

NSW Law Reform Commission

REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982

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**REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS
MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982**

Terms of Reference and Participants

New South Wales Law Reform Commission

To the Honourable D.P. Landa, LLB, M.LC.,

Attorney General and Minister of justice for New South Wales.

INTERIM REPORT ON FIRST APPOINTMENTS AS MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982

We make this Interim Report under our reference from you to inquire into and report on the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates under section 12(1) of the Local Courts Act 1982.

Professor Ronald Sackville

(Chairman)

Russell Scott

(Deputy Chairman)

Denis Gressier

(Commissioner)

J.R.T. Wood, Q.C.

(Commissioner)

16 September, 1983

New South Wales Law Reform Commission

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Deputy Chairman

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This is the thirty-eighth Report of the Commission. Its short citation is L.R.C. 38.

REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982

Summary

I. INTRODUCTION

This Interim Report is mainly concerned with the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates under section 12(1) of the Local Courts Act, 1982.

In this Summary we list the major recommendations made in the Interim Report. In some instances the words used are different from those used in the Report itself. Where this occurs the Summary must yield to the Report. In other instances the recommendations are not listed in the same order as the recommendations contained in the Report. The Summary does contain however, cross-references to the appropriate paragraphs of the Report.

By way of background information we note that the Local Courts Act, 1982, was assented to on 24 December 1982 and that most of its provisions will not commence until a day is appointed by the Governor and notified by proclamation published in the Government Gazette. On that day, Courts of Petty Sessions will be abolished and Local Courts will take their place. Subject to some minor and presently irrelevant exceptions, Local Courts will be presided over by persons appointed under section 12(1) of the Act as "Magistrates". These Magistrates will take the places of the persons who, immediately before the appointed day, were employed in the position of "stipendiary magistrate" and who presided over Courts of Petty Sessions. Where we speak in the Interim Report, and in this Summary, of a "Magistrate", we refer to a person to be appointed to preside over Local Courts, and where we speak of a "stipendiary magistrate", we refer to a person who, immediately before the appointed day, presides over Courts of Petty Sessions.

II. RECOMMENDATIONS

1. Stipendiary magistrates should not be automatically appointed as Magistrates under the Local Courts Act.

(Paragraph 4.30 and see, generally, paragraphs 4.6-4.29.)

2. The first appointments of Magistrates should be undertaken by means of a process which we call "phased selection". Under this process:

applications for appointment would first be invited from all stipendiary magistrates;

the applications would be assessed by an appointments committee which would advise the Minister as to the applicants who are recommended for appointment;

any vacancies arising after consideration of the applications from stipendiary magistrates would be filled after open advertisement, by the Minister on the recommendation of the committee, or substantially the same committee.

(Paragraph 4.52 and see, generally, paragraphs 4.31-4.51.)

3. Although ultimate responsibility for making the first appointments of Magistrates must be that of the government on the recommendation of the minister, an appointments committee of the kind referred to in Recommendation 2 should be constituted to advise the Minister in relation to the first appointments.

(Paragraph 5.11 and see, generally, paragraphs 5.10 and 5.12.)

4. The Chief Justice of New South Wales and the Chief Judge of the District Court should be members of the appointments committee and the Chief justice should be the Chairman of the committee.

(Paragraph 5.14 and see, generally, paragraph 5.13.)

5. The appointments committee should include the Solicitor General and one other person who could be Mr. A.L Barnett (formerly Deputy Under Secretary of the Department of the Attorney General and of Justice and now the Electoral Commissioner for New South Wales).

(Paragraph 5.17 and see, generally, paragraphs 5.15 and 5.16.)

6. The appointments committee should be constituted by the Governor in such a way that the provisions of sections 18 and 19 of the Defamation Act, 1974, apply to the inquiries and reports of the committee.

(Paragraph 5.19.)

7. The appointments committee should be empowered to make recommendations in relation to any appointments which may be needed to fill any vacancies in the Bench of Magistrates arising out of the non-appointment of any stipendiary magistrates, and, for this purpose, a process of open selection should be followed.

(Paragraph 5.25 and see, generally, paragraphs 4.39-4.53.)

8. For the purposes of Recommendation 7, the Chief Magistrate should be invited to join the appointments committee.

(Paragraphs 5.25 and 5.26.)

9. In determining the applicants who are to be recommended for first appointments as Magistrates, the appointments committee should take into account

legal skills;

judicial qualities;

appropriate personal characteristics;

breadth of knowledge and experience; and

reputation for honesty and integrity.

(Paragraph 5.,7 and see, generally, paragraphs 5.2-5.6.)

10. There should be no medical examination requirement in relation to the first appointments as Magistrates of persons who are now stipendiary magistrates.

(Paragraph 5.27.)

11. The Local Courts-Act, 1982, and, if necessary, the Public Service Act, 1979, should be amended to ensure that any stipendiary magistrate who does not accede to the office of Magistrate shall enjoy continuity of service and salary within the Public Service until the date of his or her retirement, subject to the discipline and conduct provisions of the Public Service Act, 1979.

(Paragraph 5.30 and see, generally, paragraphs 3.24- 3.28, 4. 10 and 4.27-4.28.)

III. OBSERVATIONS

In recommending that the Chief Justice of New South Wales and the chief Judge of the District Court should be members of our recommended appointments committee, we are aware that the Attorney General has approached them and that each has indicated that he is willing to serve on such a committee, if one is to be established (Paragraph 5.14). Both the Chief Justice and the Chief Judge have indicated that this willingness is based upon the expectation that, unless there are very exceptional circumstances, the advice of any such committee will be followed (Paragraph 5.18).

Given the eminence and expertise of the persons we have proposed for membership of the appointments committee, we consider it unnecessary and indeed inappropriate for us to specify in detail the procedures that they should follow. We have complete confidence that the committee will settle upon procedures that are fair to applicants, yet meet the need to settle the first appointments as Magistrates as soon as possible (Paragraph 5.20).

Chapter 6, the final chapter of the Interim Report lists a number of issues that may call for attention in our Final Report. The list is illustrative rather than exhaustive and may be modified in the light of submissions and our later research.

**REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS
MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982**

Preface

On 9 August 1983 the Commission received a reference from the Attorney General and Minister for justice, the Hon D.P. Landa, LLB., M.LC., to inquire into and report on the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates under section 12(1) of the Local Courts Act 1982. The terms of reference required the Commission to prepare an Interim Report as soon as possible.

The Interim Report has been prepared by a Division of the Commission By virtue of the Law Reform Commission Act, 1967, a Division is deemed to be the Commission for the purposes of the reference in respect of which it is constituted. The Division on the First Appointments as Magistrates Under the Local Courts Act, 1982, consists of the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mr. Russell Scott (Deputy Chairman)

Mr. Denis Gressier (Commissioner in charge of this reference)

Mr. J.R.T. Wood, Q.C.

We wish to express our appreciation to the Chief Justice of New South Wales, the Hon. Sir Laurence Street, K.C.M.G., K.St. J., the Chief Judge of the District Court of New South Wales, His Honour Judge J. H. Staunton C.B.E., Q.C., and the Chairman of the Bench of Stipendiary Magistrates, Mr. C.R. Briese, for their assistance in the course of our work on this Interim Report. Each of them has given freely of his time and advice. While they should not necessarily be taken as endorsing the contents of the Report (except where specifically indicated), their contributions have been of great value to us.

Mr. Julian Disney has acted as a Consultant to the Commission in connection with this reference and we acknowledge his substantial and valuable contribution.

Members of the Commission's staff who participated in the preparation of the Report are Ms. Helen Mills and Ms. Meredith Wilkie. We also acknowledge the assistance of Mr. H. Selby, Barrister.

The Commission expresses its appreciation of the important contribution made by the administrative, library and secretarial staff. This Interim Report has been prepared within a very short period and the staff of the Commission have carried a particularly heavy burden.

REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982

1. The Reference

I. TERMS OF REFERENCE

A. Matters to be Considered

1.1 On 9 August 1983 the Attorney General and Minister of Justice for New South Wales, the Hon D.P. Landa, LLB., M.LC., made the following reference to the Commission:

“To inquire into and report on the following matters

(a) the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates under section 12(1) of the Local Courts Act- 1982;

(b) having regard to

(i) the first year's operation of the Local Courts Act, 1982, and

(ii) the objectives of the Act,

the amendments, if any, which should be made to the Act and to any other legislation affecting Magistrates or the structure and Organisation of Local Courts (including the procedures and criteria which should be followed and applied for selection of persons to be appointed as Magistrates): and

(c) any incidental matters.

Pursuant to section 13(1) of the Law Reform Commission Act 1967, I direct that the Commission make an interim report as soon as possible. The interim report should deal with the matters referred to in paragraph (a), and should outline the approach that the Commission proposes to take to the examination of the matters referred to in paragraph (b).”

B. Constitution of the Division

1.2 On 22 August 1983 the Chairman of the Commission pursuant to section 1.2A(1) of the Law Reform Commission Act, 1967, and following completion of preliminary work formally constituted a Division of the Commission for the purposes of this reference. The following members of the Commission comprise the Division:

Professor Ronald Sackville (Chairman)

Mr. Russell Scott (Deputy Chairman)

Mr. Denis Gressier

Mr. J.R.T. Wood, Q.C.

C. Terminology

1.3 The Local Courts Act 1982, (“the Act”) was assented to on 24 December 1982 but most of its provisions will not commence until a day's appointed by the Governor and

notified by proclamation published in the Government Gazette (“the appointed day”). On that day, Courts of Petty Sessions will be abolished and Local Courts will take their place. Subject to some minor and presently irrelevant exceptions, Local Courts will be presided over by persons appointed under section 12(1) of the Act as “Magistrates”. These Magistrates will take the places of the persons who, immediately before the appointed day, were employed in the position of “stipendiary magistrate” and who presided over Courts of Petty Sessions. Where we speak in this Interim Report of “Magistrate(s)”, we refer to person(s) to be appointed to preside over Local Courts, and where we speak of “former magistrate(s)” or “stipendiary” magistrates, we refer to person(s) who, immediately before the appointed day, preside over Courts of Petty Sessions.

D. “Phases I and II”

1.4 The terms of reference clearly indicate that we must divide our work into two phases. For convenience, we call them “Phase I” and “Phase II”. Phase I is concerned, first, with the matters referred to in paragraph(a) of the terms of reference and, secondly, with the approach that we should take to our examination of the matters referred to in paragraph (b). This Interim Report represents the completion of Phase I. Work on Phase II, the balance of the terms of reference, is continuing.

E. Automatic Appointment

1.5 Paragraph (a) of the terms of reference speaks of “the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates. This language could conceivably be read as precluding us from considering whether stipendiary magistrates should automatically be appointed as Magistrates. The word “selection” might imply that a decision has already been taken to select Magistrate from a range of qualified persons, and not merely from the ranks of stipendiary magistrates. It would follow, if this interpretation was accepted, that our role is limited to formulating procedure and criteria appropriate to a wide-ranging process of selection.

1.6 We take the view, however, that the terms of reference should not be interpreted as foreclosing such an important issue. None of the submissions so far made to us contend that the terms of reference should be interpreted in this way. Many, especially those from stipendiary magistrates, assume that the contrary is the case. We think that the language of the terms of reference is consistent with our considering the arguments for and against automatically appointing stipendiary magistrates as Magistrates, and we do so in Chapter 4.

II. BACKGROUND TO REFERENCE

A. The Local Courts Act, 1982

1.7 Many stipendiary magistrates have argued that their judicial independence and recognition as judicial officers are jeopardised by their inclusion in the administrative structure of the Public Service. The enactment of the Local Courts Act gives substantial effect to their views. Section 12(4) of the Act for example, provides:

“The provisions of the Public Service Act, 1979, shall not apply to or in respect of the appointment of a Magistrate and a Magistrate shall not, in his capacity as a Magistrate, be subject to those provisions during his term of office as a Magistrate.”

Likewise, section 18(1) goes some way towards equating the position of a Magistrate with that of a Judge in that a Magistrate is to hold his or her office during “ability and good behaviour”, the same expression as applies to Judges of the District Court. We consider these and other provisions of this Act in Chapter 3 where we also mention some of the statutory provisions which apply to Judges of the District Court and the Supreme Court.

B. The Street Royal Commission

1.8 On 11 May 1983, the Chief Justice of New South Wales, the Hon Sir Laurence Street, KC.M.G., K St J., received a Royal Commission requiring him to inquire into two matters. The first matter was

“whether on or about 11 August 1977, Murray Frederick Farquhar [a former Chairman of the Bench of Stipendiary Magistrates] influenced or attempted to influence the outcome of committal proceedings on nine charges laid under section 173 of the Crimes Act, 1900, against Kevin Emery Humphreys, which charges were heard by Kevin William Jones, Stipendiary Magistrate, on 11 and 12 August, 1977, and determined by him in favour of the defendant on 12 August 1977”.

1.9 On 28 July 1983 the Chief Justice presented his findings and report. In an appendix to the report, he said:

“The Local Courts Act is the product of work and discussions extending back over some three or four years. It will be significant in reassuring to individual magistrates their freedom, in the discharge of their judicial duties, from exposure to influence by persons in authority over them. Moreover, the effect of the reform upon the stature and morale of the magistracy, both as they themselves perceive it, and as it will be perceived by the community at large, will be significant.

It may well be that in the future working out of the reforms embodied in the new Act amendments and adjustments of the legislation will be seen to be desirable. Indeed, this is to be expected in a reform such as this. The early implementation of the provisions of the new Act will however, go far towards meeting such public disquiet regarding the structure and administration of the Magistrates’ Courts as may have been generated in some quarters by the events examined in the present Inquiry. At the present stage the necessary preliminary consideration is being given to the actual personnel of the magistracy and other administrative matters relevant to be taken into account in proclaiming a new Court and making appointments to it. It is obvious that this must be carefully and thoroughly done. Such decisions should not be rushed through overnight as it were. At the same time I am firmly of the view that all due expedition should be given to the implementation of this reform”.¹

1.10 In announcing “a full and immediate review of the structure of the State’s Magistracy by the Law Reform Commission of New South Wales, “the Premier, the Hon N.K. Wran Q.C., stated that the review would “fulfil” the recommendations of the Chief Justice in the Royal Commission report.² The reference to us therefore represents one of the responses of the Government to the findings and report of the Chief Justice.

III. CONDUCT OF PHASE I

A. An Issues Paper

1.11 We have not yet decided whether, for the purposes of Phase II of our work on this reference, we should follow our custom of publishing a preliminary paper seeking comments from a wide range of people on what we perceive to be the main issues involved. Time constraints have, however, precluded us from taking any action of this kind in relation to Phase I.

B. Research

1.12 For the purposes of Phase I, we have, however undertaken a comparative study of the law governing magistrates in other Australian States and Territories, New Zealand, the United Kingdom Canada and the United States. Some of the material from this study

appears in Appendix A. We have also considered the history of the proposals for legislation conferring independence on the magistracy in New South Wales. This has been done principally through an examination of departmental files.

C. Submissions

1.13 We wrote to all stipendiary magistrates in New South Wales and invited submissions on any matter coming within the scope of the terms of reference. The submissions made in response to this invitation were made promptly, and were generally helpful. In addition, we extended a similar invitation to a number of persons and organisations whom we believe to have a special interest in the subject matter of the terms of reference, including two organisations of stipendiary magistrates, the New South Wales Bar Association and the Law Society of New South Wales. The persons and organisations who responded to the invitation are identified in Appendix B. All submissions, except those made on a confidential basis, may be inspected at our offices.

D. Consultations

1.14 While the terms of reference do not contain any guidance on the question of consultations, the public announcement by the Premier stated that the review would be undertaken in consultation with the Chief Justice of New South Wales, Sir Laurence Street, the Chief Judge of the District Court of New South Wales, His Honour Judge J.H. Staunton, C.B.E., Q.C., and the Chairman of the Bench of Stipendiary Magistrates, Mr. C.R. Briese. We have consulted with each of these office holders and with other persons. Included in the latter group are the following: the Chairman of the Public Service Board, Mr. David Moore, the Under Secretary of the Department of the Attorney General and of Justice, Mr. T.W. Haines; the President of the Law Society of N.S.W., Mr D. E. McLachlan, a representative of the Commissioner of Police, Commissioner C.R. Abbott Q.P.M., and representatives of the Stipendiary Magistrates' Vocational Branch of the Public Service Association of N.S.W. and the N.S.W. Petty Sessions Officers' Association.

IV. THE STRUCTURE OF THIS INTERIM REPORT

1.15 We now describe briefly the structure and contents of this Interim Report.

Chapter 2 is concerned with those aspects of the existing law and practice relating to Courts of Petty Sessions and stipendiary magistrates which are relevant to the inquiry.

Chapter 3 contrasts the existing law and practice described in Chapter 2 with the provisions of the Local Courts Act 1982.

Chapter 4 deals with our recommended approach to the first appointments as Magistrates under the Local Courts Act, 1982.

Chapter 5 explains in detail the way in which the selection process could operate, with particular reference to the appointments committee that we suggest should be established.

Chapter 6 outlines in very general terms the approach that we propose to take to Phase 11 of our work on this reference, and lists a number of issues which may need to be considered during that Phase.

Appendix A is a short statement of the results of the comparative study of the law governing magistrates referred to in paragraph 1.12.

Appendix B lists the names of the persons and organisations who have made public submissions to us.

FOOTNOTES

1. *Report of the Royal Commission of Inquiry into Certain Committal Proceedings against K E. Humphreys* (July 1983), p.98.
2. Media release, 3 August 1983.
3. See note 2 above.

2. Courts of Petty Sessions and Stipendiary Magistrates

I. HISTORY

A. England¹

2.1 The office of Justice of the Peace emerged in England in the middle of the fourteenth century. Holders of the office had police, administrative and judicial powers and duties. By 1361 these included keeping the peace, arresting and imprisoning offenders, and hearing and determining charges relating to felonies and trespasses. Sittings of the justices became known as Sessions of the Peace. There were four kinds of Sessions, Special Sessions, General Sessions, Quarter Sessions and Petty Sessions, though Quarter Sessions were in fact only a particular form of General Sessions. Special Sessions were meetings of justices for a special purpose: for example, to license an ale house. General Sessions were courts in which the justices executed the authority given to them by their commissions or by statute. Quarter Sessions, or General Quarter Sessions as they were often called, was the title given to the General Sessions when complying with a statutory requirement of 1363 to sit four times a year. Quarter Sessions, and General Quarter Sessions, used Juries. Petty Sessions, on the other hand were courts of summary jurisdiction over which two or more justices presided without a jury. The title was derived from the petty nature of the offences dealt with by the justices in those courts.

2.2 Stipendiary (paid) magistrates were first appointed in the late eighteenth century in London to discharge judicial duties formerly the province of Justices. Their appointments followed claims that the local justices had become so corrupt that they had to be replaced. Unlike the justices, the Stipendiary magistrates were lawyers. Stipendiary magistrates were, and still are, relatively uncommon outside the greater metropolitan areas. In other areas, benches of lay justices continue to discharge many Judicial duties.

B. New South Wales²

2.3 The Commission appointing Captain Arthur Phillip to be Governor of New South Wales gave him authority to appoint Justices of the Peace. The justices were to have power to keep the peace, arrest, take bail, bind to be of good behaviour, suppress and punish riots, and perform the same judicial and other duties as did justices of the Peace in England.

2.4 In February 1788 the Governor appointed the first two justices of the Peace in New South Wales. The first sittings of the justices took place twelve days later. Their work included disciplining convicts and dealing with larcenies, breaches of the peace and other minor complaints. They also exercised jurisdiction in small debt cases.

2.5 In 1825 the Governor was authorised to establish Courts of Petty Sessions throughout the country, mainly at the larger centres, and to appoint stipendiary magistrates. General Quarter Sessions had already been established.

2.6 In August 1832 an Act was assented to which outlined the respective powers and authorities of General Quarter Sessions and Petty Sessions and determined the places at which the Courts should be held. It provided that two or more justices assembled and sitting in open court at any place within the colony, the court not being a Court of General Quarter Sessions, should be a Court of Petty Sessions. The Act detailed the jurisdiction of the Courts and provided for the Governor to appoint places at which Petty Sessions should be held.

2.7 In September 1832 the Governor directed that Courts of Petty Sessions be held at 21 different places, including the Hyde Park Barrack, Bathurst, Berrima, Maitland and Port Macquarie.

II. COURTS OF PETTY SESSIONS³

A. Numbers and Location

2.8 In September 1982 there were some 200 places of Petty Sessions in New South Wales. They included Lord Howe Island, Tweed Heads, Eden, Wentworth, Broken Hill, Lightning Ridge, Mungindi and most towns and cities in the area bounded by these particular places. In short, places of Petty Sessions are reasonably accessible to the great majority of the people of New South Wales. In 1912 there were 375 such places. The difference is accounted for by population changes and improved transport systems which have led to the abolition of some places of Petty Sessions.

2.9 Not every place of Petty Sessions has a permanent court official. In some remote areas of the State, police officers also serve as acting court officials. There are, however, about 185 Court Houses throughout the State where Courts of Petty Sessions sit Nowadays they are almost invariably presided over by stipendiary magistrates, not by justices.

B. Administration

2.10 Courts of Petty Sessions are administered by a branch of the Department of the Attorney General and of Justice called "Magistrates Courts Administration". It is the largest single branch of the Department and about 1,020 officers work within it. The branch is headed by a Director and, through him, is responsible to the Under Secretary of the Department and to the Minister for the administration of Courts of Petty Sessions and Court Houses throughout the State. It is the Director's responsibility to ensure, for example, that courts and Court Houses are properly staffed and equipped and that they provide an efficient service to members of the public and the legal profession Clerks of Petty Sessions, being officers in charge of Court Houses are, in effect, "Branch Managers". An indication of Magistrates Courts Administration's powers and responsibilities can be gathered from the scope of the duties of Clerks of Petty Sessions. In addition to acting in the capacity of Clerk, they also act in some or all of the following capacities:

Chamber Magistrate.

Clerk of the Licensing Court

Registrar of Social Security.

District Agent for the Registrar of Probates.

Agent for the Government Insurance Office.

Agent for the Public Trustee.

Local Registrar of Births and Deaths.

