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THE ROLE OF JUSTICES OF THE PEACE IN QUEENSLAND

Report No 54

Queensland Law Reform Commission
December 1999

To: The Honourable Matt Foley MLA
Attorney-General, Minister for Justice and Minister for the Arts

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its Report on *The Role of Justices of the Peace in Queensland*.

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Previous Queensland Law Reform Commission publications in this reference:

Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, February 1998)

Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, May 1999)

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SUMMARY OF RECOMMENDATIONS

CATEGORIES OF OFFICE (Chapter 4)

- 4.1** The offices of justice of the peace (magistrates court), justice of the peace (qualified) and commissioner for declarations should be retained.
- 4.2** An old system justice of the peace¹ who is not a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).
- 4.3** An old system justice of the peace who is a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should hold office as a commissioner for declarations, rather than continue to hold office indefinitely as an old system justice of the peace.
- 4.4** There should be no further extension of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*.

WITNESSING FUNCTION (Chapter 5)

- 5.1** The power to take affidavits and statutory declarations and witness the execution of various documents should be exercised by:
- a justice of the peace (magistrates court);
 - a justice of the peace (qualified); and
 - a commissioner for declarations.

¹

See the explanation of the Commission's use of this term at pp 16-17 of this Report.

5.2 Until 30 June 2000, an old system justice of the peace should also be able to exercise these powers.²

SUMMONSES AND WARRANTS (Chapter 6)

6.1 Justices of the peace (magistrates court) and justices of the peace (qualified) should retain the power to issue summonses and warrants.

6.2 An old system justice of the peace should not have the power to issue a summons or a warrant.

6.3 A justice of the peace who is a member or an employee of the Queensland Police Service should not have the power to issue a summons or a warrant, whether for a member of the Service or otherwise.³

6.4 Section 53(2) of the *Justices Act 1886* (Qld) should be repealed.⁴

6.5 A justice of the peace who is an officer or employee of a government agency should not be able to issue a search warrant that is to be executed by a person who is an officer or employee of the same agency.

6.6 Neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to issue a search warrant by telephone, facsimile, radio or other similar means under section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) or under any other Act.

6.7 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that the limitation proposed in Recommendation 6.6 is to apply despite the provisions of any other Act

² See p 52 of this Report, where the Commission has recommended that, after 30 June 2000, any remaining old system justices of the peace should hold office as commissioners for declarations (Recommendations 4.2 and 4.3).

³ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

⁴ See the discussion of s 53(2) of the *Justices Act 1886* (Qld) and the reason for its enactment at pp 82-83 of this Report.

unless the other Act expressly excludes the operation of that limitation.

POLICE INTERVIEWS OF JUVENILE SUSPECTS (Chapter 7)

- 7.1** A justice of the peace (magistrates court) and a justice of the peace (qualified) should continue to be authorised to act as an interview friend for a juvenile suspect.
- 7.2** An old system justice of the peace should not be authorised to act as an interview friend for a juvenile suspect, and Schedule 3 to the *Police Powers and Responsibilities Act 1997* (Qld) and section 9E of the *Juvenile Justice Act 1992* (Qld) should be amended accordingly.
- 7.3** A justice of the peace (commissioner for declarations) should continue to be excluded from the list of people who may act as an interview friend for a juvenile suspect.⁵
- 7.4** A justice of the peace who is a member or an employee of the Queensland Police Service should not be authorised to act as an interview friend for a juvenile suspect, and Schedule 3 to the *Police Powers and Responsibilities Act 1997* (Qld) and section 9E of the *Juvenile Justice Act 1992* (Qld) should be amended accordingly.⁶

EXTENSION OF A DETENTION PERIOD FOR QUESTIONING AND INVESTIGATION (Chapter 8)

- 8.1** An application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made initially in person to a magistrate or a justice of the peace (magistrates court).

⁵ See, however, p 145 of this Report as to whether it will be necessary to continue to make this express exclusion.

⁶ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

8.2 If neither a magistrate nor a justice of the peace (magistrates court) is available in person, an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made to:

- a magistrate by any of the means authorised by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld); or
- a justice of the peace (qualified) in person.

8.3 Neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to hear an application for the extension of a detention period by telephone, facsimile, radio or other similar means. Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended so that it does not apply to the making of an application to a justice of the peace for the extension of a detention period under section 51 of that Act.

8.4 An old system justice of the peace should not be authorised to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld), and the section should be amended accordingly.

8.5 A justice of the peace (commissioner for declarations) should continue to be excluded from the list of people who may hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld).⁷

8.6 A justice of the peace who is a member or an employee of the Queensland Police Service should not have the power to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld), and the section should be amended accordingly.⁸

⁷ See, however, p 166 of this Report as to whether it will be necessary for the legislation to continue to expressly exclude a justice of the peace (commissioner for declarations).

⁸ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

8.7 A justice of the peace who is present during the interview of a detained person, whether in the capacity of an interview friend as required by section 97 of the *Police Powers and Responsibilities Act 1997* (Qld) or in some other capacity, should not have the power to hear an application for the extension of that person's detention, and section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.

CORONIAL POWERS (Chapter 9)

9.1 A justice of the peace who is not a clerk of the court or an acting clerk of the court should not be able to exercise any powers under the *Coroners Act 1958* (Qld).

9.2 The *Coroners Act 1958* (Qld) should be amended so that a justice of the peace who is not a clerk of the court or an acting clerk of the court may not be appointed as a deputy coroner.

COURT POWERS (Chapter 10)

Justices of the peace who may constitute a court

10.1 Justices of the peace (magistrates court) should continue to have the power to constitute a court.

10.2 Justices of the peace (qualified) should not have the power to constitute a court for any purpose.

10.3 A justice of the peace (magistrates court) who is a member or an employee of the Queensland Police Service should not have the power to constitute a court for any purpose.⁹

Hearing and determining a charge

10.4 Justices of the peace (magistrates court) should be able to hear and determine a charge only where:

- (a) the defendant is charged with a simple offence (other than an indictable offence that may be heard summarily) or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* (Qld);**
- (b) the defendant pleads guilty; and**
- (c) both the prosecutor and the defendant consent to the charge being heard and determined by a court constituted by justices of the peace;**

and the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended accordingly.

10.5 Justices of the peace (magistrates court) should not have the power to sentence a defendant to a term of imprisonment, whether:

- (a) as the original sentence or part of the original sentence;**
- (b) as a suspended sentence; or**
- (c) in default of paying a fine or other penalty that is imposed.**

10.6 In the case of a defendant who has defaulted in the payment of a fine or other penalty, but who was not initially sentenced to a term of imprisonment in default of paying the fine or other penalty, justices of the peace (magistrates court) should not be able to constitute a court for the purpose of sentencing such a defendant to a term of imprisonment.¹⁰ The *Penalties and Sentences Act 1992* (Qld) should be amended to provide that only a magistrate may constitute a court for that purpose.

¹⁰ See the *Penalties and Sentences Act 1992* (Qld) s 185.

10.7 If the justices of the peace (magistrates court) who are hearing and determining a charge are of the opinion, or if one of them is of the opinion, that a custodial sentence is warranted, they should adjourn the matter for sentencing by a magistrate.

Conducting an examination of witnesses (conducting a committal hearing)

10.8 Justices of the peace (magistrates court) should retain the power under section 110A(6) of the *Justices Act 1886* (Qld) to commit a defendant, with the consent of the defendant's legal representative, for trial or for sentence.

10.9 The power to conduct any other type of committal hearing should be removed from justices of the peace.

Procedural orders

10.10 Justices of the peace (magistrates court) should retain the power to make:

- (a) various procedural orders - for example, adjourning a matter, remanding a defendant, and hearing bail applications; and
- (b) the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

10.11 Justices of the peace should not have the power under section 222 of the *Justices Act 1886* (Qld) to release a person from custody pending the hearing of the person's appeal to the District Court. Section 222 of the *Justices Act 1886* (Qld) should be amended accordingly.

Constituting the Childrens Court: criminal jurisdiction

10.12 Justices of the peace (magistrates court) should retain the power to constitute the Childrens Court in its criminal jurisdiction:

- (a) subject to the present limitations contained in the *Juvenile Justice Act 1992* (Qld), to hear and determine a charge of a simple offence brought against a child where:
 - the child pleads guilty; and

- both the prosecutor and the child's legal representative consent to the charge being heard and determined by a court constituted by justices of the peace; and
- (b) to take procedural actions and make procedural orders as presently authorised by the *Juvenile Justice Act 1992 (Qld)*.

Constituting the Childrens Court: non-criminal jurisdiction

10.13 Justices of the peace (magistrates court) should retain the power to constitute the Childrens Court for the purposes prescribed by section 99 of the *Child Protection Act 1999 (Qld)*.¹¹

JUSTICES OF THE PEACE WHO ARE MEMBERS OR EMPLOYEES OF THE QUEENSLAND POLICE SERVICE (Chapter 11)

11.1 A justice of the peace who is a member or an employee¹² of the Queensland Police Service or who is a Volunteer in Policing¹³ should be limited to exercising the powers of a commissioner for declarations.

11.2 The *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should be amended to provide that the limitation proposed in Recommendation 11.1 is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that limitation.

¹¹ As at 10 December 1999, s 99 of the *Child Protection Act 1999 (Qld)* had not commenced.

¹² See the discussion of these terms at pp 273-274 of this Report.

¹³ See note 1571 of this Report for a discussion of the role of a person who is a Volunteer in Policing. See also the reference to such a person in s 10.5 of the *Police Service Administration Act 1990 (Qld)*. The term "volunteer" is defined in s 10.5(6) of that Act to mean "a person appointed by the commissioner to perform duties for the service on an unpaid voluntary basis on conditions decided by the commissioner".

APPOINTMENT TO OFFICE (Chapter 12)***Process of appointment***

- 12.1** An applicant seeking appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations should continue to be required to disclose his or her convictions for any offences.
- 12.2** The present requirement that an applicant must be nominated by his or her member of State Parliament, by a member of any Parliament in Australia, or - where an applicant seeks appointment to carry out duties in a financial institution or government department - by the general manager of the institution or chief executive of the government department concerned, should be abolished.
- 12.3** The registrar should continue to be required to make inquiries to ascertain whether an applicant is a fit and proper person.

Qualifications for appointment

- 12.4** In order to qualify for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations, a person should:
- (a) be considered by the Governor in Council to be a fit and proper person;
 - (b) be of or above the age of eighteen;
 - (c) be an Australian citizen; and
 - (d) have satisfied the relevant training requirements.
- 12.5** The relevant training requirements for an appointment made after the implementation of this recommendation should be as follows:

- (a) for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified) - the applicant must attend a mandatory training course and pass an examination;
- (b) if a lawyer seeks appointment as a justice of the peace (magistrates court) or as justice of the peace (qualified) - the applicant must pass an examination;
- (c) for appointment as a commissioner for declarations - the applicant must pass an examination;
- (d) if a lawyer seeks appointment as a commissioner for declarations - there should be no training requirement.

Limitation on the performance of bench duties

12.6 A justice of the peace, whether an *ex officio* justice of the peace¹⁴ or a justice of the peace (magistrates court),¹⁵ should not be eligible to constitute a court for any purpose after attaining the age of 70 years.

Disqualifications from office

12.7 A person who:

- (a) is an undischarged bankrupt or is taking advantage, as a debtor, of the laws in force for the time being relating to bankrupt or insolvent debtors;
- (b) has been convicted of certain offences;¹⁶ or
- (c) is a patient within the meaning of the *Mental Health Act 1974* (Qld);

¹⁴ See the discussion of *ex officio* justices of the peace at pp 28-29 of this Report.

¹⁵ See the recommendation at p 270 of this Report that justices of the peace (qualified) should not have the power to constitute a court for any purpose (Recommendation 10.2).

¹⁶ But see Recommendation 12.9.

should not be qualified to be appointed to, or continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.¹⁷

12.8 The criminal convictions that should constitute a ground of disqualification from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations should be:

- (a) conviction for an indictable offence (whether on indictment or summarily);
- (b) conviction for an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld);
- (c) conviction for the offences presently set out in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁸

12.9 If the Minister considers that special circumstances exist, the Minister should be able to exempt an applicant for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations from any of the grounds of disqualification that relate to criminal convictions.

12.10 All the grounds of disqualification should be contained in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

Validation of certain acts

12.11 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should include a provision to the effect that an act performed by a person who purports to act as a justice of the peace or as a commissioner for declarations is not invalidated by reason only of the fact that:

¹⁷ See the explanation of the terms “appointed justice of the peace” and “appointed commissioner for declarations” at p 28 of this Report.

¹⁸ Some of the grounds of disqualification in ss 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) refer to convictions or events occurring within a specified period prior to a person’s appointment. It will be necessary for those grounds of disqualification to be modified in order to make them relevant to convictions or events occurring after a person has been appointed.

- (a) the person no longer holds office as a justice of the peace or as a commissioner for declarations;
- (b) the person was not eligible to be appointed as a justice of the peace or as a commissioner for declarations.

12.12 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should include a provision to the effect that no finding, decision, or order of a Magistrates Court or of a Childrens Court may be impugned, reversed or invalidated on the ground that a justice of the peace constituting the court has attained the age of 70 years.

Fixed-term appointments

12.13 An appointment of a person as a justice of the peace (magistrates court) or as a justice of the peace (qualified) should be made for a term of seven years.

12.14 An appointment of a person as a commissioner for declarations should be made for a term of ten years.

12.15 A justice of the peace (magistrates court), a justice of the peace (qualified) or a commissioner for declarations who wishes to continue in office should be required, before the expiry of his or her current term of office, to apply to the Department of Justice and Attorney-General to renew his or her appointment.

12.16 When applying to renew an appointment, a justice of the peace (magistrates court), a justice of the peace (qualified) or a commissioner for declarations should be required to disclose:

- (a) whether his or her circumstances have undergone any changes that would disqualify the person from continuing in office;
- (b) details of the level of activity during the intervening period; and
- (c) details of any training undertaken during the intervening period.

12.17 A justice of the peace (magistrates court) or a justice of the peace (qualified) who holds office prior to the implementation of Recommendation 12.13 should be required, initially, to renew his or her appointment within three years of the implementation of that recommendation. At that point, the appointment of the justice of the peace should be renewed for a further term of seven years.

12.18 A commissioner for declarations who holds office prior to the implementation of Recommendation 12.14 should be required, initially, to renew his or her appointment within three years of the implementation of that recommendation. At that point, the appointment of the commissioner for declarations should be renewed for a further term of ten years.

Ongoing training after appointment

12.19 The Department of Justice and Attorney-General should, as the need arises, provide ongoing training for justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations.

LIABILITY (Chapter 13)

13.1 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that, where a proceeding is brought against a justice of the peace or a commissioner for declarations in respect of an act done, or omitted to be done, by the justice of the peace or by the commissioner for declarations in, or purportedly in, the performance of the functions of office, the Crown is to indemnify the justice of the peace or the commissioner for declarations against a liability for legal costs and expenses incurred by the justice of the peace or the commissioner for declarations in relation to the defence of:

- (a) a civil proceeding in which judgment is given in favour of the justice of the peace or the commissioner for declarations, or which is discontinued or withdrawn or is otherwise terminated;
- (b) a criminal proceeding in which the justice of the peace or the commissioner for declarations is acquitted, or which is discontinued or withdrawn or is otherwise terminated; or

(c) a civil proceeding that is settled, including the payment of any settlement moneys, provided that the proceeding does not arise from an act that the justice of the peace or the commissioner for declarations:

(i) knew was not authorised by law; or

(ii) did maliciously and without reasonable cause.

13.2 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that:

(a) the Crown must provide legal representation on behalf of a justice of the peace or a commissioner for declarations against whom any civil proceeding is brought in respect of an act done, or omitted to be done, by the justice of the peace or by the commissioner for declarations in, or purportedly in, the performance of the functions of office unless it appears in respect of an act giving rise to the proceeding that the justice of the peace or the commissioner for declarations:

(i) knew that the act was not authorised by law; or

(ii) did the act maliciously and without reasonable cause;

(b) the Crown may, at any stage of a civil proceeding, withdraw the legal representation referred to in paragraph (a) of this Recommendation if it appears in respect of an act giving rise to the proceeding that the justice of the peace or the commissioner for declarations:

(i) knew that the act was not authorised by law; or

(ii) did the act maliciously and without reasonable cause;

(c) if it is found, or conceded, in relation to any such proceeding that the justice of the peace or the commissioner for declarations:

(i) knew that the act was not authorised by law; or

(ii) did the act maliciously and without reasonable cause;

the Crown may recover from the justice of the peace or the commissioner for declarations the amount of the legal costs and expenses incurred by the Crown in providing legal representation on his or her behalf.

- 13.3** Where a proceeding, civil or criminal, is brought against a person in respect of anything done or omitted to be done by the person in, or purportedly in, the performance of the functions of office as a justice of the peace or as a commissioner for declarations, but the person no longer holds office as a justice of the peace or as a commissioner for declarations, Recommendations 13.1 and 13.2 should apply as if the person still holds the relevant office.

REIMBURSEMENT OF EXPENSES (Chapter 14)

Training

- 14.1** The cost of fulfilling the training requirements that have been recommended for appointment of a person as a justice of the peace (qualified) or as a commissioner for declarations should generally be borne by the individual applicant.¹⁹
- 14.2** The cost of fulfilling the training requirements that have been recommended for appointment of a person as a justice of the peace (magistrates court) should be borne by the government.²⁰
- 14.3** Ongoing training for justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations should be provided at government expense.

Application fees

- 14.4** The application fee for appointment as a justice of the peace (qualified) or as a commissioner for declarations should generally be borne by the individual applicant.

¹⁹ See p 350 of this Report (Recommendations 12.5(a), 12.5(b) and 12.5(c)).

²⁰ See p 350 of this Report (Recommendations 12.5(a) and 12.5(b)).

14.5 A person who is being appointed as a justice of the peace (magistrates court) should not be required to pay an application fee.

Guidelines for the reimbursement of expenses

14.6 The government should develop guidelines to deal with the following matters:

- (a) reimbursing a justice of the peace in respect of significant travel expenses incurred by the justice of the peace in carrying out the duties of office, other than the witnessing of a document;**
- (b) reimbursing a justice of the peace or a commissioner for declarations in respect of significant travel expenses incurred in attending ongoing training that is provided by the Department of Justice and Attorney-General;**
- (c) reimbursing a justice of the peace in respect of subsistence expenses incurred by the justice of the peace in carrying out the functions of office; and**
- (d) the question of which department should be responsible for reimbursing a justice of the peace or a commissioner for declarations in respect of certain matters.**

14.7 Justices of the peace and commissioners for declarations should not be reimbursed for:

- (a) the loss of earnings, income or a financial benefit; or**
- (b) minor administrative expenses.**

14.8 Justices of the peace and commissioners for declarations should not be remunerated for carrying out the functions of office. The offices of justice of the peace and commissioner for declarations should remain as voluntary offices.

Definition of “reward”

- 14.9** The definition of “reward” in section 35(2) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify that it does not include any amount reimbursed to a justice of the peace or a commissioner for declarations for expenses incurred in carrying out the functions of office.

CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

The Attorney-General has requested the Commission, as part of its Fifth Program, to:

review the role of Justices of the Peace in Queensland, in particular, the desirability of maintaining this office in the light of a changing society.

2. BACKGROUND

The office of justice of the peace has its origins in England in the fourteenth century.²¹ Over time, there have been many changes in the nature of the role undertaken by justices of the peace. Even within Australia, there are marked differences in the roles of justices of the peace in different jurisdictions.²²

In Queensland, justices of the peace and commissioners for declarations are appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).²³ That Act establishes:

- the various categories of justices of the peace and the office of commissioner for declarations;²⁴
- the qualifications for, and disqualifications from, office as either a justice of the peace or a commissioner for declarations;²⁵ and
- the limitations on the powers that may be exercised by a justice of the peace or by a commissioner for declarations.²⁶

²¹ See pp 6-7 of this Report for a more detailed discussion of the origins of the role.

²² See Chapters 5-10 of this Report.

²³ The background to the enactment of this Act is set out at pp 8-11 of this Report.

²⁴ See pp 14-19 of this Report.

²⁵ See pp 292-293 and 306-309 of this Report.

²⁶ See pp 12-13 of this Report.

3. ISSUES PAPER

In February 1998, the Commission published an Issues Paper on *The Role of Justices of the Peace in Queensland*.²⁷ The purpose of that paper was to provide information to interested people on the issues that the Commission envisaged would need to be addressed during the course of this reference, and to assist people in making submissions.

In particular, the Issues Paper:

- gave a brief summary of the development of the role of the justice of the peace;²⁸
- examined the existing categories of justices of the peace and the office of commissioner for declarations;²⁹
- gave an overview of the main powers that may be exercised by justices of the peace and commissioners for declarations;³⁰ and
- raised a number of specific issues about the roles of justices of the peace and commissioners for declarations on which the Commission sought submissions.³¹

Over 2,200 copies of the paper were distributed. In addition, the paper was made available on the Commission's Home Page on the Internet.³²

4. DISCUSSION PAPER

In May 1999, the Commission published a Discussion Paper on *The Role of Justices of the Peace in Queensland*.³³ The purpose of the Discussion Paper was to encourage further public response by presenting a more detailed examination of the existing

²⁷ Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998).

²⁸ Id at Chapter 2.

²⁹ Id at Chapter 3.

³⁰ Id at Chapter 5.

³¹ Id at Chapter 8.

³² At <<http://www qlrc qld gov au>>.

³³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999).

powers of justices of the peace, including an examination of the equivalent powers in other Australian jurisdictions.

The Discussion Paper contained the Commission's preliminary recommendations about the main powers that may be exercised by justices of the peace and commissioners for declarations and about their appointment, liability and the expenses incurred by them. It also raised several issues on which the Commission specifically sought submissions.³⁴

The Discussion Paper was distributed widely throughout Queensland. To date, over 2,600 copies of the paper have been distributed. The Discussion Paper was also made available on the Commission's Home Page on the Internet.³⁵

5. CALLS FOR SUBMISSIONS

In March 1998, following the release of the Issues Paper, the Commission made a public call for submissions in *The Courier-Mail*. It also advertised the release of the Issues Paper and called for submissions in *Justice Papers*, a bulletin published by the Queensland Department of Justice and Attorney-General, which is sent to all justices of the peace and commissioners for declarations in Queensland.³⁶ Calls for submissions were also published in the newsletters of two justices of the peace associations.³⁷

A total of 123 submissions were received by the Commission in response to the Issues Paper.

In June 1999, following the release of the Discussion Paper, the Commission made public calls for submissions in *The Courier-Mail*, as well as in newspapers circulating in Cairns, Townsville, Rockhampton, Gympie and Mount Isa, and on the Sunshine Coast and the Gold Coast. The Commission also announced the release of the Discussion Paper and called for submissions in *Justice Papers*³⁸ and in the newsletters

³⁴ Id at 269-270, 277, 287.

³⁵ See note 32 of this Report.

³⁶ Department of Justice (Qld), *Justice Papers* (No 5, July 1997); Department of Justice (Qld), *Justice Papers* (No 6, April 1998) at 7.

³⁷ AA Books, *JP News* (Issue 2, 1997) at 1; The Queensland Justices' and Community Legal Officers' Association, *The Brief: The QJA Newsletter* (Volume 1 Issue 2, August 1997) at 1.

³⁸ Department of Justice and Attorney-General (Qld), *Justice Papers* (No 7, October 1999) at 4.

of two justices of the peace associations.³⁹ In addition, the Department of Justice and Attorney-General publicised the release of the Discussion Paper and the Commission's call for submissions on its Web Site for justices of the peace.⁴⁰

A total of 59 submissions were received by the Commission in response to the Discussion Paper.

The overwhelming majority of submissions received by the Commission in response to both publications were from individuals who identified themselves as justices of the peace or as representing a justices of the peace association. The following is the breakdown of the respondents to the two publications:

Respondents	Issues Paper	Discussion Paper ⁴¹
Justices of the peace (magistrates court)	7	2
Justices of the peace (qualified)	75	44
Old system justices of the peace ⁴²	10	10
Commissioners for declarations	1	2
Justices of the peace - category not specified	11	3
Justices of the peace associations	3	1
Subtotal	107	62
Other	16	2
Total	123	64

A list of respondents to the Issues Paper is set out in Appendix A to this Report. A list of respondents to the Discussion Paper is set out in Appendix B to this Report. The Commission wishes to thank all those respondents for their participation in this reference.

6. SURVEY OF MAGISTRATES COURTS

³⁹ Justice of the Peace Society Queensland Inc, *J.P.S.Q. Newsletter* (Issue No 5, September 1999) at 1; AA Books, *JP News* (Issue 2, 1999) at 5.

⁴⁰ At <http://www.justice.qld.gov.au/a_jps.html> (16 December 1999).

⁴¹ Two submissions received by the Commission were made on behalf of several respondents: submissions 40, 55.

⁴² See the explanation of the Commission's use of this term at pp 16-17 of this Report.

In order to appreciate the extent to which various types of court matters are being heard by justices of the peace, the Commission, with the assistance of the former Chief Stipendiary Magistrate, Mr Deer, conducted a survey of four Magistrates Courts during March and April 1998. The Courts chosen for this survey were at Gladstone, Proserpine, Mount Isa and Innisfail.

The survey required the various Courts to maintain a log of the matters heard by justices of the peace. In particular, they recorded the types of matters heard and the categories of the justices of the peace who heard them (including whether or not the justices of the peace were employed at the Court). A copy of the form completed at the four Courts is set out in Appendix C to this Report.

The Commission is grateful for the co-operation of Mr Deer and the registrars and staff of the participating Magistrates Courts, in organising and conducting this survey.

The results of this survey are discussed in Chapters 9 and 10 of this Report.

7. QUESTIONNAIRE FOR JUSTICES OF THE PEACE (MAGISTRATES COURT)

Only a few submissions received by the Commission in response to the Issues Paper were made by justices of the peace (magistrates court).⁴³ Consequently, in July 1998, the Commission sent a questionnaire to all the justices of the peace (magistrates court) then registered in Queensland. The questionnaire posed a number of questions about their experience in exercising various court powers. A copy of the questionnaire is set out in Appendix D to this Report.

The Commission distributed 478 questionnaires and received 134 responses. The Commission wishes to thank all those who completed the questionnaire.

The responses to the questionnaire are discussed in Chapters 9 and 10 of this Report.

8. THE COMMISSION'S RECOMMENDATIONS

In this Report, the Commission makes its final recommendations in this reference. These recommendations are summarised at pages (i) to (xvii) of this Report.

⁴³ See p 4 of this Report.

CHAPTER 2

THE DEVELOPMENT OF THE PRESENT ROLES OF JUSTICE OF THE PEACE AND COMMISSIONER FOR DECLARATIONS

1. THE HISTORICAL ORIGINS OF THE OFFICE OF JUSTICE OF THE PEACE

The office of justice of the peace was first established in England by the enactment of a series of statutes in the fourteenth century.⁴⁴ In 1327, “conservators of the peace” were appointed in each county.⁴⁵ In the following year, conservators of the peace were given the power to punish offenders.⁴⁶ In 1344, they were empowered to hear and determine felonies and trespasses (now known as misdemeanours).⁴⁷

In 1361, four or five persons (including one lord) were appointed in every county to “keep the peace, to arrest and imprison offenders, to imprison or take surety of suspected persons, and to hear and determine felonies and trespasses done in the county”.⁴⁸ In 1363, these persons were directed to hold court hearings (with a jury) four times a year.⁴⁹ It was around this time that the title “justice of the peace” began to be used.⁵⁰

The four court hearings became known as the courts of quarter sessions. The jurisdiction of the courts of quarter sessions was very wide and included almost all criminal cases (apart from treason and difficult cases).⁵¹ It was not until the eighteenth century that courts of quarter sessions stopped hearing cases that might be capitally

⁴⁴ Some commentators believe that the origins of this office date back to at least the last years of the twelfth century when “keepers” and “conservators” of the peace were appointed to aid in the preservation of peace and to hand over arrested prisoners to the sheriff: see, for example, Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 286-287 and Nichols P, *Western Australia Handbook for Justices* (2nd ed 1991) at 1.1.

⁴⁵ 1 Edward III St 2 c 16 (1327), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

⁴⁶ 2 Edward III c 6 (1328), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

⁴⁷ 18 Edward III St 2 c 2 (1344), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

⁴⁸ 34 Edward III c 1 (1361), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 288.

⁴⁹ 36 Edward III St 1 c 12 (1363), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 288, 292-293.

⁵⁰ Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 288.

⁵¹ *Id* at 293.

punished.⁵²

Various statutes were enacted that empowered justices of the peace to determine less serious matters outside courts of quarter sessions. These court hearings - which were held without a jury - became known in the nineteenth century as the courts of petty sessions.⁵³

By the sixteenth century, justices of the peace were also responsible for a great deal of administrative work. They had the power to issue warrants for the arrest of suspected criminals,⁵⁴ and they carried out functions that now would be regulated by local government or other government agencies.⁵⁵

Traditionally, justices of the peace were men of position. In 1389, it was enacted that they should be “the most sufficient knights, esquires and gentlemen of the land”.⁵⁶ In 1439, a property qualification was added.⁵⁷

2. THE ROLE OF JUSTICES OF THE PEACE IN AUSTRALIA

The office of justice of the peace was inherited from England when Australia (or, more accurately, the colony of New South Wales) was first settled in 1788. Queensland inherited the office when it separated from New South Wales in 1859.

Initially, Australian justices of the peace exercised very similar powers to their English counterparts. In fact, in some cases they had even greater powers, especially over convicts.⁵⁸ However, the role of Australian justices of the peace changed significantly

⁵² Ibid.

⁵³ Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 293 and Kiralfy AKR, *Potter's Historical Introduction to English Law and Its Institutions* (4th ed 1958) at 229.

⁵⁴ Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 294-295.

⁵⁵ Castles AC, *An Australian Legal History* (1982) at 68. One commentator has said: “they regulated wages, prices, profits, employment, marriages, wearing apparel, apprenticeship and housebuilding ... they were put in charge of the regulations dealing with weights and measures, the maintenance of bridges, the upkeep of roads, the administration of the Poor Law, the building and control of local prisons”: see Babington, *A House in Bow Street* (1969) at 28, cited in Castles AC, *An Australian Legal History* (1982) at 68.

⁵⁶ 13 Richard II St 1 c 7 (1389), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 289.

⁵⁷ 18 Henry VI c 11 (1439), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 289.

⁵⁸ Crawford J, *Australian Courts of Law* (3rd ed 1993) at 91.

once the use of paid magistrates became more extensive.⁵⁹

Today, Australian justices of the peace have very little in common with their English counterparts. Although an English justice of the peace (aided by a legally qualified clerk) typically sits as a magistrate in court for a full day once a fortnight,⁶⁰ most Australian justices of the peace will never have occasion to constitute a Magistrates Court.

In Australia, the office of justice of the peace is a State institution; there are no national justices of the peace. Each State and Territory has its own legislation regulating the appointment and powers of justices of the peace. The functions and powers of justices of the peace differ from State to State.⁶¹ For example, in Queensland, it is still possible for a justice of the peace to exercise certain judicial functions, whereas in Victoria and the Australian Capital Territory a justice of the peace is generally able to carry out only administrative tasks.⁶² In all jurisdictions, including Queensland, the role is a voluntary and an unpaid one.⁶³

3. THE SITUATION IN QUEENSLAND PRIOR TO 1991

(a) *Justices Act 1886 (Qld)*

The *Justices Act 1886* (Qld) was the first statute to regulate the appointment and removal of justices of the peace in Queensland.⁶⁴

(b) *Justices of the Peace Act 1975 (Qld)*

In 1975, the provisions in the *Justices Act 1886* (Qld) dealing with the appointment and removal of justices of the peace were repealed and replaced by the *Justices of the*

⁵⁹ Note that the use of paid magistrates was a well-entrenched feature of the New South Wales legal system by about 1850: see Castles AC, *An Australian Legal History* (1982) at 212.

⁶⁰ Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 5. See also Liverani MR, "No Salaries, No Morning Teas or Early Closing Hours", *Law Society Journal* 32 (1994) 36 at 38.

⁶¹ See Chapters 5-10 of this Report.

⁶² See pp 200 and 203 of this Report.

⁶³ In South Australia, however, a special justice is entitled to such remuneration as may be determined by the Governor for the performance of judicial duties: *Justices of the Peace Act 1991* (SA) s 5(3).

⁶⁴ See *Justices Act 1886* (Qld) Part II (repealed). The *Justices Act 1886* (Qld) is still in force and confers a number of powers on justices of the peace. See Chapter 10 of this Report.

Peace Act 1975 (Qld).⁶⁵ The 1975 Act contained a number of new provisions, including provisions dealing with qualifications for appointment as a justice of the peace, the establishment of a register of justices of the peace, and the removal of a justice of the peace on grounds such as a criminal conviction, bankruptcy or mental illness.

Under the *Justices of the Peace Act 1975* (Qld), there was only one class of justice of the peace. This meant that all people appointed to the office of justice of the peace were automatically eligible to exercise the full range of powers given to justices of the peace under the *Justices Act 1886* (Qld) and various other Acts.⁶⁶ These powers included the power to hear and determine certain judicial proceedings; the power to issue summonses and warrants; and the power to witness affidavits and statutory declarations.

Under the 1975 Act (and the regulations made under it), there was no requirement for a justice of the peace to undergo any training, whether before, or subsequent to, his or her appointment as a justice of the peace. In fact, until the early 1980s, there were no training courses available.⁶⁷

(c) The 1990 Green Paper

In May 1990, the Office of the Attorney-General (Queensland) released a Green Paper on the role of justices of the peace in Queensland.⁶⁸

(i) Problems identified by the Green Paper

According to the Green Paper, the 1990 review of the role of justices of the peace was instigated because of “[w]idespread concern about the lack of compulsory training of Justices of the Peace and other problems”.⁶⁹ Some of the “other problems” identified included:

- The fact that, although all justices of the peace were eligible to exercise the full range of powers given to justices of the peace under the *Justices Act 1886* (Qld) and various other Acts, the vast majority of justices of the

⁶⁵ See note 64 of this Report.

⁶⁶ *Justices of the Peace Act 1975* (Qld) s 19.

⁶⁷ Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 8.

⁶⁸ Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990).

⁶⁹ *Id* at 1.

peace only ever witnessed signatures.⁷⁰

- Complaints received from members of the police force and the general public that it was difficult to obtain the services of an available, willing and competent justice of the peace.⁷¹
- The fact that justices of the peace were not required to be appointed on a “needs basis” and that the numbers of justices of the peace had “consequently proliferated”.⁷²
- Allegations that some justices of the peace were prepared to “rubber stamp” police requests for warrants with no exercise of judicial discretion whatsoever.⁷³
- The potential for serious mistakes in the issue of summonses and warrants by some justices of the peace.⁷⁴
- The potential for justices of the peace from small rural communities to be placed in situations where they were asked to exercise judicial powers against persons whom they knew on a personal basis.⁷⁵

(ii) Options canvassed by the Green Paper

The Green Paper canvassed numerous options for the future role of justices of the peace in Queensland. The most significant options for reform included:

- The then existing “one class” appointment provisions should be repealed and replaced with provisions that:
 - (a) require all appointees to perform administrative duties; and
 - (b) allow only specially selected and trained appointees to perform non-bench judicial duties (such as issuing summonses and

⁷⁰ Id at 1, 5-7, 13.

⁷¹ Id at 1, 5, 17-18.

⁷² Id at 1.

⁷³ Id at 17-18.

⁷⁴ Id at 1, 17-18.

⁷⁵ Id at 11.

warrants).⁷⁶

- All existing and prospective justices of the peace (including those whose appointments are limited to administrative duties) should be required to undertake an approved training course.⁷⁷
- Justices of the peace should be required to renew their registration every five years. Re-registration should be conditional upon proof that an approved refresher course has been successfully completed.⁷⁸
- Applicants who wish to perform non-bench judicial duties (as well as administrative duties) should be scrutinised far more carefully than applicants who wish to carry out only administrative duties. Applicants who wish to perform non-bench judicial duties should be required to undergo a personal interview conducted by a person authorised to do so by the Director-General of the Department of the Attorney-General.⁷⁹
- The title “justice of the peace” should be used only by those specially selected and trained persons who perform non-bench judicial duties (as well as administrative duties). All existing and prospective justices of the peace who are trained to carry out only administrative duties should be called “Commissioners of Affidavits”.⁸⁰
- Any changes to the existing legislation should be effective immediately. There should not be any “sunset clause”.⁸¹

4. JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS ACT 1991 (QLD)

In 1991, the *Justices of the Peace Act 1975* (Qld) was repealed and replaced by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). The 1991

⁷⁶ Id at 33. The question of whether there was an interim need for an even smaller select group to perform bench duties (for example, sentencing and conducting committal hearings) was left open.

⁷⁷ Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 39.

⁷⁸ Id at 44.

⁷⁹ Id at 45.

⁸⁰ Id at 37.

⁸¹ Id at 35.

Act adopted some, but not all, of the options discussed above.⁸² The most significant changes were the abolition of the “one class” appointment system and the requirement that people appointed to the new categories of justices of the peace should first pass an examination to ensure that they have the necessary skills for the range of powers exercisable by justices of the peace of that category.⁸³

As mentioned above, prior to the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) there was only one class of justice of the peace. The 1991 Act introduced a tiered approach in relation to the exercise of powers by justices of the peace by establishing the offices of commissioner for declarations, justice of the peace (qualified) and justice of the peace (magistrates court),⁸⁴ and by limiting the powers that could be exercised by people appointed to each of those offices.

5. LIMITATIONS ON THE POWERS OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS

Most of the Acts that confer powers on a justice of the peace pre-date the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Consequently, there are many Acts that are expressed to confer powers on “a justice of the peace” or on “a justice”,⁸⁵ rather than on a justice of the peace of a specified category. This is also the case with some Acts enacted after the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).⁸⁶

Although an Act may be expressed generally to confer powers on a “justice of the peace”, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)

⁸² The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not require justices of the peace to renew their registration on a regular basis; it does not require justices of the peace to undergo regular refresher courses; and it contains quite significant transitional provisions.

⁸³ See the discussion of the training of justices of the peace in Chapter 12 of this Report.

⁸⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(2), (3).

⁸⁵ The term “justice” is commonly defined to include a justice of the peace. See, for example, s 4 of the *Justices Act 1886* (Qld), where the term “justice” is defined in the following terms:

“**justices**” or “**justice**” means justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be, performed, and includes a stipendiary magistrate and, where necessary, a Magistrates Court.

See also s 36 of the *Acts Interpretation Act 1954* (Qld), where the term “justice” is defined to mean “a justice of the peace”.

⁸⁶ For example, s 28(1) of the *Police Powers and Responsibilities Act 1997* (Qld) confers the power to issue a search warrant on a “justice”.

limits the powers that may be exercised by particular categories of justices of the peace and by commissioners for declarations. The effect of these limitations is to create a tiered system, in which people appointed to the different categories of office exercise a different range of powers.

Section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides:

A justice of the peace -

- (a) subject to subsections (3) to (5), has and may exercise all the powers conferred on the justice of the peace or on a commissioner for declarations by the *Justices Act 1886* or any other Act; and
- (b) may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law. [emphasis added]

Section 29(3) to (5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) sets out the various limitations that apply to the powers that may be exercised by a justice of the peace (qualified), a justice of the peace (magistrates court) and a justice of the peace (commissioner for declarations) respectively.⁸⁷ Section 29(7) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) further provides:⁸⁸

A limitation imposed by subsection (3), (4), or (5) on the powers exercisable by a justice of the peace of a specified category applies despite the provisions of any Act conferring powers on a justice of the peace unless the Act expressly excludes the operation of the subsection.

However, the limitations imposed by subsections (3), (4) and (5) of section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) do not apply to:⁸⁹

- a magistrate exercising jurisdiction conferred on justices of the peace;

⁸⁷ These subsections are discussed below in relation to each category of justice of the peace and in relation to a justice of the peace (commissioner for declarations).

⁸⁸ See s 42(5) of the *Community Services (Aborigines) Act 1984* (Qld) and s 40(5) of the *Community Services (Torres Strait) Act 1984* (Qld) as examples of provisions that specifically exclude the effect of s 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). See also the discussion of these sections in Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 216.

⁸⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6). Although s 29(6) does not refer to a justice of the peace mentioned in s 19(1A) of the Act (a person who has retired or resigned from office as a Supreme Court judge, District Court judge or magistrate), such a person would also appear to be unaffected by the limitations imposed by s 29(3)-(5) of the Act.

- a justice of the peace whose office is preserved by section 41(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) - that is, a justice of the peace who held office immediately prior to the commencement of that Act;⁹⁰ or
- a justice of the peace mentioned in section 19(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) - that is, a Supreme Court judge, a District Court judge or a magistrate, each of whom is, without further appointment, a justice of the peace.⁹¹

Consequently, a person falling within any of these specified categories may exercise any power that is conferred generally on a “justice of the peace” or on a “justice”.

6. CATEGORIES OF OFFICE

(a) Justice of the peace (magistrates court)

The *Justices Act 1886* (Qld) is one of many Acts that confer powers on a justice of the peace. It authorises a justice of the peace - either alone or, depending on the circumstances, with at least one other justice of the peace - to constitute a Magistrates Court to deal with certain types of proceedings.⁹² For example, section 27 of the *Justices Act 1886* (Qld) provides that, subject to the provisions of any other Act, every complaint shall be heard and determined by a Magistrates Court constituted by two or more justices. The term “justice” is defined in that Act to include a justice of the peace.⁹³

However, section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) imposes a significant limitation on the exercise of that power and on similar powers conferred by other Acts. Section 29(4) provides:

A justice of the peace (magistrates court), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to -

- (a) the hearing and determination of a charge of a simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* in a case where the defendant pleads guilty; and

⁹⁰ See pp 16-17 of this Report in relation to those justices of the peace who are referred to by the Commission as “old system” justices of the peace.

⁹¹ See the discussion of *ex officio* justices of the peace at pp 28-29 of this Report.

⁹² See Chapter 10 of this Report for a discussion of the court powers that may be exercised by justices of the peace.

⁹³ See note 85 of this Report.

- (b) conducting an examination of witnesses in relation to an indictable offence under the *Justices Act 1886*; and
- (c) taking or making a procedural action or order.⁹⁴ [note added]

The types of matters that may be heard by a justice of the peace (magistrates court) are discussed in more detail in Chapter 10 of this Report. However, section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) broadly restricts a justice of the peace (magistrates court), in the exercise of “bench” duties, to:

- hearing a limited range of criminal matters in which the defendant pleads guilty;
- conducting committal hearings; and
- taking or making procedural actions or orders, for example, charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.

Section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not confer these powers on a justice of the peace (magistrates court). It simply authorises a justice of the peace (magistrates court) to exercise these powers in circumstances where another Act confers one or more of these powers generally on a “justice of the peace”.

(b) Justice of the peace (qualified)

Just as the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the circumstances in which a justice of the peace (magistrates court) may constitute a court, the Act imposes even greater limitations on the circumstances in which a justice of the peace (qualified) may do so. Section 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides:

A justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to taking or making a procedural action or order.

This limits the powers that may be exercised by a justice of the peace (qualified) to those powers mentioned in the third limb of section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in relation to the powers of a justice

⁹⁴ The term “procedural action or order” is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) as follows:

“procedural action or order” means an action taken or order made for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate, for example the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.

of the peace (magistrates court),⁹⁵ such as charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.⁹⁶

Section 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not confer these powers on a justice of the peace (qualified). It simply authorises a justice of the peace (qualified) to exercise these powers in circumstances where another Act confers one or more of these powers generally on a “justice of the peace”.

(c) Commissioner for declarations

A commissioner for declarations has, and may exercise, any power conferred on a commissioner for declarations by any Act or law, and may take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.⁹⁷

(d) Justice of the peace

In the context of discussing the different categories of justices of the peace, the bare title of “justice of the peace” is used to refer to the office held by certain justices of the peace under the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).⁹⁸ When that Act commenced on 1 November 1991, there were many justices of the peace who already held office under the *Justices of the Peace Act 1975* (Qld). The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) originally provided for a five year transitional period, which would have expired on 1 November 1996.⁹⁹ In 1996, however, the transitional period was extended until 30 June 2000.¹⁰⁰

Until the expiry of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on 30 June 2000, a justice of the peace

⁹⁵ See p 14 of this Report.

⁹⁶ See the definition of “procedural action or order” at note 94 of this Report.

⁹⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

⁹⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 31(4), Part 5. The title “justice of the peace” is also used in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) to refer to Supreme Court judges, District Court judges and magistrates who are automatically, by virtue of holding those offices, “justices of the peace”. See pp 28-29 of this Report for a discussion of *ex officio* justices of the peace.

⁹⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 41, 42.

¹⁰⁰ S 9 of the *Justices of the Peace and Commissioners for Declarations Legislation Amendment Act 1996* (Qld) amended s 42 of the principal Act.

who held office immediately before the commencement of that Act¹⁰¹ and who has not since been appointed as a justice of the peace (qualified) or as a justice of the peace (magistrates court) and has not registered as a commissioner for declarations,¹⁰² will be known simply as a “justice of the peace”.¹⁰³

If, by 30 June 2000, a person still holds that office - that is, the person has not in the meantime been appointed to one of the new categories of justice of the peace and has not registered as a commissioner for declarations - he or she will automatically cease to hold the office of “justice of the peace” and will automatically hold office as a justice of the peace (commissioner for declarations),¹⁰⁴ an office with a largely witnessing function. However, if the person is a lawyer,¹⁰⁵ he or she is exempt from the automatic conversion to the role of justice of the peace (commissioner for declarations).¹⁰⁶ Such a person will continue to hold office indefinitely as a “justice of the peace”.¹⁰⁷

In this Report, a justice of the peace who holds office only as a result of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is referred to as an “old system” justice of the peace.

An old system justice of the peace is able - until 30 June 2000 or, if the old system justice of the peace is a lawyer, indefinitely - to exercise all the powers that are conferred on a “justice of the peace” by the *Justices Act 1886* (Qld) or by any other Act.¹⁰⁸ Significantly, an old system justice of the peace is not subject to the limitations imposed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the powers that may be exercised by a justice of the peace (qualified) or by a justice of the peace (magistrates court).¹⁰⁹ Consequently, an old system justice of the

¹⁰¹ That is, a justice of the peace who held office under the *Justices of the Peace Act 1975* (Qld), which was repealed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

¹⁰² An old system justice of the peace may apply to be registered as a commissioner for declarations: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 44.

¹⁰³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 41(a), 42(1).

¹⁰⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1).

¹⁰⁵ The term “lawyer” is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean “a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State”.

¹⁰⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(3).

¹⁰⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 41(a).

¹⁰⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(a).

¹⁰⁹ S 29(6) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) confirms that s 29(3)-(5) of that Act do not limit the powers conferred by s 29(1)(a) on a justice of the peace who held office as a justice of the peace immediately before the commencement

peace may exercise greater powers than a person appointed to either of those offices.

For example, an old system justice of the peace has the power to hear and determine a charge of a simple offence that is defended, whereas a justice of the peace (magistrates court) may hear and determine such a charge only where the defendant pleads guilty.¹¹⁰ Similarly, an old system justice of the peace has the power to conduct a committal hearing under the *Justices Act 1886* (Qld),¹¹¹ whereas a person who has been appointed as a justice of the peace (qualified) is not able to exercise that power.¹¹² In fact, a respondent to the Issues Paper¹¹³ who identified himself as an old system justice of the peace stated that, although he had passed the necessary examination for appointment as a justice of the peace (qualified), he had specifically refrained from seeking appointment for the very reason that he would then be excluded from performing bench duties - a duty he considers is needed in his locality.¹¹⁴

The main reason expressed for extending the deadline for the automatic conversion of old system justices of the peace to the office of justice of the peace (commissioner for declarations) was the low rate at which old system justices of the peace were becoming qualified as justices of the peace of one of the new categories. In the second reading speech for the *Justices of the Peace and Commissioners for Declarations Legislation Amendment Bill 1996* (Qld), the then Attorney-General and Minister for Justice, the Honourable D E Beanland MLA, stated:¹¹⁵

The JP Act provided for a five-year transitional period that was to terminate on 1 November 1996. However, since 1991, of the 63,000 registered JPs, less than 50 percent have participated in the reform program. If the transition period was allowed to terminate on 1 November 1996, it could place the administration of justice in jeopardy, particularly in regional, rural and remote localities. This is because on 1 November 1996 approximately 38,000 JPs who were appointed prior to 1 November 1991 and did not upgrade to either a JP (Qualified) or JP (Magistrates Court) will lose all their old JP powers, except those of a commissioner for declarations.

of that Act and who has not converted to one of the new offices created by that Act.

¹¹⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a).

¹¹¹ See *Justices Act 1886* (Qld) s 104.

¹¹² S 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that a justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding, "is limited to taking or making a procedural action or order".

¹¹³ Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998).

¹¹⁴ Submission 17 (IP). As an old system justice of the peace, this respondent would have the power to perform bench duties even if he had not undertaken any training.

¹¹⁵ Legislative Assembly (Qld), *Parliamentary Debates* (4 September 1996) at 2423.

A further reason expressed by the then Attorney-General and Minister for Justice for extending the deadline was that concerns had been expressed by a significant number of justices of the peace about the current system.¹¹⁶ It was also suggested that the extension of the transitional period would maintain the *status quo* until the Commission presented its final report on this reference.¹¹⁷

Several respondents to the Issues Paper were critical of the fact that the powers of old system justices of the peace are more extensive than those of justices of the peace (qualified) who have undergone training for their roles.¹¹⁸

(e) Justice of the peace (commissioner for declarations)

This is not a category to which a person can apply to be appointed under section 15 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Rather, it is a category of justice of the peace that will be established on the expiry of the transitional provisions of that Act on 30 June 2000.

At that time, an old system justice of the peace who has not been appointed as a justice of the peace (qualified) or a justice of the peace (magistrates court), and who has not in the meantime applied to be registered as a commissioner for declarations and been so registered,¹¹⁹ will cease to hold office as a justice of the peace and will instead hold office as a justice of the peace (commissioner for declarations).¹²⁰

The powers of a justice of the peace (commissioner for declarations) are identical to those that may be exercised by a commissioner for declarations.¹²¹ Accordingly, a person who becomes a justice of the peace (commissioner for declarations):¹²²

- will have and be able to exercise all the powers conferred on a commissioner for declarations by any Act or law; and

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Submissions 36 (IP), 37 (IP), 54 (IP), 100 (IP). The powers of old system justices of the peace are also more extensive than those of justices of the peace (magistrates court).

¹¹⁹ See *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 44.

¹²⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1). As explained at pp 16-17 of this Report, this provision does not apply to an old system justice of the peace who is a lawyer. See, however, the Commission's recommendation at p 52 of this Report in relation to the application of the transitional provisions to old system justices of the peace who are lawyers (Recommendation 4.3).

¹²¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5).

¹²² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

- will be able to take any affidavit or attest any instrument or document that may be taken or attested under any Act or law.

The reason for having two categories with identical powers appears to have been a desire not to take the title “justice of the peace” away from old system justices of the peace, not even at the end of the transitional period of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). In the Second Reading Speech for the *Justices of the Peace and Commissioners for Declarations Bill 1991* (Qld), the then Attorney-General, the Honourable Dean Wells MLA, stated:¹²³

But what of somebody who does not want to undertake any of the courses and does not want to become a commissioner for declarations? Such a person is now a justice of the peace, and has served the community in that capacity. The Government, therefore, does not propose to take the honour or the title away from them. Such people will continue to be able to write “JP” after their name. After five years, the powers of a JP (qualified) and of a JP (Magistrates Court) will only be capable of being exercised by a person who has received formal training. A person choosing not to undertake the further training and choosing not to become a commissioner for declarations will not be entitled to a seal, but will be entitled to continue his witnessing functions, and to write “JP (commissioner for declarations)” after his name.

7. JUSTICES OF THE PEACE IN ABORIGINAL, TORRES STRAIT ISLANDER AND REMOTE COMMUNITIES

(a) Introduction

As discussed above, the various categories of justices of the peace are established by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), as are the limitations generally imposed on the exercise of powers by specific categories of justices of the peace.¹²⁴

However, other Queensland legislation enables certain justices of the peace (or, in some cases, justices of the peace in designated parts of the State) to exercise additional powers:

- Justices of the peace (magistrates court) in specified Aboriginal, Torres Strait Islander, and remote communities who are appointed under section 552C of the *Criminal Code* (Qld) may, where a defendant charged with an indictable offence under Chapter 58A of the Code pleads guilty, sentence the defendant in respect of that indictable offence. Other justices of the peace (magistrates court) are not authorised to hear and determine a charge of an indictable offence under

¹²³ Legislative Assembly (Qld), *Parliamentary Debates* (31 May 1991) at 8325.

¹²⁴ See pp 12-19 of this Report.

Chapter 58A of the *Criminal Code* (Qld), not even where the defendant pleads guilty.¹²⁵

- Under the provisions of the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld), Aboriginal and Torres Strait Islander justices of the peace in those communities may constitute an “Aboriginal Court” or an “Island Court” to hear certain charges,¹²⁶ even where a defendant pleads not guilty. Other justices of the peace (magistrates court) who constitute a Magistrates Court - even those appointed under section 552C of the *Criminal Code* (Qld) - may hear charges only where a defendant pleads guilty.

These powers are discussed below.

(b) Appointment of justices of the peace under the *Criminal Code* (Qld)

(i) Introduction

The *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* (Qld), which commenced on 1 August 1997, amended the *Criminal Code* (Qld) by making a number of changes with respect to the powers of certain justices of the peace in specified Aboriginal and Torres Strait Islander communities, and in remote communities. As a result, designated justices of the peace in Aboriginal, Torres Strait Islander and remote communities may hear and determine certain indictable offences summarily where the defendant pleads guilty.

The Explanatory Notes to the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld) give the reasons for this change. They also refer to the pilot projects that were planned for the communities of Kowanyama and Thursday Island:¹²⁷

To date the use of Justices of the Peace in local Magistrates Courts has been limited. The training of Justices of the Peace also created the option of communities convening Community Courts under the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* for the purposes of hearing breaches of by-laws passed by local Aboriginal or Islander Councils. However, due to shortcomings in the legislative provisions governing Community Courts and difficulties in Councils adequately resourcing and administering them, many communities have chosen not to establish

¹²⁵ *Criminal Code* (Qld) s 552C(1). See the discussion of the types of matters that may generally be heard by justices of the peace (magistrates court) at pp 193-194 of this Report.

¹²⁶ See p 26 of this Report.

¹²⁷ Explanatory Notes to the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld) at 3.

Community Courts.

It has been decided to pilot the use of Justices of the Peace to convene Magistrates Courts on two remote Aboriginal and Torres Strait Islander communities, namely Kowanyama and Thursday Island. The pilots will examine the benefits of using Justices of the Peace to constitute Magistrates Courts in the communities.

The pilots will establish whether the use of local Justices of the Peace will aid in a more efficient system of justice. Quicker response times may have a deterrent effect for offenders. Further, the pilot will study the effect of culturally appropriate processes and sentencing.

(ii) Jurisdiction

Before its amendment by the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* (Qld), section 552C of the *Criminal Code* (Qld)¹²⁸ provided that the summary hearing and deciding of an indictable offence under Chapter 58A of the Code had to be heard by a magistrate.

The *Criminal Code* (Qld) now provides that, in limited circumstances, certain justices of the peace may also constitute a Magistrates Court for the purpose of dealing summarily with an indictable offence under Chapter 58A of the Code.¹²⁹ The jurisdiction of these justices of the peace in relation to such an offence is limited in that:¹³⁰

- the offence must be one that is dealt with on a guilty plea; and
- the justices of the peace must consider that they may adequately punish the defendant by imposing a penalty that is not more than 100 penalty units¹³¹ or six months imprisonment; and
- if the offence involves property, or property damage or destruction, the property must not be more than \$2,500 in value.

(iii) Appointment

In order to be appointed to exercise these powers, a person must be a justice of the peace (magistrates court) and the Attorney-General must be satisfied that

¹²⁸ S 552C was inserted by s 96 of the *Criminal Law Amendment Act 1997* (Qld).

¹²⁹ *Criminal Code* (Qld) s 552C(1).

¹³⁰ *Criminal Code* (Qld) ss 552C(2), 552H(1)(b).

¹³¹ The value of a penalty unit is set out at note 1084 of this Report.

the person has “appropriate qualifications”.¹³²

The justice of the peace (magistrates court) may be appointed by the Attorney-General for a place specified in a gazette notice.¹³³ The notice may specify a place appointed for holding a Magistrates Court only if:¹³⁴

- the place is within a trust area under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld);¹³⁵ or
- the Attorney-General considers the place to be remote.

Justices of the peace who constitute a Magistrates Court under these provisions to deal summarily with an indictable offence under Chapter 58A of the *Criminal Code* (Qld) must actually be appointed for the place at which the Magistrates Court is being held. It is not sufficient if they have been appointed for a different place.

In effect, these provisions create a special class of justices of the peace (magistrates court) who may exercise additional powers to those that may be exercised by an ordinary justice of the peace (magistrates court).¹³⁶ In the absence of section 552C(1)(b) of the *Criminal Code* (Qld), no justice of the peace would be able to deal summarily with an indictable offence under Chapter 58A of the *Criminal Code* (Qld); such matters would have to be heard by a magistrate. However, section 552C of the *Criminal Code* (Qld) enables a limited group of justices of the peace (magistrates court) to hear those matters.

(iv) The current pilot projects

It is intended that the Magistrates Courts constituted by justices of the peace (magistrates court) in Aboriginal and Torres Strait Islander communities will have a high level of support from their supervising Magistrates Court registry:¹³⁷

¹³² *Criminal Code* (Qld) s 552C(4).

¹³³ *Criminal Code* (Qld) s 552C(3).

¹³⁴ *Criminal Code* (Qld) s 552C(5).

¹³⁵ See note 142 of this Report for a discussion of the effect of the *Community Services Legislation Amendment Act 1999* (Qld).

¹³⁶ S 552C(6) of the *Criminal Code* (Qld) expressly provides that s 29(4)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which imposes a number of limitations on the powers that may be exercised by a justice of the peace (magistrates court), is subject to s 552C(1)-(3) of the *Criminal Code* (Qld).

¹³⁷ Department of Justice and Attorney-General (Qld), *Profile: Justices of the Peace (Magistrates Court) Training and Instituting Court Sittings in Remote Communities* (February 1999) at 8.

It is envisaged that when two Justices constitute a court and deal with matters, the Bench Charge Sheets shall be faxed to the supervising registry as soon as the matter is finalised. The Registrar or his delegate is to then prepare any necessary documentation required and fax these back to the Justices for the defendant to be served with the documents, or enter a recognizance or other matters. This has several advantages over the system where lay Justices prepare the forms locally. ...

The Registrar of the supervising court will be able to monitor the court proceedings to ensure that correct procedures are being followed, sentences are within parameters and the correct documentation is prepared whilst the defendants are still at the court. This will negate the possibility of a matter being reopened and the defendant having to reappear in court for the same offence at a later date.

The following systems of evaluation are intended for the pilot projects:¹³⁸

Evaluation will be done in two ways. A Departmental Trainer will visit the community within six months of the Justices commencing court proceedings to report on the progress of the court. This will enable the local Justices to raise any problems directly with the trainer.

As well, there will be put in place procedures for reports to be filed with the Registrar by the Stipendiary Magistrates, the Police, the Justices, the Community Justice Groups, the local Community Councils and the Supervising court. The Registrar will then be able to monitor the performance of the remote Courts and instigate any reforms required.

At present, Magistrates Courts constituted by justices of the peace (magistrates court) are operating at Bamaga and Thursday Island.¹³⁹ The experience at Bamaga has been described as follows:¹⁴⁰

Two JPs (Mags. Court), one Indigenous and the other not, have been involved in convening a JP Magistrates Court. This has been well received in the community. It was said that having two local people, one of whom was Aboriginal determining matters ensured that both the local information as well as the traditional/cultural issues were well known to the bench. It was said that having only one non-Indigenous person on the bench had advantages in that he had experience in the wider community, beyond Bamaga and was more literate and conversant with the practice and process of convening court. Yet having a local Indigenous JP meant that first hand knowledge and life experience could also be given due regard.

(c) Justices of the peace who may constitute Aboriginal and Torres Strait

¹³⁸ Id at 9-10.

¹³⁹ Information provided by the Justices of the Peace Branch, Department of Justice and Attorney-General (Qld) (December 1999).

¹⁴⁰ Community Council Support Branch, Department of Aboriginal and Torres Strait Islander Policy and Development, *Report of the Review of Aboriginal and Torres Strait Islander (Community) Courts* (August 1998) at 84.

Islander Community Courts

(i) Introduction

The *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) provide respectively for the establishment of Aboriginal Councils and Island Councils.¹⁴¹ The Acts further provide that the Governor in Council may approve that an Aboriginal Council or an Island Council is to govern a trust area¹⁴² under those Acts.¹⁴³ There are 31 Aboriginal or Torres Strait Islander communities governed by these two Acts.¹⁴⁴

Aboriginal and Island Councils have, and may discharge, the functions of local government of the trust areas for which they are established and are, under both Acts, expressly charged with the good rule and government of those areas.¹⁴⁵ For that purpose, Councils may make by-laws¹⁴⁶ and enforce the observance of those by-laws. Included in the matters for which a Council may make by-laws are the peace, order, discipline, comfort, health, moral safety, convenience, food

¹⁴¹ *Community Services (Aborigines) Act 1984* (Qld) s 15; *Community Services (Torres Strait) Act 1984* (Qld) s 15.

