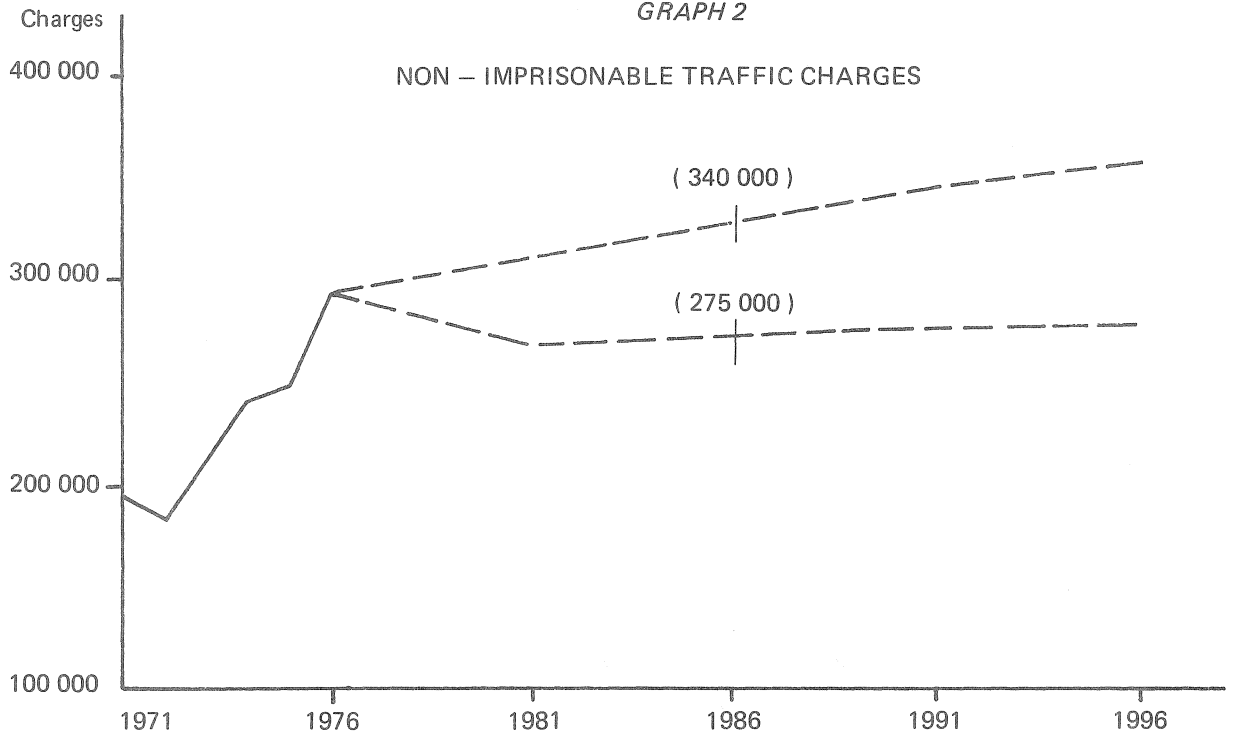
GRAPH 1

CHARGES UNDER THE CHILDREN AND YOUNG PERSONS ACT



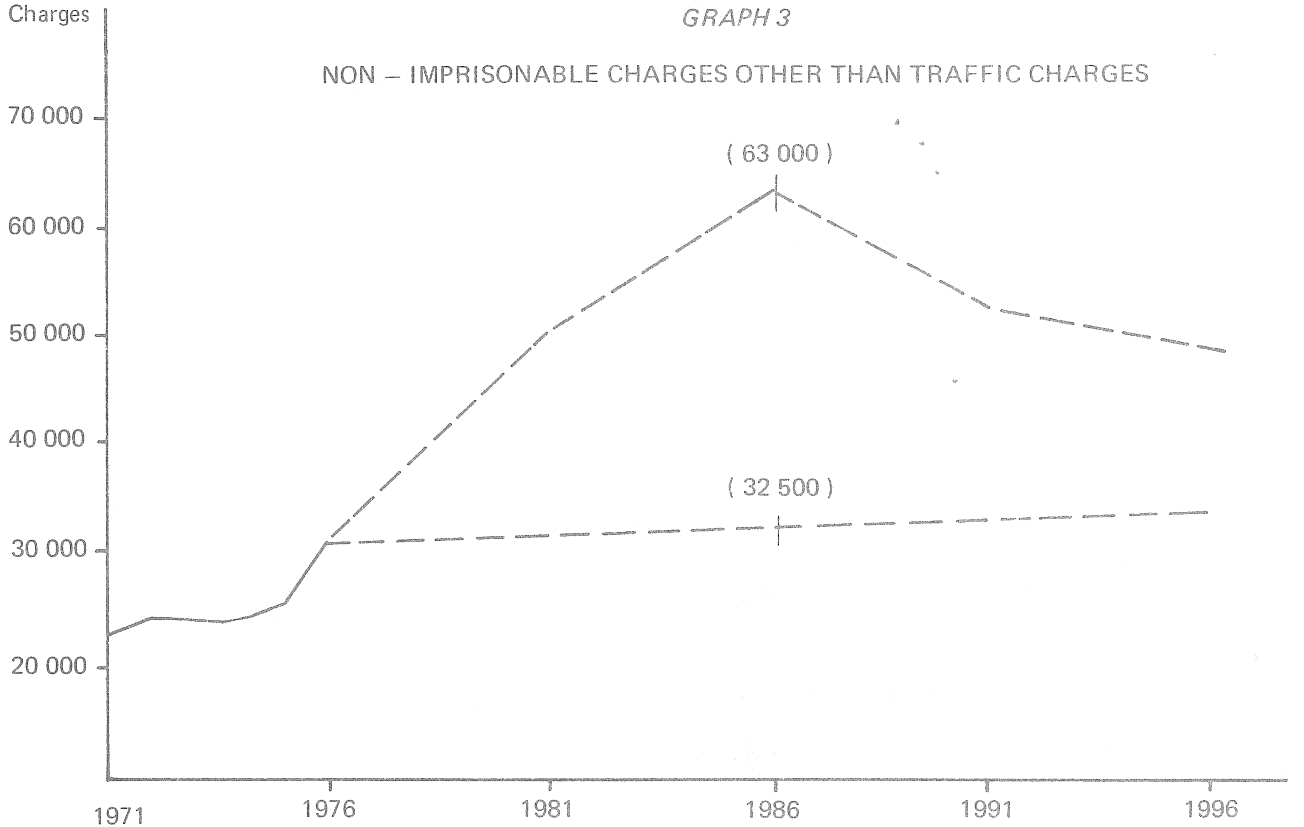
GRAPH 2

NON – IMPRISONABLE TRAFFIC CHARGES



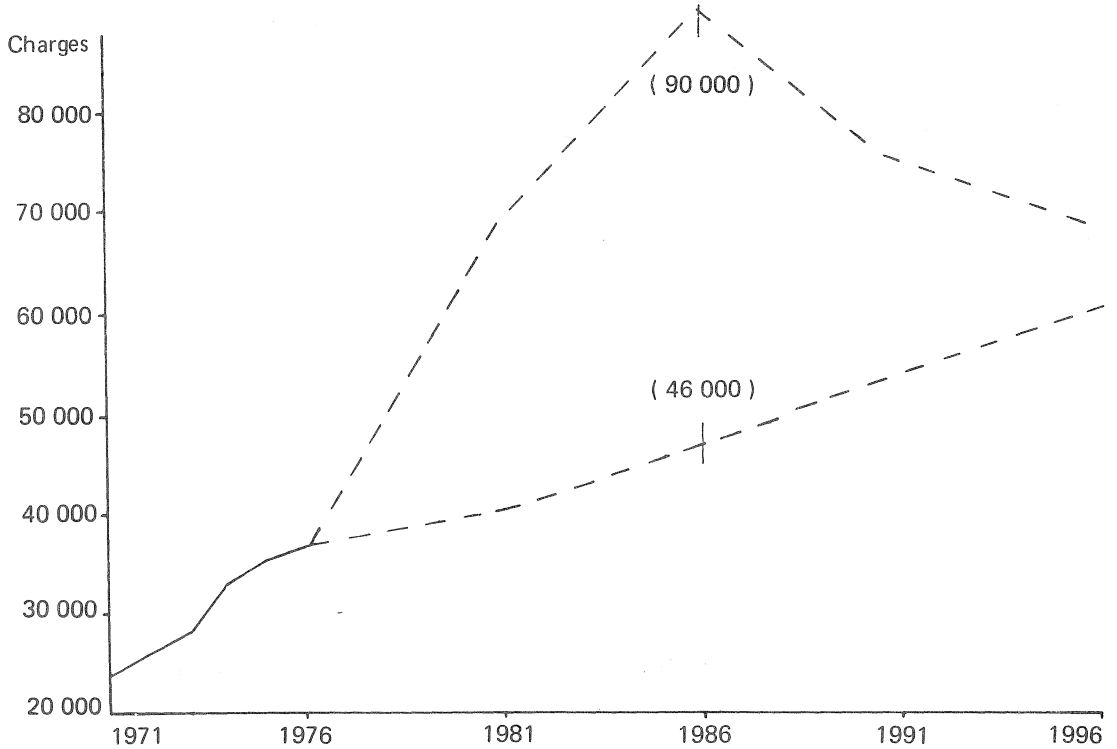
GRAPH 3

NON – IMPRISONABLE CHARGES OTHER THAN TRAFFIC CHARGES



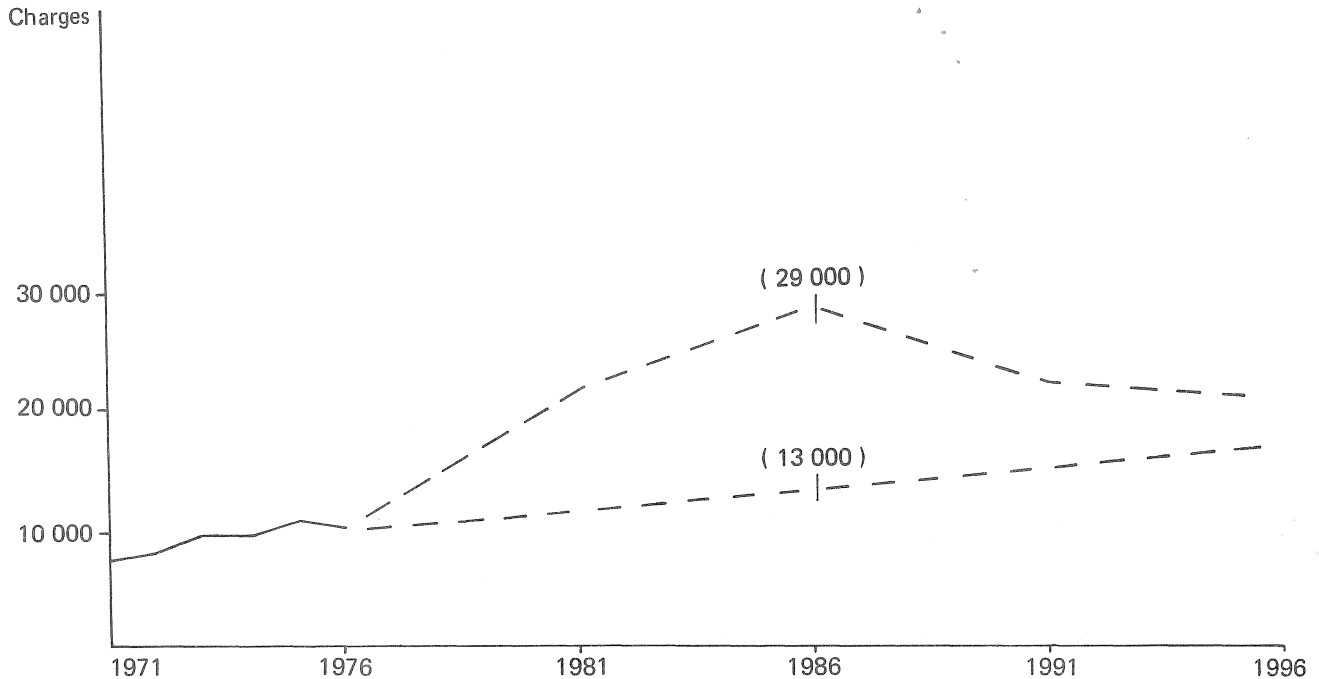
GRAPH 4

SENTENCE RANGE – UP TO THREE MONTHS

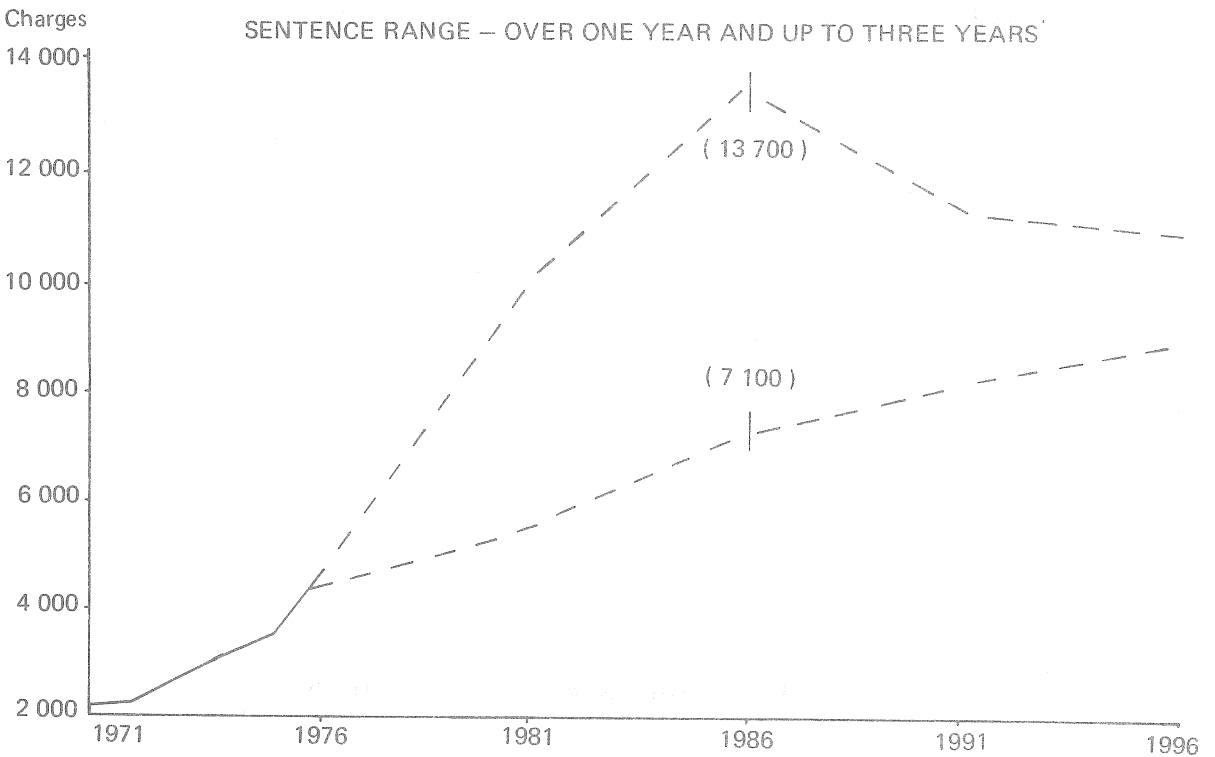


GRAPH 5

SENTENCE RANGE – OVER THREE MONTHS AND UP TO ONE YEAR

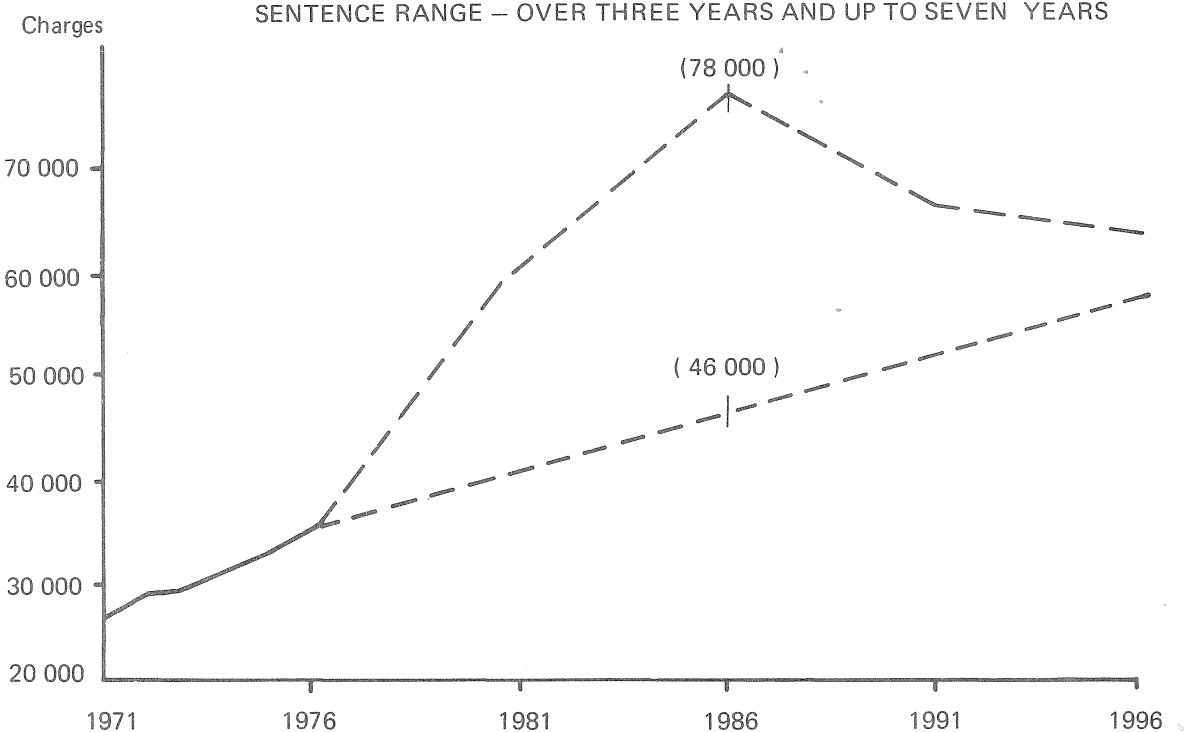


GRAPH 6


SENTENCE RANGE – OVER ONE YEAR AND UP TO THREE YEARS
Charges
14 000
12 000
10 000
8 000
6 000
4 000
2 000
(13 700)
(7 100)
1971
1976
1981
1986
1991
1996

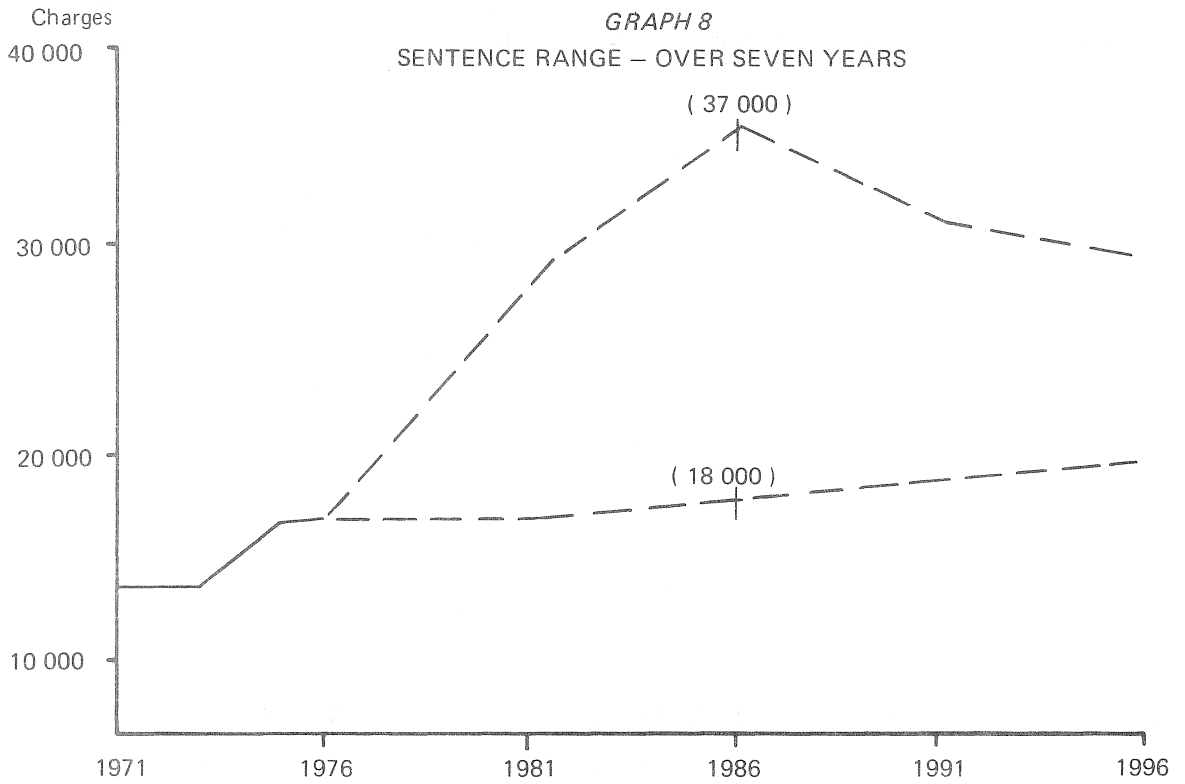
GRAPH 7

SENTENCE RANGE – OVER THREE YEARS AND UP TO SEVEN YEARS



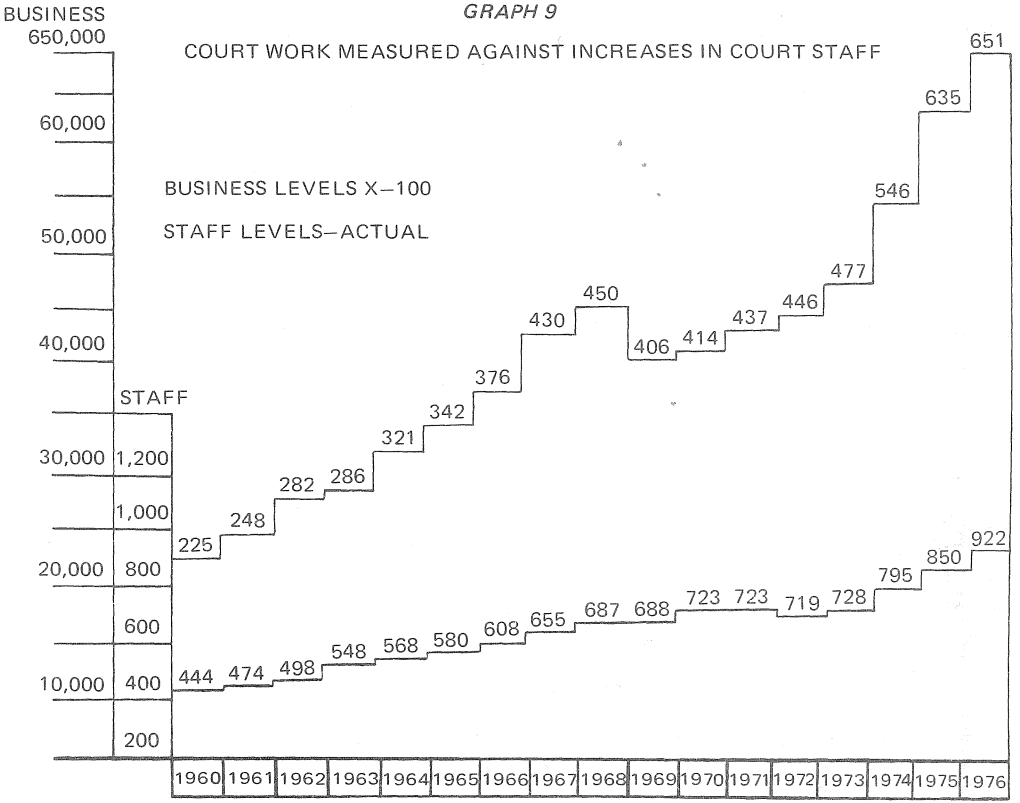
GRAPH 8

SENTENCE RANGE – OVER SEVEN YEARS



GRAPH 9

COURT WORK MEASURED AGAINST INCREASES IN COURT STAFF



APPENDIX 1

CLASSIFICATION OF OFFENCES

SUMMARY OFFENCES

Minor Offences: Fine Up to $500 Only

Arms Act 1958	3	Unlicensed dealers in firearms or ammunition.
	4	Record of dealings by licensed dealers.
	8	Sale to and possession by young persons of firearms and ammunition.
	9	Possession of unregistered firearms.
Civil Aviation Act 1964	25	Sale of liquor at international airports.
Companies Act 1955	102	Registration of charges created by company.
	104	Registration of charges existing on property acquired.
	111	Company's register of charges.
	*130	Annual return to be made by company having a share capital.
	*132	Time for completion of annual return.
	135	Duty to hold annual general meeting.
	*200	Register of directors and secretaries.
Criminal Justice Amendment Act 1962	21 (2)	Loitering by periodic detention work centre.
Gaming Act 1908	4 (2)	Being found in any common gaminghouse.
1910 Amendment	2	Street betting (first offence).
1908 Act	26	Betting on sports ground (first offence).
	27	Betting in factory.
	40	Disposal of property by lottery.
	41	Establishing or conducting lottery (first offence).
	63A	Preparation or possession of betting or lottery documents.
	64	Taking part in lottery.
Marriage Act 1955	56	Denying or impugning validity of lawful marriage.
	57	Altering register book without authority.
	61	Failing to comply with Act and offences generally.
Mental Health Act 1969	40 (1)	Offences by householders and medical practitioners.
	109 (2)	Offences by Superintendents.
	110	Only one mentally disordered person may reside in any house.
	114	Supplying liquor to mentally disordered person.
Police Offences Act 1927	3	Offences relating to good order, nuisances, obstructions in public places and removing material from foreshore.