Crown Land Agent

Mining Warden

Although stipendiary Magistrates form part of Magistrates Courts Administration, the Chairman of the Bench of Stipendiary Magistrates (an office created in 1909) has special responsibilities in relation to them. Where they sit, for example, is determined by the Chairman.

2.11 For administrative and jurisdictional purposes, the State is divided into 72 Petty Sessions districts. At least one stipendiary magistrate is allocated to each country district and he or she will usually have a circuit of Petty Sessions places within that district where Courts of Petty Sessions are held from time to time on a roster basis. The stipendiary magistrate at, for example, the town of Griffith presides over Courts of Petty Sessions at places such as Leeton, Narrandera and Darlington Point. Within the city of Sydney, stipendiary magistrates are allocated to Courts of Petty Sessions at Castlereagh, Elizabeth,

Phillip and George Streets. Similar arrangements are made for the suburban Courts of Petty Sessions at places such as Hornsby, Manly, North Sydney, Redfern, Paddington, Waverley, Bunwood and Campsie, and for the comparable courts at cities such as Newcastle and Wollongong.

C. Jurisdiction

2.12 Over the years, Courts of Petty Sessions have been invested with more and more jurisdiction both civil and criminal. The stipendiary magistrates presiding over them have also been required to cope with great changes in the nature of the matters that come before them. The Family Law Act 1975 (Cth.), for example, gives them important and often difficult work in resolving some of the consequences of separation and divorce, including custody, disputes and claims for maintenance. State legislation with respect to diverse subjects such as corporate crime, drugs, and pollution has also added a new dimension to their work. Not only the volume of cases but also their complexity and the time needed to dispose of them have increased. We speak of the work load of the Courts later in this chapter but we are concerned here with their jurisdiction. On 1 April 1983, the upper monetary limit of the civil claims jurisdiction was increased from \$3,000 to \$5,000, having been increased from \$2,000 to \$3,000 in June 1981.⁴ Important matters, for example, of contract, personal injury and property damage are now within the civil jurisdiction of the Courts.

2.13 On 16 May 1983, the criminal Jurisdiction was also enlarged by amendments made to sections 476 and 501 of the Crimes Act 1900.⁵ Under section 476 of the Crimes Act 1900, some indictable offences may be dealt with summarily by a stipendiary magistrate *if the defendant consents* and the magistrate is satisfied that the case is one which may properly be disposed of summarily. The section applies, for example, to stealing a chattel or stealing money where the value of the chattel or the amount of the money does not exceed a specified sum. Immediately before the 1983 amendment, the sum was \$1,000. It is now \$10,000. The amendment also enlarged the class of offences which may be disposed of under section 476. It now includes, for example, the offences of malicious wounding, culpable driving and culpable navigation except when death is occasioned by the driving or navigation.

2.14 Under section 501 of the Crimes Act, 1900, some indictable offences relating to property, for example, stealing a chattel or stealing money, may be dealt with summarily *without the consent of the defendant* where the value of the property or the amount of the money does not exceed a specified sum. This sum was increased from \$500 to \$2,000 by the amendment already referred to.

D. Work Load

2.15 In 1982 Courts of Petty Sessions dealt with 685,000 matters in their criminal lists, a record number. The number of defended matters, 23,700, was also the highest ever recorded. In the same year, these Courts dealt with 250,000 civil claims. They also disposed of 13,450 applications under the Family Law Act 1975 (Cth.).⁶ With their recently enlarged civil and criminal jurisdictions, the work load of Courts of Petty Sessions can reasonably be expected to become very much heavier. Experience also suggests that from time to time their jurisdiction will be further enlarged and that their work load will increase accordingly.

III. STIPENDIARY MAGISTRATES

A. Number and Location

2.16 There are 105 serving stipendiary magistrates in New South Wales. The following table gives a broad indication of their present functions and places of work. About 73 per cent of stipendiary magistrates are located in metropolitan Sydney and about 27 per cent in other cities and country towns.

B. Appointment: Qualifications and Procedures

2.17 Section 7(1) of the justices Act, 1902, provides that the Governor may appoint as stipendiary magistrates such persons as may be necessary "to have Jurisdiction within the State of New South Wales". Section 7A of the same Act allows the Governor to appoint as a stipendiary magistrate "any

person not an officer in the public service". This latter provision is subject to the qualification that no appointment of persons outside the Public Service shall be made until the Public Service Board has reported that, in its opinion there is no person in the Public Service as capable of *performing the duties of the office* as the person outside the Service whom it is proposed to appoint. Section 7A is, however, to be compared with section 64 of the Public Service Act, 1979. This section has the effect that no person who is not already an officer in the Public Service shall be appointed as a stipendiary magistrate unless the Public Service Board has reported to the Governor that there is, in its opinion, no available officer in the Public Service who is *as capable and qualified* as the person proposed to be appointed. We do not have to determine the legal effect if any, of the textual differences between section 7A of the justices Act, 1902, and section 64 of the Public Service Act, 1979. We mention the provisions merely to indicate the special position in relation to appointment as stipendiary magistrate of officers in the Public Service. Section 117 of the Public Service Act, 1979, also provides that no person shall be appointed as magistrate unless he or she is 35 years old, is willing to reside permanently within the district in which he or she is appointed, and is, or is eligible for admission as, a barrister or solicitor of the Supreme Court of New South Wales. Special provisions apply to some stipendiary magistrates. We refer in paragraph 2.37 to the special position of, for example, stipendiary magistrates who are also licensing magistrates.

Table 2.1: New South Wales Magistracy

Number and Location 1983

Title	No.	Place of Work
Chairman	1	Sydney
Deputy Chairman (Legal)	1	Sydney
Deputy Chairman (Administration)	1	Sydney
Chief Industrial Magistrate	1	Sydney
City Coroner	1	Sydney
Westmead Coroner	1	Metropolitan Sydney
Licensing Magistrates		
Chairman	1	Metropolitan Sydney and Country
Deputy Chairman	1	Metropolitan Sydney and Country
Magistrates	2	Metropolitan Sydney
Senior Special Magistrate (Children's Court)	1	Sydney
Other Special Magistrates (Children's Court)	4	Metropolitan Sydney
Chief Mining Warden	1	Sydney
Fair Rents Magistrate	1	Sydney

Relieving Magistrates	5	Based in Sydney
Country Magistrates	28	Outside Metropolitan Sydney
Metropolitan Magistrates	54	Metropolitan Sydney
Director, Magistrates Courts Administration	1	Sydney
Government and Related Employees' Appeal Tribunal	1	Sydney
	106	(One position is vacant)

2.18 The statutory provisions mentioned in the previous paragraph will not apply to persons appointed as Magistrates under the Local Courts Act, 1982.

2.19 We are told that with the exception of two stipendiary magistrates chosen from outside the Public Service in 1975, one in 1982, and five stipendiary magistrates appointed in 1968 and 1969 from other divisions of the Department of the Attorney General and of justice, all presently serving stipendiary magistrates were appointed from within the ranks of officers serving in Magistrates Courts Administration. These people had the following years of service in the Administration prior to appointment.

Table 2.2: New South Wales Magistracy

Years of Service 1983

Years of Service:	5-10	11-15	16-20	21-25	26-30	31-35
Number of Stipendiary Magistrates	4	1	44	43	5	1

2.20 Officers wishing to be considered for appointment as a stipendiary magistrate apply to the Department of the Attorney General and of Justice. From time to time, a selection committee considers the applications and interviews applicants. The composition of the committee has varied over the years but recently it has usually comprised the Chairman of the Bench of Stipendiary Magistrates, the Under Secretary of the Department of the Attorney General and of justice, the Director of Magistrates Courts Administration and one other person. For many years, the other person was a member of the Public Service Board, but more recently he or she has been a person nominate by the Attorney General (the Solicitor General is usually the nominee). The names of successful applicants are placed on an eligibility list and the persons concerned are immediately commissioned by the Governor as stipendiary magistrates. When a vacancy arises, the person whose name is on top of the list is formally appointed to the position. Between being commissioned and appointed, this person usually a senior Clerk of Petty Sessions, is available to preside over Courts of Petty Sessions on a casual basis to relieve any stipendiary magistrate who is sick, on leave or on other duties. He or she thus gains magisterial experience and assists the smooth functioning of the courts.

2.21 Unsuccessful applicants seldom if ever, appeal against, or seek a review of recommendations made by the selection committee.

C. Appointment: Criteria

2.22 There are no prescribed criteria by reference to which the suitability of an applicant for appointment as a stipendiary magistrate is assessed. We are told by officers within Magistrates Courts Administration that, in practice, members of selection committees often have regard to matters listed by the Administration such as the following:

Position Performance

How well has the applicant carried out the duties of his or her present position?

Legal Knowledge

What is the extent of the applicants legal knowledge?

Breadth of Knowledge

What is the applicant s range of knowledge and how does he or she use information and concepts derived from non-legal fields of knowledge?

Analysis and judgment

Is the applicant a critical observer? Has he or she the ability to break a problem into components, to weigh and to relate, and to arrive at sound conclusions?

Objectivity

Has the applicant an open mind? Can he or she keep emotional or personal interests from influencing decisions?

Verbal Facility

To what extent is the applicant articulate, communicative and understood by people at all levels?

Personal Characteristics

What is the sum total of the applicants temperaments Does he or she have personality characteristics which are likely to have a bearing upon his or her ability to act as an effective magistrate?

Moral Courage

What are the applicant s qualities of moral courage, fortitude, assurance, inner security, self-confidence and self-reliance?

Dependability

How well does the applicant meet schedules and deadlines and adhere to instructions and policy?

Sensitivity

What is the extent of the applicants empathy with people, his or her ability to recognise their problems and to act with consideration?

Outside Interests and Behaviour

In relation to the applicant:

What are his or her outside interests?

How is he or she received by members of organisations to which he or she belongs?

Does he or she partake of alcohol?

Does he or she indulge in gambling?

How does he or she conduct himself/herself off the job?

Is he or she residing with wife/husband and family?

Is his or her financial position sound?

D. Appointment: Duration

2.23 Generally speaking, the Public Service Act, 1979, applies to the appointments of stipendiary magistrates, and to stipendiary magistrates during the time that they hold that office. As noted, section 117 of the Act provides that no person shall be appointed as a stipendiary magistrate unless he or she has attained the age of 35 years. Section 77 of the Act has the effect that stipendiary magistrates retire upon attaining the age of 60 years but, on the recommendation of their Department Head, they may continue in office until attaining the age of 65 years.

Table 2.3: New South Wales Magistracy

Ages and Years of Service 1983

2.24 The following table indicates the ages of the present Bench of Stipendiary Magistrates:

Age:	35-40	41-45	46-50	51-55	56-60	61-65
Number of Stipendiary Magistrates:	6	16	37	33	13	Nil

The ages at which these stipendiary magistrates were appointed to the Bench are as follows:

Age:	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51
Number of Stipendiary Magistrates	22	27	14	5	11	10	4	2	1	1	2	3	1	0	0	1	1

Their years of service as stipendiary magistrates are as follows:

Years of Service:	1-5	6-10	11-15	16-20	21-25	26-30
Number of Stipendiary Magistrates:	19	20	38	26	2	Nil

We are told that in the ordinary course of events few stipendiary magistrates would be expected to retire within the next five years but that thereafter there would be a spate of retirements.

E. Grading and Salary

2.25 Stipendiary magistrates are, for administrative and salary purposes, divided into three grades. In most instances, upon appointment, stipendiary magistrate is classified as Grade 3. He or she usually progresses to Grade 2 and then to Grade 1. Progression is determined by seniority according to date of appointment and availability of positions in the next higher grade. Excluding the Chairman, his two Deputies, four licensing magistrates and the Chief Industrial Magistrate, there are 11 stipendiary magistrates on Grade 3, 28 on Grade 2 and 59 on Grade 1.

2.26 Stipendiary magistrates on Grade 3 are usually assigned to Courts of Petty Sessions in Sydney where the work is confined to traffic matters. Persons on Grade 2 are usually assigned to a country Court of Petty Sessions and those on Grade 1 to metropolitan courts. There are exceptions to these general rules. There are, for example, nine stipendiary magistrates on Grade 1 serving in country areas, for example, Gosford and Katoomba, one on Grade 2 doing fair rents work in Sydney and one on Grade 3 doing traffic work in Newcastle. Also, all stipendiary magistrates working exclusively in children's courts in Sydney are on Grade 2 with the exception of the Senior Magistrate for those courts who is on Grade 1.

2.27 The present salaries and allowances of stipendiary magistrates are as follows:

	Salary	Allowance
Chairman	\$57,717 +	\$1,549
Deputy Chairman	\$54,515 +	\$894
Grade 1	\$51,303 +	\$668
Grade 2	\$47,456 +	\$668
Grade 3	\$42,326 +	\$454

Section 82 of the Public Service Act 1979, confers a general power on the Public Service Board to determine the remuneration of officers in the Public Service including stipendiary magistrates and, for

the purposes of any industrial proceedings, the Board is by virtue of section 81 of that Act, deemed to be their employer. In 1973, in consequence of proceedings before the Industrial Commission and with the approval of that Commission the Board, agreed with the Stipendiary Magistrates' Vocational Branch of the Public Service Association of N.S.W (the stipendiary magistrates union) that the remuneration of stipendiary magistrates should be linked with that of the Judges of the District Court. It was then agreed that the following percentages of the salary of a judge of the District Court should be paid to stipendiary magistrates:

Stipendiary Magistrate Grade 1 75%

Stipendiary Magistrate Grade 2 69%

Stipendiary Magistrate Grade 3 62%

2.28 In 1981 a further work value case was brought on behalf of stipendiary magistrates by the Public Service Association. The increased work value, according to the Association's submission arose from a number of factors. These included increases in the criminal and civil jurisdiction of Courts of Petty Sessions, greater responsibilities under Commonwealth laws such as the Family Law Act 1975 and the Customs Act 1901 (which creates some drug offences), more complex work arising from a higher incidence of "white collar" criminal charges and long trials, and a community expectation that stipendiary magistrates will be aware of the social implications of their role. The case led to an agreement that the relationship between stipendiary magistrates salaries and those of District Court judges should be increased as follows.

Stipendiary Magistrate Grade 1 80%

Stipendiary Magistrate Grade 2 74%

Stipendiary Magistrate Grade 3 66%

In a submission made to this Commission the Stipendiary Magistrates' Vocational Branch suggested that the salaries of all stipendiary magistrates should be increased to 90% of the salary of District Court Judges.⁷ In summary, the submissions made on behalf of stipendiary magistrates have all been based on factors such as those referred to in paragraphs 2.12-2.14, namely, their increased Jurisdiction and the increasing complexity and importance of their work.

2.29 Licensing magistrates are not paid the salary specified in the previous paragraph. Their salaries are determined by the Statutory and Other Offices Remuneration Tribunal and are some \$3,000 below that of Grade 1 stipendiary magistrates.

2.30 Travelling and accommodation allowances are also paid to stipendiary magistrates in accordance with rules, and at rates, determined by the Public Service Board. In consequence of their being employed under the provisions of the Public Service Act, 1979, all stipendiary magistrates are eligible to contribute to the State Superannuation Fund in accordance with the provisions of the Superannuation Act, 1916.

F. Rotation of Magistrates

2.31 Stipendiary magistrates are generally expected to serve sometime on circuit in country areas. They are moved from time to time, whether serving in the country or elsewhere, and this limits the possibility that they may develop an undesirable familiarity with legal practitioners or police officers which might impair their impartiality. Likewise, it ensures that particular localities are not favoured, or disfavoured, by the continued presence of any one stipendiary Magistrate. A policy of rotation between country circuits, and within the metropolitan area has been followed for some nine years. It is reasonably flexible and allowance is made for special cases that may arise, for example, on compassionate grounds or because of the educational needs of children. The policy is administered by the Chairman of the Bench of Stipendiary Magistrates.

G. Post-Appointment Training

2.32 All stipendiary magistrates are qualified in law, either through being admitted to a degree of Bachelor of Laws within a University or through having completed the examinations conducted by the Solicitors' and Barristers' joint Examination Board of New South Wales. Some stipendiary magistrates have other tertiary qualifications. Particulars of these qualifications follow:

Master of Laws	1
Bachelor of Arts	4
Diploma in Criminology	56
Diploma in jurisprudence	1
Accountancy Certificate	1

There are, however, no mandatory courses of continuing education legal or otherwise, and there are no current proposals for such courses. A voluntary course leading to a Graduate Diploma in justice Studies is, we believe, under active consideration. It could be attractive to stipendiary magistrates in that it may be offered on an external study basis by Mitchell College of Advanced Education at Bathurst, and may include courses such as sentencing practices, the psychology and sociology of law enforcement, advanced criminal and civil law, and elective material in the social sciences.

H. Complaints and Discipline

2.33 Another consequence of stipendiary magistrates being employed under the provisions of the Public Service Act, 1979, is that they are subject to the discipline and conduct provisions of that Act. Section 85 provides as follows:

"An officer who -

- (a) commits any breach of this Act or the regulations;
- (b) engages in any misconduct;
- (c) uses intoxicating beverages or drugs to excess;
- (d) wilfully disobeys, or wilfully disregards, any lawful order made or given by a person having authority to make or give that order;
- (e) is negligent, careless, inefficient or incompetent in the discharge of his duties; or engages in any disgraceful or improper conduct,

is guilty of a breach of discipline."

The Public Service Act, 1979, replaced the Public Service Act, 1902, and section 85 is expressed in substantially the same terms as section 56(2) of the 1902 Act. We are told that no proceedings have been taken against a stipendiary magistrate under either provision in the past 30 years. This is not surprising because, apart from any other reason some of the provisions seem to be inapt in their application to the judicial role of stipendiary magistrate.

2.34 Section 56(2) of the 1902 Act applied, and section 85 of the 1979 Act applies, not only to stipendiary magistrates but also to all officers of the Public Service. Section 93(2) of the 1979 Act, which applies to all officers of the Public Service other than Departmental Heads, speaks of regulations under the Act making provision with respect to the manner of dealing with alleged breaches of discipline. An inquiry held pursuant to the regulations is a "disciplinary inquiry". Under section 102 of the 1979 Act each member of the Public Service Board and each of the Boards delegates has, for the purpose of an inquiry, the powers, authorities, protections and immunities conferred on a commissioner by Division I of Part II of the Royal Commissions Act, 1923. Regulations have not been made under section 93(2) but, under clause 19 of Schedule 6 to the 1979 Act regulations under the 1902 Act are deemed to have been made under the 1979 Act. The relevant regulation is 147A. Among other things, it requires that an officer charged with an alleged breach of discipline be notified in writing of the charge and, where the officer denies it, that he or she be summoned before the Board, and that the Board inquire into its truth. If the officer is found to have committed the breach, he or she may be cautioned, reprimanded, fined, reduced to a lower classification or position have his or her salary reduced, or be directed to resign, allowed to resign or be dismissed. If dismissed, the officer may appeal to the Government and Related Employees Appeal Tribunal constituted by the Government and Related Employees Appeal Tribunal Act 1980. A stipendiary magistrate is presently a member of that Tribunal.

2.35 Part VI of the Justices Act, 1902, is concerned with the civil liability of Justices, including stipendiary magistrates, for acts done by them within their jurisdiction and for acts done by them without, or in excess of jurisdiction. For present purposes, we attach little importance to these provisions. They are seldom invoked and, in any event in the course of our current work on criminal procedure, we may recommend that these old provisions be repealed and be replaced by provisions which are more appropriate to the conditions of today.

2.36 In short experience shows that it is most unlikely that any complaint about the conduct of a stipendiary magistrate will lead to formal proceedings of a disciplinary nature being taken against the person concerned. The absence of formal disciplinary proceedings does not mean that the actions of stipendiary magistrates go entirely unchecked. Most of their decisions are subject to the ordinary processes of judicial review and appeal. Also, informal complaints are made to the Minister, the Under Secretary of the Department of the Attorney General and of Justice, and to the Chairman of the Bench of Stipendiary Magistrates. If action is taken in response to a complaint - it is generally taken in private and is of an informal nature. The usual line of communication in recent times, has been for the Under Secretary of Justice to direct the attention of the Chairman of the Bench to a complaint. Files we have seen show that some complaints lead to discussions between the Chairman of the Bench and the magistrate in question. In one instance, a complaint resulted in the Under Secretary writing to the Chairman on behalf of the Minister and, in effect, expressing the Minister's serious objection to comments from the bench of a particular kind and requesting that magistrates be instructed by the Chairman to exercise restraint when speaking from the bench.

IV. LICENSING MAGISTRATES AND OTHERS

2.37 In paragraph 2.16 and elsewhere in this Chapter, we have made reference to stipendiary magistrates who also hold offices such as those of coroner, chief industrial magistrate, licensing magistrate, special magistrate (children's courts), chief mining warden and fair rents magistrate. Special legislative provisions apply to some of these offices. Licensing magistrates, for example, are appointed under section 8 of the Liquor Act, 1982. Section 8(4) expressly provides that the Public Service Act, 1979, does not apply to their appointments or during their term in office as licensing magistrates. Licensing magistrates hold office for such period, not exceeding 7 years, as are specified in the instruments of their appointment, but are eligible for re-appointment. Few special provisions of this kind are considered in this Interim Report. They will however, be considered in our final Report.

FOOTNOTES

1. See, generally, Sir William Holdsworth, *A History of English Law*, vol. 1, (ed. Goodhart and Hanbury, 7th ed 1966), pp. 288-298, and R. Burns, *Justice of the Peace and Parish Officer*, vol. 5, (J.B. Maule, 30th ed, 1869) p.335.
2. See, generally, "Early Days in New South Wales" (issued by T.W. Haines, Under Secretary of Justice, and compiled by R.M. Mathison, Magistrates Courts Administration Sydney, September 1982), and A.L. Barnett "Courts of Petty Sessions 1832-1982" (Department of the Attorney General and of Justice, Sydney, 1982).
3. Parts II and III of this Chapter are based in part on the materials referred to in note 2 above and in part on information supplied both orally and in writing by officers of Magistrates Courts Administration. We thank them for their assistance. In particular, we thank the Director of Magistrates Courts Administration, Mr. Ian Pike, whose co-operation with us has always been willing and able.
4. Courts of Petty Sessions (Civil Claims) Amendment Act 1982, Schedule 1: Courts of Petty Sessions (Civil Claims) Amendment Act, 1980, Schedule 2.
5. Crimes (Amendment) Act, 1983, No.10, Schedules 1 and 5.
6. Figures supplied by Mr. C.R. Briese, C.S.M., which, in due course, will be published officially.
7. Submission No. 17, pp.8-9.