¹⁴² The term "trust area" is defined in s 6 of the *Community Services (Aborigines) Act 1984* (Qld) and s 6 of the *Community Services (Torres Strait) Act 1984* (Qld). When the *Community Services Legislation Amendment Act 1999* (Qld) commences, the definitions of "area" and "trust area" in s 6 of both principal Acts will be omitted. In their place, s 6 of both Acts will be amended to include a definition of "council area". See ss 4 and 19 of the *Community Services Legislation Amendment Act 1999* (Qld). That Act was assented to on 18 November 1999. As at 10 December 1999, it had not been proclaimed into force.

¹⁴³ *Community Services (Aborigines) Act 1984* (Qld) s 14(1); *Community Services (Torres Strait) Act 1984* (Qld) s 14(1). The community of Islanders at Bamaga is also required to be governed by an Island Council: *Community Services (Torres Strait) Act 1984* (Qld) s 14(1). When the *Community Services Legislation Amendment Act 1999* (Qld) commences, s 14 of both principal Acts will be omitted and replaced. The new s 14 of each Act will provide that a regulation may declare a part of the State to be a "council area". Further, a new s 14A will be inserted into each Act. S 14A of the *Community Services (Aborigines) Act 1984* (Qld) will provide that there must be an Aboriginal council for each council area and s 14A of the *Community Services (Torres Strait) Act 1984* (Qld) will provide that there must be an Island council for each council area. See ss 7 and 22 of the *Community Services Legislation Amendment Act 1999* (Qld).

¹⁴⁴ Community Council Support Branch, Department of Aboriginal and Torres Strait Islander Policy and Development, *Report of the Review of Aboriginal and Torres Strait Islander (Community) Courts* (August 1998) at 11.

¹⁴⁵ *Community Services (Aborigines) Act 1984* (Qld) s 25(1); *Community Services (Torres Strait) Act 1984* (Qld) s 23(1). See note 142 of this Report regarding the change in terminology from "trust area" to "council area".

¹⁴⁶ A by-law is made by resolution of a Council, but does not take effect until it has been approved by the Governor in Council: *Community Services (Aborigines) Act 1984* (Qld) s 26(2); *Community Services (Torres Strait) Act 1984* (Qld) s 24(2).

supply, housing and welfare of the area.¹⁴⁷ A by-law of a Council may impose a penalty in respect of any breach of a by-law of up to \$500¹⁴⁸ or not more than \$50 per day.¹⁴⁹

The *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) provide respectively for two justices of the peace who are Aboriginal residents of an area to constitute an Aboriginal Court, and for two justices of the peace who are Islander residents of an area to constitute an Island Court.¹⁵⁰ For this purpose, a “justice of the peace” is defined to mean:¹⁵¹

- a justice of the peace whose office is preserved by the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), that is, an old system justice of the peace;¹⁵² or
- a justice of the peace (magistrates court).

These Courts are referred to in this chapter as “Community Courts”.

(ii) Jurisdiction of a Community Court

A Community Court has jurisdiction to hear and determine the following

¹⁴⁷ *Community Services (Aborigines) Act 1984* (Qld) s 25(2)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 23(2)(a).

¹⁴⁸ *Community Services (Aborigines) Act 1984* (Qld) s 25(6)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 23(6)(a). When the *Community Services Legislation Amendment Act 1999* (Qld) commences, the reference in both of these provisions to “\$500” will be omitted and replaced by the words “an amount equal to 7 penalty units”: see the minor amendments made by the schedule to the *Community Services Legislation Amendment Act 1999* (Qld). The value of a penalty unit is set out at note 1084 of this Report.

¹⁴⁹ *Community Services (Aborigines) Act 1984* (Qld) s 25(6)(b); *Community Services (Torres Strait) Act 1984* (Qld) s 23(6)(b). When the *Community Services Legislation Amendment Act 1999* (Qld) commences, the reference in both of these provisions to “\$50” will be omitted and replaced by the words “an amount equal to 1 penalty unit”: see the minor amendments made by the schedule to the *Community Services Legislation Amendment Act 1999* (Qld). The value of a penalty unit is set out at note 1084 of this Report.

¹⁵⁰ *Community Services (Aborigines) Act 1984* (Qld) s 42(2)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 40(2)(a). Where this requirement cannot be readily complied with, the Court may be constituted by members of the Council established for the area who are not parties in the matter to be determined: *Community Services (Aborigines) Act 1984* (Qld) s 42(2)(b), (3); *Community Services (Torres Strait) Act 1984* (Qld) s 40(2)(b), (3).

¹⁵¹ *Community Services (Aborigines) Act 1984* (Qld) s 42(4); *Community Services (Torres Strait) Act 1984* (Qld) s 40(4).

¹⁵² See the explanation of the Commission’s use of this term at pp 16-17 of this Report.

matters.¹⁵³

- matters of complaint that are breaches of the by-laws applicable within its area;
- disputes concerning any matter that:
 - (1) is a matter accepted by the community resident in its area as a matter rightly governed by the usages and customs of that community; and
 - (2) is not a breach of the by-laws applicable within its area or of a law of the Commonwealth or the State or a matter arising under a law of the Commonwealth or the State; and
- matters committed to its jurisdiction by the regulations.

Significantly, a large number of communities' by-laws address law and order issues.¹⁵⁴

In 1994, the former Department of Family Services and Aboriginal and Torres Strait Islander Affairs prepared a model set of by-laws dealing with law and order issues. These by-laws create basic offences (such as assault, damage to property, firearms and liquor offences), set out the powers of the community police and provide certain procedures of the court. To April 1998, 8 of the 14 Aboriginal councils and 11 of the 17 Island councils have adopted the Law and Order By-laws. [original emphasis]

To some extent, the offences created by the by-laws overlap with offences created by the *Criminal Code* (Qld) and other legislation. For example, the range of offences that have been prosecuted in Community Courts includes common assault, vandalism, stealing and disorderly conduct.¹⁵⁵ The decision as to whether a matter is prosecuted in a Community Court or in a Magistrates Court is usually made by the Officer in Charge of the State Police Service covering the particular community.¹⁵⁶

The limitations imposed by section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the court powers of a justice

¹⁵³ *Community Services (Aborigines) Act 1984* (Qld) s 43(2); *Community Services (Torres Strait) Act 1984* (Qld) s 41(2).

¹⁵⁴ Community Council Support Branch, Department of Aboriginal and Torres Strait Islander Policy and Development, *Report of the Review of Aboriginal and Torres Strait Islander (Community) Courts* (August 1998) at 18.

¹⁵⁵ Id at 59, 67.

¹⁵⁶ Id at 25.

of the peace (magistrates court) do not apply where the justice of the peace is sitting on a Community Court.¹⁵⁷ This means, for example, that two justices of the peace (magistrates court) who are constituting a Community Court are not limited to hearing a charge in a case in which the defendant pleads guilty, but may hear a defended trial in a matter where the Court has jurisdiction.

Although the legislation is in place for the operation of Community Courts, only three communities presently have Community Courts operating - Hope Vale, Woorabinda and Kowanyama. Until fairly recently, Community Courts also operated in four other communities - Lockhart River, Doomadgee, Cherbourg and Yarrabah.¹⁵⁸

In 1997, the Office of Aboriginal and Torres Strait Islander Affairs, then part of the Department of Families, Youth and Community Care, commenced a review of the operations of Aboriginal and Islander Community Courts.¹⁵⁹ The findings of this review are contained in the Report of the Community Council Support Branch of the Department of Aboriginal and Torres Strait Islander Policy and Development.¹⁶⁰

The review recommended that the present system of Community Courts be abolished. It also recommended that a more appropriate community-based court system could be provided by Magistrates Courts constituted by justices of the peace using, wherever possible, Aboriginal or Torres Strait Islander justices of the peace.¹⁶¹

8. JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS BY VIRTUE OF OFFICE HELD

Most justices of the peace and commissioners for declarations hold office as the result of appointment to their respective offices by the Governor in Council after making

¹⁵⁷ *Community Services (Aborigines) Act 1984* (Qld) s 42(5); *Community Services (Torres Strait) Act 1984* (Qld) s 40(5).

¹⁵⁸ Community Council Support Branch, Department of Aboriginal and Torres Strait Islander Policy and Development, *Report of the Review of Aboriginal and Torres Strait Islander (Community) Courts* (August 1998) at 8.

¹⁵⁹ For a more detailed discussion of this review see Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 217-219.

¹⁶⁰ Community Council Support Branch, Department of Aboriginal and Torres Strait Islander Policy and Development, *Report of the Review of Aboriginal and Torres Strait Islander (Community) Courts* (August 1998).

¹⁶¹ *Id* at 46.

application under the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) and satisfying the relevant criteria.¹⁶² A person may also hold office as a justice of the peace or as a commissioner for declarations by:

- having held the office of justice of the peace under the *Justices of the Peace Act 1975* (Qld), which office has been preserved by the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld);¹⁶³
- transferring from the office of old system justice of the peace to the office of commissioner for declarations;¹⁶⁴ or
- if the person is an old system justice of the peace, automatically becoming a justice of the peace (commissioner for declarations) after 30 June 2000.¹⁶⁵

A person who holds office by reason of any one of these means is referred to in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) as an “appointed justice of the peace” or as an “appointed commissioner for declarations”.¹⁶⁶

That distinction is made because the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) also provides for certain other people to hold office as a justice of the peace or as a commissioner for declarations by virtue of holding, or having held, a particular office.¹⁶⁷

Broadly stated, judges and magistrates automatically hold office as justices of the peace; registrars and clerks of courts automatically hold office as either justices of the peace (magistrates court) or justices of the peace (qualified), depending on whether they are legal practitioners; and clerks employed in the courts automatically hold office as commissioners for declarations. These categories are discussed in more detail below.

¹⁶² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15. The process of appointment and the qualifications for, and disqualifications from, appointment are discussed in detail in Chapter 12 of this Report.

¹⁶³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 41(a).

¹⁶⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 44.

¹⁶⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1).

¹⁶⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 3 (definitions of “appointed justice of the peace” and “appointed commissioner for declarations”).

¹⁶⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19. The provisions discussed in Chapter 12 of this Report in relation to appointment to office, disqualifications from office and cessation of office do not apply to persons who hold office by this means. They apply to the eligibility for office of an “appointed justice of the peace” and an “appointed commissioner for declarations”.

(a) Judges and magistrates (in office and retired)

Every person who holds office as a Supreme Court judge, a District Court judge, or a magistrate automatically holds office as a “justice of the peace”.¹⁶⁸ Further, a person who has retired, or resigned, from office as a Supreme Court judge, District Court judge or magistrate also automatically holds office as a justice of the peace.¹⁶⁹

A justice of the peace who holds office by virtue of being a Supreme Court judge, a District Court judge, or a magistrate may exercise all the powers that are conferred on a justice of the peace or on a commissioner for declarations by the *Justices Act 1886* (Qld) or by any other Act, as the limitations imposed by subsections 29(3) to (5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)¹⁷⁰ on the exercise of powers by a justice of the peace (qualified), a justice of the peace (magistrates court) or a justice of the peace (commissioner for declarations) do not apply to such a person.¹⁷¹

(b) Registrars of the Supreme and District Courts and clerks of the court and registrars of Magistrates Courts

A person who holds office as:

- a registrar of the Supreme Court or of the District Court; or
- a clerk of the court or registrar of a Magistrates Court who is not a police officer;

¹⁶⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1).

¹⁶⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1A). Accordingly, a judge or magistrate who was removed from office would cease to hold office as a justice of the peace.

¹⁷⁰ See pp 12-13 of this Report for a discussion of these provisions.

¹⁷¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6)(c). Although s 29(6) of the Act does not refer to a justice of the peace mentioned in s 19(1A), a justice of the peace who holds office by virtue of the latter provision would also appear to be unaffected by the limitations imposed by s 29(3)-(5) of the Act.

automatically holds office as a justice of the peace (magistrates court) if the person is a legal practitioner.¹⁷² If the person is not a legal practitioner, he or she holds office as a justice of the peace (qualified).¹⁷³

However, if a registrar of the Supreme Court or of the District Court or a clerk of the court or registrar of a Magistrates Court, other than a police officer, held office on 31 October 1991 as a justice of the peace under section 9(vi) of the *Justices of the Peace Act 1975* (Qld),¹⁷⁴ he or she automatically holds office as a justice of the peace (magistrates court) for as long as he or she continues to hold the office of registrar or clerk of the court, whether or not he or she is a legal practitioner.¹⁷⁵

(c) Clerks employed in the Supreme, District and Magistrates Courts

Every clerk of or above the age of eighteen who is employed as an officer of the public service in an office of the Supreme Court, the District Court or a Magistrates Court, for as long as he or she is so employed, holds office as a commissioner for declarations.¹⁷⁶

However, if such a clerk held office on 31 October 1991 as a justice of the peace under section 9(vi) of the *Justices of the Peace Act 1975* (Qld),¹⁷⁷ he or she automatically holds office as a justice of the peace (magistrates court) for as long as he or she continues to be employed as an officer of the public service in an office of the Supreme Court, the District Court or a Magistrates Court.¹⁷⁸

(d) Further appointment not precluded

¹⁷² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2)(c). The term "legal practitioner" is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) to mean:

- (a) a person duly admitted as a barrister of the Supreme Court whose name is currently enrolled on the Roll of Barristers of that court; or
- (b) a person duly admitted as a solicitor of the Supreme Court whose name is currently enrolled on the Roll of Solicitors of that court.

¹⁷³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2)(d).

¹⁷⁴ Under s 9(vi) of the *Justices of the Peace Act 1975* (Qld), a clerk employed as an officer of the Public Service of Queensland in an office of the Supreme Court, a District Court or a Magistrates Court who was of or above the age of 21 years was, by virtue of that office and without any further appointment, a justice of the peace.

¹⁷⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(4).

¹⁷⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(3).

¹⁷⁷ See note 174 of this Report.

¹⁷⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(4).

The fact that a person may, by reason of his or her employment, automatically hold office as a particular category of justice of the peace does not prevent that person from qualifying for, and being appointed to, another category of office. For example, a person whose office or position of employment has the effect that he or she holds office as a justice of the peace (qualified) may, after satisfying the requirements of the Act, be appointed as a justice of the peace (magistrates court). In the Magistrates Courts, in particular, many of the court staff have undergone training and been appointed to the office of justice of the peace (magistrates court).

9. THE NUMBERS OF JUSTICES OF THE PEACE AND COMMISSIONERS FOR DECLARATIONS IN QUEENSLAND AND IN OTHER AUSTRALIAN JURISDICTIONS

Queensland has approximately 50,000 justices of the peace and approximately 15,000 commissioners for declarations. The breakdown by reference to the category of justice of the peace is as follows:¹⁷⁹

Category	Number
Justices of the peace (magistrates court)	521
Justices of the peace (qualified)	16,358
Old system justices of the peace ¹⁸⁰	33,462
Subtotal	50,341
Commissioners for declarations	15,141
Total	65,482

This is a very high figure when compared with the numbers of justices of the peace and commissioners for declarations (or the equivalent) in most other Australian jurisdictions.¹⁸¹ Queensland is second only to New South Wales, where the system of

¹⁷⁹ Information provided to the Commission by the Justices of the Peace Branch of the Department of Justice and Attorney-General (Qld) as at November 1999.

¹⁸⁰ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

¹⁸¹ Information on the numbers of justices of the peace and commissioners for declarations has been provided to the Commission by the Department responsible for the administration of justices of the peace in each jurisdiction. The information in relation to New South Wales is current as at December 1999. The figures for all other jurisdictions are current as at November 1999.

justices of the peace is also under review.¹⁸²

The breakdown of appointments in the other jurisdictions is as follows:¹⁸³

Jurisdiction	Justices of the peace	Bail justices	Commissioners for declarations	Total
Australian Capital Territory ¹⁸⁴	728	-	-	728
New South Wales ¹⁸⁵	100,000	-	-	100,000
Northern Territory	213	-	696	909
South Australia	9,579	-	-	9,579
Tasmania	2,074	-	1,026	3,100
Victoria ¹⁸⁶	3,600	400	-	4,000
Western Australia ¹⁸⁷	3,475	-	534	4,009

10. USE OF TERMINOLOGY IN THIS REPORT

Where in this Report the Commission refers to “justices of the peace”, that is a generic reference to justices of the peace of all categories. Where the Commission intends to refer to a particular category of justice of the peace only, for example, a justice of the

¹⁸² See note 185 of this Report.

¹⁸³ See note 181 of this Report.

¹⁸⁴ Justices of the peace in the Australian Capital Territory do not exercise court powers and do not generally issue warrants. They perform a largely witnessing role. See Chapters 5, 6 and 10 of this Report.

¹⁸⁵ This figure is an estimate based on the assumptions that all appointments made for the last 30 years remain valid and that the average number of appointments made each year for the years 1992 to 1996 (3,327) was made in each of the last 30 years. See Attorney-General's Department (NSW), Discussion Paper, *A Review of the Law and Policy Relating to the Appointment to and Regulation of the Office of Justice of the Peace* (1998) at 7. This was still the estimate of that Department in December 1999.

¹⁸⁶ In Victoria, the office of commissioner for taking affidavits was abolished by s 144 of the *Magistrates' Court Act 1989* (Vic). Justices of the peace in Victoria do not exercise court powers and do not generally issue warrants. They perform a largely witnessing role. See Chapters 5, 6 and 10 of this Report.

¹⁸⁷ The Western Australian Ministry of Justice has advised the Commission that statistics for the number of commissioners for declarations have been kept only since 1985.

peace (qualified), it uses the specific title of that category.

As mentioned earlier in this chapter,¹⁸⁸ the term “old system” justice of the peace is used by the Commission to refer to those justices of the peace who were appointed prior to the commencement of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and whose offices have been preserved by the transitional provisions of that Act.

In the following chapters, the Commission discusses the various powers that may be exercised by justices of the peace and identifies which categories of justices of the peace may exercise those powers. A reference to a particular category of justice of the peace includes not only those justices of the peace who have been appointed to that category, but also the judicial officers and court staff who hold office as a justice of the peace of that category by virtue of the office or position held by them.¹⁸⁹

¹⁸⁸ See pp 16-17 of this Report.

¹⁸⁹ See pp 29-30 of this Report for a discussion of those justices of the peace who hold office as a justice of the peace by virtue of the office or position held by them in the Supreme Court, the District Court or a Magistrates Court.

CHAPTER 3

THE COMMISSION'S APPROACH TO THIS REVIEW

1. SCOPE OF THE REVIEW

(a) Powers under consideration

The terms of this reference require an examination of the role of justices of the peace in Queensland.¹⁹⁰ However, as observed in Chapter 2,¹⁹¹ the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not generally confer substantive powers on justices of the peace. The substantive powers of justices of the peace are derived almost entirely from other legislation.

For this reason, a review of the role of justices of the peace is broader than simply reviewing the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and considering whether the existing allocation of powers as between the existing categories of justices of the peace and commissioners for declarations is appropriate. It is also necessary to examine the powers that may currently be exercised by justices of the peace and commissioners for declarations with a view to inquiring whether it is appropriate for them to retain those powers.

Given the large number of Acts that confer powers on justices of the peace and commissioners for declarations, it has not been possible for the Commission to consider every power that may be exercised by a justice of the peace or by a commissioner for declarations. Consequently, in the Discussion Paper¹⁹² the Commission examined the main powers that justices of the peace and commissioners for declarations may exercise and made preliminary recommendations about whether those powers should be retained.

In this Report, the Commission makes its final recommendations about those powers. In formulating its recommendations, the Commission has considered:

- the extent to which various powers are presently exercised by justices of the peace and commissioners for declarations;
- whether there is a need within the communities where justices of the peace and commissioners for declarations presently exercise their various powers for them to retain those powers;

¹⁹⁰ The terms of reference are set out at p 1 of this Report.

¹⁹¹ See p 15 of this Report.

¹⁹² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999).

- whether there are other factors that make it desirable (or undesirable) for those powers to be exercised by justices of the peace or by commissioners for declarations.

(b) Justices of the peace in Aboriginal, Torres Strait Islander and remote communities¹⁹³

In the Discussion Paper, the Commission considered the role of justices of the peace in Aboriginal, Torres Strait Islander and remote communities.¹⁹⁴ In particular, the Commission discussed the pilot projects presently being undertaken by the Department of Justice and Attorney-General to examine the benefits of using justices of the peace to constitute Magistrates Courts in Aboriginal and Torres Strait Islander communities.¹⁹⁵ The Commission also discussed the role of justices of the peace in constituting Aboriginal and Torres Strait Islander Community Courts under the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld), as well as the review of the operations of those Community Courts by the Community Council Support Branch of the Department of Aboriginal and Torres Strait Islander Policy and Development.¹⁹⁶

The Commission expressed the view that it would take some time before an evaluation of the pilot projects could determine matters such as the effect of the projects on the level of crime, or the extent to which there has been a reduction in recidivism, in those communities.¹⁹⁷ The Commission noted that the pilot projects included an evaluation of their achievements.¹⁹⁸

The Commission's preliminary view was that it would be premature at this stage to attempt to evaluate the results of the pilot projects.¹⁹⁹ The Commission observed that

¹⁹³ See the discussion of the appointment and powers of justices of the peace in Aboriginal, Torres Strait Islander and remote communities at pp 20-28 of this Report.

¹⁹⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at Chapter 10.

¹⁹⁵ *Id* at 213-214.

¹⁹⁶ *Id* at 214-219.

¹⁹⁷ *Id* at 221-222.

¹⁹⁸ *Id* at 222.

¹⁹⁹ *Ibid*.

submissions to the Issues Paper²⁰⁰ made by the Indigenous Advisory Council²⁰¹ and the Queensland Law Society²⁰² both expressed a similar view.²⁰³ Further, the Commission expressed the view that, as evaluations of the pilot projects are intended to be conducted by other bodies, it would be a duplication of effort for the Commission to undertake an evaluation of the pilot projects as part of this review.²⁰⁴

Consequently, the Commission did not make a preliminary recommendation about the powers of justices of the peace in Aboriginal, Torres Strait Islander or remote communities.

Only one submission in response to the Discussion Paper commented on the Commission's preliminary view.²⁰⁵ That respondent was of the view that the pilot projects presently being undertaken by the Department of Justice and Attorney-General need a longer trial period.

The Commission's view on this issue remains unchanged. Accordingly, the Commission does not propose to make any recommendations in this Report about the specific powers of justices of the peace in Aboriginal, Torres Strait Islander or remote communities when constituting a Community Court or of justices of the peace appointed under section 552C(3) of the *Criminal Code* (Qld) when constituting a Magistrates Court. That is, the Commission is not making recommendations about whether it is appropriate that:

- justices of the peace who constitute a Community Court under the *Community Services (Aborigines) Act 1984* (Qld) or under the *Community Services (Torres Strait) Act 1984* (Qld) should be able to hear and determine certain criminal charges notwithstanding that the defendant pleads not guilty;²⁰⁶ or
- justices of the peace (magistrates court) who are appointed under section 552C(3) of the *Criminal Code* (Qld) for a specified place may, when constituting a Magistrates Court, hear and determine summarily charges of certain indictable

²⁰⁰ Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998).

²⁰¹ Submission 112 (IP).

²⁰² Submission 95 (IP).

²⁰³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 221.

²⁰⁴ Id at 222.

²⁰⁵ Submission 34.

²⁰⁶ See pp 24-28 of this Report.

offences where the defendant pleads guilty.²⁰⁷

In Chapter 10 of this Report, the Commission has recommended that certain additional restrictions should apply when a court is being constituted by justices of the peace.²⁰⁸ For example, the Commission has recommended that a court constituted by justices of the peace may hear a matter only where both the prosecutor and the defendant consent to having the matter heard by justices of the peace. The Commission has also recommended that a court that is constituted by justices of the peace may not sentence a defendant to a term of imprisonment.

The Commission's recommendations about these restrictions are not intended to apply to justices of the peace who are constituting a Community Court or to justices of the peace (magistrates court) who are appointed under section 552C(3) of the *Criminal Code* (Qld) and are constituting a court at the place for which they are appointed.²⁰⁹ Of course, if a justice of the peace (magistrates court) who is appointed under section 552C(3) of the Code is constituting a court at a place that is not the place for which he or she is appointed, the Commission's general restrictions on the powers of justices of the peace to constitute a court should apply.

2. FACTORS RELEVANT TO THE TERMS OF REFERENCE

The office of justice of the peace now bears little resemblance to its historical origins in the fourteenth century.²¹⁰ Over time, the law has become increasingly complex, placing greater demands on judicial officers. Further, advances in technology have made possible a number of changes that are beginning to have an impact on the administration of justice generally.

The Commission considers the following factors to be relevant to the question of the desirability of maintaining the office of justice of the peace in light of a changing

²⁰⁷ See pp 20-24 of this Report.

²⁰⁸ See pp 270-271 of this Report (Recommendations 10.4-10.7).

²⁰⁹ The Commission does not intend that the restrictions recommended in relation to the powers of justices of the peace to constitute a court should apply to justices of the peace (magistrates court) appointed under s 552C(3) of the *Criminal Code* (Qld), regardless of whether they are hearing a matter that they are authorised to hear only because of their appointment under the Code or whether they are hearing a matter that could be heard by a court constituted by any justices of the peace (magistrates court). Consequently, the recommended restrictions will not apply to justices of the peace (magistrates court) appointed under s 552C(3) of the *Criminal Code* (Qld), regardless of whether they are hearing summarily a charge of an indictable offence under Chapter 58A of the Code, or are merely hearing a charge of a simple or regulatory offence.

²¹⁰ See the discussion of the origins of the office at pp 6-7 of this Report.

society.²¹¹

(a) Evolutionary changes in the role of justice of the peace

Over time, the role of justice of the peace has undergone some significant changes. Even before the changes introduced by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) - which limited the powers that could be exercised by different categories of justices of the peace and by commissioners for declarations - there had been a shift in emphasis in the role undertaken by justices of the peace, with their judicial role becoming more limited.²¹² In particular, it appears that justices of the peace were being called upon to constitute a Magistrates Court less frequently than they once had been.

In the Commission's view, this change must be taken into account in reviewing the role of justices of the peace, especially in relation to their court powers. As a general proposition, the Commission is of the view that, if there are powers that are not exercised by justices of the peace or are exercised by them only rarely, it is undesirable for those powers to remain technically vested in justices of the peace. The powers of the office should reflect the reality of the role.

(b) Professionalisation of courts of summary jurisdiction

When justices of the peace were first introduced into the colony of New South Wales, they formed part of a judicial system whose officers were not generally legally qualified.²¹³ That is no longer the case.

In relatively recent times, there have been some significant changes in the courts of summary jurisdiction (such as the Magistrates Courts in Queensland) that reflect certain views about how the justice system should be administered. In a paper delivered in 1990, Mr Justice Thomas made the following observation about changes that had

²¹¹ The terms of reference are set out at p 1 of this Report.

²¹² See pp 7-8 of this Report. See also Tronc K, *Albietz - Powers and Duties of Lay Justices of the Peace in Queensland* (8th ed 1994) at 3-4.

²¹³ Bennett JM, "Early Days of the Law in Country Districts" (1972) 46 *Australian Law Journal* 578 at 579. Bennett notes in relation to the early appointments of magistrates (at 579):

By 1837 the Legislative Council had constituted fifteen Police Magistracies and contemplated three further appointments in the following year. ...

Although the official magistracy brought greater safeguards for the community, the appointees were generally untrained in law ...

occurred within Magistrates Courts throughout Australia:²¹⁴

The professionalisation of the magistracy has been one of the most notable changes in legal professional life over the past two decades. That is the period over which the magistracy has been transformed in substance from a body of persons largely public service trained to a body of professionally trained and legally qualified practitioners. From 1985, *all* new appointments to Magistrates' Courts throughout the Commonwealth have been qualified legal practitioners. The change has occurred quickly. In Queensland now there are only four magistrates who do not have the legal qualification of a barrister or solicitor. Although the position varies around the country, the transformation is substantial and inevitably it will soon be complete. [original emphasis, note omitted]

In Queensland, the *Stipendiary Magistrates Act 1991* (Qld) made some important changes to the appointment of stipendiary magistrates. It provided for magistrates to be appointed and hold office under that Act, rather than as public servants under public service legislation.²¹⁵ It also imposed, as a qualification for appointment as a magistrate, a requirement that a person be a barrister or a solicitor of at least five years standing.²¹⁶

One of the factors recognised as driving the professionalisation of the magistracy is the increasing complexity of the law. During the second reading debate of the *Stipendiary Magistrates Bill 1991* (Qld), the Hon Matt Foley MLA commented:²¹⁷

In modern times, this village society is simply not applicable so we need to have stipendiary magistrates on a professional, full-time basis in order to administer justice in our courts. This is because we ask so much of the law. We ask the law to regulate our traffic. We ask the law to regulate our domestic affairs. We ask the law to administer the Criminal Code, which is a traditional function of law. In modern times, however, the increasing web of simple offences administered through Magistrates Courts indicates that those courts are being used to regulate the economic and social affairs of society. ...

The questions that fall for determination in the Magistrates Courts are questions which directly affect the property, the liberty and, indeed, the reputations of many citizens. It is necessary, then, to ensure that magistrates who are now cloaked with such great powers and with the jurisdiction of weighty responsibilities in both civil and criminal areas are persons who are properly qualified as lawyers. This represents a change from the traditional public service background for magistrates. However, I believe that it is a change which will work to the good of delivering proper legal services to the ordinary Queensland citizen ...

It is obviously important that, having regard to the increasing complexity of the law, the persons who administer the law should have the training and experience appropriate

²¹⁴ The Hon Mr Justice JB Thomas, "The Ethics of Magistrates" (1991) 65 *Australian Law Journal* 387 at 389, paper presented to the Conference of Australian Stipendiary Magistrates, Alice Springs, 9 June 1990.

²¹⁵ *Stipendiary Magistrates Act 1991* (Qld) s 5(4).

²¹⁶ *Stipendiary Magistrates Act 1991* (Qld) s 4(1).

²¹⁷ Legislative Assembly (Qld), *Parliamentary Debates* (14 November 1991) at 2962-2963.

for the particular duties being undertaken.

(c) Advances in technology

Advances in technology have created opportunities for courts to conduct their proceedings in a manner that is now quite different from even a decade ago.

For example, many special leave applications to the High Court are now conducted by video link connections with the Court, rather than having the parties appear personally before the High Court. Even in trial work, it is now becoming more common for some witnesses to give their evidence by means of telephone or video link where the cost and inconvenience of requiring the witness to attend personally are not warranted.²¹⁸

The *Criminal Practice Rules 1999* (Qld) provide that the court may decide to receive evidence or submissions by telephone, video link or another form of communication in a proceeding.²¹⁹

A video link is currently in place between a court within the Magistrates Court complex in Brisbane and the Arthur Gorrie Correctional Centre and the Sir David Longlands Correctional Centre.²²⁰ During the year ended 30 June 1998, that video link was used to facilitate the hearing of 332 bail and remand applications and 94 pleas from detainees at the Arthur Gorrie Correctional Centre.²²¹ The video link obviates the need to bring persons on remand to the Court for the hearing of these matters.²²²

²¹⁸ See the *Audio Visual and Audio Links Amendment Act 1999* (Qld). That Act was assented to on 6 December 1999. As at 10 December 1999, it had not been proclaimed into force.

²¹⁹ *Criminal Practice Rules 1999* (Qld) r 53. That rule applies to a proceeding for an offence before the Supreme Court, the District Court or a Magistrates Court: *Criminal Practice Rules 1999* (Qld) r 52(1). Further, the term "proceeding" is defined to include a proceeding in which a person is to be sentenced and, for a Magistrates Court, a committal proceeding: *Criminal Practice Rules 1999* (Qld) r 52(3).

²²⁰ Letter from the Chief Stipendiary Magistrate to the Queensland Law Reform Commission dated 10 December 1999.

²²¹ Department of Justice, *Annual Report 1997-98* (1998) at 25.

²²² Part 6A of the *Justices Act 1886* (Qld) deals with the use of video link facilities for certain proceedings before a Magistrates Court where a person ("the detainee") is in custody at a correctional institution. S 178C of the *Justices Act 1886* (Qld) provides:

Use of video link facilities in proceedings

- (1) This section applies to a proceeding if -
- (a) a detainee is entitled or required to be present before a Magistrates Court for the proceeding; and
 - (b) the proceeding is about an offence with which the detainee is charged, including a proceeding for the detainee's bail or remand; and
 - (c) video link facilities are available linking the correctional

However, there is no video link between the Magistrates Court at Brisbane and any other Magistrates Courts throughout the State.²²³ Consequently, it is not presently possible for a magistrate in one part of the State to hear a matter by video link where the parties are located in a court in another part of the State, although, of course, communication is possible by means of telephone, facsimile and, in some cases, e-mail.²²⁴

(d) Other factors

Other factors that are relevant to the context in which the role of justices of the peace should be considered include a greater emphasis, in recent times, on:

- increasing access to justice;
- the importance of natural justice;
- the importance of involving indigenous communities in the administration of justice;
- specialisation in dealing with issues pertaining to juvenile justice; and
- the provision of services in regional and rural Queensland.

-
- institution where the detainee is in custody and the court.
- (2) A proceeding for the detainee's bail or remand must be conducted using the video link facilities, unless the court, in the interests of justice, otherwise orders.
 - (3) In a proceeding, other than a proceeding for the detainee's bail or remand, the court may order the proceeding be conducted using video link facilities only if all parties consent.
 - (4) The video link facilities may only be used to link the proceeding before the court at the place the court is sitting with the detainee, or the detainee and the detainee's representative, at the correctional institution.

Any entitlement of, or requirement for, the detainee under any law or court order to be present before the court in the proceeding is taken to be satisfied by the detainee's use of video link facilities for the proceeding: *Justices Act 1886* (Qld) s 178D(3).

²²³ Letter from Ms DM Fingleton, Chief Stipendiary Magistrate, to the Queensland Law Reform Commission dated 10 December 1999.

²²⁴ At present, eight centres are linked with the Magistrates Court at Brisbane by e-mail: letter from Ms DM Fingleton, Chief Stipendiary Magistrate, to the Queensland Law Reform Commission dated 10 December 1999.

CHAPTER 4

CATEGORIES OF OFFICE

1. INTRODUCTION

In the following chapters of this Report, the Commission examines whether the various powers that may presently be exercised by justices of the peace and commissioners for declarations should continue to be able to be exercised by them. In the light of the Commission's recommendations that particular powers should be retained, it is necessary to consider whether the present tiered approach should also be retained - perhaps with some modifications in relation to the powers that may be exercised by justices of the peace in particular categories of office - or whether all justices of the peace should be able to exercise all those powers.

The present categories are:²²⁵

- justice of the peace (magistrates court);
- justice of the peace (qualified);
- commissioner for declarations;
- "old system" justice of the peace.²²⁶

The category of "old system" justices of the peace will largely cease to exist after 30 June 2000. The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that if, by 30 June 2000, an old system justice of the peace - other than a lawyer²²⁷ - has not qualified for, and been appointed to, another category of office, or registered as a commissioner for declarations, he or she will automatically hold office as a justice of the peace (commissioner for declarations).²²⁸

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that the powers of a justice of the peace (commissioner for declarations) are limited to

²²⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 15(2), (3), 41(a). Judges of the Supreme and District Courts and magistrates hold office generally as "justices of the peace", as do judges and magistrates who have retired or resigned from those offices: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1), (1A).

²²⁶ See the explanation of the Commission's use of this term pp 16-17 of this Report.

²²⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(3). See pp 16-17 of this Report.

²²⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1).

those of a commissioner for declarations.²²⁹ Consequently, after 30 June 2000, there will be two categories of office with identical powers.

2. THE APPROPRIATE RANGE OF POWERS

(a) Discussion Paper

In the Discussion Paper, the Commission considered whether appointments of justices of the peace should be made to a single category (with all justices of the peace able to exercise all powers), whether the present tiered system of appointments should generally be retained, or whether appointments of a more specialised nature than presently occurs should be made.²³⁰

The Commission agreed with the view expressed by a large number of respondents to the Issues Paper who were opposed to the making of more specialised appointments than presently occurs under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).²³¹ The Commission expressed the view that, if appointments of a more specialised nature were made, it could prove difficult for people, especially those in rural areas, to obtain the services of an appropriately qualified justice of the peace.²³² The Commission also agreed that the creation of more categories of office could result in confusion.²³³ As one respondent to the Issues Paper observed:²³⁴

Too much specialisation only serves to further complicate the issue and make the availability of suitably qualified officers that much more difficult. What is needed is better pre-qualification, training and support for those appointed as justices of the peace (qualified) etc. Elimination of under-qualified existing appointees would reinforce the performance of those remaining and make them even more effective in this role.

The Indigenous Advisory Council, in its submission in response to the Issues Paper, also referred to the difficulties that could arise from the making of specialised appointments, suggesting that it would be impractical in rural or remote communities where justices of the peace are expected to perform a range of functions:²³⁵

²²⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5).

²³⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 30-36.

²³¹ *Id* at note 153.

²³² *Id* at 33-34.

²³³ *Id* at 34.

²³⁴ Submission 91 (IP).

²³⁵ Submission 112 (IP).

The Council agrees with the Commission's concern over the apparently high number of JPs and its approach to JPs who do not in practice exercise any of their powers. However, the reality in Indigenous communities appears to be more the reverse, that is, there are too few appropriately trained people to assume the role of JP. ...

In general terms there is no objection to the concept of appointments made for particular, specialised purposes, however this would not be practicable in rural or remote communities where JPs are expected to perform a range of functions. This has effectively been recognised in the *Aboriginal, Torres Strait Islander and Remote Communities (Justice Initiatives) Amendment Act 1997* which allows justices of the peace (magistrates court) to exercise additional powers beyond those which generally apply.

On the other hand, the Commission did not favour an approach that would allow all justices of the peace to exercise all the powers that the Commission recommends should be retained by justices of the peace. It considered that such an approach would inevitably result in a large number of justices of the peace being able to exercise powers that they will never in fact be called upon to exercise.²³⁶

For these reasons, the Commission generally favoured the retention of the present tiered approach and the categories of office that are created by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). The Commission expressed the view that the Act enables a relatively broad range of powers to be conferred on justices of the peace (qualified), while reserving to justices of the peace (magistrates court) some of the more specialised powers. It also enables commissioners for declarations to be appointed to meet the community's need for people who can witness various documents, without the need to confer on those people powers in excess of those that are really warranted.²³⁷ This benefit of a certain degree of specialisation was acknowledged by a respondent to the Issues Paper who made the following observation:²³⁸

If a need were specific and confined to a small number of areas, it would probably be more effective for appointments to be made. This would ensure that the person had the specific expertise and the opportunity to practise rather than broadening the scope of all justices of the peace.

The Commission's preliminary recommendation was that the offices of commissioner for declarations, justice of the peace (qualified) and justice of the peace (magistrates court) should be retained.

(b) Submissions

²³⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 34.

²³⁷ Ibid.

²³⁸ Submission 60 (IP).

Twenty-two submissions addressed this issue. All of these respondents agreed with the Commission's preliminary recommendation that the offices of commissioner for declarations, justice of the peace (qualified) and justice of the peace (magistrates court) should be retained.²³⁹

One respondent commented that the tiered system enabled a person to choose the extent of the role he or she wished to perform.²⁴⁰

A C. Dec may wish to serve the community in that capacity, but be unwilling to involve him/herself in the further duties of a JP Qual - such as issuing warrants and summonses - particularly if the C. Dec is a member of a small community.

(c) The Commission's view

The Commission remains of the view that the advantage of the categories of office established by the present tiered system - with the exception of the office of old system justice of the peace²⁴¹ - is that they enable a relatively broad range of powers to be conferred on justices of the peace (qualified), while restricting the exercise of more specialised powers, or powers for which the need is less widespread, to justices of the peace (magistrates court). Further, the fact that appointments can be made to the office of commissioner for declarations, an office with a largely witnessing role, means that the community's need for office holders who are authorised to witness various documents can be met, without the need to confer on those office holders powers in excess of those that are warranted or which the office holders may not wish to be called upon to exercise.

For these reasons, the Commission is of the view that the present offices of justice of the peace (magistrates court), justice of the peace (qualified) and commissioner for declarations should be retained.

3. THE FUTURE ROLE OF "OLD SYSTEM" JUSTICES OF THE PEACE

(a) Discussion Paper

²³⁹ Submissions 6, 7, 8, 9, 14, 19, 21, 22, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 51, 56, 59. A submission from one respondent (submission 19), while supporting the three-tiered system, disagreed with the requirement for old system justices of the peace to formally reapply for, and pay for, appointment to one of the new categories of office. The appointment process is discussed in Chapter 12 of this Report.

²⁴⁰ Submission 38.

²⁴¹ See the Commission's view in relation to these justices of the peace at pp 49-50 and 51-52 of this Report.

In the Discussion Paper, the Commission made a preliminary recommendation that there should be no further extension of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).²⁴² In the Commission's view, by 30 June 2000, old system justices of the peace should have had sufficient time to qualify for appointment to another category of office.²⁴³ Further, the Commission considered it undesirable that justices of the peace who have not been required to pass any kind of examination should be able to exercise significant powers, let alone exercise more significant powers than may be exercised by either justices of the peace (qualified) or justices of the peace (magistrates court).²⁴⁴

The Commission also considered the title of the office that should be held by old system justices of the peace after 30 June 2000. As noted earlier, the effect of the present transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that an old system justice of the peace who is not a lawyer and who has not by that date been appointed to another category of office or registered as a commissioner for declarations will become a justice of the peace (commissioner for declarations), but will be able to exercise only those powers that may be exercised by a commissioner for declarations.²⁴⁵

The Commission expressed the view that it is undesirable that, after 30 June 2000, there should be two offices with identical powers - namely, the office of justice of the peace (commissioner for declarations) and the office of commissioner for declarations.²⁴⁶ The Commission considered that the creation of the new office of justice of the peace (commissioner for declarations) - with identical powers to the existing office of commissioner for declarations - would unnecessarily complicate the system.²⁴⁷

The Commission also considered that the use of the title "justice of the peace (commissioner for declarations)" could give rise to confusion, especially in relation to the powers of a justice of the peace (commissioner for declarations).²⁴⁸ In particular, the Commission thought that this title might suggest that the office holder could

²⁴² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 36.

²⁴³ *Id* at 35.

²⁴⁴ *Ibid.* The limitations imposed by s 29(3)-(5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) do not apply to an old system justice of the peace: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

²⁴⁵ See pp 18-19 of this Report.

²⁴⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 34.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

exercise a greater range of powers than may be exercised by a commissioner for declarations.²⁴⁹

The Commission stated that it was not aware of any advantages that would result from retaining the office of justice of the peace (commissioner for declarations).²⁵⁰ It also observed that the preferred option in the 1990 Green Paper²⁵¹ was that, after the expiry of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), people previously appointed as justices of the peace should lose the use of the title “Justice of the Peace” and instead be called “Commissioners of Affidavits” if they performed administrative duties only.²⁵²

For these reasons, the Commission made the preliminary recommendation that an old system justice of the peace who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should simply hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).²⁵³

(b) Submissions

Sixteen submissions addressed the issue of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). All of these respondents agreed with the Commission’s preliminary recommendation that there should be no further extension of these provisions.²⁵⁴ One respondent commented:²⁵⁵

Sufficient time will have been given by the year 2000 for all interested Justices of the Peace to have qualified. The reasons given by some as to why they have not, to date, qualified are, perhaps, understandable but should not be condoned. This qualifying examination should be the criteria for culling disinterested Justices of the Peace.

Two other respondents expressed the view that the transitional process had already

²⁴⁹ Id at 18.

²⁵⁰ Id at 34.

²⁵¹ Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 37.

²⁵² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 18.

²⁵³ Id at 36.

²⁵⁴ Submissions 6, 7, 8, 14, 18, 21, 23, 24, 25, 26, 34, 40, 44, 45, 47, 51.

²⁵⁵ Submission 8.

been too long.²⁵⁶

Twenty-six submissions addressed the issue of the future role of old system justices of the peace. Twenty-one of these respondents agreed with the Commission's preliminary recommendation that an old system justice of the peace who has not, by 30 June 2000, been appointed to another category of office or been registered as a commissioner for declarations should hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).²⁵⁷

One of these respondents highlighted the confusion that could result from the use of the title "justice of the peace (commissioner for declarations)".²⁵⁸

The title, Justice of the Peace, should be dropped from Justice of the Peace (Commissioner for Declarations). Having the title JP may cause some confusion with people needing the services of a JP rather than a Commissioner for Declarations.

Another respondent commented:²⁵⁹

The ridiculous title "Justice of the Peace (Commissioner for Declarations)" should be deleted completely.

Five submissions disagreed with the Commission's preliminary recommendation. Two respondents were of the view that, after 30 June 2000, any remaining old system justices of the peace should not become commissioners for declarations, but should be removed from office altogether.²⁶⁰

A further two respondents were of the view that the title "justice of the peace (commissioner for declarations)" should be retained.²⁶¹ One of these respondents suggested that the title "commissioner for declarations" did not have the same appearance of independence as the title "justice of the peace (commissioner for declarations)".²⁶²

Because it indicated a Government salaried appointment the term 'Commissioner' e.g. Commissioner for Railways, Commissioner for Stamp Duties, Commissioner for Transport, Public Service Commissioner etc., has denoted an arm of government with

²⁵⁶ Submissions 23, 25.

²⁵⁷ Submissions 2, 6, 7, 8, 9, 13, 14, 18, 21, 23, 24, 25, 26, 34, 40, 43, 44, 45, 47, 51, 56.

²⁵⁸ Submission 13.

²⁵⁹ Submission 23.

²⁶⁰ Submissions 20, 59. This view was also expressed by three respondents to the Issues Paper: submissions 4 (IP), 57 (IP), 91 (IP).

²⁶¹ Submissions 29, 53.

²⁶² Submission 29.

restricted independence. I believe the role of a Justice of the Peace has always been regarded as independent of government in the exercise of the authority vested in the position.

The degree of specialisation envisaged seems to be a product of the times but at least the retention of Justice of the Peace (Commissioner for Declarations) does retain that appearance of independence from government essential to public confidence in the appearance of impartiality.

The other respondent preferred the title “justice of the peace (commissioner for declarations)” for the reason that many people would not be aware of the witnessing function of a commissioner for declarations.²⁶³

Another respondent who disagreed with the Commission’s preliminary recommendation was of the view that old system justices of the peace perform an important function in relation to witnessing and should therefore be retained.²⁶⁴ He stated that he disagreed with having only two categories of justices of the peace, namely justices of the peace (qualified) and justices of the peace (magistrates court). This respondent appears, however, to have misunderstood the effect of the Commission’s preliminary recommendations. Under the Commission’s preliminary recommendations, old system justices of the peace would be authorised until 30 June 2000 to witness various documents.²⁶⁵ After that time, any remaining old system justices of the peace would automatically hold office as commissioners for declarations and would continue to be able to witness the same types of documents, albeit in a different capacity.²⁶⁶

(c) The Commission’s view

The Commission notes that the effect of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that, after 30 June 2000, the powers of any remaining old system justices of the peace who are not lawyers will be restricted to those of a commissioner for declarations. The Commission agrees that the powers of any remaining old system justices of the peace should be restricted in that way. However, the Commission remains of the view that it could give rise to confusion if there are two categories of office with identical powers. The Commission rejects the suggestion that the office of commissioner for declarations appears to be a less independent office than that of justice of the peace (commissioner for declarations).

Further, the Commission believes that it would simplify the drafting of legislation if any

²⁶³ Submission 53.

²⁶⁴ Submission 36.

²⁶⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 63.

²⁶⁶ *Id* at 36, 63.

remaining old system justices of the peace became commissioners for declarations, rather than justices of the peace (commissioners for declarations). Where it is intended that a particular power should be exercised by either a justice of the peace (qualified) or a justice of the peace (magistrates court), it would be possible to confer the power simply on a justice of the peace. It would be clear on the face of the legislation that the relevant power would not be exercisable by a commissioner for declarations.²⁶⁷ At present, however, there are several Acts that confer various powers on justices of the peace and then specifically exclude a justice of the peace (commissioner for declarations) from exercising those powers.²⁶⁸

For these reasons, the Commission remains of the view that an old system justice of the peace who is not a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should automatically hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).

4. THE FUTURE ROLE OF “OLD SYSTEM” JUSTICES OF THE PEACE WHO ARE LAWYERS

(a) Discussion Paper

As noted earlier in this Report, an old system justice of the peace who is a lawyer is presently exempt from the automatic conversion to the office of justice of the peace (commissioner for declarations) that will occur in relation to other old system justices of the peace.²⁶⁹ The effect of this exemption is that an old system justice of the peace who is a lawyer will hold that office indefinitely, and will not be subject to the limitations imposed by section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the exercise of powers by other justices of the peace.

In the Discussion Paper, the Commission disagreed with this exemption. The Commission expressed the view that it was anomalous that, merely because a justice of the peace is a lawyer, he or she should have powers that exceed those of either a

²⁶⁷ The effect of s 29(7) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that a justice of the peace (commissioner for declarations) would be limited to the powers of a commissioner for declarations unless the provision in the relevant Act expressly excluded the operation of s 29(5).

²⁶⁸ See, for example, *Domestic Violence (Family Protection) Act 1989* (Qld) s 3 (definition of “justice”); *Juvenile Justice Act 1992* (Qld) ss 9E(2), 10A(2); *Police Powers and Responsibilities Act 1997* (Qld) s 51(2), Sch 3 (definition of “interview friend”).

²⁶⁹ See pp 16-17 of this Report and *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(3).

justice of the peace (qualified) or a justice of the peace (magistrates court).²⁷⁰

The Commission's preliminary recommendation was that an old system justice of the peace who is a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should hold office as a commissioner for declarations.²⁷¹

(b) Submissions

Eighteen submissions considered this issue. All of these respondents agreed with the Commission's preliminary recommendation.²⁷²

One respondent did not think that the training of a lawyer necessarily equipped the person to carry out all the duties of a justice of the peace.²⁷³

... it is a fact that many lawyers who have specialised in a particular form of work viz. conveyancing and do very few other activities, regardless of the thoroughness of their original training, could not perform all of the duties of a Justice of the Peace (Qual) as satisfactorily as a very active non-professional Justice of the Peace (Qual).

Another respondent commented:²⁷⁴

... lawyers have for far too long been regarded as a very special profession; my view is that they possess no special virtues and should be treated much the same as other good citizens of this state.

(c) The Commission's view

The Commission considers it anomalous that, under the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), old system justices of the peace - regardless of whether they are lawyers - may, until 30 June 2000, exercise powers that not even justices of the peace (magistrates court) are authorised to exercise, for example, hearing and determining a criminal charge where the defendant does not plead guilty.²⁷⁵

²⁷⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 35.

²⁷¹ Id at 36.

²⁷² Submissions 6, 7, 8, 14, 18, 21, 23, 24, 25, 26, 34, 40, 44, 45, 47, 51, 56, 59.

²⁷³ Submission 8.

²⁷⁴ Submission 25.

²⁷⁵ See the discussion of the powers of old system justices of the peace at p 17 of this Report.

The Commission does not accept that there is any justification for the continuation of this anomaly after 30 June 2000 in relation to old system justices of the peace who are also lawyers. In the Commission's view, powers that are generally required to be exercised by a magistrate, such as hearing contested criminal proceedings, should not be able to be exercised indefinitely by an old system justice of the peace simply because he or she is a lawyer.

In forming this view, the Commission does not discount the relevance of the educational and professional requirements that lawyers must fulfil in order to be admitted as solicitors or barristers. On the contrary, the Commission has recognised these factors in its recommendations in relation to the qualifications for the appointment of a lawyer as a commissioner for declarations or as a justice of the peace.²⁷⁶

However, the Commission is of the view that, after 30 June 2000, old system justices of the peace who are lawyers should not remain, in effect, as an additional category of justices of the peace with special powers. Like other old system justices of the peace, they should simply hold office as commissioners for declarations if they have not by that time been appointed to another category of office or registered as commissioners for declarations.

5. THE EXERCISE OF PARTICULAR POWERS

In the following chapters of this Report, the Commission recommends which of the main powers that may presently be exercised by justices of the peace should be retained by them. Where the Commission recommends that a particular power should be retained, the Commission also recommends whether that power should be able to be exercised by:

- a commissioner for declarations;
- a justice of the peace (qualified); or
- a justice of the peace (magistrates court).

6. RECOMMENDATIONS

²⁷⁶ See p 350 of this Report (Recommendations 12.5(b) and 12.5(d)). The Commission has recommended that a lawyer should be exempt from the requirement to pass an examination to be eligible for appointment as a commissioner for declarations. It has also recommended that a lawyer should not be required to undertake a training course to be eligible for appointment as a justice of the peace (qualified) or as a justice of the peace (magistrates court), although he or she should still be required to pass the relevant examination.

The Commission makes the following recommendations:

- 4.1 The offices of justice of the peace (magistrates court), justice of the peace (qualified) and commissioner for declarations should be retained.**
- 4.2 An old system justice of the peace²⁷⁷ who is not a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).**
- 4.3 An old system justice of the peace who is a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations should hold office as a commissioner for declarations, rather than continue to hold office indefinitely as an old system justice of the peace.**
- 4.4 There should be no further extension of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).**

²⁷⁷

See the explanation of the Commission's use of this term at pp 16-17 of this Report.

CHAPTER 5

WITNESSING FUNCTION

1. INTRODUCTION

Witnessing would seem to be the most frequently performed function of most justices of the peace. A number of submissions received by the Commission in response to the Issues Paper referred to the frequency with which justices of the peace are called on to witness documents,²⁷⁸ with one justice of the peace (qualified) stating that between November 1997 and May 1998 he had taken more than 350 affidavits.²⁷⁹ A respondent to the Discussion Paper stated that he had witnessed 108 documents in his four years of service as a justice of the peace (qualified).²⁸⁰

Several respondents to the Issues Paper, all justices of the peace (qualified), suggested that witnessing was the major task performed by justices of the peace.²⁸¹ In fact, one of these respondents stated that, in his eighteen years of service as a justice of the peace, he had never been called upon to perform any other duties.²⁸²

2. USE OF THE TERM “WITNESSING”

The main purpose of requiring a document to be witnessed is to confirm that the signature it bears is genuine. In this chapter, reference is made to a number of powers that are loosely described as “witnessing” powers. The Commission acknowledges that the term is in some respects a misnomer in that, in relation to some of the powers discussed, the role of the justice of the peace extends beyond merely witnessing the signature of a person on the relevant document. For example, a justice of the peace who takes an affidavit administers an oath to the person who makes the affidavit, and signs that the affidavit has been sworn before him or her. The role of a justice of the peace in witnessing an enduring power of attorney also extends beyond simply witnessing the signature of the person executing the document.²⁸³

²⁷⁸ Submissions 1A (IP), 14 (IP), 27 (IP), 29 (IP), 33 (IP), 35 (IP), 36 (IP), 38 (IP), 39 (IP), 42 (IP), 43 (IP), 47 (IP), 54 (IP), 58 (IP), 64 (IP), 66 (IP), 88 (IP), 89 (IP), 90 (IP), 108 (IP).

²⁷⁹ Submission 103 (IP).

²⁸⁰ Submission 14.

²⁸¹ Submissions 27 (IP), 64 (IP), 90 (IP), 108 (IP).

²⁸² Submission 27 (IP).

²⁸³ See p 58 of this Report.

The term “witnessing” is used, however, to distinguish this part of the role of a justice of the peace from the part that involves the issuing of a court process, such as a summons or a warrant.²⁸⁴ In the latter case, although the justice of the peace signs the relevant document, the purpose of the power and the discretion involved in exercising the power set the power apart from the role exercised in relation to the various matters discussed in this chapter.

3. THE COMMISSION’S APPROACH

At present, there are many documents that are required by law to be witnessed in a particular manner.²⁸⁵ In the Commission’s view, the terms of this reference²⁸⁶ do not encompass a wholesale review of the general requirements for witnessing particular types of documents. For example, the question of whether statutory declarations should be required to be witnessed at all is, in the Commission’s view, outside the terms of the present reference; this is so even though a decision that such documents should no longer be required to be witnessed would significantly reduce the witnessing role of justices of the peace. Similarly, the Commission is of the view that the question of whether people holding designated positions or people in designated occupations should be able to witness various documents - either in addition to, or in substitution for, justices of the peace - is also outside the terms of this reference.

Consequently, the Commission’s approach has been to consider whether, having regard to the existing requirements that apply to particular types of documents, there is a need for justices of the peace to perform a witnessing function and, further, whether it is appropriate for justices of the peace to continue to perform that role.

4. WITNESSING STATUTORY DECLARATIONS AND AFFIDAVITS

(a) Statutory declarations

A statutory declaration is a solemn declaration that is authorised or prescribed by statute. The person making the declaration is called the declarant. In Queensland, the manner of making a statutory declaration is regulated by the *Oaths Act 1867* (Qld). The requirement for certain statements to be made, or for certain matters to be proved,

²⁸⁴ See Chapter 6 of this Report for a discussion of summonses and warrants.

²⁸⁵ The main types of documents are discussed at pp 55-59 of this Report.

²⁸⁶ The terms of reference are set out at p 1 of this Report.

by way of a statutory declaration is found in many other Acts.²⁸⁷ In some cases, a person may choose to make a statement by way of a statutory declaration, not because there is a legal requirement to do so, but because he or she is of the view that the statement will carry more weight as a result.

Although a statutory declaration is not made on oath or by way of solemn affirmation, it is required to be expressed to be made pursuant to the provisions of the *Oaths Act 1867* (Qld).²⁸⁸

There are criminal sanctions for making a false declaration. If a person makes a statement in a statutory declaration that is to the person's knowledge false in any material particular and the person was required by law to make the statement by way of a statutory declaration, the person is guilty of a crime and is liable to imprisonment for seven years.²⁸⁹ However, if the person is not required to make a statement by way of a statutory declaration, but nevertheless does so, and makes a declaration that the person knows is false in a material particular, the person commits a misdemeanour for which the penalty is up to three years imprisonment.²⁹⁰

The *Oaths Act 1867* (Qld) prescribes the persons who may witness a declaration for Queensland law, whether inside or outside Queensland, or even outside Australia.²⁹¹ A "justice"²⁹² and a commissioner for declarations are included among the persons authorised to witness a statutory declaration.²⁹³ The other persons authorised by the Act are:²⁹⁴

- a notary public under the law of the State, the Commonwealth or another State;
- a lawyer; or

²⁸⁷ See, for example, the *Industrial Relations Act 1999* (Qld) s 328; the *Stamp Act 1894* (Qld) s 16; and the *State Housing Act 1945* (Qld) Sch, Item 18.

²⁸⁸ *Oaths Act 1867* (Qld) s 14. The prescribed form of the declaration is:

I A.B. do solemnly and sincerely declare that [*let the person declare the facts*] and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act 1867*.

²⁸⁹ *Criminal Code* (Qld) s 193.

²⁹⁰ *Criminal Code* (Qld) s 194.

²⁹¹ *Oaths Act 1867* (Qld) s 13(2).

²⁹² See note 85 of this Report as to the definition of "justice".

²⁹³ *Oaths Act 1867* (Qld) s 13(1).

²⁹⁴ *Oaths Act 1867* (Qld) s 13(1).

- a conveyancer, or another person authorised to administer an oath, under the law of the State, the Commonwealth or another State.

(b) Affidavits

An affidavit is a statement made by a person, the deponent, usually for use in court proceedings. Unlike a statutory declaration, an affidavit is made by the deponent either on oath or by way of a solemn affirmation. The role of the witness is to administer the appropriate oath or affirmation.

Evidence in court hearings, especially in interlocutory or preliminary hearings, is frequently given by way of affidavit, instead of having the witness give oral testimony in court. Sometimes, a deponent may be required to attend at court to be cross-examined on the contents of his or her affidavit.

A person who knowingly gives false testimony in any court proceeding or for the purpose of instituting any court proceeding is guilty of the crime of perjury, even though the testimony is given by affidavit, rather than orally.²⁹⁵ A person who commits perjury is liable to imprisonment for fourteen years.²⁹⁶

The *Oaths Act 1867* (Qld) prescribes the persons who may witness an affidavit for Queensland law, whether inside or outside Queensland, or even outside Australia.²⁹⁷ The persons authorised to witness an affidavit are the same as those authorised to witness a statutory declaration.²⁹⁸ An affidavit can therefore be witnessed by a justice of the peace and by a commissioner for declarations.

(c) Justices of the peace who may exercise these powers

These powers may be exercised by a commissioner for declarations,²⁹⁹ a justice of the peace (qualified),³⁰⁰ a justice of the peace (magistrates court)³⁰¹ or an old system justice

²⁹⁵ *Criminal Code* (Qld) s 123.

²⁹⁶ *Criminal Code* (Qld) s 124(1). Other offences may also apply to a false statement made in an affidavit: see *Criminal Code* (Qld) s 193 (False statements in statements required to be under oath or solemn declaration) and s 194 (False declarations).

²⁹⁷ *Oaths Act 1867* (Qld) s 41.

²⁹⁸ See p 56 of this Report.

²⁹⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

³⁰⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³⁰¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

of the peace.³⁰² From 1 July 2000, these powers will also be able to be exercised by a justice of the peace (commissioner for declarations).³⁰³

5. WITNESSING AN ENDURING POWER OF ATTORNEY

An enduring power of attorney is a formal document by which one person (the principal) empowers another person (the attorney) to act on his or her behalf for certain purposes.

Unlike a general power of attorney, which is automatically revoked if the principal loses the legal capacity to make decisions that are the subject of the power,³⁰⁴ an enduring power of attorney is not revoked by the subsequent legal incapacity of the principal³⁰⁵ (other than by death³⁰⁶). This means that, even though a person is no longer capable at law of making certain decisions, the person's attorney is still authorised to make those decisions on the person's behalf. An enduring power of attorney is therefore a very important document, as it authorises the attorney to act under it, even once the principal has lost the capacity to supervise the attorney.