*Maximum fine of $10 per day for default.

	3C	Disturbing public worship.
	3E	Drinking of liquor in public conveyances and by minors in public place.
	4	Offences by persons on public places relating to riding horses and driving vehicles, herding cattle, setting dog on another animal or person or otherwise obstructing a public place.
	5A	Children under 12 on tractors and implements.
	18	Sunday trading
	19	Publication of false notice of birth, death, or marriage.
	20	Imitation of Court documents.
	21	Issuing or exhibiting documents falsely purporting to be official documents.
	22	Public use of words, initials or abbreviations likely to lead others to wrongly believe the person holds a degree, etc.
Statutes Amendment Act 1939	57	Restriction on the use of certain names.
Police Offences Act 1927	22A	Restriction on use of word "Ruakura".
Police Offences Amendment Act 1956	2	Restriction on use of name "Returned Services Association" or "R.S.A.".
Statutes Amendment Act 1948	38 (2–4)	Use of emblem, seal or name of United Nations and other organisations.
Police Offences Act 1927	23	Carrying on trade etc. wrongly implying appointment by Governor-General.
	24	Use of words denoting Government patronage.
	25	Disfiguring natural objects.
	27	Supplying tobacco and smoking by youths.
	30	Use of certain words having reference to the Great War for purposes of trade or business.
	36	Obtaining admission to any place without paying fee lawfully charged.
		Failing to give correct name and address.
	37	Publishing unauthorised programmes.
	41 (a)	Persons found drunk.
	45	Keepers of hotels allowing prostitutes or persons of notoriously bad character to meet therein.
	61	Hours of closing public billiard rooms.
	68	Illegal boxing contests.
Police Offences Amendment Act (No.2) 1952	12 (1)	Fortune telling for reward.
	13	Advertising reward for stolen property.
Police Offences Amendment Act 1954	2 (2) (a)	Sale or disposal of contraceptives to children.
	2 (3) (b)	Procuring or attempting to procure contraceptives by child under 16.

Police Offences Amendment Act 1950	2	Offence to remain on ship when ordered to leave.
Police Offences Act 1927	76	Obstructing officers in execution of Act.
Transport Act 1962	7	Registration and licensing of motor vehicle
	9	Applications for registrations and alteratio of mileage recorder.
	12	Applications for licences for motor vehicles
	15	Unauthorised, deceptive or obscured registration plates or unauthorised licen
	18	Notification of change of ownership of mot vehicle.
	19	Cancellation of registration on destruction permanent removal of motor vehicle.
	25/193	Unlicensed persons not to drive motor vehicles.
	37/193	Surrender of disqualified drivers licence.
	42	Failure to pay speeding infringement fee specified in speeding infringement notic before date specified in notice.
	52	50 km/hour in towns.
	59	Being in charge of motor vehicle while und influence of drink or drugs or failure to surrender keys.
	60	Careless or inconsiderate use of motor vehicle.
	63	Failure to comply (by person incapable of driving) with direction not to drive or to surrender ignition keys.
	65 (2) (3)	Duties of drivers in case of accident.
	68	Attendance at traffic improvement school.
	68B (2C)	Removal of notice that vehicle unsafe.
	68C	Drivers and pedestrians to comply with traffic directions.
	69B	Overloading infringements.
	71	Restriction of heavy traffic on roads.
	76A	Use of motor vehicle on closed road.
	192A	Personation or obstruction of traffic officer

Maximum Penalty: Fine Up To $1,000 Only

Companies Act 1955	48A	Invitation to deposit money or lend money company
	48	Matters to be stated and reports to be set in prospectus.
	51	Registration of prospectus.
Mental Health Act 1959	40 (2) (3)	Offences by householders and medical practitioners.
	109 (1)	Offences by Superintendents.
	111	False or misleading certificate by medical practitioner.
Transport Act 1962	69A	Ancillary offences relating to overloading heavy motor vehicles.

Maximum Penalty Not Exceeding 3 Months Imprisonment

Arms Act 1958	7	Permits for possession.
	7B	Allowing use by unauthorised person.
	11	Unregistered firearms to be surrendered to police.
	11A	Non-registerable firearms may be required to be surrendered.
	12	Possession of unlawful weapons.
	13	Carriage of pistols without licence.
	16	Carriage or possession of firearms, ammunition or explosives except for proper and sufficient purposes.
	16A	Careless use of firearm.
	18	Presenting firearms at other persons.
	19	Obstruction of member of police.
Companies Act 1955	54	Criminal liability for misstatements in prospectus.
	58	Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar.
Criminal Justice Act 1954	10	Breach of conditions of probation.
Criminal Justice Amendment Act 1962	21 (1)	Offences by detainee sentenced to periodic detention.
Gaming Act 1908	4 (1)	Using premises as gaminghouse.
	8	Gaming in or within view of public place.
	22	Obstructing constable.
1910 Amendment	2	Street betting (second and subsequent offences).
Gaming Act 1908	26	Betting on sports grounds (second and subsequent offences).
1920 Amendment	2	Bookmaking (first and second offence).
Gaming Act 1908	37	Receiving money on condition of paying money on event of any bet.
	56	Obstructing constable.
	58	Persons giving false names or addresses.
	62	Exhibiting placards or advertising betting houses, sweepstakes or lotteries.
	63	Advertising as to betting, sweepstakes or lotteries.
	67	Making bet with or inviting infant to bet.
Insolvency Act 1967	127 (1)	Failure to keep proper books of account.
	128	Summary offences.
	151	Offence in respect of obtaining credit.
	164	False and misleading statements and refusal to answer questions.
Mental Health Act 1969	113 (2)	Sexual intercourse between person other than employee of hospital or house and woman or girl patient.
Narcotics Act 1965	6	Possession and use of narcotics.
	7	Miscellaneous offences.
	8	Licences.
	9	False statements.

	10	Obstruction.
	13	Power to demand production of books and to inspect stocks of narcotics.
Police Offences Act 1927	33B	Fighting in public place.
	3D	Riotous, offensive, threatening, insulting or disorderly behaviour and threatening or insulting words.
	5	Offences tending to personal injury (obstructions, exposed holes, poorly repaired fences in public places and polluting water supplies).
	6	Wilful destruction of property.
	26	Combination affecting the supply of gas, electric light or water.
	29	Unauthorised representative of foreign states.
	31	Offences in respect of military decorations.
	33	Unlawful intimidation or violence with a view to restricting the freedom of any person.
	34	Inciting violence, disorder or lawlessness.
	34B	Publications relating to manufacture of explosives or incendiary devices.
	41 (b) (c)	Persons found drunk (with previous convictions)
	43	Persons drunk and are guilty of riotous or disorderly behaviour or who are in charge of a horse.
	44	Failure of drunk person to pay expenses and cost of maintenance.
	46	Prostitutes importuning passengers or being riotous.
	48	Using foul language in a public place.
	49	Vagrancy.
	50	Idle and disorderly.
	51	Persons armed by night or wearing disguises.
	52A	Peeping into window or dwellinghouse by night.
	54	Being found on property without lawful excuse.
Police Offences Amendment Act (No. 2) 1952	12 (1A)	Fortune telling for reward with intent to deceive.
Police Offences Amendment Act 1954	2 (2) (b)	Sale or disposal of contraceptives to children.
Police Offences Amendment Act 1935	4	Offence to make false allegation to officer of police that offence committed.
Police Offences Act 1927	77	Wilful obstruction of constable.
Penal Institutions Act 1954	36A	Failure to submit to medical examination or procedure.
	44	Offences.

Poisons Act 1960	8	Sale and packing of poisons.
	9	Sale by vending machine.
	10	Hawking.
	11	No sale of poison without request.
	12	Licence or authority to sell poison (wholesale or extended purposes).
	13	Retail sales.
	14	Authority to pack poisons.
	22	Containers.
	23	Records of sales.
	24	Custody of poisons.
	25	Storage of poisons.
	26	Restriction on possession and use of prescription poisons and restricted poisons.
	27	Information to be furnished.
	29	Control of advertisements.
	30	Power of entry and inspection.
	33	Procuring of samples.
	36	Ships or aircraft arriving with certain poisons on board.
	38	Sending or carrying poisons under false descriptions.
	40	Power of District Registrar to require information.
	45	Obstruction of officers.
	46	Abetting offence against corresponding law of another country.
Secret Commissions Act 1910	3	Gifts to agent without consent of principal.
	4	Acceptance of such gifts.
	5	Duty of agent to disclose pecuniary interest in contract.
	6	Giving false receipt etc. to agent.
	7	Delivering false receipt etc. to principal.
	8	Receiving secret reward for procuring contract.
	9	Aiding and abetting offences.
	10	Persons acting on behalf of agents.
Transport Act 1962	34	Applying for drivers licence while disqualified.
	35	Driving while disqualified or contrary to terms of limited licence—first offence.
	50	Obtaining a drivers licence while disqualified.
	56 (1)	Causing bodily injury or death through careless use of a motor vehicle.
	57	Reckless or dangerous driving.
	58	Driving with an excess of blood alcohol or while under the influence of drink or drugs.
	58C	Refusing to supply a specimen of blood.
	58D (12)	Refusal of a person in hospital to allow a specimen of blood to be taken.
	65 (5)	Duties of accident driver where no-one killed or injured.

Maximum Penalty of 3.1–12 Months Imprisonment

Civil Aviation Act 1964	24	Dangerous operation of aircraft.
Companies Act 1955	151	Keeping books of account.
	152	Profit and loss account and balance sheet.
Gaming Act 1908	41	Establishing or conducting lottery (second or subsequent offence).
Gaming Amendment Act 1920	2	Bookmaking (third or subsequent offence).
	3	Making bets with bookmaker.
Official Secrets Act 1951	5, 6, 8, 9, 10, 11	(where accused tried and convicted summarily)
Police Offences Act 1927	47	Exposure of person.
	52	Imposters, loiterers and trespassers by night.
	53A	Carrying offensive weapon in public place without lawful excuse.
Police Offences Amendment Act 1952 (No. 2)	4	Common assault.
	8	Householder permitting defilement of young girl on his premises.
	9	Unlawful detention with intent to have carnal knowledge.
Police Offences Act 1927	77A	Assaults on constables, prison officers and traffic officers.
	34A	Disorderly conduct on private premises.
Penal Institutions Act 1954	44 (2)	Certain offences by officer of a penal institution.
Poisons Act 1960	47	Penalty for false statement.
Social Security Act 1964	127	Offences—misleading officer and obtaining some benefit.

Maximum Penalty of 1.1–2 Years Imprisonment

Arms Act 1958	6	Permits for import of firearms.
	17	Unlawful acquisition of firearms, ammunition or explosives.
	27	Governor-General may proclaim areas in which possession of firearms, ammunition and explosives is prohibited.

INDICTABLE OFFENCES TRIABLE SUMMARILY

Maximum Penalty Fine Only

Accident Compensation Act 1972	180 (1)	Evading levies or making false statements.
Shipping and Seamen Act 1952	195	Contravention of ship construction and survey rules.
	209 (6)	Contravention of radio rules.
	280 (4)	Contravention of timber cargo regulations.
	299 (1)	Failure to search for missing ship.
	304	Wilfully misdescribing dangerous goods.

	307 (3)	Contravention of dangerous goods rules.
	309 (4)	Contravention of grain cargo rules.
	310 (3)	Contravention of regulations as to ballast.
	311 (2)	Carriage of goods liable to spontaneous combustion.
	322 (2)	Contravention of regulations as to overloading and overcrowding.
	442 (1)	Carrying improper national colours.

Maximum Penalty Not Exceeding 3 Months Imprisonment

Crimes Act 1961	227 (d)	Theft (not covered by s.227 (a)–(b) if object stolen does not exceed $10 in value).
	246 (2) (c)	Obtaining by false pretence thing capable of being stolen—value less than $10.
	258 (1) (c)	Receiving property dishonestly obtained worth less than $10.
	401	Contempt of court.