3. The Local Courts Act, 1982

I. THE BACKGROUND¹

A. The Participants

3.1 Many persons and organisations were involved in the policy discussions which preceded the enactment of the Local Courts Act, 1982. The persons included the Chairman of the Bench of Stipendiary Magistrates, Mr. C.R. Briese; the Deputy Chairman, Messrs. K.S. Anderson and B.R. Brown the Under Secretary of the Department of the Attorney General and of justice, Mr. T.W. Haines; his Deputy Under Secretary, Mr. W.J. Robinsom a former Attorney General the Hon. F.J. Walker, Q.C., M.P., and the Premier, the Hon N.K. Wran Q.C., M.P. Organisations involved included the N.S.W. Petty Sessions Officers Association the Conference of Chamber Magistrates of New South Wales, the Stipendiary Magistrates' Vocational Branch of the Public Service Association of New South Wales and the Public Service Board. Divergent views on the merits of various provisions proposed for the Act were strongly held and argued.

B. The Public Service Act, 1979

3.2 The Public Service Act, 1979, commenced on 28 September 1979, some four months after Mr. C. R. Briese had been appointed Chairman of the Bench of Stipendiary Magistrates. In January 1980, Mr. Briese wrote a letter to an Assistant Under Secretary of the Department saying, in effect, that stipendiary magistrates should be taken outside the application of the Public Service Act, 1979. The details of all that followed need not be recounted here but a summary is given in the following paragraphs by way of background information

3.3 In a later submission to the then Attorney General, the Chairman and his two Deputies argued that the changes effected by the Public Service Act, 1979, increased the power of the executive over the magistracy and therefore made an already unsatisfactory situation even worse.

3.4 They pointed out that under the Public Service Act, 1902, stipendiary magistrates were subject to the control of the Public Service Board. Under the Public Service Act, 1979, this control was, it was argued, transferred to the Minister of justice. The transfer was effected, in their view, by the following provisions of the new Act:

"Section 128. Nothing in this Act shall be construed as restricting the ordinary and necessary departmental authority of any Minister with respect to the direction and control of staff and work."

"Section 47. (1) A Departmental Head is responsible to the appropriate Minister for the general conduct and the efficient effective and economical management of the functions and activities of the Department.

(2) For the purposes of exercising his responsibility under subsection (1), a Departmental Head may take such action as he deems appropriate and as is not inconsistent with the functions of the Board specified in this Act"

"Section 112(1). (1) Where the Department Head considers it to be in the interests of the Department to do so, he may direct the transfer of an officer from one position in the Department to another position in the Department equivalent in classification and salary to the first-mentioned position provided the officer possesses the qualifications... in respect of that other position"

The position of stipendiary magistrate was, they argued, to be contrasted with that of among others, judges of the Supreme Court and the District Court, masters of the Supreme Court, crown prosecutors

and public defenders. The holders of these offices were not subject to the provisions of the Public Service Act, 1902, and are not subject to the provisions of the Public Service Act 1979.

C. Judicial Independence

3.5 The submission from the Chairman and his Deputies made many references to the concept of Judicial independence. They cited texts and speeches to the effect of the following:

that an independent judiciary is the surest protection against abuse of power;

that only an independent judiciary can impartially check administrative authorities exceeding their power and direct the performance of duties due by public officials to private citizens;

that the independence and recognition of magistrates is jeopardised by their inclusion in the administrative structure of the general public service;

that the independence of magistrates should be the same as that of judges.

They also relied on judgments of the Full Court of the Supreme Court of South Australia delivered in 1976 in a case where it held that a magistrate was disqualified by bias from hearing and determining proceedings commenced by a member of the same Department of the Public Service as himself.² In the words of two of the judges:

“... there are strong grounds for maintaining that no person holding judicial office should be in the Public Service, more especially if he or she has to hear and determine prosecutions or civil causes in which the Crown or some instrumentality thereof is a party.....”³

In pursuing this line of argument, the submission added:

“... there are today many more cases before magistrates which are charges or informations authorised by the Minister That the Minister has the power to allot one of his officers, a magistrate who by the 1979 Act is now directly under his control to adjudicate upon a prosecution which he himself launches, is an unacceptable state of affairs. At the very least such arrangement creates a situation whereby the appearance of justice being done is simply disregarded.”

3.6 As part of the argument for independence the Chairman and his Deputies also said that the salary of a stipendiary magistrate should be determined by the Statutory and other offices Remuneration Tribunal and not by the Public Service Board. They again pointed to the difference between their position and that of judges, judicial salaries being determined by the Tribunal.

3.7 In the event, the Premier, the then Attorney General and the Public Service Board acknowledged the weight of the arguments in favour of magisterial independence, although none of them necessarily accepted all the proposals put forward by the Chairman and his Deputies.

D. A Related Issue: “Opening up the Magistracy”

3.8 One hundred and three of the presently serving 105 stipendiary magistrates held office in the Public Service at the time of their respective appointments and 99 of the 103 had held office in Magistrates Courts Administration. Any proposal to take stipendiary magistrates outside the application of the Public Service Act 1979, and to accept applications for appointment to that office from persons outside the Public Service was likely to meet opposition from persons aspiring to the office. Many members of the Petty Sessions Officers Association and the Conference of Chamber Magistrates had, and have, such aspirations and they expressed their opposition to the proposal. In January 1982, members of the Association held a stop work meeting (the first in the history of the Association) and voted overwhelmingly ‘to oppose outside appointments to the magistracy. Shortly stated, the Associations view seemed to be that the great majority of magistrates should be appointed from officers serving in Magistrates Courts Administration because outside appointments would seriously endanger the career

prospects of its members and, if those prospects were to be endangered, morale would deteriorate and it would not be possible to maintain the high quality of public service provided by its members. The views of the Conference of Chamber Magistrates seemed to be similar to those of the Association. The Conference emphasised the special knowledge gained by its members in the course of long service in Magistrates Courts Administration and the advantage that this service must give them over “outsiders”, whether from outside the Public Service itself or outside Magistrates Courts Administration in the effective performance of magisterial duties. Both the Association and the Conference stressed that the prospect of eventual appointment as a stipendiary magistrate was the incentive that prompted officers in Magistrates Courts Administration to undertake special studies, and to tolerate long service in country areas and frequent transfers from one area to another. It was argued that in the absence of this incentive there would be a marked reluctance on the part of members to accept these conditions of service.

3.9 The view of Government was that the position of Magistrate should be open to all persons who are qualified for appointment. Once this view became generally known interest concentrated on the processes of selecting the persons to be appointed. The Stipendiary Magistrates' Vocational Branch and the Petty Sessions Officers Association argued that the new Act should itself constitute a committee the function of which would be to interview and select suitable persons for appointment as vacancies arose. It was decided however, that ad hoc advisory committees would be constituted but that the final decision would be a matter for Cabinet upon the recommendation of the Minister.

E. The Views of the Magistracy

3.10 The matter of the independence of the magistracy was raised at conferences of stipendiary magistrates in July 1980 and July 1981. On the first occasion a motion calling for independence was carried by a majority of 37 to 35. On the second occasion a like motion was carried by a majority of 78 to 1. We can only speculate as to the reasons for the change in voting. It has been put to us, however, that the persons voting against the 1980 motion did so because they wished to assist the persons who were then opposing the proposal to “open up” the magistracy. By 1981, when the proposal for outside appointments seemed likely to be adopted, this reason was much less compelling.

F. Opposition to “Independence”

3.11 The persons who did not support the move to take stipendiary magistrates outside the application of the Public Service Act, 1979, appear to have done so for a number of reasons. In summary, these seem to have been:

The status of the magistracy as a whole depends almost entirely on every holder of the office demonstrating his or her fitness for the office; a new Act would not confer anything more than “paper” status; real status has to be earned, it cannot be conferred.

Conferring even “paper” independence might lead to the magistracy seeking conditions of service comparable to those of judges of the Supreme Court and the District Court, including higher salary, non-contributory pensions and longer leave.

It might be difficult to deal with conduct and discipline if the provisions of the Public Service Act, 1979, could not be invoked.

There would be an adverse impact on the career prospects of officers within Magistrates Courts Administration if an impetus to outside appointments were given by removing the links with the Public Service Act, 1979.

II. RELEVANT PROVISIONS OF THE ACT

A. Qualifications for Appointment

3.12 By virtue of section 12(2) of the Local Courts Act a person is qualified to be appointed as a Magistrate if he or she is, or is eligible to be appointed as:

a barrister or solicitor of the Supreme Court of New South Wales;

a barrister or solicitor, or a barrister and solicitor, of -

(a) any court in any other State, or of a Territory, of Australia or

(b) the High Court of Australia.

When the Act commences, the Public Service Act, 1979, and in particular section 117 of that Act will cease to apply to the appointment of Magistrates. The minimum age requirement of 35 years will be removed and lawyers from anywhere in Australia, not only from New South Wales, will satisfy the qualification test. In addition although not strictly matters of qualification persons seeking appointment will not have to satisfy a statutory condition of being willing to reside permanently in a particular district (the regulations under the Act may, however, impose such a requirement), and those applying for appointment from outside the Public Service will compete, so far as statutory conditions are concerned, on an equal footing with those who apply from within the Service. This last statement is limited to statutory conditions because, in practice, some preference may be given to applicants from within the Service. For present purposes, the significance of these changes is that the number of potential applicants for appointment as Magistrates will be very high.

B. Criteria for Selection

3.13 Apart from specifying the basic qualifications for appointment as a Magistrate, the Act is silent as to the criteria which an applicant for appointment should satisfy. Our terms of reference enjoin us to make recommendations as to what they should be.

C. Procedure for Appointment

3.14 Section 12(1) of the Act merely provides that the Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate. The practical effect of this provision is that the Minister will make a submission to Cabinet in which he will recommend the appointment of a particular person or persons. Our thinking, and that of most of the persons who have made submissions to us, is, at least in relation to the first appointments, that the Minister should have the assistance of an advisory appointments committee. There is widespread agreement that the Chief Justice of New South Wales and the Chief Judge of the District Court should be invited to serve on that committee.

D. Duration of Appointment

3.15 Sections 18 to 21 of the Act are concerned with matters touching the duration of a Magistrate's appointment. Section 18 speaks of "Magistrates tenure", section 19 of "Suspension and retirement from office in certain cases", section 20 of "Vacation of office", and section 21 of "Additional terms of office". Each of these provisions will be examined in detail in the course of our work on Phase II of the reference but, for the purposes of Phase I, we are mainly concerned with section 18(1) and section 18(2) (a). These provisions are to the effect, first, that subject to the Act as a whole, a Magistrate shall hold his office "during ability and good behaviour" and, secondly, that the Governor may remove a Magistrate from his office for "incompetence, misbehaviour or contravention of the terms and conditions of his service".

3.16 By way of explanation we note that section 22 of the Act provides that in general the terms and conditions of the service of Magistrates "shall be as determined by the Governor from time to time". Also, section 28 of the Act empowers the Governor to make regulations with respect to the terms and conditions of service of Magistrates. The form of the regulations has not been finally settled but we are told that under the heading "Terms and Conditions of Service" the present draft has only two provisions, one relating to leave entitlements and the other to residency within districts.

3.17 Although the provision that a Magistrate shall hold his office "during ability and good behaviour" is expressed to be "Subject to this Act", the provision itself is intended to give a degree of judicial independence to Magistrates which stipendiary magistrates do not have. The provision is to be contrasted with the provisions applicable to judges of the Supreme Court and the District Court. Section

27 of the Supreme Court Act, 1970, is expressed to be subject to the Judges Retirement Act 1919, but it provides that the commission of every judge "shall be, continue and remain in force during his good behaviour. The section provides for the removal of a judge by the Governor "upon the address of both Houses of Parliament". Section 14 of the District Court Act, 1973, is also expressed to be subject to the judges Retirement Act, 1918, but it differs from the comparable provision in the Supreme Court Act in that it says that a judge shall hold his office "during ability and good behaviour, the same expression as is to apply to Magistrates. On the other hand, the District Court Act enables the Governor to remove a judge only for "inability or misbehaviour" and only if, before being so removed, he or she has been given 21 days notice of the intention to remove and within that time he or she has been given an opportunity of making representations to the Governor and of being heard before the Governor in Council.

3.18 We spoke of the Liquor Act, 1982, in paragraph 2.37. We find it anomalous that section 8(10) of that Act contains provisions relating to the removal of a licensing magistrate which are different from those contained in section 18(2) of the Local Courts Act 1982, relating to the removal of Magistrates. For the purposes of removal the office of licensing magistrate is equated with that of a judge of the District Court but the office of Magistrate is not so equated.

E. Salaries and Grading

3.19 In speaking of the background to the Act, we mentioned in paragraph 3.7 the importance that the stipendiary magistrates placed upon the manner in which their remuneration is determined. By virtue of section 24(1) of the Act, Magistrates will now be entitled to be paid remuneration in accordance with determinations made under the Statutory and Other Offices Remuneration Act 1975. This provision represents another break from Public Service Board and Ministerial influence and will move Magistrates closer to the position of judges of the Supreme Court and the District Court whose remuneration is, as we have mentioned, also determined in accordance with the Statutory and Other Offices Remuneration Act, 1975. It is thought that this move will be seen by many magistrates as enhancing their independence and status.

3.20 We are told that it is presently intended that when the Act commences the regulations will provide for the following classifications of Magistrates.

Chief Magistrate.

Deputy Chief Magistrates.

Magistrates of such grades as the Statutory and Other Offices Remuneration Tribunal shall determine.

The Tribunal will be empowered to determine grades for Magistrates and the ranking of those grades. A Magistrate's commission will specify the grade to which he or she is appointed and the Minister will be empowered to appoint to another grade if, and only if the Chief Magistrate certifies that the Magistrate is able to perform satisfactorily all the functions performed by Magistrates holding the other grade.

F. Reports to the Minister

3.21 The Chief Magistrate will be required by virtue of section 27(a)(iii) of the Act to submit to the Minister reports on any matters relating to discipline which arise and which have affected, or may affect the availability of Magistrates or the disposal of business by the Local Courts. Regulations may also be made under section 28(1)(d) of the Act providing for the establishment of committees to advise the Chief Magistrate. We are told that the present draft of the regulations empowers the Chief Magistrate to establish a committee of Magistrates for the purpose of conducting an inquiry into, and reporting to the Chief Magistrate on:

any allegation of incompetency of, or misbehaviour by, a Magistrate.

any alleged contravention by a Magistrate of the terms and conditions of his or her service as such

These provisions relating to incompetence and misbehaviour, and the extent to which they are, or may be, used will be examined in the course of our work on Phase II of this reference. We mention them here because, to the extent that they may be said to allow a form of "peer review", they touch upon the new independence of Magistrates and the consequences that flow from that independence. Also, we foreshadow that in the course of our work on Phase II we will examine the scope of section 27(a)(iii) and the adequacy of the powers of the Chief Magistrate with respect to allegations about the competency and behaviour of other Magistrates. In the course of that examination we will also consider general questions touching what ought to be the legal relationship between the Minister and the Chief Magistrate.

G. Temporary Appointments

3.22 Section 13(1) provides for temporary appointments of Magistrates. The scope of the subsection is not free from doubt and we reproduce it in full:

"Where the Governor considers it appropriate that a Magistrate should be appointed for a particular term of office, the Governor may, in the commission of the Magistrate's appointment -

(a) by reference to dates, specify the term of office for which the Magistrate is appointed; and

(b) fix terms and conditions (including terms and conditions requiring him to exercise his functions at a particular place) subject to which the Magistrate shall serve in his office."

It can be argued that the subsection enables the appointment of a Magistrate for a particular term of office and without any other special terms and conditions. On the other hand, it can be argued that the words "the Governor may" should, in the context in which they are used, be construed as "the Governor shall". On the former approach, a stipendiary magistrate could be appointed a temporary Magistrate and exercise the functions of a Magistrate during the term of the appointment anywhere in New South Wales, unless especially restricted to a particular place by his or her Commission. On the latter approach it could be that such a person could exercise those functions only at a particular place. It seems that the provision was intended only to allow a temporary Magistrate to be appointed for such a period as would enable him or her to dispose of arrears of work at a particular court. As indicated, the question of whether the provision allows a wider interpretation is not free from doubt. We raise the doubt here because it has been suggested to us that if it were thought that a particular stipendiary magistrate was not now suitable for appointment as a Magistrate, he or she could be appointed as a temporary Magistrate and his or her position could be reviewed at a later date. We do not believe that the provision was intended to be used for this purpose and, even if it could be, we would not recommend that it be so used unless in exceptional circumstances. We are presently unable to envisage any such circumstance, except perhaps where a stipendiary magistrate is ill and the likely duration of his or her illness is unknown.

H. Stipendiary Magistrates not Appointed Magistrates

3.23 The last of the provisions of the Act with which we are immediately concerned is clause 5(3) of Schedule I. For the purposes of the clause, the expression "former Magistrate" means a person who, immediately before the commencement of the Act was employed under the Public Service Act, 1979, in the position of stipendiary magistrate. The clause itself says:

"Any former magistrate who does not accede to the office of a Magistrate on the appointed day shall if he has not attained the age of 60 years, be appointed to a position in the Public Service not lower in classification or salary than that which he held immediately before that day."

The importance of this provision needs no elaboration. It does, however, need some elucidation.

3.24 Clause 5(3) gives rise to questions of both legal and practical importance. The clause, in effect, commands that a former stipendiary magistrate be appointed to a position in the Public Service "not lower in classification or salary" than that which he or she held immediately before the appointed day. What are the legal consequences of a command of this kind. What is a position "not lower in

classification or salary”? And apart from the legal consequences, what are the practical consequences if there is no such position or no such available position?

3.25 Before attempting to answer these questions, we think it helpful to consider what would have been the position of a stipendiary magistrate not acceding to the office of magistrate if clause 5(3) had not been enacted. Comparable problems are not uncommon. Departments, for example, are often restructured and the positions of some officers are abolished. If the position of a Special Division officer (a Department Head) under the age of 60 years is abolished, he or she is entitled, by virtue of section 52(6) of the Public Service Act, 1979, to be appointed to another position in the Public Service not lower in classification and salary than that which he or she held immediately before he or she became a Special Division officer. We note that whereas clause 5(3) speaks of “classification or salary”, section 52(6) speaks of “classification and salary”. Officers who are not special Division officers and whose position is abolished may attract the provisions of sections 113 and 114 of the Public Service Act 1979. Under section 113 the Board may take such steps as are practicable to secure the transfer of excess staff to vacant positions in the Public Service at existing salaries. It however, the excess cannot usefully be employed in the Public Service, their services can be dispensed with by the Board with the approval of the Governor. Under section 114, if an officer in the Public Service is in receipt of a greater salary than the maximum fairly appropriate to his or her work, a procedure similar to that used in section 113 cases maybe followed, and the officer’s salary maybe reduced to the maximum determined by the Board to be appropriate to the work being performed. It may be, however, that clause 5(3) does not exclude the operation of sections 113 and 114.

3.26 As we understand the present view of the Public Service Board, upon the appointed day there will be no work in the Public Service reasonably similar to the work now being done by stipendiary magistrates. It can be argued therefore that there will be no position in the Public Service not lower in *classification* to which a stipendiary magistrate could be appointed. The object of the reference to “classification” in clause 5(3) may have been to guard against the appointment of a stipendiary magistrate to a position in the Public Service which though *carrying an equivalent salary*, is in some way inappropriate or demeaning in status having regard to that persons former position if, in practical terms, this object cannot be achieved, what follows:

3.27 One possibility would be the exercise by the Crown of its common law right to dispense with the services of its servants at pleasure. This right is preserved by section 118 of the Public Service Act 1979, which provides as follows:

“Nothing in this Act shall be construed or held to abrogate or restrict the right or power of the Crown as it existed immediately before the commencement of this section to dispense with the services of any person employed in the Public Service.”

As we understand the position, in practice the common law right is exercised only in case’s of gross misconduct but in law there appears to be no condition precedent to its exercise. If it were to be exercised by the Governor in Council we doubt that any appeal would lie to the Government and Related Employees Appeal Tribunal or that a dismissed stipendiary magistrate could apply under section 20A of the Industrial Arbitration Act, 1940, for an award directing the Public Service Board to reinstate him or her to a position not less advantageous than that held prior to dismissal. An application under section 20A could be made, however, by a union of which he or she was a member.

3.28 We return to the matter of stipendiary magistrates who are not appointed Magistrates in Chapter 5.

FOOTNOTES

1. Many of the statements of fact made in this chapter are based on our reading of departmental files. These files are not public documents and hence we do not identify particular documents.

2. *Fingleton v. Christian Ivanoff Pty.Ltd.* (1976) 14 S.A.S.R. 530.

3. *Id.*, at p.546, per Wells and Sangster, JJ.

4. The First Appointments

I. INTRODUCTION

A. Recapitulation

4.1 Proposals for "an independent magistracy" were made by the Chairman of the Bench of Stipendiary Magistrates, Mr. C.R Briese, in January 1980. These and related proposals were examined in detail and at length by the Government, the magistracy, and unions representing magistrates and Petty Sessions officers. The proposals were adopted, with some modifications, by the Local Courts Act, 1982.

4.2 The operative provisions of the Act have not yet commenced but, when they do, Local Courts presided over by Magistrates will take the place of Courts of Petty Sessions presided over by stipendiary magistrates. Unlike stipendiary magistrates, Magistrates will not, in their capacity as Magistrates and during their terms of office as Magistrates, be subject to the provisions of the Public Service Act 1979. They will hold office during ability and good behaviour. In short stipendiary magistrates are public servants performing judicial duties but Magistrates will be judicial officers.

4.3 It was intended at one time that the Act would commence on 30 May 1983. But on 11 May 1983 the Chief Justice of New South Wales, the Hon Sir Laurence Street, KC.M.G.. K St J, received a Royal Commission requiring him to inquire into two matters. The first matter involved, among others, a Chairman of the Bench of Stipendiary Magistrates (not the present Chairman) and a serving stipendiary magistrate. At about this time, a decision was made to defer the commencement of the Act On 28 July 1983 the Chief Justice presented his findings and report, and commented to the effect that the making of the first appointments as Magistrates must be done "carefully and thoroughly".¹ On 9 August 1983 the Attorney General and Minister for Justice, the Hon. D.P. Landa, LLB., M.LC., made the reference to this Commission which is the subject of this Interim Report The Report deals with the procedures and criteria which should be followed and applied for selection of the persons to be first appointed as Magistrates.