An enduring power of attorney may be witnessed by, among others, a justice of the peace or a commissioner for declarations.³⁰⁷ However, the witness's role is not confined to making sure that the donor's signature is genuine; the witness must also certify that, at the time of signing the document, the person making the enduring power of attorney appeared to the witness to have the capacity necessary to make the document.³⁰⁸ A witness to an enduring power of attorney therefore has a high degree of responsibility.

These powers may be exercised by a commissioner for declarations,³⁰⁹ a justice of the

³⁰² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1). See the explanation of the Commission's use of this term at pp 16-17 of this Report.

³⁰³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 29(5), (8), 42(1).

³⁰⁴ *Powers of Attorney Act 1998* (Qld) s 18.

³⁰⁵ *Powers of Attorney Act 1998* (Qld) s 32(2).

³⁰⁶ *Powers of Attorney Act 1998* (Qld) s 51.

³⁰⁷ *Powers of Attorney Act 1998* (Qld) ss 31(1), 44(3)(b). S 31(1) provides that a lawyer and a notary public are also eligible witnesses. The section precludes as witnesses people who have particular relationships to the principal or to the attorney being appointed under the enduring power of attorney.

³⁰⁸ *Powers of Attorney Act 1998* (Qld) s 44(4)(b).

³⁰⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

peace (qualified),³¹⁰ a justice of the peace (magistrates court)³¹¹ or an old system justice of the peace.³¹² From 1 July 2000, these powers will also be able to be exercised by a justice of the peace (commissioner for declarations).³¹³

6. WITNESSING SIGNATURES

Many documents are required to be witnessed by a justice of the peace or a commissioner for declarations.³¹⁴ For example, instruments under the *Land Title Act 1994* (Qld) are required to be witnessed by one of a specified list of people, which includes a justice of the peace and a commissioner for declarations.³¹⁵

This power may be exercised by a commissioner for declarations,³¹⁶ a justice of the peace (qualified),³¹⁷ a justice of the peace (magistrates court)³¹⁸ or an old system justice of the peace.³¹⁹ From 1 July 2000, this power will also be able to be exercised by a justice of the peace (commissioner for declarations).³²⁰

7. OTHER JURISDICTIONS

(a) Statutory declarations

Some jurisdictions have extended the range of people who are authorised to witness

³¹⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³¹¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³¹² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³¹³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 29(5), (8), 42(1).

³¹⁴ Interestingly, there are no special requirements for being a witness to a will other than that the person is competent to be a witness in civil proceedings and is not blind: *Succession Act 1981* (Qld) s 14.

³¹⁵ *Land Title Act 1994* (Qld) Sch 1. The other eligible witnesses are: a notary public, a barrister, a solicitor, a legal practitioner, a conveyancer and another person approved by the registrar.

³¹⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(8).

³¹⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³¹⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³¹⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

³²⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 29(5), (8), 42(1).

statutory declarations, possibly reducing the need to appoint as many people as justices of the peace or commissioners for declarations to witness various documents.

(i) Designated occupations

Commonwealth legislation and legislation in Victoria, Western Australia, Tasmania and the Australian Capital Territory authorises people in a range of designated occupations to witness statutory declarations.³²¹

The *Statutory Declarations Regulations 1993* (Cth) authorise a number of categories of people to witness a statutory declaration made under the *Statutory Declarations Act 1959* (Cth). In addition to authorising a commissioner for affidavits, a commissioner for declarations and a justice of the peace to witness a statutory declaration under that Act, the Regulations also authorise people in a variety of offices and occupations to do so:³²²

PART 1 - MEMBERS OF CERTAIN PROFESSIONS

Chiropractor
Dentist
Legal practitioner
Medical practitioner
Nurse
Patent attorney
Pharmacist
Physiotherapist
Psychologist
Veterinary surgeon

PART 2 - OTHER PERSONS

Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public
Australian Consular Officer, or Australian Diplomatic Officer, (within the meaning of the *Consular Fees Act 1985*)
Bailliff
Bank officer with 5 or more years of continuous service
Chief executive officer of a Commonwealth court
Civil marriage celebrant
Clerk of a court
Commissioner for Affidavits
Commissioner for Declarations
Credit union officer with 5 or more years of continuous service
Fellow of the National Tax Accountants' Association
Finance company officer with 5 or more years of continuous service
Holder of a statutory office not specified in another item in this Part

³²¹ *Statutory Declarations Regulations 1993* (Cth) reg 3, Sch; *Evidence Act 1958* (Vic) s 107A(1); *Declarations and Attestations Act 1913* (WA) s 2, Sch; *Evidence Act 1910* (Tas) s 131B; *Interpretation Act 1967* (ACT) s 14 (meaning of "statutory declaration").

³²² *Statutory Declarations Regulations 1993* (Cth) reg 3, Sch.

Judge of a court
 Justice of the Peace
 Magistrate
 Master of a court
 Member of the Association of Taxation and Management Accountants
 Member of the Australian Defence Force who is:

- (a) an officer; or
- (b) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* with 5 or more years of continuous service; or
- (c) warrant officer within the meaning of that Act

 Member of the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants or the National Institute of Accountants
 Member of the Institute of Corporate Managers, Secretaries and Administrators
 Member of the Institution of Engineers, Australia, other than at the grade of student
 Member of:

- (a) the Parliament of the Commonwealth; or
- (b) the Parliament of a State; or
- (c) a Territory legislature; or
- (d) a local government authority of a State or Territory

 Minister of religion registered under Division 1 of Part IV of the *Marriage Act 1961*
 Notary public
 Permanent employee of:

- (a) the Commonwealth or of a Commonwealth authority; or
- (b) a State or Territory or of a State or Territory authority; or
- (c) a local government authority;

 with 5 or more years of continuous service who is not specified in another item in this Part
 Permanent employee of the Australian Postal Corporation with 5 or more years of continuous service who is employed in an office supplying postal services to the public
 Person before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made
 Police officer
 Registrar, or Deputy Registrar, of a court
 Senior Executive Service officer of the Commonwealth, or of a State or Territory, or of a Commonwealth, State or Territory authority
 Sheriff
 Sheriff's officer
 Teacher employed on a full-time basis at a school or tertiary education institution.

The *Evidence Act 1910* (Tas) provides that the people listed in the Schedule to the *Statutory Declarations Regulations 1993* (Cth) are, if they have not attained the age of seventy years, automatically commissioners for declarations in Tasmania.³²³

The *Evidence Act 1958* (Vic) contains its own list of various office holders and persons in designated occupational groups who may, in addition to a justice of the peace or a bail justice, witness a statutory declaration.³²⁴ This list is similar,

³²³ *Evidence Act 1910* (Tas) s 131B.

³²⁴ *Evidence Act 1958* (Vic) s 107A(1).

but not identical, to that found in the Schedule to the *Statutory Declarations Regulations 1993* (Cth).³²⁵ For example, whereas the Commonwealth list includes a teacher employed on a full-time basis at a school or tertiary education institution,³²⁶ the Victorian list includes a principal in the teaching service.³²⁷ Further, the Victorian list does not include, among others, chiropractors, nurses, physiotherapists or psychologists.

In Western Australia, people in certain designated occupations are authorised to witness any statutory declaration or other document that is required to be made before a justice of the peace.³²⁸

(ii) Any adult

In the Northern Territory, a statutory declaration must be made in the presence of a person who has attained the age of eighteen years.³²⁹

This is a similar approach to that now taken by the Commonwealth in relation to people who may complete the proof of identity declaration for a passport application under the *Passport Regulations 1939* (Cth). Until fairly recently, the prescribed application form listed people in a number of occupations.³³⁰ Now, the only requirement is that the person must be eighteen years of age or over, must have known the applicant for the passport for the past twelve months, and must not be related to the applicant by either birth or marriage.³³¹

(b) Affidavits

Most jurisdictions still take a fairly traditional approach in relation to the people who are

³²⁵ See pp 60-61 of this Report.

³²⁶ See p 61 of this Report.

³²⁷ *Evidence Act 1958* (Vic) s 107A(1)(t).

³²⁸ *Declarations and Attestations Act 1913* (WA) s 2(b)(i), Sch.

³²⁹ *Oaths Act* (NT) s 23C(1)(b).

³³⁰ Accountants, bailiffs, bank managers, barristers, solicitors and patent attorneys, chartered professional engineers, clerks of courts, clerks of petty sessions, certain members currently serving in the regular Australian Defence Force, dentists, registered medical practitioners, members of State, Federal and Territory Parliaments and Shire Councils, certain holders of statutory offices, judges, members of the Chartered Institute of Company Secretaries in Australia, marriage celebrants, pharmacists, certain police officers, postal managers, certain public servants, sheriffs, stipendiary magistrates, certain teachers, registered veterinary surgeons, and registered nurses.

³³¹ *Passport Regulations 1939* (Cth) reg 5(1). See also Department of Foreign Affairs and Trade, *Australian Adult Passport Application* (Form PC1, 10/98).

authorised to witness affidavits³³² - even those jurisdictions that have significantly widened the classes of people authorised to witness statutory declarations.

(i) Commonwealth

The *Evidence Act 1995* (Cth) provides that affidavits for use in an Australian court (other than a court of a Territory) involving the exercise of federal jurisdiction may be sworn before any justice of the peace, notary public or lawyer.³³³

Other Commonwealth Acts regulate who may witness an affidavit that is used in a particular type of proceeding. For example, the *Federal Court of Australia Act 1976* (Cth) provides that an affidavit to be used in a proceeding in the Federal Court may be sworn within the Commonwealth or a Territory before:³³⁴

- a Judge of the Court;
- the Registrar;
- a Deputy Registrar;
- a District Registrar;
- a justice of the peace;
- a commissioner for affidavits;
- a commissioner for declarations; or
- a person not mentioned above who is authorised to administer oaths for the purposes of the Court or for the purposes of the High Court or the Supreme Court of a State or Territory.

The list of people who are eligible to witness an affidavit is significantly narrower than the list of people authorised to witness a statutory declaration made under the *Statutory Declarations Act 1959* (Cth).³³⁵

³³² See, for example, the *Oaths Act 1900* (NSW) s 26; the *Evidence (Affidavits) Act 1928* (SA) s 2; and the *Oaths Act 1936* (SA) s 28.

³³³ *Evidence Act 1995* (Cth) s 186(1)(a).

³³⁴ *Federal Court of Australia Act 1976* (Cth) s 45. For an example of a similar provision, see s 262 of the *Bankruptcy Act 1966* (Cth).

³³⁵ See pp 60-61 of this Report.

(ii) Victoria

Although the list of people authorised in Victoria to witness affidavits is more extensive than that which applies in Queensland, it is still considerably more restricted than the list of people authorised in Victoria to witness statutory declarations. The following people are authorised in Victoria to witness affidavits:³³⁶

- (a) any judge or the associate to any judge;
- (b) a master of the Supreme Court or of the County Court or the secretary of such a master;
- (c) a justice of the peace or a bail justice;
- (d) the prothonotary or a deputy prothonotary of the Supreme Court, the registrar or a deputy registrar of the County Court, the principal registrar of the Magistrates' Court or a registrar or deputy registrar of the Magistrates' Court;
- (da) the registrar of probates or an assistant registrar of probates;
- (db) the registrar or deputy registrar of the Legal Profession Tribunal;
- (e) a member or former member of either House of the Parliament of Victoria;
- (ea) a member or former member of either House of the Parliament of the Commonwealth;
- (f) a notary public;
- (g) a natural person who is a current practitioner or interstate practitioner within the meaning of the *Legal Practice Act 1996*;
- (ga) a member of the police force of or above the rank of sergeant or for the time being in charge of a police station;
- (gb) a person employed under Part 3 of the *Public Sector Management and Employment Act 1998* with a classification that is prescribed as a classification to which this section applies;
- (gc) a senior officer of a Council as defined in the *Local Government Act 1989*;
- (gd) a person registered as a patent attorney under Part XV of the *Patents Act 1952* of the Commonwealth;
- (ge) a fellow of the Institute of Legal Executives (Victoria);
- (h) any officer or person empowered authorized or permitted by or under any Act of Parliament to take affidavits in relation to the matter in question or

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Evidence Act 1958 (Vic) s 123C(1).

in the particular part of Victoria in which the affidavit is sworn and taken.

Although this list of eligible witnesses is more extensive than the list of eligible witnesses in Queensland for the taking of affidavits, in real terms it would be unlikely to provide significantly greater access to witnesses.

(iii) Northern Territory

Although a statutory declaration must be made in the presence of a person who has attained the age of eighteen years,³³⁷ the witnessing of an affidavit that is required for any proceeding or matter before any court is restricted to a justice³³⁸ or a commissioner for oaths.³³⁹

In addition to persons who are appointed by the Minister as commissioners for oaths, the following persons are commissioners for oaths by virtue of their office or position:³⁴⁰

- a member of the Legislative Assembly;
- a member of either house of the Parliament of the Commonwealth elected to represent the Territory or a constituency in the Territory;
- a legal practitioner who holds, or shall be deemed to hold, a current practising certificate under the *Legal Practitioners Act* (NT); and
- a member of the Police Force who has attained the age of eighteen years.

Eligibility to witness an affidavit is significantly more restricted than is eligibility to witness a statutory declaration.

8. DISCUSSION PAPER

(a) The need for the witnessing role

In the Discussion Paper, the Commission considered whether there was a need for

³³⁷ *Oaths Act* (NT) s 23C(1)(b).

³³⁸ The term “justice” is defined in s 17 of the *Interpretation Act* (NT) to mean “a justice within the meaning of the *Justices of the Peace Act*”.

³³⁹ *Oaths Act* (NT) s 13.

³⁴⁰ *Oaths Act* (NT) s 17.

justices of the peace and commissioners for declarations to retain their witnessing role. The Commission considered that, given the limited purpose for which affidavits are used (namely, in court proceedings), it was likely that the number of affidavits that require witnessing would be considerably less than the number of statutory declarations and other documents that require witnessing. However, the Commission observed that, if justices of the peace and commissioners for declarations were removed from the list of people authorised to witness affidavits, the list of eligible witnesses would virtually be confined to lawyers.³⁴¹

The Commission considered that, in a State as decentralised as Queensland, such a change could significantly restrict access to a person who was authorised to witness an affidavit.³⁴² In the Commission's view, there would undoubtedly be many areas in Queensland where people would not have ready access to either a solicitor or a barrister. With an increase in the number of litigants who are acting for themselves, the removal of this power from justices of the peace and commissioners for declarations could result in difficulties for those litigants in having affidavits witnessed.³⁴³

The Commission expressed the view that, even in metropolitan areas, where there are relatively high numbers of lawyers, the removal of this power from justices of the peace and commissioners for declarations could still cause considerable inconvenience. For example, a sole practitioner who needed to swear an affidavit in his or her own name would have to find a solicitor in another firm to witness the affidavit. The Commission observed that, at present, the solicitor may well have a staff member who has been appointed as a justice of the peace or as a commissioner for declarations who is able to witness the affidavit.³⁴⁴

The Commission considered that documents other than affidavits would almost certainly constitute the vast bulk of documents that are required to be witnessed. The Commission was therefore of the view that, because of the volume of documents requiring witnessing, there is a need for an available pool of witnesses to attend to the witnessing of these documents.³⁴⁵

Although the Commission acknowledged that it might be possible for that need to be

³⁴¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 57. See pp 56 and 57 of this Report as to persons who may witness an affidavit.

³⁴² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 57.

³⁴³ Ibid.

³⁴⁴ Id at 58.

³⁴⁵ Ibid.

met, at least in part, by an expansion of the list of eligible witnesses,³⁴⁶ it was of the view that there would be little point, if justices of the peace were to retain their witnessing role in relation to affidavits, in omitting them from any expanded list of witnesses for other types of documents.³⁴⁷ In forming this view, the Commission was conscious of the fact that, although a number of jurisdictions have expanded the categories of people who may witness statutory declarations and other documents, those jurisdictions have nonetheless retained justices of the peace and commissioners for declarations in their respective lists.³⁴⁸ The Commission considered that to do otherwise could result in a significant diminution in access to an available witness, especially in communities where there might not be a person who is in a designated position or occupational group.³⁴⁹

(b) Appropriateness of the witnessing role for justices of the peace

In the Discussion Paper, the Commission considered a number of factors that were advanced by respondents to the Issues Paper in support of the desirability of having justices of the peace and commissioners for declarations witness documents. The Commission generally accepted the force of those submissions.³⁵⁰

(i) Knowledge of the law/training

The reason given by a large number of respondents to the Issues Paper for preferring documents to be witnessed by a justice of the peace was the knowledge and training that justices of the peace have in relation to witnessing various types of documents.³⁵¹ It was suggested that, as a result of the training that justices of the peace are required to undertake,³⁵² they would be more familiar with the documents³⁵³ and would therefore be able to perform this task

³⁴⁶ See, however, the Commission's view at p 55 of this Report as to the scope of this reference.

³⁴⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 58.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Id at 58-62.

³⁵¹ Submissions 6 (IP), 7 (IP), 8 (IP), 10 (IP), 16 (IP), 33 (IP), 36 (IP), 38 (IP), 43 (IP), 44 (IP), 49 (IP), 51 (IP), 53 (IP), 54 (IP), 61 (IP), 62 (IP), 63 (IP), 65 (IP), 67 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 88 (IP), 92 (IP), 94 (IP), 96 (IP), 98 (IP), 101 (IP), 103 (IP), 107 (IP), 108 (IP).

³⁵² Submissions 6 (IP), 7 (IP), 8 (IP), 10 (IP), 51 (IP), 108 (IP).

³⁵³ Submission 16 (IP).

to a higher standard than other groups. As one respondent suggested:³⁵⁴

The key issue is that JPs/CDecs are/should be better trained than general occupational categories.

Another respondent expressed a similar view:³⁵⁵

Persons such as myself, being a JP (Qual.) or JP (C. Dec.), have undertaken a reasonable level of training to provide a professional service with respect to a wide range of witnessing functions.

These persons are familiar with a wide range of documentation and have the knowledge and skills to ensure the witnessing function is undertaken correctly. For example, the following small but important matters are often overlooked by people who come to me for the witnessing of documents:

- checking documents to make sure all appropriate parts are complete;
- ensuring all pages are initialled; and
- ensuring all deletions and alterations are undertaken in the appropriate manner.

I often find that people rely on me to be familiar with the multitude of documents which require a witness ...

Other respondents to the Issues Paper were of the view that justices of the peace would be more likely than other possible witnesses to detect errors in documents,³⁵⁶ and that witnessing by a justice of the peace would provide some assurance that execution had been undertaken in a proper manner.³⁵⁷

A registrar of a Magistrates Court in Queensland was of the view that the taking of affidavits requires specialised knowledge, although, in relation to the more general witnessing of enduring powers of attorney, statutory declarations and other documents, he was of the view that people in designated occupations would be appropriate witnesses.³⁵⁸

The Commission acknowledged that, although a large number of submissions received in response to the Issues Paper had emphasised the need for justices of the peace to receive more and better training,³⁵⁹ the fact remained that, at

³⁵⁴ Submission 38 (IP).

³⁵⁵ Submission 53 (IP).

³⁵⁶ Submission 101 (IP).

³⁵⁷ Submissions 53 (IP), 58 (IP).

³⁵⁸ Submission 114 (IP).

³⁵⁹ See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at note 296. See also the discussion of training in Chapter 12 of this Report.

least in relation to justices of the peace appointed since the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) came into force, justices of the peace have been required to pass an examination in order to qualify for appointment. For this reason, the Commission was of the view that justices of the peace are likely to have a better understanding of the execution requirements of particular documents than some of the occupational groups who may witness statutory declarations in other jurisdictions.³⁶⁰

The Commission considered that the same could not necessarily be said of justices of the peace appointed before the commencement of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) or of commissioners for declarations appointed under that Act.³⁶¹ Although some justices of the peace appointed prior to the commencement of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) did undergo training for the role,³⁶² there was no requirement for them to do so. Similarly, persons appointed under the Act as commissioners for declarations are not required to first pass an examination.³⁶³

In relation to these two categories, the Commission thought it was difficult to say that they were better qualified in terms of their knowledge of the law than persons in the various occupational groups mentioned earlier. While those who have been active as justices of the peace or as commissioners for declarations may have developed a level of experience “on the job”, the Commission saw no reason why other groups could not, with time, also gain that experience.³⁶⁴

(ii) Availability and willingness

A large number of respondents to the Issues Paper expressed the view that justices of the peace would be more available to witness documents than people in various occupational groups.³⁶⁵ One respondent referred to the fact that, as a justice of the peace, he occasionally performed home visits to witness

³⁶⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 58-59.

³⁶¹ *Id* at 59.

³⁶² Of the 55,200 justices of the peace registered when the Green Paper was released in 1990, 9,467 had undertaken TAFE training courses: submission 67 (IP).

³⁶³ See pp 292-293 of this Report.

³⁶⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 59.

³⁶⁵ Submissions 12 (IP), 18 (IP), 19 (IP), 21 (IP), 29 (IP), 30 (IP), 33 (IP), 35 (IP), 41 (IP), 43 (IP), 44 (IP), 46 (IP), 47 (IP), 49 (IP), 53 (IP), 57 (IP), 60 (IP), 61 (IP), 66 (IP), 67 (IP), 69 (IP), 85 (IP), 87 (IP), 92 (IP), 98 (IP), 105 (IP).

documents where the age or ill-health of the person warranted this.³⁶⁶ Other respondents considered that the role was of particular importance to the elderly.³⁶⁷

In its submission in response to the Issues Paper, the Office of Rural Communities, Rural Communities Development Division, part of the Queensland Department of Local Government and Planning, expressed a concern about the availability in rural communities of people in the designated occupations.³⁶⁸

In some rural communities, it may be difficult to find a significant person as detailed in the list of others who may witness a statutory declaration or affidavit as there are not always professional people ... in a community. ... Therefore, it is essential to have a Justice of the Peace or Commissioner of Declarations in the community ...

Several respondents also emphasised the fact that justices of the peace are available at all hours of the day.³⁶⁹ Two respondents thought that many of the people in designated occupations might be available only during business hours,³⁷⁰ which might not be practical in many cases.³⁷¹

... imagine going to a school mid morning to have a teacher sign urgent documents.

Several submissions expressed the view that justices of the peace, partly because of the voluntary nature of the role, are willing to perform their role, and have a commitment to the role that people in designated occupational groups might not necessarily have.³⁷² One respondent summed it up in this way:³⁷³

A Justice of the Peace/Commissioner for Declarations undertakes these tasks on a voluntary basis. ... It follows, in most instances, that he has an interest in what he is doing. It is a community service. ... A JP knows that he should be available 24 hours a day - a person in a designated occupation, in all probability, would feel that someone wanting him to witness a document on Sunday morning, was an intruder.

³⁶⁶ Submission 47 (IP).

³⁶⁷ Submissions 30 (IP), 33 (IP).

³⁶⁸ Submission 12 (IP).

³⁶⁹ Submissions 18 (IP), 21 (IP), 29 (IP), 44 (IP), 46 (IP), 53 (IP), 66 (IP), 85 (IP), 92 (IP), 98 (IP).

³⁷⁰ Submissions 21 (IP), 43 (IP).

³⁷¹ Submission 44 (IP).

³⁷² Submissions 31 (IP), 35 (IP), 44 (IP), 46 (IP), 86 (IP).

³⁷³ Submission 46 (IP).

Another respondent thought that some people in designated occupations might be prevented by their employer from witnessing during working hours.³⁷⁴ The Commission considered, however, that the same constraint could also apply to justices of the peace.³⁷⁵

It was further suggested that there could be problems in obtaining access to a person in a designated occupation after hours:³⁷⁶

It is obvious that there is a need for Justices appointed from the community. People in designated occupations may be available only at their place of business during office hours. They may not wish the public to know their residential address. They may not wish to have their home addresses published ...

A similar concern was expressed by another respondent, who suggested that, if the witnessing role were given to other people to the exclusion of justices of the peace, although there would technically be more witnesses, accessibility would be no better and may be potentially worse, as people's own work priorities would come first.³⁷⁷

The Commission considered the availability and willingness of witnesses to be an important consideration. In particular, it agreed that accessibility is not simply a question of having large numbers of people who are authorised to witness documents. In real terms, there will be an increase in access to witnesses only if the potential witnesses are available and willing to perform the function.³⁷⁸

The Commission recognised that many potential witnesses may be unable, because of their work commitments, to witness documents during their work hours. Although the Commission considered that this constraint could apply equally to justices of the peace as to persons in other occupational groups, the Commission recognised that many justices of the peace are willing to make themselves available out of hours.³⁷⁹ For example, many justices of the peace have availed themselves of the Department of Justice and Attorney-General's

³⁷⁴ Submission 43 (IP).

³⁷⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 59.

³⁷⁶ Submission 87 (IP).

³⁷⁷ Submission 91 (IP).

³⁷⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 59.

³⁷⁹ *Ibid.*

offer to publish their details on the Internet.³⁸⁰

The Commission expressed the view that people in designated occupational groups might not be as willing as justices of the peace to publicise details of how they could be contacted out of business hours.³⁸¹ Consequently, if justices of the peace were no longer authorised to witness documents, a person seeking a witness could well be restricted to witnesses he or she happens to know, for example, the neighbour who happens to be a pharmacist or their family doctor.³⁸²

(iii) Privacy

Several submissions received by the Commission in response to the Issues Paper raised the issues of privacy and confidentiality.³⁸³ Two respondents, in particular, were of the view that it would be embarrassing for people to have a professional known to them, such as a doctor, teacher or dentist, witness their personal documents.³⁸⁴ Another respondent commented:³⁸⁵

... I believe most people seek out a Justice of the Peace because they ... prefer not to have just anyone know of their private business.

Other respondents were concerned that, unlike justices of the peace, people in the designated occupational groups were not required to take an oath of office, and might not treat the information disclosed to them confidentially.³⁸⁶

The Commission accepted that some people might find it more awkward, or perhaps consider it more of an imposition, to have to ask a person such as their family doctor to witness a document than they would to ask a justice of the peace who has voluntarily assumed the office and is presumably willing to

³⁸⁰ Listings of justices of the peace by reference to locality and category of office can be found on the Department of Justice and Attorney-General's Web Site at <<http://jp.justice.qld.gov.au/jpws/locatejp.html>> (15 December 1999).

³⁸¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 59.

³⁸² Ibid.

³⁸³ Submissions 31 (IP), 88 (IP), 92 (IP), 98 (IP).

³⁸⁴ Submissions 92 (IP), 98 (IP).

³⁸⁵ Submission 31 (IP).

³⁸⁶ Submissions 41 (IP), 55 (IP). Before a person performs any of the functions of a justice of the peace or a commissioner for declarations, the person is required to take an oath of office: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 20(1), (5).

perform that task.³⁸⁷

(iv) Solemnity/formality

A number of submissions received by the Commission in response to the Issues Paper raised issues about the solemnity and formality of the witnessing process as a reason for the role to be retained by justices of the peace.³⁸⁸ One respondent was of the view that witnessing by a justice of the peace emphasised the importance of the matter.³⁸⁹ Another suggested that the witnessing of statutory declarations by people other than justices of the peace would degrade the implied commitment of the declarant, of the document, or of the process itself.³⁹⁰

It was suggested that an advantage of having documents witnessed by a justice of the peace was that it was more likely to ensure that people told the truth and did not make false claims in their documents.³⁹¹ However, another respondent to the Issues Paper did not share that view:³⁹²

There also appear to be many documents being presented for witnessing that are to my mind unnecessary. These could just as well be witnessed by any adult member of the community, if indeed they need a witness at all. After all a false statement is just as false whether it is made before a JP or any one else.

Another respondent suggested that important documents should be witnessed by people who are “sworn servants of the State”,³⁹³ while other respondents suggested that a document witnessed by a justice of the peace would be more valid,³⁹⁴ more authentic,³⁹⁵ or would carry more weight:³⁹⁶

³⁸⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60.

³⁸⁸ Submissions 7 (IP), 31 (IP), 45 (IP), 50 (IP), 51 (IP), 53 (IP), 91 (IP).

³⁸⁹ Submission 45 (IP).

³⁹⁰ Submission 91 (IP).

³⁹¹ Submissions 50 (IP), 51 (IP).

³⁹² Submission 23 (IP).

³⁹³ Submission 7 (IP).

³⁹⁴ Submission 39 (IP).

³⁹⁵ Submissions 6 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP).

³⁹⁶ Submission 31 (IP).

Would you be inclined to put more weight on a Statutory Declaration witnessed by an unknown person (over 18), or would you prefer to see a trained Commissioner for Oaths or J.P.(Qual.) or (Mag.) witness the document, complete with authorisation seal and identification number?

In the Discussion Paper, the Commission expressed the view that, although having a justice of the peace witness a document is certainly no guarantee that the person signing the document is being truthful, for some people it may nevertheless be a reminder of the seriousness of the declaration contained in the document they are signing.³⁹⁷

(v) Established role

In the Discussion Paper, the Commission accepted that the role of justices of the peace in relation to witnessing documents is an established role and widely known within the general community.³⁹⁸ This was a point emphasised by a number of respondents to the Issues Paper.³⁹⁹ One of these respondents commented in relation to the witnessing of documents:⁴⁰⁰

Yes one could agree to allowing ANYONE in the community who was a substantial figure to witness a document. But I believe most people seek out a Justice of the Peace because they understand the lay nature of our office ... The term Justice of the Peace is widely known in Western culture. [original emphasis]

The Commission expressed the view that, if the power of justices of the peace to witness documents were removed, this could cause confusion in relation to the witnessing of documents.⁴⁰¹ Even if an expanded list of witnesses were adopted, the Commission considered it unlikely that there would be the same level of awareness as to the particular groups who were authorised to witness documents as there presently is in relation to the role of justices of the peace in relation to witnessing.⁴⁰²

The Commission expressed a particular concern about the confusion that could

³⁹⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60.

³⁹⁸ Ibid.

³⁹⁹ Submissions 31 (IP), 35 (IP), 48 (IP), 105 (IP).

⁴⁰⁰ Submission 31 (IP).

⁴⁰¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60.

⁴⁰² Ibid. See p 61 of this Report as to the variations between the Commonwealth and Victorian lists of people authorised to witness statutory declarations. If something like those lists were adopted, there may well be confusion as to whether, for example, any teacher could witness a document, or only a principal.

arise if justices of the peace could not witness affidavits.⁴⁰³ Justices of the peace are authorised by Commonwealth legislation to witness affidavits for use in any Australian court involving the exercise of federal jurisdiction.⁴⁰⁴ In the Commission's view, it would be confusing if justices of the peace could witness an affidavit for use in a matter in a State court where the proceedings involved the exercise of federal jurisdiction, but could not witness an affidavit for use in a matter in a State court where the proceedings did not involve the exercise of federal jurisdiction.⁴⁰⁵

(vi) Free service

In the Discussion Paper, the Commission referred to a number of submissions to the Issues Paper⁴⁰⁶ that emphasised the fact that, whereas justices of the peace provide a free service, people in designated occupational groups might not be as willing to provide a similar service for no fee.⁴⁰⁷

The Commission noted that justices of the peace are presently prohibited from charging for their services.⁴⁰⁸ Although the Commission was of the view that it would be possible to prohibit people in other designated occupations from charging for witnessing documents, it acknowledged that such a prohibition might have an impact on the willingness of some people in those occupations to provide their time for this type of service.⁴⁰⁹

403 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60.

404 *Evidence Act 1995* (Cth) s 186(1)(a). See p 62 of this Report.

405 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60.

406 Submissions 18 (IP), 28 (IP), 43 (IP), 57 (IP), 85 (IP), 86 (IP), 89 (IP), 92 (IP), 97A (IP), 98 (IP), 107 (IP).

407 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 60-61.

408 Justices of the peace and commissioners for declarations are prohibited from seeking or receiving any reward in connection with the performance of the functions of office: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35.

409 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 61.

(vii) Various personal qualities

In the Discussion Paper, the Commission considered a large number of submissions made in response to the Issues Paper⁴¹⁰ that suggested that justices of the peace are ideally suited to the witnessing role because of their various personal qualities.⁴¹¹ Justices of the peace were described in these submissions as being persons of integrity,⁴¹² who have respect for the law,⁴¹³ and are honest, unselfish and trustworthy.⁴¹⁴ It was also suggested that they are independent,⁴¹⁵ objective,⁴¹⁶ and exercise their role “without fear or favour”.⁴¹⁷

Other respondents to the Issues Paper expressed a concern that other witnesses might not be as “careful of the truth” as justices of the peace,⁴¹⁸ and that other potential categories of witnesses have not been subjected to the same scrutiny by the authorities as justices of the peace. In particular, two respondents to the Issues Paper observed that justices of the peace must pass a police check before they can be appointed,⁴¹⁹ whereas other potential witnesses might not necessarily satisfy all the criteria that are presently required of justices of the peace before their appointment.⁴²⁰

The Commission expressed the view that it is difficult to make generalisations about the character of either justices of the peace or, indeed, people in various occupational groups.⁴²¹ It suggested that it was probably even more difficult to

⁴¹⁰ Submissions 5 (IP), 7 (IP), 8 (IP), 10 (IP), 11 (IP), 20 (IP), 25 (IP), 31 (IP), 38 (IP), 41 (IP), 43 (IP), 45 (IP), 46 (IP), 50 (IP), 51 (IP), 57 (IP), 85 (IP), 91 (IP), 93 (IP), 96 (IP), 102 (IP), 105 (IP), 117 (IP).

⁴¹¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 61-62.

⁴¹² Submissions 5 (IP), 7 (IP), 11 (IP), 93 (IP), 102 (IP).

⁴¹³ Submission 117 (IP).

⁴¹⁴ Submission 41 (IP).

⁴¹⁵ Submissions 5 (IP), 25 (IP), 31 (IP), 43 (IP).

⁴¹⁶ Submission 57 (IP).

⁴¹⁷ Submissions 31 (IP), 85 (IP).

⁴¹⁸ Submission 41 (IP).

⁴¹⁹ Submissions 46 (IP), 51 (IP). See Chapter 12 of this Report for a discussion of the process of appointment.

⁴²⁰ Submission 51 (IP).

⁴²¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 61.

attempt to make a comparison between the two groups, as qualities such as integrity, honesty, trustworthiness and independence are individual qualities. As such, whether a particular individual possessed these qualities was unlikely to turn on whether that person had been appointed as a justice of the peace or as a commissioner for declarations.⁴²²

Nonetheless, the Commission identified two factors that it considered relevant to any assessment of the character of justices of the peace:⁴²³

- Although some justices of the peace and commissioners for declarations might seek appointment for work-related reasons, for the most part, the role is one that is assumed by them voluntarily. From this, it could be inferred that the majority of justices of the peace are reasonably public spirited and committed to their role. As one respondent to the Issues Paper commented:⁴²⁴

... trained JPs and Com Decs ... help their fellow citizens NOT BECAUSE THEY HAVE TO, BUT BECAUSE THEY WANT TO. [original emphasis]

- Before justices of the peace and commissioners for declarations are appointed, the Department of Justice and Attorney-General conducts searches to ascertain whether they have any criminal record. Certain criminal convictions presently constitute a bar to appointment.⁴²⁵ People in other groups might not necessarily be able to satisfy this criterion.

The Commission concluded that, other things being equal, these two factors tended to support the suitability of justices of the peace and commissioners for declarations for their present witnessing role.⁴²⁶

(c) Preliminary recommendations

For the reasons expressed above, the Commission formed the view that the witnessing role that is conferred on justices of the peace by numerous Queensland Acts is an

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Submission 61 (IP).

⁴²⁵ See the discussion at pp 307-309 of this Report of the extent to which certain criminal convictions disqualify a person from appointment as a justice of the peace or as a commissioner for declarations.

⁴²⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 62.

appropriate role for them to undertake.⁴²⁷

In considering whether commissioners for declarations should also be able to undertake this role, the Commission acknowledged that commissioners for declarations are not presently required to undergo any training prior to appointment.⁴²⁸ Nonetheless, the Commission expressed the view that the availability of commissioners for declarations and their willingness to perform this role justified their retention of the witnessing role. The Commission considered that the removal of this role from commissioners for declarations could cause considerable inconvenience to members of the public who required the services of a person who was authorised to witness particular documents.⁴²⁹

The Commission's preliminary recommendation was that the power to take affidavits and statutory declarations and witness the execution of various documents should be exercised by:

- justices of the peace (magistrates court);
- justices of the peace (qualified); and
- commissioners for declarations.⁴³⁰

The Commission also recommended that, until 30 June 2000, old system justices of the peace should also be able to exercise these powers.⁴³¹

9. SUBMISSIONS

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that the power to take affidavits and statutory declarations and witness the execution of various documents should be exercised by justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations. Twenty-one of these

⁴²⁷ Ibid.

⁴²⁸ Ibid. See the Commission's recommendation at p 350 of this Report in relation to the training requirements for the appointment of commissioners for declarations in the future (Recommendation 12.5(c)).

⁴²⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 62.

⁴³⁰ Id at 63.

⁴³¹ Ibid.

respondents agreed with the Commission's preliminary recommendation.⁴³²

One respondent commented:⁴³³

I agree with the Commission's preliminary recommendation. With witnessing, a certain expertise develops with practice. As an example, in scanning documents, looking for (and regularly finding) large blank spaces, corrections and crossings out, all of which require attention both by the signatory and the witness. ... Justices of the Peace as part of their training are aware of, and look for these irregularities. ...

Further, as mentioned in the Discussion Paper, I agree that the established role, and the solemnity and formality engendered with the presence of a Justice of the Peace cannot be ignored or discounted.

One submission disagreed, in part, with the Commission's preliminary recommendation.⁴³⁴ That submission, from an association of justices of the peace, suggested that, in view of the lack of adequate training for commissioners for declarations, they should not be able to witness affidavits.

Twenty submissions commented on the Commission's preliminary recommendation that, until 30 June 2000, old system justices of the peace should also be able to exercise these powers. All of these respondents agreed with the Commission's preliminary recommendation.⁴³⁵

10. THE COMMISSION'S VIEW

The Commission's view on these issues remains unchanged. Having regard to the training, availability and willingness of justices of the peace to undertake the witnessing role, and the fact that it is a well-established role that is performed free of charge, the Commission remains of the view that the witnessing role is an appropriate one for justices of the peace to undertake.

Similarly, the Commission is of the view that the availability and willingness of commissioners for declarations to undertake this role justifies their retention of the role. As stated earlier,⁴³⁶ the Commission is of the view that, notwithstanding that commissioners for declarations are not presently required to undergo any training in order to be eligible to be appointed, considerable inconvenience could be caused to

⁴³² Submissions 6, 7, 8, 9, 14, 18, 21, 22, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 51, 58, 59.

⁴³³ Submission 8.

⁴³⁴ Submission 47.

⁴³⁵ Submissions 6, 7, 8, 9, 14, 18, 21, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 51, 58, 59.

⁴³⁶ See pp 76-77 of this Report.

people who require this service if commissioners for declarations were no longer authorised to witness various documents.

Given that the Commission has recommended that, after 30 June 2000, any remaining old system justices of the peace should hold office as commissioners for declarations,⁴³⁷ and that commissioners for declarations should be able to witness various documents, the Commission also remains of the view that, until 30 June 2000, old system justices of the peace should retain the power to witness such documents.

11. RECOMMENDATIONS

The Commission makes the following recommendations:

5.1 The power to take affidavits and statutory declarations and witness the execution of various documents should be exercised by:

- a justice of the peace (magistrates court);
- a justice of the peace (qualified); and
- a commissioner for declarations.

5.2 Until 30 June 2000, an old system justice of the peace⁴³⁸ should also be able to exercise these powers.⁴³⁹

⁴³⁷ See p 52 of this Report (Recommendations 4.2 and 4.3).

⁴³⁸ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

⁴³⁹ See p 52 of this Report, where the Commission has recommended that, after 30 June 2000, any remaining old system justices of the peace should hold office as commissioners for declarations (Recommendations 4.2 and 4.3).

CHAPTER 6

SUMMONSES AND WARRANTS

1. ISSUING SUMMONSES

A summons, in the context of the criminal law, is “a direction or command to the defendant to appear before a court to answer a charge or charges”.⁴⁴⁰

(a) Sources of power

In Queensland, there are a number of Acts that confer on justices of the peace the power to issue a summons.⁴⁴¹ However, the main Act that deals with the issuing of summonses is the *Justices Act 1886* (Qld).

Generally, all proceedings under the *Justices Act 1886* (Qld) are commenced by a complaint in writing.⁴⁴² The making of a complaint is usually the first step in having a summons issue against a defendant to answer charges.⁴⁴³ When a complaint is made before a justice of the peace that any person is guilty of, or is suspected of, having committed any indictable offence, simple offence, or breach of duty that is within the jurisdiction of the justice, then the justice may issue a summons.⁴⁴⁴

Every summons must be directed to the defendant and must require the defendant to appear at a certain time and place before a Magistrates Court, or, as the case may require, before justices taking an examination of witnesses in relation to an indictable offence,⁴⁴⁵ to answer the complaint and to be dealt with according to law.⁴⁴⁶

⁴⁴⁰ Queensland Police Service, *Operational Procedures Manual* s 3.5.4 (Proceedings by way of complaint and summons).

⁴⁴¹ See, for example, the *Dividing Fences Act 1953* (Qld) s 18; the *Domestic Violence (Family Protection) Act 1989* (Qld) s 47; the *Peace and Good Behaviour Act 1982* (Qld) s 4; and the *Property Law Act 1974* (Qld) s 144.

⁴⁴² *Justices Act 1886* (Qld) s 42(1). When it is intended in the first instance to issue a summons against the party charged, the complaint in writing need not be on oath. However, the complaint must be on oath if it is intended to issue a warrant in the first instance against the party charged: *Justices Act 1886* (Qld) s 51. See the discussion of warrants in the first instance at pp 86-87 of this Report.

⁴⁴³ In some circumstances, the making of a complaint may result in a warrant, rather than a summons, being issued against a person. See pp 86-87 of this Report.

⁴⁴⁴ *Justices Act 1886* (Qld) s 53(1).

⁴⁴⁵ See the discussion of committal hearings at pp 224-231 of this Report.

⁴⁴⁶ *Justices Act 1886* (Qld) s 54(1).

Under the *Justices Act 1886* (Qld), a justice of the peace may also issue a summons to a witness to require the witness to appear at a hearing to give evidence⁴⁴⁷ or to produce documents.⁴⁴⁸

It has been held that, in issuing a summons, a justice of the peace must exercise a discretion in a judicial manner.⁴⁴⁹

Section 60 of the *Justices Act* [of New South Wales] provides that whenever an information is laid before a justice, against any person, he may issue his summons for the appearance of such person. He is not bound to issue a summons. Before doing so he should consider the information to see what it alleges.

“A summons”, said Lord Goddard CJ, “is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons”: *R v Wilson; Ex parte Battersea Borough Council*. This does not mean that the issuing of a summons is a judicial act in the same sense as is an adjudication to determine the rights of parties. Probably it would be better described as an administrative or ministerial act, or, as this Court said in *Donohue v Chew Ying*, as a matter of procedure. But, however described, a justice who receives an information must decide whether or not he should issue a summons. He has a discretion and he must exercise it in a judicial manner. [notes omitted]

However, a justice of the peace does not have to be satisfied that the complaint discloses a prima facie case. The following observation has been made about the New South Wales provision that is equivalent to section 53(1) of the *Justices Act 1886* (Qld), which enables a justice of the peace to issue a summons:⁴⁵⁰

The question is: what must a justice of the peace do in the exercise of his discretion in order to satisfy himself that it is a proper case for him to receive the information laid before him and issue the summons thereon? It seems to me, however, that the expression “prima facie case” is not a wholly satisfactory one to use in this context. ... If the justice, after reading the information, is satisfied that no legal offence is alleged in it, he may decline to issue the summons. In the exercise of his discretion he may also decline to issue a summons upon other grounds, even though a legal offence is averred in the information, as, for instance, where he considers that the issue of a summons would be vexatious or improper. ... On the other hand, if the justice is satisfied that a legal offence is averred in the information and no other matter appears to him to justify a refusal to issue the summons, he may in the exercise of his discretion receive the information and issue

⁴⁴⁷ *Justices Act 1886* (Qld) s 78.

⁴⁴⁸ *Justices Act 1886* (Qld) s 83.

⁴⁴⁹ *Electronic Rentals Pty Limited v Anderson (and Others)* (1971) 124 CLR 27 per Windeyer J at 39.

⁴⁵⁰ *Ex parte Electronic Rentals Pty Ltd; Re Anderson and Others* (1970) 92 WN (NSW) 672 per Asprey JA at 681. Note that the *Justices Act 1902* (NSW) uses the term “information” instead of the term “complaint”. These observations were approved in *R v Peacock; ex parte Whelan* [1971] Qd R 471 per Skerman J at 476 and per Matthews J at 479. See also the judgment of Robertson DCJ in *Reid v Coombs* (unreported, District Court, App No 6 of 1998, 27 May 1998 at 9-12).

the summons thereon.

Under the *Justices Act 1886* (Qld) no objection may be taken in relation to the issuing of a summons on the basis that the complainant and the justice of the peace were, in effect, employees of the same agency, or on the basis that the justice of the peace was an employee or a partner of the complainant's solicitor. Section 53(2) of the *Justices Act 1886* (Qld) provides:

No objection shall be taken or allowed to a summons issued upon a complaint under this section on the ground that -

- (a) the justice who issued the summons and the complainant were at the date of its issue -
 - (i) officers of the same department, subdepartment, branch or section of a department of the Government of the Commonwealth or of the State;
 - (ii) employees of Brisbane City Council;
 - (iii) employees of the same local government within the meaning of the *Local Government Act 1993*; or
- (b) the justice who issued the summons was at the date of its issue, the complainant's solicitor, or that solicitor's partner or an employee of either of them.

Section 53(2) was introduced into the *Justices Act 1886* (Qld) in 1973,⁴⁵¹ presumably to overcome the effect of the decision of the Full Court of the Supreme Court of Queensland in *R v Peacock; ex parte Whelan*.⁴⁵² In that case a complaint alleging a breach by Mrs Whelan of the by-laws of a local authority was laid in the name of the local authority by a firm of solicitors acting on its behalf. The summons was issued by a justice of the peace who was an articled clerk employed by the firm of solicitors. The Court held that, since a reasonable suspicion of bias would be engendered in informed minds by the circumstance that the justice of the peace who issued the summons was an employee of the firm of solicitors acting on behalf of the complainant, the requirements of natural justice had not been observed.

The effect of section 53(2) of the *Justices Act 1886* (Qld) is that a public servant may issue a summons for proceedings that are being prosecuted by a person employed by the same department. For example, proceedings for an offence under the *Trade Measurement Administration Act 1990* (Qld) or under the *Trade Measurement Act 1990*

⁴⁵¹ During the second reading speech for the *Justices Act Amendment Bill 1973* (Qld), the Hon W E Knox stated (Legislative Assembly (Qld), *Parliamentary Debates* (5 April 1973) at 3755):

At present, where a defendant can show, for instance, that the complainant and the justice of the peace who issued the summons both work in the same Government office, an objection to the validity of the summons must be upheld. It is considered that this situation should not continue, and that ground for objection is removed by clause 3.

⁴⁵² [1971] Qd R 471.

(Qld) are to be taken in a summary manner under the *Justices Act 1886* upon complaint of the chief inspector, or other person authorised in that behalf by the chief inspector.⁴⁵³ There is no prohibition on the summons for such an offence being issued by a justice of the peace who is employed in the Trade Measurement Branch of the Office of Fair Trading.

The *Police Powers and Responsibilities Act 1997* (Qld)⁴⁵⁴ now provides an alternative means for a police officer to commence proceedings against a defendant.⁴⁵⁵ Instead of commencing proceedings by summons, it is now possible for proceedings to be commenced by the service of a notice to appear.

If a police officer reasonably suspects that a person has committed or is committing an offence, the police officer may issue and serve a notice to appear on the person.⁴⁵⁶ A notice to appear must be served personally on a person,⁴⁵⁷ and must satisfy a number of requirements. Section 41 of the Act provides:

- (1) A notice to appear must -
 - (a) state the substance of the offence alleged to have been committed; and
 - (b) state the name of the person alleged to have committed the offence; and
 - (c) require the person to appear before a Magistrates Court in relation to the offence at a stated time and place; and
 - (d) be signed by the police officer serving the notice to appear.
- (2) The place stated in a notice to appear for the person to appear before the court must be a place where the court will be sitting at the time stated.
- (3) The time stated in a notice to appear for the person to appear before the court must be a time at least 14 days after the notice is served.

Unlike a summons, a notice to appear is not issued by a justice of the peace. It is simply signed by the police officer serving it⁴⁵⁸ and filed with the clerk of the court at the Magistrates Court where the person is required to appear.⁴⁵⁹

⁴⁵³ *Trade Measurement Administration Act 1990* (Qld) s 13.

⁴⁵⁴ The *Police Powers and Responsibilities Act 1997* (Qld) commenced on 6 April 1998.

⁴⁵⁵ This procedure does not apply where the defendant is a child: *Police Powers and Responsibilities Act 1997* (Qld) s 40(1).

⁴⁵⁶ *Police Powers and Responsibilities Act 1997* (Qld) s 40(2).

⁴⁵⁷ *Police Powers and Responsibilities Act 1997* (Qld) s 40(3).

⁴⁵⁸ *Police Powers and Responsibilities Act 1997* (Qld) s 41(1)(d).

⁴⁵⁹ *Police Powers and Responsibilities Act 1997* (Qld) s 42(1).

The *Police Powers and Responsibilities Act 1997* (Qld) provides that a notice to appear requiring a person to appear before a Magistrates Court in relation to an offence at a stated time and place is taken to be a summons issued by a justice under the *Justices Act 1886* (Qld).⁴⁶⁰

(b) Justices of the peace who may issue a summons

The issuing of a summons is not included in the examples given in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).⁴⁶¹ However, it would still fall within that definition by constituting “an action taken ... for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate”. It is, therefore, a power that may be exercised by a justice of the peace (qualified),⁴⁶² a justice of the peace (magistrates court),⁴⁶³ or an old system justice of the peace whose office is preserved by the transitional provisions of the Act.⁴⁶⁴

A single justice of the peace may issue a summons, notwithstanding that the case must be heard and determined by two or more justices.⁴⁶⁵

(c) Policy of the Queensland Police Service⁴⁶⁶

The Operational Procedures Manual of the Queensland Police Service sets out the Police Service’s policy and procedures for various matters, including the issuing of summonses.

The Manual provides that “[w]here it is not possible to institute proceedings by way of notice to appear proceedings should be instituted by complaint and summons”.⁴⁶⁷ The

⁴⁶⁰ *Police Powers and Responsibilities Act 1997* (Qld) s 45(2).

⁴⁶¹ The definition of “procedural action or order” is set out at note 94 of this Report.

⁴⁶² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

⁴⁶³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

⁴⁶⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6). See the explanation of the Commission’s use of this term at pp 16-17 of this Report.

⁴⁶⁵ *Justices Act 1886* (Qld) s 24.

⁴⁶⁶ For a discussion of the position of justices of the peace who are members of the Queensland Police Service, see Chapter 11 of this Report.

⁴⁶⁷ Queensland Police Service, *Operational Procedures Manual* s 3.5.4 (Proceedings by way of complaint and summons).

policy in relation to summonses allows a police officer the discretion to attend before a clerk of the court or a justice of the peace to have a summons issued.⁴⁶⁸

It is also Queensland Police Service policy that members⁴⁶⁹ are not to use the services of justices of the peace in circumstances where bias or a conflict of interest may arise.⁴⁷⁰ The Manual gives, as an example of an action that may result in bias or a conflict of interest if performed for a member of the Police Service, the issuing of a summons by a justice of the peace who is also a member of the Police Service or by another person who has close associations with the Police Service.⁴⁷¹

However, notwithstanding the general policy that a member of the Queensland Police Service should not issue a summons for another member of the Police Service, the relevant order⁴⁷² in the Manual contains an exception in relation to the issuing of a summons for a “traffic adjudication matter”:⁴⁷³

In the case of traffic adjudication matters, members may use the services of another member who is a justice of the peace performing duty at a traffic adjudication section for the purpose of issuing summonses in respect of traffic matters which have been adjudicated upon by the section to which that member is attached.

2. ISSUING WARRANTS UNDER QUEENSLAND LEGISLATION

(a) Introduction

There are many Acts in Queensland under which warrants of various kinds may be issued. It is beyond the scope of this reference to examine all those Acts. The Commission has therefore focused on the main types of warrants that may be issued by justices of the peace - namely, warrants to apprehend a person and search warrants - and the main Acts under which those warrants may be issued.

(b) Warrants to apprehend a person

⁴⁶⁸ Ibid.

⁴⁶⁹ The term “member” is defined in the *Operational Procedures Manual* to include a police officer, a staff member and a police recruit.

⁴⁷⁰ Queensland Police Service, *Operational Procedures Manual* s 3.9.15 (Use of justices of the peace and commissioners for declarations).

⁴⁷¹ Ibid.

⁴⁷² See note 1556 of this Report as to the effect of an order.

⁴⁷³ Queensland Police Service, *Operational Procedures Manual* s 3.9.15 (Use of justices of the peace and commissioners for declarations).

Under the *Criminal Code* (Qld), the definition of an offence as a crime imports that the offender may be arrested without warrant, whereas a warrant is generally required for arrest in the case of a misdemeanour.⁴⁷⁴

The arrest of a person “constitutes the first formal step toward bringing a person alleged to have committed an offence before a court to be dealt with according to law”.⁴⁷⁵ This arises from the “statutory obligations cast upon the person making the arrest to bring the arrested person before a justice”.⁴⁷⁶ For example, the *Criminal Code* (Qld) provides that a person who has arrested another person on the charge of an offence must take that person “forthwith before a justice to be dealt with according to law”.⁴⁷⁷

The *Justices Act 1886* (Qld) provides for the issuing of warrants in relation to both indictable offences and simple offences.

A justice of the peace may, in certain circumstances, issue a warrant to apprehend a person and have the person brought before a court to answer a charge of an indictable offence. Section 57 of the *Justices Act 1886* (Qld) provides:

If a complaint is made before a justice -

- (a) that a person is suspected of having committed an indictable offence within the justice's jurisdiction; or
- (b) that a person charged with committing an indictable offence elsewhere within the State is suspected of being within the justice's jurisdiction; or
- (c) that a person charged with committing an indictable offence on the high seas, or elsewhere outside the State, of which notice may be taken by the courts of the State, is suspected of being within the justice's jurisdiction;

the justice may issue a warrant -

- (d) to apprehend the person; and
- (e) have the person brought before justices to answer the complaint and to be further dealt with according to law.

⁴⁷⁴ *Criminal Code* (Qld) s 5(2). See also Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (4th ed 1997) at para 4.4.

⁴⁷⁵ See Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (4th ed 1997) at para 5.7.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Criminal Code* (Qld) s 552. A person who, in those circumstances, wilfully delays taking the person before a justice to be dealt with according to law is guilty of a misdemeanour and liable to imprisonment for two years: *Criminal Code* (Qld) s 137. See also s 65 of the *Justices Act 1886* (Qld) for a similar requirement.

The *Justices Act 1886* (Qld) further provides that a justice of the peace may issue a summons against a person for an indictable offence instead of issuing a warrant to apprehend the person.⁴⁷⁸

In certain circumstances, a justice of the peace may, instead of issuing a summons, issue a warrant to apprehend a person and have the defendant brought before a court to answer a charge of a simple offence. Section 59 of the *Justices Act 1886* (Qld) provides:

- (1) When complaint is made before a justice of a simple offence, the justice may, upon oath being made before the justice substantiating the matter of the complaint to the justice's satisfaction, instead of issuing a summons, issue in the first instance the justice's warrant to apprehend the defendant, and to cause the defendant to be brought before justices to answer the complaint and to be further dealt with according to law.
- (2) A warrant in the first instance shall not be issued on a complaint of a simple offence (not being an indictable offence) pursuant to subsection (1) unless the Act or law creating the offence authorises -
 - (a) the arrest of an offender without warrant; or
 - (b) the issue of a warrant in the first instance.

This type of warrant is described as a "warrant in the first instance" because it issued, not as a result of disobedience to a summons, but instead of a summons.

Other provisions of the *Justices Act 1886* (Qld) also enable a justice of the peace to issue a warrant to apprehend a person, for example:

- If a person summoned as a witness neglects or refuses to appear at the time and place appointed by the summons, and no just excuse is offered, the justices of the peace before whom the person should have appeared may, in addition to imposing a monetary penalty, issue a warrant to have the person brought before them to testify.⁴⁷⁹
- If a justice of the peace is satisfied by evidence given on oath that it is probable that a person whose evidence is desired will not attend to give evidence without being compelled to do so, then, instead of issuing a summons, the justice of the peace may issue a warrant.⁴⁸⁰
- If a defendant does not appear at the time and place appointed by summons for the hearing and determining of a complaint of a simple offence or breach of duty,

⁴⁷⁸ *Justices Act 1886* (Qld) s 58(1).

⁴⁷⁹ *Justices Act 1886* (Qld) s 79.

⁴⁸⁰ *Justices Act 1886* (Qld) s 81.

the justices of the peace may, upon being satisfied of certain matters, issue a warrant to apprehend the defendant and bring him or her before the justices of the peace to answer the complaint and to be further dealt with according to law.⁴⁸¹

Justices of the peace also have the power under other Acts to issue warrants to apprehend a person.⁴⁸²

(c) Search warrants

In this Report, the term “search warrant” is used in its broadest sense to mean a warrant that confers on the person executing the warrant the power to enter certain premises, whether to search the premises with a view to seizing certain goods or simply to inspect certain things at the premises for the purpose of monitoring compliance with particular legislation. Not all search warrants are directed to police officers. Legislation also provides for search warrants to be issued to enable certain other people, for example, a government inspector or another authorised person, to enter premises for various specified purposes.⁴⁸³

A search warrant authorises the police officer or other designated person to whom it is directed to do what is otherwise unlawful - to enter peacefully occupied premises and seize and take away the property of people who may have no connection with any criminal activity.⁴⁸⁴ Under many Acts, the issuing of a search warrant is restricted to a magistrate.⁴⁸⁵ Nevertheless, justices of the peace still have some significant powers with respect to search warrants, the main power being found in the *Police Powers and Responsibilities Act 1997* (Qld).

The *Police Powers and Responsibilities Act 1997* (Qld) provides that a police officer

⁴⁸¹ *Justices Act 1886* (Qld) s 142(1)(b).

⁴⁸² See, for example, the *Gaming Machine Act 1991* (Qld) s 208; the *Racing and Betting Act 1980* (Qld) s 231; and the *Peace and Good Behaviour Act 1982* (Qld) ss 4, 7(1)(a).

⁴⁸³ See, for example, the *Apiaries Act 1982* (Qld) s 5; the *Fair Trading Act 1989* (Qld) s 89; the *Agricultural Chemicals Distribution Control Act 1966* (Qld) s 34; the *Collections Act 1966* (Qld) s 26A; the *Diseases in Timber Act 1975* (Qld) s 6; the *Food Act 1981* (Qld) s 28; the *Medical Act and Other Acts (Administration) Act 1966* (Qld) s 14; the *Private Employment Agencies Act 1983* (Qld) s 9; the *Retirement Villages Act 1988* (Qld) s 52; and the *Rural Lands Protection Act 1985* (Qld) s 101.

⁴⁸⁴ See *Hedges v Grundmann; ex parte Grundmann* [1985] 2 Qd R 263 per Moynihan J at 268, in discussing s 679 of the *Criminal Code* (Qld).

⁴⁸⁵ See, for example, the *Child Care Act 1991* (Qld) s 68; the *Classification of Films Act 1991* (Qld) s 50; the *Crimes (Confiscation) Act 1989* (Qld) s 59; the *Dairy Industry Act 1993* (Qld) ss 71, 72; the *Drugs Misuse Act 1986* (Qld) s 18(2); the *Juvenile Justice Act 1992* (Qld) s 220; the *Liquor Act 1992* (Qld) s 180; and the *Trade Measurement Administration Act 1990* (Qld) s 19.

may apply to a justice of the peace for a search warrant to enter and search a place to obtain evidence of the commission of an offence, other than evidence that may be used in a forfeiture proceeding.⁴⁸⁶

If the warrant is sought to search a place to obtain evidence that may be used in a forfeiture proceeding, the warrant must be issued by a magistrate.⁴⁸⁷ If it is intended to do anything that may cause structural damage to a building, the application for the warrant must be made to a Supreme Court judge.⁴⁸⁸

An application for a search warrant under the *Police Powers and Responsibilities Act 1997 (Qld)* must:⁴⁸⁹

- be sworn and state the grounds on which the warrant is sought; and
- include certain specified information about any search warrants issued within the previous year in relation to the place or a person suspected of being involved in the commission of the offence or suspected offence to which the application relates.

A justice of the peace may issue a search warrant under the *Police Powers and Responsibilities Act 1997 (Qld)* only if he or she is satisfied that there are reasonable grounds for suspecting that there is at the place, or is likely to be at the place within the next 72 hours, evidence of the commission of an offence.⁴⁹⁰ The requirement that the justice of the peace is satisfied “that there are reasonable grounds for suspecting” is significant.

A similar requirement was considered by the High Court in relation to section 679 of the *Criminal Code (Qld)*, which was the predecessor of section 28 of the *Police Powers and Responsibilities Act 1997 (Qld)*.⁴⁹¹ Section 679(1) of the *Criminal Code (Qld)* provides:

If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place -

⁴⁸⁶ *Police Powers and Responsibilities Act 1997 (Qld)* s 28(1). A “forfeiture proceeding” is a proceeding for the forfeiture or restraint of property under the *Crimes (Confiscation) Act 1989 (Qld)* or another Act: *Police Powers and Responsibilities Act 1997 (Qld)* Sch 3 (definition of “forfeiture proceeding”).

⁴⁸⁷ *Police Powers and Responsibilities Act 1997 (Qld)* s 28(2).

⁴⁸⁸ *Police Powers and Responsibilities Act 1997 (Qld)* s 28(3).