Maximum Penalty Not Exceeding 3.1–6 Months Imprisonment

(under enactments other than Crimes Act)

Commerce Act 1975	64	Contravention of Order in Council.
	77	Participation in illegal aggregation proposal.
Electoral Act 1956	130	Offences in respect of ballot boxes and ballot papers.
Local Election and Polls Act 1976	56 (2)	Offences in respect of voting etc.
Post Office Act 1959	58	Wrongful divulgence of contents of postal article by officer.
	100	Divulging contents of telegram by officer.

Maximum Penalty Not Exceeding 3.1 Months–1 Years Imprisonment

Crimes Act 1961	86	Unlawful assembly.
	91	Forcible entry and detainer.
	107	Contravention of statute.
	121 (3)	Assisting escape by failing to perform legal duty.
	145	Criminal nuisance.
	196	Common assault.
	227 (c)	Theft (not covered by s.227 (a)–(b) if object stolen exceeds $10 in value).
	229	Being in possession of instrument for conversion.
	246 (2) (b)	Obtaining by false pretence thing capable of being stolen—value exceeds $10 but does not exceed $40.
	247	Obtaining credit fraudulently.
	258 (1) (b)	Receiving property dishonestly obtained worth more than $10 but no more than $40.
	287	Defacing coin and uttering defaced coin.
	288	Melting coin.
	289	Possessing counterfeit coin.

Maximum Penalty 6.1–12 Months Imprisonment

(under enactments other than Crimes Act)

Electoral Act 1956	150	Corrupt or illegal practices.
Naval and Victualling Stores Act 1908	5 (1)	Knowingly receiving or selling marked stores.
Overseas Investment Act 1973	17	Offences relating to overseas investment.
Police Offences Act 1927	53A	Unlawfully carrying an offensive weapon in a public place.
Post Office Act 1959	57	Wrongfully opening or delaying postal article (not by officer).
	95	Sending false telegram.
	98	Wrongfully opening or delaying telegram (not by officer).
	108	Illegal use of telephone.
	158	Interference with telephone system.
	232	Personation of officer.
Reserve Bank of N.Z. Act 1964	25 (3)	Offences relating to conversion of currency.
	51	Offences against regulations.

Maximum Penalty of 1.1–3 Years Imprisonment

Crimes Act 1961	87	Riot
	111	False statements or declarations.
	114	Use of purported affidavit or declaration.
	124	Distribution or exhibition of indecent matter.
	125	Indecent act in public place.
	126	Indecent act with intent to insult or offend.
	144	Indecency with animal.
	150	Misconduct in respect of human remains.
	181	Concealing dead body of child.
	190	Injuring by unlawful act.
	192	Aggravated assault.
	193	Assault with intent to injure.
	194	Assault on child or by male on female.
	200 (2)	Poisoning with intent to cause inconvenience or annoyance.
	202	Permitting trap to remain.
	206	Bigamy (with knowledge).
	207	Feigned marriage (with knowledge).
	228 (2)	Attempted conversion or unlawful interference with motor vehicle etc.
	231	Fraudulently destroying document (lowest maximum sentence—3 years).
	232	Fraudulent concealment.
	233	Bringing into New Zealand things stolen.
	244	Being disguised or in possession of instruments for burglary.
	254	False statement by public officer.
	262	Taking reward for recovery of stolen goods.
	290	Uttering counterfeit or non-current coin.
	305	Providing explosive to commit crime.
	307	Threatening to destroy property.
	308	Threatening acts.
	309	Conspiring to prevent collection of rates or taxes.

Maximum Penalty 1.1–2 Years Imprisonment

(under enactments other than Crimes Act)

Animals Act 1967	21	Introducing organism causing disease.
	38	Wilfully communicating disease.
	88	Wrongful alteration of brand or approved mark.
	102	Making knowingly false declaration.
Auctioneers Act 1928	38	Misappropriation or falsifying accounts.
Births and Deaths Registration Act 1951	48	Making false statement.
Building Societies Act 1965	29	Contravention of provisions.
	30	Contravention of provisions.
	64	Contravention of provisions.
	70	Contravention of provisions
	132	Offences in relation to property.
	133	False statements in documents.
Chattels Transfer Act 1924	58	Defrauding or attempting to defraud grantee of instrument by way of security.
Companies Special Investigations Act 1958	28	Destroying or altering records.
Cornish Companies Management Act 1974	22	Destroying or altering records.
Customs Act 1966	246	Wilfully false declarations.
Designs Act 1953	42	Offences in respect of designs required to be kept secret.
	43	Falsification of register, etc.
Distillation Act 1971	86	Stealing spirits from distillery, etc.
Electoral Act 1956	130	Offences by Returning Officer in respect of ballot boxes and ballot papers.
Friendly Societies Act 1909	75	Wrongful supply of rules.
Harbours Act 1950	247	Wilful damage to works.
Local Election and Polls Act 1976	56 (4)	Offences in respect of voting, etc.
Magistrates' Courts Act 1947	116A	False statement of service of documents.
Marriage Act 1955	60	False statements, etc.
Mental Health Act 1969	112	Neglect or ill treatment of mentally disordered person.
	113 (1)	Sexual intercourse with mentally disordered female.
Merchandise Marks Act 1954	18	Contravention of Act.
Misuse of Drugs Act 1975	12	Use of premises or vehicle.
Moneylenders Act 1908	6	False statements, etc., by moneylenders.
Naval and Victualling Stores Act 1908	4	Destroying marks with intent to steal stores.
Patents Act 1953	25 (6)	Breach of secrecy as to certain inventions.

	26 (8)	Unlawful publication of information as to inventions relating to atomic energy.
	105	Falsification of register of patents.
Plant Varieties Act 1973	35 (1)	Falsification of register, etc.
Post Office Act 1959	51 (2)	Theft of money from postal articles.
	56	Wrongful opening or delaying of postal article by officer.
	61	Fraudulently retaining or destroying a postal article.
	62	Making a false statement.
	97	Wrongful opening or delaying of telegram by officer.
	102	Wrongful retaining of telegram
	104	Fraudulent statement regarding telegram.
Sales Tax Act 1974	68	Making false declaration.
Shipping and Seamen Act 1952	26	Offences as to certificates of competency.
	37	Offences as to agreements with crew.
	50 (8)	Offences as to certificates of competency.
	63	Offences as to discharge of seamen.
	118	Forcing seaman ashore.
	119 (3)	Contravention of provisions.
	136 (7)	Offences as to certificates of competency.
	163	Misconduct endangering ship or life.
	177 (9)	Offences as to official log book.
	181 (10)	Offences as to engine room log book.
	229	Forgery of declaration of survey or certificate.
	257 (6)	Contravention of regulation as to load lines.
	269	Taking ship to sea with load line submerged.
	283	Forgery of load line and other certificates.
	287 (2)	Failure to observe collision regulations.
	289 (2)	Failure to render assistance after collision.
	292 (1)	Failure to assist persons in danger at sea.
	294 (5)	Failure to assist ships, aircraft, or persons in distress at sea.
	301	Offences in relation to anchors and chain cables.
	314 (1) (2)	Sending unseaworthy ship to sea.
	368 (7)	Forgery in salvage claims.
	395	Use of improper certificate of registry.
	411 (1)	Illegal transfers and mortgages of ships.
	439	Concealment of Commonwealth or assumption of foreign character of ship.
	457	Forgery, false declaration relation to registration of ships.
	494 (4)	Offences as to documents produced in evidence.
	498 (2)	Obstructing service of documents.
	503 (1)	Forgery or fraudulent alteration of forms.
Summary Proceedings Act 1957	29 (2)	False statement of service.
	181 (5)	False statement of service.
Syndicates Act 1973	17 (1)	Untrue statement in prospectus.
Trade Marks Act 1953	70	Falsification of register of trade marks.

Trustee Companies Management Act 1975	20	Destroying or altering records.

Maximum Penalty 2.1–3 Years Imprisonment

(under enactments other than Crimes Act)

Arms Act 1958	7A	Unlawful possession of pistols.
	16B	Unlawful carriage, possession of firearms etc.
Estate and Gift Duties Act 1968	95 (1)	Delivery of false document with intent to evade duty, penalty or interest.
Insolvency Act 1967	126	Crimes by bankrupt.
	127 (2)	Crimes by bankrupt.
Land Drainage Act 1908	82	Wilful damage to works.
Land Transfer Act 1952	225	Fraudulently procuring certificate of title, etc.
Medical Practitioners Act 1968	35	Fraudulently procuring registration.
Municipal Corporations Act 1954	374	Wilful damage to drainage works or waterworks.
Post Office Act 1959	53	Theft of postal article by person other than officer.
Soil Conservation and Rivers Control Act 1941	154	Wilful damage to watercourse or works.
Transport Act 1962	56 (1A)	Causing bodily injury or death through careless use of motor vehicle if defendant exceeded speed limit or drove under influence of drink etc.
Veterinary Surgeons Act 1956	22	Offences as to registration.

Maximum Penalty 3.1–5 Years Imprisonment

Crimes Act 1961	110	False oaths.
	120	Escape from lawful custody.
	122	Assisting escape of mentally defective person under detention for offence.
	136	Conspiracy to induce sexual intercourse.
	141	Indecency between men.
	147	Brothel keeping
	148	Living on earnings of prostitution.
	149	Procuring sexual intercourse.
	153	Duty of employers to provide necessaries.
	189 (2)	Injuring with intent to injure.
	195	Cruelty to child.
	202 (1)	Setting traps.
	203	Endangering transport in manner likely to injure.
	242	Entering with intent.
	243	Being armed with intent to break and enter.
	256	Concealing deeds and encumbrances.

	257	Conspiracy to defraud.
	268	Counterfeiting corporate seals.
	269	Sending false telegrams with intent to defraud.
	280	Imitating authorised marks.
	281	Imitating customary marks.
	286 (2)	Possession of filing etc. from impaired coin.
	297	Attempt to damage property by fire or explosive.
	298 (4)	Wilful damage.
	299	Wilful waste, or diversion of water, gas or electricity.
	300 (2)	Interfering with transport.

Maximum Penalty 3.1–4 Years Imprisonment

(under enactments other than Crimes Act)

Land Transfer Act 1952	226	Forging seal of Registrar.

Maximum Penalty 4.1–5 Years Imprisonment

Burial and Cremation Act 1964	56 (3)	Unlawful cremation.
Customs Act 1966	238	Influencing or resisting officer of Customs.
Finance Act 1915	65	Bribing officer of Customs.
Marriage Act 1955	58	False solemnisation of marriage.
	59	Falsely pretending to be officiating minister.
Post Office Act 1959	47	Putting fire or dangerous substance in letterbox.
	49	Posting of dangerous substance.
	55	Stealing or unlawfully opening mail.
	99	Theft, secreting or destruction of telegram.
	137	Issuing of money order etc. with fradulent intent.
Real Estate Agents Act 1976	59	Rendering false account.
Shipping and Seamen Act 1952	115	Fraudulently obtaining property of deceased seaman or seamen left abroad.
	354 (1)	Offences in respect of wreck.
Transport Act 1962	35 (1)	Driving while disqualified or contrary to terms of limited licence (2nd or subsequen offence).
	55 (1)	Causing bodily injury or death through reckless or dangerous driving.
	55 (2)	Causing bodily injury or death through driving while under influence of drink etc.
	65 (4)	Failing to stop after accident and render assistance to injured person.

Maximum Penalty 5.1–7 Years Imprisonment

Crimes Act 1961	118	Assisting escape of prisoners of war or internees.
	119	Breaking penal institution.
	121	Assisting escape from lawful custody.

131	Sexual intercourse with girl under care or protection.
134	Sexual intercourse or indecency with girl between 12 and 16.
135	Indecent assault on woman or girl.
137	Inducing sexual intercourse under pretence of marriage.
138	Sexual intercourse with severely subnormal woman or girl.
139	Indecent act between woman and girl.
151	Duty to provide the necessaries of life.
152	Duty of parent or guardian to provide necessaries.
154	Abandoning child under six.
185	Female procuring her own miscarriage.
186	Supplying means of procuring abortion.
206	Bigamy (without knowledge).
207	Feigned marriage (without knowledge).
210	Abduction of child under 16.
227 (a) (b)	Theft.
228 (1)	Conversion.
229A	Taking or dealing with certain documents with intent to defraud.
230	Criminal breach of trust.
237	Assault with intent to rob.
238 (3)	Forcing to do unlawful act or restraining from lawful act.
239	Demanding with intent to steal.
246 (1)	Obtaining by false pretence—valuable security.
246 (2) (a)	Obtaining by false pretence—thing capable of being stolen—value exceeds $40.
248	Personation.
249	Acknowledging instrument in false name.
252	False accounting by officer or member of body corporate.
253	False accounting by employee.
255	Issuing false dividend warrants.
258 (1) (a)	Receiving property dishonestly obtained valued at more than $40.
271	Possession of forged bank notes.
275	Counterfeiting stamps.
277	Falsifying extracts from registers.
278	Uttering false certificates.
279	Forging certificates.
286 (1)	Impairing coin.
291	Buying or selling counterfeit coin.
292	Importing or exporting counterfeit coin.
296	Damage to other property by fire or explosive.
298 (2) (3)	Wilful damage.
300 (1)	Interfering with means of transport.
303	Interfering with signals for guidance or control of ships and aircraft.