B. The Need for Expedition and Care

4.4 Although the Chief justice was concerned to ensure that the first appointments under the Act are made carefully and thoroughly, he also expressed his firm view that "all due expedition" should be given to the implementation of the reforms that are embodied in the Act.² The Attorney General expressed similar views where in our terms of reference, he directed us to make this Interim Report "as soon as possible". We share these concerns and are conscious of the fact that in a circular of 21 April 1983 addressed to all stipendiary magistrates their Chairman acting in good faith told them that they would all accede to the office of Magistrate. To the extent that our terms of reference now cast doubt on their positions, many stipendiary magistrates may well be uncertain of their futures. It is right that uncertainty of this kind be resolved as soon as possible. But, on the other hand, it is important to ensure that every person who is appointed to the Local Courts as a Magistrate has the special qualities that are needed for that office. In our view, these Courts, and the persons who preside over them will play an increasingly important role in the administration of justice in New South Wales, and we anticipate that the recommendations to be made in our final Report will reflect this view. It would be a matter for regret if the future of the Local Courts were to be in any way clouded because of haste or ill-considered initial appointments.

C. The Structure of this Chapter

4.5 The balance of this chapter is in two parts. In Part II we consider whether all stipendiary magistrates should be appointed automatically under the Local Courts Act. We conclude that they should not. In Part III we consider three options for the appointment of Magistrates, each of which assumes that stipendiary magistrates will not be automatically appointed to the position. These options are

to appoint all stipendiary magistrates except those, if any, who are removed in consequence of disciplinary proceedings;

to open all Magistrates' positions to applications from all qualified persons, so that stipendiary magistrates would compete on an equal footing with other applicants;

to invite, in the first instance, only stipendiary magistrates to apply for appointment and to consider their applications before inviting applications from qualified persons for any vacancies.

II. AUTOMATIC APPOINTMENT

A. Arguments for Automatic Appointment

1. Introduction

4.6 Automatic appointment is, not surprisingly, the approach preferred by the Stipendiary Magistrates' Vocational Branch of the Public Service Association of N.S.W. In its written submission to us, the Branch argues strongly that "all presently serving magistrates should be reappointed when the Local Courts Act comes into force".³ The Branch's arguments for automatic appointment, and similar arguments, are referred to in the following paragraphs.

2. Demonstrated Fitness for Appointment

4.7 The discipline and conduct provisions of the Public Service Acts of 1902 and 1979 have not been invoked in relation to any serving stipendiary magistrate. It is argued that it should accordingly be presumed that all stipendiary magistrates are efficient and competent in the performance of their duties. The duties of Magistrates will on this argument, be the same as those of stipendiary magistrates, and the latter's presumed efficiency and competence entitle them to automatic appointment as Magistrates.⁴

3. Judicial Independence

4.8 Although subject to the provisions of the Public Service Act 1979, stipendiary magistrates nonetheless perform judicial duties. Practices and conventions designed to preserve judicial independence should, it is argued, also apply to them. When the Supreme Court Act, 1970, and the District Court Act, 1973, were enacted, they provided, in effect, that no Judge could, by reason of the enactment, be denied his or her commission as a judge. The Local Courts Act does not contain any comparable provision but if its enactment is seen to be used as a means of removing any stipendiary magistrate from office, great harm will be done to the principle of judicial independence. Will not the independence of Magistrates be at risk if it is now demonstrated that an act subsequent to the Local Courts Act can be used to remove them from office? This argument assumes that the Local Courts Act continues the present system of Courts of Petty Sessions in the same way as, for example, section 22 of the Supreme Court Act, 1970, continued the Supreme Court of New South Wales as the State's superior court. In short, the argument says that the Local Courts Act effects only "cosmetic" changes, that Local Courts will be the same as Courts of Petty Sessions, and that if the people now presiding over Courts of Petty Sessions are not automatically appointed to preside over the Local Courts, the principle of judicial independence would be infringed.

4.9 Support for this argument may be sought in the fact that when magistrates in the Australian Capital Territory, Tasmania and Western Australia were taken outside the application of their local equivalent of this State's Public Service Act no magistrate lost his or her office.⁵ There are, however, significant differences. In Western Australia, magistrates were not subject to the Public Service Act of that State in relation to appointments and discipline even before 1979, when the Act ceased to apply to them. In the Australian Capital Territory and Tasmania there were few magistrates at the time of their removal from the relevant Acts. The possibility of there being stipendiary magistrates who are unfit for the office of Magistrate is greater in New South Wales where the Bench is much larger.

4. Reasonable Expectations

4.10 We have already said that stipendiary magistrates were told by their Chairman in April 1983 that they would all be appointed as Magistrates. Apart from this, expectations also arose upon appointment as a stipendiary magistrate. These included expectations of receipt of a magisterial salary until retirement and of substantial superannuation benefits upon retirement. If a stipendiary magistrate is not appointed as a Magistrate, he or she may well have to abandon at least some of these expectations. We spoke of clause 5 (3) of Schedule I to the Act in paragraphs 3.24- 3.29 and we return to it in Chapter 5. For present purposes it is sufficient to say that notwithstanding clause 5(3), a stipendiary magistrate who does not become a Magistrate will be, at least in theory, at risk of not retaining the position in the Public Service to which he or she will be appointed pursuant to clause 5(3). The submission of the Stipendiary Magistrates' Vocational Branch emphasised the possibly disastrous financial effects on a stipendiary magistrate who is not appointed under the Local Courts Act and whose services are dispensed with under the Public Service Act.⁶

5. Speedy Implementation

4.11 The need to proclaim the commencement of the Act as quickly as possible is widely recognised. We have stated the views of the Chief justice and the Attorney General on this subject in paragraph 4.4. There is little doubt that the automatic appointment of all stipendiary magistrates as Magistrates would be the quickest way of satisfying this need. It would also remove at the earliest possible moment the uncertainty on the part of stipendiary magistrates to which we have already referred.

B. Arguments Against Automatic Appointment

1. Introduction

4.12 Many submissions to us opposed automatic appointment. The New South Wales Bar Association for example, said that

"The existing magistrates are appropriate to be considered for selection and [we accept] that they will form the bulk of the first appointments, but there should be some outside appointments if possible."⁷

Sir Adrian Solomons M.L.C., on behalf of the Leader of the Opposition in the Legislative Assembly, suggested that the Attorney General should constitute a small committee to

"examine the record, qualifications and performance of all existing [stipendiary magistrates] with a view to recommending whether or not their commissions are to be renewed under ... the Local Courts Act".

Sir Adrian added that on completion of this task it would become clear how many vacancies remained to be filled, and these could be the subject of nationwide advertisements seeking applications.⁸ The Council for Civil Liberties contended that the appointment of serving stipendiary magistrates as Magistrates under the Local Courts Act, should not be automatic,

but should be made on merit.⁹ The Acting Public Solicitor proposed that if the Attorney General considered that there were existing stipendiary magistrates who were not “performing their duties competently” they should not be appointed to the new bench.¹⁰ We refer to other submissions, and to arguments advanced in them, in the course of the following discussion.

2. Changes Wrought by the Local Courts Act

4.13 The arguments in favour of automatic appointment based on demonstrated fitness and judicial independence rely heavily on the premise that the office of Magistrate in a Local Court will not be significantly different from that of a stipendiary magistrate in a Court of Petty Sessions. In our view, this basic premise is misconceived. The Local Courts Act changes many of the consequences of appointment as a Magistrate. Their general effect is that Magistrates will have higher status and greater freedom from governmental direction or supervision than is presently enjoyed by stipendiary magistrates. In total these changes are sufficiently significant for it to be appropriate to require an appraisal of each stipendiary magistrate’s suitability for appointment as a Magistrate, rather than for such appointment to be automatic.

4.14 Under the Act the position of Magistrates, as compared with that of stipendiary magistrates, is improved in the following areas:

- general status;
- security of tenure;
- susceptibility to minor disciplinary action;
- susceptibility to administration direction by Government;
- method of salary determination.

The nature of these changes has been described in earlier chapters, but summarise them briefly in the following paragraph.

4.15 First, Magistrates will be independent judicial officers, rather than public servants subordinate to a Department Head. In this respect they will be in a position similar to that of judges of the District Court and the Supreme Court. This change in status was sought, and its significance was emphasised, by the Chairman and his Deputies in submission made to the Department prior to the enactment of the Local Courts Act. Secondly, Magistrates will hold office “during ability and good behaviour”, rather than being removable from office under the discipline and conduct provisions of the Public Service Act, 1979. The fact that the new criterion for removal is the same as for the District Court judges emphasises the significance of this change. Thirdly, Magistrates, in their capacity as Magistrates, will not, in theory or in practice, be subject to direction by a Department Head, the Public Service Board, or even the Minister. In this context, our comments in paragraph 2.36 on present practices concerning complaints about stipendiary magistrages are pertinent. Fourthly, Magistrates will not be subject to investigation, and possible discipline, by a Department Head or the Public Service Board in relation to disciplinary matters of the kind specified in section 85 of the Public Service Act, 1979. Save where there may be grounds for removal from office, the Government will no longer be empowered to require Magistrates to explain their conduct, or to issue directions as to appropriate standards of behaviour. Fifthly, Magistrates’ salaries will be determined by the independent tribunal which fixes salaries for those persons (including judges of the District Court and the Supreme Court) who are statutory officers rather than public servants. By contrast, the salaries of stipendiary magistrates are determined by the same procedures as apply to other public servants.

4.16. It is also relevant to consider here a number of consequences which are not expressly provided for in the Local Courts Act but which may flow from that Act or be recommended in our final Report. These consequences relate to

method of appointment;

appointment from outside the Public Service;

jurisdiction;

level of salaries.

We summarise them briefly in the following paragraph.

4.17 First, it is reasonably clear that the future method of appointing Magistrates will have less affinity with Public Service processes that is the case with stipendiary magistrates. This applies particularly to the composition of any advisory appointments committee which might be constituted. Secondly, we mentioned earlier the increased likelihood of Magistrates being appointed from outside of the Public Service. This change is likely, overtime, to make additional high-calibre applicants available for appointments as Magistrates, and to improve the status and manifest independence of the Bench. Thirdly, as we described in paragraph 2.12-2.14 the jurisdiction of stipendiary magistrates was increased substantially earlier this year. These increases occurred a few months after the enactment of the Local Courts Act had made it clear that the status and independence of Magistrates were to be enhanced. There is a clear Possibility that this enhancement will contribute to the increases in jurisdiction from time. Fourthly, there is a possibility that the increased responsibilities, calibre and status of Magistrates will lead to an increase in their salaries. We have mentioned earlier that the Stipendiary Magistrates' Vocational Branch has already submitted to us that there should be such an increase.

4.18 The changes expressly effected by the Local Courts Act are sufficient in themselves to indicate that automatic appointment of all stipendiary magistrates as Magistrates is inappropriate. But the argument against automatic appointment is made even more compelling by the possible consequences flowing from the Act referred to in paragraphs 4.16-4.17.

3. The Absence in the Past of Effective Disciplinary Procedures

4.19 We said in paragraph 2.33 that no disciplinary proceedings under the Public Service Acts of 1902 and 1979 have been taken against a stipendiary magistrate in the past 30 years. There are no doubt a number of reasons for this, including the fact that the disciplinary provisions of these Acts seem to be inapt in their application to officers performing judicial duties such as stipendiary magistrates. It seems clear, however, both in New South Wales and other Australian States, that formal disciplinary proceedings against magistrates under Public Service Acts are very rare and, in practice, require very strong evidence of serious misconduct.¹¹ In our view, the fact that formal disciplinary proceedings under the Public Service Acts have not been taken against serving stipendiary magistrates does not necessarily establish that all such magistrates meet the criteria that are appropriate for appointment to a *new and independent court*. This in turn indicates that automatic appointment of stipendiary magistrates to the position of Magistrate under the Local Courts Act is not necessarily warranted.

4. Doubts Concerning the Suitability of Some Stipendiary Magistrates for Appointment

4.20 Neither the submissions we have received, nor any other information we have gathered during the course of our inquiry has indicated general dissatisfaction with the competence or behaviour of serving stipendiary magistrates. On the contrary, the impression we have gained from those who are familiar with the work of stipendiary magistrates is that most of their

perform their difficult role competently and diligently and would meet criteria that could reasonably be imposed for appointment to the Local Court Nonetheless, it is clear that some well informed participants in and observers of, the system have serious concerns about the Suitability of some stipendiary magistrates for appointment to a new and independent court. it is not our function to determine whether these concerns are well founded or not The point is that if serious doubts are entertained by such people, careful consideration should be given to the first appointments to the Local Courts.

4.21 A number of submissions expressed these doubts in arguing against the automatic appointment of serving stipendiary magistrates to the Local Courts. The Law Society of New South Wales, in expressing its tentative and not concluded views, suggested that no present stipendiary magistrate should be automatically appointed. The Society contended that there is "only one course open to the Government", which is to appoint serving stipendiary magistrates, unless they come within the small band "to whom the following circumstances apply". In detailing these circumstances, the Society added that it had indications that there are many complaints about a small number of stipendiary magistrates. It said that, in the time table, it had not been able to assess the substance of the complaints and hence was not in a position identify any particular stipendiary magistrate. The Society did, however, list the following general categories of complaints received in relation to a "small number of magistrates":

prejudice;

discourtesy;

impatience;

favour to the prosecution;

favour to the defence; and

lack of commonsense.¹²

4.22 The submission of the Commissioner of Police, Mr. C.R. Abbott said that experience has shown that some stipendiary magistrates have exhibited prejudices and biases which "ill behoves the administration of justice in New South Wales". He pointed out that "[u]nsatisfactory personal conduct on the part of magistrates . . . brings discredit to the administration of -justice but stated that only a "very small number of magistrates have exhibited questionable personality traits". He suggested, among other things, that an independent selection panel should be established to examine the qualifications and skills of all prospective appointees as Magistrates.¹³

4.23 The Combined Community Legal Centres Group (N.S.W.) was particularly forthright in its comments. Its submission pointed to the wide publicity given to the Local Courts Act as providing reforms which will restore public confidence in the magistracy. It suggested that the enhancement of the powers and status of the Magistrates demands that those appointed under the new Act be selected on the basis of merit and not by the routine appointment of all those who currently hold commissions as stipendiary magistrates. The submission went on to assert that:

"[t]here are some magistrates currently sitting in Courts of Petty Sessions who are unfit to hold judicial office [A] broad consensus [exists] among lawyers on the identities of certain magistrates not suited to their office either because of a clear lack of legal skills or because of extreme partiality".¹⁴

4.24 Our examination of departmental files shows that the Chairman of the Bench of Stipendiary Magistrates has expressed the view to the Minister that not all stipendiary

magistrates are suitable for appointment as Magistrates under the Local Courts Act This view, which was shared by his two Deputies, was based on information derived from a variety of sources. These included barristers, solicitors, police prosecutors and other police officers, officers within Magistrates Courts Administration stipendiary magistrates, members of the public and, in some instances, direct personal knowledge. In broad terms, the information indicated that a small number of stipendiary magistrates have at least some of the following failings:

unjudicial behaviour on the bench (for example. domineering and over-bearing conduct);

blatant reluctance to work (for example, gross unpunctuality, short working hours and unnecessary adjournments) or to do particular kinds of work;

undue haste in disposing of cases;

erratic approaches to sentencing;

incompetence.

The views of the Chairman and his Deputies have been known to stipendiary magistrates, and to the public, for some time. They were referred to In an editorial in the Sydney Morning Herald of 8 August 1983.

4.25 We stress again that we have not seen it as part of our function to assess whether the doubts expressed, In Submissions and elsewhere as to the availability of some stipendiary magistrates for appointment as Magistrates are well-founded. The point is that the doubts exist in the minds of some serious. well-informed and responsible people. The doubts cannot be resolved if all currently serving stipendiary magistrates are automatically appointed to the new Bench.

5. The Intentions of Parliament

4.26 We referred in paragraph 4.8 to the fact that the Supreme Court Act 1970, and the District Court Act, made it clear that all serving judges would automatically accede to office under the new Acts. The Local Courts Act, however, makes it equally clear that some stipendiary magistrates may not accede to the office of Magistrate. Clause 5(3) of Schedule 1 to the Act provides expressly for those who do not. It is possible that this provision was inserted because it was contemplated that some stipendiary magistrates may choose not to apply for appointment to the new office. It is difficult, however, to see why a stipendiary, magistrate would decline automatic appointment, if offered. The language of clause 5(1) is clearly not confined to such a case. Accordingly, we take the view that the provisions of the Local Courts Act show that Parliament did not assume that all stipendiary magistrates would be appointed automatically to the new Bench.

6. Reasonable Expectations

4.27 We noted in paragraphs 3.25-3.28 that there is a risk that a stipendiary magistrate who does not accede to the office of Magistrate will not retain the position within the Public Service to which he or she must be appointed pursuant to clause 5(3) of schedule 1 to the Local Courts Act. It may well be that the risk is more theoretical than real, since in practice senior public servants who have been displaced from their positions (otherwise than for misconduct) have had their employment and salary maintained within the Public Service. The same result may reasonably be expected to flow from clause 5(3). Assuming, however, that the risk is a significant one, we think that this would not be a sufficient ground to warrant automatic appointment of serving stipendiary magistrates as Magistrates. Obviously the absence of financial security would be a most serious matter for any stipendiary magistrate not appointed. Nonetheless, it would be a matter of weighing up the public importance of securing a high quality bench of Magistrates against the potential hardship to individual stipendiary

magistrates who are not able to meet the criteria for appointment. The proper administration of justice may be of such significance to society that it should prevail over individual hardship. Similarly, it may be that the possible "loss of face" which would follow the event of a stipendiary magistrate not being appointed a Magistrate is not a sufficient justification for automatically appointing all stipendiary magistrates. If a person cannot satisfy the objective selection criteria to which we have referred, it may very well be that his or her private hurt cannot match the public detriment that is likely to follow his or her appointment. It is to be noted that stipendiary magistrates themselves voted for a change in their status at a time when they had no undertaking that as individuals they would attain the new status.

4.28 Nonetheless it is clear that stipendiary magistrates have an expectation that they will enjoy financial security within the Public Service. It is equally clear that it would be a serious matter to disturb this expectation. We do not think that the most appropriate solution to the problem is the automatic appointment of all stipendiary magistrates as Magistrates. Rather, the Local Courts Act should be amended, or other action taken, to ensure that any stipendiary magistrate not appointed as a Magistrate will enjoy continuity of employment within the Public Service and will not be at risk of suffering a diminution of salary, except in cases of misconduct. We return to this matter later.

7. Implementation of the Act

4.29 We see no merit in an argument that the automatic appointment of all stipendiary magistrates as Magistrates is justified by a need to proclaim the Local Courts Act as quickly as possible. While expedition is clearly desirable, the quality of the Bench of Magistrates is a matter of considerable importance for the administration of justice in New South Wales. As the report of the Street Royal Commission says, the selection of the personnel of the magistracy must be "carefully and thoroughly done".¹⁵ The procedures adopted must minimise delays and avoid disruption to the work of the magistracy. This does not however, require the conclusion that stipendiary magistrates should be appointed automatically as Magistrates under the Local Courts Act.

C. Conclusion

4.30 We have given careful consideration to the arguments in favour of automatic appointment as Magistrates of serving stipendiary magistrates. We reject these arguments for a number of reasons.

The Local Courts Act effects substantive changes in relation to Magistrates (enhanced status, security of tenure, greater independence, and a new method of salary determination). These changes make it appropriate to apply criteria for appointment more stringent than those which might determine whether disciplinary proceedings are justified against particular stipendiary magistrates. Thus, the fact that disciplinary proceedings have not been brought against serving stipendiary magistrates, does not necessarily establish that all such magistrates are suitable for appointment under the Local Courts Act, 1982.

There are serious doubts held on the part of well-informed observers, reflected in submissions to us, as to whether all stipendiary magistrates are suitable for appointment as Magistrates.

The reasonable expectations of serving stipendiary magistrates that they should enjoy financial security can be met by ensuring that they are entitled to continuity of service and of salary within the Public Service.

The Local Courts Act by its terms, recognises that not all serving stipendiary magistrates will necessarily be appointed as Magistrates.

The need for speedy implementation of the Local Courts Act is not so great as to warrant automatic appointment of all serving stipendiary magistrates.

Accordingly, **we recommend that serving stipendiary magistrates should not be appointed automatically as Magistrates under the Local Courts Act, 1982.**

III. THE OPTIONS

4.31 If stipendiary magistrates are not to be appointed automatically as Magistrates, it is necessary to decide which approach should be taken to the first appointments under the Local Courts Act. There are, no doubt, many possible approaches, but we have identified three main options. As indicated in paragraph 4.5, these are:

to appoint all stipendiary magistrates except those, if any, who are removed in consequence of disciplinary proceedings, and then fill any vacancies by open selection from all qualified applicants;

to open all Magistrates' positions to applications from all qualified persons, so that stipendiary magistrates would compete on an equal footing with other applicants;

to invite, in the first instance, only stipendiary magistrates to apply for appointment and to consider their applications before inviting applications from all qualified persons for any remaining vacancies.

We consider each of these options.

A. Institution of Disciplinary Proceedings

4.32 One approach would be to appoint as Magistrates all stipendiary magistrates except those, if any, who are removed from office in consequence of disciplinary action. The submission from the Stipendiary Magistrates' Vocational Branch is to the effect that if its preferred option of automatic appointment is not adopted, then one of two possible courses of action should be taken. If a particular stipendiary magistrate is considered to be unsuitable for appointment, proceedings for his or her dismissal should be immediately commenced under the provisions of the Public Service Act, 1979. Alternatively, if it is considered that these proceedings would unreasonably delay the commencement of the Local Courts Act the stipendiary magistrate should be appointed a Magistrate and action for his or her removal should then be taken under section 18(2) (a) of that Act. We consider this suggestion in the following paragraphs. For the purposes of discussion we do not take into account any possibility that action under section 18(2) (a) should not, or could not, be taken in respect of incompetence or misbehaviour occurring before the commencement of the new Act.