⁴⁸⁹ *Police Powers and Responsibilities Act 1997 (Qld)* 28(4).

⁴⁹⁰ *Police Powers and Responsibilities Act 1997 (Qld)* s 28(6).

⁴⁹¹ The *Police Powers and Responsibilities Act 1997 (Qld)* does not expressly repeal any other Acts. Rather, s 9 of the *Police Powers and Responsibilities Act 1997 (Qld)* provides that, to the extent of any inconsistency, that Act prevails over any other Act.

- (a) anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
- (b) anything whether animate or inanimate and whether living or dead as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of any offence; or
- (c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;

the justice may issue a warrant directing a police officer or police officers named therein or all police officers to enter, by force if necessary, and to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law. [emphasis added]

The High Court held that the opening words of section 679 of the *Criminal Code* (Qld) - "If it appears to a justice" - imposed on a justice to whom an application for a search warrant was made the duty of satisfying himself or herself that the conditions for the issue of the warrant were fulfilled.⁴⁹² It must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds exist for the relevant suspicion and belief.⁴⁹³ Those comments would apply equally to the requirements for issuing a search warrant under section 28 of the *Police Powers and Responsibilities Act 1997* (Qld).

The High Court also held that it was a requirement of section 679 of the *Criminal Code* (Qld) that the sworn complaint should contain sufficient facts to found the reasonable suspicion and the reasonable belief respectively mentioned in section 679:⁴⁹⁴

If that requirement is not satisfied, the information otherwise conveyed to the issuing justice is immaterial but, if that requirement is satisfied, the justice may seek confirmation by inquiry of the complainant.

Given that the *Police Powers and Responsibilities Act 1997* (Qld) requires an application for a search warrant to "be sworn and state the grounds on which the warrant is sought",⁴⁹⁵ these comments would also seem to apply to a warrant sought under section 28 of that Act.

⁴⁹² *George v Rockett* (1990) 170 CLR 104 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 111.

⁴⁹³ Id at 112. The High Court held (at 112) that the requirement imposed by the Full Court of the Supreme Court of Queensland in *Hedges v Grundmann; ex parte Grundmann* [1985] 2 Qd R 263 that the justice must not only be satisfied that there are reasonable grounds for suspicion and belief, but must also entertain the relevant suspicion and belief, was excessive and beyond the requirements of s 679 of the *Criminal Code* (Qld).

⁴⁹⁴ *George v Rockett* (1990) 170 CLR 104 at 114. The Court rejected an argument that the basis of the justice's satisfaction was not required to be on oath, although the complaint itself was required to be on oath.

⁴⁹⁵ *Police Powers and Responsibilities Act 1997* (Qld) s 28(4)(a).

In issuing a search warrant, a justice of the peace exercises a very important function. In *Parker (and Others) v Churchill (and Others)*,⁴⁹⁶ Burchett J said of a justice of the peace's duty in relation to an information for a search warrant under the now repealed section 10 of the *Crimes Act 1914* (Cth):⁴⁹⁷

The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.

The *Police Powers and Responsibilities Act 1997* (Qld) made a significant change to the way in which some search warrants may be obtained. The *Criminal Code* (Qld) makes no provision for a search warrant to be obtained by telephone or other means of communication. This situation was changed by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld), which now enables search warrants and certain other authorities under that Act to be issued by telephone, facsimile, radio or another similar facility if it is impracticable to apply in person to the person issuing the warrant or other authority.

Section 129 provides:

Obtaining warrants, orders and authorities, etc., by telephone or similar facility

- (1) This section applies if, under this Act, a police officer may obtain a warrant, approval, notice to produce a document or another authority (a “**prescribed authority**”) before doing a stated act.
- (2) A police officer may apply to the person who may issue the prescribed authority (the “**issuer**”) for the prescribed authority by phone, fax, radio or another similar facility if, for any reason, it is impracticable to apply for the authority in person.
- (3) Before making the application, the police officer must prepare an application stating the grounds on which the application is made.
- (4) The police officer may apply for the prescribed authority before the application is sworn.
- (5) After issuing the prescribed authority, the issuer must immediately fax a copy to the police officer if it is reasonably practicable to fax a copy.
- (6) If it is not reasonably practicable to fax a copy to the police officer the issuer must -

⁴⁹⁶ (1985) 9 FCR 316.

⁴⁹⁷ Id at 322. S 10 of the *Crimes Act 1914* (Cth), which was repealed by s 5 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), was in substantially the same terms as s 679 of the *Criminal Code* (Qld).

- (a) tell the police officer what the terms of the prescribed authority are; and
 - (b) tell the police officer the date and time the prescribed authority was issued.
- (7) The prescribed authority form, or the prescribed authority form properly completed by the police officer, authorises the performance of the act for which the authority is obtained.
- (8) The police officer must, at the first reasonable opportunity, send the issuer -
- (a) the sworn application; and
 - (b) if the police officer completed a prescribed authority form - the completed prescribed authority form.
- (9) On receiving the documents, the issuer must attach them to the prescribed authority.
- (10) Subsection (11) applies to a court if -
- (a) a question arises, in a proceeding in or before the court, whether a power that may be performed under a prescribed authority under this Act was authorised by a prescribed authority under this section; and
 - (b) the authority is not produced in evidence.
- (11) The court may presume the exercise of the power was not authorised by a prescribed authority under this section, unless the contrary is proved.

This provision is not unusual in enabling a warrant to be sought other than by an applicant in person. For some time, this has been possible under a number of Queensland Acts. Some provisions authorise these procedures where there are circumstances of urgency⁴⁹⁸ or special circumstances, such as the “remote location” of the person seeking the warrant.⁴⁹⁹ Other provisions do not even restrict the use of these procedures to particular circumstances.⁵⁰⁰

What is unusual about section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) is that it enables a justice of the peace to issue search warrants and other authorities by those means. Generally, legislation in Queensland that enables a search

⁴⁹⁸ See, for example, the *Child Care Act 1991* (Qld) s 69(1) (by telephone); the *Classification of Films Act 1991* (Qld) s 51(1) (by telephone); the *Dairy Industry Act 1993* (Qld) s 75(1)(a) (by telephone, facsimile, radio or another form of communication); the *Juvenile Justice Act 1992* (Qld) s 221(1)(a) (by telephone, facsimile, radio or another form of communication); and the *Liquor Act 1992* (Qld) s 181(1)(a) (by telephone, facsimile, radio or another form of communication).

⁴⁹⁹ See, for example, the *Dairy Industry Act 1993* (Qld) s 75(1)(b); the *Juvenile Justice Act 1992* (Qld) s 221(1)(b); and the *Liquor Act 1992* (Qld) s 181(1)(b).

⁵⁰⁰ See, for example, the *Crimes (Confiscation) Act 1989* (Qld) s 59 (by telephone, telex, radio, facsimile copy or other similar facility); and the *Drugs Misuse Act 1986* (Qld) s 18(6) (by telephone, telex, radio or other similar facility).

warrant to be sought and issued using some form of technology restricts the issuing of the search warrant to a magistrate.⁵⁰¹

(d) Justices of the peace who may issue warrants

The issuing of a warrant is included in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). It is, therefore, a power that may be exercised by a justice of the peace (qualified),⁵⁰² a justice of the peace (magistrates court)⁵⁰³ or an old system justice of the peace.⁵⁰⁴

A single justice of the peace may issue a warrant, notwithstanding that the case must be heard and determined by two or more justices of the peace.⁵⁰⁵

(e) Policy of the Queensland Police Service⁵⁰⁶

The Queensland Police Service Operational Procedures Manual sets out the Police Service's policy in relation to applications for warrants.

In relation to a search warrant that may be issued by a justice of the peace, it is Queensland Police Service policy to seek the warrant from a justice of the peace employed at a Magistrates Court.⁵⁰⁷ Where it is not practicable to obtain the services of a justice of the peace employed at a Magistrates Court, the investigating officer concerned is to use the services of a justice of the peace who is not a member of the Police Service.⁵⁰⁸

The Operational Procedures Manual also addresses Queensland Police Service policy in relation to warrants for the arrest of a person under sections 57 and 59 of the *Justices Act 1886* (Qld). It provides that, if time permits, the arresting officer should

⁵⁰¹ See notes 485, 498-500 of this Report.

⁵⁰² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

⁵⁰³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

⁵⁰⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

⁵⁰⁵ *Justices Act 1886* (Qld) s 24.

⁵⁰⁶ For a discussion of the position of justices of the peace who are members of the Queensland Police Service, see Chapter 11 of this Report.

⁵⁰⁷ Queensland Police Service, *Operational Procedures Manual* s 2.8.3 (Obtaining a search warrant).

⁵⁰⁸ *Ibid.*

seek the issue of such a warrant by laying the complaint before a stipendiary magistrate or a justice of the peace who is employed at a court house.⁵⁰⁹

As mentioned above,⁵¹⁰ it is the policy of the Queensland Police Service that members⁵¹¹ are not to use the services of justices of the peace in circumstances where bias or a conflict of interest may arise.⁵¹² The issuing of a warrant for a member of the Queensland Police Service by a justice of the peace who is also a member of the Police Service or by another person who has close associations with the Police Service is given as an example of an action that may result in bias or a conflict of interest.⁵¹³

3. ISSUING WARRANTS UNDER COMMONWEALTH LEGISLATION

Justices of the peace also have powers to issue warrants under some Commonwealth legislation.⁵¹⁴ The term “Justice of the Peace” is defined in the *Acts Interpretation Act 1901* (Cth) to include “a Justice of the Peace for a State or part of a State or for a Territory”.⁵¹⁵ Consequently, where a Commonwealth Act confers the power to issue a warrant on a “justice of the peace”, that power, if not otherwise restricted, may be exercised by a justice of the peace (qualified), by a justice of the peace (magistrates court) or by an old system justice of the peace.

Some Commonwealth Acts draw a distinction between a justice of the peace who is employed in a court of a State or Territory and a justice of the peace from the general community.

For example, the *Customs Act 1901* (Cth) prescribes the circumstances in which a “judicial officer” may issue a warrant to search premises.⁵¹⁶ Although the definition of

⁵⁰⁹ Id s 3.5.13 (Proceedings by way of a warrant in the first instance).

⁵¹⁰ See p 85 of this Report.

⁵¹¹ See note 469 of this Report.

⁵¹² Queensland Police Service, *Operational Procedures Manual* s 3.9.15 (Use of justices of the peace and commissioners for declarations).

⁵¹³ Ibid.

⁵¹⁴ See, for example, the *Quarantine Act 1908* (Cth) ss 74AB, 74A, 74B and 74BA; the *Insurance Act 1973* (Cth) s 115A; the *Environment Protection (Impact of Proposals) Act 1974* (Cth) s 24; and the *Dairy Produce Act 1986* (Cth) s 116.

⁵¹⁵ *Acts Interpretation Act 1901* (Cth) s 26(e).

⁵¹⁶ *Customs Act 1901* (Cth) s 198.

“judicial officer” includes a justice of the peace, it is restricted to:⁵¹⁷

a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants. [emphasis added]

This particular power may be exercised only by a justice of the peace who is employed at a court house.⁵¹⁸ It may not be exercised by an ordinary justice of the peace.

The Commission does not have jurisdiction to make recommendations about the powers of justices of the peace under Commonwealth legislation.

4. FREQUENCY OF ISSUING SUMMONSES AND WARRANTS

The Queensland Police Service, in its submission in response to the Issues Paper, advised that there are no available statistics to quantify the issuing of summonses or warrants by justices of the peace.⁵¹⁹ It advised, however, that the availability of the procedure under the *Police Powers and Responsibilities Act 1997* (Qld) in relation to notices to appear⁵²⁰ has substantially reduced the number of summonses issued for the police.

Other submissions received by the Commission in response to the Issues Paper varied widely in their assessments of how frequently justices of the peace exercise their powers to issue summonses and warrants. A large number of respondents thought that justices of the peace issued summonses and warrants quite often,⁵²¹ while other respondents thought they did so only rarely.⁵²² One respondent suggested that this was partly because police and various types of inspectors are instructed to apply to magistrates.⁵²³ A number of respondents suggested that, where a person seeking a summons or warrant is near a court house, magistrates and justices of the peace who are employed at the court tend to be used in preference to other justices of the

⁵¹⁷ *Customs Act 1901* (Cth) s 183UA. See also the *Crimes Act 1914* (Cth) ss 3C (definition of “issuing officer”), 3E.

⁵¹⁸ See the discussion of these justices of the peace in Chapter 2.

⁵¹⁹ Submission 121 (IP).

⁵²⁰ See pp 83-84 of this Report.

⁵²¹ Submissions 1 (IP), 5 (IP), 6 (IP), 19 (IP), 21 (IP), 62 (IP), 63 (IP), 67 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 120 (IP).

⁵²² Submissions 7 (IP), 30 (IP), 43 (IP), 50 (IP), 65 (IP), 105 (IP), 117 (IP).

⁵²³ Submission 50 (IP).

peace.⁵²⁴

Thirty-one respondents to the Issues Paper commented on how often they had personally issued summonses and warrants:

- eleven indicated that they had never been called upon to issue a summons or a warrant;⁵²⁵
- ten indicated that they had done so infrequently,⁵²⁶ for example, one summons and two warrants in the last five years,⁵²⁷ and two summonses ever;⁵²⁸
- four indicated that they had done so occasionally,⁵²⁹ for example, eight summonses and six warrants in the previous two years,⁵³⁰ and one or two warrants per annum;⁵³¹
- six advised that they did so regularly,⁵³² with one of these respondents having issued 83 warrants and summonses in the previous two and a half years.⁵³³

The same variation was reflected in the submissions received by the Commission in response to the Discussion Paper:

- one old system justice of the peace indicated that he had never issued a warrant,⁵³⁴
- one justice of the peace (qualified) indicated that he had issued four summonses

⁵²⁴ Submissions 6 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 119 (IP). These respondents were all justices of the peace who were not employed at a court.

⁵²⁵ Submissions 14 (IP), 31 (IP), 39 (IP), 47 (IP), 57 (IP), 60 (IP), 64 (IP), 66 (IP), 69 (IP), 101 (IP), 123 (IP).

⁵²⁶ Submissions 9 (IP), 30 (IP), 35 (IP), 36 (IP), 38 (IP), 43 (IP), 53 (IP), 54 (IP), 100 (IP), 105 (IP).

⁵²⁷ Submission 38 (IP).

⁵²⁸ Submission 30 (IP).

⁵²⁹ Submissions 51 (IP), 88 (IP), 89 (IP), 90 (IP).

⁵³⁰ Submission 51 (IP).

⁵³¹ Submission 88 (IP).

⁵³² Submissions 1A (IP), 20 (IP), 91 (IP), 93 (IP), 97 (IP), 103 (IP).

⁵³³ Submission 103 (IP).

⁵³⁴ Submission 36.

and eight warrants during the previous four years;⁵³⁵ and

- one justice of the peace (qualified) indicated that she had issued 28 summonses and seven warrants during the previous three and a half years;⁵³⁶
- one justice of the peace (qualified) indicated that he issues a number of search warrants each week, usually in the evening.⁵³⁷

The respondents to the Issues Paper who had issued summonses and warrants either occasionally or frequently could not be said to reside in one particular type of locality. Respondents resided in Warner, Toowoomba, Montville, outside Toowoomba, several in Brisbane and one at Coolumb.⁵³⁸

Two reasons emerged from the submissions as to why justices of the peace are used to issue summonses and warrants:

- They appear to be used after hours when court registries have closed. The majority of the respondents who had issued summonses or warrants advised that they had done so outside normal business hours, such as at night, on holidays and on weekends.⁵³⁹
- They also appear to be used in locations where there is no local court house. The respondent who had issued 83 warrants and summonses resided in an area where there was no court house within 50 kilometres of the local police station.⁵⁴⁰ A clerk of the court at a Magistrates Court in a rural area commented on this particular reason for using justices of the peace to issue summonses and warrants.⁵⁴¹

Presently, Justices of the Peace (Magistrates Court and Qualified) within the Court system would exercise these powers frequently and in all localities.

Those outside the system, in country areas, are also called upon regularly where the availability of Court staff is limited or non-existent.

⁵³⁵ Submission 14.

⁵³⁶ Submission 38.

⁵³⁷ Submission 50.

⁵³⁸ Submissions 1A (IP), 20 (IP), 29 (IP), 88 (IP), 89 (IP), 91 (IP), 93 (IP), 97 (IP).

⁵³⁹ Submissions 20 (IP), 22 (IP), 29 (IP), 51 (IP), 93 (IP), 97 (IP).

⁵⁴⁰ Submission 103 (IP).

⁵⁴¹ Submission 114 (IP).

5. OTHER JURISDICTIONS⁵⁴²

(a) Australian Capital Territory

A justice of the peace is not generally authorised to issue a summons or a warrant.⁵⁴³ The *Magistrates Court Act 1930* (ACT) confers jurisdiction on magistrates and registrars to issue summonses and warrants under that Act.⁵⁴⁴ As far as the Commission is aware, most Acts restrict the power to issue a search warrant to a magistrate.⁵⁴⁵

(b) New South Wales

A justice of the peace has the power under the *Justices Act 1902* (NSW) to issue a summons for the appearance of a person charged with an indictable offence⁵⁴⁶ or an offence that is punishable on summary conviction.⁵⁴⁷ Alternatively, a justice may, in relation to both types of offences, issue a warrant in the first instance for the apprehension of a person.⁵⁴⁸

A justice of the peace may also issue a warrant for the apprehension of a person who

⁵⁴² In the following discussion, the Commission has confined its comments to legislation in the particular jurisdiction that confers power on a justice of the peace to issue summonses and warrants. It should be borne in mind that justices of the peace also have powers with respect to issuing warrants under some Commonwealth Acts: see p 94 of this Report.

⁵⁴³ Under s 31(2) of the *Prisoners (Interstate Transfer) Act 1993* (ACT) a justice of the peace may, in certain circumstances, issue a warrant to order the return to a participating State of a person who has attempted to escape. This Act is, however, part of a national scheme for the transfer of prisoners between the States and Territories: see *Halsbury's Laws of Australia* at para 335-1255. Similar provisions to s 31(2) of the *Prisoners (Interstate Transfer) Act 1993* (ACT) are found in the legislation of all other States and Territories, although, in Victoria, the power to issue a warrant in these circumstances is conferred on the Magistrates' Court, rather than on a justice of the peace. See the *Prisoners (Interstate Transfer) Act 1982* (NSW) s 32(2); the *Prisoners (Interstate Transfer) Act* (NT) s 30(2); the *Prisoners (Interstate Transfer) Act 1982* (Qld) s 31(2); the *Prisoners (Interstate Transfer) Act 1982* (SA) s 32(2); the *Prisoners (Interstate Transfer) Act 1982* (Tas) s 30(2); the *Prisoners (Interstate Transfer) Act 1983* (Vic) s 32(2); and the *Prisoners (Interstate Transfer) Act 1983* (WA) s 30(2).

⁵⁴⁴ *Magistrates Court Act 1930* (ACT) s 12(1).

⁵⁴⁵ See, for example, the *Children's Services Act 1986* (ACT) s 69P(1); the *Crimes Act 1900* (ACT) ss 349AA (definition of "issuing officer"), 349E; the *Drugs of Dependence Act 1989* (ACT) s 187(2); the *Firearms Act 1996* (ACT) s 77(1); and the *Food Act 1992* (ACT) s 54(1).

⁵⁴⁶ *Justices Act 1902* (NSW) s 24.

⁵⁴⁷ *Justices Act 1902* (NSW) s 60.

⁵⁴⁸ *Justices Act 1902* (NSW) ss 23, 59.

has not appeared in response to a summons.⁵⁴⁹

However, the *Search Warrants Act 1985* (NSW) generally restricts the issuing of search warrants to an “authorised justice”. The term “authorised justice” is defined to mean:⁵⁵⁰

- (a) a Magistrate, or
- (b) a justice of the peace who is a Clerk of a Local Court or the registrar of the Drug Court, or
- (c) a justice of the peace who is employed in the Department of Courts Administration and who is declared (whether by name or by reference to the holder of a particular office), by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act.

The effect of this definition is that an ordinary justice of the peace may not issue a search warrant to which the *Search Warrants Act 1985* (NSW) applies.

(c) Northern Territory

A justice of the peace has the power under the *Justices Act* (NT) to receive a complaint and issue a summons in relation to a simple offence,⁵⁵¹ and to receive an information and issue a summons in relation to an indictable offence.⁵⁵² Alternatively, a justice of the peace may, in relation to both types of offences, issue a warrant in the first instance for the apprehension of a person.⁵⁵³

A justice of the peace may also issue a warrant for the apprehension of a person who has not appeared in response to a summons.⁵⁵⁴

Other Acts also authorise a justice of the peace to issue search warrants.⁵⁵⁵

⁵⁴⁹ *Justices Act 1902* (NSW) s 66.

⁵⁵⁰ *Search Warrants Act 1985* (NSW) s 3.

⁵⁵¹ *Justices Act* (NT) ss 49, 57.

⁵⁵² *Justices Act* (NT) ss 101, 104.

⁵⁵³ *Justices Act* (NT) ss 58(2), 103.

⁵⁵⁴ *Justices Act* (NT) ss 58(3), 105.

⁵⁵⁵ See, for example, the *Police Administration Act* (NT) ss 117, 120B; and the *Consumer Affairs and Fair Trading Act* (NT) s 20(3).

(d) South Australia

The making of a complaint and the issuing of a summons are governed by the *Summary Procedure Act 1921* (SA). A justice of the peace has the power to issue a summons under that Act.⁵⁵⁶ However, as a result of an amendment in 1992, section 57(1) of that Act now provides that:

When a complaint has been made and filed in the Court, the Court must, subject to subsection (2), issue a summons for the appearance of the defendant.

It has been held that this section now makes the issuing of a summons mandatory once a complaint has been made and filed in the court, and that a justice of the peace no longer has any discretion with respect to the issue of the summons.⁵⁵⁷ The following reason has been given for this change:⁵⁵⁸

The change in the legislation, in my view, reflects an intention on the part of the legislature to remove the discretion vested in the justice of the peace and overcome any difficulties which may have been encountered under the previous Act.

A justice of the peace also has the power to issue search warrants under a number of Acts.⁵⁵⁹

(e) Tasmania

A justice of the peace may issue a summons under the *Justices Act 1959* (Tas)⁵⁶⁰ and under certain other Acts.⁵⁶¹

Justices of the peace have jurisdiction under a number of Acts to issue warrants. Under the *Justices Act 1959* (Tas), a justice of the peace may issue a warrant of

⁵⁵⁶ *Summary Procedure Act 1921* (SA) ss 49, 57. S 7A(2) of the *Magistrates Court Act 1991* (SA) provides that, where there is no magistrate available to constitute the Court, the Court may be constituted by two justices or a special justice.

⁵⁵⁷ *Miller v Police* (1997) 67 SASR 484 at 488.

⁵⁵⁸ *Id* at 489.

⁵⁵⁹ See, for example, the *Drugs Act 1908* (SA) s 36; the *Petroleum (Submerged Lands) Act 1982* (SA) s 137D; the *Supported Residential Facilities Act 1992* (SA) s 22(2), (3); the *Taxation (Reciprocal Powers) Act 1989* (SA) s 7(2); and the *Wilderness Protection Act 1992* (SA) s 15(6).

⁵⁶⁰ *Justices Act 1959* (Tas) ss 23(a), 32(a).

⁵⁶¹ See, for example, the *Maintenance Act 1967* (Tas) s 114; and the *Poisons Act 1971* (Tas) s 77.

apprehension in the first instance⁵⁶² and a warrant of apprehension for a person already summoned.⁵⁶³

A number of Acts authorise justices of the peace to issue search warrants in specific circumstances.⁵⁶⁴ Under the *Search Warrants Act 1997* (Tas), a justice of the peace has a more general power to issue a warrant to search premises in any case where he or she is satisfied by information on oath that there is, or there will be within the next 72 hours, any “evidential material”⁵⁶⁵ at the premises.⁵⁶⁶ The *Search Warrants Act 1997* (Tas) provides for an application for a search warrant to be made to a justice of the peace in person or by telephone, telex, facsimile or other electronic means.⁵⁶⁷

(f) Victoria

A justice of the peace does not have the power to issue a summons or a warrant. The *Magistrates’ Court Act 1989* (Vic) provides that:⁵⁶⁸

Unless the context otherwise requires, any reference in any Act (other than this Act or the *Evidence Act 1958*) or in any subordinate instrument to a justice of the peace is to be taken to refer to a magistrate.

Under the *Magistrates’ Court Act 1989* (Vic), criminal proceedings are commenced by filing a “charge”.⁵⁶⁹ A registrar must, if satisfied that the charge discloses an offence known to law, issue either a summons to answer the charge or, if certain conditions are

⁵⁶² *Justices Act 1959* (Tas) s 32(b).

⁵⁶³ *Justices Act 1959* (Tas) s 33. A justice of the peace may also issue a warrant under s 59 of the *Alcohol and Drug Dependency Act 1968* (Tas).

⁵⁶⁴ See, for example, the *Child Welfare Act 1960* (Tas) s 76; the *Health Complaints Act 1995* (Tas) s 47; the *National Parks and Wildlife Act 1970* (Tas) s 42(9); and the *Vocational Education and Training Act 1994* (Tas) s 70.

⁵⁶⁵ The term “evidential material” is defined in s 3 of the *Search Warrants Act 1997* (Tas) to mean “a thing relevant to an offence, including such a thing in electronic form”.

⁵⁶⁶ An issuing officer may issue a search warrant: *Search Warrants Act 1997* (Tas) s 5. An issuing officer is defined to mean a justice of the peace, but does not include a magistrate: *Search Warrants Act 1997* (Tas) s 3. The *Search Warrants Act 1997* (Tas) is not intended to limit or exclude the operation of other Acts that confer power to issue a search warrant: *Search Warrants Act 1997* (Tas) s 4.

⁵⁶⁷ *Search Warrants Act 1997* (Tas) ss 5, 15.

⁵⁶⁸ *Magistrates’ Court Act 1989* (Vic) Sch 8, cl 4.

⁵⁶⁹ *Magistrates’ Court Act 1989* (Vic) s 26.

satisfied, a warrant to arrest the defendant.⁵⁷⁰ For a “prescribed summary offence”,⁵⁷¹ a “prescribed person”⁵⁷² may also issue a summons.⁵⁷³ The *Magistrates’ Court Act 1989* (Vic) does not confer any power on a justice of the peace to issue a summons.

The issuing of warrants is generally restricted to registrars and magistrates. A search warrant may be issued only by a magistrate.⁵⁷⁴ Other warrants may be issued by a registrar or a magistrate.⁵⁷⁵ A remand warrant may be authorised by a “bail justice”.⁵⁷⁶

(g) Western Australia

Justices of the peace have the power to issue summonses and warrants under a number of Acts. In particular, a justice of the peace may issue a summons under section 52 of the *Justices Act 1902* (WA),⁵⁷⁷ and may issue a search warrant under section 711 of the *Criminal Code* (WA).⁵⁷⁸

In its Report on Courts of Petty Sessions, the Law Reform Commission of Western Australia considered whether the power of justices of the peace to issue warrants should be removed or limited.⁵⁷⁹ Referring to submissions made to it that search warrants and warrants of arrest should be issued only by stipendiary magistrates and judges, the Western Australian Commission observed that judges and magistrates are not as widely and readily available as justices of the peace.⁵⁸⁰ It also considered that the suggested change would place a significant burden on magistrates and judges.

⁵⁷⁰ *Magistrates’ Court Act 1989* (Vic) s 28(4), (5).

⁵⁷¹ These offences are prescribed by reg 802 of the *Magistrates’ Court General Regulations 1990* (Vic).

⁵⁷² A “prescribed person” is a member of the police force who has served two or more years: *Magistrates’ Court General Regulations 1990* (Vic) reg 801.

⁵⁷³ *Magistrates’ Court Act 1989* (Vic) s 30.

⁵⁷⁴ *Magistrates’ Court Act 1989* (Vic) s 57(5).

⁵⁷⁵ *Magistrates’ Court Act 1989* (Vic) s 57(4).

⁵⁷⁶ *Magistrates’ Court Act 1989* (Vic) s 57(6). See the discussion of this term at p 240 of this Report.

⁵⁷⁷ This section is the equivalent of s 53(1) of the *Justices Act 1886* (Qld).

⁵⁷⁸ This section is similar to s 679 of the *Criminal Code* (Qld), which is set out in part at p 89 of this Report.

⁵⁷⁹ Law Reform Commission of Western Australia, *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1986) at para 2.24.

⁵⁸⁰ *Ibid.*

Consequently, the Commission did not recommend that any changes be made to the existing powers of justices of the peace to issue warrants.⁵⁸¹

The Justice of the Peace Review Committee in Western Australia also recommended that the power of justices of the peace to issue search warrants should not be removed.⁵⁸² Although the Committee acknowledged that there had been problems with the issuing of search warrants by justices of the peace, it considered that more intensive training should overcome these problems.⁵⁸³

6. DISCUSSION PAPER

(a) The need for justices of the peace to issue summonses and warrants

There was a widely held view among respondents to the Issues Paper that there is a need for justices of the peace to be able to issue summonses and warrants, especially in rural and remote communities, and where urgent action is required outside normal business hours.⁵⁸⁴ A large number of respondents considered the availability of justices of the peace to be an advantage,⁵⁸⁵ especially after hours⁵⁸⁶ or for urgent matters.⁵⁸⁷ It was suggested that the availability of justices of the peace enabled police to obtain summonses and warrants more quickly.⁵⁸⁸

581 Ibid.

582 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 30.

583 Ibid.

584 Submissions 1A (IP), 3 (IP), 5 (IP), 6 (IP), 8 (IP), 10 (IP), 11 (IP), 19 (IP), 21 (IP), 22 (IP), 30 (IP), 31 (IP), 33 (IP), 36 (IP), 38 (IP), 40 (IP), 43 (IP), 49 (IP), 50 (IP), 51 (IP), 53 (IP), 54 (IP), 57 (IP), 60 (IP), 61 (IP), 62 (IP), 63 (IP), 67 (IP), 69 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 87 (IP), 88 (IP), 91 (IP), 92 (IP), 93 (IP), 95 (IP), 96 (IP), 97 (IP), 98 (IP), 103 (IP), 105 (IP), 117 (IP), 120 (IP), 121 (IP).

585 Submissions 10 (IP), 33 (IP), 39 (IP), 41 (IP), 43 (IP), 50 (IP), 53 (IP), 55 (IP), 60 (IP), 93 (IP), 97 (IP), 103 (IP), 117 (IP).

586 Submissions 1A (IP), 6 (IP), 9 (IP), 19 (IP), 20 (IP), 21 (IP), 29 (IP), 30 (IP), 33 (IP), 36 (IP), 43 (IP), 50 (IP), 51 (IP), 53 (IP), 54 (IP), 62 (IP), 63 (IP), 67 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 93 (IP), 116A (IP).

587 Submissions 3 (IP), 5 (IP), 6 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP).

588 Submissions 1 (IP), 6 (IP), 8 (IP), 38 (IP), 51 (IP), 60 (IP), 62 (IP), 63 (IP), 70 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 94 (IP).

Other respondents emphasised the fact that, in some rural and remote communities, the availability of justices of the peace is especially important as there is no available magistrate.⁵⁸⁹

Although several respondents thought that a greater use of technology could reduce the need for justices of the peace to issue summonses and warrants,⁵⁹⁰ other respondents expressed the view that, if applications were required to be made to magistrates by means of technology, rather than being able to be made to a justice of the peace in person, the number of magistrates would have to be increased dramatically.⁵⁹¹ As one respondent observed:⁵⁹²

Doing away with Justices of the Peace is not going to lessen the need to have ... Warrants or Summonses being issued. This will only increase over the years to come rather than diminish. Even technology such as fax machines can only help in processing paper work, not in answering questions asked about the Search Warrant, etc ...

The Queensland Police Service was of the view that, despite recent legislative changes, there was still an important role to be served by justices of the peace in this area.⁵⁹³

Whilst access to a Magistrate and a Clerk of the Court may be reasonably simple in metropolitan and larger areas it is not so possible in remote areas of the State. For these reasons it is imperative that Justices of the Peace retain the power to issue summonses and warrants.

Technology and legislative change may reduce the need for Justices of the Peace to fulfil this function, however, availability of Justices of the Peace at all times is the greatest perceived advantage under the current system.

In the Discussion Paper, the Commission considered, in particular, the effect that the introduction of the notice to appear procedure under the *Police Powers and Responsibilities Act 1997 (Qld)*⁵⁹⁴ was likely to have on the need for justices of the peace to be able to issue summonses. Although the Commission thought that the need might not be as great as it once was, it did not believe that it would be possible for magistrates to issue all the summonses that are required.⁵⁹⁵ Consequently, the

⁵⁸⁹ Submissions 33 (IP), 40 (IP), 43 (IP).

⁵⁹⁰ Submissions 7 (IP), 19 (IP), 30 (IP), 39 (IP), 60 (IP), 94 (IP).

⁵⁹¹ Submissions 41 (IP), 87 (IP), 117 (IP).

⁵⁹² Submission 28 (IP).

⁵⁹³ Submission 121 (IP).

⁵⁹⁴ See pp 83-84 of this Report.

⁵⁹⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 91.

Commission considered that there was still a need for justices of the peace to be able to issue summonses - certainly those who are employed at Magistrates Courts.⁵⁹⁶

The Commission expressed the view that, if in the future the practice of issuing summonses fell entirely into disuse, it would be appropriate for the power to be removed. However, the Commission was concerned that, until that point is reached, the removal from justices of the peace of the power to issue summonses could be a cause of unnecessary inconvenience to those seeking the issue of a summons.⁵⁹⁷

The need for justices of the peace to be able to issue warrants seemed to the Commission to be even clearer.⁵⁹⁸ Some Acts provide for warrants to be issued by telephone or other similar means.⁵⁹⁹ However, that is authorised on a case by case basis; there is no provision of general application authorising all warrants to be issued in this way. Consequently, there are still many types of warrants that may be issued only in person. For this reason, the Commission considered the availability of people who are authorised to issue warrants to be of considerable importance.⁶⁰⁰

The Commission noted that it is the policy of the Queensland Police Service for officers to seek a warrant from a justice of the peace employed at a Magistrates Court where practicable to do so.⁶⁰¹ However, the Commission considered that it might not be practicable to do so where the need for a warrant arose out of hours and Court staff could not easily be contacted, or where there was no court house within a reasonable distance of the officer seeking the warrant. The Commission was therefore of the view that there is a need for justices of the peace, including justices of the peace from the general community, to be able to issue warrants.⁶⁰²

(b) Appropriateness of the role

A number of submissions received by the Commission in response to the Issues Paper addressed the question of whether the issuing of summonses and warrants was an appropriate role to be performed by justices of the peace.

The main advantages suggested as justifying the retention of this role were identified

596 Ibid.

597 Ibid.

598 Id at 92.

599 See p 92 of this Report.

600 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 92.

601 Ibid.

602 Ibid.

as:⁶⁰³

- the availability of justices of the peace, especially after hours and in remote communities where there is no available magistrate;⁶⁰⁴
- cost effectiveness;⁶⁰⁵
- the fact that the use of justices of the peace in this role reduces the workload of magistrates and court staff;⁶⁰⁶
- the independence that justices of the peace bring to this role;⁶⁰⁷
- the local knowledge that justices of the peace bring to this role.⁶⁰⁸ In particular, the Indigenous Advisory Council considered that the knowledge of a local justice of the peace and, in particular, the justice's knowledge of the local culture, could lead to decisions that were more appropriate and more accepted by the community;⁶⁰⁹
- that having summonses and warrants issued by justices of the peace rather than by magistrates avoided the potential conflicts of interest that could arise if a matter subsequently came on for hearing before the magistrate who had issued the summons or warrant.⁶¹⁰

On the other hand, some respondents to the Issues Paper expressed some reservations about the appropriateness of having summonses and warrants issued by justices of the peace. The main disadvantages were identified as:⁶¹¹

603 See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 86-91.

604 Id at 86.

605 Id at 87.

606 Ibid.

607 Ibid.

608 Id at 87-88.

609 Submission 112 (IP).

610 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 88.

611 Id at 88-90.

- lack of expertise.⁶¹² This lack of expertise was attributed by some respondents⁶¹³ to the fact that justices of the peace are seldom used in this role, and therefore lack experience in dealing with applications.⁶¹⁴ Other respondents attributed it, at least in part, to a lack of training.⁶¹⁵

The Criminal Justice Commission advised that it had, since its inception in 1989, received a number of complaints about police officers obtaining from justices of the peace search warrants that were vexatious and/or unfounded:⁶¹⁶

In some of these cases, the complaint (used to support the application for the warrant) simply contains a statement to the following effect:

“Confidential and reliable information has been obtained that the resident of the premises is in possession of ...”

- compliance.⁶¹⁷ Several respondents expressed concerns about justices of the peace being used to “rubber stamp” warrants or being “steamrolled”.⁶¹⁸

In the Discussion Paper, the Commission acknowledged that, given the urgency that often attaches to the issuing of warrants, it is important that there are sufficient numbers of people who are authorised to issue them. On the other hand, the Commission recognised that it is equally important that the people who are authorised to issue warrants are sufficiently qualified to be able to exercise this significant power properly.⁶¹⁹

(c) Justices of the peace who should be authorised to issue a summons or a warrant

The Commission initially considered whether the issuing of warrants should be restricted to justices of the peace (magistrates court). However, the Commission decided that, as many justices of the peace (magistrates court) are members of staff

⁶¹² Id at 89.

⁶¹³ Submissions 60 (IP), 65 (IP), 91 (IP).

⁶¹⁴ Submissions 30 (IP), 35 (IP).

⁶¹⁵ Submissions 36 (IP), 38 (IP), 53 (IP), 54 (IP), 113 (IP).

⁶¹⁶ Submission 113 (IP).

⁶¹⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 89.

⁶¹⁸ Submissions 38 (IP), 39 (IP), 70 (IP).

⁶¹⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 92.

at Magistrates Courts, this approach would be too restrictive, especially in those areas where there is no local court house.⁶²⁰

The Commission also considered whether a hierarchical approach could be adopted, whereby justices of the peace (qualified) could issue warrants, but only if a justice of the peace (magistrates court) were not available. However, because of the relatively limited numbers of justices of the peace (magistrates court), the Commission considered that it would be futile to recommend a hierarchy when, in some cases, there would be limited availability of justices of the peace (magistrates court).⁶²¹ The Commission also expressed the view that, if justices of the peace (qualified) are to be able to issue warrants at all, it will be necessary for them to be trained to the same standard, in that respect, as justices of the peace (magistrates court). For these reasons, the Commission did not favour a hierarchical approach in relation to the issuing of warrants.⁶²²

Consequently, the Commission formed the view that the power to issue warrants should be able to be exercised by justices of the peace (magistrates court) and justices of the peace (qualified). In both cases, the Commission considered it important that they receive adequate training in relation to the exercise of the power to issue warrants, both prior to appointment and on an ongoing basis.⁶²³

The Commission was of the general view that the same considerations would apply in relation to the issuing of summonses.⁶²⁴

The Commission's preliminary recommendation was therefore that justices of the peace (magistrates court) and justices of the peace (qualified) should retain their powers to issue summonses and warrants.⁶²⁵

620 Ibid.

621 Ibid.

622 Ibid.

623 Id at 92-93.

624 Id at 93.

625 Id at 95.

(d) Justices of the peace who should not be authorised to issue a summons or a warrant

(i) An old system justice of the peace

Old system justices of the peace are presently authorised to issue summonses and warrants.⁶²⁶ The Commission observed that, unlike justices of the peace (magistrates court) and justices of the peace (qualified), old system justices of the peace have not been required to attend any training or pass an examination in order to qualify for appointment. The Commission was therefore of the view that it was undesirable that old system justices of the peace should have the power to issue summonses or warrants.⁶²⁷

The Commission's preliminary recommendation was that old system justices of the peace should not have the power to issue summonses or warrants.⁶²⁸

(ii) A justice of the peace who is a member or an employee of the Queensland Police Service

The Commission expressed the view that it is important that the power to issue a summons or a warrant should be exercised only by a person who is independent of the Queensland Police Service.⁶²⁹ The Commission agreed with the view expressed by the Criminal Justice Commission in its submission in response to the Issues Paper⁶³⁰ that the exercise of these powers should not simply be the subject of Queensland Police Service policy.⁶³¹

The Commission's preliminary recommendation was that justices of the peace who are members of the Queensland Police Service or who are employed by the Queensland Police Service should not have the power to issue a summons or a warrant for a member of the Police Service.⁶³²

⁶²⁶ See pp 84 and 92 of this Report.

⁶²⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 93.

⁶²⁸ *Id* at 95.

⁶²⁹ *Id* at 93.

⁶³⁰ Submission 113 (IP).

⁶³¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 93.

⁶³² *Id* at 95.

(e) Means by which an application for a search warrant may be made

Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) enables an application for a “prescribed authority” - in this case, a search warrant under section 28 of that Act - to be made by means of the telephone or another similar facility.⁶³³ Although the Commission was generally of the view that justices of the peace should retain the power to issue search warrants, the Commission did not consider it desirable that justices of the peace should be able to hear an application for a search warrant under the *Police Powers and Responsibilities Act 1997* (Qld) by telephone or other similar facility.⁶³⁴

The Commission expressed the view that, if it were necessary to use the telephone or other similar facility to apply for a search warrant, the application should be made to a magistrate. In the Commission’s view, magistrates bring a greater expertise to the issues involved in issuing search warrants, and are likely to be more experienced in hearing applications for them by telephone or other similar means.⁶³⁵ The Commission also considered that, once it becomes necessary to make an application by one of these means, the general availability of justices of the peace does not carry the same weight as it does in relation to the exercise of powers that can be exercised only in person, for example, attending a police interview of a juvenile.⁶³⁶

The Commission observed that section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) imposes on both the person seeking the warrant and the person issuing the warrant a number of procedural requirements that do not apply when a warrant is being sought and issued in person.⁶³⁷

- The person issuing the search warrant must, if it is not reasonably practicable to send a copy of the warrant to the police officer by facsimile, tell the police officer what the terms of the warrant are and the date and time the warrant was issued.⁶³⁸

⁶³³ See pp 91-92 of this Report.

⁶³⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 93.

⁶³⁵ Magistrates already have the power under a number of Acts to hear applications for search warrants by telephone or other means. See notes 498-500 of this Report in relation to the applications for various search warrants that may be made to magistrates by telephone or other means.

⁶³⁶ See Chapter 7 of this Report.

⁶³⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 94. S 129 of the *Police Powers and Responsibilities Act 1997* (Qld) is set out in full at pp 91-92 of this Report.

⁶³⁸ *Police Powers and Responsibilities Act 1997* (Qld) s 129(6).

- The police officer must, at the first reasonable opportunity, send the person who has issued the search warrant the sworn application for the warrant and, if the police officer completed a prescribed authority form, the completed prescribed authority form.⁶³⁹
- On receiving these documents, the person who issued the search warrant must attach them to the prescribed authority.⁶⁴⁰

The Commission considered it more appropriate for the requirements imposed on the person issuing a warrant pursuant to section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) to be carried out by a magistrate than by a justice of the peace. In the Commission's view, given that the documentation supporting the application must be sent to the person who has issued the warrant, there would be more control over the documentation if the number of people eligible to issue a warrant by these means were relatively restricted.⁶⁴¹ The Commission also considered that magistrates are more likely than justices of the peace to have available to them the resources for processing the relevant documentation and the facilities for storing any documentation.⁶⁴²

Further, given that most Acts that enable a search warrant to be issued by telephone or other similar means restrict the exercise of that power to a magistrate, the Commission believed that permitting a justice of the peace to issue a search warrant under section 28 of the *Police Powers and Responsibilities Act 1997* (Qld) by these means could cause some confusion in relation to the manner in which application might be made for different types of search warrants.⁶⁴³

For these reasons, the Commission expressed the view that justices of the peace should not be authorised by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) to issue a search warrant by telephone or other similar means.⁶⁴⁴

Although the Commission was not aware of any Acts other than the *Police Powers and Responsibilities Act 1997* (Qld) that authorised a justice of the peace to hear an application for a search warrant by telephone or other similar means, it was generally of the view that, for the reasons expressed above, justices of the peace should not have the power to hear any application for a search warrant or issue any search

⁶³⁹ *Police Powers and Responsibilities Act 1997* (Qld) s 129(8).

⁶⁴⁰ *Police Powers and Responsibilities Act 1997* (Qld) s 129(9).

⁶⁴¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 94.

⁶⁴² *Ibid.*

⁶⁴³ *Id* at 94-95.

⁶⁴⁴ *Id* at 95.

warrant by those means.⁶⁴⁵

Consequently, the Commission made the following preliminary recommendations:⁶⁴⁶

- The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that, in exercising any power to issue a search warrant, a justice of the peace is not authorised to hear the application by telephone or similar means or issue the search warrant by telephone or similar means.
- The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that the abovementioned restriction in relation to search warrants is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that restriction.⁶⁴⁷

7. SUBMISSIONS

(a) Justices of the peace who should be authorised to issue a summons or a warrant

Twenty-five submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that justices of the peace (magistrates court) and justices of the peace (qualified) should retain their powers to issue summonses and warrants. All of these respondents agreed with the Commission's preliminary recommendation.⁶⁴⁸

One respondent was of the view that the availability of justices of the peace after hours, especially in remote areas, was an important reason why justices of the peace should retain these powers.⁶⁴⁹

(b) Justices of the peace who should not be authorised to issue a summons or a warrant

⁶⁴⁵ Ibid.

⁶⁴⁶ Id at 96.

⁶⁴⁷ For a similar provision, see s 29(7) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is set out at p 13 of this Report.

⁶⁴⁸ Submissions 6, 7, 8, 9, 10, 13, 14, 18, 21, 22, 23, 24, 25, 26, 31, 33, 34, 38, 40, 44, 45, 47, 53, 58, 59.

⁶⁴⁹ Submission 38.

(i) An old system justice of the peace

Twenty-three submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that old system justices of the peace should not have the power to issue summonses or warrants. Twenty-two of these respondents agreed with the Commission's preliminary recommendation.⁶⁵⁰

Only one respondent disagreed with the Commission's preliminary recommendation.⁶⁵¹

(ii) A justice of the peace who is a member or an employee of the Queensland Police Service

Twenty-three submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that justices of the peace who are members or employees of the Queensland Police Service should not have the power to issue a summons or a warrant for a member of the Police Service. Twenty-two of these respondents agreed with the Commission's preliminary recommendation.⁶⁵²

Several of these respondents commented on the conflict of interest that could arise if a justice of the peace who was a police officer exercised these powers.⁶⁵³ In particular, a justice of the peace (qualified) who is a member of the Queensland Police Service commented:⁶⁵⁴

I agree with these five recommendations. I have been a Justice of the Peace for twenty-four of the twenty-five years I have been a member of the Police Service. I have never considered issuing a summons or warrant for a fellow member of the Police Service. I would be very surprised if a fellow member of the Service ever asked me to consider a summons or warrant, it could clearly be perceived as a conflict of interest.

As Members of the Commission would be well aware, the Queensland Police Service has issued very clear instructions outlining the circumstances where members of the Queensland Police Service who are serving Justices of the Peace should refrain from exercising the JP function.

⁶⁵⁰ Submissions 6, 7, 8, 9, 10, 14, 18, 21, 22, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 58, 59.

⁶⁵¹ Submission 53. This respondent advised that, since being appointed as a justice of the peace in 1975, he had never issued a summons or a warrant.

⁶⁵² Submissions 6, 7, 8, 9, 10, 14, 18, 21, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 53, 58, 59.

⁶⁵³ Submissions 14, 23, 25, 53.

⁶⁵⁴ Submission 25.

Only one submission expressed a different view. That respondent, although not commenting on this specific preliminary recommendation, expressed the general view that a justice of the peace who is a police officer should not be precluded from exercising the powers of a justice of the peace.⁶⁵⁵

(c) Means by which an application for a search warrant may be made

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should be amended to provide that, in exercising any power to issue a search warrant, a justice of the peace is not authorised to hear the application by telephone or similar means or to issue the search warrant by telephone or similar means. Twenty of these respondents agreed with the Commission's preliminary recommendation,⁶⁵⁶ although one of these respondents - a justice of the peace (qualified) who is a member of the Queensland Police Service - qualified his support for this preliminary recommendation.⁶⁵⁷

A word of caution regarding the future of the recommendations re the issue of search warrants by telephone or facsimile. I am sure Commission Members are well aware of the need to occasionally seek a warrant under such conditions. This community need must be balanced against possible abuse or mis-use. I would always argue that emergency warrants must be available, in emergencies, and someone must be authorised to issue them. Magistrates are not **always** available at **all** times. [original emphasis]

Two respondents expressly disagreed with the Commission's preliminary recommendation.⁶⁵⁸ One of these respondents considered that justices of the peace (qualified) and justices of the peace (magistrates court) should be able to issue telephone warrants as it provides a greater number of authorised persons and is more efficient for the police.⁶⁵⁹

I feel that in certain circumstances this could be actioned by a JP (Qual) or JP (Mag Ct). Example: I live in Collinsville and part of the Bowen police district includes a township of Mount Coolon, which is approx 120 km or two hours travel from Collinsville. Should a police officer be in Mount Coolon on a visit (there are no officers stationed there) he could have an urgent need for a search warrant. A "phone warrant" by a Justice of the Peace would be a quick and efficient way to allow the police officer to continue his investigations.

The "phone warrant" would at all times be subject to all the "checks and balances" currently in place.

⁶⁵⁵ Submission 22.

⁶⁵⁶ Submissions 6, 7, 8, 9, 10, 21, 22, 23, 24, 25, 26, 34, 38, 40, 44, 45, 47, 53, 58, 59.

⁶⁵⁷ Submission 25.

⁶⁵⁸ Submissions 14, 56.

⁶⁵⁹ Submission 14.

By allowing Justices of the Peace to have the power to authorise a “phone warrant”, a greater number of persons are available to police officers than if they could only contact a Magistrate.

Justices of the Peace (Qual) & (Mag Ct) have studied and trained to be appointed - I feel this should qualify them to handle “phone warrants”, where considered necessary.

Another respondent, although not expressly commenting on this preliminary recommendation, impliedly disagreed with it.⁶⁶⁰ That respondent stated that he did not wish to see any reduction in the powers of justices of the peace (qualified).

Twenty submissions received by the Commission in response to the Discussion Paper commented on the Commission’s preliminary recommendation that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that the restriction in relation to the issuing of search warrants by telephone or other similar means should apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that restriction. Nineteen of these respondents agreed with the Commission’s preliminary recommendation.⁶⁶¹

Only one respondent disagreed with this preliminary recommendation.⁶⁶²

8. THE COMMISSION’S VIEW

(a) Justices of the peace who should be authorised to issue a summons or a warrant

The Commission’s view on this issue remains unchanged. Justices of the peace (magistrates court) and justices of the peace (qualified) should retain the power to issue summonses and warrants. It is important, however, that they receive proper training for this role both before and after their appointment.

(b) Justices of the peace who should not be authorised to issue a summons or a warrant

(i) An old system justice of the peace

The Commission’s view on this issue remains unchanged. Given their lack of training, old system justices of the peace should not have the power to issue a

⁶⁶⁰ Submission 39.

⁶⁶¹ Submissions 6, 7, 8, 9, 10, 22, 23, 24, 25, 26, 34, 38, 40, 44, 45, 47, 53, 58, 59.

⁶⁶² Submission 14.

summons or a warrant.

(ii) A justice of the peace who is a member or an employee of the Queensland Police Service

The Commission's preliminary recommendation that justices of the peace who are members or employees of the Queensland Police Service should not have the power to issue a summons or a warrant for a member of the Police Service raises two further issues for consideration.

Firstly, if the Commission's preliminary recommendation is implemented, a justice of the peace who is a member or an employee of the Queensland Police Service will not be able to issue a summons for a "traffic adjudication matter".⁶⁶³ This would require a police officer to use the services of a justice of the peace external to the Police Service for the issuing of a summons for one of these matters.

The Commission has made informal inquiries of the Queensland Police Service in relation to the volume of summonses issued for traffic adjudication matters. Information provided to the Commission for the Metro North Region⁶⁶⁴ indicates that the number of traffic summonses issued for that region alone would be approximately 5,000 each year. It is, therefore, a matter of some convenience for the Queensland Police Service that officers are permitted to use justices of the peace employed by the Police Service for the issuing of these summonses.

Given the number of summonses that would be issued for these matters on a State-wide basis, the Commission accepts that, if a justice of the peace who is a member or an employee of the Queensland Police Service is not able to issue a summons for a traffic adjudication matter, there will be a resulting inconvenience for the Police Service.

However, as a matter of principle, the Commission does not accept that it is

⁶⁶³ See p 85 of this Report. Issuing a summons for a traffic adjudication matter is an exception to the general policy of the Queensland Police Service that a member of the Service should not issue a summons for another member of the Service. Summonses for traffic adjudication matters are issued for various offences under the *Transport Operations (Road Use Management) Act 1995* (Qld) and are commonly used where a person issued with an infringement notice elects to defend the notice. Prior to the commencement of the *Road Transport Reform Act 1999* (Qld), these offences were contained in the *Traffic Act 1949* (Qld). The *Road Transport Reform Act 1999* (Qld), which amends a number of Acts administered by the Minister for Transport and Minister for Main Roads, formed part of the adoption of the National Road Rules, which began operation on 1 December 1999. Among other things, the *Road Transport Reform Act 1999* (Qld) made a number of amendments to the *Traffic Act 1949* (Qld), including the relocation of numerous provisions from the *Traffic Act 1949* (Qld) to the *Transport Operations (Road Use Management) Act 1995* (Qld).

⁶⁶⁴ The Metro North Region covers the area north of the Brisbane River up to and including Sandgate and Petrie.

possible to distinguish between a summons issued for a traffic offence and a summons issued for any other type of offence. The Commission is of the view that, while it continues to be the law that a justice of the peace must exercise a discretion in relation to the issuing of a summons,⁶⁶⁵ the power to issue a summons - regardless of the nature of the offence - should be exercised only by a person who is independent of the Queensland Police Service.

Consequently, the Commission does not consider that any exception should be made to its preliminary recommendation in order to allow the present practice in relation to the issuing of summonses for traffic adjudication matters to continue. It may be that consideration should be given to an alternative means of proceeding in respect of some offences where the scope for the exercise of a discretion is minimal, for example, offences detected by the use of red light cameras or speed cameras. That question, however, is outside the terms of this reference.

Secondly, the terms of the Commission's preliminary recommendation in relation to a justice of the peace who is a member or an employee of the Queensland Police Service would still allow such a justice of the peace to issue a summons or a warrant for a person who is not a member of the Police Service, for example, for an inspector employed by a government agency.⁶⁶⁶

If a summons is issued by a member or an employee of the Queensland Police Service in respect of an offence where the prosecuting authority is some other government agency, there is, strictly speaking, no actual conflict of interest and duty. The same is true of a warrant that is issued by a member or an employee of the Police Service where it is an officer of some other government agency, rather than a police officer, who will be executing the warrant.

However, given that members of the Police Service are quite often in the position of applying for the issuing of a summons or a warrant, the Commission is concerned that, as a class, they might be thought to be less inclined than other justices of the peace to refuse such an application when it is made to them. Accordingly, the Commission is of the view that a person who is a member or an employee of the Queensland Police Service should not be able to issue a summons or a warrant, whether for a member of the Service or otherwise.

(iii) Other exclusions

⁶⁶⁵ See the discussion at p 99 of this Report in relation to the issuing of summonses in South Australia, where it is now mandatory for a summons to be issued if a complaint under the *Summary Procedure Act 1921* (SA) is filed in the Court.

⁶⁶⁶ See note 483 of this Report in relation to the various Acts under which a justice of the peace may issue a search warrant to authorise an inspector or an authorised person to enter certain residential premises.

Earlier in this chapter, the Commission referred to the effect of section 53(2) of the *Justices Act 1886* (Qld) and the reason for its introduction.⁶⁶⁷ In the Commission's view, the issuing of a summons by an employee of the prosecuting authority or by the solicitor, or an employee of the solicitor, of the prosecuting authority raises the same difficulty as discussed above in relation to the issuing of summonses for traffic adjudication matters by members of the Queensland Police Service.⁶⁶⁸

It is undoubtedly a considerable convenience for the authorities concerned that they are able to use a justice of the peace who is an employee to issue a summons that is being prosecuted by the relevant authority. However, this situation inevitably results in a conflict between the employee's duty as a justice of the peace and his or her interest as an employee of the authority.

It is important, given that a justice of the peace must exercise a discretion in issuing a summons, that a summons should not be issued by a justice of the peace who is associated with the prosecuting agency concerned or with the solicitors acting for the prosecuting agency. In the Commission's view, section 53(2) of the *Justices Act 1886* (Qld) should, therefore, be repealed.

At present, a similar situation can also arise in relation to the issuing of a search warrant. A justice of the peace who is an employee of a government agency is not excluded from issuing a search warrant for an inspector or authorised person who is employed by the same agency. For example, under the *Food Act 1981* (Qld), an authorised officer requires a warrant to enter residential premises to search for evidence of non-compliance with that Act.⁶⁶⁹ It is possible that an application for such a warrant could be made to a justice of the peace⁶⁷⁰ who is employed by the Health Department.

In the Commission's view, a justice of the peace who is an officer or employee of a government agency should not be able to issue a search warrant that is to be executed by a person who is an officer or employee of the same agency.⁶⁷¹

(c) Means by which an application for a search warrant may be made

⁶⁶⁷ See pp 82-83 of this Report.

⁶⁶⁸ See pp 115-116 of this Report.

⁶⁶⁹ *Food Act 1981* (Qld) s 28.

⁶⁷⁰ A justice of the peace is authorised to issue such a warrant: *Food Act 1981* (Qld) s 28(3).

⁶⁷¹ The Commission notes that s 71 of the *State Penalties Enforcement Act 1999* (Qld) specifically provides that a justice of the peace (magistrates court) who is employed by the State Penalties Enforcement Registry is not able to issue a search warrant under that section.

Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) presently enables a police officer to apply to a justice of the peace for a search warrant under section 28 of that Act by means of the telephone, facsimile, radio or another similar facility if it is impracticable to apply for the search warrant in person. The Commission is not aware of any other Acts that enable an application for a search warrant to be made to a justice of the peace by these means.⁶⁷²

In the Commission's view, magistrates bring a greater expertise than justices of the peace to the questions involved in the issuing of search warrants. Accordingly, the Commission believes that, once it is necessary to make an application for a search warrant by telephone, facsimile, radio or other similar means, it is more appropriate for the application to be made to a magistrate than to a justice of the peace.⁶⁷³ Further, the *Police Powers and Responsibilities Act 1997* (Qld) prescribes a detailed procedure for issuing a search warrant by any of these means.⁶⁷⁴ As noted earlier, section 129 of the Act requires the supporting documentation for the application to be sent to the person who issued the search warrant.⁶⁷⁵ In the Commission's view, by restricting the issuing of search warrants by these means to magistrates, it is possible to exercise greater control over this documentation.

The Commission also believes that there is the potential for confusion if justices of the peace are permitted under some legislation to issue search warrants by telephone, facsimile, radio or other similar means.⁶⁷⁶ A justice of the peace to whom an application for a search warrant under a particular Act is made might be unsure whether the particular search warrant is one that can be issued by any of these means or is one that must be issued in person. The Commission considers that magistrates are better placed than justices of the peace to be able check the relevant legislation when approached in relation to such a matter to ensure that they have the power in question.

The Commission therefore remains of the view that neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to issue

⁶⁷² See notes 498-500 of this Report in relation to a number of Acts that enable an application for a search warrant to be made by these means to a magistrate.

⁶⁷³ The Commission notes that there is a system in place whereby a "Duty Magistrate" is on call to deal with various matters that may be required to be heard by a magistrate outside normal court hours, including applications by police officers for warrants under the *Police Powers and Responsibilities Act 1997* (Qld): letter from Ms DM Fingleton, Chief Stipendiary Magistrate, to the Queensland Law Reform Commission dated 10 December 1999.

⁶⁷⁴ See s 129 of the *Police Powers and Responsibilities Act 1997* (Qld), which is set out at pp 91-92 of this Report.

⁶⁷⁵ See pp 109-110 of this Report.

⁶⁷⁶ At present, with the exception of the power to issue a search warrant under the *Police Powers and Responsibilities Act 1997* (Qld), the power to issue a search warrant by telephone, facsimile, radio or other similar means is generally restricted to a magistrate.

a search warrant by telephone, facsimile, radio or other similar means under section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) or any other Act.

The Commission is also of the view that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that the limitation proposed in relation to the issuing of a search warrant should apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that limitation.

9. RECOMMENDATIONS

The Commission makes the following recommendations:

- 6.1 Justices of the peace (magistrates court) and justices of the peace (qualified) should retain the power to issue summonses and warrants.**
- 6.2 An old system justice of the peace⁶⁷⁷ should not have the power to issue a summons or a warrant.**
- 6.3 A justice of the peace who is a member or an employee of the Queensland Police Service should not have the power to issue a summons or a warrant, whether for a member of the Service or otherwise.⁶⁷⁸**
- 6.4 Section 53(2) of the *Justices Act 1886* (Qld) should be repealed.⁶⁷⁹**
- 6.5 A justice of the peace who is an officer or employee of a government agency should not be able to issue a search warrant that is to be executed by a person who is an officer or employee of the same agency.**
- 6.6 Neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to issue a search warrant by telephone, facsimile, radio or other similar means under section 129 of the *Police***

⁶⁷⁷ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

⁶⁷⁸ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

⁶⁷⁹ See the discussion of s 53(2) of the *Justices Act 1886* (Qld) and the reason for its enactment at pp 82-83 of this Report.

Powers and Responsibilities Act 1997 (Qld) or under any other Act.