	304	Interfering with mines.
	306	Threatening to kill or do grievous bodily harm.

Maximum Penalty 5.1–7 Years Imprisonment

(under enactments other than Crimes Act)

Misuse of Drugs Act 1975	9	Cultivation of prohibited plants.
	10	Aiding offences against corresponding law of another country.
	11	Theft, etc., of controlled drugs.
Narcotics Act 1965	6A	Theft, etc. of narcotics.
Official Secrets Act 1951	5	Unlawful use of uniforms, forgery, personation, false documents, etc.
	6	Wrongful communication of information.
	8	Interfering with police or persons on guard.
	10	Attempts, incitement.
	11	Duty to give information as to offences.
Post Office Act 1959	51 (1)	Theft of postal article by officer.
	52	Theft of money from postal articles.
	54	Receiving of postal matter dishonestly obtained.

Maximum Penalty 7.1–10 Years Imprisonment

Crimes Act 1961	130	Incest.
	132 (2)	Attempted sexual intercourse with girl under 12.
	133	Indecency with girl under 12.
	140	Indecency between man and boy.
	146	Keeping place of resort for homosexual acts.
	189	Injuring with intent to cause grievous harm.
	234	Robbery.
	241	Burglary.
	250	False statement by promoter.
	251	Falsifying accounts relating to public funds.
	265	Forgery.
	266	Uttering false documents.
	266A	Altering or reproducing document with intent to defraud.
	266B	Using altered or reproduced document with intent to defraud.
	267	Counterfeiting public seals.
	270	Procuring execution of document by fraud.
	272	Drawing document without authority.
	273	Using probate obtained by forgery or perjury.
	274	Papers or implements for forgery.
	276	Falsifying registers.
	283	Preparations for coining.
	284	Counterfeiting coin.
	285	Altering coin.
	295	Attempted arson.
	302	Attempting to wreck ship or aircraft.

Maximum Penalty 10.1–14 Years Imprisonment

Crimes Act 1961	132 (1)	Sexual intercourse with girl under 12.
	203 (1)	Endangering transport with intent to injure.
	208	Abduction of woman or girl.
	236	Compelling execution of documents by force.
	238	Extortion by certain threats.
	294	Arson.
	298 (1)	Wilful damage.
	301	Wrecking ship or aircraft.

Maximum Penalty 7.1–14 Years Imprisonment

(under enactments other than Crimes Act)

Misuse of Drugs Act 1975	6	Dealing with controlled drugs.
	10	Aiding offences against corresponding law of another country.
Narcotics Act 1965	5	Dealing with narcotics.
	5A	Aiding offences against corresponding law of another country.

APPENDIX 2

EXTRACT FROM THE JUDGES ACT—CANADA

CHAPTER 16 (2nd Supp.)

An Act to amend the Judges Act

[1970–71–72, c. 55]

CANADIAN JUDICIAL COUNCIL

30. (1) A Council is hereby established to be known as the Canadian Judicial Council, (hereinafter referred to as "the Council") consisting of the Chief Justice of Canada, who shall be the chairman of the Council, and the chief justice and associate chief justice of each superior court or branch or division thereof.

(2) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in the superior, district and county courts, including, without limiting the generality of the foregoing,

(a) the establishing from time to time of a conference of chief justices;
(b) the establishing from time to time of seminars for the continuing education of judges; and
(c) subject to section 31, the making of the inquiries and the investigating of any complaint or allegation described in that section.

(3) The Council shall meet at least once a year.

(4) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

(5) The Council may make by-laws

(a) respecting the calling of meetings of the Council;
(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and
(c) respecting the conduct of inquiries and investigations described in section 31.

(6) Each member of the Council may appoint a judge of his court to be a substitute member of the Council and such substitute member shall act as a member of the Council during any period in which he is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

(7) The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 31.

31. (1) The Council shall, at the request of the Minister of Justice of Canada or the attorney general of a province, commence an inquiry as to whether a judge of a superior, district or county court should be removed from office for any of the reasons set out in paragraphs 32 (2) (a) to (d).

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior, district or county court.

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister of Justice of Canada, shall constitute an Inquiry Committee.

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if he is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel him to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of opinion that such publication is not in the public interest.

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister of Justice of Canada requires that it be held in public.

(7) A judge in respect of whom an inquiry or investigation under this section is to be made shall be given reasonable notice of the subject matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity by himself or his counsel of being heard thereat and of cross-examining witnesses and of adducing evidence on his own behalf.

32. (1) After an inquiry or investigation under section 31 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister of Justice of Canada.

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made, has become incapacitated or disabled from the due execution of his office by reason of

(a) age or infirmity,
(b) having been guilty of misconduct,
(c) having failed in the due execution of his office, or
(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office,

the Council, in its report to the Minister of Justice of Canada under subsection (1), may recommend that the judge be removed from office and that he cease to be paid any further salary.

(3) A judge who is found by the Governor in Council, upon report made to the Minister of Justice of Canada by the Council, to have become incapacitated or disabled from the due execution of his office shall, notwithstanding anything in this Act, cease to be paid or to receive or to be entitled to receive any further salary if the Council so recommends.

(4) Notwithstanding subsection (3); the Governor in Council may grant leave of absence to any judge found, pursuant to subsection (2), to be

incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

(5) The Governor in Council may, on the recommendation of the Minister of Justice of Canada, after the receipt of a report described in subsection (1), remove a judge of a county court from office.

(6) The Governor in Council may grant to any judge found, pursuant to subsection (3), to be incapacitated or disabled, if he resigns his office, the annuity that the Governor in Council might have granted him if he had resigned, at the time when such finding was made by the Governor in Council.

(7) Any order of the Governor in Council made pursuant to subsection (5) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made, or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

11. Section 35 of the said Act is amended by adding thereto the following subsection:

"(4) A reference in this section to a judge of a superior court does not include a supernumerary judge of that court."

12. Section 33 of the *Members of Parliament Retiring Allowances Act* does not apply in respect of a judge.

APPENDIX 3

POSITION DESCRIPTION

JUDGE'S ASSOCIATE

August 1977

1. **Duties and Objectives**

To give personal assistance to a Judge of the Supreme Court with the aim of giving him maximum relief from all avoidable matters of detail and routine.

To act as his private secretary in respect of his official duties and personal business and appointments related thereto.

"In Court" duties:

- to prepare the Judge's requirements as to books and papers, and (for the Associate's own use) preliminary information for each case;
- to record evidence as spoken directly onto a typewriter, mostly verbatim (sometimes by ex tempore interpretation into a narrative form) and always with complete accuracy, for immediate use;
- as required, to take in shorthand and/or on tape recorder all other proceedings of the Court (other than the writing of the court register).

Sittings in other centres:

- to accompany the Judge to perform the above duties, including necessary preparatory work for the first two trials and assembly and packing of all requirements;
- to correspond with Registrars and attend to all travel details, bookings, payments, luggage, etc.
- upon return, to unpack and prepare for Monday work.

Accounting:

To operate an Imprest account with the Reserve Bank (in the Associate's name) covering expenses related to the official duties of the Judge and his Associate—limit $2,000 per transaction, annual volume approximately $12,000; and to attend to personal petty cash and personal accounting (as required) for the Judge.

Generally:

To carry out all correspondence as directed (and also upon the Associate's own initiative), to file and/or bind all papers, judgments, etc., to update current law bulletins, prepare meeting papers, and attend to robing requirements (including ceremonial occasions).

2. **Qualifications and Experience Required**

Age approximately 25 or over, single, or otherwise unattached.

Vocabulary must be, or develop to be, extraordinarily wide (including legal, medical and other technical terms used in evidence) and grammar and spelling accurate.

Shorthand/typing speeds, minimums of 150/90 w.p.m. respectively (compared with average good general purpose typing 70 w.p.m.).

Must be highly intelligent, perceptive, capable of intense and sustained concentration, and precise and accurate in all work.

Personal requirements are integrity, self-motivation, and an acceptable degree of social grace, neat and unobtrusive dress and a sense of vocation strong enough to place the duties of office above personal convenience.

3. Use of Qualifications and Experience

The duties of this office encompass a wide variety of activities and all the above requirements are constantly needed to cope with the complexities of the position—often to be met in urgency and/or sustained pressure.

4. Public Relations

The Associate is regularly dealing or communicating either directly or as the Judge's intermediary with a wide range of court officers, legal practitioners and their staff, and others in respect of travel, business and social arrangements.

The position requires courtesy, tact and persuasiveness, with ability to motivate and co-operate with others.

5. Work Patterns and Rules

The Associate is instructed by the Judge as to any special requirements but generally is expected to initiate action and adjust methods etc. to suit circumstances. Many of the activities are clearly guided by established Court procedures or by general usage or customs. However, a fair proportion of the activities require original initiative.

In all Court work, an extremely high degree of accuracy is required (complete accuracy in judgments) and in all typing and shorthand work, constant checking to record correct names and facts.

6. Freedom to Act

Apart from relatively infrequent direct instructions from the Judge and the strict requirements of recording and known customs and usage, the Associate has the obligation and complete freedom to act and to decide how to perform the duties or to solve any problems arising.

7. Accountability

The Associate reports to and is solely responsible to the Judge. It is a sole position of absolute confidentiality with no assistant or assistance available.

The Associate is totally responsible for the competent performance of all duties of the office.

8. Working Hours and Environment

Basic hours—usually approximately 9 a.m. to 6 p.m. weekdays. Lunch hours are mostly used to carry out ex-Court and private secretarial duties.

Court duties, usually 10 a.m. to 5 p.m. weekdays, occur on all but approximately 4 days per month, which days are used catching up on ex-Court work.

Extra hours are common and (except for 86c per hour for weekend travel)

are not paid for. They usually arise from late sittings and tidying-up after sittings in other centres. For example:

- Late juries about 15/20 times per annum averaging about 3 hours after 6 p.m.
- After sittings in other centres, tidying-up and completion of urgent outstanding work—usually about 3 hours during the weekend.
- Any other time required to catch up or for social assistance and travel.

The uncertainties arising from the need to work irregular hours and to meet unexpected demands makes it difficult to make or keep personal appointments.

9. **General Comments**

This appears to be a most demanding position. It is a one-person job with no relief from duties, with attendance to be maintained through minor illnesses. It is severely demanding on physical, emotional and mental resources and interferes with any development of a regular pattern of personal life, e.g. medical, dental and social appointments and shopping (especially provisioning on return from sittings in other centres).

It would appear that it requires personal effort and sacrifice beyond that usual to regular employment in public service or in commerce.

APPENDIX 4

DUTIES OF A FLOATING ASSOCIATE

Duties would include:

1. Assisting with typing of judgments etc., and relieving in court as required. Courts are too vulnerable, relying as they do on full-time attendance of the associates for each and every day of the Supreme Court sittings throughout the year. The availability of an additional associate, who is familiar with all requirements, would ease the workload and solve any problems in the case of temporary absence or sickness.

2. Travelling on circuit with other judges as the need arises. The availability of an associate to travel on circuit to relieve an associate who is unable to travel because of illness, would be a great advantage.

3. Training new associates. An associate receives no training on her appointment. She has to manage as best she can, applying her initiative and secretarial experience and eliciting any advice she may from other associates in whatever time they can spare between court sittings. When circumstances permit, there is a brief hand-over from the retiring associate, but a new appointee generally has an unsatisfactory start in a complex and responsible assignment, where she is immediately expected to master the difficult technique of recording evidence. A period of training before and after she commences, given by an experienced associate, would be an advantage to her and her employing judge. Training would very much depend on the new appointee and should therefore be flexible; probably no more than two weeks would be required.

4. Training District Court reporters. Undertaking initial training for District Court jury reporters in co-operation with their supervisor (further comments under the section on recording of evidence, paragraph 841).

5. Undertaking enquiries on behalf of judges and associates when they are pressed for time.

6. Progressively compiling and up-dating a working manual for associates, for easy reference. This would combine such notes as are in existence into a common manual, covering procedures and personnel, which would assist in training new associates.