1. Arguments for this Approach

4.33 Stipendiary magistrates now have the expectation that subject only to the discipline and conduct provisions of the Public Service Act 1979, they will if they live to the age of 60 years, hold office until they attain that age. Because these discipline and conduct provisions are part of their conditions of service, they cannot complain if the provisions are invoked against them. But, it is argued, they can complain if the security of their tenure of office, and their judicial independence, are attacked by means other than those provided for in the relevant statute, whether the Public Service Act, 1979, or the Local Courts Act. It follows, on this argument that the only basis for not appointing stipendiary magistrates as Magistrates will be that they are found unsuited for office as a consequence of disciplinary proceedings being taken against them pursuant to the relevant statute.

4.34 A further argument is that formal disciplinary proceedings, at least those taken under the Public Service Act 1979, are subject to procedural and other safeguards designed to ensure that the person against whom the proceedings are taken is not denied natural justice. These

proceedings would provide stipendiary magistrates with a full opportunity to hear and answer any allegations which may be made against them. A stipendiary magistrate whose appointment as a Magistrate is in doubt should not, it is argued, be denied these safeguards. Any attempt to do so would be a denial of natural justice itself.

2. Analysis

4.35 One argument against this approach is, as stated in paragraph 4.19, that the discipline and conduct provisions of the Public Service Act 1979, are generally inappropriate for officers performing judicial duties. Even if this difficulty could be overcome (by for example, utilising the removal provisions of section 18(2)(a) of the Local Courts Act) there is still in our view, an overwhelming objection to the suggestion that disciplinary proceedings should be the only means of determining whether a stipendiary magistrate is unsuited for appointment as a Magistrate under the Local Courts Act. The objection is, as discussed in paragraph 4.13, that the Act will effect a substantial change to the status and position of the persons who will preside over Local Courts as distinct from those who now preside over Courts of Petty Sessions. This change necessitates the formulation of criteria and procedures for the appointment of Magistrates which will ensure that the new Bench will be of the highest quality. The criteria for appointment should set standards of competence and general suitability for office that are higher than those that would be relevant in proceedings for removal from office. Thus, in our view, the crucial question is whether serving stipendiary magistrates meet reasonable criteria for appointment rather than whether they have displayed such incompetence or misbehaviour as to justify the taking of disciplinary action against them. The appropriate way to answer this question is by a selection process, adapted to the special circumstances of the particular case presented by the new Act, not by reliance on the institution or non- institution, of disciplinary proceedings designed in effect to punish for past misconduct.

4.36 We have reached this conclusion as a matter of principle. There are, however, other considerations suggesting the same result. First, given that doubts have been expressed about the suitability of some stipendiary magistrates for appointment, the choice would be between initiating disciplinary proceedings against a number of stipendiary magistrates or, in accordance with past practice, regarding such proceedings as available only in the most extreme cases. The former course of action would not only be a dramatic break with the past, but would involve prolonged proceedings that would almost certainly bring the magistracy into disrepute. The latter approach would simply not address a problem that is widely perceived to exist. Secondly, stipendiary magistrates contemplating a disciplinary inquiry would face a dilemma. If the outcome of the inquiry was that they remained in office, their good name and authority would have been adversely affected because, even if the inquiry was held in private, word of it would very soon spread among their peer group and those associated with that group. On the other hand, if the outcome was that they were to be removed from office, they would lose whatever benefits they maybe entitled to under clause 5(3) of Schedule 1 to the Act.

4.37 We are conscious that the failure to appoint any stipendiary magistrate as a Magistrate may have a significant impact on that person. But for reasons we have given, we consider that these personal considerations do not outweigh the interests of the public in the administration of justice. Nevertheless, as stated earlier, we think that the proper expectations held by stipendiary magistrates of continuity of service and salary within the Public Service should be preserved and placed beyond doubt.

4.38 Accordingly we do not recommend that all stipendiary magistrates should be appointed as Magistrates except those who are removed from office in consequence of disciplinary proceedings.

B. Open Selection

4.39 A second approach is to regard all Magistrates' positions under the Local Courts Act as open to competition from all qualified persons without any preference being accorded to any particular group of applicants. In other words, all barristers and solicitors throughout Australia, whether in the Public Service or not and whether or not serving stipendiary magistrates, would be eligible applicants. Selection would be by Cabinet on the recommendation of the Minister and the Minister might, or might not seek the assistance of an advisory committee. There would be no formal presumption of preference in favour of stipendiary magistrates, but demonstrated ability and experience in that office could reasonably be expected to carry considerable weight.

1. Arguments for Open Selection

4.40 The main arguments for open selection can be stated shortly. They include the following.

Open selection is clearly the best way of obtaining the best qualified Magistrates, with the greatest range and depth of judicial qualities.

As stated earlier, Magistrates will have enhanced independence, security of tenure, and status in comparison with stipendiary magistrates. They will also have a much wider jurisdiction than most stipendiary magistrates had at the time-of their respective appointments (bearing in mind that all but 39 of the present Bench of 105 were appointed more than ten years ago). It is therefore appropriate to have open selection in order to obtain the best possible candidates for the new office. It would be wrong for stipendiary magistrates to be appointed automatically to, or to be given special preference for, an office that is significantly different from that which they now hold. There is, moreover, every likelihood that the jurisdiction of Magistrates will continue to be enlarged from time to time.

Open selection would enhance public confidence in the magistracy as a carefully selected and high quality group of judicial officers. It would increase the likelihood of the new Act being, and being seen to be, the beginning of a new era for the magistracy and those who appear before it.

By comparison with the use of disciplinary inquiries, this option would avoid any necessity to inquire publicly into the conduct of particular stipendiary magistrates, and would reduce the damage to the reputation of those not appointed as Magistrates.

2. Analysis

4.41 The case in favour of open selection of the first Magistrates is powerful as it would lead, in theory, to the establishment of the most highly qualified Bench and thus improve the administration of justice in New South Wales. There are, however, a number of reasons for not adopting this approach despite its apparent attractions.

4.42 First, if there were many applications for the position of Magistrate it may be difficult to give thorough consideration to them all. This difficulty would be compounded by the need to proclaim the commencement of the Local Courts Act as soon as possible. One possible consequence is that, so far as serving stipendiary magistrates are concerned, undue emphasis may be given to "paper" qualifications, or to performance in relatively brief interviews, rather than to a careful examination of past performance. Some stipendiary magistrates who have performed competently and sensitively, yet have modest qualifications, may be overlooked while other applicants, whether from the magistracy or elsewhere, may be preferred simply on the basis of apparently superior paper qualifications.

4.43 Secondly, if there were many applications, a thorough selection process may be too lengthy to permit the involvement of the most appropriate people. It might preclude, for example, the active participation of persons at the highest levels of the judiciary. Yet such

involvement may be important in order to provide a selection process which has the confidence of the public and the magistracy, and reflects the importance of the appointments.

4.44 Thirdly, an open selection process creates the possibility that a substantial proportion of serving stipendiary magistrates would not be appointed as Magistrates. If this occurred, great transitional difficulties could arise from a large influx of new Magistrates, many of whom may have no judicial experience. Moreover, assuming that any stipendiary magistrates who are not appointed retain continuity of service and salary within the Public Service,¹⁶ the cost and inconvenience to the State could be great.

4.45 Fourthly, while the expectations of stipendiary magistrates should not stand in the way of measures needed to improve the quality of the administration of justice, those expectations should be given proper weight. Open selection would lead to conflict with the expectations of stipendiary magistrates; whether based on statements made to them or otherwise. This may create resentment and perhaps could affect the work performed by stipendiary magistrates while the selection process takes place. Moreover, it would also be desirable for the selection process to reassure stipendiary magistrates that demonstrated ability and experience in that office will be given due weight.

4.46 We conclude that despite its theoretical attractions, open selection should not be used for the first appointments of Magistrates under the Local Courts Act.

C. Phased Selection

4.47 On a 'phased selection' approach, the following procedure would be adopted:

applications for appointment as Magistrates under the Local Courts Act would first be invited from serving stipendiary magistrates;

applications would be assessed by a committee, whose task would be to advise the Minister as to which of the applicants meet criteria which can fairly be expected of appointees to a newly independent court;

any vacancies in the magistracy arising out of this process would be filled by open selection with recommendations being made by the same committee, or substantially the same committee;

any stipendiary magistrate not appointed as a Magistrate would be entitled to continuity of service and salary, within the Public Service.

Phased selection would give some preference to serving stipendiary magistrates. The selection procedure would involve assessing whether stipendiary magistrates meet specified criteria. It would not involve the imposition of a penalty for past misconduct.

1. Arguments for Phased Selection

4.48 The arguments in favour of phased selection of Magistrates are implicit in the reasoning of this Interim Report. They include the following:

Phased selection recognises that the status and position of Magistrates under the Local Courts Act are different from those of stipendiary magistrates, and that it would not be appropriate automatically to appoint all stipendiary magistrates or to appoint all except those against whom disciplinary proceedings might be instituted in respect of past misconduct or incompetence.

By concentrating in the first instance on applications from serving stipendiary magistrates, phased selection would permit those applications to receive full and careful consideration, yet enable the selection process to proceed with reasonable speed. It would reduce the

task of *competitive* selection to what are likely to be manageable proportions, and thus mean that a high-level selection committee, which would command the confidence of the public and the magistracy, could be established to recommend initial appointments.

This approach should reassure stipendiary magistrates that their qualifications and experience will be given proper weight by any selection committee.

Phased selection avoids the excessive expenditure of time and effort which could result from an open selection process and which would delay unacceptably the implementation of the Local Courts Act.

Phased selection would also avoid the difficulties which are inherent in disciplinary proceedings, difficulties to which we referred in paragraphs 4.35 and 4.36.

2. Analysis

4.49 Arguments against the phased selection approach were considered when earlier in this chapter we discussed other possible approaches. One is that phased selection is less likely than open selection to result in the best appointments to the magistracy. We considered this contention in paragraphs 4.41-4.46 where we examined the suggestion that all initial appointments should be made by open selection. We concluded there that though open selection had attractions in theory, there would be significant disadvantages in practice. These included the difficulty of giving careful consideration to all applications, the magnitude of the task, the transitional disruptions which might be caused, and the fact that open selection would conflict with expectations held by serving stipendiary magistrates.

4.50 A second argument is that any stipendiary magistrate whose application for appointment as a Magistrate is unsuccessful may feel that he or she has been denied the full opportunity to present his or her case which would be available in disciplinary proceedings. In paragraphs 4.35-4.36, we gave our reasons for concluding that disciplinary proceedings should not be employed as the means of determining whether any stipendiary magistrate is unsuitable for appointment under the Local Courts Act. Among other difficulties, such an approach would give insufficient recognition to the changes effected by the Act.

4.51 It is desirable that stipendiary magistrates should have an opportunity to respond to any doubts a selection committee may have about their suitability for appointment as Magistrates. In our view, however, concerns of this kind can be met through the establishment of an appropriate appointments committee and the adoption by that committee of fair selection procedures. We turn to these matters in the next chapter.

IV. CONCLUSION

4.52 **We recommend that the first appointment of Magistrates under the Local Courts Act, 1982, should be undertaken by means of the process we describe as “phased selection”. Under this process**

applications for appointment would first be invited from all serving stipendiary magistrates;

the applications would be assessed by an appointments committee which would advise the Minister as to the applicants who are recommended for appointment;

any vacancies arising after consideration of the applications from stipendiary magistrates would be filled, after open advertisement, by the Minister on the recommendation of the committee, or substantially the same committee.

Phased selection would pay due regard to the changes effected by the Local Courts Act. It would assist in maintaining public confidence in the judicial system by ensuring that any

stipendiary magistrate appointed as a Magistrate would have been the subject of a recommendation made by a highly qualified appointments committee. At the same time, it would accord due weight to the expectations and experience of stipendiary magistrates. It would also provide a selection process that is both thorough and expeditious.

4.53 Our preference for phased selection requires attention to be given to the criteria for appointment the composition and powers of the appointments committee, and the procedures to be followed by the committee. It is also important to make just provision for the stipendiary magistrates, if any, who are not appointed Magistrates. We examine these issues in Chapter 5.¹⁷

FOOTNOTES

1. *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against KE. Humphreys* (July 1983), p.98.

2. *Ibid.*

3. Submission No.17, p.1

4. The submission is qualified in its application to Mr. K W Jones, S.M.

5. See Appendix A to this Interim Report.

6, Submission No.17, pp.22-23.

7. Submission No.42.

8. Submission No.7.

9. Submission No.50.

10. Submission No.51.

11. The point can be illustrated by the thorough consideration given in 1978 to the possibility of taking disciplinary proceedings against the then Chairman of the Bench of Stipendiary Magistrates. In the event proceedings were not taken. See *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against K E Humphreys* (July 1983), Appendix 10.

12. Submission No.49.

13. Submission No.38.

14. Submission No.43.

15. See note 1 above.

16. Whether pursuant to clause 5(3) of Schedule 1 to the Local Courts Act, 1982, or to some other provisions resulting from our recommendation.

17. We note that clause 3 of Schedule 9 to the justices (Local Courts) Amendment Act, 1982, is directed at certain transitional problems which could arise if a stipendiary magistrate is not appointed a Magistrate and, on the appointed day, is "part-heard" in particular proceedings. We have not examined this provision with a view to determining whether it covers all possible contingencies.

5. The Selection Process

I. THE SCOPE OF THIS CHAPTER

5.1 We concluded in Chapter 4 that what we call a phased selection approach should be adopted for the selection of the persons to be first appointed as Magistrates under the Local Courts Act 1982. In this chapter, we consider the selection process itself. We do so under the following heads.

- the criteria for appointment;
- the appointments committee;
- the appointments procedure;
- the filling of any consequent vacancies in the magistracy.

We then consider some related matters, namely

- the need, if any, for medical reports in respect of successful applicants;
- the position of any stipendiary magistrate who is not appointed a Magistrate.

We conclude the chapter by directing some attention to the office of Chief Magistrate.

II. THE SELECTION PROCESS

A. The Criteria for Appointment

5.2 We are not concerned here with qualifications for appointment. They are stated in section 12(2) of the Local Courts Act and, for the purposes of this Interim Report we regard them as settled. If a person is, or is eligible to be appointed as, a solicitor, a barrister, or a barrister and solicitor anywhere in Australia, he or she is qualified for appointment as a Magistrate. The fact that a person is qualified is, of course, no indication that he or she is suitable for appointment.

5.3 Writings on the merits of the criteria used in the selection of magistrates and judges are not extensive. We have, however, had regard to some writings of this kind.¹ In view of the enlarged jurisdiction exercised by stipendiary magistrates, and the enhanced status and responsibilities that Magistrates will have under the Act, we see the criteria which are relevant to the selection of judges as being generally applicable to the selection of Magistrates, although some adaptation may be required.

5.4 We set out in paragraph 2.22 the major matters to which regard is often had when appointments as stipendiary magistrates are being considered. This list covers in a general way most, although not all of the qualities sought in the holders of judicial office. We do not repeat the list here. We simply note that the relevant criteria fall broadly into several categories, which are not necessarily mutually exclusive.

legal skills, including knowledge of the substantive law and relevant procedural rules and the ability to identify, analyse and reach conclusions on legal issues;

judicial qualities, including the capacity to assess evidence critically and carefully, to make decisions without prejudice or bias and to express reasoning and conclusions clearly and persuasively,

personal characteristics, including “moral courage” (especially imperviousness to corrupting influences), dependability, commonsense, diligence, and sensitivity to the difficulties and needs of other people; personal attributes to which the Chief justice of New South Wales has elsewhere attached importance are “humanity, humility and a liberated intellect”;²

breadth of knowledge and experience, including an understanding of non-legal disciplines insofar as they relate to sentencing and other judicial responsibilities, and professional experience with problems of the kind that come before the courts;

reputation for honesty and integrity in both professional work and personal life.

In the report of the Street Royal Commission the Chief Justice expressed the requirements of judicial office as follows:

"uncompromised and uncompromisable integrity in the dispassionate determination of disputes within the disciplined guidelines of the body of admissible evidence and established rules of law. Calm disengagement from external or collateral considerations, and independent detachment from extraneous influences, are essential if justice is to be administered with the fair impartiality upon which the integrity of our judicial system rest".³

5.5 It is interesting to compare the criteria formulated by Magistrates Courts Administration with a list compiled in the United States after 144 judges had been asked which of 23 judicial qualities were seen by them to be the most useful.⁴ The six most important qualities were said to be:

moral courage;

decisiveness;

reputation for fairness and uprightness;

patience;

good health physical and mental;

consideration for others.

Of these six qualities two, decisiveness and patience (which are not necessarily compatible), are not expressly referred to in the list formulated by Magistrates Courts Administration. This suggests that it may not be easy to reach agreement on the precise attributes required of judicial officers, or at least the relative importance of the various attributes.

5.6 Even assuming agreement can be reached, it is often exceedingly difficult to ascertain whether individual applicants possess, or will retain those qualities. One writer has commented perceptively on the United States survey referred to in the previous paragraphs

“A striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate - what he is rather than what he has done, his innate or intrinsic qualities rather than his external attainments. They are more concerned with temperament, disposition character, and attitude than with background, training, or formal achievement Except for good health they tend to be subjective and difficult to recognize and measure. Furthermore, they are qualities that do not relate uniquely to the law, its study or its practice, and are not peculiar to lawyers or judges. They do not clearly differentiate those who are best equipped to be trial judges from other persons of virtue ...

The difficulty is not in accepting the importance of the highly favoured human attributes, but in determining which lawyers have them and to what extent. Because these qualities are largely subjective, difficult to discern and, almost impossible to measure, the problem is a vexing one.”⁵

5.7 We do not think it is feasible, at least without considerable further work and perhaps not even then to specify a definitive set of criteria to govern the initial selection of Magistrates. In the end, there can be no substitute for the exercise of judgment by the responsible authority. We think it is enough **to recommend that the appointments committee, to which we refer in the next section, should take into account the matters referred to in paragraphs 5.4 and 5.5, under the following general headings:**

legal skills;

judicial qualities;

appropriate personal characteristics;

breadth of knowledge and experience; and reputation for honesty and integrity.

The relative weight to be attached to each of these attributes should be for the committee to determine.

5.8 On the phased selection approach recommended in Chapter 4, the first task of the appointments committee will be to assess applications from serving stipendiary magistrates for appointment as Magistrates under the Act. These applicants will not be competing for priority among themselves, since the positions available will equal or exceed the number of applicants. Rather the appointments committee will be concerned to determine whether each applicant meets the standards that can reasonably be expected of initial appointees. We have said that these standards should be more stringent than the minimum level of competence and behaviour that has sufficed in the past to avoid disciplinary action. For example, it may be that the decisions of a stipendiary magistrate consistently reveal important deficiencies in his or her understanding of the law, perhaps in an area added to the jurisdiction of Courts of Petty Sessions after that stipendiary magistrate was appointed. These deficiencies may not be so gross as to justify disciplinary action on the ground of incompetence. Yet they may be sufficiently serious to indicate clearly that the interests of justice would be served by not appointing the stipendiary magistrate as a Magistrate under the Act.

5.9 We have said that, if there are any vacancies in Magistrates positions after the applications from stipendiary magistrates have been considered, the vacancies should be filled by open selection. Applicants responding to open advertisement will be competing among themselves for a limited number of vacancies. It will be necessary for the appointments committee not only to determine whether applicants meet the selection criteria, but to rank them in order of priority. Thus in the case of these appointments the selection criteria will play a somewhat different role than in relation to applications from stipendiary magistrates.

B. The Appointments Committee

1. Responsibility for Making Appointments

5.10 We explained in paragraphs 2.17-2.20 the procedure governing the appointment of stipendiary magistrates under the justices Act, 1902. In practice applications from officers serving within Magistrates Courts Administration are assessed by a selection committee, which draws up an eligibility list. It is, however, the Minister's responsibility to make a recommendation to Cabinet, the formal appointment being made by the Governor following a resolution of Cabinet and the Executive Council. The Stipendiary Magistrates' Vocational Branch submitted that, if it is proposed that stipendiary magistrates should not automatically be appointed as Magistrates, the question of the appointment should be *determined* by a tribunal.⁶ Section 12 of the Local Courts Act expressly provides, however, that appointments as Magistrates shall be made by the Governor. We doubt that our terms of reference allow us to question this provision but, in any event, we would not wish to do so in the case of the first appointments as Magistrates. The long established practice, in New South Wales, other Australian jurisdictions, and the United Kingdom is that Government determines who shall be appointed to judicial office. The Governor, acting on the advice of his Ministers, makes the formal appointment. This view has

political support.⁷ Thus we think that the responsibility for making the first appointments should remain with the Minister and the Government of the day.

2. Establishment of an Appointments Committee

5.11 A number of submissions suggested that in the case of the first appointments to the magistracy, the Minister should have the assistance of a suitably constituted appointments committee. We agree that the Minister should receive thorough and impartial advice from a committee of unquestioned eminence, whose members will give due weight to the importance of the position of Magistrate and of fairness to applicants for the position. In reaching the conclusion that an appointments committee should be established, we have had regard to the unusual circumstances surrounding the deferred commencement of the Local Courts Act and the difficult and delicate task involved in making more than 100 initial appointments under that Act. A stipendiary magistrate who is not appointed as a Magistrate must have no reasonable grounds for believing that he or she has not been dealt with fairly or that the decision was made on political grounds. Accordingly, **we recommend that an appointments committee be constituted to advise the Minister in relation to the first appointments as Magistrates under the Local Courts Act.**

5.12 We wish to emphasise that this recommendation does not assume that a formal appointments committee should be established in relation to future appointments as Magistrates. There is a substantial literature on judicial commissions and similar bodies, which will be explored in Phase II of our reference. A number of difficult and potentially far-reaching issues will need to be examined in depth. We repeat that the need for an appointments committee in this case arises from the particular circumstances in which the first appointments as Magistrates must be made.

3. Composition of the Committee

5.13 The submissions vary in their suggestions about the composition of an appointments committee. Among those who supported the idea of such a committee, there was general agreement that, if possible, the Chief Justice and the Chief Judge of the District Court should be members. Other suggestions included the Chairman of the Bench of Stipendiary Magistrates, the Under Secretary of the Department of the Attorney General and of Justice, the Director of Magistrates Courts Administration, and representatives of the Bar Association and the Law Society.