- 6.7** The *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should be amended to provide that the limitation proposed in Recommendation 6.6 is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that limitation.

CHAPTER 7

POLICE INTERVIEWS OF JUVENILE SUSPECTS

1. SOURCES OF POWER

(a) Introduction

Provisions dealing with the requirements of police interviews of juvenile suspects are found in the *Juvenile Justice Act 1992* (Qld), as well as in the *Police Powers and Responsibilities Act 1997* (Qld). Both Acts require the presence of a person from one of a number of specified categories. In this chapter, this person is referred to as an “interview friend”. Certain types of justices of the peace are included in the categories of possible interview friends specified in both Acts.

Since the commencement of the *Police Powers and Responsibilities Act 1997* (Qld) in April 1998, the provision in the *Juvenile Justice Act 1992* (Qld) is of limited effect.⁶⁸⁰ However, as several cases concerning section 9E of the *Juvenile Justice Act 1992* (Qld) have made important determinations about the obligations that must be fulfilled by an interview friend, that section is discussed below.

(b) *Juvenile Justice Act 1992* (Qld)

Section 9E of the *Juvenile Justice Act 1992* (Qld) provides:

- (1) In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement made or given to a police officer by the defendant when a child, unless the court is satisfied that there was present at the time and place the statement was made or given, a person mentioned in subsection (2).
- (2) The person required to be present is -
 - (a) a parent of the child; or
 - (b) a legal practitioner acting for the child; or
 - (c) a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
 - (d) a justice of the peace other than -
 - (i) a justice of the peace who is a member of the Queensland Police Service; or
 - (ii) a justice of the peace (commissioner for declarations); or

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See p 122 of this Report.

- (e) an adult nominated by the child.
- (3) Subsection (1) does not apply if -
 - (a) the prosecution satisfies the court that there was proper and sufficient reason for the absence of a person mentioned in subsection (2) at the time the statement was made or given; and
 - (b) the court considers that, in the particular circumstances, the statement should be admitted into evidence.
- (4) This section does not require that a police officer permit or cause to be present when a child makes or gives the statement a person whom the police officer suspects on reasonable grounds -
 - (a) is an accomplice of the child; or
 - (b) is, or is likely to become, an accessory after the fact;
 in relation to the offence or another offence under investigation.
- (5) This section does not limit the power of a court to exclude evidence from admission in a proceeding. [emphasis added]

(c) *Police Powers and Responsibilities Act 1997 (Qld)*

The *Police Powers and Responsibilities Act 1997 (Qld)* imposes certain requirements if a police officer wants to question a person in custody⁶⁸¹ as a suspect in relation to an indictable offence⁶⁸² and the police officer reasonably suspects the person is a child.⁶⁸³ In these circumstances, the Act prohibits a police officer from questioning the child unless.⁶⁸⁴

⁶⁸¹ S 94 of the *Police Powers and Responsibilities Act 1997 (Qld)* defines when a person is “in custody” for these purposes:

When is a person “in custody” for this part

- (1) A person is “**in custody**” for this part if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an offence.
- (2) However, a person is not in custody only because of subsection (1) if the officer is exercising any of the following powers -
 - (a) power conferred under any Act or law to detain and search the person; or
 - (b) power conferred under an Act to require the person to give information or answer questions.

⁶⁸² *Police Powers and Responsibilities Act 1997 (Qld)* s 93.

⁶⁸³ *Police Powers and Responsibilities Act 1997 (Qld)* s 97(1).

⁶⁸⁴ *Police Powers and Responsibilities Act 1997 (Qld)* s 97.

- before questioning starts, the police officer has, if practicable, allowed the child to speak to his or her interview friend in circumstances in which the interview will not be overheard; and
- an interview friend is present while the child is being questioned.

The *Police Powers and Responsibilities Act 1997* (Qld) defines the term “interview friend”, for a child, as:⁶⁸⁵

- a parent or guardian of the child; or
- a lawyer acting for the child; or
- a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
- if none of the above is available, a relative or friend of the child who is acceptable to the child; or
- in the case of an Aboriginal or a Torres Strait Islander child, if none of the above is available, a person whose name is included in a list kept by the Commissioner of Police;⁶⁸⁶
- if none of the above is available, a justice of the peace other than a justice of the peace who is a member of the Queensland Police Service or a justice of the peace (commissioner for declarations).⁶⁸⁷

Unlike section 9E of the *Juvenile Justice Act 1992* (Qld), the list of possible interview friends specified in the *Police Powers and Responsibilities Act 1997* (Qld) is hierarchical. Significantly, the *Police Powers and Responsibilities Act 1997* (Qld) provides that, to the extent of any inconsistency, that Act prevails over the provisions of another Act.⁶⁸⁸ Consequently, justices of the peace can no longer be asked to attend police interviews of juveniles who are in custody and suspected of having committed

⁶⁸⁵ *Police Powers and Responsibilities Act 1997* (Qld) Sch 3.

⁶⁸⁶ *Police Powers and Responsibilities Act 1997* (Qld) s 105.

⁶⁸⁷ See also s 29(5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which limits the powers of a justice of the peace (commissioner for declarations) to those of a commissioner for declarations, and s 29(7) of that Act, which has the effect that the limitation imposed by s 29(5) applies despite the provisions of any Act conferring powers on a justice of the peace unless the Act expressly excludes the operation of that subsection.

⁶⁸⁸ *Police Powers and Responsibilities Act 1997* (Qld) ss 8, 9, Sch 1.

an indictable offence⁶⁸⁹ unless no other person from the categories listed above is available.⁶⁹⁰

2. JUSTICES OF THE PEACE WHO MAY ACT AS AN INTERVIEW FRIEND

Under both the *Police Powers and Responsibilities Act 1997* (Qld) and the *Juvenile Justice Act 1992* (Qld), the role of attending a police interview of a juvenile suspected of having committed an indictable offence can be performed by a justice of the peace (qualified),⁶⁹¹ a justice of the peace (magistrates court)⁶⁹² or an old system justice of the peace.⁶⁹³

Both Acts expressly exclude a justice of the peace who is a member of the Queensland Police Service and a justice of the peace (commissioner for declarations) from performing this role.⁶⁹⁴

3. THE NATURE OF THE ROLE

The courts have held that, even when the formal legislative requirements have been met, there is still a discretion to exclude the statement of a child⁶⁹⁵ on the ground that there is doubt as to its voluntariness or fairness.

⁶⁸⁹ *Juvenile Justice Act 1992* (Qld) s 9E(1); *Police Powers and Responsibilities Act 1997* (Qld) s 93. See note 1056 of this Report in relation to the meaning of “indictable offence”.

⁶⁹⁰ The Commission notes that, whereas s 9E of the *Juvenile Justice Act 1992* (Qld) provides that a statement made otherwise than in compliance with that section is not generally admissible in evidence against the child, the effect of non-compliance with the requirements of s 97 of the *Police Powers and Responsibilities Act 1997* (Qld) is not stipulated in the latter Act, although s 7 of that Act provides that the Act does not affect the court’s discretion at common law to exclude evidence.

⁶⁹¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

⁶⁹² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1).

⁶⁹³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1). See the explanation of the Commission’s use of this term at pp 16-17 of this Report.

⁶⁹⁴ *Juvenile Justice Act 1992* (Qld) s 9E(2)(d)(i), (ii); *Police Powers and Responsibilities Act 1997* (Qld) Sch 3 (definition of “interview friend” para (b)(vi)).

⁶⁹⁵ The term “child” is defined in s 5 of the *Juvenile Justice Act 1992* (Qld) to mean a person who is under 17 years of age. There is provision in the Act for the age to be increased by one year by regulation: see s 6. The term “child” is defined in Sch 3 to the *Police Powers and Responsibilities Act 1997* (Qld) as a child within the meaning of the *Juvenile Justice Act 1992* (Qld).

In three recent cases the alleged admission of a young person has been held to be inadmissible because of inadequacies in the conduct of the justice of the peace who was present at the young person's interview. These cases all concerned section 9E of the *Juvenile Justice Act 1992* (Qld). However, the same considerations would also apply in relation to section 97 of the *Police Powers and Responsibilities Act 1997* (Qld).

In *R v C*,⁶⁹⁶ the Court of Appeal quashed the conviction of a juvenile, even though a justice of the peace was present when the juvenile was interviewed by the police. The Court commented adversely on the state of the justice of the peace who was present during the interview, and rejected the admissions made by the juvenile in her presence:⁶⁹⁷

So this was the justice of the peace: a "nervous wreck", annoyed at being called out, not understanding the rights of the suspect, and - as if that were not enough - found to be unreliable in giving an account of the events in question.

The most that could be said from this is that the requirements of s. 9E were formally complied with ... Just as it is necessary that a suspect be in a fit physical and mental condition to be interviewed, so it is necessary for a person present when a child is being interviewed to be in a fit physical and mental condition to act in that role, otherwise formal compliance with s. 9E will be little more than a solemn farce.

In *R v W*,⁶⁹⁸ the justice of the peace admitted during cross-examination that she had told the juvenile that "it would be best to co-operate with the police"; that "you will have to go through a record of interview with the police before you can be released"; and that "you could be charged with perjury if you don't tell the police the truth". The justice of the peace also gave evidence that she had told alleged juvenile offenders, "The best thing to do is to tell the truth and get it over with and then you can get out of here". When questioned as to her understanding of the role as an interview friend, the justice of the peace answered:

To see that the operations of the interview would come off without any trouble, no - that's not the way to put it. That nobody gets any preferences as to answers or questions ... I tell them that I'm not on anybody's side.

In *R v J*,⁶⁹⁹ a justice of the peace (qualified) was present while a juvenile was being interviewed by the police in respect of the death of a person who had been beaten to death. The investigating police officers, believing that the parents of the juvenile were unavailable, contacted the justice of the peace concerned in an effort to satisfy the requirements of the *Juvenile Justice Act 1992* (Qld). In a private conversation with the juvenile, which occurred before the commencement of the formal police interview, the

⁶⁹⁶ [1997] 2 Qd R 465.

⁶⁹⁷ Id at 471.

⁶⁹⁸ Unreported, McMurdo DCJ, District Court, Brisbane, 4 June 1997.

⁶⁹⁹ Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996.

justice of the peace made some comments to the juvenile in accordance with statements contained in the training manual.⁷⁰⁰

In the trial of the juvenile for murder, the admissions made by the juvenile when interviewed by the investigating police officers in the presence of the justice of the peace were held by the trial judge to be inadmissible because the Crown had failed to prove that the statements relied on were made voluntarily.⁷⁰¹ The trial judge, who accepted that the justice of the peace had “made every effort to fulfil the function that had been allotted to him, as he understood it”, thought that the justice of the peace had been confused about what he should say to the juvenile at the time of the private conversation and that this confusion had resulted in the juvenile’s misunderstanding of his rights when being questioned.⁷⁰² In particular, it was held that the juvenile had gleaned from his conversation with the justice of the peace that, if he failed to answer the questions during the interview he would not have another chance to give his account and that he would be in trouble if he did not give his account then and there.⁷⁰³ Even though, on the commencement of the police interview, the investigating officer warned the juvenile that he was not obliged to say anything, the trial judge held that the effect of the private conversation with the justice of the peace was not dispelled in the juvenile’s mind.⁷⁰⁴

A submission from a community legal service expressed a concern that, in its experience, justices of the peace from time to time actively encourage young people to participate in police interviews, rather than assisting them to make an informed choice about whether or not to participate.⁷⁰⁵

⁷⁰⁰ The relevant training manual gives the following advice to a justice of the peace who is acting as an “independent person” when a child under the age of seventeen is being questioned by the police (Department of Justice and Attorney-General, *Manual Two: A Manual for Queensland Justices of the Peace (Qualified)* (1993) at 22):

7. Explain that having you there to validate the record of interview will make it impossible to challenge that record in Court, if the answers are untrue or if the answers have been given as a result of police pressure.

The justice of the peace (qualified) gave evidence under cross-examination that he followed the wording of this item in the manual when explaining to the juvenile that he would be “validating the record of interview” (transcript, 4 June 1996 at 61-67).

⁷⁰¹ Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996 (transcript at 393). As a result of the trial judge’s ruling, the charge against the juvenile was withdrawn.

⁷⁰² Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996 (transcript at 394).

⁷⁰³ Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996 (transcript at 395).

⁷⁰⁴ Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996 (transcript at 397).

⁷⁰⁵ Submission 35.

The role of interview friend is undoubtedly a difficult one to carry out. Certainly, no assistance as to the required standard of conduct can be derived from the terms of the legislative provisions. Nevertheless, the role is an extremely important one. The significance of the role, both for the juvenile and for the broader community, was recognised by two respondents to the Issues Paper. One respondent noted:⁷⁰⁶

It is fundamental to the admissibility of a confession that it must have been made voluntarily, that it is without duress, intimidation, undue pressure or hope of advantage. A voluntary statement must not only be made without threat or inducement but must be made by a person who has been fully informed of their rights and is capable of understanding them and has the ability to use them.

The reason for the presence of an independent adult person witnessing an interview is to ensure that the statements are truly voluntary and fair procedures are followed.

The other respondent observed:⁷⁰⁷

When evidence is rejected by the court because of some technicality, or because a requirement relative to its collection has not been met, it is not just an indictment on the officer responsible for its collection but it can be an unjust penalty on the community, especially when an offender, be it a child or an adult, is discharged from the indictment due to an item of evidence not being accepted because of some technicality.

4. FREQUENCY OF ATTENDANCE

A number of submissions received by the Commission in response to the Issues Paper addressed the question of how often justices of the peace are called on to attend police interviews of juvenile suspects. Almost half of these submissions were from justices of the peace who said that they had never attended a police interview of a juvenile.⁷⁰⁸ Two of these respondents said that they had notified their local police station of their availability, but had not been called upon to attend.⁷⁰⁹

The submissions did not reveal any particular pattern in the attendance of justices of the peace at police interviews of juveniles, in relation to either frequency or location. In the experience of one respondent, “the use of a justice of the peace in these proceedings is very infrequent and usually occurs in rural areas”.⁷¹⁰ The Queensland Police Service observed that “minimal use is now made of justices of the peace in this

⁷⁰⁶ Submission 37 (IP).

⁷⁰⁷ Submission 7 (IP).

⁷⁰⁸ Submissions 9 (IP), 11 (IP), 30 (IP), 31 (IP), 34 (IP), 35 (IP), 36 (IP), 38 (IP), 39 (IP), 47 (IP), 53 (IP), 54 (IP), 57 (IP), 60 (IP), 66 (IP), 69 (IP), 89 (IP), 100 (IP), 108 (IP), 117 (IP), 123 (IP).

⁷⁰⁹ Submissions 35 (IP), 47 (IP).

⁷¹⁰ Submission 114 (IP).

role”,⁷¹¹ and suggested that this may be because justices of the peace are now placed last on the list of “interview friends”.⁷¹²

On the other hand, other submissions referred to attendance at interviews in Brisbane (“many interviews”),⁷¹³ Inala (“several times”),⁷¹⁴ Maroochydore,⁷¹⁵ Toowoomba,⁷¹⁶ Townsville,⁷¹⁷ and Collinsville (four interviews in the last four years).⁷¹⁸ One respondent reported that the local Juvenile Aid Bureau had advised that justices of the peace are in attendance at approximately 20 per cent of interviews of juveniles, with a parent present in the other 80 per cent.⁷¹⁹

5. OTHER JURISDICTIONS

Legislation in six jurisdictions - the Australian Capital Territory, the Commonwealth, New South Wales, the Northern Territory, South Australia and Victoria - provides that a child cannot be questioned in relation to an offence unless a person of a particular category is present and, in the case of the Commonwealth and Victoria, the child has had an opportunity to communicate with that person before the questioning begins.⁷²⁰ Justices of the peace are not specifically provided for in any of the categories of relevant people.

In Tasmania and Western Australia, legislation does not require the presence of an interview friend as such. However, legislation in those jurisdictions imposes other

⁷¹¹ Submission 121 (IP).

⁷¹² See p 122 of this Report in relation to the hierarchy of interview friends.

⁷¹³ Submission 88 (IP).

⁷¹⁴ Submissions 5, 50.

⁷¹⁵ Submission 1A (IP).

⁷¹⁶ Submission 40 (IP).

⁷¹⁷ Submission 61 (IP); submission 51.

⁷¹⁸ Submission 14.

⁷¹⁹ Submission 40 (IP).

⁷²⁰ See the *Children’s Services Act 1986* (ACT) s 30; the *Crimes Act 1914* (Cth) s 23K; the *Children (Criminal Proceedings) Act 1987* (NSW) s 13; the *Juvenile Justice Act* (NT) s 25; the *Summary Offences Act 1953* (SA) s 79A(1a); and the *Crimes Act 1958* (Vic) s 464E. In certain circumstances, these requirements can be dispensed with, for example, if compliance with the requirements would result in the escape of an accomplice or the fabrication or destruction of evidence: see the *Children’s Services Act 1986* (ACT) s 30(2), (3); the *Crimes Act 1914* (Cth) s 23L(1); and the *Crimes Act 1958* (Vic) s 464E(2).

requirements where a child is in custody, for example, to permit the child to contact certain people, or to inform an adult that the child is to be questioned.⁷²¹

(a) Australian Capital Territory

In the Australian Capital Territory, an interview friend may be any one of:⁷²²

- a parent of the child;
- a relative of the child who is acceptable to the child; or
- a legal practitioner acting for the child or some other appropriate person acceptable to the child.⁷²³

However, another person (who may be a police officer) who has not been concerned in the investigation may be present if reasonable steps have been taken, without success, to secure the presence of a person in the listed categories of interview friends.⁷²⁴

Evidence obtained in contravention of this requirement must not be admitted into evidence unless the court is satisfied that the admission of the evidence is substantially in the public interest as regards the administration of criminal justice, and that that interest would outweigh any prejudice to the rights of any person, including the child, that has occurred or is likely to occur as a result of the contravention or the admission of the evidence.⁷²⁵

(b) Commonwealth

Under the *Crimes Act 1914* (Cth) an “interview friend” for a child under the age of

⁷²¹ In Tasmania, a child under the age of seventeen who is detained in custody is generally entitled to communicate with a friend or relative to inform that person of his or her whereabouts, to communicate with a legal practitioner, or to communicate with a friend or relative to inform that person of his or her whereabouts and with a legal practitioner: *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(1), (2). In Western Australia, a police officer must notify a responsible adult of the intention to question a young person who has been apprehended for the commission of an offence: *Young Offenders Act 1994* (WA) s 20.

⁷²² *Children’s Services Act 1986* (ACT) s 30.

⁷²³ The term “appropriate person” is not defined in the *Children’s Services Act 1986* (ACT).

⁷²⁴ *Children’s Services Act 1986* (ACT) s 30(1)(e).

⁷²⁵ *Children’s Services Act 1986* (ACT) s 40(1).

eighteen is defined to mean:⁷²⁶

- a parent or guardian of the child or a legal practitioner acting for the child; or
- if none of the above is available - a relative or friend of the child who is acceptable to the child; or
- if the child is an Aboriginal person or a Torres Strait Islander and none of the above is available - a person whose name is included in the relevant list maintained under section 23J(1) of the *Crimes Act 1914* (Cth); or
- if none of the above is available - an independent person.

(c) New South Wales

In New South Wales, an interview friend may be any one of:⁷²⁷

- a person responsible for the child;
- an adult (other than a member of the Police Force) who was present with the consent of the person responsible for the child;
- in the case of a child who is of or above the age of sixteen years, an adult (other than a member of the Police Force) who was present with the consent of the child; or
- a barrister or solicitor chosen by the child.

Generally, a statement, confession, admission or information made or given to a member of the Police Force by a child in the absence of an interview friend will not be admitted in evidence unless the person acting judicially in the proceedings is satisfied that there was “proper and sufficient” reason for the absence of an interview friend and considers that the statement, confession, admission or information should be admitted.⁷²⁸

(d) Northern Territory

⁷²⁶ *Crimes Act 1914* (Cth) s 23K(3).

⁷²⁷ *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).

⁷²⁸ *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(b).

In the Northern Territory, an interview friend may be any one of:⁷²⁹

- a parent or guardian of the child;
- a relative or friend acceptable to the child; or
- another person acceptable to the child who is not, in the opinion of the member of the Police Force, an accomplice of the juvenile or likely to lose, destroy or fabricate evidence; or
- the child's legal practitioner.

However, an interview friend must not be a juvenile or a member of the Police Force.⁷³⁰

Another person who is of good repute and who has no concern in the investigation or interest in its outcome may act as an interview friend if reasonable steps have been taken, without success, to secure the presence of a person in the listed categories of interview friends.⁷³¹

(e) South Australia

In South Australia, a person who is apprehended on suspicion of having committed an offence is entitled to have a solicitor, relative or friend present during any interrogation or investigation to which the person is subjected while in custody. In the case of a minor, the relative or friend must be an adult.⁷³²

Where a minor has been apprehended on suspicion of having committed an offence and the minor does not nominate a solicitor, relative or friend to be present during an interrogation or investigation, or the nominated person is unwilling or unavailable to attend, the minor must not be subjected to an interrogation or investigation until the member of the Police Force in charge of the investigation has secured the presence of:⁷³³

- a person nominated by the Director-General of Community Welfare to represent

⁷²⁹ *Juvenile Justice Act* (NT) s 25(1)(c).

⁷³⁰ *Juvenile Justice Act* (NT) s 25(1)(c).

⁷³¹ *Juvenile Justice Act* (NT) s 25(1)(d).

⁷³² *Summary Offences Act 1953* (SA) s 79A(1)(b)(i).

⁷³³ *Summary Offences Act 1953* (SA) s 79A(1a). This section is, however, subject to s 79A(1b), which permits the interrogation or investigation to proceed where the offence in question is not punishable by more than two years imprisonment and it is not "reasonably practicable" to find a "suitable representative of the child's interests".

the interests of the child subject to criminal investigation; or

- where no such person is available, some other person (not being a minor, a member of the Police Force or an employee of the Police Department) who, in the opinion of the member of the Police Force, is a suitable person to represent the interests of the child.

(f) Victoria

In Victoria, a child under the age of seventeen who is under investigation for an offence must not be interviewed unless his or her parent or guardian, or - if a parent or guardian is not available - an independent person is present, and the child has been allowed to communicate privately with that person before the commencement of any questioning.⁷³⁴

6. DISCUSSION PAPER

(a) The Commission's approach

(i) A role of last resort

Under section 9E of the *Juvenile Justice Act 1992* (Qld), the people specified as able to attend a police interview of a juvenile suspect are not listed in any hierarchical order. However, the *Police Powers and Responsibilities Act 1997* (Qld) provides that a justice of the peace may attend the interview only if no-one from any of the previously listed categories is available.

Some of the submissions received by the Commission in response to the Issues Paper suggested that, in some cases, a juvenile suspect may prefer to have a justice of the peace in attendance at the interview than, for example, a parent.⁷³⁵ This would not be possible under the provisions of the *Police Powers and Responsibilities Act 1997* (Qld), which arguably supersedes the *Juvenile Justice Act 1992* (Qld).

In the Discussion Paper, the Commission expressed the view that the issue of who should be able to attend police interviews of juvenile suspects, and in what order, is beyond the scope of this reference. It considered that the task of the Commission is to review the powers that may be exercised by justices of the peace, to determine whether those powers should continue to be exercised by

⁷³⁴ *Crimes Act 1958* (Vic) s 464E(1).

⁷³⁵ Submissions 7 (IP), 29 (IP), 50 (IP), 91 (IP), 108 (IP).

justices of the peace and, if so, by what category of justice of the peace they should be exercised.⁷³⁶

Accordingly, the Commission did not comment further on the hierarchical nature of the list of people who may be an interview friend under section 97 of the *Police Powers and Responsibilities Act 1997* (Qld).

(ii) Other possible interview friends

Further, the Commission confined its observations to the issues of whether, having regard to the existing requirement, there is a need for justices of the peace to be included in the list of people who may attend a police interview of a juvenile suspect and whether it is appropriate for justices of the peace to continue to perform that role. The Commission did not consider, for example, what other categories of people might be suitable for the role. That was consistent with the Commission's approach in relation to other aspects of the role of justices of the peace.⁷³⁷

(iii) Interviews of persons other than juvenile suspects

A number of respondents to the Issues Paper stated that, as justices of the peace, they also attended police interviews of vulnerable persons other than juveniles.⁷³⁸ Police interviews of some other vulnerable suspects are now regulated by the *Police Powers and Responsibilities Act 1997* (Qld) and the Police Responsibilities Code.⁷³⁹ Under the relevant provisions, justices of the peace can no longer attend those interviews. The Criminal Justice Commission noted that it is difficult to see why justices of the peace should be able to attend interviews of juveniles, but not of indigenous adult suspects and mentally incapacitated suspects.⁷⁴⁰

This Commission expressed the view that the question of who should be able to attend police interviews of indigenous adult suspects and mentally

⁷³⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 115-116.

⁷³⁷ See, for example, Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 57 in relation to the witnessing of various documents.

⁷³⁸ For example, submissions 33 (IP), 34 (IP), 36 (IP), 43 (IP), 54 (IP), 67 (IP), 99 (IP), 103 (IP).

⁷³⁹ See s 96 of the *Police Powers and Responsibilities Act 1997* (Qld), which deals with police interviews of Aboriginal and Torres Strait Islander suspects, and s 67 of the Police Responsibilities Code, which deals with police interviews of mentally incapacitated suspects. The Police Responsibilities Code is set out in Sch 2 to the *Police Powers and Responsibilities Regulation 1998* (Qld).

⁷⁴⁰ Submission 113 (IP).

incapacitated suspects is beyond the scope of this reference.⁷⁴¹

The Criminal Justice Commission also observed that the *Police Powers and Responsibilities Act 1997* (Qld) and the Police Responsibilities Code do not provide for the use of an interview friend for vulnerable suspects who are not children, indigenous or mentally incapacitated, or police interviews of other vulnerable witnesses who are not suspects. The Commission expressed the view that this issue is also beyond the scope of its reference.⁷⁴²

(b) The need for the juvenile interview friend role

The Commission considered whether, in the light of the other people specified in the definition of “interview friend” for the purposes of section 97 of the *Police Powers and Responsibilities Act 1997* (Qld), it is necessary to include justices of the peace in the legislative list. The Commission noted that a large number of respondents to the Issues Paper⁷⁴³ had expressed the view that there was a need for justices of the peace who had received suitable training to continue to undertake this role because of their independence and availability, particularly out of hours, and because they do not charge a fee for their services.⁷⁴⁴

The people whose presence at the police interview of a juvenile suspect will satisfy the requirements of section 97 are a parent or guardian of the child, a lawyer acting for the child or a person acting for the child who is employed by an agency whose primary purpose is to provide legal services. In the absence of these people, a relative or friend of the child who is acceptable to the child may attend. If the child is an Aboriginal or a Torres Strait Islander, and none of the people already mentioned is available, a person from a list maintained by the Commissioner of Police may attend.⁷⁴⁵

The Commission observed that the list of interview friends for the purposes of

⁷⁴¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at note 592.

⁷⁴² Ibid.

⁷⁴³ Submissions 1A (IP), 3 (IP), 5 (IP), 6 (IP), 7 (IP), 8 (IP), 9 (IP), 10 (IP), 11 (IP), 12 (IP), 14 (IP), 16 (IP), 19 (IP), 20 (IP), 21 (IP), 22 (IP), 30 (IP), 31 (IP), 34 (IP), 35 (IP), 36 (IP), 38 (IP), 39 (IP), 40 (IP), 41 (IP), 42 (IP), 43 (IP), 47 (IP), 48 (IP), 49 (IP), 50 (IP), 51 (IP), 53 (IP), 54 (IP), 55 (IP), 56 (IP), 57 (IP), 60 (IP), 61 (IP), 62 (IP), 63 (IP), 64 (IP), 65 (IP), 66 (IP), 67 (IP), 70 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 87 (IP), 88 (IP), 89 (IP), 91 (IP), 92 (IP), 93 (IP), 94 (IP), 95 (IP), 96 (IP), 97 (IP), 101 (IP), 103 (IP), 104 (IP), 105 (IP), 106 (IP), 108 (IP), 112 (IP), 113 (IP), 114 (IP), 117 (IP), 120 (IP), 122 (IP), 123 (IP).

⁷⁴⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 106.

⁷⁴⁵ *Police Powers and Responsibilities Act 1997* (Qld) s 105.

section 97 is reasonably comprehensive. Nonetheless, the Commission acknowledged that situations could arise where it was not possible for the police to contact one of the above persons from the list to arrange for them to attend the interview.⁷⁴⁶ This point was made by the Queensland Police Service in its submission in response to the Issues Paper.⁷⁴⁷

... there are circumstances where no other person listed as "Interview Friend" or in section 9E of the *Juvenile Justice Act* is available and therefore a Justice of the Peace should undertake this role.

Accordingly, the Commission's preliminary view was that the list of people who may attend a police interview of a juvenile suspect should include justices of the peace.⁷⁴⁸

(c) Appropriateness of the juvenile interview friend role

In the Discussion Paper, the Commission considered a number of factors that were advanced by respondents to the Issues Paper in support of having justices of the peace attend police interviews of juvenile suspects. Despite some reservations, which are outlined below, the Commission generally accepted the substance of those submissions.⁷⁴⁹

(i) Knowledge/training

Many of the submissions received in response to the Issues Paper considered that justices of the peace would be better informed about the rights of suspects than would some of the other people on the legislative list.⁷⁵⁰ In the view of one respondent:⁷⁵¹

It is a decided advantage that the Justice of the Peace knows the rights of the child concerned and a parent or guardian might not have this knowledge.

⁷⁴⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 112.

⁷⁴⁷ Submission 121 (IP).

⁷⁴⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 112.

⁷⁴⁹ *Id* at 112-114.

⁷⁵⁰ Submissions 3 (IP), 7 (IP), 16 (IP), 33 (IP), 36 (IP), 43 (IP), 47 (IP), 49 (IP), 54 (IP), 61 (IP), 67 (IP), 87 (IP), 92 (IP), 94 (IP), 96 (IP), 98 (IP), 105 (IP).

⁷⁵¹ Submission 33 (IP).

Two other respondents voiced a similar concern:⁷⁵²

It is a distinct possibility that even a parent may have little or no knowledge of the juvenile's rights. ... A child may feel more comfortable with an adult nominated by themselves, but does the juvenile know if the nominee has the appropriate skills to ensure fairness in his or her case?

On the other hand, a significant number of submissions identified a need for adequate and appropriate training in order for this role to be satisfactorily carried out.⁷⁵³ Several respondents were, to a greater or lesser extent, critical of the standard of the existing training for attendance at police interviews of juvenile suspects,⁷⁵⁴ and suggested that some of the problems that have arisen in the past⁷⁵⁵ might have been avoided if the individuals concerned had been better trained.

In the Discussion Paper, the Commission expressed the view that, in order to effectively protect the rights of a juvenile suspect, a person who attends a police interview of the suspect should not only have some knowledge and understanding of those rights, but should also appreciate the fundamental nature of the role.⁷⁵⁶

The Commission accepted that, since justices of the peace appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) have been required to pass an examination in order to qualify for appointment, it may well be true that justices of the peace (magistrates court) and justices of the peace (qualified) have greater knowledge than some parents or some friends or relatives who may be nominated by juvenile suspects.⁷⁵⁷

However, the Commission did not believe that the same could necessarily be said of old system justices of the peace appointed prior to the 1991 Act, as they have not been required to undergo training.⁷⁵⁸

⁷⁵² Submissions 36 (IP), 54 (IP).

⁷⁵³ Submissions 1A (IP), 7 (IP), 10 (IP), 11 (IP), 12 (IP), 28 (IP), 33 (IP), 35 (IP), 36 (IP), 37 (IP), 38 (IP), 39 (IP), 48 (IP), 49 (IP), 53 (IP), 54 (IP), 60 (IP), 65 (IP), 66 (IP), 69 (IP), 70 (IP), 88 (IP), 91 (IP), 94 (IP), 95 (IP), 103 (IP), 105 (IP), 112 (IP).

⁷⁵⁴ Submissions 10 (IP), 33 (IP), 37 (IP), 69 (IP), 87 (IP), 88 (IP), 112 (IP).

⁷⁵⁵ See pp 123-125 of this Report.

⁷⁵⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 112.

⁷⁵⁷ Ibid.

⁷⁵⁸ Ibid.

The Commission noted that a significant number of respondents to the Issues Paper seemed to be under a misapprehension as to the nature of the role of attending at juvenile interviews.⁷⁵⁹ Many described the function in terms of independence, as being on neither one side nor the other. While the legislation merely requires the presence of one of a number of specified people at the interview, the Court of Appeal has described the role as “obviously ... intended to support the child”,⁷⁶⁰ and commented that mere formal compliance with the requirements of the legislation would be little more than “a solemn farce”.⁷⁶¹

In the Commission’s view, the misapprehension among justices of the peace seems to have arisen at least in part as a result of the training manual used by justices of the peace appointed under the 1991 Act.⁷⁶² While the Commission was encouraged to note that so many justices of the peace take their position seriously and follow the instructions in their manual, the Commission expressed concern that those justices of the peace are being misinformed as to the nature of their role.⁷⁶³

The Commission expressed the view that it would be desirable for appropriately trained justices of the peace to continue to undertake the role of attending at police interviews of juvenile suspects.⁷⁶⁴

(ii) Independence

According to the submissions received in response to the Issues Paper, the independence of justices of the peace was one of the attributes that qualified them for the role of attending police interviews of juvenile suspects.⁷⁶⁵ People in the other categories listed in the legislation were, on the other hand, widely perceived to have either a personal or a professional interest in the outcome of

⁷⁵⁹ Ibid.

⁷⁶⁰ *R v C* [1997] 2 Qd R 465 at 470.

⁷⁶¹ *Id* at 471.

⁷⁶² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 113. The relevant training manual gives the following advice to a justice of the peace who is acting as an “independent person” when a child under the age of seventeen is being questioned by the police (Department of Justice and Attorney-General, *Manual Two: A Manual for Queensland Justices of the Peace (Qualified)* (1993) at 21):

4. Explain that you are not on the side of the police, nor on the side of the accused person. You are independent!

⁷⁶³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 113.

⁷⁶⁴ Ibid.

⁷⁶⁵ *Id* at 107-108.

the interview.⁷⁶⁶ Parents, in particular, were regarded as likely to be biased in favour of either their child or the police.⁷⁶⁷

To the extent that justices of the peace are independent of the Queensland Police Service, the Commission agreed with those submissions. However, in the light of the comments made by the Court of Appeal in relation to the person present at the interview acting in support of the child, the Commission considered that those submissions were somewhat misguided.⁷⁶⁸

(iii) Availability

The availability of justices of the peace was another reason frequently given as to why justices of the peace should retain this role.⁷⁶⁹ Justices of the peace were seen to be more accessible in terms of response time, locality and ability to be contacted out of normal working hours. One respondent noted that a justice of the peace would usually be able to attend such an interview “at short notice and within reasonable proximity”.⁷⁷⁰

In contrast, the other people listed in the legislation may not be readily available.⁷⁷¹ For example:⁷⁷²

Parents frequently do not live in the area where the juvenile has been apprehended, their whereabouts are unknown or they are unwilling to attend.

There was some concern expressed that, if justices of the peace were not to continue their present role of attending police interviews of juveniles, and reliance had to be placed on the other legislative categories, representatives of some of those categories would not be available in some localities,⁷⁷³ particularly in rural areas.⁷⁷⁴

⁷⁶⁶ Submissions 7 (IP), 10 (IP), 69 (IP), 87 (IP), 120 (IP).

⁷⁶⁷ Submissions 7 (IP), 87 (IP).

⁷⁶⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 113.

⁷⁶⁹ Submissions 5 (IP), 6 (IP), 7 (IP), 19 (IP), 20 (IP), 21 (IP), 29 (IP), 30 (IP), 40 (IP), 41 (IP), 43 (IP), 51 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 87 (IP), 92 (IP), 96 (IP), 98 (IP).

⁷⁷⁰ Submission 87 (IP).

⁷⁷¹ Submissions 7 (IP), 20 (IP), 21 (IP), 40 (IP), 51 (IP).

⁷⁷² Submission 7 (IP).

⁷⁷³ Submission 43 (IP).

⁷⁷⁴ Submissions 10 (IP), 21 (IP).

A number of respondents also pointed out that these interviews often take place outside normal working hours, so that there is a need for extended availability, which is presently, and should continue to be, met by justices of the peace.⁷⁷⁵

The Commission expressed the view that, when a juvenile is in police custody for the purpose of being questioned as a suspect in the commission of an offence, it is desirable that the interview take place as soon as possible. The Commission therefore considered it important that the person who is to attend the interview to satisfy the requirements of section 97 of the *Police Powers and Responsibilities Act 1997* (Qld) should be reasonably accessible.⁷⁷⁶

Although some justices of the peace may not, because of work commitments, be available during normal business hours, it appeared to the Commission that a considerable number of justices of the peace are retired and are usually willing to give their time to perform this function when necessary.⁷⁷⁷ Moreover, the Commission observed that many justices of the peace willingly make themselves available out of hours when, if a parent is not available, it might be more difficult to contact a lawyer or a person employed by an agency that provides legal services. The Commission noted that many justices of the peace have accepted the offer made by the Department of Justice and Attorney-General to publish their contact details in the Yellow Pages and on the Internet.⁷⁷⁸

The Commission was therefore of the view that, if justices of the peace were not to retain this role, it was possible that juveniles might be kept in police custody for longer than necessary or that the police might be prevented from questioning a juvenile who was suspected of committing a serious offence.⁷⁷⁹

(iv) Cost

Several of the submissions received in response to the Issues Paper referred to the fact that justices of the peace do not charge for their services.⁷⁸⁰

⁷⁷⁵ Submissions 21 (IP), 88 (IP), 92 (IP), 98 (IP).

⁷⁷⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 113.

⁷⁷⁷ Ibid.

⁷⁷⁸ Id at 113-114. See note 380 of this Report. The Yellow Pages listings of justices of the peace have since been discontinued. See Department of Justice and Attorney-General, *Justice Papers* (No 7, October 1999) at 2.

⁷⁷⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 114.

⁷⁸⁰ Submissions 21 (IP), 43 (IP), 49 (IP), 61 (IP), 87 (IP), 92 (IP), 96 (IP), 97 (IP), 98 (IP). Justices of the peace are presently prohibited from charging in any way for their services: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35. See the discussion of

In the Discussion Paper, the Commission expressed the view that the accessibility of justices of the peace in terms of cost was an important factor in favour of justices of the peace retaining the role of interview friend for juvenile suspects.⁷⁸¹

(d) Justices of the peace who should be authorised to act as an interview friend for a juvenile suspect

The submissions received by the Commission in response to the Issues Paper emphasised that the role of attending at police interviews of juvenile suspects should be undertaken only by relevantly qualified justices of the peace.⁷⁸²

The Commission's preliminary recommendation was that justices of the peace (magistrates court) and justices of the peace (qualified) should continue to be included in the list of people who may act as an interview friend for a juvenile suspect.⁷⁸³

(e) Justices of the peace who should not be authorised to act as an interview friend for a juvenile suspect

(i) An old system justice of the peace

Both the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) authorise an old system justice of the peace to attend a police interview of a juvenile suspect.⁷⁸⁴ As noted above,⁷⁸⁵ old system justices of the peace were not required to undergo training or testing prior to their appointment. The Commission expressed the view that some justices of the peace who have not undergone training might not be fully informed about the

this section at p 368 of this Report.

⁷⁸¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 114.

⁷⁸² Submissions 6 (IP), 7 (IP), 30 (IP), 33 (IP), 34 (IP), 35 (IP), 41 (IP), 49 (IP), 50 (IP), 61 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 120 (IP). See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 111.

⁷⁸³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 116.

⁷⁸⁴ See p 123 of this Report.

⁷⁸⁵ See pp 9 and 16-18 of this Report.

rights of a juvenile who is being questioned by the police as a suspect.⁷⁸⁶

The Commission's preliminary recommendation was that old system justices of the peace should not be included in the list of people who may act as an interview friend and that Schedule 3 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.⁷⁸⁷

(ii) A justice of the peace (commissioner for declarations)

The Commission considered it appropriate that the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) exclude a justice of the peace (commissioner for declarations) from the categories of people who may act as an interview friend for a juvenile suspect.⁷⁸⁸

The Commission's preliminary recommendation was that justices of the peace (commissioners for declarations) should continue to be excluded from the list of people who may act as an interview friend for a juvenile suspect.⁷⁸⁹

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service

The Commission also considered it appropriate that the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) exclude a justice of the peace who is a police officer from performing this role.⁷⁹⁰ The Commission expressed the view that it is important that this role is performed only by a person who is independent of the Queensland Police Service.⁷⁹¹ For that reason, the Commission was of the view that the legislation should prohibit not only a police officer from performing this role, but also a person employed by the Queensland Police Service, for example, in an administrative capacity.⁷⁹²

The Commission's preliminary recommendation was that justices of the peace who are members of the Queensland Police Service or employed by the Queensland Police Service should be excluded from the list of people who may

⁷⁸⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 114.

⁷⁸⁷ Id at 116.

⁷⁸⁸ Id at 115.

⁷⁸⁹ Id at 116.

⁷⁹⁰ Id at 115.

⁷⁹¹ Ibid.

⁷⁹² Ibid.

act as an interview friend for a juvenile suspect.⁷⁹³

7. SUBMISSIONS

(a) The Commission's approach

(i) A role of last resort?

Several submissions received in response to the Discussion Paper addressed the issue of whether justices of the peace should be called on to perform the role of interview friend for a juvenile suspect only if a person in one of the other categories specified in the legislation is not available. All of these respondents were of the view that the role of justices of the peace should not be restricted in this way.⁷⁹⁴

One respondent suggested that, if a justice of the peace (qualified) was properly trained, then he or she should be the first selection for the role.⁷⁹⁵ Two other respondents thought that there would be times when a juvenile would prefer to have a justice of the peace present.⁷⁹⁶ Another respondent was also of the view that justices of the peace should not be regarded as a last resort and suggested that a justice of the peace should be required whenever "a non-professional" had been chosen or was in attendance at such an interview:⁷⁹⁷

The "Interview Friend" chosen or approved by the juvenile suspect can often be more of a nuisance to both the juvenile and the Police interviewer. As an example, a child's mother, emotionally shaken by the events, obviously anti-Police, is unable to give the child "a fair go" and will cause unnecessary problems for the interviewer. An independent, procedurally aware, but friendly witness could assist all parties. My opinion is that the Justice of the Peace, relevantly trained, tested and qualified, should be called as an interview friend whenever a non-professional has been chosen or is in attendance at such interviews. The Justice of the Peace should not be regarded by the system nor the Police as a last resort.

⁷⁹³ Id at 117.

⁷⁹⁴ Submissions 8, 13, 34, 48, 56.

⁷⁹⁵ Submission 34.

⁷⁹⁶ Submissions 13, 50. This point was also made by several respondents to the Issues Paper. See p 131 of this Report.

⁷⁹⁷ Submission 8.

Another respondent commented:⁷⁹⁸

I would encourage you to put justices of the peace at the top of the list. Many juveniles in this situation are living on the streets and do not have an available parent. Others simply prefer to have a justice of the peace, rather than their parents. What do parents know about their children's rights?

(ii) The scope of the role

A respondent to the Discussion Paper⁷⁹⁹ raised a similar issue to that raised by a number of respondents to the Issues Paper.⁸⁰⁰ This respondent, a community legal service, suggested that the role of justices of the peace as interview friends should be extended to a number of situations where it does not presently apply:

... we submit that the presence of an independent person should be required in every situation wherein a juvenile is in police custody for investigation or questioning in relation to indictable offences and simple offences and particularly in cases where an admission is made for the purposes of receiving a caution under sections 12 to 17 of the Juvenile Justice Act 1992 or referral to a community conference (section 18).

(b) Need for the interview friend role

One submission received by the Commission in response to the Discussion Paper addressed the issue of whether it was generally desirable for justices of the peace to perform the role of interview friend for a juvenile suspect.⁸⁰¹ That submission, from a community legal service, expressed some reservations about whether a justice of the peace would be perceived by a young person as someone who would uphold the young person's rights and interests:

It is imperative in examining the role of a Justice of the Peace as interview friend or independent person to bear firmly in mind that their role will be performed at a police station or in police custody. ...

In such circumstances and in general terms, a young person is neither in a comfortable situation nor an equal one in terms of power. They are surrounded by persons of authority who may or may not be known to the young person. The addition of another adult stranger, a Justice, may not be perceived by the young person as someone who can uphold the young person's rights and interests.

Nonetheless, this respondent acknowledged the benefits of permitting justices of the

⁷⁹⁸ Submission 56.

⁷⁹⁹ Submission 35.

⁸⁰⁰ See p 132 of this Report.

⁸⁰¹ Submission 35.

peace to perform this role and therefore supported their retention in the list of people who may attend a juvenile interview:

... it is acknowledged that there is a need for flexibility in the role so as to avoid where possible the holding of a young person in custody for any longer than is strictly necessary.

...

Thus, we support the recommendation that certain Justices continue to be included in the list of people who may perform the role of interview friend or independent person.

(c) Justices of the peace who should be authorised to act as an interview friend for a juvenile suspect

Twenty-five submissions received by the Commission in response to the Discussion Paper considered this issue. All of these respondents agreed with the Commission's preliminary recommendation that justices of the peace (magistrates court) and justices of the peace (qualified) should continue to be included in the list of people who may act as an interview friend for a juvenile suspect.⁸⁰²

A submission from a community legal centre, while not commenting specifically on the categories of justices of the peace who should be able to perform this role, suggested that specific training should be required in order to be eligible to perform the role:⁸⁰³

We submit strongly that such persons, to be eligible for inclusion, must receive very specific training, and accreditation, to ensure sound knowledge of the law and the issues as the role requires such knowledge in order to impart sound advice as to the potential consequences of engaging in an interview.

(d) Justices of the peace who should not be authorised to act as an interview friend for a juvenile suspect

(i) An old system justice of the peace

Twenty-three submissions addressed the Commission's preliminary recommendation that old system justices of the peace should not be included in the list of people who may act as an interview friend for a juvenile suspect and that Schedule 3 to the *Police Powers and Responsibilities Act 1997 (Qld)* should be amended accordingly. All of these respondents agreed with the

⁸⁰² Submissions 6, 7, 8, 9, 13, 14, 18, 21, 23, 24, 25, 26, 31, 33, 34, 38, 40, 44, 45, 47, 48, 51, 53, 58, 59.

⁸⁰³ Submission 35.

Commission's preliminary recommendation.⁸⁰⁴

(ii) A justice of the peace (commissioner for declarations)

Twenty-three submissions addressed the Commission's preliminary recommendation that justices of the peace (commissioners for declarations) should continue to be excluded from the list of people who may act as an interview friend for a juvenile suspect. All of these respondents agreed with the Commission's preliminary recommendation.⁸⁰⁵

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service

Twenty-two submissions addressed the Commission's preliminary recommendation that justices of the peace who are members of the Queensland Police Service or employed by the Queensland Police Service should be excluded from the list of people who may act as an interview friend for a juvenile suspect. Twenty-one of these respondents agreed with the Commission's preliminary recommendation.⁸⁰⁶

In particular, a submission from a justice of the peace (qualified) who is also a serving member of the Queensland Police Service strongly supported the Commission's preliminary recommendation.⁸⁰⁷

Once again, I wholeheartedly agree with these four recommendations, particularly the fourth one. I cannot imagine any circumstance where a member of the Police Service should act as an interview friend for a juvenile suspect. It is my view that if no other authorised person is available, the interview does not take place.

Only one submission expressed a different view. That respondent, although not commenting on this specific preliminary recommendation, expressed the general view that a justice of the peace who is a police officer should not be precluded from exercising the powers of a justice of the peace.⁸⁰⁸

8. THE COMMISSION'S VIEW

⁸⁰⁴ Submissions 6, 7, 8, 9, 14, 18, 21, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 48, 51, 53, 58, 59.

⁸⁰⁵ Submissions 6, 7, 8, 9, 14, 18, 21, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 48, 51, 53, 58, 59.

⁸⁰⁶ Submissions 6, 7, 8, 9, 14, 21, 23, 25, 26, 33, 34, 38, 40, 44, 45, 47, 48, 51, 53, 58, 59.

⁸⁰⁷ Submission 25.

⁸⁰⁸ Submission 22.

(a) Scope of the reference

The Commission is not persuaded to change its view in relation to the scope of this reference. The Commission is not undertaking a general review of the law relating to police interviews of suspects with special needs. In the Commission's view, issues about whether justices of the peace should act as interview friends in particular types of interview situations where they do not currently have any legislative role are best considered in the context of a review specifically about those types of interview situations or about police procedures more generally. Given the terms of the present reference,⁸⁰⁹ it would not be appropriate for the Commission to examine whether persons other than justices of the peace should also be able to act as interview friends in those situations, or whether they might be more or less appropriate than justices of the peace.

For the same reason, the Commission also remains of the view that an examination of the hierarchy stipulated in the *Police Powers and Responsibilities Act 1997* (Qld) is outside the terms of the current reference. Such an examination necessarily entails a comparison of the relative merits of the different categories of persons who are presently authorised to act as an interview friend. In the Commission's view, the only question that is appropriate for consideration, in the context of this reference, is whether justices of the peace should be able to exercise the role that is presently conferred on them in this respect.

(b) Justices of the peace who should be authorised to act as an interview friend for a juvenile suspect

The Commission's view on this issue is unchanged. There is a need for appropriately qualified justices of the peace to perform this role. The Commission is therefore of the view that a justice of the peace (magistrates court) and a justice of the peace (qualified) should continue to be included in the list of people who may act as an interview friend for a juvenile suspect.

(c) Justices of the peace who should not be authorised to act as an interview friend for a juvenile suspect**(i) An old system justice of the peace**

As noted previously, old system justices of the peace were not required to undergo any training or pass an examination in order to qualify for

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See p 1 of this Report.

appointment.⁸¹⁰ The Commission remains of the view that, having regard to the responsibilities attaching to this role, an old system justice of the peace should not be authorised to act as an interview friend for a juvenile suspect.

(ii) A justice of the peace (commissioner for declarations)

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) presently provides that an old system justice of the peace who is not a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations will automatically hold office as a justice of the peace (commissioner for declarations).⁸¹¹ Just as the Commission is of the view that an old system justice of the peace is not qualified to perform this role, it is also of the view that a justice of the peace (commissioner for declarations) is not qualified to perform this role.

The Commission remains of the view that a justice of the peace (commissioner for declarations) should continue to be excluded from the list of people who may act as an interview friend for a juvenile suspect.

Earlier in this Report, the Commission recommended that, if an old system justice of the peace who is not a lawyer is not appointed to another category of office or does not register as a commissioner for declarations by 30 June 2000, he or she should hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations).⁸¹² If that recommendation is implemented, it will no longer be necessary for relevant provisions of the *Juvenile Justice Act 1992* (Qld) or the *Police Powers and Responsibilities Act 1997* (Qld) to expressly exclude a justice of the peace (commissioner for declarations). However, if that recommendation is not implemented, those provisions should continue to exclude a justice of the peace (commissioner for declarations) from the list of people who may act as an interview friend for a juvenile suspect.

⁸¹⁰ See pp 9 and 16-18 of this Report.

⁸¹¹ See p 16 of this Report.

⁸¹² See p 52 of this Report (Recommendation 4.2). The Commission also recommended that an old system justice of the peace who is a lawyer should, in these circumstances, hold office as a commissioner for declarations, rather than continue to hold office indefinitely as an old system justice of the peace. See p 52 of this Report (Recommendation 4.3).

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service⁸¹³

The Commission's view on this issue is unchanged. The Commission considers it of paramount importance that, to the extent that the role of interview friend is undertaken by a justice of the peace, the role is undertaken only by a person who is independent of the Queensland Police Service. Although the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) both exclude a member of the Queensland Police Service from performing this role, neither of those Acts presently excludes a person who is simply employed by the Queensland Police Service, for example, in an administrative capacity, from performing this role.

The Commission is of the view that a justice of the peace who is a member or an employee of the Queensland Police Service should be excluded from the list of people who may act as an interview friend for a juvenile suspect.

The Commission's recommendation is not intended to apply if the police officer or employee of the Queensland Police Service would be eligible to act as an interview friend in a capacity other than that of justice of the peace. For example, if the juvenile being questioned was the child of a police officer, the officer would be eligible to act as an interview friend by virtue of being the child's parent. The Commission does not intend that a parent who is a member or an employee of the Queensland Police Service should be ineligible to act as an interview friend for his or her own child, simply because he or she is also a justice of the peace.

(iv) Legislative amendments

The preliminary recommendations in the Discussion Paper were expressed in terms of amendments to the *Police Powers and Responsibilities Act 1997* (Qld). Given that it is not clear whether section 9E of the *Juvenile Justice Act 1992* (Qld) has any residual operation,⁸¹⁴ the Commission is of the view that, in implementing its recommendations, amendments should be made to section 9E of the *Juvenile Justice Act 1992* (Qld), as well as to the *Police Powers and Responsibilities Act 1997* (Qld).

⁸¹³ Generally, see Chapter 11 of this Report.

⁸¹⁴ See p 122 of this Report.

9. RECOMMENDATIONS

The Commission makes the following recommendations:

- 7.1 A justice of the peace (magistrates court) and a justice of the peace (qualified) should continue to be authorised to act as an interview friend for a juvenile suspect.
- 7.2 An old system justice of the peace⁸¹⁵ should not be authorised to act as an interview friend for a juvenile suspect, and Schedule 3 to the *Police Powers and Responsibilities Act 1997* (Qld) and section 9E of the *Juvenile Justice Act 1992* (Qld) should be amended accordingly.
- 7.3 A justice of the peace (commissioner for declarations) should continue to be excluded from the list of people who may act as an interview friend for a juvenile suspect.⁸¹⁶
- 7.4 A justice of the peace who is a member or an employee of the Queensland Police Service should not be authorised to act as an interview friend for a juvenile suspect, and Schedule 3 to the *Police Powers and Responsibilities Act 1997* (Qld) and section 9E of the *Juvenile Justice Act 1992* (Qld) should be amended accordingly.⁸¹⁷

⁸¹⁵ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

⁸¹⁶ See, however, p 145 of this Report as to whether it will be necessary to continue to make this express exclusion.

⁸¹⁷ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

CHAPTER 8

EXTENSION OF A DETENTION PERIOD FOR QUESTIONING AND INVESTIGATION

1. INTRODUCTION

As noted earlier in this Report, there is a general requirement that a person who is arrested must be taken “forthwith before a justice to be dealt with according to law”.⁸¹⁸ However, in Queensland, as in most Australian jurisdictions, there are statutory schemes that create exceptions to this requirement. The purpose of these exceptions is to enable a police officer, for a specified period, to detain a person who has been arrested in order to question the person about, and carry out various investigations into, the offence in relation to which the person has been arrested or, in some cases, another offence.

The rationale for these legislative schemes has been described in the following terms:⁸¹⁹

Under these schemes, the police ... are given powers of questioning suspects after they have been taken into custody. The common law rule (and its statutory equivalents) that a person who has been arrested must be taken after arrest before a justice as soon as possible is abrogated. The rule was seen as unduly restrictive of the proper needs of investigators who frequently disregarded it or avoided its operation by artificial and undesirable stratagems; for example, suspects who were in reality in police custody and not free to leave were said to be volunteers who were assisting the police with their enquiries voluntarily and without compulsion.

The Commission’s interest in these schemes lies in the extent to which they empower a justice of the peace to extend the statutory detention period. The Commission is not generally examining the various protections afforded by these schemes to a detained person.⁸²⁰

2. SOURCE OF POWER

Under the *Police Powers and Responsibilities Act 1997* (Qld), a police officer has the power to detain a person who has been arrested for an indictable offence, or certain

⁸¹⁸ *Criminal Code* (Qld) s 552. See also the *Justices Act 1886* (Qld) s 65; the *Police Powers and Responsibilities Act 1997* (Qld) s 39; the *Crimes Act 1900* (NSW) s 352; the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(1); and the *Bail Act 1982* (WA) s 5.

⁸¹⁹ *The Laws of Australia* CRIMINAL PROCEDURE 11.1 [Ch 3 “Questioning”] at para 88.

⁸²⁰ See, however, Chapter 7 of this Report, which examines the requirement for an “interview friend” when a juvenile suspect is being questioned.

other suspects who are already in custody,⁸²¹ for a reasonable time to investigate, or question the person about:⁸²²

- if the person is in custody following arrest for an indictable offence - the offence for which the person was arrested; or
- in any case - any indictable offence that the person is suspected of having committed, whether or not it is the offence for which the person is in custody.

As a general rule, the initial detention period must not exceed eight hours.⁸²³ However, the person may not be questioned for the whole of that time. The questioning time during the initial detention period must not exceed four hours.⁸²⁴ The balance of the detention period may be used for what is described in the *Police Powers and Responsibilities Act 1997* (Qld) as “time out”.⁸²⁵ The term “time out” is defined to include the time reasonably required for various specified purposes, for example, to allow the person to speak to a lawyer, to allow the person to rest, to allow for the questioning of co-offenders, to allow for an identification parade to be arranged and held, and to allow for the search of any place.⁸²⁶

An application to extend a detention period may be made to a magistrate or to certain justices of the peace.⁸²⁷ A police officer who is applying for an extension must give the magistrate or justice of the peace information about any time out that the police officer reasonably anticipates will be necessary.⁸²⁸ A magistrate or a justice of the peace may extend the detention period for a reasonable time only if satisfied that:⁸²⁹

- (a) the nature and seriousness of the offence require the extension; and
- (b) further detention of the person is necessary -

⁸²¹ *Police Powers and Responsibilities Act 1997* (Qld) s 48(2).

⁸²² *Police Powers and Responsibilities Act 1997* (Qld) s 50(1).

⁸²³ *Police Powers and Responsibilities Act 1997* (Qld) s 50(2). That section provides an exception where the person is charged with an indictable offence or is lawfully held in custody.

⁸²⁴ *Police Powers and Responsibilities Act 1997* (Qld) s 50(3)(a).

⁸²⁵ *Police Powers and Responsibilities Act 1997* (Qld) s 50(3)(b).

⁸²⁶ The term “time out” is defined in Sch 3 to the *Police Powers and Responsibilities Act 1997* (Qld).

⁸²⁷ *Police Powers and Responsibilities Act 1997* (Qld) s 51(2). See pp 150-151 of this Report as to which categories of justices of the peace may authorise extensions.

⁸²⁸ *Police Powers and Responsibilities Act 1997* (Qld) s 51(3).

⁸²⁹ *Police Powers and Responsibilities Act 1997* (Qld) s 51(5).

- (i) to preserve or obtain evidence of the offence or another indictable offence; or
 - (ii) to complete the investigation into the offence or another indictable offence; or
 - (iii) to continue questioning the person about the offence or another indictable offence; and
- (c) the investigation is being conducted properly and without unreasonable delay; and
- (d) the person, or the person's lawyer, has been given the opportunity to make submissions about the application.

The magistrate or justice of the peace must state in the order:⁸³⁰

- how much time is to be allowed as time out; and
- the time, of not more than eight hours, for which the person may be questioned.

Only a magistrate is authorised to extend the detention period if the extension would bring the total questioning time since the detention began to more than twelve hours.⁸³¹ Given that the initial detention period of eight hours may not include more than four hours of questioning time, justices of the peace are, in effect, empowered to extend a detention period from eight hours to a period possibly in excess of sixteen hours (that is, by a further eight hours of questioning time plus any further time out periods that may be considered necessary).

3. JUSTICES OF THE PEACE WHO MAY EXTEND A DETENTION PERIOD

Section 51(2) of the *Police Powers and Responsibilities Act 1997* (Qld) sets out a hierarchy of persons who may hear an application for an extension of a detention period.⁸³²

The application must be made initially to a magistrate or a justice of the peace

⁸³⁰ *Police Powers and Responsibilities Act 1997* (Qld) s 51(6).

⁸³¹ *Police Powers and Responsibilities Act 1997* (Qld) s 51(8).

⁸³² The operational guidelines contained in the Police Responsibilities Code provide that, "[i]f reasonably practicable, a police officer applying for an extension of a detention period warrant must apply to a justice at a magistrates court": Police Responsibilities Code, Operational Guideline 37.1. However, although the Police Responsibilities Code is contained in Sch 2 to the *Police Powers and Responsibilities Regulation 1998* (Qld), the operational guidelines are not part of the Regulation: *Police Powers and Responsibilities Act 1997* (Qld) s 135(4). Their purpose is to "help in the administration of the [*Police Powers and Responsibilities Act 1997* (Qld)] by enabling police officers and other readers to better understand the operation of the Act and this code": Police Responsibilities Code s 2(3).

(magistrates court). If there is no magistrate or justice of the peace (magistrates court) available, then the application must be made to:⁸³³

another justice of the peace other than a justice of the peace (commissioner for declarations).

This enables an application to be made to a justice of the peace (qualified) or to an old system justice of the peace.⁸³⁴

Section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) does not preclude a justice of the peace who is a member of the Queensland Police Service from extending a detention period under that Act.⁸³⁵

4. OTHER JURISDICTIONS

Legislation in a number of Australian jurisdictions authorises a police officer to detain a suspect for questioning before charging the suspect or taking him or her before a magistrate or a justice of the peace. Most jurisdictions take a fairly restrictive approach in relation to the persons who are authorised to extend the period of time for which a suspect may be detained.

(a) Commonwealth

If a person has been lawfully arrested⁸³⁶ for a Commonwealth offence, the person may be detained for a reasonable time for the purpose of investigating whether the person committed that offence or any other Commonwealth offence.⁸³⁷ However, the initial

⁸³³ *Police Powers and Responsibilities Act 1997* (Qld) s 51(2)(c).