7. Assisting the judges' clerks to keep work up to date in the judges' library.

8. Catching up on her own judge's work and preparing for his return.

APPENDIX 5

NEW ZEALAND LAW SOCIETY CODE OF ETHICS CONDUCT OF PROCEEDINGS

4.17

Defence Access to D.S.I.R. Examinations.

The following procedure has been issued as a Police instruction by the Commissioner of Police and agreed to by the Society with the proviso that such agreement and recommendation to practitioners to adopt the general instructions cannot bind practitioners in the conduct of an individual case:

(1) All requests from the defence for details of D.S.I.R. analysts' reports, or for discussion with a D.S.I.R. analyst, or for a sample for independant analysis shall be made through the prosecutor and not direct to the D.S.I.R.

(2) Prosecutors shall on request advise the defence of the general findings of an analysis or examination by the D.S.I.R., and where the certificate is in such general terms, a copy may be supplied.

(3) If the defence wishes to ascertain what general technique was employed by an analyst their request shall be given in writing to the prosecutor and a written answer shall be supplied by the analyst through the prosecutor, but exact steps shall not be given.

(4) When a D.S.I.R. analysis or test favours the defendant and it is not intended to call the analyst, the report shall be forwarded to the defence without delay even if there has been no request for it.

(5) When the defence requests in writing a sample for independant analysis, and one is available, it shall be supplied by the D.S.I.R.; provided that, in the case of a narcotic or substance governed by the Poisons Act or any other act requiring a permit for possession, the sample shall be tested in the presence of a D.S.I.R. analyst, who will virtually retain possession.

(6) The defence will not be permitted to test the actual Police exhibit, e.g. a blood stained shirt. Permission for defence experts to be present during the examination or experimentation by the D.S.I.R. shall be granted, unless after consultation with the D.S.I.R. and prosecution good reason exists for a refusal.

(7) If the defence request that the D.S.I.R. perform a particular test on an exhibit the D.S.I.R. shall carry it out, unless after consultation with the prosecution good reason exists for refusal.

(8) If the defence supplies material requesting D.S.I.R. analysis or examination, etc., thereof, this shall be undertaken, unless after consultation with the prosecution good reason exists for refusal.

(9) Any query by the Police or an analyst as to the interpretation or implementation of this General Instruction or for guidance as to situations not covered herein shall be referrred to the Commissioner (Legal Section) or the Director of the Chemistry Division of the D.S.I.R.

APPENDIX 6

ORGANISATIONS AND PERSONS WHO MADE SUBMISSIONS DURING THE HEARINGS OF THE ROYAL COMMISSION ON THE COURTS

Headnote:

Two copies of all the submissions listed in Appendix A below together with two copies of written evidence and the transcription of oral evidence, have been deposited with the General Assembly Library, and one copy with the University Law Faculty Library in Auckland, Wellington, Christchurch and Dunedin

Organisation	Submission Number	Presented by
Anglican Church, Waikato Diocese	56	Archdeacon M. J. Mills Canon Clarke P. Phillips
Anglican Women, Association of	98	Mrs. M. Dell Mrs. J. Hesketh
Association of Anglican Women	98	"
Association of Maori Graduates	69	A. J. Mahuika H. B. Marumaru Miss P. A. K. McDonald
Auckland Branch, Family Law Reform Association (Inc.)	30	G. K. Bunce R. P. A. Crickett K. Morrison
Auckland Branch, N.Z. Association of Probation Officers (Inc.)	37	E. G. Coyle
Auckland Branch, N.Z. Association of Social Workers	138	G. M. Harbutt N. F. Smith
Auckland Committee on Racism and Discrimination (A.C.O.R.D.)	35	Dr O. Sutherland Mrs T. Samoa Mrs E. Ilolahia Ms R. M. Evans Mrs T. Harawira
Auckland District Law Society	152	B. D. Lynch B. H. Slane D. F. Dugdale L. J. Newhook S. W. Halstead Ms S. Elias J. G. Adams
Auckland District Maori Council	25	Dr R. Walker Mrs E. N. Pirie S. George N. P. Puriri
	122	Dr R. Walker M. J. A. Brown
Auckland, N.Z. Institute of Legal Executives Inc.	83	H. T. D. Knight R. S. Winterburn K. R. Passmore T. J. Nash
Ayo, G.	139	Self

Organisation	Submission Number	Presented by
Badger, Miss J. E.	112	Put in by Secretary
Baragwanath, W. D.	39	Self
Barbour, D. A.	127A	Put in by Secretary
Barker, The Hon. Mr Justice	173	Self
Barton, Doogue and Ellis, Messrs	147	J. A. Doogue A. A. T. Ellis
Boorman, S.	104	Self
Booth, P. J.	67	Self
Boxing Association Inc., New Zealand	80	J. B. Kent
Bredin, A. K. and T. H.	19	Put in by Secretary
Bremner, F. W., S.M.	161	Self
Brickell, R. G.	141	Put in by Secretary
Burn, J. F.	92	Self
Butler, Mrs E. I.	102	D. J. More
Canterbury District Law Society	125	N. W. Williamson R. Kerr
Citizens Association for Racial Equality Inc., (C.A.R.E.)	136	D. V. Williams
Chappell, Dr Joan	55	Self Dr L. I. B. Miller
Chief Justice	117	The Rt. Hon. Sir Richa Wild
Chief Ombudsman	163	G. R. Laking
Chisholm, F.	128	Self
Christchurch Probation Officers	70	Ms D. Crossan Miss A. Stewart
Civil Liberties, N.Z. Council for	43	N. B. Dunning
Collins, R. B.	134	Self
Committee of Investigation into Legal Ethics and Malpractice (C.I.L.E.M.)	99	Mrs A. B. Costello
Community Liaison Group (Wakari/Dunedin)	87	Dr R. G. Muir
Costello, Mrs A. B.	4	Withdrawn
Court Officers' Group	127	G. F. Soper J. B. Curran P. J. Cunneen K. Seebeck C. G. Crowhurst R. J. Seton
Crimanon	140	F. Harris Miss De Jong S. A. Sim
Criminal Law Reform Committee	154	P. B. Temm, Q.C. D. A. S. Ward G. David
Croot, Mrs L. M.	54	Self
Crowhurst, C. G., Registrar Magistrate's Court, Wellington	184	Put in by consent
Davey, Dr C. L.	72	Put in by Secretary
Department of Justice	2 111 182	G. S. Orr M. P. Smith B. J. Cameron

Organisation	Submission Number	Presented by
Department of Scientific and Industrial Research	155	F. Hurst
Department of Social Welfare	64	S. J. Callahan R. Te Punga J. J. Gavin
Department, Valuation	75	M. R. Mander
Doogue, Ellis and Barton, Messrs	75	J. A. Doogue A. A. T. Ellis
Duggan, L. E.	96	Put in by Secretary
Elias, Ms S. and Horrocks, C. E.	137	Self and C. E. Horrocks
Ellis, Doogue and Barton, Messrs	147	J. A. Doogue A. A. T. Ellis
Family Law Reform Association, Auckland (Inc.)	30	G. K. Bunce R. P. A. Crickett K. Morrison
Family Law Reform Association, Wellington (Inc.)	58	J. E. Pomeroy
Fitzpatrick, B. V.	34	Self
Foote, Mrs M. E.	63	Self
Friends at Court Society, Christchurch	20	Mrs Z. M. Hannah
Friends at Court Society, Dunedin	51	Mrs L. E. Wallis Mrs J. Hadley Mrs D. Byrne
Gardner, Mrs A. E.	78	Self
Gillanders, G. H.	150	S. J. Bird
Green, J., J.P.	114	Self
Grierson, B. M.	31	Self
Hall, R.	14	Put in by Secretary
Hamilton District Law Society	107	D. L. Tompkins, Q.C. R. G. Hammond P. F. Feenstra J. E. S. Allen J. D. Bathgate P. E. G. Hosking P. Skelton
Hammond, R. G.	65	Self
Hanan, J. G.	143	Self
Hay, G. A.	5	Put in by Secretary
Hellewell, Mrs P.	110	Put in by Secretary
Hewland, Dr R.	42	Self
Hillyer, P. G., Q.C. (Council of Legal Research Foundation)	146	Self
Horrocks, C. E. and Elias, Ms S.	137	Self and Ms S. Elias
Horsfall, R. E.	82	Self
Howard League for Penal Reform, N.Z.	33A	F. C. Jordan
Inner City Ministry	86	D. J. Robinson Mrs M. J. Malcolm
Intellectually Handicapped, New Zealand Society for the	97	Dr D. M. G. Beasley R. G. Mathews
Jackson, C. C.	13	Put in by D. J. More
Jeffreys, Rev G. A.	28	Self
Jordan, F. C.	33	Withdrawn

Organisation	Submission Number	Presented by
Judges—		
Barker, The Hon. Mr Justice	173	Self
Mahon, The Hon. Mr Justice	176	Put in by Secretary
McMullin, The Hon. Mr Justice	156	Self
Moller, The Hon. Mr Justice	174	Self
Perry, The Hon. Sir Clifford	175	Self
Speight, The Hon. Mr Justice	175	Self
Thomson, Judge J. B.	148	Self
Wild, The Rt. Hon. Sir Richard, Chief Justice	117	Self
Justice Department	2	G. S. Orr
	111	M. P. Smith
	182	B. J. Cameron
Justices, Royal Federation of New Zealand, Association Inc.	3	J. L. Noakes
	169	Dr D. G. McLachlan G. C. Kent
	183	Put in by Sir James Wicks
Karklins, A.	17	Self
Kawakawa Maori Executive	22	Mrs H. K. Nathan
Kawiti, W. B. and Ngatahine Tribe	23	Self
Keesing, A. G. and Others (Lower Hutt Practitioners)	160	A. G. Keesing
Kemp, B. J.	16	Put in by Secretary
Laking, G. R., Chief Ombudsman	163	Self
Law Societies:		
Auckland	152	B. D. Lynch B. H. Slane D. F. Dugdale L. J. Newhook S. W. Halstead Ms S. Elias J. G. Adams
Canterbury	125	N. W. Williamson R. Kerr
Hamilton	107	D. L. Tompkins, Q.C. R. G. Hammond P. F. Feenstra J. E. S. Allen J. D. Bathgate P. E. G. Hosking P. Skelton
Manawatu	157	J. H. Williams
New Zealand:		
Part I	41	L. J. Castle W. M. Rodgers E. W. Thomas
Part II	181	L. H. Southwick, Q.C. W. M. Rodgers E. W. Thomas
Otago	124	M. H. N. Haggitt D. J. More
South Canterbury	172	Put in by Secretary

Organisation	Submission Number	Presented by
Wellington (Magistrate's Court Committee)	162	J. H. C. Larsen R. M. Crotty J. A. L. Gibson
Law Students' Association of New Zealand	121	M. G. Stevens C. Chapman G. Sharrock
Leary, E. P.	149	Self
Legal Association of New Zealand	129	T. M. Abbott K. J. Osborne
Legal Association of New Zealand, Otago Branch	113	J. B. Robertson
Legal Executives Inc., N.Z. Institute of, Auckland	83	H. T. D. Knight R. S. Winterburn K. R. Passmore T. J. Nash
Legal Research Foundation, Council of	146	P. G. Hillyer, Q.C.
Legge, A. A.	66	Put in by Secretary
Lewin, A. J., J.P.	131	Put in by Secretary
Locker, Dr R. H.	73	Put in by Secretary
Loughnan, Ms J.	61	Self
Love, Dr H. G. I.	12, 119	Self
Lower Hutt Practitioners (A. G. Keesing and others)	160	A. G. Keesing
Ludbrook, R.	166	Put in by Secretary
Magistrates:		
Executive	144, 167	Sir James Wicks S.M. W. J. Mitchell S.M. F. G. Paterson S.M. P. J. Trapski S.M.
Waikato	88	T. B. Mooney S.M.
Waikato/Bay of Plenty	171	Put in by Secretary
Bremner, F. W., S.M.	161	Self
Patterson, J. K., S.M.	68	Self
Sullivan, D. J., S.M.	168	Self
Turner, A. R., S.M.	145	Self
Magistrate's Court Committee, Wellington District Law Society	162	J. H. C. Larsen R. M. Crotty J. A. L. Gibson
Mahon, The Hon. Mr Justice	176	Put in by Secretary
Malloy, M. O.	10	Self
Maori Committee, Rahiri	142	Put in by Secretary
Maori Council, Auckland District	25	Dr R. Walker Mrs E. N. Pirie S. George N. P. Puriri
	122	Dr R. Walker M. J. A. Brown
Maori Council, New Zealand	151	N. A. Watene W. Jarman T. K. Royal K. Workman M. Bennett