5.14 We have been informed by the Attorney General that he has approached the Chief Justice and the Chief Judge of the District Court and each has indicated that he is willing to serve on an appointments committee if one is to be established. We think it is essential both from the viewpoint of public confidence in the magistracy and the viewpoint of stipendiary magistrates themselves, that this willingness to serve be translated into an appointment to the committee. The public interest is served if the first appointments to the Local Courts are the subject of recommendations made by persons of great eminence and experience. The interests of stipendiary magistrates are also served by the same considerations. Indeed, it is a public recognition of the importance of the office of Magistrate that the Chief Justice and the Chief Judge are willing to participate in the selection process. **We recommend that the Chief Justice and the Chief Judge be appointed to the committee we have proposed, and that the Chief Justice be Chairman of that committee.**

5.15 The Stipendiary Magistrates' Vocational Branch suggested in its first submission to us that the Chairman of the Bench should sit on the committee proposed by the Branch.⁸ In its second submission, the Branch contended that the Chairman should not be a member of the committee.⁹ The reason given was that the Chairman might "be required as a witness for the Magistrate or the Minister" and that he could not really be regarded as completely independent and impartial.¹⁰ It may be that this comment was based on the assumption, which we do not share, that the committee would operate as a formal tribunal hearing of allegations of misconduct against stipendiary magistrates. Clearly the Chairman knows his magistrates well and his considered views ought to be available to the committee. But as we mentioned in paragraph 4.24, the Chairman has expressed the view to the Minister that not all stipendiary magistrates are suitable for appointment as Magistrates under the Local Courts Act. In the circumstances, we think it might be seen as unfair if the Chairman having expressed these views, were

to be appointed a member of the committee responsible for making recommendations to the Minister about particular stipendiary magistrates. The Chairman has told us that he understands and willingly accepts this position. In saying that the Chairman should not sit on the committee we have proposed, we do not mean that the Chief Magistrate under the Local Courts Act should be precluded from sitting on a permanent committee, should one be established, to advise the Minister on later appointments as Magistrates.

5.16 We have given careful consideration to whether the Under Secretary of the Department, the Director of Magistrates Courts Administration and representatives of the Bar Association and Law Society should be members of the appointments committee. On balance we think not. Each of these persons and organisations has a close involvement with and deep knowledge of, the stipendiary magistrates now serving in New South Wales. Clearly their views, if sought, should be available to the committee. A difficulty could arise, however, if, for example, the views of the Law Society or the Department of the Attorney General and of Justice were sought and representatives of each body were on the committee. It might be thought difficult for the committee objectively to evaluate these views, if a representative of the body putting them forward is also a member of the appointments committee. There is an additional consideration which affects Departmental representatives. It could be seen as inappropriate for Departmental officers to serve on the appointments committee, given that a major objective of the Local Courts Act is to secure the independence of the magistracy from the Department. The same consideration would apply to any member of the committee drawn from the Public Service Board of New South Wales.

5.17 We have formed the view, however, that the appointments committee should include two members other than the Chief Justice and the Chief Judge. One should be the Solicitor General who is the senior non-political law officer of the Crown. The holder of the office is not subject to the Public Service Act, 1979, and has no formal connections with Magistrates Courts Administration or the magistracy and is clearly in a position to exercise an impartial judgment. The fourth member should be a person who has had the opportunity to observe the magistracy closely, but whose links with it are no longer close. A person fitting this description is a former Deputy Under Secretary of the Department of the Attorney General and of Justice, now the Electoral Commissioner for New South Wales, Mr. A.L. Barnett. Thus, **we recommend that the appointments committee should include the Solicitor General and one other person who could be Mr. A.L. Barnett.** Since on our proposals there would be four members of the committee, **we recommend that, in the event of an equal division, the Chairman should have a casting vote.**

5.18 We have said that the ultimate responsibility for making the initial appointments should rest with the Minister and the Government. Thus the role of the appointments committee would be to provide advice on those appointments. Nonetheless, we would expect, unless there are very exceptional circumstances, that the advice of the appointments committee would be followed. We are at liberty to add that both the Chief Justice and the Chief Judge have indicated that their willingness to participate as members of the committee is based upon this expectation.

4. Privilege

5.19 The task facing the committee will require it to obtain information and advice from a variety of bodies and individuals. We think it is important that any person or body furnishing information to the committee should have absolute privilege under the law of defamation. Similarly, the committee itself should have absolute privilege in respect of any republication of that information. We formed the tentative view that this protection could be afforded under sections 18 and 19 of the Defamation Act, 1974, if the committee was appointed under the authority of the Governor. Those sections provide for a defence of absolute privilege for a publication in the course of an inquiry or in an official report of an inquiry made under the authority of the Governor. This view was confirmed in an advice to us by the State Crown Solicitor, Mr. H. K. Roberts. Accordingly, **we recommend that the appointments committee should be constituted by the Governor in such a way that the provisions of sections 18 and 19 of the Defamation Act, 1974, apply to the inquiries and reports of the committee.**

C. The Appointments Procedures

1. Background

5.20 Given the eminence and expertise of the persons we have proposed for membership of the appointments committee, it is unnecessary and indeed inappropriate for us to specify in detail the procedures they should follow. We have complete confidence that the committee will settle upon procedures that are fair to applicants, yet meet the need to settle the first appointments of Magistrates as soon as possible. We do think it worthwhile, however, to indicate in a general way what we see as some of the central issues.

5.21 Our assessment of the position is influenced by two important factors. First for reasons we have explained, we do not see the appointments committee as being involved in a disciplinary inquiry or hearing, to which elaborate procedural safeguards might be appropriate.¹¹ It is undertaking a selection process which should be characterised by informality and confidentiality. Secondly. We recommend in paragraph 5.30 that the expectations of stipendiary magistrates should be specifically protected, in that their employment and salary within the Public Service should not be prejudiced if they fail to gain appointment as Magistrates. If this recommendation is accepted, any stipendiary magistrate whose application is unsuccessful not suffer financial detriment or loss of security of employment compared with his or her current position.

2. Selection from Stipendiary Magistrates

5.22 In our view, the first step in the selection process should be for the Minister to invite stipendiary magistrates to apply for appointment as Magistrates. There are two reasons for suggesting this approach. First, some stipendiary magistrates may prefer not to apply, and so preserve their continuity of employment and salary within the Public Service. Secondly, the applications can be expected to provide the appointments committee with information concerning the applicants' qualifications, experience and other attributes which in the light of the criteria identified earlier, may be especially relevant. We do not suggest any particular form of application-, doubtless the committee will form its own views.

5.23 The committee should be authorised to undertake such consultations as it thinks fit. We suggest (without specifically recommending) that members of the committee should consult with the Chief Magistrate and any Deputy Chief Magistrates, and with the Under Secretary of the Department of the Attorney General and of Justice. In making this suggestion we assume that the Chief Magistrate and Deputy Chief Magistrates will be appointed before the committee begins its deliberations. We return to this question later in this chapter. In addition, we think that it would be appropriate to solicit the views of the Presidents of the Law Society and the Bar Association. There may be other bodies who should be consulted. The committee should have access to departmental files to the extent that they are relevant to the applications. We have referred to the question of privilege in paragraph 5.19.

5.24 The appointments committee would of course, have power to interview any applicant, and, if necessary, on more than one occasion. We would expect that if the committee were doubtful as to whether a particular applicant warranted appointment, he or she would be interviewed before a final recommendation was made. In such a case, we would also expect that the committee would indicate to the applicant ways in which he or she may not meet the criteria for appointment and give that applicant an appropriate opportunity of discussing the matter with the committee. We repeat that interviews of this kind would not be in the nature of hearings, and should take such form as the committee determines. The report itself should be made to the Governor and might be very short, perhaps simply recommending that the persons named in an attached list should be appointed as Magistrates.

3. Open Selection

5.25 After the appointments committee has considered applications from stipendiary magistrates, there may be vacancies on the Local Courts bench. These will need to be filled expeditiously if the commencement of the Local Courts Act is not to be delayed unduly. Vacancies may arise because

at the time the committee commences its work, not all stipendiary magistrates' positions are filled,

some stipendiary magistrates do not apply for appointment as Magistrates: or

some stipendiary magistrates are unsuccessful in their applications.

We recommend that the committee should be empowered to make recommendations concerning appointments to any such vacancies and that this be done by open selection of the kind discussed in paragraphs 4.39-4.53. It may become apparent at an early stage of the committee's work that there will be vacancies to be filled by open selection if this is the case, advertisements could be placed before the committee has completed its consideration of applications from stipendiary magistrates.

5.26 We suggested in paragraph 5.15 that the Chairman of the Bench of Stipendiary Magistrates should not be a member of the appointments committee established to consider applications from stipendiary magistrates. The same considerations do not apply to the committee's consideration of applications made as part of an open selection process. **We recommend that the Chief Magistrate join the committee at the second stage of its work. This recommendation applies whether or not the Chairman is appointed as the first Chief Magistrate.**

III. RELATED MATTERS

A. Medical Reports

5.27 Persons appointed as Magistrates will hold a statutory office. The general practice in New South Wales is that all persons proposed to be appointed, or reappointed, to statutory office must undergo a medical examination. Some stipendiary magistrates may not pass such an examination. If they are otherwise suitable for appointment as Magistrates should they be denied appointment on this ground? Almost certainly they will have all passed a medical examination in the course of their careers in the Public Service, whether for the purpose of entry into the State Superannuation Fund or for entry into the Public Service itself. If they are appointed Magistrates, they will be subject to the provisions of section 19 of the Local Courts Act under which they may be suspended or retired from office on physical or mental grounds. In our view, to impose a medical examination requirement on those stipendiary magistrates who would otherwise be appointed Magistrates could cause undue hardship. **We recommend that the requirement of a medical examination be waived in relation to the first appointments of persons who are now stipendiary magistrates, but that it be not waived in relation to appointments of any other persons.**

B. Stipendiary Magistrates who are not Appointed Magistrates

5.28 Clause 5(3) of Schedule 1 to the Act is concerned with stipendiary magistrates who are not appointed Magistrates. We have referred to the clause on a number of occasions in this Interim Report. The clause itself is reproduced in paragraph 3.24 and some of its implications are mentioned in paragraphs 3.25-3.28, 4.10 and 4.27.

5.29 As we have explained, we think that it is reasonably clear that a stipendiary magistrate who is not appointed a Magistrate will in whatever position in the Public Service to which he or she is appointed pursuant to clause 5(3), be subject to sections 113, 114 and 118 of the Public Service Act, 1979. In short, he or she will legally be at risk at some time in the future of being dismissed or having to suffer a reduction in salary. We think it exceedingly unlikely that section 118, which preserves the common law right of the Crown to dispense with the services of its servants at pleasure, would be used to dismiss a person except perhaps in a case of gross misconduct. If dismissal were to be effected it is more likely that section 113 would be invoked. This section enables the Public Service Board, with the approval of the Governor, to dismiss excess staff who cannot use fully be employed in the Public Service. Again, we think it unlikely that this section would be invoked in the case of a stipendiary magistrate who is not appointed a Magistrate. It is, however, a possibility. In practice, we think it more likely that after a period of some years, action might be taken against a stipendiary magistrate, pursuant to section 114, to reduce his or her salary to a level appropriate to the work then being performed.

5.30 We said in paragraph 4.28 that it would be a serious matter to disturb the expectation that stipendiary magistrates will enjoy continuity of service and salary within the Public Service. We also said there that legislation should be amended, or other action taken to ensure that any stipendiary magistrate not appointed as a Magistrate will enjoy continuity of employment within the Public Service and will not be at risk of suffering a diminution of current salary, except in accordance with the conduct and discipline provisions of the Public Service Act 1979. For reasons we have given we do not think that stipendiary magistrates are entitled to automatic appointment as Magistrates. We do think, however, that they should not suffer loss of employment or reduction in salary as the result of the implementation of the Local Courts Act. This view is consistent with what we believe ought to have been the purpose of clause 5(3) of Schedule 1. Indeed, it may be consistent with a proper construction of that clause. The clause itself seems to recognise that stipendiary magistrates are different from other officers in the Public Service in that no other officer in the Service performs judicial duties. It is perhaps for this reason that the clause speaks of "classification or salary" as distinct from section 52(6) of the Public Service Act, 1979, which speaks of "classification and salary". This textual difference may reflect the fact that there could be no position in the Public Service which is comparable in classification to that held by a stipendiary magistrate. To the extent that this result imposes a cost on the State, it is the necessary price for improving the quality of a newly independent magistracy. Accordingly, **we recommend that the Local Courts Act, 1982, and, if necessary, the Public Service Act, 1979, be amended to ensure that any stipendiary magistrate who does not accede to the office of Magistrate shall enjoy continuity of service and salary within the Public Service until the date of his or her retirement, subject to the discipline and conduct provisions of the Public Service Act, 1979.** We do not rule out the possibility that stipendiary magistrates could be accorded an appropriate degree of security by means other than legislation. This might be done, for example, by the State entering into a contractual arrangement with each stipendiary magistrate not appointed as a Magistrate. We would regard an alternative of this kind as acceptable, provided it gives legal effect to the expectations we have identified as reasonable.

5.31 If the recommendation in the previous paragraph is accepted, we further **recommend that all stipendiary magistrates should be advised of its adoption before they are invited to apply for appointment as Magistrates.**

C. The Offices of Chief Magistrate and Deputy Chief Magistrate

5.32 We have not considered in this Interim Report the question of appointments to the offices of Chief Magistrate and Deputy Chief Magistrates. We note, however, that on 1 December 1982, during the Second Reading Debate on the Local Courts Bill in the Legislative Council, the Hon J.R. Hallam M.L.C., on behalf of the Hon. D.P. Landa. M.L.C., said:

"The chief magistrate will be assisted in his administration of the magisterial bench by deputy chief magistrates, provision for whom is made in the Act. Currently there are two deputy chief magistrates and this same number will be continued under the new arrangements. I can assure all honourable members that the present chief magistrate and the present two deputies will both be reappointed under the new Act."¹²

We do not know to what extent this statement reflects the current views of the Government. If it does, the Government can be expected to take the view that the Chairman of the Bench of Stipendiary Magistrates and his deputies should be exempted from any requirement to apply for appointment as Magistrates.

5.33 It is not our function to make recommendations in relation to particular persons. On the other hand, we do suggest that the Government should, as soon as possible, take action in relation to the appointments of the first Chief Magistrate and the first Deputy Chief Magistrates. We do not think that these appointments should be the subject of a recommendation by the appointments Committee referred to earlier. The matter is one for the Government to determine. We think it important however, that the persons to be appointed should be decided upon before the appointments committee which we have recommended begins its deliberations. We say this because we expect that the members of the committee will wish to consult with these designated office holders.

5.34 Magistrates, in common with, among others, judges of the District Court and the Supreme Court will be entitled to be paid remuneration in accordance with the Statutory and Other Offices Remuneration Act, 1975. The remuneration of the Chief judge of the District Court is the same as that of a Judge of the Supreme Court and reflects the importance of the office of Chief Judge. We think that there is much to be said for the proposition that the Chief Magistrate should be of equivalent status, and receive the same salary and allowance, as a judge of the District Court. This would reflect the importance of the position within the system of justice in New South Wales and the heavy judicial and administrative responsibilities associated with it. The change, if considered desirable, could be effected either by a determination of the Statutory and other Offices Remuneration Tribunal or by an amendment to section 14 of the Local Courts Act. We do not read paragraph(a) of our terms of reference as requiring or entitling us to make recommendations in relation to matters of this kind in this Interim Report. Nonetheless, they are issues to which the Government may wish to direct attention before making decisions on the initial appointments of the Chief Magistrate and the Deputy Chief Magistrates.

FOOTNOTES

1. See, S. Shetreet. *Judges on Trial* (1976) G.R. Winters, (Ed.), *Judicial Selection and Tenure* (1973) (American Judicature Society).
2. Quoted with permission of Sir Laurence Street *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against K E. Humphreys* (July 1983), p.52.
4. See note 1 above: M. Rosenberg (in *Judicial Selection and Tenure*), "The Qualities of Justices - Are they Strainable?", p.5.
5. *Ibid.*
6. Submission No.1.
7. Submission No.7.
8. Submission No.1.
9. Submission No.17.
10. Submission No. 17, p.24. This submission does not advert to the possibility that the Chairman of the Bench of Stipendiary Magistrates may not be appointed Chief Magistrate under section 14 of the Local Courts Act 1982. For the purposes of the present discussion we assume that he will be so appointed and that the Branch would object to any serving stipendiary magistrate also serving on the committee in question.
11. We do not consider it necessary in this interim Report to analyse the technical requirements of natural justice. We note the distinction recognised in the authorities between "forfeiture" and "application case", and the acknowledgement of an intermediate category of "expectation" cases: *McInnes v. Onslow-Fane* [1978] 3 All E.R. 211; *Cunningham v. Cole*. unreported, 14 October 1982, Federal Court of Australia. (Ellicott J.).
12. New South Wales Parliamentary Debates (Hansard), 1 December 1982. p.3586.

6. The Second Phase Of Our Inquiry

I. THE GENERAL APPROACH

6.1 This Interim Report covers the matters referred to in paragraph (a) of our terms of reference. The terms of reference also require us to outline in this Report the approach that we propose to take to the examination of the matters referred to in paragraph (b). Paragraph (b) requires us to report, having regard to the first years operation of the Local Courts Act 1982, and the objectives of the Act, on

“the amendments, if any, which should be made to the Act, and to any other legislation affecting Magistrates or the structure and organisation of Local Courts (including the procedures and criteria which should be followed and applied for selection of persons to be appointed as Magistrates)”.

6.2 It is clear that paragraph (b) covers a wide range of issues and that it will be necessary to establish priorities. Moreover, some issues may fall within our reference to review the law and practice relating to criminal procedure and might better be considered in the course of that reference. To date our work has been directed almost exclusively to the matters covered by paragraph (a) of the terms of reference. We have, however, identified a number of issues that may call for attention under paragraph (b). These are listed briefly in the second section of this chapter. We emphasise that the list is illustrative rather than exhaustive and could be modified in the light of submissions and our own researches.

6.3 We anticipate that, subject to the availability of resources, we shall follow our usual approach in dealing with Phase II of the reference. This means that we shall among other activities:

invite submissions from interested groups and individuals on matters covered by the terms of reference;

hold discussions with Judges, Magistrates, court staff, government departments (especially Attorney General and Justice, and Youth and Community Services), litigants, defendants in criminal cases, legal practitioners, the police, academics and members of the public;

undertake further comparative research into the structure, organisation and operations of equivalent courts elsewhere in Australia and overseas; and

conduct meetings or seminars to discuss matters falling within our terms of reference.

6.4 A number of organisations have undertaken or are undertaking, research into the operations of Australian courts. For our purposes, the most notable is the New South Wales Bureau of Crime Statistics and Research. Others include the Law Foundations in New South Wales and Victoria and the new Australian Institute of Judicial Administration. We anticipate that the work of these institutions, and of individual academic researchers, will be of considerable assistance to us. It may be feasible for us to encourage further research by these organisations and individuals which will assist our work.

6.5 Once the Government has announced its intentions concerning the proclamation of the commencement of the Local Courts Act, we shall call for submissions to be forwarded to us by specified date. We shall then proceed to determine the areas and issues to which we will give a special priority. We leave open the question of whether a Working Paper should be prepared, given that this Interim Report has been published. We note that our terms of reference require us to have regard to “the first year s operation of the Local Courts Act, 1982”. Accordingly, we shall not make our final Report until after that period has elapsed.

II. ISSUES FOR EXAMINATION

6.6 We list below some areas, and particular issues, which fall within our terms of reference. This list should be read in the light of our comments in paragraph 6.2.

A. Magistrates

1. Criteria and Procedures for Appointment

The identity of the appointing body.

Formal eligibility requirements.

Criteria for selection

Procedures for seeking applications.

The composition powers and procedures of bodies involved in the selection process.

2. Duration and Nature of Appointment

Voluntary and compulsory retirement ages.

Extension beyond retirement age.

Fixed-term appointments.

Probationary appointments.

Part-time appointments.

3. Internal Structure

The appointment powers and responsibilities of the Chief Magistrate and Deputy Chief Magistrates.

The extent to which there should be different grades of Magistrates.¹

The role of committees of Magistrates.

Peer review Procedures.

Criteria and procedures for promotion.

Assignment of Magistrates to particular districts or duties.

4. Range of judicial Functions

The creation of special categories of Magistrates, such as licensing magistrates, industrial magistrates, children's court magistrates, coroners and mining wardens.

The relationships between the various courts and offices constituted by Magistrates.²

5. Relationship to Higher Courts

The respective roles of the Chief Justice and the Chief Judge of the District Court, if any, in relation to Magistrates.

Permanent or temporary appointment of Magistrates to higher courts.

Judges of higher courts sitting temporarily in Local Courts.

6. Titles, Dress, Conditions of Service

Designation of Magistrates as “judges”.

Court dress.

Criteria for determination of salary, leave entitlements and other benefits.³

Residency within an assigned district.

7. Training and Education⁴

Training after appointment, but before commencement of duty.

Refresher training and other continuing education

Sentencing seminars.

Visits to institutions and agencies.

8. Standards of Conduct

Formulation of specific rules, for example, in relation to out-of-court associations with legal practitioners or police officers.

Development of a Code of Conduct.

9. Complaints, Discipline and Disability

The procedures for making complaints about Magistrates.

Investigations into the conduct and physical or mental fitness of particular Magistrates.

Review of investigations.

Formal and informal determination of complaints.

Formal and informal disciplinary sanctions.

Civil liability of Magistrates.

B. The Local Courts

1. Administration

The appropriate administrative structure for Local Courts.

The respective roles of Magistrates, the Department of the Attorney General and of justice (including Magistrates Courts Administration) and the Chief Magistrate.

Allocation of responsibility for specific aspects of administration and for particular geographical areas.

Provision of staff for the Chief Magistrate and other senior Magistrates.

Use of management consultants, advisory committees and other outside experts.

The nature of statistical and other records that should be maintained and published.

The extent to which computer technology can be utilised in court administration.