⁸³⁴ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

⁸³⁵ The operational guidelines contained in the Police Responsibilities Code provide that, "[t]o avoid any suggestion of bias that may lead a court to question the validity of a [sic] extension of the detention period, a police officer should not apply to a justice who is a member of the police service": Police Responsibilities Code, Operational Guideline 37.2. However, although the Police Responsibilities Code is contained in Sch 2 to the *Police Powers and Responsibilities Regulation 1998* (Qld), the operational guidelines are not part of the Regulation: *Police Powers and Responsibilities Act 1997* (Qld) s 135(4). See note 832 of this Report.

⁸³⁶ The relevant provisions also apply, in certain circumstances, to a person who, although not lawfully arrested, is in the company of an investigating official for the purpose of being questioned. See *Crimes Act 1914* (Cth) s 23B(1) (definition of "arrested"), (2), (3), (4); the *Crimes Act 1900* (NSW) s 355(2); and *The Laws of Australia* CRIMINAL PROCEDURE 11.1 [Ch 3 "Questioning"] at para 97.

⁸³⁷ *Crimes Act 1914* (Cth) s 23C(1), (2), (4).

investigation period is generally limited to four hours. If the person is, or appears to be, under eighteen, an Aboriginal person or a Torres Strait Islander, the initial investigation period is limited to two hours.⁸³⁸

The investigation period for a “serious offence”⁸³⁹ may be extended by up to eight hours, but must not be extended more than once.⁸⁴⁰ The *Crimes Act 1914* (Cth) establishes a hierarchy of judicial officers who may extend an investigation period. An application to extend the investigation period must be made to:⁸⁴¹

- a magistrate; or
- if it cannot be made at a time when a magistrate is available - a justice of the peace employed in a court of a State or Territory or a bail justice; or
- if it cannot be made when any of the foregoing is available - any justice of the peace.

An application for the extension of an investigation period may be made by telephone, radio or radio-telephone.⁸⁴²

(b) Australian Capital Territory

If an offence against a law of the Australian Capital Territory is punishable by imprisonment for more than twelve months and the investigating official concerned is a member or special member of the Australian Federal Police, the Commonwealth provisions that are discussed above in relation to the detention of arrested persons apply.⁸⁴³

Consequently, a justice of the peace in the Australian Capital Territory may extend an investigation period, but only if the application cannot be made to a magistrate or to a

⁸³⁸ *Crimes Act 1914* (Cth) s 23C(4).

⁸³⁹ The term “serious offence” is defined in s 23D(6) of the *Crimes Act 1914* (Cth) to mean a Commonwealth offence that is punishable by imprisonment for a period of more than twelve months.

⁸⁴⁰ *Crimes Act 1914* (Cth) s 23D(1), (5).

⁸⁴¹ *Crimes Act 1914* (Cth) s 23D(2).

⁸⁴² *Crimes Act 1914* (Cth) s 23E(1).

⁸⁴³ Part 1C of the *Crimes Act 1914* (Cth) applies to those Australian Capital Territory offences by virtue of s 23A(6) of the *Crimes Act 1914* (Cth). Part 1C of that Act includes ss 23C, 23D and 23E, which are discussed at pp 151-152 of this Report.

justice of the peace who is employed in a court.⁸⁴⁴

An application for the extension of an investigation period may be made by telephone, radio or radio-telephone.⁸⁴⁵

(c) New South Wales

In New South Wales, the maximum initial investigation period for a person who is under arrest⁸⁴⁶ is four hours or such longer period to which the maximum investigation period may be extended.⁸⁴⁷ The investigation period may be extended by a detention warrant.⁸⁴⁸ The investigation period may be extended by up to eight hours, but must not be extended more than once.⁸⁴⁹

An application for the extension of an investigation period must be made to an “authorised justice”.⁸⁵⁰

The term “authorised justice” is defined to mean:⁸⁵¹

- a magistrate; or
- a justice of the peace who is a clerk of a Local Court; or
- a justice of the peace who is employed in the Attorney-General’s Department and who is declared under the *Search Warrants Act 1985* (NSW) to be an authorised justice for the purposes of that Act.

Consequently, a justice of the peace from the general community does not have any power to extend a detention period.

An application for the extension of an investigation period may be made in person or

⁸⁴⁴ *Crimes Act 1914* (Cth) ss 23A(6), 23D(2).

⁸⁴⁵ *Crimes Act 1914* (Cth) ss 23A(6), 23E(1).

⁸⁴⁶ A reference in Part 10A of the *Crimes Act 1900* (NSW) includes a reference to a person who, in certain circumstances, is in the company of a police officer for the purpose of participating in an investigative procedure. See *Crimes Act 1900* (NSW) s 355(2).

⁸⁴⁷ *Crimes Act 1900* (NSW) ss 356C(1), 356D(2).

⁸⁴⁸ *Crimes Act 1900* (NSW) s 356D(2).

⁸⁴⁹ *Crimes Act 1900* (NSW) s 356G(1), (3), (4).

⁸⁵⁰ *Crimes Act 1900* (NSW) s 356G(1).

⁸⁵¹ *Crimes Act 1900* (NSW) s 355(1) (definition of “authorised justice”).

by telephone, radio, facsimile or any other communication device.⁸⁵²

(d) Northern Territory

In the Northern Territory, a police officer may detain a person who has been taken into lawful custody for “a reasonable period” to enable the person to be questioned or investigations to be carried out to obtain evidence in relation to an offence that the officer believes on reasonable grounds involves the person.⁸⁵³ The person may be detained for this purpose whether or not the offence being investigated is the offence in respect of which the person was taken into custody.⁸⁵⁴

However, a police officer may continue to hold a person for the purposes of enabling the person to be questioned or investigations to be carried out to obtain evidence of or in relation to:

- the offence in respect of which the person was taken into custody - only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for any period; or
- an offence that is not the offence in respect of which the person was taken into custody - only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for five years or more.⁸⁵⁵

The question of what is a reasonable time for these purposes may be brought before a justice of the peace or the Magistrates Court.⁸⁵⁶ In determining this question, the justice of the peace or court must take into account an extensive range of factors.⁸⁵⁷

(e) South Australia

In South Australia, a suspect who is apprehended without warrant must ordinarily be

⁸⁵² *Crimes Act 1900* (NSW) ss 355(1) (definition of “telephone”), 356H(1).

⁸⁵³ *Police Administration Act* (NT) s 137(2).

⁸⁵⁴ *Police Administration Act* (NT) s 137(2)(c).

⁸⁵⁵ *Police Administration Act* (NT) s 137(3).

⁸⁵⁶ *Police Administration Act* (NT) s 138.

⁸⁵⁷ *Police Administration Act* (NT) s 138. The list of factors includes the following: the time taken for investigators to interview the person; the number and complexity of the matters to be investigated; and the time taken by a legal adviser, friend or relative of the person or an interpreter to arrive where the questioning took place.

delivered “forthwith” into custody at the nearest police station.⁸⁵⁸ However, where such a person is suspected of having committed a “serious offence”,⁸⁵⁹ he or she may be detained for up to four hours in order to investigate the suspected offence before being taken into custody at the nearest police station.⁸⁶⁰ A magistrate may extend the detention period to not more than eight hours.⁸⁶¹

If a suspect has already been taken into custody at a police station, a magistrate may authorise his or her temporary removal into the custody of a police officer for a purpose related to the investigation of the offence.⁸⁶²

Justices of the peace are not authorised to exercise either of these powers.

(f) Tasmania

In Tasmania, a person who has been taken into custody may be detained by a police officer for “a reasonable time” for the purposes of questioning the person or carrying out investigations in which the person participates in order to determine the person’s involvement, if any, in relation to an offence.⁸⁶³ The legislation includes an extensive list of matters that must be taken into account in determining what constitutes a reasonable time.⁸⁶⁴

The legislation does not impose an initial maximum detention period or any requirement that a police officer must seek an extension of the detention period after a specified period of time.

(g) Victoria

⁸⁵⁸ *Summary Offences Act 1953* (SA) s 78(1).

⁸⁵⁹ The term “serious offence” is defined in s 78(6) of the *Summary Offences Act 1953* (SA) to mean an indictable offence or an offence punishable by imprisonment for two years or more.

⁸⁶⁰ *Summary Offences Act 1953* (SA) s 78(2)(a), (6) (definition of “the prescribed period”).

⁸⁶¹ *Summary Offences Act 1953* (SA) s 78(6) (definition of “the prescribed period”).

⁸⁶² *Summary Offences Act 1953* (SA) s 78(3).

⁸⁶³ *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(2).

⁸⁶⁴ The specified matters include the number and complexity of the offences to be investigated and the time during which questioning is suspended to allow the person to communicate with his or her legal practitioner: *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(4).

In Victoria, a person who is taken into custody⁸⁶⁵ must, if the person is not released unconditionally or released on bail, be brought before a bail justice or the Magistrates' Court within a reasonable time of being taken into custody.⁸⁶⁶ Within that "reasonable time", an investigating officer may, if the person suspected of having committed an offence is in custody for that offence, question the person or carry out investigations in which the person participates in order to determine the involvement (if any) of the person in that offence.⁸⁶⁷ Specific matters must be taken into account in determining what constitutes a reasonable time for this purpose.⁸⁶⁸

Where a suspect is held in a prison or in a police gaol and is reasonably suspected of having committed an offence other than the offence for which he or she is being held, an investigating official may apply to the Magistrates' Court or, in the case of a child under seventeen, to the Children's Court for an order that the person be delivered into the custody of the investigating official for the purpose of questioning or investigation in respect of the first-mentioned offence.⁸⁶⁹ The Court may, if the person being held consents, extend a period of custody or, on a subsequent application under section 464B(1) of the *Crimes Act 1958* (Vic), make orders whether in respect of the same or a different offence reasonably suspected of having been committed by the person being held.⁸⁷⁰

No time limit is specified for the initial or extended period of detention.

In Victoria, justices of the peace are not authorised to constitute either the Magistrates' Court or the Children's Court.⁸⁷¹ Consequently, they are not authorised to exercise any of these powers under the *Crimes Act 1958* (Vic).

⁸⁶⁵ Subdivision 1 of Part III of the *Crimes Act 1958* (Vic) applies not only to a person who is under lawful arrest, but also to a person who is in the company of an investigating official and is being questioned, is to be questioned, or is otherwise being investigated to determine his or her involvement (if any) in the commission of an offence if there is sufficient information in the possession of the investigating official to justify the arrest of that person in respect of that offence: *Crimes Act 1958* (Vic) s 464(1).

⁸⁶⁶ *Crimes Act 1958* (Vic) s 464A(1).

⁸⁶⁷ *Crimes Act 1958* (Vic) s 464A(2).

⁸⁶⁸ *Crimes Act 1958* (Vic) s 464A(4). These factors include the following: the period of time reasonably required to bring the person before a bail justice or the Magistrates' Court; the number and complexity of the offences to be investigated; any time taken to communicate with a legal practitioner, friend, relative, parent, guardian or independent person; and any time during which the questioning or investigation of the person is suspended or delayed to allow the person to receive medical attention or to allow the person to rest.

⁸⁶⁹ *Crimes Act 1958* (Vic) s 464B(1), (5).

⁸⁷⁰ *Crimes Act 1958* (Vic) s 464B(8).

⁸⁷¹ See pp 203 and 262 of this Report.

5. DISCUSSION PAPER

(a) The need for the role

In the Discussion Paper,⁸⁷² the Commission agreed with the following observation made by the Criminal Justice Commission:⁸⁷³

... pre-charge detention represents a significant change to the common law and a potentially serious infringement on individual liberty. Consequently, decisions about a suspect's initial detention and authorisation of extensions of that detention, particularly where a long period of time may be involved, should be treated with the utmost seriousness.

This Commission therefore considered it important that there is a body of persons, independent of the Queensland Police Service, who may hear an application to extend the period of time for which a person may be detained in custody for questioning by the police. It also considered it important that the persons on whom this role is conferred should be appropriately qualified and both willing and available to perform the role.⁸⁷⁴

The Commission expressed the view that, subject to the matters referred to below, there is a need for justices of the peace to perform this role, and it is an appropriate role for them to perform.⁸⁷⁵

(b) Justices of the peace who should be authorised to hear an application for the extension of a detention period

As the exercise of the power conferred by section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) to extend a detention period may have significant consequences in terms of a person's liberty and well-being, the Commission formed the view that the exercise of that power should be restricted to those justices of the peace who are most qualified to hear such an application. However, the Commission acknowledged that, given the relatively small number of justices of the peace (magistrates court)⁸⁷⁶ and the decentralised nature of Queensland's population, there might be insufficient people available to deal with these applications if the hearing of

⁸⁷² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 125.

⁸⁷³ Submission 113 (IP).

⁸⁷⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 125.

⁸⁷⁵ Ibid.

⁸⁷⁶ See p 31 of this Report.

such an application were restricted to justices of the peace (magistrates court).⁸⁷⁷

For this reason, the Commission expressed the view that it is appropriate that justices of the peace (qualified) should continue, in the circumstances presently provided for by section 51(2)(c) of the *Police Powers and Responsibilities Act 1997* (Qld), to exercise this power. The Commission generally agreed with the hierarchical approach in section 51(2). In the Commission's view, a justice of the peace (magistrates court) would be more experienced in hearing these applications than a justice of the peace (qualified) and, if available, should therefore take precedence over a justice of the peace (qualified).⁸⁷⁸

The Commission was conscious of the fact that, while future appointees to the offices of justice of the peace (magistrates court) and justice of the peace (qualified) would be trained in, or examined on, the power to extend a detention period under the *Police Powers and Responsibilities Act 1997* (Qld), justices of the peace (magistrates court) and justices of the peace (qualified) who were appointed well before the commencement of that Act would not necessarily have received any training about that role. That fact did not dissuade the Commission from its view that it was appropriate for justices of the peace (magistrates court) and justices of the peace (qualified) to perform this role. It did reinforce, however, the Commission's view as to the importance of providing regular refresher courses for justices of the peace.⁸⁷⁹

The Commission made the following preliminary recommendations.⁸⁸⁰

- An application to extend a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made initially to a magistrate or a justice of the peace (magistrates court).
- If neither a magistrate nor a justice of the peace (magistrates court) is available, an application to extend a detention period should be made to a justice of the peace (qualified).

(c) Means by which an application for the extension of a detention period should be made

⁸⁷⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 125-126.

⁸⁷⁸ *Id* at 126.

⁸⁷⁹ *Ibid*. See the Commission's recommendation at p 353 of this Report in relation to the provision of post-appointment training for justices of the peace (magistrates court) and justices of the peace (qualified) (Recommendation 12.19).

⁸⁸⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 127-128.

Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) presently enables an application for the extension a detention period to be made by telephone, facsimile, radio or another similar facility.⁸⁸¹

The Commission's preliminary recommendation was that justices of the peace should not be able to hear an application for the extension of a detention period by means of the telephone or other similar facility, and that section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.⁸⁸²

The Commission expressed the view that, if it is necessary to use the telephone or other similar means to make an application, the application should be made to a magistrate.⁸⁸³

(d) Justices of the peace who should not be authorised to hear an application for the extension of a detention period

(i) An old system justice of the peace

The Commission's preliminary recommendation was that old system justices of the peace should not be included in the list of justices of the peace who may exercise this power, and that section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.⁸⁸⁴ The Commission noted that, unlike justices of the peace (magistrates court) and justices of the peace (qualified), old system justices of the peace have not been required to undergo any training or to pass an examination in order to qualify for appointment.⁸⁸⁵

(ii) A justice of the peace (commissioner for declarations)

The Commission considered it appropriate that section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) prohibits a justice of the peace (commissioner for declarations) from extending a detention period under that Act.⁸⁸⁶ Accordingly, the Commission's preliminary recommendation was that justices of the peace (commissioners for declarations) should continue to be

⁸⁸¹ See pp 91-92 of this Report.

⁸⁸² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 128.

⁸⁸³ Id at 127.

⁸⁸⁴ Id at 128.

⁸⁸⁵ Id at 126.

⁸⁸⁶ Ibid.

excluded from the list of people who may extend a detention period.⁸⁸⁷

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service

The Commission agreed with the view of the Criminal Justice Commission in its submission in response to the Issues Paper⁸⁸⁸ that a justice of the peace who is a member of the Queensland Police Service should not be authorised to exercise this power. The Commission considered it important that this power is exercised only by a person who is independent of the Queensland Police Service. For that reason, the Commission formed the view that, if a justice of the peace is a member of the Queensland Police Service or is employed by the Police Service, for example, in an administrative capacity, the justice of the peace should not be authorised under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) to hear an application for the extension of a detention period.⁸⁸⁹

The Commission's preliminary recommendation was that justices of the peace who are members or employees of the Queensland Police Service should not have the power to hear an application to extend a detention period, and that section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.⁸⁹⁰

6. SUBMISSIONS

(a) Justices of the peace who should be authorised to hear an application for the extension of a detention period

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that an application to extend a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made initially to a magistrate or a justice of the peace (magistrates court). Twenty-one of these respondents agreed with the Commission's preliminary recommendation.⁸⁹¹

⁸⁸⁷ Id at 128.

⁸⁸⁸ Submission 113 (IP).

⁸⁸⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 127.

⁸⁹⁰ Id at 128.

⁸⁹¹ Submissions 6, 7, 9, 14, 21, 22, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

Twenty-three submissions commented on the Commission's preliminary recommendation that, if neither a magistrate nor a justice of the peace (magistrates court) is available, an application to extend a detention period should be made to a justice of the peace (qualified). Twenty-two of these respondents agreed with the Commission's preliminary recommendation.⁸⁹²

One respondent, although agreeing that justices of the peace (magistrates court) and justices of the peace (qualified) should be able to hear an application for the extension of a detention period, disagreed with the Commission's preliminary recommendations in relation to the hierarchy that should apply in relation to the making of such an application.⁸⁹³ That respondent was of the view that there should be no differentiation between justices of the peace (magistrates court) and justices of the peace (qualified) in performing this role.

(b) Means by which an application for the extension of a detention period should be made

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that justices of the peace should not be able to hear an application for the extension of a detention period by means of the telephone or other similar facility, and that section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly. Twenty-one of these respondents agreed with the Commission's preliminary recommendation.⁸⁹⁴

One respondent expressly disagreed with the Commission's preliminary recommendation, commenting that, in his view, justices of the peace (qualified) and justices of the peace (magistrates court) are adequately trained to perform this role.⁸⁹⁵

Another respondent, although not expressly commenting on this preliminary recommendation, impliedly disagreed with it.⁸⁹⁶ That respondent stated that he did not wish to see any reduction in the powers of justices of the peace (qualified).

(c) Justices of the peace who should be not be authorised to hear an application for the extension of a detention period

⁸⁹² Submissions 6, 7, 9, 14, 18, 21, 22, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

⁸⁹³ Submission 56.

⁸⁹⁴ Submissions 6, 7, 9, 18, 21, 22, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

⁸⁹⁵ Submission 14.

⁸⁹⁶ Submission 39.

(i) An old system justice of the peace

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that old system justices of the peace should not be included in the list of justices of the peace who may exercise this power, and that section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly. All of these respondents agreed with the Commission's preliminary recommendation.⁸⁹⁷

(ii) A justice of the peace (commissioner for declarations)

Twenty-two submissions commented on the Commission's preliminary recommendation that justices of the peace (commissioners for declarations) should continue to be excluded from the list of people who may extend a detention period. All of these respondents agreed with the Commission's preliminary recommendation.⁸⁹⁸

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service

Twenty-two submissions commented on the Commission's preliminary recommendation that justices of the peace who are members of the Queensland Police Service or employed by the Queensland Police Service should not have the power to hear an application under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld), and that the section should be amended accordingly. Twenty-one of these respondents agreed with the Commission's preliminary recommendation.⁸⁹⁹

One of these respondents expressed the view that there was too great a possibility of a conflict of interest if a member of the Queensland Police Service could hear an application to extend the detention of a suspect.⁹⁰⁰

Only one submission expressed a different view. That respondent, although not commenting on this specific preliminary recommendation, expressed the general view that a justice of the peace who is a police officer should not be precluded

⁸⁹⁷ Submissions 6, 7, 9, 14, 18, 21, 22, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

⁸⁹⁸ Submissions 6, 7, 9, 14, 18, 21, 22, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

⁸⁹⁹ Submissions 6, 7, 9, 14, 18, 21, 23, 24, 25, 26, 29, 33, 34, 38, 40, 44, 45, 47, 51, 58, 59.

⁹⁰⁰ Submission 23.

from exercising the powers of a justice of the peace.⁹⁰¹

(iv) A justice of the peace who is acting as an interview friend

One respondent to the Discussion Paper, while agreeing with the Commission's preliminary recommendations about the exercise of this power, suggested that a further exclusion should be made.⁹⁰² That respondent contemplated that the situation could arise where a justice of the peace (magistrates court) or a justice of the peace (qualified) was in attendance for the questioning of a juvenile suspect⁹⁰³ when the need arose to apply to extend the detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld). It was suggested that, in those circumstances, the police should be required to contact another justice of the peace.

7. THE COMMISSION'S VIEW

(a) Justices of the peace who should be authorised to hear an application for the extension of a detention period

The Commission's view on this issue remains unchanged. The extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) has serious implications for a detained person's liberty. Given that a justice of the peace may make an order that results in a detained person being held in custody for a period in excess of sixteen hours,⁹⁰⁴ the Commission favours a restrictive approach in relation to the categories of justices of the peace who may exercise this power. However, the Commission is also mindful of the decentralised nature of Queensland's population, and recognises that it might be impracticable to restrict the exercise of this power to magistrates and justices of the peace (magistrates court). For that reason, the Commission is of the view that, in certain circumstances, justices of the peace (qualified) should also be able to exercise this power.

Section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) presently creates a hierarchy in relation to the persons to whom an application to extend a detention period may be made. In the Commission's view, the hierarchy stipulated in section 51

⁹⁰¹ Submission 22.

⁹⁰² Submission 51.

⁹⁰³ See Chapter 7 of this Report.

⁹⁰⁴ See pp 149-150 of this Report.

reflects the gravity of this power and should therefore be retained.⁹⁰⁵ An application for an extension of a detention period under section 51 should be made initially to a magistrate or to a justice of the peace (magistrates court). If neither a magistrate nor a justice of the peace (magistrates court) is available, an application to extend a detention period should be made to a justice of the peace (qualified).

It is important that justices of the peace (magistrates court) and justices of the peace (qualified) receive proper training in relation to the exercise of this power both before their appointments and on an ongoing basis.⁹⁰⁶

(b) Means by which an application to extend a detention period should be made

The Commission remains of the view that only magistrates should have the power to hear an application for the extension of a detention period by telephone or other similar means and that section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended to provide that justices of the peace may not hear an application to extend a detention period by the means specified in that section.

In the Commission's view, magistrates have greater experience in hearing telephone applications generally⁹⁰⁷ and are more likely to have the facilities available to comply with the requirements imposed by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) on a person who orders an extension of a detention period by the means authorised by that section.⁹⁰⁸ Further, if magistrates are authorised to hear an application for the extension of a detention period by telephone or other similar means, there is no need for justices of the peace to be able to hear an application by those means.⁹⁰⁹ The Commission has been informed by the Chief Stipendiary Magistrate that there is a system in place in the Magistrates Courts whereby a "Duty Magistrate" is on call to deal with various matters that may be required to be heard by a magistrate

⁹⁰⁵ See the Commission's view in relation to the relationship between ss 51 and 129 of the *Police Powers and Responsibilities Act 1997* (Qld) at pp 164-165 of this Report.

⁹⁰⁶ See the Commission's recommendations in relation to training at pp 350 and 353 of this Report (Recommendations 12.5(a), 12.5(b) and 12.19).

⁹⁰⁷ See pp 88 and 92 of this Report.

⁹⁰⁸ S 129 of the *Police Powers and Responsibilities Act 1997* (Qld) is set out at pp 91-92 of this Report.

⁹⁰⁹ This view is consistent with the Commission's earlier recommendation that neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to issue a search warrant by telephone, facsimile, radio or other similar means under s 129 of the *Police Powers and Responsibilities Act 1997* (Qld) or under any other Act. See p 119 of this Report (Recommendation 6.7).

outside normal court hours.⁹¹⁰

The Commission believes that there is presently an ambiguity in the *Police Powers and Responsibilities Act 1997* (Qld) as to the effect of section 129 of that Act on the hierarchy stipulated in section 51 of that Act. It is not entirely clear whether the fact that an application may be made by the means specified in section 129 where it is impracticable to make the application in person must be taken into account in determining whether a magistrate or a justice of the peace (magistrates court) is “available” under section 51. Even if the Commission’s recommendation that justices of the peace should not be able to hear an application by any of the means specified in section 129 of the Act is implemented, this ambiguity will still exist in relation to what is meant by the “availability” of a magistrate.

In the light of the Commission’s recommendations, the issue is whether, if it is not practicable for a police officer to apply in person to a magistrate or a justice of the peace (magistrates court):

- the police officer should apply to a magistrate by any of the means authorised by section 129 of the Act before applying to a justice of the peace (qualified); or
- the police officer should apply to a justice of the peace (qualified) in person before applying to a magistrate by any of the means authorised by section 129 of the Act.

The Commission has given careful consideration to this issue. In the Commission’s view, the physical presence of a person is not the only relevant consideration in determining the availability of a person under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld). The suitability of a person to whom such an application might be made - in terms of the person’s expertise and experience - is also a relevant consideration. For that reason, it might be more appropriate, on some occasions, for an application to be made to a magistrate by telephone or other means authorised by section 129 of the Act than to a justice of the peace (qualified). On the other hand, the Commission is conscious of the administrative burden that would be imposed on the Magistrates Courts if, in all cases where there was no magistrate or justice of the peace (magistrates court) available in person, a police officer was required to apply to a magistrate under section 129 of the Act and could apply to a justice of the peace (qualified) only if a magistrate was not available by any of the means authorised by section 129.

The Commission considers it important to retain some flexibility in relation to this issue. Consequently, the Commission does not believe that the legislation should give either of these options preference over the other. The Commission is of the view that, if neither a magistrate nor a justice of the peace (magistrates court) is available in

⁹¹⁰

Letter from Ms DM Fingleton, Chief Stipendiary Magistrate, to the Queensland Law Reform Commission dated 10 December 1999.

person, it should be possible for a police officer to apply to a magistrate by any of the means authorised by section 129 of the Act or to a justice of the peace (qualified) in person. The Commission believes that both options should be equally available in these circumstances.

(c) Justices of the peace who should not be authorised to hear an application for the extension of a detention period

(i) An old system justice of the peace

As noted previously, old system justices of the peace were not required to undergo any training or pass an examination in order to qualify for appointment.⁹¹¹ The Commission remains of the view that, having regard to the responsibilities attaching to this role, an old system justice of the peace should not be authorised to extend a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld). The *Police Powers and Responsibilities Act 1997* (Qld) should be amended to remove the power of an old system justice of the peace to do so.

(ii) A justice of the peace (commissioner for declarations)

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) presently provides that an old system justice of the peace who is not a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations will automatically become a justice of the peace (commissioner for declarations).⁹¹² Just as the Commission is of the view that an old system justice of the peace is not qualified to perform this role, it is also of the view that a justice of the peace (commissioner for declarations) is not qualified to perform this role.

The Commission remains of the view that a justice of the peace (commissioner for declarations) should continue to be excluded from the list of people to whom an application for the extension of a detention period may be made under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld).

Earlier in this Report, the Commission recommended that, if an old system justice of the peace who is not a lawyer is not appointed to another category of office or does not register as a commissioner for declarations by 30 June 2000, he or she should hold office as a commissioner for declarations, rather than as

⁹¹¹ See pp 9 and 16-17 of this Report.

⁹¹² See p 16 of this Report.

a justice of the peace (commissioner for declarations).⁹¹³ If that recommendation is implemented, it will no longer be necessary for section 51(2) of the *Police Powers and Responsibilities Act 1997* (Qld) to expressly exclude a justice of the peace (commissioner for declarations). However, if that recommendation is not implemented, section 51(2) of the *Police Powers and Responsibilities Act 1997* (Qld) should continue to exclude a justice of the peace (commissioner for declarations) from the list of people to whom an application for the extension of a detention period may be made.

(iii) A justice of the peace who is a member or an employee of the Queensland Police Service

The Commission remains of the view that a justice of the peace who is a member or an employee of the Queensland Police Service should not have the power to hear an application under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld), and that the section should be amended accordingly. Having regard to the purpose of this power, the Commission considers it important that the exercise of this power is restricted to a justice of the peace who is independent of the Queensland Police Service.

(iv) A justice of the peace who is present during the interview of a detained person

The Commission agrees with the submission that suggested that, if a justice of the peace is present as an interview friend during the interview of a juvenile suspect, that justice of the peace should not be able to hear an application to extend the detention of the juvenile.⁹¹⁴ However, the Commission believes that a recommendation in those terms might be too narrow in its application.

It is possible that a justice of the peace could be present during the interview of a person other than a juvenile suspect. For example, the Police Responsibilities Code requires that, if the police are questioning a person with impaired capacity, a carer must be present while the person is being questioned.⁹¹⁵ It is possible that the carer could be a justice of the peace, even though he or she is present in the capacity of a carer, rather than in the capacity of a justice of the peace. The Commission is therefore of the view that a recommendation of more general application is warranted.

In the Commission's view, a justice of the peace who is present during the

⁹¹³ See p 52 of this Report (Recommendation 4.2).

⁹¹⁴ See pp 162-163 of this Report. See also s 97 of the *Police Powers and Responsibilities Act 1997* (Qld) and Chapter 7 of this Report (Police Interviews of Juvenile Suspects).

⁹¹⁵ Police Responsibilities Code s 67(2)(b). The Police Responsibilities Code is set out in Sch 2 to the *Police Powers and Responsibilities Regulation 1998* (Qld).

interview of a detained person, whether in the capacity of an interview friend as required by section 97 of the *Police Powers and Responsibilities Act 1997* (Qld) or in some other capacity, should not be able to hear an application for the extension of that person's detention.

8. RECOMMENDATIONS

The Commission makes the following recommendations:

- 8.1 An application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made initially in person to a magistrate or a justice of the peace (magistrates court).
- 8.2 If neither a magistrate nor a justice of the peace (magistrates court) is available in person, an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be made to:
- a magistrate by any of the means authorised by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld); or
 - a justice of the peace (qualified) in person.
- 8.3 Neither a justice of the peace (magistrates court) nor a justice of the peace (qualified) should have the power to hear an application for the extension of a detention period by telephone, facsimile, radio or other similar means. Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended so that it does not apply to the making of an application to a justice of the peace for the extension of a detention period under section 51 of that Act.
- 8.4 An old system justice of the peace⁹¹⁶ should not be authorised to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld), and the section should be amended accordingly.

⁹¹⁶

See the explanation of the Commission's use of this term at pp 16-17 of this Report.

- 8.5** A justice of the peace (commissioner for declarations) should continue to be excluded from the list of people who may hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997 (Qld)*.⁹¹⁷
- 8.6** A justice of the peace who is a member or an employee of the Queensland Police Service should not have the power to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997 (Qld)*, and the section should be amended accordingly.⁹¹⁸
- 8.7** A justice of the peace who is present during the interview of a detained person, whether in the capacity of an interview friend as required by section 97 of the *Police Powers and Responsibilities Act 1997 (Qld)* or in some other capacity, should not have the power to hear an application for the extension of that person's detention, and section 51 of the *Police Powers and Responsibilities Act 1997 (Qld)* should be amended accordingly.

⁹¹⁷ See, however, p 166 of this Report as to whether it will be necessary for the legislation to continue to expressly exclude a justice of the peace (commissioner for declarations).

⁹¹⁸ See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

CHAPTER 9

CORONIAL POWERS

1. INTRODUCTION

The *Coroners Act 1958* (Qld) is one of the many Queensland Acts that confer powers on justices of the peace.

Under that Act, the following people are coroners, merely by virtue of the offices held by them:

- every stipendiary magistrate and acting stipendiary magistrate,⁹¹⁹ and
- every clerk of the court and acting clerk of the court (who, in both cases, is also a justice of the peace and a public service officer).⁹²⁰

The Governor in Council may also “from time to time by notification published in the gazette appoint any persons to be coroners”.⁹²¹

Although a clerk of the court or an acting clerk of the court is an *ex officio* coroner, he or she may not act as a coroner if a magistrate, an acting magistrate or a coroner appointed under the Act is present, unless requested to do so by the magistrate, acting magistrate or appointed coroner, as the case may be.⁹²²

A coroner may appoint a justice of the peace to be the coroner’s deputy.⁹²³ The appointment of a deputy coroner may be limited to a particular purpose or for a fixed time.⁹²⁴ Subject to the terms of the appointment, a deputy coroner has “all of the jurisdiction, powers, functions and authorities” of the coroner who appointed the deputy, and is subject to the same obligations and liabilities as the coroner.⁹²⁵ Unless the appointment of a deputy coroner is limited to a particular purpose, a deputy coroner may not act as a coroner when the coroner who appointed the deputy is present, except

⁹¹⁹ *Coroners Act 1958* (Qld) s 6(1)(a).

⁹²⁰ *Coroners Act 1958* (Qld) s 6(1)(b).

⁹²¹ *Coroners Act 1958* (Qld) s 6(2).

⁹²² *Coroners Act 1958* (Qld) s 6(1A).

⁹²³ *Coroners Act 1958* (Qld) s 6(4). That subsection provides, however, that a deputy coroner may not appoint a deputy.

⁹²⁴ *Coroners Act 1958* (Qld) s 6(4A).

⁹²⁵ *Coroners Act 1958* (Qld) s 6(4D).

at the direction of that coroner.⁹²⁶

2. POWERS UNDER THE *CORONERS ACT 1958 (QLD)*

The *Coroners Act 1958* (Qld) gives a coroner jurisdiction to inquire into matters such as the cause and circumstances of the disappearance of missing persons⁹²⁷ and, where the coroner is of the opinion that a person has died in certain specified circumstances, whether a death has occurred and the cause and circumstances of the death.⁹²⁸

Under the Act, a coroner may order a medical practitioner to conduct a post-mortem examination of a body⁹²⁹ and may require tests to be carried out on the body by an analyst or a pathologist or other qualified person.⁹³⁰

If a coroner is satisfied of certain circumstances in relation to the death of a person, the coroner must hold an inquest into the death.⁹³¹ A coroner may also order the burial, or issue a certificate authorising the cremation, of the body of any deceased person in respect of which the coroner has jurisdiction under the Act.⁹³² A coroner also has powers in relation to the exhumation of bodies.⁹³³

3. JUSTICES OF THE PEACE WHO MAY EXERCISE CORONIAL POWERS

The *Coroners Act 1958* (Qld) refers merely to a “justice of the peace”. However, the effect of that Act is modified to some extent by the provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) that limit the powers that may be exercised by particular categories of justices of the peace.⁹³⁴ Those provisions determine the extent to which the jurisdiction conferred by the *Coroners Act 1958* (Qld) may still be exercised by a justice of the peace.

⁹²⁶ *Coroners Act 1958* (Qld) s 6(4E).

⁹²⁷ *Coroners Act 1958* (Qld) s 10(1).

⁹²⁸ *Coroners Act 1958* (Qld) s 7(1).

⁹²⁹ *Coroners Act 1958* (Qld) s 18(1).

⁹³⁰ *Coroners Act 1958* (Qld) s 18(3).

⁹³¹ *Coroners Act 1958* (Qld) s 7B(1).

⁹³² *Coroners Act 1958* (Qld) s 23(1), (2).

⁹³³ *Coroners Act 1958* (Qld) s 17.

⁹³⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29. See pp 12-13 of this Report.

(a) A justice of the peace (qualified)

Section 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the purposes for which a justice of the peace (qualified) may constitute a court. In relation to bench duties, a justice of the peace (qualified) is limited to “taking or making a procedural action or order”, such as the charging of a defendant, the issuing of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.⁹³⁵

As a result of this limitation, a justice of the peace (qualified) is not able to constitute a Coroner’s Court to conduct an inquest under the *Coroners Act 1958* (Qld). However, it would still be possible for a justice of the peace (qualified) to perform various administrative functions, such as ordering a post-mortem examination or issuing a burial order or a certificate authorising a cremation.

(b) A justice of the peace (magistrates court)

The bench duties of a justice of the peace (magistrates court) under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) are wider than those of a justice of the peace (qualified). In addition to taking a procedural action or making a procedural order, a justice of the peace (magistrates court) is authorised to hear a limited range of criminal matters, provided that the defendant pleads guilty, and to conduct committal hearings.⁹³⁶

However, the additional purposes for which a justice of the peace (magistrates court) may constitute a court do not include constituting a Coroner’s Court for the purpose of conducting an inquest. Consequently, a justice of the peace (magistrates court) is also limited to performing various administrative functions, such as ordering a post-mortem examination or issuing a burial order or a certificate authorising a cremation.

(c) An old system justice of the peace

Old system justices of the peace⁹³⁷ are not presently affected by the limitations imposed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on justices of the peace who have been appointed since the commencement of that Act. Until 30 June 2000, an old system justice of the peace is able to exercise all the powers that are “conferred on the justice of the peace or on a commissioner for declarations

⁹³⁵ See the definition of “procedural action or order” at note 94 of this Report.

⁹³⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4).

⁹³⁷ See the explanation of the Commission’s use of this term at pp 16-17 of this Report.

by the *Justices Act 1886* (Qld) or by any other Act".⁹³⁸

Consequently, until 30 June 2000, an old system justice of the peace is able to exercise any of the powers conferred on a justice of the peace by the *Coroners Act 1958* (Qld). Unlike a justice of the peace (qualified) or a justice of the peace (magistrates court), an old system justice of the peace is not limited to performing administrative functions under the *Coroners Act 1958* (Qld). Theoretically, if an old system justice of the peace were appointed as a deputy coroner, he or she would have the power to conduct an inquest.

As noted earlier in this Report,⁹³⁹ the powers of an old system justice of the peace who is a lawyer are not affected by the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).⁹⁴⁰ Accordingly, an old system justice of the peace who is a lawyer is able, indefinitely, to exercise all the powers conferred on a justice of the peace by the *Coroners Act 1958* (Qld).

4. FREQUENCY OF EXERCISING CORONIAL POWERS

Of the responses received in answer to the questionnaire forwarded to all justices of the peace (magistrates court),⁹⁴¹ only four respondents identified coronial functions as a significant power that had been exercised.⁹⁴² Each of these four respondents was a member of staff at a Magistrates Court in a country area.

Coronial powers were not exercised by justices of the peace at any of the Magistrates Courts surveyed by the Commission during March and April 1998.⁹⁴³

Under the *Coroners Act 1958* (Qld), a copy of every appointment of a justice of the peace as a deputy coroner must be sent "forthwith to the chief executive and be kept

⁹³⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 29(1)(a), (6)(b), 41(a), 42(1).

⁹³⁹ See pp 16-17 of this Report.

⁹⁴⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(3). See, however, the Commission's recommendation at p 52 of this Report that an old system justice of the peace who is a lawyer and who has not, by 30 June 2000, been appointed to another category of office or registered as a commissioner for declarations, should hold office as a commissioner for declarations (Recommendation 4.3).

⁹⁴¹ See p 5 of this Report.

⁹⁴² Q3, Q57, Q69, Q70.

⁹⁴³ See pp 4-5 of this Report.

among the records of the department”.⁹⁴⁴ The Commission has been informed by an officer of the Department of Justice and Attorney-General that, after searching departmental records, no record could be found of a justice of the peace, other than one who is a clerk of the court or an acting clerk of the court, having been appointed as a deputy coroner.⁹⁴⁵

The former Coroner for Brisbane, Mr Casey SM, has informed the Commission that he is aware of only one occasion on which a justice of the peace from the general community has been appointed as a deputy coroner under section 6(4) of the *Coroners Act 1958* (Qld). That appointment was made approximately thirty years ago in a country centre.⁹⁴⁶ Mr Casey explained that, when an urgent request for a post-mortem examination or for a burial order arises in an area where there is no local court house, the request is directed to the nearest coroner (clerk of the court or stipendiary magistrate) in the Magistrates Courts District in which the death has occurred.⁹⁴⁷

5. OTHER JURISDICTIONS

At present, there is only one other Australian jurisdiction where justices of the peace, by virtue of holding that office, may be appointed to perform any coronial duties. In South Australia, a justice of the peace or any other person may be appointed to be a coroner.⁹⁴⁸

In New South Wales, a person who, in the opinion of the relevant Minister, is a fit and proper person may be appointed by the Governor as a coroner or an assistant coroner.⁹⁴⁹ The Tasmanian legislation simply provides that “the Governor may appoint persons as coroners”.⁹⁵⁰

In Victoria, magistrates, acting magistrates, barristers and solicitors are eligible to be appointed as coroners.⁹⁵¹

⁹⁴⁴ *Coroners Act 1958* (Qld) s 6(4B).

⁹⁴⁵ Letter from the Executive Director, Administration of Justice Program, Department of Justice and Attorney-General to the Queensland Law Reform Commission dated 8 November 1999.

⁹⁴⁶ Letter from Mr GM Casey SM to the Queensland Law Reform Commission dated 14 October 1999.

⁹⁴⁷ Ibid.

⁹⁴⁸ *Coroners Act 1975* (SA) s 11(1).

⁹⁴⁹ *Coroners Act 1980* (NSW) ss 5(1), 5A(1).

⁹⁵⁰ *Coroners Act 1995* (Tas) s 10(1).

⁹⁵¹ *Coroners Act 1985* (Vic) s 8.

In the Australian Capital Territory, the Northern Territory and Western Australia, every magistrate is, by virtue of that position, also a coroner.⁹⁵² In the Australian Capital Territory there is also provision for the appointment of any person as a deputy coroner,⁹⁵³ who, subject to the directions of the Chief Coroner, has and may exercise the powers of a coroner.⁹⁵⁴ However, the Chief Coroner may not direct a deputy coroner to hold an inquest into a death in custody.⁹⁵⁵ Similar provisions exist in the Northern Territory, except that the list of matters into which a deputy coroner may not conduct an inquest is more extensive.⁹⁵⁶

6. DISCUSSION PAPER

In the Discussion Paper, the Commission observed that the coronial powers given to justices of the peace by the *Coroners Act 1958* (Qld) were infrequently exercised. Consequently, the Commission formed the view that there is only a limited need for justices of the peace to retain their coronial powers.⁹⁵⁷ In the absence of a magistrate or an acting magistrate, certain clerks of the court and acting clerks of the court may act as a coroner, without the need for other justices of the peace to be appointed as deputy coroners.⁹⁵⁸ The Commission considered that, if necessary, urgent police requests for a post-mortem examination and applications for burial orders and orders authorising the cremation of deceased persons under the Act, could be handled by a coroner over the telephone.⁹⁵⁹

The Commission noted that a submission received from a retired stipendiary magistrate⁹⁶⁰ expressed the view that, although a clerk of the court in a country centre might act as the coroner while the magistrate was away on circuit, the only powers that were needed by the clerk of the court were the power to issue an order for a post-mortem examination and, following a post-mortem examination, the power to make an

⁹⁵² *Coroners Act 1997* (ACT) s 5; *Coroners Act* (NT) s 4(3); *Coroners Act 1996* (WA) s 11.

⁹⁵³ *Coroners Act 1997* (ACT) s 8.

⁹⁵⁴ *Coroners Act 1997* (ACT) s 9(1).

⁹⁵⁵ *Coroners Act 1997* (ACT) s 9(2).

⁹⁵⁶ *Coroners Act* (NT) ss 5(1), 6(3), (4).

⁹⁵⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 134.

⁹⁵⁸ See p 170 of this Report.

⁹⁵⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 134.

⁹⁶⁰ Submission 120 (IP).

order permitting burial or cremation. Even then, the respondent acknowledged that a police request for a post-mortem examination could be made by telephone to the coroner in the nearest regional centre.⁹⁶¹

The Commission expressed a concern that the exercise of coronial powers might have serious implications. For example, if a post-mortem examination was required because a person had died in suspicious circumstances, cremation of the body could result in the destruction of evidence that might be required subsequently.⁹⁶² The Commission considered that, in some cases, there could also be a need to have regard to particular cultural sensitivities.⁹⁶³

For these reasons, the Commission formed the view that any need that might exist for justices of the peace to exercise coronial powers was outweighed by the need to ensure that those powers could be exercised only by people who are sufficiently experienced to be able to make the most appropriate decision in all the circumstances.⁹⁶⁴

The Commission made the following preliminary recommendations:⁹⁶⁵

- A clerk of the court or an acting clerk of the court who is also a justice of the peace and public service officer should continue to be a coroner, by virtue of holding that office.⁹⁶⁶
- Other justices of the peace should not be able to exercise any powers under the *Coroners Act 1958* (Qld), and the *Coroners Act 1958* (Qld) should be amended accordingly.

7. SUBMISSIONS

Twenty-three submissions received by the Commission in response to the Discussion Paper commented on the preliminary recommendation that a clerk of the court or an

⁹⁶¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 133-134.

⁹⁶² *Id* at 134.

⁹⁶³ *Ibid.* See Malbon J, Airo-Farulla G and Banks C, Final Report, *Review of Queensland Coronial Law* (Prepared for the Indigenous Advisory Council, 1997).

⁹⁶⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 134.

⁹⁶⁵ *Id* at 135.

⁹⁶⁶ See the *Coroners Act 1958* (Qld) s 6(1)(b).

acting clerk of the court who is also a justice of the peace and public service officer should continue to be a coroner, by virtue of holding that office. All of these respondents agreed with the Commission's preliminary recommendation.⁹⁶⁷

Twenty-four submissions commented on the preliminary recommendation that a justice of the peace, other than a clerk of the court or an acting clerk of the court, should not be able to exercise any powers under the *Coroners Act 1958* (Qld) and that that Act should be amended accordingly. Twenty-three of these respondents agreed with this recommendation.⁹⁶⁸

One of these respondents, a justice of the peace (qualified), commented that justices of the peace do not receive any training on this role and that the training manuals do not provide any assistance.⁹⁶⁹

On the other hand, another respondent, although in general agreement with this recommendation, thought it might be useful to enable justices of the peace (magistrates court) and justices of the peace (qualified) to act as a coroner in special circumstances, especially in remote areas.⁹⁷⁰

The Commission has been informed that the practice of coroners in Queensland has been to appoint as deputy coroners justices of the peace employed at Magistrates Courts, rather than justices of the peace from the general community.⁹⁷¹ The reason for this practice was explained in the following terms:⁹⁷²

The complexities of coronial matters can require a significant level of understanding of court procedures. Subsequently, it has been the practice of Coroners in Queensland to appoint Deputy Coroners from within the Magistrates Courts Service, who through practical experience and training are well conversed in the requirements of the *Coroners Act 1958* (Qld). At present no specific training is given to Justices of the Peace in respect of the operations of the Coroner's Court.

The former Coroner for Brisbane has advised the Commission that, in his opinion, justices of the peace (other than those who simultaneously hold the position of clerk of the court) should not have any jurisdiction under the existing legislation or under any

⁹⁶⁷ Submissions 6, 7, 8, 9, 14, 18, 21, 22, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 51, 53, 58, 59.

⁹⁶⁸ Submissions 6, 7, 8, 9, 14, 18, 21, 22, 23, 24, 25, 26, 33, 34, 38, 40, 44, 45, 47, 51, 53, 58, 59.

⁹⁶⁹ Submission 23.

⁹⁷⁰ Submission 33.

⁹⁷¹ Letter from the Executive Director, Administration of Justice Program, Department of Justice and Attorney-General to the Queensland Law Reform Commission dated 8 November 1999.

⁹⁷² Ibid.

proposed superseding legislation.⁹⁷³ He also expressed the view that the jurisdiction of clerks of the court should be limited to administrative matters only, such as issuing orders for post-mortem examinations, burial and cremation. That view is consistent with the limitations imposed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the purposes for which a justice of the peace (magistrates court) or a justice of the peace (qualified) may constitute a court.⁹⁷⁴

One respondent expressly disagreed with the Commission's preliminary recommendation.⁹⁷⁵ That respondent advised that he was unaware of any problem with justices of the peace having these powers:

I was involved with the then Under Secretary of the Department of Justice, an experienced Magistrate, in formulating the administrative aspect of the Coroners Act 1958. It was considered that the appointment of a Justice of the Peace as a Deputy Coroner in circumstances where such an appointment was necessary in the public interest would be the appropriate step to take. Generally there was ready communication between the Justice so appointed and the Stipendiary Magistrate for the District, particularly in remote western areas of Queensland. I cannot recall any problems arising in this administrative area and I had many conversations with Justices so appointed.

Another respondent, although not expressly commenting on this preliminary recommendation, impliedly disagreed with it.⁹⁷⁶ That respondent stated that he did not wish to see any reduction in the powers of justices of the peace (qualified).

8. THE COMMISSION'S VIEW

In the Discussion Paper, the Commission made a preliminary recommendation that a clerk of the court or an acting clerk of the court who is also a justice of the peace and public service officer should continue to be a coroner by virtue of holding that office.⁹⁷⁷ Upon further consideration, the Commission is of the view that this preliminary recommendation is primarily concerned with the powers of a clerk of the court, rather than with the powers of a justice of the peace. The Commission considers that a review of the powers of clerks of the court is outside the terms of this reference.

Consequently, the Commission does not propose to make any recommendation about

⁹⁷³ Letter from Mr GM Casey SM to the Queensland Law Reform Commission dated 14 October 1999.

⁹⁷⁴ See pp 14-15 of this Report.

⁹⁷⁵ Submission 29.

⁹⁷⁶ Submission 39.

⁹⁷⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 135.

whether a clerk of the court or an acting clerk of the court should, by virtue of holding that office, be a coroner. For the same reason, the Commission does not propose to make a recommendation about whether the *Coroners Act 1958* (Qld) should be amended so that the powers of a clerk of the court are expressly limited to administrative matters only.⁹⁷⁸

The Commission's view in relation to a justice of the peace who is not a clerk of the court or an acting clerk of the court remains unchanged. A justice of the peace who does not hold such an office should not be able to exercise any powers under the *Coroners Act 1958* (Qld). In the Commission's view, the retention of these powers cannot be justified on the grounds of need.⁹⁷⁹ Further, the Commission does not believe that it is generally appropriate for a justice of the peace to act as a deputy coroner. As the Commission observed in the Discussion Paper, even the exercise of administrative coronial powers, such as the issuing of a certificate authorising a cremation, can have serious implications, especially in relation to the destruction of evidence that might subsequently be required.⁹⁸⁰

9. RECOMMENDATIONS

The Commission makes the following recommendations:

9.1 A justice of the peace who is not a clerk of the court or an acting clerk of the court should not be able to exercise any powers under the *Coroners Act 1958* (Qld).

⁹⁷⁸ See the suggestion made by the former Coroner for Brisbane, Mr Casey SM, at p 177 of this Report. It is not entirely clear whether the powers of a clerk of the court or an acting clerk of the court are already so limited by s 29(3) and (4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). A clerk of the court or an acting clerk of the court is not a coroner under s 6(1)(b) of the *Coroners Act 1958* (Qld) unless he or she is also a justice of the peace. If the limitations in s 29(3) and (4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) apply to a clerk of the court or an acting clerk of the court because he or she is also a justice of the peace, then the clerk of the court or acting clerk of the court would not be capable of constituting a Coroner's Court to conduct an inquest and would, therefore, be limited to exercising the administrative powers conferred by the *Coroners Act 1958* (Qld). The alternative argument is that a clerk of the court or an acting clerk of the court who acts as a coroner exercises those powers by virtue of being a clerk of the court or an acting clerk of the court, rather than by virtue of being a justice of the peace and is, therefore, not affected by the limitations imposed by s 29(3) and (4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

⁹⁷⁹ See pp 173-174 of this Report for a discussion of the frequency with which coronial powers are exercised.

⁹⁸⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 134.

9.2 The *Coroners Act 1958* (Qld) should be amended so that a justice of the peace who is not a clerk of the court or an acting clerk of the court may not be appointed as a deputy coroner.

CHAPTER 10

COURT POWERS

1. INTRODUCTION

A number of Acts provide that justices of the peace may constitute a court for various purposes within the criminal jurisdiction of the Magistrates Courts⁹⁸¹ - for example, to hear and determine a charge of an offence or to conduct a committal hearing. When justices of the peace constitute a court, they are often said to be performing “bench duties”. This chapter discusses the main bench duties that may be performed by justices of the peace.

2. MAGISTRATES COURTS IN QUEENSLAND

Queensland is divided into 37 districts for the purposes of holding Magistrates Courts.⁹⁸² Within those districts, various places are appointed for holding Magistrates Courts. At present, there are 125 places designated for holding Magistrates Courts.⁹⁸³ Seventy-four magistrates hold appointments for Queensland, and these are based at 30 court houses throughout the State.⁹⁸⁴ In addition, nineteen clerks of the court hold appointments as acting magistrates.⁹⁸⁵ Their appointments are activated by the Senior Stipendiary Magistrate, by delegation from the Chief Stipendiary Magistrate, in appropriate circumstances on a needs basis.⁹⁸⁶

Magistrates travel on regular circuits to hear matters in centres that do not have a resident magistrate. In most cases, centres are visited by a magistrate every month. If a town has only one magistrate, it will be without that magistrate while he or she is on circuit to other parts of the district. Where possible, matters are set down for hearing on the dates on which the magistrate will be in attendance at the particular

⁹⁸¹ An appointed justice of the peace does not have any powers in the civil jurisdiction of the Magistrates Courts. S 16 of the *Magistrates Courts Act 1921* (Qld) provides that every action shall be heard and determined by a magistrate sitting alone.

⁹⁸² *Justices Regulation 1993* (Qld) ss 17, 18, Sch 4. See Appendix E to this Report.

⁹⁸³ *Justices Regulation 1993* (Qld) ss 17, 18, Sch 4. See Appendix E to this Report.

⁹⁸⁴ See Appendix E to this Report.

⁹⁸⁵ S 6(1) of the *Stipendiary Magistrates Act 1991* (Qld) provides that the Governor in Council may appoint a clerk of the court to act as a magistrate. The *Public Service Act 1996* (Qld) does not apply to a clerk of the court while the clerk acts as a magistrate: *Stipendiary Magistrates Act 1991* (Qld) s 6(2).

⁹⁸⁶ Letter from the Chief Stipendiary Magistrate to the Queensland Law Reform Commission dated 10 December 1999.

Court.

In making decisions about whether justices of the peace should be able to exercise bench duties for any purposes, it is necessary to balance the need to ensure that the various court powers are exercised by people who are appropriately qualified against the need to ensure that there is proper access to justice for people who might be affected if the powers that may presently be exercised by justices of the peace were removed from them.

3. THE EXERCISE OF COURT POWERS BY JUSTICES OF THE PEACE

As noted in Chapter 2, many of the Acts that confer powers on a justice of the peace pre-date the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and refer simply to “a justice of the peace” or to “a justice”,⁹⁸⁷ rather than to a particular category of justice of the peace. However, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) restricts the performance of bench duties to certain categories of justices of the peace and imposes some other restrictions on the types of matters they may hear. Subsections 29(3) and (4) of the Act provide:

- (3) A justice of the peace (qualified), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to taking or making a procedural action or order.
- (4) A justice of the peace (magistrates court), in the exercise of any power to constitute a court for the purpose of a proceeding is limited to -
 - (a) the hearing and determination of a charge of a simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* in a case where the defendant pleads guilty;⁹⁸⁸ and
 - (b) conducting an examination of witnesses in relation to an indictable offence under the *Justices Act 1886*; and
 - (c) taking or making a procedural action or order. [note added]

The term “procedural action or order” is defined to mean:⁹⁸⁹

... an action taken or order made for, or incidental to, proceedings not constituting a hearing and determination on the merits of the matter to which the proceedings relate, for

⁹⁸⁷ The term “justice” is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.

⁹⁸⁸ These types of offences are discussed at pp 193-194 of this Report.

⁹⁸⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 3. The main procedural orders that may be made by justices of the peace are discussed at pp 231-235 of this Report.

example the charging of a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.

These provisions limit not only the categories of justices of the peace who may hear various matters, but also the types of matters that may be heard by justices of the peace at all. For example, although an Act might purport to confer jurisdiction on a justice of the peace to hear and determine a charge that is defended, the effect of section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that only a justice of the peace (magistrates court) may hear a matter only if the defendant pleads guilty to the charge, while a justice of the peace (qualified) may not hear the matter at all.⁹⁹⁰

Because of these limitations, the main court powers that may be exercised by justices of the peace are:

- hearing and determining a limited range of criminal charges where the defendant pleads guilty;
- conducting committal hearings; and
- making certain procedural orders.

These powers, including the frequency with which they are exercised, are examined in more detail later in this chapter.⁹⁹¹

4. EXERCISE OF COURT POWERS WHEN A STIPENDIARY MAGISTRATE IS AVAILABLE

Generally, a justice of the peace may not constitute a court where a stipendiary magistrate is available to do so, although there are exceptions to that general proposition. Subsections 30(2) and (3) of the *Justices Act 1886* (Qld) provide:

- (2) Unless otherwise expressly provided, when a stipendiary magistrate is present at a place appointed for holding Magistrates Courts and is available to constitute any such court to be held at that place the court shall be constituted by the stipendiary magistrate alone.
- (3) Nothing in subsection (2) shall be construed to abridge or prejudice the ministerial power of justices in taking an examination of witnesses in relation to an indictable

⁹⁹⁰ Note, however, that the limitations imposed by s 29(3) and (4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) do not apply to an old system justice of the peace or to a serving Supreme Court judge, District Court judge or magistrate: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6).

⁹⁹¹ The issuing of warrants is discussed in Chapter 6 of this Report.

offence, or the powers of justices to receive a complaint or to issue, grant or endorse a summons or warrant, to grant bail or to adjourn a hearing of a complaint of a simple offence or breach of duty.

The effect of these provisions is that it is really only in relation to the hearing and determining of a charge of a criminal offence and the remanding of a defendant in custody that the court must be constituted by a magistrate, rather than by justices of the peace, if a magistrate is present and available.

However, a submission from the former Chief Stipendiary Magistrate indicated that the exercise of court powers by justices of the peace is minimal, and is largely confined to accepting guilty pleas in relation to minor matters, to forfeiting bail, and to remanding a defendant when a magistrate is not available.⁹⁹² A clerk of the court of a Magistrates Court made a similar comment:⁹⁹³

Since the introduction of the *Justices of the Peace and Commissioner for Declarations Act 1991* (Qld), the use of these powers has been very infrequent, limited to the procedural functions of granting bail, remanding a defendant, adjourning proceedings and, on very rare occasions, dealing with a simple offence but only where a plea of guilty has been entered.

This has occurred mainly through the provisions of the *Bail Act 1980* (Qld), which have permitted police officers greater discretion when considering bail, the greater limitations imposed by the *Justices of the Peace and Commissioner for Declarations Act 1991* (Qld), and the introduction of legislation enabling greater use of 'offence notices'.

5. SOURCES OF INFORMATION

The information available to the Commission about the extent to which justices of the peace exercise various court powers has largely come from the following sources:⁹⁹⁴

(a) Submissions

Most of the submissions received in response to the Issues Paper and the Discussion Paper were from justices of the peace (qualified).⁹⁹⁵ Although justices of the peace (qualified) may constitute a court to deal with certain procedural matters, none of the

⁹⁹² Submission 110 (IP).

⁹⁹³ Submission 114 (IP).

⁹⁹⁴ The Department of Justice and Attorney-General maintains only limited records in relation to the extent to which justices of the peace exercise court powers. In particular, these records do not reveal whether the justice of the peace hearing a matter is employed at the court house or is a justice of the peace drawn from the general community.

⁹⁹⁵ See p 4 of this Report.

justices of the peace (qualified) who made submissions indicated that they had ever been called upon to exercise any court powers.

Only eight submissions received by the Commission in response to the Issues Paper were from individuals with personal experience of exercising bench duties. Two of these submissions were from old system justices of the peace,⁹⁹⁶ while a third was from a justice of the peace (magistrates court) from the general community.⁹⁹⁷ In addition, the Commission received submissions from the former Chief Stipendiary Magistrate,⁹⁹⁸ from a retired stipendiary magistrate,⁹⁹⁹ and from the clerks of the court at three Magistrates Courts.¹⁰⁰⁰ One of these clerks of the court made a further submission in response to the Discussion Paper.¹⁰⁰¹

(b) Survey of Magistrates Courts

As mentioned in Chapter 1, the Commission conducted a survey of four Magistrates Courts during March and April 1998.¹⁰⁰² The purpose of the survey was to gauge the extent to which particular types of court matters were being heard by justices of the peace. The Courts chosen for this survey were at Gladstone, Proserpine, Mount Isa and Innisfail. There is a resident stipendiary magistrate located at each of the Gladstone, Mount Isa and Innisfail Magistrates Courts, but not at the Proserpine Magistrates Court.

The survey required the various Courts to maintain a log of the matters heard by justices of the peace. In particular, the Courts were asked to record the types of matters heard and the categories of justices of the peace who heard those matters, including whether or not the justices of the peace were employed at the Court.

(c) Questionnaire for justices of the peace (magistrates court)

Because the Commission, following the release of the Issues Paper, received only a

⁹⁹⁶ Submissions 17 (IP), 40 (IP). See the explanation of the Commission's use of this term at pp 16-17 of this Report.

⁹⁹⁷ Submission 117 (IP).

⁹⁹⁸ Submission 110 (IP).

⁹⁹⁹ Submission 120 (IP).

¹⁰⁰⁰ Submissions 114 (IP), 116 (IP), 116A (IP), 119 (IP).

¹⁰⁰¹ Submission 16.

¹⁰⁰² A copy of the form completed at the four Magistrates Courts is set out in Appendix C to this Report.

limited response from justices of the peace (magistrates court),¹⁰⁰³ in July 1998 it sent a questionnaire to all the justices of the peace (magistrates court) then registered in Queensland.¹⁰⁰⁴ A total of 478 questionnaires were distributed. The Commission received 134 responses.