Organisation	Submission Number	Presented by
Maori Graduates' Association	69	A. J. Mahuika H. B. Marumaru Miss P. A. K. McDonald
Maori Women's Welfare League	118	Mrs E. Murchie Miss A. Delamere
– Otara	62	Put in by Secretary
– Taumutu	26	Put in by Secretary
– Te Rau	62	Put in by Secretary
– Te Rongo Pai	62	Put in by Secretary
Manawatu District Law Society	157	J. H. Williams
Married Women's Association of New Zealand (Inc.), Auckland	24	Dr A. H. Morgan Mrs E. N. Pirie Mrs D. A. Hodren Mrs K. I. Murphy
Mathews, M. J.	11	Self
McMullin, The Hon. Mr Justice	156	Self
Miller, C. N. H.	40	Self
Millman, K. R. J. and P. J.	52	Put in by Secretary
Ministry of Transport	50	A. J. Edwards A. M. Roxburgh
Moller, The Hon. Mr Justice	174	Self
Moore, Miss M. L.	105	Self
More, D. J.	130	Self
Morgan, H. P. and J. E.	7	Selves
Morrison, Mrs I. McG.	49	Self
Mortimer, J. B.	8	Put in by Secretary
Muir, I.	109	Self
National Council of Women	76	Mrs D. J. Horsman Mrs G. Hollander
National Marriage Guidance Council	153	I. W. Jenkin R. F. Pethig
National Organisation for Women, Christchurch Branch	123	Mrs A. R. Elstob
Nelson, Dr D. F. and Shanahan, Dr R.	164	Put in by Secretary
New Zealand Association of Probation Officers	36	B. J. McKenzie
New Zealand Association of Probation Officers (Inc.), Auckland Branch	37	E. G. Coyle
New Zealand Association of Social Workers, Auckland Branch	138	G. M. Harbutt N. F. Smith
New Zealand Boxing Association Inc.	80	J. B. Kent
New Zealand Council for Civil Liberties	43	N. B. Dunning
New Zealand Council of Social Service	71	E. C. Gallen Mrs A. Reeves J. Jenkin
New Zealand Federation of University Women	85	Mrs S. R. Cartwright Mrs J. Bodmin Mrs J. Fish
New Zealand Howard League for Penal Reform	33	F. C. Jordan
New Zealand Institute of Legal Executives Inc., Auckland	83	H. T. D. Knight R. S. Winterburn K. R. Passmore T. J. Nash

Organisation	Submission Number	Presented by
New Zealand Institute of Valuers	115	J. N. B. Wall A. L. McAlister
New Zealand Law Society:		
Part I	41	L. J. Castle W. M. Rodgers E. W. Thomas
Part II	181	L. H. Southwick, Q.C. W. M. Rodgers E. W. Thomas
New Zealand Law Students' Association	121	M. G. Stevens C. Chapman G. Sharrock
New Zealand Legal Association, Christchurch Branch	129	T. M. Abbott K. J. Osborne
New Zealand Legal Association, Otago Branch	113	J. B. Robertson
New Zealand Maori Council	151	N. A. Watene W. Jarman T. K. Royal K. Workman M. Bennett
New Zealand Organisation of Man Inc.	48	J. M. Henderson D. Huddlestone A. F. Reid
New Zealand Police	44	Senior Sergeant D. Kerr Inspector P. Mears
New Zealand Public Service Association	81	P. A. Harris D. H. Thorp
New Zealand Society for the Intellectually Handicapped Inc.	97	Dr D. M. G. Beasley R. G. Mathews
Ngatahine Tribe and W. B. Kawiti	23	Self
North Canterbury Hospital Board Psychiatric Advisory Committee	90	Dr K. Zelas Dr J. Dobson
North Canterbury Hospital Board Working Party on Forensic Psychiatry	86	D. J. Robinson Mrs M. J. Malcolm
Omudsmen:		
Sir Guy Powles	135	Put in by Secretary
G. R. Laking	163	Self
Organisation of Man N.Z. (Inc.)	48	J. M. Henderson D. Huddlestone A. F. Reid
Otago Branch, N.Z. Legal Association	113	J. B. Robertson
Otago District Law Society	124	M. H. N. Haggitt D. J. More
Otara Maori Women's Welfare League	62	Put in by Secretary
Pacific Islands Advisory Council, Wellington	133	N. Nawalowalo Mrs F. Kingston Rev. Te Pene L. Tapu
Palmer, D. M.	120	Self
Patterson, J. K., S.M.	68	Self
Pegler, A. C.	77	Self
Perry, The Hon. Sir Clifford	175	Self

Organisation	Submission Number	Presented by
Police Department	44	Senior Sergeant D. Kerr Inspector P. Mears
Powles, Sir Guy	135	Put in by Secretary
Probation Officers, Auckland	37	E. G. Coyle
Probation Officers, Christchurch	70	Ms D. Crossan Miss A. Stewart
Probation Officers, N.Z. Association	36	B. J. McKenzie
Psychiatric Advisory Committee, North Canterbury Hospital Board	90	Dr K. Zelas Dr J. Dobson
Psychiatric Advisory Committee, Forensic Working Party	89	Dr E. D. Anderson Dr H. R. Hewland Dr J. Dobson
Public Service Association	81	P. A. Harris D. H. Thorp
Race Relations Conciliator	95	H. D. B. Dansey
Rahiri Maori Committee	142	Put in by Secretary
Riddick, G.	74	Self
Robson, J.	116	Self
Rogers, E. J. (C.I.L.E.M.)	103	Self
Royal Federation of New Zealand Justices Association Inc.	3 169 183	J. L. Noakes Dr D. G. McLachlan G. C. Kent
Ryan, G.	29	Self
Ryan, K.	18	Self
Ryan, T. B.	101	Self
Salmon, P. M.	38	Self
Salvation Army	47	Commissioner Elliott Major Howie Captain D. Miller
Scientific and Industrial Research, Department of	155	F. Hurst
Scott, A. F.	6	Self
Selkirk, R. C.	170	Put in by Secretary
Shakes, B. R.	27	Put in by Secretary
Shanahan, Dr R. and Nelson, Dr D. F.	164	Put in by Secretary
Shenkin, B. K.	108	Self
Six A Incorporated	53 178	L. M. O'Reilly M. K. Brown Dr R. Hewland
Smellie, R. P.	59	Self
Social Service, N.Z. Council of	71	E. C. Gallen Mrs A. Reeves J. Jenkin
Social Welfare, Department of	64	S. J. Callahan R. Te Punga J. J. Gavin
Solicitor-General	1	R. C. Savage, Q.C.
South Canterbury District Law Society	172	Put in by Secretary
Speight, The Hon. Mr Justice	175	Self
Sprott, T. J.	94	P. J. Booth
Stanton, A. M.	45	Self
Stock Exchange Association of New Zealand	15	Put in by Secretary

Organisation	Submission Number	Presented by
Sullivan, D. J., S.M.	168	Self
Sunnyside Women's Prison	55	Dr J. Chappell Dr L. I. B. Miller
Taylor, R. and V.	9	Put in by Secretary
Taumutu Maori Women's Welfare League	26	Put in by Secretary
Te Rau Maori Women's Welfare League	62	Put in by Secretary
Te Rongo Pai Maori Women's Welfare League	62	Put in by Secretary
Thames-Coromandel District Council	132	
Thomson, Judge J. B.	148	Self
Thomson, J. C. A.	159	J. H. Williams
Transport, Ministry of	50	A. J. Edwards A. M. Roxburgh
Treadwell, P. J.	165	Put in by Secretary
Turner, A. R., S.M.	145	Self
University Women, New Zealand Federation of	85	Mrs S. R. Cartwright Mrs J. Bodmin Mrs J. Fish
Valuer-General	75	M. R. Mander
Valuers, New Zealand Institute of	115	J. N. B. Wall A. L. McAlister
Waikato Diocese, Anglican Church	56	Archdeacon M. J. Mills Canon Clarke, P. Phillips
Waikato Magistrates	88	T. B. Mooney, S.M.
Waikato/Bay of Plenty Magistrates	171	Put in by Secretary
Wakari/Dunedin Community Liaison Group	87	Dr R. G. Muir
Walters, H.	79	Self
Ward, A. G.	57	Self
Waring, Ms M., M.P.	180	Put in by Secretary
Weathered, E.	100	Put in by Secretary
Webb, Professor P. R. H.	60	Self
Wellington Branch, Family Law Reform Association	58	J. E. Pomeroy
Wellington District Law Society, Magistrate's Court Committee	162	J. H. C. Larsen R. M. Crotty J. A. L. Gibson
Wellington Regional Pacific Islands Advisory Council	133	N. Nawalowalo Mrs F. Kingston Rev. Te Pene L. Tapu
Wernham, M.	84	Self
Whakahou Youth Group	106	Put in by Secretary
Wild, The Rt. Hon. Sir Richard	117	Self
Williams, J. H.	159	Self
Williams, P. A. D.	21	Self
Williams, P. A.	93	Self
Willy, A. A. P.	126	Self
Winkel, E. R.	177	Put in by Secretary
Women, The National Organisation for	123	Mrs A. R. Elstob
Women, National Council of	76	Mrs D.J. Horsman Mrs G. Hollander
Wood, V.	46	Put in by Secretary
Wright, A. R.	91	Self

APPENDIX 7

OTHER PERSONS WHO GAVE EVIDENCE BEFORE THE COMMISSION

Aberhart, R. D.
Auckland Magistrates
Cope, S. W. S.
Curtin, F. L.
Doyle, Dr M. W.
Findlay, E. R.
Gibb, A. D.
Gilbert, R. J.
Hamilton, Ms J. M.
Lewis, Mrs D. M.
Lightband, G.
MacRae, Rev. K. D.
Read-Allen, Mrs C. L.
Treasury, The
Trelewan, J. R.
Watson, Mrs S.
Williams, D. R.

APPENDIX 8

OTHER PERSONS OR ORGANISATIONS WHO ASSISTED THE COMMISSION OVERSEAS

AUSTRALIA

Queensland:

Cook, D. J.	Senior Stipendiary Magistrate
Crommellin, B.	Registrar, Family Court of Australia
Demach, Hon. Mr Justice	Senior Judge, Family Court of Australia, Brisbane
Grant-Taylor, His Honour Judge	Chief Judge, District Court
Rawlings, E.	Chief Court Reporter, Court Reporting Bureau
White, W. J.	Under Secretary of Justice

New South Wales:

Bartley, R. J., S.M.	Parramatta Magistrates' Court
Carson, N. R.	Solicitor, Sydney
Cook, W. F., M.V.O.	Registrar, N.S.W. Bar Association
Downs, L. K.	Under Secretary of Justice
Glass, The Hon. Mr Justice	Judge of the Court of Appeal
Hope, The Hon. Mr Justice (and others)	Judge of the Court of Appeal
Larkins, The Hon. Mr Justice	Supreme Court of N.S.W.
Loveday, His Honour Judge	District Court
McGregor, D. G., Q.C. (and Association members)	President, N.S.W. Bar Association
Marshall, Mrs A.	Director of Court Counselling, Family Court
Milson, N.	Senior Administrative Officer, Magistrates' Court
Moffitt, The Hon. Mr Justice	President, N.S.W. Court of Appeal
Morris, D.	N.Z. Consulate General's office
O'Grady, E. J.	Commissioner of Legal Aid
Pople, H. I.	Assistant Executive Officer, Supreme Court
Purnell, H. F., Q.C.	Senior Public Defender
Reynolds, The Hon. Mr Justice	Judge of the Court of Appeal
Riedel, A.	Chief Executive Officer, Magistrates' Court Administration
Ross-Jones, The Hon. Mr Justice (and others)	Judge of the Family Court of Australia (N.S.W.)
Sheppard, The Hon. Mr Justice	Supreme Court of N.S.W.
Staunton, His Honour Chief Judge	Chief Judge, District Court
Street, The Hon. Sir Laurence, K.C.M.G.	Chief Justice of New South Wales
Turnbull, R. J.	N.Z. Consul-General
Walker, The Hon. F. J., M.L.A.	Attorney-General, N.S.W.
Warton, N. J.	Chief Executive Officer, Supreme Court

Wootten, The Hon. Mr Justice	Chairman, N.S.W. Law Reform Commission

South Australia:

Bray, The Hon. Dr	Chief Justice of South Australia
Cameron, I. E., S.M.	
Collins, H. G.	Sheriff of South Australia
Ligitwood, His Honour Chief Judge	Chief Judge, District Criminal Courts
Morris, L. D., J.P.	Principal Registrar, District Criminal Courts
Newman, His Honour Judge	Local and Criminal Court
Redman, J. J., S.M.	Former Supervising Stipendiary Magistrate
Stevens, Her Honour Judge	District Criminal Courts
Walters, The Hon. Mr Justice	Supreme Court
Ward, M., S.M.	Small Claims Court