The staffing of individual courts, including the use of police officers as court attendants.

The making of reports, whether confidential or public, on the operations of Local Courts.

2. Accommodation and Services

Facilities that should be provided for:

the public;

Magistrates and court staff;

legal practitioners;

police officers.

3. Jurisdiction

Whether there should be changes in:

the matters in respect of which Local Courts have Jurisdiction;

monetary limits on the Jurisdiction of Local Courts;

the Jurisdiction that can be exercised by the consent of parties.

4. Procedure

Systems for listing cases.

Pre-trial proceedings.

Rights of audience.

Procedures where parties are unrepresented.

use of affidavit evidence and written statements.⁵

5. Chamber Magistrates and Clerks of Court

Criteria and procedures for appointment.

Powers and responsibilities in relation to Local Courts.

Training and experience after appointment

Conditions of service.

Career prospects, including the opportunity for appointment as Magistrates.

6. Non-Lawyers

The role and functions of Justices of the Peace.

The use of assessors by Local Courts.⁶

FOOTNOTES

1. Stipendiary magistrates are presently divided into three grades (paragraphs 2.25-2.28). Draft regulations under the Local Courts Act, 1982, propose two Grades. Some submissions to us have argued that there should be only one grade, contending that more than one is inconsistent with judicial independence and that gradings involve bureaucratic assumptions inappropriate to the work of the Bench (submission No.17, 35 and 57).

2. Some provisions of the Child Welfare Act, 1939, and the Community Welfare Act, 1982, may require amendment if Magistrates constituting Children's Courts are to enjoy the same independence as Magistrates constituting Local Courts (Submission Nos. 30 and 48).

3. Submissions have proposed conditions of employment closer to those of judges. Salary, extent and types of leave, and the structure of superannuation or pension benefits are the main issues (Submissions Nos. 3, 17 and 36).

4. One submission specifically suggested a Training Institute for Magistrates (Submission No. 49). Another suggested that Children's Courts' Magistrates require special skills and experience including "and awareness of the relevant criminological research relating to criminal behaviour in children" (Submission No. 54).

5. The capacity of the court to cope with the volume of cases is raised by submission No. 58. A suggestion that matters could be streamlined (without injury to "rights") by use of written statements and affidavit evidence is outlined in Submission No. 36.

6. Sections 77 and 78 of the Community Welfare Act, 1982, provide for the presence of an assessor. See also Submission No. 54.

Appendix A - Appointment And Discipline Of Magistrates (Or Equivalent Office-Holders) In Places Outside New South Wales

I. THE SCOPE OF THE APPENDIX

A.1 This appendix is in three parts. In the first part we outline the systems for appointment and discipline of magistrates in Australia, outside New South Wales. In the second part we describe briefly three recent instances in Australia when the status of the magistracy was altered significantly by legislation. In the final part we refer briefly to certain aspects of the system for appointment and discipline of magistrates (or broadly equivalent office-holders) in several other countries.

II. MAGISTRATES IN OTHER PARTS OF AUSTRALIA

Introduction

A.2 In descriptions of the Australian magistracy a distinction is often drawn between magistrates who are subject to a Public Service Act and those who are not. In Queensland, South Australia and Victoria, magistrates are subject to such an Act.¹ In South Australia, however, we understand that the Government is giving active consideration to removing the magistracy from the Public Service Act. Magistrates are not subject to a Public Service Act or Ordinance in Tasmania (since 1969), the Australian Capital Territory (since 1977), and Western Australia (since 1979).²

A.3 It is important to note, however, that the fact that magistrates in a particular jurisdiction are subject to a Public Service Act does not necessarily mean that most or all of them were public servants prior to appointment. In Queensland and Victoria, all current magistrates were public servants prior to appointment and had worked in the magistrates courts or, in a few instances in Victoria, in some other capacity in the Law Department. But in South Australia, most current magistrates were private legal practitioners prior to appointment, and none had worked as magistrates courts officers.

A.4 Conversely, the fact that magistrates are not subject to a Public Service Act does not necessarily mean that they were practising lawyers rather than court officers, prior to appointment. In the Australian Capital Territory and Tasmania, all current magistrates were previously private legal practitioners or government lawyers, rather than magistrates courts officers. But in Western Australia some magistrates were practising lawyers prior to appointment and others were previously court officers. This mixture in Western Australia applies both to appointments made before 1979 (when the magistracy was removed from the Act) and subsequently.

A.5 The approximate number of full-time magistrates in the various jurisdictions is as follows:

Australian Capital Territory	5
Queensland	66
South Australia	32

Tasmania	13
Victoria	73
Western Australia	30

In the Australian Capital Territory there are 5 part-time magistrates, and in all other jurisdictions some justices of the peace perform minor judicial functions, on a part-time basis, in courts of summary jurisdiction.

A.6 In those Jurisdictions where magistrates are not subject to a Public Service Act, there is nonetheless a government department which has administrative responsibilities in relation to them (for example, concerning provision of premises, payment of salaries etc.). In each of these jurisdictions, the Attorney General is the ministerial head of the department in question. In those jurisdictions where magistrates are public servants, the Attorney General is the ministerial head of the department to which they belong, although in South Australia the department is the Courts Department, which is responsible only for courts administration, and the other aspects of the Attorney General's portfolio are the responsibility of a separate department with a different permanent head.

A.7 We turn now to a general outline of the position in the principal Australian jurisdictions outside New South Wales. Our purpose is to give an overview rather than exhaustive detail. We refer mainly to statutory provisions, but we also mention certain practices which our inquiries indicate have become established in particular jurisdictions.

B. Qualifications for Appointment

A.8 In three jurisdictions there is only one avenue for appointment as a magistrate. In the Australian Capital Territory and Tasmania it is necessary to have been admitted as a legal practitioner for at least five years prior to appointment.³ In Queensland, it is necessary to have become *eligible* for admission as a legal practitioner and to have worked for at least five years as an officer in the Magistrates' Courts or certain other branches of the justice Department.⁴

A.9 In South Australia there are no qualifications prescribed by statute,⁵ although, in practice, admission as a legal practitioner for at least five years is regarded as a prerequisite.

A.10 In the other two jurisdictions there are alternative avenues. In Victoria, a candidate for appointment must be at least 35 years old and must either:

have practised as a legal practitioner for at least five years (mere admission, without practising, for such a period is insufficient), or

have passed a prescribed course of examinations (which, in practice, is a law degree) and have worked as a magistrates courts clerk for at least 10 years.⁶

In Western Australia, it is necessary either to be admitted as a legal practitioner or to complete a comprehensive course of legal examinations supervised by a special board.⁷

C. Appointment Procedure

A.11 Magistrates are appointed by the Governor,⁸ who in accordance with constitutional convention acts upon the advice of the Cabinet conveyed to him in the Executive Council. Cabinet usually relies on the Attorney General to recommend suitable candidates to it.

The only exception to this system is in South Australia, to which we refer in paragraph A.13.

A.12 The Government is not required by statute to consult anyone before advising the Governor. Usually, however, the positions are advertised, and the Attorney General and his or her officers carry out informal consultations. Candidates may or may not be interviewed. In Victoria, the chief magistrate's recommendations almost invariably have been sought and adopted; elsewhere there is no firmly established practice but the Chief Justice, the chief magistrate, the Solicitor General and the Presidents of the Law Society and the Bar Association are among those whose views may be sought. The principal exception from this pattern is Queensland, where a selection committee is invariably constituted, though not required by statute. This committee usually consists of the chief magistrate and the heads of the justice Department and the Public Service Board. It interviews only those candidates unknown to the members and makes a recommendation to the Public Service Board. The Board's recommendations are invariably adopted.

A.13 In South Australia, the statutory procedure is that appointments are made by the Governor on the recommendation of the Public Service Board, provided that the Chief Justice endorses the recommendation.⁹ In practice, vacancies are advertised and candidates are considered by a selection committee comprising the two senior magistrates and the head of the Courts Department (see paragraph A.6). The committee's recommendation is formally adopted by the Public Service Board but may be vetoed by the Attorney General the Chief Justice, or Cabinet.

D. Duration of Appointment

A.14 Magistrates are appointed until the age of 65,¹⁰ subject to the disciplinary and disability provisions described in paras. A.20-A.29. In Queensland, there is optional retirement at the age of 60,¹¹ and in Western Australia the Governor has discretion to continue a magistrate's term until the age of 70 "if the occasion requires it".¹²

A.15 In Western Australia there is provision for magistrates to be appointed for a fixed term of years,¹³ and some such appointments have been made in recent years. As was intended, the provision has attracted some established legal practitioners to accept appointment to the magistracy. In Tasmania, magistrates can also be appointed on a "temporary" basis.¹⁴

A.16 It is convenient to refer here to the appointment of part-time magistrates. There is specific provision for such appointment in the Australian Capital Territory¹⁵ and Western Australia.¹⁶ As mentioned earlier, there are currently five part-time magistrates in the Australian Capital Territory. They are academic or retired lawyers. Their working hours fluctuate but for those who sit regularly, they average about half those of a full-time magistrate.

E. Promotions

A.17 Most jurisdictions have two or more grades of magistrate (in addition to those of chief magistrate and deputy chief magistrate or equivalent). The grade affects salary, and may determine where a magistrate sits¹⁷ and whether he or she has administrative authority over other magistrates.¹⁸ There are no such grades in the Australian Capital Territory¹⁹ and Western Australia. In Queensland, promotion between grades is made by the same procedure as initial appointment, and is based on efficiency (or, in the event of equal efficiency, on seniority).²⁰ In South Australia, promotion is determined by the Attorney General but there are no statutory criteria or procedures, save that promotion from the initial grade is restricted to magistrates of at least five years standing.²¹ In Tasmania, promotion is based entirely on seniority.²² In Victoria, promotion is dependent

on the recommendation of the Chief Stipendiary Magistrate.²³ There are no statutory criteria or procedures, save that promotion from the lower grade is restricted to magistrates of at least five years standing. We understand that, on occasion, promotion in Victoria has been withheld or delayed for disciplinary reasons.

A.18 In every jurisdiction except the Australian Capital Territory, the chief magistrate and any deputy chief magistrate must be drawn from the ranks of the magistracy.²⁴ There is no other statutory criterion for appointment, save that in South Australia the chief magistrate.²⁵ Appointment is made by the must have at least five years experience as a magistrate. Appointment is made by the Governor, acting on the recommendation of Cabinet (or, in South Australia, the Attorney-General²⁶) There are no statutory requirements for further consultation.

A.19 There is no express provision in relation to promotion of magistrates to higher courts. We are not aware of any formally established practices to the effect that promotions will not occur, or that specified criteria will be applied when considering promotion in Tasmania in 1973, a magistrate was promoted to Chief justice of the Supreme Court. In Western Australia two lawyers who had been magistrates earlier in their careers were appointed in recent years as, respectively, a Supreme Court judge and President of the Industrial Commission. However, they were not promoted directly from the magistracy.

F. Grounds for Discipline

1. Removal from Office

A.20 In the Australian Capital Territory, magistrates can only be removed from office for “proved misbehaviour or incapacity,”²⁷ while in Tasmania and Western Australia they hold office “during good behaviour”.²⁸ In the other jurisdictions, magistrates are subject to the Public Service Act, including its provisions relating to discipline. Thus, in Queensland a magistrate can be dismissed from the Public Service for being “inefficient or incompetent” or absent without leave for 14 consecutive days,²⁹ and can be reduced in classification (which could involve removal from office as a magistrate) for any of a number of offences, unless in the particular circumstances the conduct is considered to be only a minor offence. The offences³⁰ include breaching the Public Service Act, being “negligent, careless or indolent in the discharge of [their] duties, being “inefficient or incompetent in the discharge of [their] duties” for reasons within their control failing to pay judgment debts within three months, “intoxicating beverages or drugs to excess”, and “disgraceful or improper conduct”. Magistrates who become bankrupt may be dismissed or demoted, unless they show that they were not guilty of “fraud, dishonourable conduct or extravagance.”³¹ Magistrates charged with indictable offences maybe suspended and, if convicted, maybe dismissed or demoted.³² The relevant provisions of the Public Service Acts in South Australia and Victoria are broadly similar to those in Queensland.
33

2. Suspension and other Lesser Sanctions

A.21 A magistrate may be suspended from office for “misbehaviour or incapacity” in the Australian Capital Territory,³⁴ “on any allegation of misbehaviour made by the Attorney General” in Western Australia³⁵, and for failure to maintain “good behaviour” in Tasmania.³⁶ There is no provision in any of these three jurisdictions for sanctions other than removal or suspension. In Queensland, where magistrates are subject to the Public Service Act, the grounds mentioned in para. A.20 in relation to removal or demotion below the rank of magistrate apply also to suspension from office and demotion within the ranks of the magistracy.³⁷ Where the offence is of a minor nature, the available sanctions are

deduction from salary, reprimand and caution³⁸ The relevant provisions in South Australia and Victoria are broadly similar to those in Queensland.³⁹

G. Disciplinary Authorities and Procedures

1. Magistrates not under the Public Service Act

A.22 In the Australian Capital Territory, Tasmania and Western Australia magistrates may be removed from office only by the Governor on the address of both Houses of Parliament.⁴⁰ There are no statutory provisions about the procedure to be adopted in bringing such a matter to the attention of Parliament, nor about the way in which it is to be investigated and considered by Parliament.

A.23 The only other sanction provided for in these jurisdictions is suspension. In Tasmania, this power lies in the Governor on the address of both Houses.⁴¹ In the Australian Capital Territory, it lies in the Governor General but the Attorney General must report the suspension to Parliament within a specified period and the suspension is cancelled unless within 15 sitting days of receiving the report each House resolves that the magistrate should be removed from office.⁴² In Western Australia, the Governor may suspend on the recommendation of the Attorney General but the Chief justice (or a judge nominated thereby) must then inquire into the truth of the allegation.⁴³ The Governor may confirm the suspension if the inquiry so recommends, and continue it "pending consideration of the removal of the magistrate from office."⁴⁴ Thus, both in the Australian Capital Territory and Western Australia, suspension is, in effect, available only as a prelude to consideration of removal. We know of no instance, at least in recent years, of a removal or suspension occurring in any of these three jurisdictions.

A.24 Neither the Attorney General nor the chief magistrate has any statutory power to investigate the conduct of magistrates, or to impose minor disciplinary sanctions such as a demotion or a reprimand. It is likely, however, that if action were taken to suspend or remove a magistrate the Attorney General acting perhaps at the suggestion of the chief magistrate, would be principally responsible for investigating the matter and placing it before Parliament or the Governor as appropriate.

2. Magistrates under the Public Service Act

A.25 In Queensland, South Australia and Victoria, magistrates are subject to the general disciplinary provisions of the Public Service Acts, which as mentioned in paras. A-20 and A.21, provide for sanctions such as removal suspension salary reduction and reprimand. The only special provision in relation to magistrates is that in South Australia they may not be "dismissed or reduced in status" except on the recommendation of the Chief Justice.⁴⁵ There are no provisions governing the procedure to be adopted by the Chief justice before deciding upon such a recommendation.

A.26 The disciplinary authorities and procedures under the various Public Service Acts are too complex to describe here in full. The position in Queensland, summarised below, is broadly similar to that in the other two States. In Queensland,⁴⁶ permanent heads may impose minor sanctions, such as reprimands, without following any formal procedures. A final appeal lies to the Public Service Board. Where the offence is considered worthy of a heavier sanction the permanent head must formulate a written charge and give the officer an opportunity to give a written explanation in reply. The charge, the explanation and any reports obtained by the permanent head are then considered by the Public Service Board which if it wishes, can appoint one or more persons to "make a full and complete inquiry"⁴⁷ into the matter, with power to subpoena and to take evidence on oath and report to the Board. An appeal lies to an Appeal Tribunal comprising either a Supreme Court or District Court judge sitting alone, or, more usually, a magistrate appointed by the Governor as Chairman a person appointed by the Board, and a person appointed by the officer s

union. The parties are entitled to be represented and to examine witnesses. The proceedings are private unless the officer wishes them to be public. The Tribunal has all the powers and privileges of a Commission of Inquiry but is to "inquire... without regard to legal forms and solemnities, and shall direct themselves by the best evidence they can procure, or that is laid before them, whether the same is such evidence as the law would require or admit in other cases or not".⁴⁸ The Tribunal's decision is adopted by the Public Service Board and a recommendation is made to the Governor. The final decision rests with the Governor, from whom there is no appeal.

A.27 In each jurisdiction the principal responsibility and power to initiate disciplinary action against a magistrate lies with the permanent head of the department to which magistrates belong, rather than with the chief magistrate. So far as we can ascertain disciplinary powers have rarely been exercised against magistrates. Some years ago a Queensland magistrate allegedly over-imbibed and fell asleep on the Bench. Charges were made under the Public Service Act and the magistrate was demoted to clerk of the Magistrates Court. We have been unable to ascertain the incidence of other sanctions such as reprimands or cautions, but we understand that they are extremely rare.

H. Disability Provisions

A.28 In this section we consider provisions relating to magistrates suffering from a mental or physical disability. In the Australian Capital Territory, such disability may be so severe as to constitute "incapacity", in which case the procedures for removal and suspension referred to in paras. A.22 and A.23 apply. In Tasmania, magistrates hold office "during good behaviour", and the disability may lead to conduct which justifies removal or suspension for breach of this requirement. The procedure for such action has been described in paras. A.22 and A.23. In neither of these Jurisdictions are there any further, or more specific, provisions in relation to disability. In Western Australia, however, the Attorney General is given explicit power to relieve a magistrate of duties if the magistrate is "physically or mentally unfit to discharge efficiently the duties of his office."⁴⁹ The Attorney General may then appoint a board of three medical practitioners to report on the magistrate's fitness and recommend either "reinstatement" or "retirement".⁵⁰ If the board recommends retirement, the Attorney General may advise the Governor to remove the magistrate from office.

A.29 In the jurisdictions where magistrates are subject to the Public Service Act the general provisions of that Act in relation to disability apply also to magistrates. As mentioned before, however, in South Australia a magistrate cannot be removed or demoted otherwise than on the recommendation of the Chief Justice. The relevant provisions in the Queensland Public Service Act⁵¹ are broadly similar to those in the other two jurisdictions,⁵² and we summarise them here. In Queensland, the Governor can dismiss a magistrate, on the recommendation of the Public Service Board, if the magistrate, "by reason of any mental or bodily infirmity, is unfit to discharge or incapable of discharging the duties of his office efficiently."⁵³ If the Board considers it "necessary" to do so, it can appoint one or more medical practitioners to examine and report upon the magistrate before the Board decides whether to recommend dismissal. In addition some of the disciplinary provisions referred to in para A.20, relating, for example, to excessive use of intoxicating beverages or drugs, may also be relevant in the context of disability.

III. REMOVAL OF MAGISTRATES FROM THE PUBLIC SERVICE ACT

A.30 In this section we summarise certain aspects of the removal of magistrates from the Public Service Act which occurred in three Australian jurisdictions (the Australian Capital Territory, Tasmania, and Western Australia) in recent years. We begin with a background to the reasons for these removals.

A.31 It seems clear that at least in the Australian Capital Territory and Western Australia a major factor leading to the removals was the view held by some magistrates that, strictly speaking, they should disqualify themselves from hearing charges brought by a prosecutor who is a fellow public servant, especially if the prosecutor is employed in the same government department as the magistrate. In 1976 a South Australian magistrate disqualified himself on this ground and was upheld by the Supreme Court.⁵⁴ The Government responded by transferring magistrates from the Attorney General's Department to the Premier's Department and then to the Courts Department (see para. A.6), and is now considering removing them from the Act. In 1977 a Western Australian magistrate disqualified himself in a case where the prosecutor was from a different government department. The Supreme Court held that the magistrate was wrong to disqualify himself, because he was not in the same department as the prosecutor nor subject to the same Minister.⁵⁵ The Court also doubted whether magistrates in Western Australia could be regarded as subject to the Public Service Act; their appointment, salaries and dismissal were not subject to that Act, the disciplinary provisions of the Act arguably did not apply to them, and the Stipendiary Magistrates Act used the words "as if they were officers of the Public Service".⁵⁶

A.32 Other arguments which some magistrates have advanced for removal from the Public Service Act include a perceived lack of judicial independence and status arising from the provisions of the Act relating to matters such as discipline, and salary determination.

A.33 In none of the three jurisdictions was the removal from the Public Service Act occasioned by a major increase in the magistrates jurisdictions or powers.⁵⁷ We turn now to the effect of the removal in each jurisdiction on appointment discipline and certain other matters relating to the magistracy.

A. Australian Capital Territory

A.34 Magistrates were removed from the Public Service Act in 1977.⁵⁸ The Government described the purpose of this change as being to remedy the "undesirable situation" that "the arrangements in relation to appointment, conditions of service and discipline", were such that magistrates "do not have the appearance of independence from the Executive Government".⁵⁹ It said that "added point has been given to the need for change" by the South Australian case referred to in paragraph A-31.⁶⁰

A.35 The amending ordinance did not re-appoint all existing magistrates but the Government made it clear that all would be re-appointed and they were. The power of appointment continued to be vested in the Governor General (but the Public Service Board ceased to be involved in the selection process) and the criteria and the duration of appointment remained unchanged. The determination of salaries, however, was transferred from the Public Service system to an independent tribunal. There was a substantial change in the disciplinary provisions. Magistrates ceased to be subject to the provisions of the Public Service Act, which enabled a wide range of sanctions to be imposed by the permanent head or Public Service Board. Instead, a judicial-type system was established with the only formal sanctions being removal by the Governor General on an address of both Houses of Parliament on the ground of "proved misbehaviour or incapacity", and suspension by the Governor General pending consideration by Parliament whether the magistrate should be removed. The chief magistrate retained the substantial administrative control over other magistrates which had been vested in him several years earlier.

B. Tasmania

A.36 Magistrates were removed from the Public Service Act in 1969.⁶¹ The principal reason appears to have been that the Attorney General who had recently been a magistrate himself, considered that they should have Judicial independence.