The questionnaire posed a number of questions about the experience of justices of the peace (magistrates court) in exercising various court powers. It also inquired as to the basis of the person's appointment as a justice of the peace (magistrates court). The responses received fell into the following categories:

Staff member at a Magistrates Court ¹⁰⁰⁵	101
Resident of an Aboriginal or a Torres Strait Islander community	16
Other	16
Total	133

6. JUSTICES OF THE PEACE WHO SHOULD BE ABLE TO CONSTITUTE A COURT

(a) Introduction

In the light of the Commission's recommendations in this chapter that justices of the peace should continue to be able to exercise certain court powers,¹⁰⁰⁶ it is necessary to consider the issue of which categories of justices of the peace should be able to exercise those powers.

At present, justices of the peace (magistrates court) and justices of the peace (qualified) both have the power to constitute a court for various purposes, the latter category being restricted to taking a procedural action or making a procedural order.¹⁰⁰⁷ In addition, old system justices of the peace have an unrestricted power to constitute

¹⁰⁰³ See p 4 of this Report. Only seven respondents to the Issues Paper were justices of the peace (magistrates court).

¹⁰⁰⁴ A copy of the questionnaire is set out in Appendix D to this Report.

¹⁰⁰⁵ This figure includes staff members of Magistrates Courts that are part of the Queensland Government Agency Program (QGAP).

¹⁰⁰⁶ See the Commission's recommendations at pp 270-272 of this Report.

¹⁰⁰⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

a court,¹⁰⁰⁸ although the Commission has recommended earlier in this Report that, after 30 June 2000, all remaining old system justices of the peace should hold office as commissioners for declarations.¹⁰⁰⁹ The question for consideration is, therefore, whether both justices of the peace (magistrates court) and justices of the peace (qualified) should be able to constitute a court.

(b) Discussion Paper

In the Discussion Paper, the Commission observed that justices of the peace (qualified) had not constituted a Magistrates Court for any purpose at any of the Magistrates Courts surveyed by the Commission during March and April 1998.¹⁰¹⁰ At three of the four Courts surveyed, the Courts were constituted, on each occasion when justices of the peace heard matters, by justices of the peace (magistrates court) who were employed at the Court.¹⁰¹¹ To the extent that justices of the peace heard matters at the fourth Court,¹⁰¹² the Court was constituted during the first month of the survey by a justice of the peace (magistrates court) who was employed at the Court sitting with an old system justice of the peace. During the second month, that Court was constituted, like the other three Courts surveyed, by two justices of the peace (magistrates court) who were employed at the Court.¹⁰¹³

The Commission also observed that, although it had received 75 submissions from justices of the peace (qualified) in response to the Issues Paper, none of those respondents indicated that they had ever performed any bench duties.¹⁰¹⁴

Although the Commission noted that the court powers of justices of the peace (qualified) are already restricted to “taking or making a procedural action or order”,¹⁰¹⁵ it was not satisfied that there is presently a demonstrated need for justices of the peace

¹⁰⁰⁸ See p 17 of this Report.

¹⁰⁰⁹ See p 52 of this Report (Recommendations 4.2 and 4.3).

¹⁰¹⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 201.

¹⁰¹¹ Magistrates Courts at Innisfail, Proserpine and Mount Isa.

¹⁰¹² The Gladstone Magistrates Court.

¹⁰¹³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 201-202.

¹⁰¹⁴ Id at 202.

¹⁰¹⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

(qualified) to retain even those limited powers.¹⁰¹⁶ The Commission restated its view that it is undesirable for powers that are not exercised by justices of the peace to remain vested in them, since the infrequent exercise of those powers would make it less likely that justices of the peace would develop the necessary experience and expertise to exercise them. The Commission considered that, in relation to court powers, this could lead to a lack of consistency in the decisions made by justices of the peace when constituting a court.¹⁰¹⁷

Further, the Commission was of the opinion that, if large numbers of justices of the peace were, at least theoretically, authorised to exercise a range of court powers, it would be virtually impossible to keep all of them up to date with the frequent changes in the relevant law and procedure. The Commission considered it more effective for the exercise of court powers to be restricted to a relatively small group of more intensively trained justices of the peace.¹⁰¹⁸

For these reasons, the Commission's preliminary view was that the exercise of court powers should be restricted to justices of the peace (magistrates court). Justices of the peace (qualified) and old system justices of the peace should not be able to exercise these powers.¹⁰¹⁹

The Commission was also of the view that, for the reasons expressed in Chapters 5, 6 and 7 of the Discussion Paper,¹⁰²⁰ a justice of the peace who is a police officer or who is employed by the Queensland Police Service should not be able to constitute a Court for any purpose. Although the Commission was not aware of that situation ever having occurred, the Commission did not believe that it was appropriate for that issue to be addressed only by Queensland Police Service policy.¹⁰²¹

The Commission considered the further issue of whether, if a magistrate were not available, it would be more appropriate for the Court to be constituted by justices of the peace who were staff members at a Magistrates Court than by justices of the peace

¹⁰¹⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 202.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid.

¹⁰²⁰ Id at 93, 115 and 127.

¹⁰²¹ Id at 202. It is Queensland Police Service Policy that "[m]embers are not to use the services of justices of the peace ... who are members of the Service for any purpose associated with the performance of a function of the Service except for traffic adjudication matters and witnessing declarations under the *Oaths Act 1867* for the purpose of endorsing statements pursuant to s.110A of the *Justices Act 1886*": Queensland Police Service, *Operational Procedures Manual* s 3.9.15 (Use of justices of the peace and commissioners for declarations).

from the general community.¹⁰²²

The Commission agreed with those submissions that suggested that, in these circumstances, it was more appropriate for the Court to be constituted by justices of the peace who were either a clerk of the court or employed at the Magistrates Court. The Commission considered that the experience obtained in the course of their work by justices of the peace who are employed at a Magistrates Court is an advantage when they are called upon to exercise various court powers.¹⁰²³ As one respondent to the Issues Paper, himself a justice of the peace (qualified), commented:¹⁰²⁴

The clerk of the court of a magistrates court, provided he/she is experienced in that position, must be a better selection than a Justice of the Peace (Qual.). Firstly such a person would be more comfortable in the position. Secondly such a person would have a better understanding of the procedures and functions of the Court and be more competent. Thirdly, being an officer of the Court, such a person is seen as independent of both the prosecution and the defence.

Another respondent to the Issues Paper commented:¹⁰²⁵

I have not heard of a court being convened where one of the justices of the peace was not a clerk of the court or one of the court house staff. There needs to be at least one person from the court system to make sure that the paper work is done correctly.

The Commission did not accept the force of the submissions received in response to the Issues Paper that were opposed to the use of justices of the peace who are staff members at a Magistrates Court. The Commission was not satisfied that there was any basis for the suggestion that justices of the peace who are court officers are not as independent or as impartial as justices of the peace from the general community.¹⁰²⁶

Nonetheless, the Commission acknowledged that, in some communities, the number of court staff is very small and, consequently, there might be a need in those communities for a justice of the peace (magistrates court) from the general community to be able to constitute the Court with either the clerk of the court or another justice of the peace (magistrates court) who is a staff member at the Court.¹⁰²⁷ This

1022 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 202-203.

1023 Ibid.

1024 Submission 7 (IP).

1025 Submission 40 (IP).

1026 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 203.

1027 Ibid.

consideration was raised by a respondent to the Issues Paper:¹⁰²⁸

Unfortunately, with staffing cutbacks, there are now many smaller court houses where there is only one staff member. In these locations, if a court has to be convened for any reason, a civilian justice of the peace will have to be called upon to sit with the clerk of court.

A similar view was expressed by another respondent to the Issues Paper who was a clerk of the court at a Magistrates Court. That respondent acknowledged that he has sometimes had to call on a justice of the peace who is not employed at the Court, although he did not consider this to be the ideal situation.¹⁰²⁹

Accordingly, although the Commission was of the view that the exercise of court powers should be restricted to justices of the peace (magistrates court), it did not believe that the exercise of those powers should be further restricted to justices of the peace (magistrates court) who are staff members at a Magistrates Court.¹⁰³⁰

The Commission's preliminary recommendation was that only justices of the peace (magistrates court) should have the power to constitute a court.¹⁰³¹

(c) Submissions

Twenty-two submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that only justices of the peace (magistrates court) should have the power to constitute a court. Twenty of these respondents agreed with the Commission's preliminary recommendation.¹⁰³²

One respondent commented:¹⁰³³

The training of JsP (Qual) falls far too short of what is needed to attain the standard of professionalism required to carry out these duties.

Another respondent considered that there was no longer any need for justices of the

¹⁰²⁸ Submission 40 (IP).

¹⁰²⁹ Submission 116 (IP).

¹⁰³⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 203.

¹⁰³¹ *Id* at 207.

¹⁰³² Submissions 6, 7, 8, 9, 14, 18, 21, 23, 24, 25, 26, 31, 40, 44, 45, 47, 51, 53, 56, 59.

¹⁰³³ Submission 23.

peace (qualified) to be able to exercise court powers:¹⁰³⁴

[In] most courts these days a magistrate or a visiting magistrate, clerk of the court or acting clerk of the court would be available. If not, the courts now have staff qualified as justices of the peace (magistrates court). There are now lay justices of the peace (magistrates court) in country areas who could hold a court ... This obviates the use of justices of the peace (qualified).

Three respondents who agreed with the preliminary recommendation were of the view, however, that more justices of the peace (magistrates court) should be appointed,¹⁰³⁵ especially from the general community.¹⁰³⁶

Two respondents expressly disagreed with the Commission's preliminary recommendation. One of these respondents considered that justices of the peace (qualified) were capable of constituting a court and that this could be an advantage in remote areas.¹⁰³⁷ He also suggested that there appeared to be ample safeguards against serious error by a justice of the peace, although no details were given of those safeguards.

The other respondent was of the view that the title "justice of the peace (magistrates court)" should be abolished and that clerks of the court of Magistrates Courts should sit as Acting Magistrates when required, rather than as justices of the peace (magistrates court):¹⁰³⁸

I agree that all Clerks of Court should by virtue of normal work experience be capable of carrying out this duty. It is not necessary to call them JP (MAG CT) as the title Clerk of Court would define their position.

In addition, this respondent suggested that justices of the peace (qualified) could be trained to perform this role:¹⁰³⁹

JP (Qual) can be specially trained, and then must serve a preliminary period of at least one year attending various Magistrates Courts as a witness to gain the required experience. If properly trained then a JP (Qual) would be a valuable asset in saving Magistrates considerable time on minor cases and also save expense. This role has been carried out very successfully in South Australia.

A third respondent, although not expressly commenting on the preliminary

¹⁰³⁴ Submission 51.

¹⁰³⁵ Submissions 14, 56, 59.

¹⁰³⁶ Submissions 56, 59.

¹⁰³⁷ Submission 33.

¹⁰³⁸ Submission 34.

¹⁰³⁹ Ibid.

recommendation that only justices of the peace (magistrates court) should be able to constitute a court, impliedly disagreed with it.¹⁰⁴⁰ That respondent stated that he did not wish to see any reduction in the powers of justices of the peace (qualified).

(d) The Commission's view

The Commission is of the view that justices of the peace (magistrates court) should continue to be able to constitute a court. However, the Commission is not satisfied that there is a demonstrated need for justices of the peace (qualified) to retain their present powers to constitute a court to take procedural actions or make procedural orders.¹⁰⁴¹ Although the Commission has received well over one hundred submissions from justices of the peace (qualified) during the course of this reference,¹⁰⁴² none of these respondents indicated that they have ever constituted a court for any purpose. The Commission considers it undesirable for justices of the peace to retain powers that are never, or only infrequently, exercised by them. As stated earlier, the risk in allowing justices of the peace to retain powers that are rarely exercised by them is that it could result in a lack of consistency in the decisions made by them if they are ever called upon to constitute a court.

The Commission believes that, if justices of the peace (magistrates court) are the only category of justices of the peace authorised to constitute a court, there is a greater likelihood, given their relatively small numbers,¹⁰⁴³ that they can receive more intensive training for this role and can be kept up to date with changes in the law.

By removing the power of justices of the peace (qualified) to constitute a court, it should be possible for the training courses for justices of the peace (qualified) to be more effective. The courses will be able to concentrate on those roles that are most frequently performed by justices of the peace (qualified) - for example, issuing summonses and warrants and acting as an interview friend for a juvenile suspect - rather than having to include a component canvassing the various aspects of a role they are unlikely ever to perform.

The Commission remains of the view that a justice of the peace (magistrates court) who is a member or an employee of the Queensland Police Service should not be able to constitute a court for any purpose. In the Commission's view, this prohibition should have legislative force.

The Commission does not propose any change to the power to constitute a court of a

¹⁰⁴⁰ Submission 39.

¹⁰⁴¹ See p 186 of this Report.

¹⁰⁴² See p 4 of this Report.

¹⁰⁴³ See p 31 of this Report.

person who holds office as a justice of the peace under subsections 19(1) or 19(1A) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) - that is, a Supreme Court judge, a District Court judge or a magistrate or a person who has retired or resigned from holding one of those offices.¹⁰⁴⁴

7. HEARING AND DETERMINING CHARGES

(a) Source of power

The *Justices Act 1886* (Qld) provides that, subject to the provisions of any other Act, every complaint shall be heard and determined by a Magistrates Court constituted by two or more “justices”.¹⁰⁴⁵ Generally, proceedings under the *Justices Act 1886* (Qld) are commenced by a complaint,¹⁰⁴⁶ which sets out the conduct of the defendant that is alleged to constitute a particular offence.

(b) Justices of the peace who may exercise this power

Charges may be heard and determined by justices of the peace (magistrates court)¹⁰⁴⁷ and by old system justices of the peace.¹⁰⁴⁸ Despite the reference in the *Justices Act 1886* (Qld) to two or more “justices”, a justice of the peace (qualified) is not authorised to constitute a court for this purpose.¹⁰⁴⁹

Although justices of the peace (magistrates court) may constitute a court for the

¹⁰⁴⁴ Whether or not any other *ex officio* justice of the peace will be able to constitute a court will depend on whether the person is an *ex officio* justice of the peace (magistrates court) or an *ex officio* justice of the peace (qualified). See pp 28-30 of this Report.

¹⁰⁴⁵ *Justices Act 1886* (Qld) s 27(1). The term “justice” is defined in s 4 of the *Justices Act 1886* (Qld) as follows:

“**justices**” or “**justice**” means justices of the peace or a justice of the peace having jurisdiction where the act in question is, or is to be, performed, and includes a stipendiary magistrate and, where necessary, a Magistrates Court.

Note that a stipendiary magistrate has the power to do alone what may be done by two or more justices constituting a Magistrates Court: *Justices Act 1886* (Qld) s 30(1).

¹⁰⁴⁶ *Justices Act 1886* (Qld) s 42(1).

¹⁰⁴⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (4)(a).

¹⁰⁴⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6)(b).

¹⁰⁴⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3). See the discussion of this provision at p 15 of this Report.

purpose of hearing and determining charges, they are limited to:¹⁰⁵⁰

... the hearing and determining of a charge of a simple offence or a regulatory offence¹⁰⁵¹ pursuant to proceedings taken under the *Justices Act 1886* in a case where the defendant pleads guilty; ... [note added]

In effect, justices of the peace (magistrates court) are limited to accepting pleas of guilty and sentencing in respect of these offences; they do not have the power to hear trials of defended matters. This restriction on their powers was one of the significant changes made by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

However, the fact that those limitations do not apply to old system justices of the peace¹⁰⁵² means that they still retain the power to hear a defended trial, although it is not the practice for them to do so.

(c) Matters that may be heard and determined by justices of the peace (magistrates court)

As mentioned above, justices of the peace (magistrates court) may, subject to the defendant pleading guilty, hear and determine a charge of “a simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886*”.¹⁰⁵³

The term “simple offence” is defined in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in the following terms:¹⁰⁵⁴

“**simple offence**” means a simple offence or breach of duty within the meaning given to those terms by section 4 of the *Justices Act 1886*.

The *Justices Act 1886* (Qld) defines the terms “breach of duty” and “simple offence” in the following terms:¹⁰⁵⁵

“**breach of duty**” means any act or omission (not being a simple offence or a nonpayment of a mere debt) on complaint of which a Magistrates Court may make an order on any person for the payment of money or for doing or refraining from doing any

¹⁰⁵⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a). See the discussion of this provision at pp 14-15 of this Report.

¹⁰⁵¹ See the *Regulatory Offences Act 1985* (Qld).

¹⁰⁵² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

¹⁰⁵³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a).

¹⁰⁵⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 3.

¹⁰⁵⁵ *Justices Act 1886* (Qld) s 4.

act.

“**simple offence**” means any offence (indictable¹⁰⁵⁶ or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise. [note added]

Examples of the types of offences in respect of which justices of the peace may sentence a defendant are:

- driving under the influence of liquor;¹⁰⁵⁷
- driving without due care and attention;¹⁰⁵⁸
- being drunk in a public place;¹⁰⁵⁹
- leaving a service station without paying for, or making proper arrangements to pay for, petrol to the value of \$150;¹⁰⁶⁰
- leaving a hotel without paying for goods or services to the value of \$150;¹⁰⁶¹ and
- wilfully destroying or damaging property, thereby causing loss of \$250 or less.¹⁰⁶²

Although the definition of “simple offence” in the *Justices Act 1886* (Qld) includes a reference to an indictable offence that may be tried summarily, section 552C(1) of the *Criminal Code* (Qld) provides that a Magistrates Court that deals summarily with an indictable offence under Chapter 58A of the Code must be constituted by a magistrate or by certain justices of the peace who are specially appointed under section

¹⁰⁵⁶ Offences that are expressed to be crimes or misdemeanours are both “indictable” offences, and a person cannot, unless expressly provided for, be prosecuted or convicted except upon indictment: *Criminal Code* (Qld) s 3(3). An indictment is a document that details the charges made against the defendant: *Criminal Code* (Qld) s 1. Normally, indictable offences are heard before a judge and jury in either the Supreme Court or the District Court. However, in some cases, an indictable offence may be tried summarily - that is, in a Magistrates Court where there is no jury.

¹⁰⁵⁷ *Transport Operations (Road Use Management) Act 1995* (Qld) s 79, previously s 16 of the *Traffic Act 1949* (Qld). See note 663 of this Report.

¹⁰⁵⁸ *Transport Operations (Road Use Management) Act 1995* (Qld) s 83, previously s 17 of the *Traffic Act 1949* (Qld). See note 663 of this Report.

¹⁰⁵⁹ *Liquor Act 1992* (Qld) s 164(2).

¹⁰⁶⁰ *Regulatory Offences Act 1985* (Qld) ss 4 (definitions of “goods” and “shop”), 5(1)(c).

¹⁰⁶¹ *Regulatory Offences Act 1985* (Qld) s 6.

¹⁰⁶² *Regulatory Offences Act 1985* (Qld) s 7.

552C(3).¹⁰⁶³ Consequently, justices of the peace (magistrates court) are not ordinarily able to sentence a person charged with an indictable offence under the *Criminal Code* (Qld).

However, the *Criminal Code* (Qld) is not the only legislation that creates indictable offences that may, in certain circumstances, be tried summarily. There are a number of other Acts that also provide for indictable offences created by them to be tried summarily. Whether a Magistrates Court hearing those offences may be constituted by justices of the peace or must be constituted by a magistrate depends on the terms of the particular Act. Some Acts exclude justices of the peace from hearing summarily a charge of an indictable offence that may otherwise, under those Acts, be heard summarily.¹⁰⁶⁴ In that event, the matter must be heard before a magistrate. Other Acts, however, contain no such restriction.¹⁰⁶⁵ Under those Acts, justices of the peace may sentence a defendant who pleads guilty to a charge of an indictable offence that is being heard summarily.

(d) Sentencing options

Legislative provisions that create offences usually prescribe the maximum penalty that may be imposed in respect of that offence. The maximum penalty is usually expressed in terms of a monetary penalty (invariably expressed as a certain number of penalty units¹⁰⁶⁶) or imprisonment for a certain period of time. However, within those parameters and subject to the provisions of the *Penalties and Sentences Act 1992* (Qld), a court that is sentencing a defendant, including a court that is constituted by justices of the peace, has available to it a variety of sentencing options. For example, the court may:

¹⁰⁶³ In order to be able to be appointed under s 552C(3) of the *Criminal Code* (Qld), a person must be a justice of the peace (magistrates court), must have “appropriate qualifications”, and must also be appointed by the Attorney-General for a place that is within a trust area under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld) or that the Attorney-General considers is remote: *Criminal Code* (Qld) s 552C(4), (5). S 552C(6) of the *Criminal Code* (Qld) expressly provides that s 29(4)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is subject to s 552C(1)-(3) of the Code. See the discussion of justices of the peace appointed under s 552C of the *Criminal Code* (Qld) in Chapter 2 of this Report and, in particular, the discussion of the change in terminology from “trust area” to “council area” at note 142 of this Report.

¹⁰⁶⁴ See, for example, the *Drugs Misuse Act 1986* (Qld) s 45; the *Coastal Protection and Management Act 1995* (Qld) s 82; the *Environmental Protection Act 1994* (Qld) s 186; the *Keno Act 1996* (Qld) s 223; the *Lotteries Act 1997* (Qld) s 209(1)(a); the *Nature Conservation Act 1992* (Qld) s 166(1)(a); and the *Sewerage and Water Supply Act 1949* (Qld) s 17D.

¹⁰⁶⁵ See, for example, the *Classification of Films Act 1991* (Qld) s 61. That provision enables any indictable offence against that Act, at the election of the defendant, to be heard and determined summarily. The Act does not restrict the hearing to a Magistrates Court constituted by a magistrate sitting alone. See also the *Classification of Publications Act 1991* (Qld) s 33 and the *Casino Control Act 1982* (Qld) s 120.

¹⁰⁶⁶ The value of a penalty unit is set out at note 1084 of this Report.

- release an “offender”¹⁰⁶⁷ unconditionally;¹⁰⁶⁸
- release an offender if he or she enters into a recognisance¹⁰⁶⁹ in such amount as the court considers appropriate, on the conditions that the offender must be of good behaviour and appear for conviction and sentence if called on within a certain period, as is stated in the order;¹⁰⁷⁰
- where an offender has been convicted summarily - release the offender if the offender enters into a recognisance in such amount as the court considers appropriate, on the conditions that the offender keeps the peace and is of good behaviour for a period, fixed by the court, of up to one year;¹⁰⁷¹
- order an offender to make restitution of property, pay compensation for any loss or destruction of property, or pay compensation for personal injury suffered by a person, any of which may be in addition to any other sentence to which the offender is liable;¹⁰⁷²
- impose a fine, which may be in addition to, or instead of, any other sentence to which the offender may be liable;¹⁰⁷³
- order that a fine be paid by instalments or that the offender be allowed time to pay a fine;¹⁰⁷⁴
- if a court makes an “original order”¹⁰⁷⁵ for an offender - make a fine option order

¹⁰⁶⁷ The term “offender” is defined to mean a person who is convicted of an offence whether or not a conviction is recorded: *Penalties and Sentences Act 1992* (Qld) s 4.

¹⁰⁶⁸ *Penalties and Sentences Act 1992* (Qld) ss 17, 19(1)(a).

¹⁰⁶⁹ See note 1399 of this Report.

¹⁰⁷⁰ *Penalties and Sentences Act 1992* (Qld) ss 17, 19.

¹⁰⁷¹ *Penalties and Sentences Act 1992* (Qld) s 31.

¹⁰⁷² *Penalties and Sentences Act 1992* (Qld) s 35(1), (2).

¹⁰⁷³ *Penalties and Sentences Act 1992* (Qld) s 45(1), (2). The court may impose a lesser fine than the fine stated in the Act: *Penalties and Sentences Act 1992* (Qld) s 47.

¹⁰⁷⁴ *Penalties and Sentences Act 1992* (Qld) ss 50, 51.

¹⁰⁷⁵ The term “original order” is defined in s 52 of the *Penalties and Sentences Act 1992* (Qld) to mean an order of a court:

- (a) that imposes a fine on an offender, whether or not it also requires the payment of another penalty; and
- (b) that directs that in default of payment of the fine or other penalty either immediately or within a fixed time, the offender is to be imprisoned for a period ordered by the court.

requiring the offender to perform community service for a specified number of hours¹⁰⁷⁶ if it is satisfied that:¹⁰⁷⁷

- (a) the offender is unable to pay the fine in accordance with the original order or, if the offender were to pay the fine in accordance with the original order, the offender or the offender's family would suffer economic hardship; and
 - (b) the offender is a suitable person to perform community service under a fine option order.
- make a probation order;¹⁰⁷⁸
- make a community service order, the effect of which is that the offender is required to perform unpaid community service for the number of hours stated in the order;¹⁰⁷⁹
- where the court sentences an offender to imprisonment for five years or less - suspend the whole or part of the term of imprisonment;¹⁰⁸⁰
- if the court records a conviction, make an order of imprisonment.¹⁰⁸¹

(e) Imprisonment in default of payment of a penalty

Currently, a court that orders an offender to pay a penalty¹⁰⁸² may also order that, if the offender fails to pay the penalty immediately or within the time allowed by the court in its order, the offender is to be imprisoned for a term calculated in accordance with a statutory formula.¹⁰⁸³ Subject to the Act under which the penalty is ordered to be paid, the court may order that, in default of paying the penalty, the offender is to be imprisoned for up to fourteen days for each penalty unit, or part of a penalty unit, that

¹⁰⁷⁶ *Penalties and Sentences Act 1992* (Qld) ss 60, 66. If a court makes a fine option order, it may suspend the original order in so far as that order required the payment of a fine: *Penalties and Sentences Act 1992* (Qld) s 62.

¹⁰⁷⁷ *Penalties and Sentences Act 1992* (Qld) s 57(1).

¹⁰⁷⁸ *Penalties and Sentences Act 1992* (Qld) s 90.

¹⁰⁷⁹ *Penalties and Sentences Act 1992* (Qld) ss 100, 102.

¹⁰⁸⁰ *Penalties and Sentences Act 1992* (Qld) s 144(1), (3).

¹⁰⁸¹ *Penalties and Sentences Act 1992* (Qld) s 152.

¹⁰⁸² The term "penalty" is defined to include "any fine, compensation, restitution or other amount of money": *Penalties and Sentences Act 1992* (Qld) s 4.

¹⁰⁸³ *Penalties and Sentences Act 1992* (Qld) s 182A(1), (2).

the offender was ordered to pay.¹⁰⁸⁴ If an offender does not pay the penalty immediately or within the time allowed by the court, the clerk of the court must issue a warrant for the arrest and imprisonment of the offender for the term ordered by the court.¹⁰⁸⁵

If a court that orders an offender to pay a penalty does not make an order for imprisonment in default of payment of the penalty and the offender fails to pay the penalty, the court may still order that the offender be imprisoned.¹⁰⁸⁶ Subject to the terms of the Act under which the penalty is ordered to be paid, the term of imprisonment may be up to fourteen days imprisonment for each penalty unit, or part of a penalty unit, that the offender was originally ordered to pay.¹⁰⁸⁷

If a court makes an initial order sentencing an offender to a term of imprisonment in default of paying a penalty and the penalty is not paid or, if a court initially orders an offender to pay a penalty, which is not paid, and the court subsequently orders the offender to be imprisoned, the clerk of the court must issue a warrant of commitment for the imprisonment of the offender as soon as practicable after the end of the time (if any) fixed by the court in which the penalty is to be paid.¹⁰⁸⁸

Before issuing a warrant for the commitment of the offender to prison, the clerk of the court of the court that imposed the fine must give the offender an opportunity to apply

¹⁰⁸⁴ *Penalties and Sentences Act 1992* (Qld) s 182A(2)(a)(ii), (3). The value of a penalty unit is currently \$60 for part 4A of the *Justices Act 1886* (Qld) or an infringement notice penalty under that Part, \$100 for the *Cooperatives Act 1997* (Qld), or \$75 in any other case: *Penalties and Sentences Act 1992* (Qld) s 5. However, this will be altered when the *State Penalties Enforcement Act 1999* (Qld) commences. That Act will omit the reference to the *Justices Act 1886* (Qld) and provide that the value of a penalty unit for the *State Penalties Enforcement Act 1999* (Qld) or an infringement notice under that Act will be \$75. The value of a penalty unit in the other cases will remain unchanged.

¹⁰⁸⁵ *Penalties and Sentences Act 1992* (Qld) ss 4 (definition of “proper officer”), 182B. There is also provision under s 36(2) of the *Penalties and Sentences Act 1992* (Qld) for a court to order that an offender who has been ordered to pay restitution or compensation be imprisoned if the offender fails to comply with an order made under s 35(1) of that Act. In the case of an order made on summary conviction, the term of imprisonment order may be up to six months: *Penalties and Sentences Act 1992* (Qld) s 37(b). Unlike s 182A, however, there is provision for the offender to be brought back before the court on the question of enforcing the order of imprisonment. At the time of making an order that an offender be imprisoned if he or she fails to comply with the order, the court may give directions as to the enforcement of the order of imprisonment, including a direction that the offender must appear before the court to show cause why imprisonment should not be enforced because of the failure to comply with the order: *Penalties and Sentences Act 1992* (Qld) s 39.

¹⁰⁸⁶ *Penalties and Sentences Act 1992* (Qld) ss 183, 185(1).

¹⁰⁸⁷ *Penalties and Sentences Act 1992* (Qld) s 185(2)(a)(ii), (3).

¹⁰⁸⁸ *Penalties and Sentences Act 1992* (Qld) s 185A(1).

for a fine option order. The clerk of the court is required to give the offender:¹⁰⁸⁹

- an application for a fine option order; and
- a notice informing the offender that, if the offender fails to apply for a fine option order within fifteen business days after the notice is posted, or given personally to the offender, a warrant may be issued for the offender's commitment to prison for failing to pay the fine.

The notice may be posted to the offender's last address known to the clerk of the court.¹⁰⁹⁰

This regime will be altered upon the commencement of the *State Penalties Enforcement Act 1999* (Qld).¹⁰⁹¹ The main purpose of the Act is to implement a new scheme for the enforcement of payment of court-ordered penalties and fines. In order to do this, a new government body, the State Penalties Enforcement Registry ("SPER") will be established.¹⁰⁹² The types of fines and penalties that may be registered with SPER include:¹⁰⁹³

- fines imposed by infringement notices issued under Part 3 of the Act;
- a court order fining a person for an offence;
- an order under section 33A of the *Penalties and Sentences Act 1992* (Qld) that an amount be paid on the forfeiture of a recognisance;
- a court order that a person pay to someone else an amount by way of restitution or compensation under section 35 of the *Penalties and Sentences Act 1992* (Qld).

The registrar of SPER will have a number of mechanisms available to enforce the payment of fines and penalties. These mechanisms include certain civil enforcement remedies (for example, the issuing of an enforcement warrant ordering the attachment

¹⁰⁸⁹ *Penalties and Sentences Act 1992* (Qld) s 56(2).

¹⁰⁹⁰ *Penalties and Sentences Act 1992* (Qld) s 56(3).

¹⁰⁹¹ This Act was assented to on 6 December 1999. As at 10 December 1999, it had not been proclaimed into force.

¹⁰⁹² *State Penalties Enforcement Act 1999* (Qld) Part 2.

¹⁰⁹³ *State Penalties Enforcement Act 1999* (Qld) ss 33, 34.

of earnings),¹⁰⁹⁴ as well as the issuing of a warrant for arrest and imprisonment.¹⁰⁹⁵ The term of imprisonment ordered under such a warrant is determined by a statutory formula contained in the Act, rather than by reference to any default term of imprisonment that may have been ordered by the court.¹⁰⁹⁶

The *State Penalties Enforcement Act 1999* (Qld) makes a number of amendments to the *Penalties and Sentences Act 1992* (Qld). However, even once those amendments take effect, a court will still have the power:

- to make an initial order sentencing an offender to a term of imprisonment in default of paying a penalty immediately or within the time ordered by the court;¹⁰⁹⁷ and
- where a court that originally ordered an offender to pay a penalty did not make an order for a default term of imprisonment - to order that the offender be imprisoned.¹⁰⁹⁸

Further, although a clerk of the court will have the option, if an offender does not pay the relevant penalty¹⁰⁹⁹ immediately or within the time allowed by the court, to give the registrar of SPER the necessary particulars to enable the unpaid penalty to be registered with SPER, the clerk of the court is not required to do so. The clerk of the court may, in the alternative, simply issue a warrant for the arrest and imprisonment of the offender for the term ordered by the court.¹¹⁰⁰ Accordingly, a default term of

¹⁰⁹⁴ *State Penalties Enforcement Act 1999* (Qld) Part 5.

¹⁰⁹⁵ *State Penalties Enforcement Act 1999* (Qld) s 119. The registrar of SPER may issue such a warrant if, after attempting to enforce an enforcement warrant against an “enforcement debtor”, he or she is satisfied that the unpaid amount under the enforcement warrant cannot be satisfied in any other way: *State Penalties Enforcement Act 1999* (Qld) s 119(1). However, the *State Penalties Enforcement Act 1999* (Qld) provides that imprisonment is still available as a means of enforcement at any stage after the unpaid penalty or fine has been registered with SPER: *State Penalties Enforcement Act 1999* (Qld) s 62.

¹⁰⁹⁶ *State Penalties Enforcement Act 1999* (Qld) s 39.

¹⁰⁹⁷ *Penalties and Sentences Act 1992* (Qld) s 182A, which is unaffected by the *State Penalties Enforcement Act 1999* (Qld).

¹⁰⁹⁸ *Penalties and Sentences Act 1992* (Qld) s 185, which is unaffected by the *State Penalties Enforcement Act 1999* (Qld).

¹⁰⁹⁹ This applies to a penalty ordered to be paid under ss 182A or 185 of the *Penalties and Sentences Act 1992* (Qld).

¹¹⁰⁰ *Penalties and Sentences Act 1992* (Qld) s 185A(1), as amended by the *State Penalties Enforcement Act 1999* (Qld). In the event that the clerk of the court intends to issue a warrant for the arrest and imprisonment of the offender, but the court did not order a default term of imprisonment, the matter must first be referred back to the court for an order for the imprisonment of the offender under s 185 of the *Penalties and Sentences Act 1992*: *Penalties and Sentences Act 1992* (Qld) s 185A(2), as amended by the *State Penalties Enforcement*

imprisonment that is ordered by a court constituted by justices of the peace could still result in an offender being required to serve that term.

(f) Frequency of sentencing

Justices of the peace constituted Courts to sentence defendants in three of the four Magistrates Courts surveyed during March and April 1998. During the two month period, two defendants were sentenced at the Mount Isa Magistrates Court, two at the Proserpine Magistrates Court and four at the Innisfail Magistrates Court.¹¹⁰¹

The results of the questionnaire distributed to justices of the peace (magistrates court) also indicated that sentencing was not an unusual duty to be undertaken by justices of the peace of that category. The majority of the justices of the peace (magistrates court) who responded to the questionnaire stated that they had sentenced defendants.¹¹⁰² This had occurred in many towns.¹¹⁰³ Only ten of these justices of the peace (magistrates court) were not employed at a Magistrates Court.

One respondent to the Issues Paper, a justice of the peace (magistrates court) at Cloncurry, indicated that she was sometimes called on to form a Court to sentence, usually in relation to defendants who were passing through town.¹¹⁰⁴

(g) Other jurisdictions

(i) Australian Capital Territory

Justices of the peace do not have the power to constitute a court for any purpose. Under the *Magistrates Court Act 1930* (ACT) the jurisdiction of a

Act 1999 (Qld).

¹¹⁰¹ In all these cases, the sentencing was undertaken by two justices of the peace (magistrates court) who were employed at the respective Magistrates Courts.

¹¹⁰² Q1, Q3, Q5, Q6, Q7, Q9, Q10, Q11, Q12, Q13, Q14, Q16, Q19, Q21, Q23, Q25, Q26, Q27, Q29, Q30, Q31, Q32, Q33, Q34, Q35, Q36, Q37, Q40, Q41, Q42, Q43, Q46, Q47, Q49, Q50, Q51, Q52, Q53, Q56, Q57, Q58, Q59, Q60, Q63, Q65, Q67, Q68, Q69, Q70, Q71, Q72, Q73, Q75, Q76, Q77, Q78, Q79, Q81, Q82, Q83, Q89, Q92, Q93, Q94, Q99, Q100, Q102, Q103, Q106, Q107, Q108, Q109, Q110, Q114, Q116, Q119, Q120, Q121, Q123, Q125, Q126, Q127, Q128, Q130, Q132, Q133.

¹¹⁰³ The places included: Ayr; Blackwater; Cloncurry; Cooktown; Cunnamulla; Gatton; Gayndah; Gin Gin; Gladstone; Gympie; Hervey Bay; Inala; Julia Creek; Kingaroy; Longreach; Maryborough; Mossman; Mount Isa; Nambour; Noosa; Pittsworth; Pomona; St George; Thursday Island; and Winton.

¹¹⁰⁴ Submission 117 (IP) and telephone conversation of 16 February 1999. This respondent advised that a magistrate visits Cloncurry for one day each month.

Magistrates Court may be exercised only by a magistrate or by one or more special magistrates.¹¹⁰⁵

(ii) New South Wales

In some districts, justices of the peace may hear and determine some summary cases.¹¹⁰⁶ However, it is not the practice for them to do so. These matters would ordinarily be reserved for hearing by a magistrate:¹¹⁰⁷

Only in the most extreme emergency will those duties be performed by a JP and it is the usual case that such a JP would be employed in the justice/court system.

Further, sentencing in relation to some types of matters is restricted to a magistrate.¹¹⁰⁸

(iii) Northern Territory

Generally, the Court of Summary Jurisdiction is empowered to hear and determine any complaint.¹¹⁰⁹ The Court has the jurisdiction to hear and determine complaints for summary offences,¹¹¹⁰ certain minor indictable offences¹¹¹¹ and certain other indictable offences that may be heard

¹¹⁰⁵ *Magistrates Court Act 1930* (ACT) s 18(2). A special magistrate is a type of magistrate who sits on a part-time basis: see *Magistrates Court Act 1930* (ACT) ss 10H, 10J, 10K, 10L. The main function of a justice of the peace in the Australian Capital Territory is to witness the signing or execution of documents: The Australian Capital Territory Attorney-General's Department, *Guidance Notes for Justices of the Peace of the Australian Capital Territory* (1993) at 6.

¹¹⁰⁶ *Local Courts Act 1982* (NSW) s 8 and *Justices Act 1902* (NSW) ss 78, 80. In certain districts, only magistrates may exercise these powers: *Justices Act 1902* (NSW) s 13.

¹¹⁰⁷ Attorney-General's Department (NSW), Discussion Paper, *A Review of the Law and Policy Relating to the Appointment to and Regulation of the Office of Justice of the Peace* (1998) at 5.

¹¹⁰⁸ *Justices Act 1902* (NSW) ss 75B-75F.

¹¹⁰⁹ *Justices Act* (NT) s 43(1). The term "Complaint" is defined in s 4 of the *Justices Act* (NT) to include "a charge of a minor indictable offence, if, and when, a Court of Summary Jurisdiction proceeds to dispose of the charge summarily".

¹¹¹⁰ *Justices Act* (NT) ss 4 (definition of "complaint"), 43(1).

¹¹¹¹ *Justices Act* (NT) s 120. The term "Minor indictable offence" is defined in s 4 of the *Justices Act* (NT) to mean an "indictable offence which is capable of being, and is, in the opinion of the Justice before whom the case comes, fit to be heard and determined in a summary way under the provisions of Division 2 of Part V".

summarily.¹¹¹²

The Court may be constituted by a magistrate or, if there is no magistrate present who is competent and willing to act, by two or more justices.¹¹¹³ Further, a single justice may hear and determine certain minor matters of complaint with the consent of the complainant and the defendant.¹¹¹⁴

However, only a magistrate may hear and determine a minor indictable offence or other indictable offence that may, under the provisions of the *Justices Act* (NT), be heard summarily.¹¹¹⁵

(iv) South Australia

The *Magistrates Court Act 1991* (SA) provides that, subject to the *Summary Procedure Act 1921* (SA), the Magistrates Court has jurisdiction to hear and determine a charge of a minor indictable offence or a summary offence.¹¹¹⁶

Generally, the Magistrates Court, when sitting to adjudicate on any matter, must be constituted by a magistrate.¹¹¹⁷ However, if there is no magistrate available to constitute the Court, it may be constituted by two justices or by a special justice.¹¹¹⁸ The definition of “justice” in the *Summary Procedure Act 1921* (SA)

¹¹¹² *Justices Act* (NT) s 121A. The Court may hear and determine charges in relation to certain specified indictable offences if the defendant and prosecutor consent to the matter being heard summarily and the Court is of the opinion that the case can properly be disposed of summarily.

¹¹¹³ *Justices Act* (NT) s 43(1).

¹¹¹⁴ *Justices Act* (NT) s 43(2). A single justice may hear a matter only where the matter of complaint is that the defendant has committed an offence against a law in force in the Territory; the offence is an offence that is not punishable by a term of imprisonment; and the penalty that may be imposed for the offence is a pecuniary penalty not exceeding \$100.

¹¹¹⁵ Amendments made to the *Justices Act* (NT) by s 4 of the *Justices Amendment Act 1997* (NT) removed the power previously held by two or more justices to hear and determine complaints for certain minor indictable offences under s 120 of the *Justices Act* (NT). Prior to that amendment, the hearing of charges under s 121A of the *Justices Act* (NT) was already restricted to a magistrate.

¹¹¹⁶ *Magistrates Court Act 1991* (SA) s 9(b), (c). In South Australia, offences are divided into the following classes: summary offences and indictable offences. Indictable offences are comprised of minor indictable offences and major indictable offences. See s 5(1) of the *Summary Procedure Act 1921* (SA). The terms “summary offence”, “minor indictable offence” and “major indictable offence” are defined in s 5(2), (3)(a) and (3)(b) respectively of the *Summary Procedure Act 1921* (SA).

¹¹¹⁷ *Magistrates Court Act 1991* (SA) s 7A(1).

¹¹¹⁸ *Magistrates Court Act 1991* (SA) s 7A(2).

includes a justice of the peace for the State of South Australia.¹¹¹⁹

A respondent to the Discussion Paper advised that, in South Australia, justices of the peace frequently sit in city courts to hear and determine charges of minor indictable offences and summary offences where the defendant pleads guilty.¹¹²⁰

(v) Tasmania

Under the *Justices Act 1959* (Tas), two or more justices¹¹²¹ may hear and determine a complaint under that Act.¹¹²² Their jurisdiction includes certain indictable offences that are deemed to be simple offences,¹¹²³ as well as simple offences and breaches of duty.¹¹²⁴ Justices of the peace hear the majority of traffic regulation matters, with the exception of matters where the defendant pleads not guilty.¹¹²⁵

Some Acts provide, however, that certain offences must be heard by a magistrate sitting alone.¹¹²⁶

(vi) Victoria

Justices of the peace do not have the power to hear and determine any criminal charge. That power was removed from justices of the peace in 1984.¹¹²⁷

(vii) Western Australia

In Western Australia, two or more justices of the peace may hear and determine

¹¹¹⁹ *Summary Procedure Act 1921* (SA) s 4.

¹¹²⁰ Submission 34.

¹¹²¹ The term “justice” is defined in s 46 of the *Acts Interpretation Act 1931* (Tas) to mean a justice of the peace.

¹¹²² *Justices Act 1959* (Tas) s 20.

¹¹²³ *Justices Act 1959* (Tas) ss 71, 72.

¹¹²⁴ *Justices Act 1959* (Tas) Part IX.

¹¹²⁵ Department of Justice (Tas), *Justices’ Guide* (1995) at 9.

¹¹²⁶ See, for example, the *Dental Act 1982* (Tas) s 42; the *Fire Service Act 1979* (Tas) s 129; the *Police Offences Act 1935* (Tas) ss 37A-37D; and the *Traffic Act 1925* (Tas) s 32.

¹¹²⁷ *Magistrates’ Courts Act 1971* (Vic) s 18A, inserted by s 4 of the *Magistrates’ Courts (Jurisdiction) Act 1984* (Vic). The *Magistrates’ Courts Act 1971* (Vic) was repealed by the *Magistrates’ Court Act 1989* (Vic).

an offence that is punishable on summary conviction.¹¹²⁸ However, in relation to an indictable offence that may be punished summarily, justices of the peace may not deal with the charge if there is a magistrate available or if the defendant does not consent.¹¹²⁹

In its Report on Courts of Petty Sessions, the Law Reform Commission of Western Australia observed that this power was usually exercised only where a defendant had pleaded guilty:¹¹³⁰

In practice, justices rarely conduct trials and are largely confined to imposing sentences where a defendant pleads guilty. Where justices conduct trials they do so in minor cases and usually only in remote areas to avoid the inconvenience to the defendant if a matter had to be adjourned until it could be dealt with by a stipendiary magistrate.

The Western Australian Commission explained the reasons for this practice, but nevertheless acknowledged what it regarded as the contribution of justices of the peace in relation to hearing guilty pleas:¹¹³¹

The present practice in relation to trials recognises that there are limits as to the matters with which justices can deal confidently. Their lack of legal qualifications means that generally they do not have a knowledge of the rules of evidence and the procedures required in conducting trials and preliminary hearings as a matter of course. Where defendants are unrepresented (as is often the case) the presiding justices may not be able to give them advice necessary to ensure that they have a fair trial. Nevertheless, the Commission acknowledges that justices of the peace make a significant contribution to the administration of justice in dealing with guilty pleas, especially in country areas. It would not be desirable to exclude them from the court system altogether unless there were sufficient stipendiary magistrates to deal with cases expeditiously and so avoid delays and inconvenience to defendants (possibly involving lengthy remands in custody) that would otherwise occur. [note omitted]

Although the Western Australian Commission recommended that there should be no change in the jurisdiction of justices, that recommendation was expressed to be made on the assumption that the existing practices as to the matters heard by justices of the peace would continue.¹¹³²

The Law Reform Commission of Western Australia did recommend, however, that a statutory limitation should be imposed on the term of imprisonment and

¹¹²⁸ *Justices Act 1902 (WA)* s 20(1).

¹¹²⁹ *Justices Act 1902 (WA)* s 20(2).

¹¹³⁰ Law Reform Commission of Western Australia, *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1986) at para 2.18.

¹¹³¹ *Id* at para 2.19.

¹¹³² *Ibid.*

on the amount of a fine that a court constituted by justices of the peace may impose.¹¹³³ The reason for restricting the amount of the fine, in addition to restricting the term of imprisonment, was that the “imposition of a substantial fine could lead to a lengthy period of imprisonment if the defendant defaulted in payment”.¹¹³⁴ The Western Australian Commission acknowledged that the proposed limitation would prevent justices of the peace from passing sentence where the legislature had provided for a minimum fine that exceeded the limit, but was of the view that, in those cases, the sentencing should be left to be determined by a stipendiary magistrate.¹¹³⁵

When the role of justices of the peace was further reviewed in Western Australia in 1994, the Justice of the Peace Review Committee recognised that, while justices of the peace were empowered by the *Justices Act 1902 (WA)* to preside over a defended hearing - that is, where the defendant has pleaded not guilty - they had not done so for many years.¹¹³⁶ The Review Committee was of the view that it was proper and desirable that they should not do so, and concluded that the practice should be formalised by legislation to remove the power to hear defended matters.¹¹³⁷

The Review Committee did not agree with the recommendation of the Law Reform Commission of Western Australia that there should be a restriction on the term of imprisonment or on the fine that could be imposed by a justice of the peace.¹¹³⁸

The Review Committee also considered, and rejected, a proposal that would require a stipendiary magistrate to ratify all terms of imprisonment imposed by justices of the peace.¹¹³⁹

The Review Committee did recommend, however, that justices of the peace should be required to seek advice from their local stipendiary magistrate before

1133 Id at para 2.22.

1134 Id at note 60 to Chapter 2.

1135 Id at note 61 to Chapter 2.

1136 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 27-28.

1137 Ibid.

1138 Id at 26.

1139 Ibid.

sentencing a defendant to a term of imprisonment.¹¹⁴⁰ The Review Committee explained that the purpose of the recommendation was not to remove the discretion of justices of the peace, but to place an onus upon them to obtain legal advice before sentencing.¹¹⁴¹ The Review Committee acknowledged that this recommendation could not be implemented until arrangements with stipendiary magistrates could be put in place.¹¹⁴²

In 1995, new sentencing legislation was introduced in Western Australia. The *Sentencing Act 1995 (WA)* requires a magistrate to review any sentence of a term of imprisonment that is imposed by a justice of the peace. Section 38 provides:

38. Imprisonment by justices: magistrate to review

- (1) If a justice or justices in a court of petty sessions -
 - (a) sentence an offender to suspended imprisonment; or
 - [(b) *deleted*]
 - (c) sentence an offender to a term of imprisonment,a magistrate must review the sentence within 2 working days after it is imposed.
- (2) The review is to be based on an examination of the court papers relevant to the offence (or copies or faxes of them) in the absence of the parties and is not to involve a hearing.
- (3) Having reviewed the original sentence, the magistrate may -
 - (a) confirm the original sentence; or
 - (b) cancel the original sentence and order the offender to appear before a magistrate to be sentenced again.
- (4) If the original sentence is cancelled the offender must be bailed or remanded in custody to appear to be sentenced again.

¹¹⁴⁰ Ibid. The Review Committee noted (at 26) that, in England, justices may seek assistance from a qualified clerk. Generally, a justice's clerk is a barrister or solicitor who has served for not less than five years as assistant to a justice's clerk: *Justices of the Peace Act 1997* (UK) s 43. The functions of a justice's clerk include giving advice to the justices to whom he or she is clerk, at their request, about the law, practice or procedure on questions arising in connection with the discharge of their functions: *Justices of the Peace Act 1997* (UK) s 45(4). The powers of a justice's clerk also include, at any time he or she thinks it should be done, bringing to the attention of those justices any point of law, practice or procedure that is or may be involved in any question that arises: *Justices of the Peace Act 1997* (UK) s 45(5).

¹¹⁴¹ The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 27.

¹¹⁴² Ibid.

- (5) A magistrate sentencing an offender again may sentence the offender in any manner the magistrate could if he or she had just convicted the offender of the offence for which the original sentence was imposed.
- (6) In deciding how to deal with an offender when sentencing the offender again, the magistrate must take into account any time spent in custody by the offender under the original sentence.
- (7) A failure to review the original sentence under this section does not affect its validity.
- (8) The original sentence, if cancelled, may not be appealed against.
- (9) This section does not affect any right of appeal against an original sentence that is confirmed on review or that is not reviewed under this section.
- (10) This section does not affect any right of appeal against a sentence imposed under this section by a magistrate.

(h) Discussion Paper

A number of questionnaires completed by justices of the peace (magistrates court)¹¹⁴³ and submissions received by the Commission in response to the Issues Paper addressed the question of whether justices of the peace should retain the power to sentence. It was suggested that the main advantages of retaining of this role were:¹¹⁴⁴

- *Defendants spend less time in custody*

It was suggested that, because justices of the peace have the power to sentence, defendants do not spend longer in custody than is necessary.¹¹⁴⁵ One respondent commented generally in relation to the exercise of court powers by justices of the peace:¹¹⁴⁶

If no magistrate is available, then it is better justices of the peace be able to exercise these powers rather than lengthy remand periods occur.

- *Convenience*

A number of justices of the peace (magistrates court) and respondents were of the view that the sentencing of defendants by justices of the peace was an issue

¹¹⁴³ See pp 184-185 of this Report and Appendix D to this Report.

¹¹⁴⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 151-154.

¹¹⁴⁵ Q1, Q6, Q19, Q36, Q41, Q42, Q47, Q115.

¹¹⁴⁶ Submission 43 (IP).

of convenience,¹¹⁴⁷ especially for defendants.¹¹⁴⁸ In particular, it was suggested that it avoids the need for people charged when travelling through a town, especially visitors from interstate, to return on a date when the magistrate will be available.¹¹⁴⁹

- *Speedy resolution of matters*

A large number of justices of the peace (magistrates court) commented that sentencing by justices of the peace avoids delays and enables matters to be finalised more quickly.¹¹⁵⁰ A number of respondents were also of the view that having justices of the peace hear matters saves time and money,¹¹⁵¹ and enables cases to be resolved more quickly, especially in relation to minor matters.¹¹⁵²

- *Cost effectiveness*

A large number of justices of the peace (magistrates court) and respondents commented on the cost effectiveness of sentencing by justices of the peace.¹¹⁵³

The Department of Families, Youth and Community Care was of the view that being able to deal with matters quickly aided in the efficient administration of justice.¹¹⁵⁴

The lapse of time between the charge and the court appearance creates problems for the efficient administration of justice. For example, the lapse of time means that it is common for defendants not to turn up on the day of their summons, requiring the issue of a warrant with a consequent waste of police resources.

1147 Q9, Q33, Q34, Q107. Submissions 114 (IP), 116A (IP), 117 (IP).

1148 Q11, Q13, Q14, Q16, Q19, Q35, Q36, Q48, Q59, Q61, Q116, Q121.

1149 Q7, Q15, Q29, Q36, Q58, Q65, Q72, Q78, Q83, Q92, Q116, Q120.

1150 Q1, Q9, Q10, Q18, Q20, Q21, Q25, Q26, Q32, Q40, Q41, Q43, Q44, Q46, Q48, Q52, Q53, Q55, Q57, Q58, Q62, Q63, Q64, Q67, Q68, Q73, Q75, Q85, Q86, Q89, Q92, Q93, Q99, Q101, Q108, Q109, Q115, Q117, Q118, Q128, Q132.

1151 Submissions 5 (IP), 36 (IP), 43 (IP), 51 (IP), 54 (IP), 94 (IP).

1152 Submissions 60 (IP), 93 (IP), 108 (IP).

1153 Q20, Q23, Q32, Q43, Q45, Q48, Q69, Q82, Q92, Q96, Q115. Submissions 1A (IP), 6 (IP), 21 (IP), 28 (IP), 36 (IP), 43 (IP), 48 (IP), 49 (IP), 54 (IP), 60 (IP), 61 (IP), 62 (IP), 63 (IP), 66 (IP), 67 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 92 (IP), 94 (IP), 95 (IP), 96 (IP), 98 (IP), 103 (IP), 105 (IP), 117 (IP).

1154 Submission 111 (IP).

- *Availability*

A number of respondents emphasised the availability of justices of the peace, pointing out that many communities do not have a resident magistrate.¹¹⁵⁵

- *Reduction in workload of magistrates*

A number of justices of the peace (magistrates court) commented on the fact that the matters heard by justices of the peace reduce the workload of magistrates.¹¹⁵⁶

- *Reduction in the incidence of bail breaches*

Two justices of the peace (magistrates court) were of the view that, where justices of the peace can sentence on a guilty plea, the likelihood of a breach of bail is less than if the defendant is granted bail to appear at a later date before the magistrate.¹¹⁵⁷

A submission from a clerk of the court explained the significance of this issue.¹¹⁵⁸ That respondent suggested that, if justices of the peace could not sentence a defendant appearing before them, they might have to release the defendant on bail until a magistrate could hear the charge. This could result in the defendant inadvertently failing to appear at the adjourned hearing. This respondent said that, if a person had breached bail on three occasions in a twelve month period, that could not be ignored if the person was applying for bail on a subsequent occasion. Consequently, he was of the view that an inability to sentence some defendants immediately might have the effect of putting at risk their prospects of being granted bail in the future.

- *Local knowledge*

Several justices of the peace (magistrates court) and respondents were of the view that the local knowledge of justices of the peace was an advantage in sentencing.¹¹⁵⁹

- *Community involvement in justice issues*

¹¹⁵⁵ Submissions 1A (IP), 12 (IP), 19 (IP), 22 (IP), 30 (IP), 40 (IP), 43 (IP), 48 (IP), 50 (IP), 57 (IP), 60 (IP), 66 (IP), 92 (IP), 93 (IP), 96 (IP), 98 (IP), 117 (IP).

¹¹⁵⁶ Q20, Q81, Q91, Q109, Q118, Q126, Q129, Q130.

¹¹⁵⁷ Q65, Q99.

¹¹⁵⁸ Submission 116A (IP).

¹¹⁵⁹ Q17, Q58, Q87, Q90, Q92, Q111, Q112, Q122. Submissions 8 (IP), 60 (IP), 66 (IP), 88 (IP).

Several justices of the peace (magistrates court) thought that the involvement of the community in justice issues was an advantage.¹¹⁶⁰ In particular, some justices of the peace (magistrates court) were of the view that this would result in decisions that reflect community values,¹¹⁶¹ and that a defendant would have more respect for a decision made by his or her peers.¹¹⁶²

A number of respondents suggested that having justices of the peace exercise court powers generally strengthened the sense of community justice,¹¹⁶³ would encourage people “into believing in our justice system”,¹¹⁶⁴ and would engender a greater respect for the law.¹¹⁶⁵

On the other hand, a number of respondents to the Issues Paper raised several concerns about justices of the peace exercising the power to sentence defendants. The main disadvantages identified were:¹¹⁶⁶

- *Lack of expertise generally*

A number of justices of the peace (magistrates court) suggested that justices of the peace were inexperienced,¹¹⁶⁷ although one justice of the peace (magistrates court) suggested that Magistrates Court employees were generally better informed than “outsiders”.¹¹⁶⁸ This view was not shared by another justice of the peace (magistrates court) who thought that, with the exception of clerks of the court, even justices of the peace employed at a Magistrates Court had a “tenuous” claim to expertise and training.¹¹⁶⁹

¹¹⁶⁰ Q17, Q37, Q106.

¹¹⁶¹ Q51.

¹¹⁶² Q53, Q92.

¹¹⁶³ Submission 3 (IP).

¹¹⁶⁴ Submission 31 (IP).

¹¹⁶⁵ Submission 108 (IP).

¹¹⁶⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 155-157. Some respondents to the Issues Paper gave reasons for justices of the peace not retaining their court powers, although they did not specifically address the question of sentencing (or other powers). Where relevant to the question of sentencing, those general comments have been incorporated.

¹¹⁶⁷ Q3, Q32, Q38, Q42, Q51, Q56, Q59, Q60, Q62, Q72, Q77, Q79, Q105, Q107, Q116, Q120, Q126.

¹¹⁶⁸ Q32.

¹¹⁶⁹ Q70.

The comment was made that justices of the peace have less knowledge than a magistrate¹¹⁷⁰ and are therefore more likely to make mistakes.¹¹⁷¹

- *Lack of expertise in relation to sentencing*

Several justices of the peace (magistrates court) commented on the lack of expertise of justices of the peace in relation to sentencing options¹¹⁷² and the appropriate range of penalties.¹¹⁷³ One justice of the peace (magistrates court) commented that it can be difficult to decide whether to record a conviction.¹¹⁷⁴ It was suggested that these factors could lead to a lack of consistency in sentencing.¹¹⁷⁵

- *Lack of familiarity with court procedures*

It was suggested that justices of the peace who were not employed at a Magistrates Court were very often unfamiliar with court procedures.¹¹⁷⁶

- *Potential for bias*

Several justices of the peace (magistrates court) considered that the local knowledge of some justices of the peace and their prior knowledge of some defendants could give rise to a bias or prejudice in some cases.¹¹⁷⁷ A respondent to the Issues Paper expressed a similar concern:¹¹⁷⁸

A disadvantage of JPs exercising power in “close” local communities is a possible perception that JPs may not be able to act impartially when they are aware of the “background” circumstances of the matter before them or are personally known to those involved in the proceedings.

Another respondent made the observation that a justice of the peace could feel compromised if he or she were part of the local community or knew the

1170 Q2, Q23, Q30, Q48, Q50, Q54, Q59, Q61, Q68, Q71, Q73, Q76, Q110, Q116, Q123, Q124.

1171 Q27, Q42, Q74, Q92, Q115, Q133.

1172 Q3, Q46, Q63, Q75, Q104, Q128.

1173 Q60, Q104, Q128.

1174 Q46.

1175 Q7, Q10, Q42, Q59, Q85, Q93, Q99, Q104, Q108, Q114, Q120, Q128, Q132.

1176 Q75, Q77, Q98, Q116, Q123, Q126.

1177 Q92, Q104, Q116.

1178 Submission 38 (IP).

defendant well.¹¹⁷⁹

In the Discussion Paper, the Commission emphasised the fact that the exercise of the power to sentence a defendant can have serious ramifications for a defendant, even where the offence is a relatively minor one and the defendant pleads guilty. In some cases, it may result in a defendant acquiring a criminal record. Depending on the nature of the charge, it may also result in the imprisonment of the defendant, which could have enormous consequences for a defendant, even if he or she is imprisoned for only a short period.¹¹⁸⁰

The Commission observed that sentencing legislation¹¹⁸¹ is now quite complex, and that there is a range of sentencing options that might need to be considered in any given case, including whether to record a conviction at all.¹¹⁸² The Commission considered that, however well-trained an individual justice of the peace might be, it is unlikely that, as a class, justices of the peace will have the same level of expertise as magistrates in relation to sentencing.¹¹⁸³

The Commission noted that, in Queensland, a person is required to have five years standing as a barrister or a solicitor to be eligible for appointment as a magistrate.¹¹⁸⁴ It also considered that, because sentencing is one of a magistrate's ordinary court duties, it is easier for a magistrate to keep up to date in his or her knowledge of sentencing law and practice. The Commission thought it would be more difficult for a justice of the peace who was called upon to sentence a defendant only infrequently to develop or maintain a similar level of expertise. The Commission shared the concerns of those respondents who commented on the lack of expertise of justices of the peace, especially in relation to sentencing options and the appropriate range of penalties.¹¹⁸⁵ For these reasons, the Commission was generally of the view that, ideally, all sentencing should be undertaken by a magistrate.¹¹⁸⁶

¹¹⁷⁹ Submission 60 (IP).

¹¹⁸⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 157.