Western Australia:

Ackland, His Honour Judge	District Court
Burrows, R. M.	New Zealand Consul
Burt, The Rt. Hon. Sir Francis, K.C.M.G.	(Former) Chief Justice (now Lieutenant-Governor of Western Australia)
Christie, R. M.	Under Secretary for Law, Crown Law Department
Davies, R. J.	Senior Crown Counsel
Franklin, J. A.	Executive Officer, Law Society of South Australia
Kay, His Honour Judge	District Court
Lavan, The Hon. Mr Justice	Supreme Court
Nichols, Miss H.	Department of Community Welfare
O'Connor, His Honour Judge	District Court
Pidgeon, His Honour Judge	Chairman of Judges, District Court
Robins, Mrs A.	Barrister and Solicitor
Robins, F. C., S.M.	
Staples, G. T.	Master, Supreme Court
Vodanovich, I. M.	Chief Probation and Parole Officer
Wallace, The Hon. Mr Justice	Supreme Court

CANADA

Montreal:

Giroeard, M. G.	Chief Prosecutor, Montreal
Tremblay, Prof. A. (and judges, lawyers, magistrates, and law lecturers)	Law School, Montreal University

Ottawa:

Eyre, His Excellency the Hon. D. J.	N.Z. High Commissioner

Quebec:

Acheson, M. H.	Ministère de la Justice
Cliche, His Honour Chief Judge	Chief Justice, Provincial Court

Dorrian, M. (and colleagues)	Director-General (Court Services)
Dussault, M. R.	Deputy Minister of Justice
Jacoby, Me. D.	Sous-Ministre Associé, Ministère de la Justice
Lemieux, Me. L.	Sous-Ministre Associé, Ministère de la Justice
Letourneau, M. G.	Director of Research
Longtin, Me. M.	Legislative Draughtsman
Pirearb, M. P.	Vice-President, Committee for Protection of the Young
Tellier, M. J.	President, Committee for Protection of the Young
Tremblay, F.	Sous-Ministre Associé, Ministère de la Justice
Vallee, The Hon. Me. Justice	Chief Justice of Quebec

Toronto:

Andrews, His Honour Chief Judge	Family Division
Arnup, The Hon. Mr Justice	Court of Appeal
Beaulieu, His Honour Judge	Family Division
Chester, S.	Executive Assistant to the Deputy Attorney General
Colter, His Honour Chief Judge	County and District Court
Hayes, His Honour Chief Judge	Provincial Court
Howland, The Hon. Mr Justice	Court of Appeal
Keel, R. G.	Law Clerk to Chief Justice of Ontario
Lawson, A. M., Q.C.	Provincial Director, Ontario Legal Aid Plan
Leal, H. A., Q.C.	Deputy Attorney General
McMurtry, The Hon. R., Q.C.	Attorney General of Ontario
Mendes da Costa, Dr D., Q.C.	Chairman, Ontario Law Reform Commission
Perry, L. E., Q.C.	Official Guardian
Paterson, R. B.	Legal Officer to Court of Appeal
Rice, His Honour Judge	Provincial Court
Scott, G.	Director of Courts Administration and Inspector of Legal Offices
Sherman, G.	Ministry of the Attorney General
Watson, A. K.	N.Z. Consul General
Wilson, The Hon. Me. Justice	Court of Appeal

Vancouver:

British High Commission	Consul General
Burnett, Mrs A.	Family Advocate, Family Court, Surrey
Farris, The Hon. Mr Justice	Chief Justice
Finkle, P. S.	N.Z. Consul
Goulet, His Honour Judge	Associate Chief Judge of Provincial Courts
Krasnick, M. R.	Ministry of the Attorney General
McFarlane, The Hon. Mr Justice	Supreme Court
Morrison, J.	Family Court, Ministry of the Attorney General
Munroe, The Hon. Mr Justice	Supreme Court
Parfitt, B.	Senior Counsel for Family Law

Prevost, F.	Facilities Management Unit, Ministry of the Attorney General
Vogel, R. H.	Deputy Attorney General
Williams, B.	Family Court Counsellor, Surrey
Wong, H.	Family Court Counsellor, Surrey

SINGAPORE

Hensley, His Excellency Mr. G. C.	N.Z. High Commissioner
Kulasekram, The Hon. Mr Justice	Supreme Court, Singapore
Marshall, D.	Barrister
Rajah, The Hon. Mr Justice	Supreme Court, Singapore

UNITED KINGDOM

Adams, W. J.	Principal Establishment Officer, Office of the Deputy Director of Public Prosecutions
Barr, D., S.M.	Bow Street Courts
Berryman, J. D.	Clerk to the Magistrates, Croydon
Brayshaw, A. J., C.B.E., J.P.	Retiring Secretary to the Magistrates' Association
Bridge, The Rt. Hon. Sir Nigel	Lord Justice, Court of Appeal
Carter, The Hon. Sir Douglas, K.C.M.G.	N.Z. High Commissioner
Commonwealth Magistrates' Association	
Crocker, His Honour Judge	Crown Court Judge
Denby, Sir Richard	President, The Law Society
Donaldson, The Hon. Sir John	Queens Bench Division, High Court
Elwyn-Jones, The Rt. Hon. Lord, C.H.	Lord Chancellor
Graham-Hall, Her Honour Judge	Crown Court Judge
Grobler, R. V.	Courts Administrator, Old Bailey
Hendrick, J. S., J.P.	Magistrates' Court, Croydon
Hickling, Mrs, S.M.	
Horsman, E. R., O.B.E.	Assistant Secretary of Commissions, Lord Chancellor's Office
Jacob, I. H., Q.C.	Senior Master and Queen's Remembrancer
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Kempin, Mrs A. B. F.	Supervisor, Court Reporting Service, Royal Courts of Justice
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Norman, G., J.P.	Secretary, Magistrates' Association
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Perks, His Honour Judge, M.C., T.D.	Crown Court Judge
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Robinson, P. D.	Circuit Administrator, South Eastern Circuit
Scratchley, E., J.P.	Magistrates' Court, Croydon
Skyrme, Sir Thomas, K.C.V.O., C.B., C.B.E., T.D.	Secretary of Commissions, Lord Chancellor's Office

Mahon, The Hon. Mr Justice	Supreme Court, Auckland
Mason, K. H., S.M.	Auckland
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McKay, I. L.	Wellington
McMullin, G. A.	Gore
McMullin, The Hon. Mr Justice	Supreme Court, Auckland
MacRae, Rev K. D.	Court Conciliation Centre, Auckland
Melbourne, Ms M.	Neighbourhood Law Office, Grey Lynn
Mills, The Hon. Mr Justice	Supreme Court, Auckland
Moller, The Hon. Mr Justice	Supreme Court, Auckland
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Ngatahine Block Objection Committee	
North, The Rt. Hon. Sir Alfred	Auckland
Ongley, The Hon. Mr Justice	Supreme Court, Wellington
O'Regan, The Hon. Mr Justice	Supreme Court, Wellington
Paterson, F. G., S.M.	Christchurch
Perry, The Hon. Sir Clifford	Supreme Court, Auckland
Pihama, Mr	Department of Maori Affairs, Auckland
Pledger, the late C. E., S.M.	Auckland
Pou, T. H.	Department of Maori Affairs, Wellington
Preston, D. A.	Wellington
Priest, H. T.	Christchurch
Puketapu I. P.	Secretary and Maori Trustee, Department of Maori Affairs, Wellington
Puriri, N. P. K.	Department of Maori Affairs, Auckland
Quilliam, The Hon. Mr Justice	Supreme Court, Wellington
Rangihau, J.	Department of Maori Affairs, Wellington
Richmond, The Rt. Hon. Sir Clifford	President, Court of Appeal
Robson, F. N.	Orewa
Robson, Dr J. L.	Victoria University, Wellington
Roper, The Hon. Mr Justice	Supreme Court, Christchurch
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Sinclair, The Hon. Mr Justice	Supreme Court, Auckland
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Thames-Coromandel District Council and other Local Authorities and Organisations	
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University of Auckland, Public Law Reform Committee	
Upton, J. O.	Wellington

Victoria University	Librarian and Staff, Wellington
Waikato University Social Science Forum	Hamilton
Waikato Women's Division, Federated Farmers of N.Z.	Hamilton
Webb, Mrs O.	Christchurch
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Williams, A. J.	Department of Maori Affairs, Auckland
Williams, E. W.	Department of Maori Affairs, Wellington
Williamson, N. W.	Christchurch
Wilson, D. B., S.M.	Tauranga
Wilson, J.	Neighbourhood Law Office, Grey Lynn
Wi Rutene, T.	Rotorua
Woodhouse, The Rt. Hon. Sir Owen	Court of Appeal

APPENDIX 10

OTHER PERSONS OR ORGANISATIONS WHO ASSISTED THE COMMISSION BY CORRESPONDENCE

Australia

Brennan, The Hon. Mr Justice	President, Administrative Review Council, Canberra
Christie, R. M.	Under Secretary for Law, Crown Law Department
Collins, H. G.	Sheriff for South Australia, Adelaide
Duncan, The Hon. P.	Attorney-General, Adelaide, S.A.
Dwyer, J. D.	Secretary to the Attorney-General, Tasmania
Ellicott, The Hon. R. J., Q.C.	Attorney-General for the Commonwealth, Canberra
Franklin, J. A.	Executive Officer, The Law Society of Western Australia
Glenister, R.	Secretary to the Law Department, State Law Offices, Victoria
Handke, B. N.	Attorney-General's Office, Department of Legal Services, S.A.
Hitchens, G. E.	Attorney-General's Department, Canberra
Home, Ms L.	Research Officer, Law Institute of Victoria
Jorgenson, His Excellency Mr	Ambassador, Royal Norwegian Embassy, Canberra
Lickiss, The Hon. W. D., Q.G.M. F.C.I.V., F.A.I.C., F.R.A.P.I.	Attorney-General, Queensland
Maynard, L. S.	Assistant Legal Officer, The Law Society of N.S.W.
Medcalf, The Hon. I. G. M.L.C.	Attorney-General for Western Australia
Miller, B. C., M.L.C.	Attorney-General, Tasmania
Mitchell, The Hon. Justice	Supreme Court, Adelaide, S.A.
O'Grady, E. J.	Commissioner for Legal Aid Services, N.S.W.
Savas, Mr G.	Canberra
Sedsman, Mrs J. E.	Executive Officer, Law Society of S.A. Inc.
Storey, The Hon. H., Q.C.	Attorney-General, Victoria
Walker, The Hon. F. J., M.L.A.	Attorney-General for New South Wales
White, W. J.	Under Secretary, Department of Justice, Queensland

Canada

Brooks, B. H.	Deputy High Commissioner, N.Z. High Commission, Ottawa
Halpenny, Ms C.	Direction Generale des Greffes, Ministère de la Justice, Quebec
Scott, G. W. S.	Director of Courts Administration and Inspector of Legal Offices, Ministry of the Attorney General, Ontario
Vogel, R. M.	Deputy Attorney General, British Columbia

United Kingdom

Moriarty, M. J.	Home Office
Pope, J. D.	Assistant Director, Legal Division, Commonwealth Secretariat
Smith, E. G.	Procurator Fiscal, Edinburgh
Oulton, A. D. M.	Deputy Permanent Secretary, Lord Chancellor's Office

United States of America

Colosimo, E. T.	Secretary-Treasurer, National American Indian Court Judges Association, Washington
Williams, R. B.	Para-legal Assistant, Native American Rights Fund, Boulder, Colorado

New Zealand

Adams, J.	Auckland
Aminoff, His Excellency Mr Sten	Ambassador of Sweden, Royal Swedish Embassy
Anderson, Captain O.	Consul-General of Norway, Wellington
Blatmann, M. R.	Cultural Attaché, French Embassy, Wellington
Cameron, N.	Senior Lecturer in Law, Victoria University
Criminal Law Reform Committee	Chairman and Members
Cuttress, Ms B.	
Edwin-Hall, T.	Medical Superintendent, Sunnyside Hospital, Christchurch
Fellows, Mrs P.	Office of the Ombudsman
Flaes, R.	Counsellor, Royal Netherlands Embassy
Gazley, W. V.	Wellington
Gendall, J. W.	Wellington
Kinsella, A. K.	Principal, N.Z. Technical Correspondence Institute, Lower Hutt
Maclaren, R. L.	Auckland
Mathieson, Dr D. L.	Wellington
Morrison, J. B.	Consul-General of Denmark, Royal Danish Consulate-General
O'Leary, T. D.	Deputy High Commissioner, British High Commission
Slane, B.	Auckland
Spratt, G.	First Secretary (Information), Australian High Commission, Wellington
White, D. J.	Wellington

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