A.37 The amending legislation re-appointed all existing magistrates. The power of appointment had been vested previously in the Governor on the recommendation of the Public Service Commissioner, but the new Act deleted reference to any such recommendation so that the Governor now acts on the advice of his Ministers. The criteria for appointment and the duration of appointment remained basically unchanged, but the power to determine salaries was transferred from the Public Service authorities to the Governor. Magistrates ceased to be subject to the disciplinary provisions of the Public Service Act, which covered a wide range of offences and, in relation to senior officers such as magistrates, empowered the Minister to suspend and the Governor, on the recommendation of a special tribunal appointed by him, to dismiss, demote, fine or impose lesser sanctions. Under the new system, magistrates were given judicial-type tenure “during good behaviour”, with the only formal sanctions being removal or suspension by the Governor on the address of both Houses of Parliament. There is no chief magistrate, but the senior magistrate in each district has administrative control over other magistrates in the district.

C. Western Australia

A.38 Magistrates were removed from the Public Service Act in 1979.⁶² The reasons given by the Government when introducing the relevant legislation were to remove “any inference or connotation that magistrates are public servants” and to achieve “an up-to-date statute dealing with all major aspects of the magistracy”.⁶³ In fact, few changes were made in relation to matters such as appointment, salaries and discipline. As mentioned earlier,⁶⁴ Western Australian magistrates had not been subject to the Public Service Act in relation to these matters prior to 1979.

A.39 All existing magistrates were re-appointed by the legislation and the power of appointment continued to lie in the Governor. Provision was made for the appointment of temporary or part-time magistrates, and the Governor was empowered to allow particular magistrates to continue beyond the specified retirement age. Salaries continued to be determined by an independent tribunal rather than through Public Service procedures. There was little change in the disciplinary provisions; magistrates continued to hold office “during good behaviour”, to be removable only by the Governor on the address of both Houses and to be suspendable only by the Attorney General pending an inquiry by the Chief justice and subsequent consideration of removal. The chief magistrate retained the substantial administrative control over magistrates which had been vested in him some years earlier.

IV. COMPARABLE OFFICE HOLDERS IN OTHER COUNTRIES

A.40 In this section we outline the systems for appointment and discipline of magistrates, or equivalent office-holders, in certain other countries. We begin by looking at two Canadian provinces in which there has been considerable discussion and innovation in this area. We then look briefly at New Zealand and the United Kingdom.

A. Canada

1. British Columbia

A.41 The lowest level of court in British Columbia is the Provincial Court. Judges of that court are appointed by the Lieutenant Governor on the recommendation of the judicial Council.⁶⁵ The judicial Council was established in 1969 and comprises the Chief judge and Deputy Chief Judge of the Court, the presidents of the two principal societies of

lawyers in the province (or their respective nominees), and up to five other persons (of whom one must be a judge of the court) appointed by the Lieutenant Governor. Appointees to the Court must have been admitted as legal practitioners for at least five years or have "other legal or judicial experience satisfactory to the [judicial] Council." ⁶⁶

A.42 Provincial Court Judges hold office "during good behaviour" ⁶⁷ and may be removed only by the Judicial Council or a Supreme Court Judge, after holding an inquiry in accordance with the procedure described below. The only other formal sanction is suspension which can be imposed by the authorities after pursuing a similar inquiry procedure. The inquiry can consider "all matters ... relevant to the fitness of the judge ... to perform his duties including

- (a) mental or physical disability,
- (b) misconduct,
- (c) failure in the execution of his office, or
- (d) conduct incompatible with the due execution of his office." ⁶⁸

In addition the Chief Judge has "the power and the duty to supervise the judges", including the power to assign them to "the duties the Chief judge considers advisable". ⁶⁹

A.43 All complaints about judges, other than the Chief Judge, who, "having examined the complaint", ⁷⁰ must report in writing to the complainant and the judge. The Chief Judge can then conduct an investigation into the fitness of the Judge to perform his or her duties, and must do so if directed by the Attorney General. Upon completion of the investigation the Chief Judge may take "corrective action", ⁷¹ (but is given no power to impose formal sanctions) or order an inquiry, and must report to the Attorney General "the nature of the investigation relevant facts, his findings and any corrective action taken". ⁷² The Attorney General also has power to order an inquiry. ⁷³

A.44 The inquiry is to be undertaken by the Judicial Council or, if the judge in question so elects, by a Supreme Court judge chosen by the Chief Justice. ⁷⁴ The tribunal of inquiry has power to subpoena and to hear evidence on oath and is to proceed in public unless it considers that the public interest requires otherwise. The tribunal must give the judge "particulars of the matter being inquired into" and "the opportunity, by himself or his counsel to be heard to cross-examine witnesses and to adduce evidence." ⁷⁵ The tribunal can retain legal counsel for the purposes of the inquiry. At the completion of the inquiry it can order reinstatement suspension for up to six months, or removal. It must give reasons, and an appeal lies to the Court of Appeal.

A.45 A complaint about the Chief Judge must be directed to the Attorney General, who can order an inquiry, of the type described above, by a Supreme Court Judge chosen by, the Chief Justice. ⁷⁶

A.46 The Judicial Council is not confined to the areas of appointment and discipline. Its other statutory functions include continuing education for Judges, consideration of proposals for improving the judicial services of the court, and development of a code of Judicial ethics. ⁷⁷

2. Ontario

A.47 The Provincial Court is the lowest level of court in Ontario. judges of the Court are appointed by the Lieutenant Governor on their commendation of the Attorney General. ⁷⁸ The Attorney General is not required to consult his or her fellow Ministers, but may do

so. He or she is empowered, but not required, to consult the judicial Council for Provincial judges about proposed appointments.⁷⁹ We understand that the invariable practice is for the Council to be invited to comment on names under consideration by the Attorney General. The judicial Council was established in 1968 and comprises the two most senior judicial office-holders in Ontario. The Chief Judges of the Provincial Courts two divisions, the president of the Law Society and no more than two other persons appointed by the Lieutenant Governor.⁸⁰ Most but not all appointees to the Court are qualified lawyers.

A.48 Provincial Court Judges can be removed by the Lieutenant Governor for "misbehaviour or inability to perform [their] duties properly,"⁸¹ provided the circumstances have been inquired into by one or more Supreme Court Judges appointed by, and reporting to, the Lieutenant Governor.⁸² The inquiring Judge has extensive powers to subpoena evidence. The Judge under inquiry must be given the opportunity to be legally represented at the inquiry, to be heard, to produce evidence, and to cross-examine witnesses. It seems that the Lieutenant Governor need not adopt the report resulting from this inquiry (whether or not it recommends removal), but any order of removal and the report, must be laid before Parliament.

A.49 The Judicial Council can receive and investigate complaints against judges at any time, and has power to subpoena evidence for that purpose.⁸³ It may "review" the complaint with the judge in question and refer the complaint, and the result of its investigations, to the chief judge of the court to which the judge belongs, or to the Attorney General. It can recommend establishment of the type of inquiry by a Supreme Court judge referred to above. The Councils proceedings are not to be public.

A.50 In 1973 the Ontario Law Reform Commission recommended that it should be mandatory for the Attorney General to consult the Judicial Council about appointments, that all appointees should have to have been admitted as lawyers at least 5 years previously, and that the two chief judges should have "general supervision and control" over judges in their respective divisions.⁸⁴ These recommendations have not been given statutory effect.

B. New Zealand

A.51 In New Zealand, the lowest courts are the District Courts. These courts were established in 1980 to replace the Magistrates Courts.⁸⁵ They have considerably greater jurisdiction than the previous courts, and their members are known as judges rather than magistrates. The courts jurisdiction may be exercised by justices of the peace in respect of some minor matters.⁸⁶

A.52 The Act which created the District Courts appointed all existing magistrates as judges of the new courts.⁸⁷ The basic provisions relating to appointment and discipline were not substantially changed. The judges are appointed by the Governor General from persons who either have held a legal practitioners practising certificate for at least 7 years or have been continuously employed as a Clerk of Court, and been eligible for admission as a practitioner, for at least 7 years.⁸⁸ They may be removed by the Governor General for "inability or misbehaviour."⁸⁹ There are no special statutory provisions in relation to the procedures to be followed for appointment or discipline.

A.53 In 1978 a Royal Commission on the Courts⁹⁰ recommended that before making judicial appointments, including those to the proposed District Courts, the Government should seek suggestions from an Appointments Committee, and seek the Committee's views on any other persons being considered by the Government.⁹¹ The Committee would comprise the Chief Justice, Chief District Court Judge, two Government appointees (such as the Solicitor General and the Secretary for justice) and two persons nominated by the Law Society. In particular instances, the chief judge of the court to which the

appointment related might be co-opted to the Committee. The Committee would not be “bound by strict procedural rule”, and “would employ the widest degree of consultation compatible with confidentiality”.⁹² The Commission did not oppose the promotion of District Court Judges to higher courts but said that it should be confined to “exceptional circumstances”.⁹³

A.54 The Royal Commission recommended legislative action in relation to procedures for removal of judges in order “to adequately protect a judge’s right to be heard in his own defence”⁹⁴ and perhaps to provide some sort of appeal or review. It did not consider that a sufficient need had been demonstrated for the introduction of formal procedures for consideration of sanctions less than removal but said that the Canadian Judges Act 1971 would be a suitable model if such procedures proved necessary. The Secretary for Justice had submitted to the Commission that such procedures were necessary and referred to “several cases over the last 25 years where the ability or the conduct of the magistrate had been the subject of responsible and repeated criticism”, and to the fact that “no satisfactory answer can now be given to such complainants.”⁹⁵ The Commission recommended an improved procedure for enabling complaints about particular judges to be brought to the attention of the chief judge of the court in question but did not propose any specific statutory powers to investigate or to impose sanctions.

A.55 The Commission also recommended the establishment of district boards to monitor and report upon “all consumer aspects” of the court system.⁹⁶ Each board could be composed of a lawyer, a lay person and a court officer.

A.56 None of the Commissions recommendations referred to above have been implemented to date.

C. United Kingdom

1. England

A.57 Much of the judicial work in the Magistrates’ Courts is handled on a part-time basis by justices of the peace, most of whom are non-lawyers. In many metropolitan areas, however, most of the work is handled by full-time stipendiary magistrates, who are broadly equivalent to magistrates in New South Wales. Stipendiary magistrates are appointed by the Crown on the recommendation of the Lord Chancellor.⁹⁷ They must have been admitted as a legal practitioner at least 7 years prior to appointment,⁹⁸ and most of them are drawn from the ranks of the private profession. They may be removed from office by the Crown on the recommendation of the Lord Chancellor on the ground of “inability or misbehaviour”.⁹⁹

2. Scotland

A.58 The Scots equivalent of an English stipendiary magistrate is a sheriff. There is a broad similarity between these offices in relation to appointment and discipline.¹⁰⁰ The following differences are significant for present purposes. First, sheriffs may be removed on the grounds of “inability, neglect of duty or misbehaviour”.¹⁰¹ Secondly, the holders of the two most senior judicial offices in Scotland may investigate any sheriff’s fitness for office and then report to the Government, and the Government may direct them to do so.¹⁰² Thirdly, the Government cannot remove a sheriff save in accordance with a report from these judges, and the removal can be annulled by either House of Parliament.¹⁰³

FOOTNOTES

1. *Queensland*: Public Service Act, 1922-1965: Public Service Regulations of 1958, reg.106; South Australia: Justices Act, 1921-1982, s.11; Public Service Act, 1967-1981, s.8 exempts various judicial and statutory officers, but does not include stipendiary magistrates-, Victoria: Magistrates' Courts Act, 1971, s.7(1).
2. *Australian Capital Territory*: Court of Petty Sessions (Amendment) Ordinance, No.4 of 1977; Tasmania: Stipendiary Magistrates Act, 1969; Western Australia: Stipendiary Magistrates Amendment Act No.15 of 1979.
3. *Australian Capital Territory*: Court of Petty Sessions Ordinance, 1930, s.8; Tasmania: Magistrates Act, 1969-1972, s.8(1).
4. Public Service Regulations of 1958 (Qld.), reg.106(5).
5. Justices Act 1921-1982 (S.A.).
6. Magistrates Courts Act, 1971 (Vic.), s.7(1A); Public Service Regulations (Vic.), reg.28(1)(b).
7. Stipendiary Magistrates Act, 1957 (W.A.), s.4(2).
8. *Australian Capital Territory*: Court of Petty Sessions Ordinance, 1930, s.7(2)@
Queensland: Justices Acts, 1886-1975, s.11(1); South Australia: Justices Act, 1921-1982, s.11; Tasmania: Magistrates Act, 1969-1972, s.4(1); Victoria: Magistrates' Courts Act 1971, s.7(1); Western Australia: Stipendiary Magistrates Act, 1957, s.4(1).
9. Justices Act 1921-1982 (S.A.), s.11(2).
10. *Australian Capital Territory*: Court of Petty Sessions Ordinance, 1930, s.10A(1); Queensland: Public Service Acts, 1922-1965, s.24; South Australia: Justices Act, 1921-1982, s.11(2); Tasmania: Magistrates Act, 1969-1972, s.9(3),(4); Victoria: Magistrates Courts Act 1971, s.7(1); Western Australia: Stipendiary Magistrates Act, 1957, s.5B.
11. Public Service Superannuation Acts, 1958 (Qld.), s.77A; Public Service Regulations of 1958 (Qld.), reg.65.
12. Stipendiary Magistrates Act, 1957 (W.A.), s.5B(3).
13. Id., s.5C(2).
14. Magistrates Act 1969-1972 (Tas.), s.4(5).
15. Court of Petty Sessions Ordinance, 1930 (A.C.T.), ss.10H - 10L
16. Stipendiary Magistrates Act, 1957 (W.A.), s.5C(2), (3).
17. Eg., in Queensland.
18. Eg., in South Australia and Tasmania.
19. But note the distinction between full-time and part-time magistrates referred to in para.A.5.
20. Public Service Regulations of 1958 (Qld.), reg.105.
21. Justices Act 1921-1982 (S.A.), s.13a(1).
22. Magistrates Act, 1969-1972 (Tas.), s.6.

23. Advice received from the Law Department Melbourne, Victoria.
24. Queensland: Public Service Regulations of 1958, reg.106(5), South Australia: Justices Act, 1921-1982, s.13a; Tasmania: Magistrates Act, 1969-1972, s.6; Victoria: Magistrates Courts Act, 1971, s.8; Western Australia: Stipendiary Magistrates Act, 1957, s.4(4).
25. Justices Act, 1921-1982 (S.A.), s.13a.
26. *Ibid.*
27. Court of Petty Sessions Ordinance, 1930 (A.C.T.), s.10D(1).
28. Tasmania: Magistrates Act 1969-1972, s.9(1); Western Australia: Stipendiary Magistrates Act 1957, s5(1).
29. Public Service Act, 1922-1965 (Qld.), ss.27(1) (b),(2) and 29(1).
30. *Id*, s32.
31. *Id*, s.26.
32. *Id*, s.28.
33. South Australia: Public Service Act 1967, ss.58 and 64(1)(b)(iv); Victoria: Public Service Act, No.8656, ss.59 and 64(1).
34. Court of Petty Sessions Ordinance, 1930 (A.C.T.), s.10D(2). Note the omission of the word "proved" by comparison with the ground for removal.
35. Stipendiary Magistrates Act, 1957 (W.A.), s.5(3).
36. Magistrates Act 1969-1972 (Tas.), s.9(1).
37. Public Service Act 1922-1965 (Qld), ss.26, 28(1), (2), 29(1) and 32(3)(ii), (v)(d).
38. *Id*, s. 3 2 (2).
39. *South Australia*: Public Service Act, 1967, ss.61 and 64(1); Victoria: Public Service Act No.8656, s.59(2).
40. *Australian Capital Territory*: Court of Petty Sessions Ordinance, 1930, s.10D(1)@ Tasmania: Magistrates Act 1969-1972, s.9(1). Western Australia: Stipendiary Magistrates Act, 1957, s.5(2).
41. Magistrates Act 1969-1972 (Tas.), s.9(1).
42. Court of Petty Sessions Ordinance, 1930 (A.C.T.), s.10D(2)-(6).
43. Stipendiary Magistrates Act, 1957 (W.A.), s.5(3).
44. *Id*, s. 5 (3) (b).
45. Justices Act 1921- 1982 (S.A.), s.11(2).
46. For the procedures described in this paragraph see Public Service Act, 1922-1965, ss.32, 35, 35A and 36.
47. *Id*, s.32(3)(vii).

48. *Id.*, s. 3 6 (6).
49. Stipendiary Magistrates Act, 1957 (W.A.), s.5(4).
50. *Ibid.*
51. Public Service Act 1922-1965 (Qld), s.27.
52. South Australia: Public Service Act, 1967, s.51, Victoria: Public Service Act, No.8656, s.57.
53. Public Service Act, 1922-1965 (Qld.), s.27(1)(a).
54. *Fingleton v. Christian Ivanoff Pty.Ltd.* (1976) 14 S.A.S.R. 530.
55. *Falconer v. Howe and Baker* [1978] W.A.R 81.
56. *Id.*, p.84. The relevant provision of the Stipendiary Magistrates Act, 1957 (W.A.) was s.8(1), now repealed.
57. The civil jurisdiction of courts of petty sessions in the Australian Capital Territory was increased at the same time from a monetary limit of \$1,000 to \$2,500.
58. Court of Petty Sessions (Amendment Ordinance, No.4 of 1977 (A.C.T.)).
59. Court of Petty Sessions (Amendment Bill (No.2) 1976) Explanatory memorandum, Hansard (A.C.T. Legislative Assembly), 27 October 1976, p.113.
60. *Ibid.*
61. Stipendiary Magistrates Act, 1969 (Tas.).
62. Stipendiary Magistrates Act Amendment Act, No. 15 of 1979 (W.A.).
63. Western Australia Parliamentary Debates (Assembly), 24 April, 1979, p.644.
64. Para.A.31.
65. Provincial Court Act, ch 341, 1979 (B.C.), ss.5(i) and 13(a).
66. *Id.*, s. 5 (2).
67. *Id.*, s.10(1).
68. *Id.*, s. 17.
69. *Id.*, s.6.1(1).
70. *Id.*, s.6.1(2).
71. *Id.*, s.6.1(4) (a).
72. *Id.*, s.6.1(4).
73. *Id.*, s.14.
74. *Id.*, s.15(1).

75. *Id.*, s.18(3).
76. *Id.*, s.16.
77. *Id.*, s.13.
78. The Provincial Courts Act, ch 369, 1970 (Ont), s.2.
79. *Id.*, s.8(1)(a).
80. *Id.*, s.7(1).
81. *Id.*, s.4(1).
- 82 For the provisions concerning such inquiry, see *id.*, s.4.
83. *Id.*, s.8(5).
84. Ontario Law Reform Commission Report on the administration of Ontario Courts, 1971, Part 11, pp.9 and 22.
85. District Courts Amendment Act, No. 125 of 1979 (N.Z.).
86. Summary Proceedings Act 1957 1980 (N.Z.), s.4.
87. District Courts Amendment Act No.125 of 1979 (N.Z.) s.19(2).
88. *Id.*, s.6. It is also necessary to have worked in the Department of justice (whether as a Clerk of Court or otherwise) for at least 10 years.
89. Magistrates Courts Act No.16 of 1947 (N.Z.), as amended, s.7.
90. Royal Commission on the Courts, Report, (1978); Beattie, J., Chairman.
91. *Id.*, p.200.
92. *Id.*, p.202,
93. *Id.*, p.204.
94. *Id.*, p.217.
95. *Id.*, pp.218-219.
96. *Id.*, p.252.
97. Administration of justice Act 1973 (U. K), s.2(2).
98. *Id.*, s.2(1).
99. *Id.*, s.2(2).
100. Sheriff Courts (Scotland) Act- 1971 (U.K-), ss.5 and 12.
101. *Id.*, s.12(1)(b).
102. *Id.*, s.12(1).

103. *Id.*, s.12(3)(a).

**REPORT 38 (1983) - THE MAGISTRACY: INTERIM REPORT - FIRST APPOINTMENTS AS
MAGISTRATES UNDER THE LOCAL COURTS ACT, 1982**

Appendix B - Submissions

1. Public Service Association (Professional Branch), Stipendiary Magistrates' Vocational Branch - No. 1.
2. Sterland, R., S.M.
3. Society of Labor Lawyers (N.S.W.)
4. Confidential
5. Fitzpatrick K.J., S.M.
6. Leo, D.F., S.M.
7. N.S.W. Opposition.
8. Ayling, H.L, S.M.
9. Parnell J., S.M.
10. Confidential
11. Hiatt J.W., S.M.
12. Confidential
13. Pepper, N.C., S.M.
14. Hanrahan B.P., S.M.
15. Dunm J.A., S.M.
16. Kearney, D., S.M.
17. Public Service Association (Professional Branch), Stipendiary Magistrates' Vocational Branch - No.2.
18. Milsom N.J.H., S.M.
19. Meehan, R-, S.M.
20. Clarke, K, S.M.
21. Cook W.F., S.M.
22. Climas, V., S.M.
23. Pearce, D.J., S.M.
24. McLennam G.H., S.M.
25. Vaughan K, S.M.

26. Macrae, G., S.M.
27. Gilmore, C.A., S.M.
28. Reason, A.J., S.M.
29. Confidential
30. Conroy, C.B., S.M.
31. Confidential
32. McMahan J.L, S.M.
33. Dale, K.C., S.M.
34. Price, M.K, S.M.
35. Mackenzie, F.J., S.M.
36. Bartley, R.J., Chairman Liquor Administration Board.
37. Werry, C.L, S.M.
38. Commissioner of Police.
39. N.S.W. Petty Sessions Officers Association.
40. Anderson, J.C., S.M.
41. Stackpool, N.M., S.M.
42. N.S.W. Bar Association.
43. Combined Community Legal Centres Group (N.S.W.).
44. Conference of Chamber Magistrates (N.S.W.).
45. Henderson, K.C., S.M.
46. Brahe, C.R, S.M.
47. Flack, K.C., S.M.
48. Blackmore, R.D., Senior Special Magistrate.
49. Law Society of N.S.W.
50. Council for Civil Liberties.
51. Public Solicitor (Acting).
52. Weir, T.M., S.M.
53. Gilbert, W., S.M.
54. Department of Youth and Community Services, Director-General Langshaw, W.C.

55. Confidential

56. Blissett R, S.M.

57. Miszalski R.P., S.M.

58. Public Service Association (Professional Branch), Stipendiary Magistrates' Vocational Branch - No.3.

59. Confidential.