¹¹⁸¹ See the *Penalties and Sentences Act 1992* (Qld); the *Corrective Services Act 1988* (Qld); and the *Juvenile Justice Act 1992* (Qld).

¹¹⁸² See pp 195-196 of this Report.

¹¹⁸³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 157.

¹¹⁸⁴ *Stipendiary Magistrates Act 1991* (Qld) s 4(1). See pp 38-39 of this Report.

¹¹⁸⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 157.

¹¹⁸⁶ *Ibid.*

However, the Commission acknowledged that Queensland has a decentralised population and that the resources of the justice system are such that not all areas of Queensland have access to the services of a resident magistrate. The Commission noted that a respondent who is a justice of the peace (magistrates court) in Cloncurry informed the Commission that a magistrate hears matters in that town for only one day each month.¹¹⁸⁷

In the normal course of events, the Commission did not believe that there would usually be a degree of urgency attached to the sentencing of a defendant. The Commission expressed the view that it should therefore be possible for most matters to be listed for sentencing on a date when a magistrate will be available. In that respect, the Commission considered that sentencing differs from, say, an application for a temporary care and protection order in relation to a child, where there might be a risk of injury to the child if the order cannot be made promptly.¹¹⁸⁸

Although the survey of the four Magistrates Courts did not suggest that sentencing was a much-used power of justices of the peace,¹¹⁸⁹ the responses to the questionnaire distributed to justices of the peace (magistrates court) did indicate that a large proportion of those justices of the peace had sentenced defendants, although it was not clear how frequently they had done so.¹¹⁹⁰

The Commission expressed its concern that all defendants should have equal access to justice. However, the Commission did not consider that the opportunity to appear before a qualified person was the only relevant factor in ensuring equality of justice to defendants. In the Commission's view, the decentralised nature of the Queensland population and the present level of services for particular areas could also have an impact on some defendants' access to justice. The Commission was conscious of the fact that, if the power to sentence were removed from justices of the peace, some defendants in remote areas might be adversely affected in ways that would not be experienced by defendants in metropolitan areas or larger regional centres where magistrates are more readily available.¹¹⁹¹

The Commission gave careful consideration to the issues raised by the submissions that addressed the question of whether justices of the peace should retain the power to sentence. In particular, the Commission considered the specific ways in which it was

¹¹⁸⁷ Id at 158.

¹¹⁸⁸ Ibid. See pp 252-253 of this Report.

¹¹⁸⁹ See p 200 of this Report.

¹¹⁹⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 158. See p 200 of this Report.

¹¹⁹¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 158.

suggested that the removal of the power to sentence could adversely affect some defendants.¹¹⁹²

- In some cases, the fact that a defendant is able to be sentenced promptly may mean that the defendant actually spends less time in custody. The Commission thought that it would be unusual for a person who was not likely to receive a custodial sentence to be refused bail and remanded in custody prior to being sentenced. Nevertheless, the Commission acknowledged that such a situation could arise where a particular defendant had a history of breaching bail and, for that reason, was refused bail. If sentencing were restricted to magistrates, a defendant who had been refused bail and had been remanded in custody for sentencing by a magistrate might, depending on the availability of the magistrate, have to spend longer in custody than if he or she could be sentenced by justices of the peace.
- As a corollary, the removal from justices of the peace of the power to sentence could increase the likelihood that some defendants would develop a history of bail breaches in the first place. As a respondent who is a clerk of the court at a Magistrates Court commented, if it is necessary to adjourn a matter to a date when a magistrate is available to sentence the defendant, this invites the risk that the defendant might inadvertently fail to appear on the next hearing date. If a defendant has breached bail on a number of occasions, that could prejudice the likelihood that the defendant will on a future occasion be granted bail.¹¹⁹³
- Many submissions made the point that it is often a matter of convenience for a defendant to have a matter heard promptly by justices of the peace, rather than have the matter adjourned to a date when a magistrate will be available.¹¹⁹⁴ This is particularly so where the defendant is from out of town or from interstate. If a court constituted by justices of the peace could not be convened while the defendant was in town, he or she would have to return, possibly some weeks later, to have the matter heard by a magistrate.

The Commission acknowledged that, although it regarded it as preferable for sentencing to be undertaken by magistrates, some instances of injustice could result if the power to sentence were removed altogether from justices of the peace. Consequently, the Commission formed the view that justices of the peace (magistrates court) should retain the power to sentence, at least in some form.¹¹⁹⁵

¹¹⁹² Id at 158-159.

¹¹⁹³ Submission 116A. See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 153-154.

¹¹⁹⁴ See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 152.

¹¹⁹⁵ Id at 159.

(i) Circumstances in which justices of the peace should be able to sentence

The Commission considered the following options as safeguards for the proper exercise of the power to sentence:

A. Sentencing on a guilty plea

The Commission noted that, at present, justices of the peace (magistrates court) are restricted to hearing and determining charges where the defendant pleads guilty.¹¹⁹⁶ The Commission further noted that this restriction does not apply to old system justices of the peace,¹¹⁹⁷ who may, therefore, hear and determine a charge that is defended, although it is not the practice for them to do so.¹¹⁹⁸

The Commission expressed the view that it is not appropriate for any justices of the peace to be conducting trials of defended matters. The Commission agreed with the view expressed by the Law Reform Commission of Western Australia that justices of the peace do not generally have the knowledge of the rules of evidence or of procedure that are required to conduct a trial, and that they may not be able to give an unrepresented defendant the assistance necessary to ensure a fair trial.¹¹⁹⁹

B. Types of offences

Justices of the peace may presently hear and determine a charge of a “simple offence or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886*”.¹²⁰⁰ As observed earlier in this chapter,¹²⁰¹ the term “simple offence” includes an indictable offence that may be tried summarily, although justices of the peace are generally excluded from hearing and determining an indictable offence that may be tried summarily under Chapter 58A of the *Criminal Code*

¹¹⁹⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a).

¹¹⁹⁷ See note 990 of this Report. Old system justices of the peace who are not lawyers will lose this power from 1 July 2000.

¹¹⁹⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 159.

¹¹⁹⁹ Id at 159-160. In Queensland, it has become more difficult in recent times for defendants to obtain legal aid to secure representation in criminal matters to be heard in the Magistrates Courts: see Criminal Justice Commission, *Criminal Justice System: Monitor Series* (Vol 4, February 1999) at 1.

¹²⁰⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a).

¹²⁰¹ See pp 193-194 of this Report.

(Qld).¹²⁰² The exclusion in the Code does not, however, prevent justices of the peace from hearing and determining an indictable offence under another Act if the Act in question provides for the summary determination of the offence and does not expressly exclude justices of the peace from hearing the offence.

The Commission considered it anomalous - having regard to the significant change made by section 552C of the *Criminal Code* (Qld) to the jurisdiction of justices of the peace to hear indictable offences under the Code - that they should continue to be able to sentence defendants charged with some indictable offences. In the view of the Commission, the power to hear and determine any indictable offence summarily should be removed from justices of the peace altogether.¹²⁰³

C. Consent of the defendant

Although the Commission had reservations about justices of the peace having the power to sentence, it accepted that, in some circumstances, it might be to the advantage of a defendant for justices of the peace to be able to convene a Magistrates Court promptly in order to sentence a defendant, rather than for the matter to be adjourned until a magistrate was available. However, the Commission expressed the view that, if a defendant does not wish to be sentenced by justices of the peace, the matter should be adjourned to a date when a magistrate will be available to hear the matter.¹²⁰⁴

D. Consent of the prosecutor

The Commission was of the view that there could be some cases where, although a defendant was willing to be sentenced by justices of the peace, the prosecutor was of the opinion that, having regard to the nature of the offence and the circumstances in which it was committed, it would be more appropriate for the matter to be heard before a magistrate.¹²⁰⁵

The Commission was of the view that, while the consent of the defendant should be required in order for a matter to be heard before justices of the peace, it should not be the sole determining factor. The Commission expressed the view that the consent of the prosecutor should also be required before justices of the

¹²⁰² There is an exception in relation to justices of the peace (magistrates court) who are specially appointed under s 552C of the *Criminal Code* (Qld) for particular Aboriginal, Torres Strait Islander and remote communities. See Chapter 2 of this Report.

¹²⁰³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 160.

¹²⁰⁴ Ibid.

¹²⁰⁵ Id at 161.

peace are able to sentence a defendant.¹²⁰⁶

(ii) Restrictions on sentencing

The Commission did not consider the requirement that a defendant must consent to being sentenced by justices of the peace to be a sufficient safeguard of itself. The Commission thought that some defendants might not receive advice to enable them to exercise such a right of election in an informed way.¹²⁰⁷

The Commission noted that, at present, if justices of the peace have the power to hear a matter, they may impose the same penalties as may be imposed by a magistrate; as justices of the peace, they are not restricted in respect of either the amount of the fine or the term of imprisonment that may be imposed by them.¹²⁰⁸ The Commission was concerned that justices of the peace might impose a custodial sentence or, alternatively, might impose a fine, the non-payment of which could result in a defendant serving a term of imprisonment.¹²⁰⁹ The Commission therefore gave consideration to the following recommendations that had been either made or implemented in Western Australia as a restraint on the sentencing power of justices of the peace:¹²¹⁰

- the recommendation of the Law Reform Commission of Western Australia that there should be a limit on the term of imprisonment (and the amount of any fine) that may be imposed by justices of the peace;¹²¹¹
- the recommendation of the Western Australian Justice of the Peace Review Committee that justices of the peace should consult a magistrate

¹²⁰⁶ Ibid.

¹²⁰⁷ Ibid.

¹²⁰⁸ Some charges that may, on a guilty plea, be heard by justices of the peace carry substantial penalties. For example, under s 78 of the *Transport Operations (Road Use Management) Act 1995* (Qld) (previously s 15 of the *Traffic Act 1949* (Qld)), a person convicted of driving without a “driver licence” may, in certain circumstances, be liable to a penalty not exceeding \$2,550 (34 penalty units) or imprisonment for a term not exceeding eighteen months. See note 663 of this Report.

¹²⁰⁹ See pp 197-198 of this Report. Queensland has a high imprisonment rate for fine defaulters. During the 1997-1998 financial year, over a quarter of all people admitted to prison were fine defaulters, and almost 30 per cent of those were of Aboriginal or Torres Strait Islander descent: see Criminal Justice Commission, *Criminal Justice System: Monitor Series* (Vol 4, February 1999) at 11. See also the discussion of the *State Penalties Enforcement Act 1999* (Qld) at pp 198-199 of this Report.

¹²¹⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 161-162.

¹²¹¹ See p 204 of this Report.

before sentencing a defendant to a term of imprisonment;¹²¹² and

- the requirement in the *Sentencing Act 1995 (WA)* that a magistrate must review any custodial sentence imposed by a justice of the peace and either confirm the original sentence or cancel it and order the offender to be sentenced again.¹²¹³

The Commission did not favour a regime under which one judicial officer was required to consult another judicial officer before sentencing; nor did it favour a regime under which it was necessary for a sentence imposed by certain judicial officers to be confirmed by a judicial officer of another category. The Commission thought that the former regime, in particular, could be cumbersome in practice.¹²¹⁴

More importantly, however, the Commission considered that the various proposals that have emanated from Western Australia and the legislation that was ultimately enacted in that State all highlight the very problem they were intended to address - that is, whether it is appropriate for justices of the peace, under any circumstances, to be able to sentence a defendant to a term of imprisonment. It seemed to the Commission that the various approaches were all underpinned by a concern about the propriety of this power being exercised by justices of the peace.¹²¹⁵

The Commission was of the view that, rather than retain the power of justices of the peace to sentence a defendant to a term of imprisonment and subject it to various restrictions, it would be more appropriate to remove that power from justices of the peace altogether. That approach seemed to the Commission to be the most effective way to address its concerns about custodial sentences being imposed by justices of the peace. Further, the Commission was of the view that such an approach would avoid the administrative burdens it considered would be likely to result from the Western Australian requirement that all custodial sentences imposed by justices of the peace must be reviewed by a magistrate, or from the proposal that justices of the peace must consult a magistrate before they impose a custodial sentence.¹²¹⁶

The Commission noted that the *Penalties and Sentences Act 1992 (Qld)*

¹²¹² See p 205 of this Report.

¹²¹³ S 38 of the *Sentencing Act 1995 (WA)* is set out at pp 205-206 of this Report.

¹²¹⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 162.

¹²¹⁵ Ibid.

¹²¹⁶ Ibid.

presently enables a court, when imposing a fine, to impose a term of imprisonment that should be served if the offender defaults in paying the fine.¹²¹⁷

The Commission therefore expressed the view that justices of the peace should not be able to sentence a defendant to a term of imprisonment, whether:

- as the original sentence or as part of the original sentence;
- as a suspended sentence; or
- in default of paying a fine or other penalty that has been imposed.¹²¹⁸

This would not affect the range of other orders that might, depending on the nature of the offence, be made under the *Penalties and Sentences Act 1992* (Qld) - for example, that the defendant pay a fine, restore property, make compensation, or perform unpaid community service.¹²¹⁹

The Commission also noted that, even if a court that ordered an offender to pay a penalty did not make an order for imprisonment in default of payment of the penalty, the court could, if the offender failed to pay the penalty, subsequently order the offender to be imprisoned for a prescribed period.¹²²⁰ The Commission expressed the view that, for this purpose, a Magistrates Court should only be able to be constituted by a magistrate.¹²²¹

The Commission also considered the possibility that, in some cases, the justices of the peace hearing a charge, or one of them, might be of the opinion - notwithstanding that both the defendant and the prosecutor consent to having the matter heard by justices of the peace - that a custodial sentence is warranted. The Commission expressed the view that, in those circumstances, the justices of the peace should be required to adjourn the matter for sentencing by a magistrate.¹²²²

(iii) Preliminary recommendations

¹²¹⁷ Ibid. See p 197 of this Report.

¹²¹⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 163.

¹²¹⁹ See pp 195-196 of this Report.

¹²²⁰ See the discussion of ss 183 and 185 of the *Penalties and Sentences Act 1992* (Qld) at pp 197-199 of this Report.

¹²²¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 163.

¹²²² Ibid.

The Commission made the following preliminary recommendations:¹²²³

- Justices of the peace (magistrates court) should be able to hear and determine a charge only where:
 - (a) the defendant is charged with a simple offence (other than an indictable offence that may be heard summarily) or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* (Qld);
 - (b) the defendant pleads guilty; and
 - (c) both the prosecutor and the defendant consent to the charge being heard and determined by a court constituted by justices of the peace.
- Justices of the peace (magistrates court) should not have the power to sentence a defendant to a term of imprisonment, whether:
 - (a) as the original sentence or part of the original sentence;
 - (b) as a suspended sentence; or
 - (c) in default of paying a fine or other penalty that has been imposed.
- Justices of the peace (magistrates court) should not be able to constitute a court for the purposes of imposing a term of imprisonment on an offender who defaults in the payment of a fine or other penalty. The *Penalties and Sentences Act 1992* (Qld) should be amended to provide that only a magistrate may constitute a Magistrates Court for this purpose.
- If the justices of the peace (magistrates court) who are hearing and determining a charge are of the opinion, or if one of them is of the opinion, that a custodial sentence is warranted, they should adjourn the matter for sentencing by a magistrate.

(i) Submissions

Seventeen submissions received by the Commission in response to the Discussion Paper addressed the Commission's preliminary recommendations in relation to the circumstances in which justices of the peace should be able to hear and determine

¹²²³

Id at 207.

charges and the limitations that should apply when they do so.

Sixteen of these respondents agreed with the Commission's preliminary recommendation that justices of the peace (magistrates court) should be able to hear and determine a charge only where:

- the defendant is charged with a simple offence (other than an indictable offence that may be heard summarily) or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* (Qld);
- the defendant pleads guilty; and
- both the prosecutor and the defendant consent to the charge being heard and determined by a court constituted by justices of the peace.¹²²⁴

The same respondents also agreed with the Commission's other preliminary recommendations about sentencing, the effect of which was that justices of the peace (magistrates court) should not have the power to sentence a defendant to a term of imprisonment or make an order that could result in a defendant being imprisoned.¹²²⁵

One respondent, a Registrar of a Magistrates Court, disagreed with the Commission's proposed restriction.¹²²⁶ He considered that, if the option of imposing a custodial sentence were denied to justices of the peace, it would virtually defeat the rationale behind the Commission's recommendation that the sentencing power be retained - namely, "to expedite justice and not unduly disadvantage persons".¹²²⁷

This respondent expressed the view that a justice of the peace (magistrates court) is competent to impose a custodial sentence, although, in his experience, the usual sentencing option is the imposition of a fine or other monetary penalty.¹²²⁸

The entire recommendation seems to imply that a Justice of the Peace (Magistrates Court) has some appropriate judicial knowledge and ability to properly consider and impose a sentence eg. probation, recognisance, community service etc (options considered far more onerous) but is not competent to make the simple determination of an appropriate period which forms but the default of the primary penalty.

In the majority of cases determined by Justices, the imposition of an appropriate fine or other monetary penalty is sufficient and appropriate in the interests of justice and such a penalty is usually strictly limited by the legislation. As indicated in the paper, the maximum

¹²²⁴ Submissions 6, 7, 8, 9, 14, 23, 24, 25, 26, 40, 44, 45, 47, 51, 53, 59.

¹²²⁵ These preliminary recommendations are set out in full at p 219 of this Report.

¹²²⁶ Submission 16.

¹²²⁷ Ibid.

¹²²⁸ Ibid.

period of imprisonment is enshrined in legislation and any order requires but appropriate consideration. Although other sentencing options may be considered, it would be very rare for another to be utilised given the nature of the matter before the Court.

The respondent did not share the concerns raised by some respondents to the Issues Paper about the potential for a lack of consistency in sentencing if justices of the peace exercise this power:¹²²⁹

Given that the ratio of Justices of the Peace (Magistrates Court) within the Courts system to that of others is about 4 to 1, most who will utilise these powers will come from within the Courts system. It is usual for those officers to adopt the sentencing guidelines of the visiting or resident Stipendiary Magistrate thus maintaining uniformity in sentencing.

If the Commission's recommendations are accepted, the training that should ensue will enable all Justices of the Peace (Magistrates Court) to receive guidance in the appropriate determination of such a period to enhance their abilities.

In any event, this respondent suggested that the establishment of the State Penalties Enforcement Registry would assist in allaying some of the concerns of the Commission by ensuring that any default imprisonment period was utilised only as a last resort.¹²³⁰

(j) The Commission's view

(i) Circumstances in which justices of the peace should be able to sentence

As noted above, there is presently no provision of general application prohibiting justices of the peace from hearing and determining an indictable offence that may be tried summarily.¹²³¹ The question is determined by the particular Act creating the offence. Although the Commission is aware of only a few Acts under which justices of the peace may hear and determine an indictable offence summarily, the Commission is of the view that the power to do so should be removed from justices of the peace altogether. Such an offence should be required to be tried before a magistrate.¹²³²

Although justices of the peace are already limited to hearing and determining

¹²²⁹ Ibid.

¹²³⁰ The *State Penalties Enforcement Act 1999* (Qld) was assented to on 6 December 1999. As at 10 December 1999, it had not been proclaimed into force. See the discussion of this Act at pp 198-199 of this Report.

¹²³¹ See p 194 of this Report.

¹²³² See, however, the Commission's comments at pp 35-37 of this Report. The Commission is not, as part of this reference, reviewing the powers of justices of the peace (magistrates court) appointed under the *Criminal Code* (Qld). Those justices of the peace may, in certain circumstances, hear and determine a charge of an indictable offence that may, under Chapter 58A of the *Criminal Code* (Qld), be tried summarily.

certain charges where the defendant pleads guilty, the Commission does not believe that that limitation is, of itself, sufficient. Although in many cases it might be convenient for a defendant to have a charge heard by justices of the peace, the Commission believes that, if a defendant would prefer to have a charge heard by a magistrate, he or she should be entitled to have the matter so heard.

On the other hand, the Commission does not consider that the consent of the defendant should be the sole factor in determining whether a matter is heard by justices of the peace or by a magistrate. The Commission believes that the consent of the prosecutor should also be required. That requirement should operate as a filtering device so that cases of a more serious or complex nature will be heard by a magistrate, rather than by justices of the peace.

For these reasons, the Commission remains of the view that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that justices of the peace (magistrates court) should be able to constitute a court to hear and determine a charge only where:

- the defendant is charged with a simple offence (other than an indictable offence that may be heard summarily) or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* (Qld);
- the defendant pleads guilty; and
- both the prosecutor and the defendant consent to the charge being heard and determined by a court constituted by justices of the peace.

(ii) **Restrictions on sentencing**

The Commission has given careful consideration to the further issue of whether justices of the peace who hear and determine a charge should be able to sentence a defendant to a term of imprisonment.

Although the Commission regards it as preferable for sentencing generally to be undertaken by magistrates, it accepts that some defendants, especially those in communities that have limited access to a magistrate, might be disadvantaged if justices of the peace did not have any power to sentence a defendant. However, while it is appropriate, in the Commission's view, for justices of the peace to be able to exercise some sentencing powers, the nature of certain powers is such that the exercise of those powers should be restricted to a magistrate. The Commission considers that the imposition of a custodial sentence is such a power.

The Commission acknowledges the complexity of the sentencing options

available to a court when sentencing a defendant.¹²³³ However, the Commission's particular concern about the imposition of a custodial sentence is the effect that such a sentence might have on a defendant. It was for this reason that the Commission made a number of preliminary recommendations about sentencing, the effect of which was that justices of the peace should not have the power to sentence a defendant to a term of imprisonment or make an order that could result in a defendant serving a term of imprisonment if he or she defaulted in paying the fine or other penalty ordered.

The Commission accepts that, when the *State Penalties Enforcement Act 1999* (Qld) commences, a number of additional avenues will be available for the recovery of an unpaid fine or penalty.¹²³⁴ Nonetheless, it will still be possible, after the commencement of that Act, for a clerk of the court, instead of giving the registrar of SPER the particulars necessary to register the unpaid amount of the fine or penalty, to issue a warrant for the arrest and imprisonment of a defendant for the default term of imprisonment ordered by the court.¹²³⁵

Consequently, even once the *State Penalties Enforcement Act 1999* (Qld) has commenced, a default term of imprisonment that is ordered by a court constituted by justices of the peace could still result in a defendant serving that term of imprisonment.

The Commission is conscious of the fact that, although the majority of submissions agreed with the Commission's preliminary recommendations on this issue, a Registrar of a Magistrates Court advocated that justices of the peace should have the power to sentence a defendant to a term of imprisonment in default of paying a fine.¹²³⁶

However, because of the potentially serious consequences for a defendant of serving a custodial sentence, the Commission is not persuaded to change its preliminary recommendation. The Commission remains of the view that:

- a court constituted by justices of the peace (magistrates court) should not have the power to sentence a defendant to a term of imprisonment, whether as the original sentence or part of the original sentence, as a suspended sentence, or in default of paying a fine or other penalty that has been imposed;

¹²³³ See the range of sentencing options set out at pp 195-196 of this Report.

¹²³⁴ See the discussion of the *State Penalties Enforcement Act 1999* (Qld) at pp 198-199 of this Report.

¹²³⁵ *Penalties and Sentences Act 1992* (Qld) s 185A(1), as amended by the *State Penalties Enforcement Act 1999* (Qld).

¹²³⁶ See pp 220-221 of this Report.

- in the case of a defendant who has defaulted in the payment of a fine or other penalty, but who was not initially sentenced to a term of imprisonment in default of paying the fine or other penalty, justices of the peace (magistrates court) should not be able to constitute a court for the purpose of sentencing such a defendant to a term of imprisonment;¹²³⁷ and
- if the justices of the peace (magistrates court) who are constituting a court to hear and determine a charge are of the opinion, or if one of them is of the opinion, that a custodial sentence is warranted, they should adjourn the matter for sentencing by a magistrate.

8. CONDUCTING AN EXAMINATION OF WITNESSES

(a) Source of power

The *Justices Act 1886* (Qld) provides that justices of the peace may conduct an examination of witnesses in relation to an indictable offence.¹²³⁸ This is commonly referred to as conducting a “committal hearing”. Although the Act authorises a single “justice”¹²³⁹ to conduct a committal hearing, the court may nevertheless be constituted by more than one justice of the peace for this purpose.¹²⁴⁰

Some indictable offences may be tried summarily, that is, by a magistrate sitting alone, rather than before a judge and jury.¹²⁴¹ However, most indictable offences are required to be tried before a judge and jury in either the District Court or the Supreme Court. The purpose of a committal hearing is to determine whether there is sufficient evidence for the defendant to be tried. Evidence is called on behalf of the prosecution¹²⁴² and may also be offered by the defendant if the defendant wishes.¹²⁴³

¹²³⁷ See s 185 of the *Penalties and Sentences Act 1992* (Qld).

¹²³⁸ However, some Acts provide that only a magistrate may conduct a committal hearing in relation to certain charges. See, for example, the *Lotteries Act 1997* (Qld) s 209(1)(b); the *Nature Conservation Act 1992* (Qld) s 166(1)(b); the *Sugar Industry Act 1991* (Qld) s 238A(2)(b); and the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) s 82(3)(b).

¹²³⁹ See note 85 of this Report for the definition of “justice” in the *Justices Act 1886* (Qld).

¹²⁴⁰ *Justices Act 1886* (Qld) s 104(1)(a). See, for example, ss 104(2) and 104A of the *Justices Act 1886* (Qld).

¹²⁴¹ See Chapter 58A of the *Criminal Code* (Qld) (Indictable offences dealt with summarily).

¹²⁴² *Justices Act 1886* (Qld) s 104(2).

¹²⁴³ *Justices Act 1886* (Qld) s 104(4).

A committal hearing is required to be conducted in the presence and hearing of the defendant, if the defendant is required to be present, and the defendant's counsel and solicitor (if any).¹²⁴⁴

If, after all the evidence to be offered by the prosecution has been called, the evidence, in the opinion of the justices then present, is not sufficient to put the defendant on trial for any indictable offence, the justices must order the defendant, if he or she is in custody, to be discharged as to the charge. However, if, in the opinion of the justices, the evidence is sufficient, the justices must ask the defendant if he or she wishes to say anything in answer to the charge or enter any plea.¹²⁴⁵ If the defendant, in response to that question, says that he or she is guilty of the charge, the justices must order the defendant to be committed for sentence before a court of competent jurisdiction.¹²⁴⁶

If, however, the defendant wishes to offer evidence in relation to the charge, the justices are obliged to hear and receive all admissible evidence tendered on behalf of the defendant that tends to show whether or not the defendant is guilty of the offence charged.¹²⁴⁷

If, having considered all the evidence called in relation to the indictable offence, the justices are of the opinion that the evidence is sufficient for the defendant to be put on trial, they must order the defendant to be committed to be tried for the offence before a court of competent jurisdiction, that is, depending on the nature of the offence, in either the District Court or the Supreme Court.¹²⁴⁸

As an alternative to calling a witness to give evidence orally at a committal hearing, in some circumstances it may be possible for a written statement of the witness to be admitted in lieu of that witness's oral evidence.¹²⁴⁹ This procedure cannot be followed if the defendant, or one of the defendants, is not represented by a barrister or a solicitor.¹²⁵⁰ Further, a written statement cannot be admitted unless the prosecution and the defence agree to its admission and certain other criteria are satisfied.¹²⁵¹

¹²⁴⁴ *Justices Act 1886* (Qld) s 104(1)(b). However, the court is authorised under s 40 of the *Justices Act 1886* (Qld) to remove the defendant on the grounds that he or she is disrupting the proceedings. The defendant may also apply under s 104A of that Act to be excused from attendance during the taking of any evidence for the prosecution.

¹²⁴⁵ *Justices Act 1886* (Qld) s 104(2).

¹²⁴⁶ *Justices Act 1886* (Qld) s 113.

¹²⁴⁷ *Justices Act 1886* (Qld) s 104(4).

¹²⁴⁸ *Justices Act 1886* (Qld) s 108(1) .

¹²⁴⁹ *Justices Act 1886* (Qld) s 110A.

¹²⁵⁰ *Justices Act 1886* (Qld) s 110A(4).

¹²⁵¹ *Justices Act 1886* (Qld) s 110A(5).

In certain circumstances, justices may commit a defendant to be sentenced or tried without any consideration of the statements admitted. Where all the evidence (whether for the prosecution or the defence) consists of written statements admitted in accordance with the procedure outlined above, and counsel or the solicitor for the defendant consents to the defendant being committed for trial or, as the case may be, for sentence without consideration of the contents of the written statements, the justices, without determining whether the evidence is sufficient to put the defendant on trial for an indictable offence, must formally charge the defendant and must order the defendant to be committed for trial or, as the case may be, for sentence.¹²⁵²

However, where all the evidence consists of written statements admitted in accordance with this procedure, but counsel or the solicitor for the defendant does not consent to the defendant being committed for trial or for sentence, the justices, after hearing submissions from the prosecution and defence, must determine whether the evidence is sufficient to put the defendant on trial for the offence.¹²⁵³

(b) Justices of the peace who may exercise this power

Despite the reference in the *Justices Act 1886* (Qld) to a “justice”, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits who may conduct a committal hearing. The effect of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that a committal hearing may be conducted by a justice of the peace (magistrates court),¹²⁵⁴ but not by a justice of the peace (qualified), who is, in the exercise of any power to constitute a court, limited to taking or making procedural actions or orders.¹²⁵⁵ The power to conduct a committal hearing obviously exceeds that limited power.

As the limitations imposed by section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) do not apply to a justice of the peace whose office is preserved by the transitional provisions of that Act,¹²⁵⁶ an old system justice of the peace may also conduct a committal hearing.

(c) Frequency of conducting committal hearings

Justices of the peace did not conduct a committal hearing in any of the Magistrates

¹²⁵² *Justices Act 1886* (Qld) s 110A(6).

¹²⁵³ *Justices Act 1886* (Qld) s 110A(10).

¹²⁵⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b).

¹²⁵⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹²⁵⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

Courts surveyed during March and April 1998. This result was consistent with the responses to the questionnaire distributed to justices of the peace (magistrates court).

Of the 134 responses to the questionnaire, seventeen justices of the peace (magistrates court) indicated that they had heard all the matters the subject of the questionnaire.¹²⁵⁷ This would include committal hearings. It was not clear from these responses, however, whether these hearings had been conducted in recent years or whether they were cases where the defendant had been committed by consent under section 110A(6) of the *Justices Act 1886* (Qld) (where no consideration of the tendered statements is required).

Two justices of the peace (magistrates court) - who were both employed at a Magistrates Court - commented that they had never heard of justices of the peace conducting committal hearings.¹²⁵⁸ This view was shared by one of the respondents to the Issues Paper.¹²⁵⁹ A submission from a retired police officer stated that court diaries are arranged so that committal hearings are conducted by the visiting magistrate - usually on a monthly basis.¹²⁶⁰

(d) Other jurisdictions

Although justices of the peace retain the power in a number of jurisdictions to conduct committal hearings, it seems that, in practice, it is extremely rare for them to exercise that power.

(i) Australian Capital Territory

As mentioned above, justices of the peace in the Australian Capital Territory do not have jurisdiction to constitute a court for any purpose.¹²⁶¹ Consequently, they do not have the power to conduct a committal hearing.

(ii) New South Wales

Although justices of the peace are authorised to conduct committal hearings in New South Wales,¹²⁶² it is unusual for them to do so. Similar to the practice in

¹²⁵⁷ Q5, Q14, Q35, Q36, Q37, Q40, Q47, Q50, Q70, Q71, Q76, Q81, Q103, Q106, Q125, Q128, Q130.

¹²⁵⁸ Q12, Q77.

¹²⁵⁹ Submission 40 (IP).

¹²⁶⁰ Submission 50 (IP).

¹²⁶¹ See p 200 of this Report.

¹²⁶² *Local Court Act 1982* (NSW) s 8 and *Justices Act 1902* (NSW) ss 32-48I.

that State in relation to the hearing and determining of summary offences,¹²⁶³ committal hearings are ordinarily reserved for hearing by a magistrate.¹²⁶⁴

(iii) Northern Territory

Where a person is charged with an indictable offence, a justice may, under the provisions of the *Justices Act (NT)*, conduct a preliminary examination.¹²⁶⁵

However, the Act restricts the exercise of certain ancillary powers to a magistrate. For example, the Act provides that, at any stage of the proceedings, a magistrate may accept a guilty plea from a defendant charged with an indictable offence that could, in certain circumstances, be tried summarily.¹²⁶⁶ A justice of the peace is not empowered to take a guilty plea in respect of such a charge.¹²⁶⁷

(iv) South Australia

The Magistrates Court has jurisdiction to conduct a preliminary examination of a charge of an indictable offence.¹²⁶⁸ Generally, the Magistrates Court, when sitting to adjudicate on any matter, must be constituted by a magistrate.¹²⁶⁹ However, if there is no magistrate available to constitute the Court, it may be constituted by two justices or by a special justice.¹²⁷⁰

(v) Tasmania

Although justices of the peace are authorised to conduct committal hearings,¹²⁷¹

¹²⁶³ See p 201 of this Report.

¹²⁶⁴ Attorney-General's Department (NSW), Discussion Paper, *A Review of the Law and Policy Relating to the Appointment to and Regulation of the Office of Justice of the Peace* (1998) at 5.

¹²⁶⁵ *Justices Act (NT)* ss 105A, 105B, 106, 109-112, 134, 135.

¹²⁶⁶ *Justices Act (NT)* s 106A(1).

¹²⁶⁷ *Justices Act (NT)* s 106A(1). The power of justices of the peace to take a guilty plea for indictable offences that may be heard summarily was removed by s 3 of the *Justices Amendment Act 1997 (NT)*, which amended s 106A of the principal Act.

¹²⁶⁸ *Magistrates Court Act 1991 (SA)* s 9(a); *Summary Procedure Act 1921 (SA)* ss 104-107.

¹²⁶⁹ *Magistrates Court Act 1991 (SA)* s 7A(1).

¹²⁷⁰ *Magistrates Court Act 1991 (SA)* s 7A(2).

¹²⁷¹ *Justices Act 1959 (Tas)* s 23(e), Part VII, Division 2.

the practice is that they deal only with “appropriate uncontested committals”.¹²⁷² Committal hearings in relation to some charges may be conducted only by a magistrate sitting alone.¹²⁷³

(vi) Victoria

The power to conduct a committal hearing was removed from justices of the peace in 1984.¹²⁷⁴

(vii) Western Australia

Justices of the peace are authorised to conduct committal hearings,¹²⁷⁵ although in practice they do not do so. In its Report on Courts of Petty Sessions, the Law Reform Commission of Western Australia stated that it was not aware of justices of the peace conducting committal hearings since 1970.¹²⁷⁶ Although the Commission did not recommend any change to the jurisdiction of justices of the peace, it did so on the basis that the practice as to the matters heard by them would continue.¹²⁷⁷

In 1994, the Justice of the Peace Review Committee in Western Australia recommended that the existing practice should be formalised, and that the power of justices of the peace to conduct preliminary hearings should be removed.¹²⁷⁸ The Committee did recommend, however, that the power of justices of the peace to commit defendants under the expedited committal

¹²⁷² Department of Justice (Tas), *Justices' Guide* (1995) at 9.

¹²⁷³ See, for example, the *Criminal Code* (Tas) s 185 (rape).

¹²⁷⁴ *Magistrates' Courts Act 1971* (Vic) s 18A, inserted by s 4 of the *Magistrates' Courts (Jurisdiction) Act 1984* (Vic). The *Magistrates' Courts Act 1971* (Vic) was repealed by the *Magistrates' Court Act 1989* (Vic).

¹²⁷⁵ *Justices Act 1902* (WA) Part V, Division 2.

¹²⁷⁶ Law Reform Commission of Western Australia, *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1986) at para 2.18, note 49.

¹²⁷⁷ *Id* at para 2.19, note 52.

¹²⁷⁸ The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 27-28.

process available in Western Australia¹²⁷⁹ should remain.¹²⁸⁰

(e) Discussion Paper

The Commission observed that, in the light of the submissions received in response to the Issues Paper and the responses to the questionnaire distributed to justices of the peace (magistrates court), it appeared that it was extremely rare for justices of the peace to conduct a committal hearing.¹²⁸¹

Just as the Commission considered it inappropriate for justices of the peace to conduct a trial of a defended charge, it also considered it inappropriate for justices of the peace to conduct a contested committal hearing. A contested hearing requires a knowledge of the rules of evidence and court procedure that justices of the peace may not possess. Consequently, the Commission was of the view that the power to conduct a contested committal hearing should be removed from justices of the peace.¹²⁸²

The Commission noted that section 110A(6) of the *Justices Act 1886* (Qld) provides an avenue for defendants who do not wish to have a contested committal hearing, but who simply wish to proceed expeditiously to trial or to a sentencing hearing, to be committed accordingly.¹²⁸³ The Commission did not have the same concerns about justices of the peace presiding over a committal hearing conducted in accordance with section 110A(6) of the *Justices Act 1886* (Qld) as it had about justices of the peace conducting a contested committal hearing. The Commission made the observation that the procedure in section 110A(6) applies only where all the evidence consists of written statements, the defendant is legally represented, and the defendant's legal representative consents to the defendant's committal. The Commission also noted that the procedure does not require the justices of the peace to consider the evidence before the court.¹²⁸⁴

¹²⁷⁹ The *Justices Act 1902* (WA) contains a procedure for an expedited committal hearing in certain circumstances where the defendant pleads guilty. If, having been served with certain material by the prosecution, the defendant pleads guilty to the charge, the justices of the peace must commit the defendant to a court of competent jurisdiction for sentence: *Justices Act 1902* (WA) s 101.

¹²⁸⁰ The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 28.

¹²⁸¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 169.

¹²⁸² *Id* at 169-170.

¹²⁸³ This procedure is discussed at p 225 of this Report.

¹²⁸⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 170.

The Commission made the following preliminary recommendations about the power of justices of the peace to conduct an examination of witnesses:¹²⁸⁵

- Justices of the peace (magistrates court) should retain the power under section 110A(6) of the *Justices Act 1886* (Qld) to commit a defendant, with the consent of the defendant's legal representative, for trial or for sentence.
- The power to conduct any other type of committal hearing should be removed from justices of the peace.

(f) Submissions

Seventeen submissions commented on the Commission's preliminary recommendations in relation to committal hearings. All of these respondents agreed with both recommendations.¹²⁸⁶

(g) The Commission's view

The Commission's view on this issue remains unchanged. Justices of the peace should retain the power under section 110A(6) of the *Justices Act 1886* (Qld) to commit a defendant, with the consent of the defendant's legal representative, for trial or for sentence. As noted above, that procedure does not require the justices of the peace to consider the evidence before the court.¹²⁸⁷

However, the power to conduct any other type of committal hearing should be removed from justices of the peace. The Commission does not consider it appropriate for justices of the peace to conduct a contested committal hearing.¹²⁸⁸

9. PROCEDURAL POWERS

(a) Remands, adjournments and bail

(i) Sources of power

¹²⁸⁵ Id at 208.

¹²⁸⁶ Submissions 6, 7, 8, 9, 14, 23, 24, 25, 26, 40, 44, 45, 47, 51, 53, 56, 59.

¹²⁸⁷ See p 225 of this Report.

¹²⁸⁸ This view is consistent with the Commission's view in relation to the hearing of a defended charge. See p 214 of this Report.

Section 84 of the *Justices Act 1886* (Qld) provides that, in any case of a charge of an indictable offence, if from the absence of witnesses or from any other reasonable cause it becomes necessary or advisable to defer the hearing of the case, the justices before whom the defendant appears may adjourn the hearing, and may remand the defendant to a gaol or lockup for a period of not more than eight days at any one time.¹²⁸⁹

Section 88 of the *Justices Act 1886* (Qld) authorises “the justices present, or, if only 1 justice is present, that justice” to adjourn a hearing of a charge of a simple offence or breach of duty to a time and place to be then appointed, or to adjourn the hearing and leave the time and place at which it is to be continued to be later determined by the justices then present.

Other legislation also confers on a justice of the peace the power to hear and determine an application for a remand or adjournment of a case.¹²⁹⁰

After being arrested and charged with an offence, and before the matter is finally resolved by conviction or acquittal in the appropriate court, a person (the defendant) may be remanded in custody, or may be released from custody in the intervening period through a grant of bail.

Bail is a procedure that allows a person who has been accused of a criminal offence, and arrested, to be released from custody until he or she stands trial. It recognises that the liberty of a person who has not been convicted of an offence should not be restricted unless it is necessary in the interests of the community that the person be detained.

Under the *Bail Act 1980* (Qld), a court has various powers with respect to the granting of bail:¹²⁹¹

A court, subject to this Act -

- (a) may grant bail to a person held in custody on a charge of or in connection with an offence if -
 - (i) the person is awaiting a criminal proceeding to be held by that court in relation to that offence; or
 - (ii) the court has adjourned the criminal proceeding; or

¹²⁸⁹ The justices also have the power under s 8 of the *Bail Act 1980* (Qld) to grant the defendant bail. See p 232 of this Report.

¹²⁹⁰ See, for example, the *Health Act 1937* (Qld) s 145(2); and the *Penalties and Sentences Act 1992* (Qld) s 182(4).

¹²⁹¹ *Bail Act 1980* (Qld) s 8(1). Generally, see Queensland Law Reform Commission, Report, *The Bail Act 1980* (R 43, 1993).

- (iii) the court has committed or remanded the person in the course of or in connection with a criminal proceeding to be held by that court or another court in relation to that offence;
- (b) may enlarge, vary or revoke bail so granted.

The definition of “court” in the *Bail Act 1980* (Qld) includes a “justice” sitting in court, as well as any justice or justices conducting an examination of witnesses in relation to an indictable offence.¹²⁹² Although “justice” is not defined in the *Bail Act 1980* (Qld), it is defined in the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.¹²⁹³ The police officer in charge of a police station or watch-house has a general power to grant bail to a person in his or her custody.¹²⁹⁴ Such a grant of bail discharges the duty of taking the person before a justice to be dealt with according to law.¹²⁹⁵

However, if a person is refused bail by the police officer in charge of the police station or watch-house, the person must be taken before a court.¹²⁹⁶ If bail is refused to a defendant who is already in custody, the defendant must be remanded in custody.¹²⁹⁷

(ii) Justices of the peace who may exercise these powers

The remand of a defendant, the adjournment of proceedings and the granting of bail are all included in the definition of “procedural action or order” in section 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹²⁹⁸ They are, therefore, powers that may be exercised by a justice of the peace (qualified),¹²⁹⁹ a justice of the peace (magistrates court)¹³⁰⁰ or an old system justice of the peace.¹³⁰¹

¹²⁹² *Bail Act 1980* (Qld) s 6.

¹²⁹³ *Acts Interpretation Act 1954* (Qld) s 36.

¹²⁹⁴ *Bail Act 1980* (Qld) s 7(1).

¹²⁹⁵ *Bail Act 1980* (Qld) s 7(4).

¹²⁹⁶ For an offence punishable by either an indefinite sentence or sentence for life, only a Supreme Court judge may grant bail: *Bail Act 1980* (Qld) s 13.

¹²⁹⁷ *Bail Act 1980* (Qld) s 8(2).

¹²⁹⁸ The definition of “procedural action or order” is set out at note 94 of this Report.

¹²⁹⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹³⁰⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

¹³⁰¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

(b) Certain domestic violence orders

(i) Source of power

The *Domestic Violence (Family Protection) Act 1989* (Qld) provides a regime for the making of domestic violence orders to protect an “aggrieved spouse” and certain other persons from acts of domestic violence¹³⁰² committed by a “respondent spouse”.

The Act provides for two types of domestic violence orders: protection orders and temporary protection orders.¹³⁰³ A “temporary protection order” is an order made for a short period until the court decides whether or not to grant a protection order.¹³⁰⁴

Magistrates Courts have jurisdiction under the *Domestic Violence (Family Protection) Act 1989* (Qld) to hear and determine all applications made to them under that Act. Ordinarily, a Magistrates Court hearing matters under the *Domestic Violence (Family Protection) Act 1989* (Qld) must be constituted by a magistrate.¹³⁰⁵ However, a Magistrates Court may be constituted by two or more justices of the peace if application is made for any of the following purposes:¹³⁰⁶

- (a) to make a domestic violence order in terms agreed to by, or on behalf of, an aggrieved spouse and a respondent spouse; or

¹³⁰² “Domestic violence” is defined in s 11 of the *Domestic Violence (Family Protection) Act 1989* (Qld) as any of the following acts committed by a person against his or her spouse:

- (a) wilful injury;
- (b) wilful damage to the spouse's property;
- (c) intimidation or harassment of the spouse;
- (d) indecent behaviour to the spouse without consent;
- (e) a threat to commit an act mentioned in paragraphs (a) to (d).

¹³⁰³ *Domestic Violence (Family Protection) Act 1989* (Qld) s 13(2).

¹³⁰⁴ *Domestic Violence (Family Protection) Act 1989* (Qld) s 13(3).

¹³⁰⁵ *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(2).

¹³⁰⁶ *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(3). Note however that, when the *Domestic Violence (Family Protection) Amendment Act 1999* (Qld) commences, s 4 of the principal Act will be amended. The new s 4(5) and (6) will confer certain additional powers on justices of the peace (magistrates court) who are appointed under s 552C(3) of the *Criminal Code* (Qld) to act in specified Aboriginal, Torres Strait Islander or remote communities. In those communities, a Magistrates Court constituted by two or more such justices of the peace (magistrates court) will be able, if an offender appears in relation to an offence involving domestic violence and pleads guilty to the offence, to deal with an application for a domestic violence order, or make a domestic violence order on its own initiative, relating to the offence and for which the offender is the respondent spouse. See s 5 of the *Domestic Violence (Family Protection) Amendment Act 1999* (Qld). That Act was assented to on 18 November 1999. As at 10 December 1999, it had not been proclaimed into force.

- (b) to make or extend a temporary protection order and a Magistrate is not readily available to constitute a Magistrates Court for the purpose; or
- (c) to adjourn proceedings taken with a view to the making of a domestic violence order against a respondent spouse; ...

An order made, or action taken, for any of these purposes is deemed to be a procedural order or action for the purposes of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹³⁰⁷

The *Domestic Violence (Family Protection) Act 1989* (Qld) provides a procedure for a police officer to apply to a magistrate for a temporary protection order by way of telephone, facsimile, telex, radio or other similar facility where the police officer:¹³⁰⁸

- has taken a person suspected of committing domestic violence into custody; or
- has investigated a case of suspected domestic violence and reasonably believes that a person is an aggrieved spouse, that there is sufficient reason for the officer to take action, and that, because of distance, time or other circumstance of the case, it is not practicable for an application made to a court, or to be made to a court, to be heard and determined quickly.

(ii) Justices of the peace who may exercise these powers

Where justices of the peace are authorised to constitute a Magistrates Court for the purposes of certain proceedings under the *Domestic Violence (Family Protection) Act 1989* (Qld), the Court may, as those purposes are expressed to be procedural,¹³⁰⁹ be constituted by a justice of the peace (qualified),¹³¹⁰ a justice of the peace (magistrates court)¹³¹¹ or an old system justice of the peace.¹³¹² A justice of the peace (commissioner for declarations) is expressly excluded from constituting a Court for these purposes.¹³¹³ That approach is consistent with the limitations imposed by the *Justices of the Peace and Commissioners for*

¹³⁰⁷ *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(4).

¹³⁰⁸ *Domestic Violence (Family Protection) Act 1989* (Qld) s 54.

¹³⁰⁹ *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(4).

¹³¹⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹³¹¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(c).

¹³¹² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

¹³¹³ *Domestic Violence (Family Protection) Act 1989* (Qld) ss 3 (definition of "justice"), 4(3).

Declarations Act 1991 (Qld) on the powers of a justice of the peace (commissioner for declarations).¹³¹⁴

(c) Frequency of making procedural orders

(i) Remands, adjournments and bail

These matters would appear to be heard frequently by justices of the peace. During March and April 1998, justices of the peace heard numerous applications for procedural orders in all four Magistrates Courts surveyed, as indicated in the table below.¹³¹⁵

	Gladstone	Proserpine	Mount Isa	Innisfail
Remands	0	0	4	0
Adjournments	7 ¹³¹⁶	10	75	18
Applications for bail or to enlarge bail	5	0	8	1
Applications for forfeiture of bail	0	2	68	0

Mount Isa was by far the busiest of the four Magistrates Courts surveyed. There is one resident magistrate at the Mount Isa Magistrates Court. The clerk of the court at Mount Isa has advised that the circuit of the sole resident magistrate covers the north west area of Queensland, including a number of Gulf of Carpentaria communities. As a result of his duties, the magistrate is absent from Mount Isa for approximately a third of each month, during which time urgent matters must be attended to by justices of the peace.¹³¹⁷

The responses to the questionnaires sent to justices of the peace (magistrates court) also indicated that it is common for justices of the peace (magistrates court) to remand defendants and hear applications for adjournments and bail.

Almost all the court-employed justices of the peace (magistrates court) who

¹³¹⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5).

¹³¹⁵ These figures exclude the number of orders made in relation to various types of domestic violence applications, which are discussed separately at p 236 of this Report.

¹³¹⁶ This included the adjournment of proceedings against four defendants involving 120 charges of indictable offences.

¹³¹⁷ Q70.

responded to the questionnaire indicated that they had heard these matters.¹³¹⁸ The reasons given were that there was no resident stipendiary magistrate at the court or that the stipendiary magistrate was absent.

Only six court-employed justices of the peace (magistrates court) stated that they had not made these types of procedural orders.¹³¹⁹ These justices of the peace tended to be located at larger centres where there is more than one stipendiary magistrate, such as Beenleigh,¹³²⁰ Brisbane¹³²¹ and Southport.¹³²² A justice of the peace (magistrates court) at the Southport Magistrates Court commented that the availability of magistrates at that centre obviated the need for justices of the peace to perform any bench duties at all.¹³²³

(ii) Domestic violence orders

Justices of the peace constituted Courts to deal with various domestic violence applications in three of the four Magistrates Courts surveyed during March and April 1998. During the two month period, eight applications were heard at the Gladstone Magistrates Court, two at the Proserpine Magistrates Court and five at the Mount Isa Magistrates Court.

Although the questionnaire distributed to justices of the peace (magistrates court) did not specifically inquire about applications for domestic violence orders, a significant number of justices of the peace (magistrates court) stated that they had heard various applications for domestic violence orders.¹³²⁴ This had occurred in many towns.¹³²⁵

¹³¹⁸ Q1, Q2, Q3, Q5, Q6, Q7, Q8, Q10, Q11, Q12, Q13, Q14, Q15, Q16, Q18, Q19, Q21, Q22, Q23, Q24, Q25, Q26, Q27, Q28, Q29, Q30, Q31, Q32, Q33, Q34, Q35, Q36, Q38, Q41, Q42, Q43, Q46, Q47, Q49, Q50, Q51, Q53, Q54, Q55, Q57, Q58, Q59, Q60, Q61, Q63, Q65, Q67, Q68, Q69, Q70, Q71, Q72, Q73, Q74, Q75, Q76, Q77, Q79, Q82, Q83, Q85, Q89, Q93, Q94, Q95, Q97, Q99, Q100, Q101, Q102, Q103, Q107, Q108, Q110, Q114, Q115, Q116, Q119, Q120, Q121, Q123, Q124, Q125, Q126, Q127, Q128, Q132, Q133.

¹³¹⁹ Q45, Q48, Q86, Q96, Q98, Q104.

¹³²⁰ Q45.

¹³²¹ Q86, Q96.

¹³²² Q98.

¹³²³ Ibid.

¹³²⁴ Q1, Q9, Q29, Q49, Q54, Q57, Q66, Q74, Q75, Q95, Q97, Q99, Q100, Q101, Q108, Q115, Q124. All but one of these justices of the peace (magistrates court) advised that they were employed at a Magistrates Court.

¹³²⁵ Ayr, Biloela, Cairns, Charters Towers, Cleveland, Cooktown, Gatton, Gladstone, Gympie, Hervey Bay, Maryborough, Monto, Normanton, Petrie, Pomona, Rockhampton, Stanthorpe, St George, Toogoolawah, Tully, Winton, Wynnum, Yeppoon.

Two respondents to the Issues Paper indicated that they had been called on to constitute a Court to deal with applications for domestic violence orders. One respondent was an old system justice of the peace who had heard one such matter at St George some years ago.¹³²⁶ The other respondent was a justice of the peace (magistrates court) at Cloncurry, who advised that these matters were heard in between the magistrate's monthly circuit visits to Cloncurry.¹³²⁷

(d) Other jurisdictions

(i) Remands, adjournments and bail

In all jurisdictions where justices of the peace may constitute a court, they have the power to adjourn proceedings, remand a defendant and grant bail.

A. Australian Capital Territory

As mentioned above, justices of the peace in the Australian Capital Territory do not have jurisdiction to constitute a court for any purpose.¹³²⁸ Consequently, they do not have the power to make procedural orders.

Under the *Bail Act 1992* (ACT), the power to grant bail is conferred on certain police officers (who may, except for certain offences, grant bail to an accused person who is present at a police station¹³²⁹) and on the Supreme Court and the Magistrates Court.¹³³⁰ As noted earlier, the jurisdiction of the Magistrates Court may be exercised only by a magistrate or a special magistrate.¹³³¹ Consequently, justices of the peace do not have the power to grant bail.

B. New South Wales

Under the *Justices Act 1902* (NSW), justices of the peace are authorised to adjourn committal hearings and the hearing of any information or complaint.¹³³² When a hearing is adjourned, justices of the peace may remand a defendant in

¹³²⁶ Submission 40 (IP).

¹³²⁷ Submission 117 (IP) and telephone conversation of 16 February 1999. This respondent advised that the magistrate visits Cloncurry for one day each month.

¹³²⁸ See p 200 of this Report.

¹³²⁹ *Bail Act 1992* (ACT) ss 3 (definition of "authorised officer"), 14.

¹³³⁰ *Bail Act 1992* (ACT) ss 3 (definition of "court"), 19, 20.

¹³³¹ See note 1105 of this Report.

¹³³² *Justices Act 1902* (NSW) ss 30, 33, 41, 48G, 65, 66G, 68.

custody.¹³³³

Under the *Bail Act 1978* (NSW), a magistrate or a justice of the peace who is employed by the Department of Courts Administration (NSW) is authorised to grant bail to a defendant in certain circumstances.¹³³⁴ Consequently, justices of the peace who are not employed in the Department of Courts Administration (NSW) do not have the power to hear and determine an application for bail.

C. Northern Territory

A justice of the peace may adjourn the hearing of any complaint.¹³³⁵ A justice of the peace may also adjourn a preliminary examination, in which case the justice of the peace may remand the defendant into custody or grant the defendant bail.¹³³⁶ Where an accused person has been refused bail by a justice of the peace, in respect of an offence, the justice of the peace may not, except with the consent of the accused person, adjourn the hearing for a period exceeding fifteen clear days.¹³³⁷

If justices of the peace before whom a defendant appears, charged with offences that may, under sections 120 or 121A of the *Justices Act* (NT) be heard summarily, are not competent to hear and determine the case summarily, and it appears to them that the case is fit to be determined summarily, they may adjourn the hearing.¹³³⁸

A justice of the peace may grant bail to a person appearing before him or her who is accused of an offence, or to an appellant pending an appeal from the Court of Summary Jurisdiction to the Supreme Court.¹³³⁹ The power of the justice to grant bail is limited.¹³⁴⁰ For example, a justice may not grant bail after an accused has appeared in the Supreme Court following his or her committal for trial or sentence.

1333 *Justices Act 1902* (NSW) ss 34, 69.

1334 *Bail Act 1978* (NSW) s 23.

1335 *Justices Act* (NT) s 65.

1336 *Justices Act* (NT) ss 113, 114. The remand period is initially limited to fifteen days.

1337 *Bail Act* (NT) s 22.

1338 *Justices Act* (NT) s 124.

1339 *Bail Act* (NT) s 20. Special circumstances are required for a grant of bail where an appeal is pending in the Court of Criminal Appeal: *Bail Act* (NT) s 23A.

1340 *Bail Act* (NT) s 21.

D. South Australia

The *Magistrates Court Act 1991* (SA) provides that a justice may adjourn proceedings before the Court and exercise any procedural or non-judicial powers of the Court assigned by the rules.¹³⁴¹

Under the *Summary Procedure Act 1921* (SA), the Magistrates Court may remand a defendant in a number of situations.¹³⁴² As noted earlier, the Magistrates Court may be constituted by two justices or by a special justice if a magistrate is not available.¹³⁴³

A court before which an “eligible person”¹³⁴⁴ has been charged with the offence in respect of which the person has been taken into custody, or before which the eligible person has appeared for trial or sentencing, is a bail authority for the purposes of the *Bail Act 1985* (SA).¹³⁴⁵ This would include the Magistrates Court.

In certain circumstances, a decision made by justices may be reviewed by a magistrate. Where an application for release on bail is made to a Court constituted by justices and the applicant is dissatisfied with the decision and there is no magistrate in the vicinity immediately available to review the decision, the justices who made the decision must, on the written application of the applicant, contact a magistrate by telephone for the purpose of having the decision reviewed.¹³⁴⁶

E. Tasmania

Under the *Justices Act 1959* (Tas), justices of the peace are authorised to adjourn proceedings in a number of situations.¹³⁴⁷ If a committal hearing or the hearing of a complaint of an indictable offence is for any reason adjourned, justices of the peace may remand the defendant in custody.¹³⁴⁸ Where justices

¹³⁴¹ *Magistrates Court Act 1991* (SA) s 15(b), (c).

¹³⁴² *Summary Procedure Act 1921* (SA) ss 59, 103, 112.

¹³⁴³ See p 202 of this Report.

¹³⁴⁴ The term “eligible person” is defined in s 3 of the *Bail Act 1985* (SA) to mean a person who is eligible to apply for release on bail under s 4 of that Act.

¹³⁴⁵ *Bail Act 1985* (SA) s 5(1)(b), (c).

¹³⁴⁶ *Bail Act 1985* (SA) s 15(1).

¹³⁴⁷ *Justices Act 1959* (Tas) ss 21(1)(b), 31(4), 50B, 56A(2A), 106F.

¹³⁴⁸ *Justices Act 1959* (Tas) ss 58, 74B.

of the peace find a person guilty of an offence, they may remand that person for sentencing by themselves or by other justices.¹³⁴⁹

Justices of the peace are authorised to hear and determine applications for bail.¹³⁵⁰

F. Victoria

Justices of the peace do not have the power to make procedural orders or to grant bail. The power to hear bail applications was removed from justices of the peace in 1989,¹³⁵¹ when the more specialised role of “bail justice” was created by the *Magistrates’ Court Act 1989* (Vic).¹³⁵² That Act also amended the *Bail Act 1977* (Vic) to enable a bail justice to grant bail.¹³⁵³

G. Western Australia

Under the *Justices Act 1902* (WA), justices of the peace may adjourn the hearing of a charge of a simple offence or any other matter.¹³⁵⁴ Justices of the peace may also adjourn the hearing of a charge of an indictable offence.¹³⁵⁵

Where, in the case of a charge of an indictable offence, justices of the peace adjourn the hearing, they may remand the defendant in custody.¹³⁵⁶

Justices of the peace are authorised to grant bail to a defendant for an initial appearance in court, for an appearance in court following an adjournment, or on committing a defendant to a higher court.¹³⁵⁷

¹³⁴⁹ *Justices Act 1959* (Tas) s 50C.

¹³⁵⁰ *Justices Act 1959* (Tas) s 35; *Bail Act 1994* (Tas) s 11.

¹³⁵¹ Although the office of justice of the peace was preserved by s 115 of the *Magistrates’ Court Act 1989* (Vic), the effect of s 150 and Sch 8, cl 4 of that Act is that the role of justice of the peace has been reduced to a largely witnessing role.

¹³⁵² *Magistrates’ Court Act 1989* (Vic) s 120. In addition, certain office holders are, by virtue of holding those offices, bail justices without further appointment: *Magistrates’ Court Act 1989* (Vic) s 121.

¹³⁵³ *Bail Act 1977* (Vic) s 12.

¹³⁵⁴ *Justices Act 1902* (WA) s 86. See also *Justices Act 1902* (WA) ss 134-136.

¹³⁵⁵ *Justices Act 1902* (WA) s 79.

¹³⁵⁶ *Justices Act 1902* (WA) ss 79, 80.

¹³⁵⁷ *Bail Act 1982* (WA) ss 3 (definition of “judicial officer”), 7, 13, Part A of Sch 1. See also *Justices Act 1902* (WA) s 123: a justice may grant bail on committing a defendant charged with an indictable offence for trial or sentence.

(ii) Domestic violence orders

Statutory provisions exist in all other Australian jurisdictions to make orders to restrain misconduct in domestic and, in some jurisdictions, non-domestic situations.¹³⁵⁸ In those jurisdictions that enable justices of the peace to make restraining orders, they are not generally able to hear such applications by telephone or other means of telecommunication. As in Queensland,¹³⁵⁹ a more restrictive approach is usually taken in relation to applications made by those means.

A. Australian Capital Territory

In the Australian Capital Territory, the Magistrates Court may make a protection order or an interim protection order to restrain a person from conduct that constitutes domestic violence.¹³⁶⁰ However, as mentioned above, justices of the peace in the Australian Capital Territory are not authorised to constitute the Magistrates Court for any purpose.¹³⁶¹ Consequently, they do not have power to make protection orders.

B. New South Wales

In New South Wales, the *Crimes Act 1900* (NSW) makes provision for a court to make an apprehended violence order to restrain a person from engaging in conduct against another that would constitute an offence of personal violence,¹³⁶² molestation, harassment, intimidation or stalking.¹³⁶³ Where the defendant is eighteen years of age or older at the time the complaint is made, the Local Court may make an apprehended violence order.¹³⁶⁴ However, if the defendant is under the age of eighteen at that time, application must be made to the Children's Court.¹³⁶⁵

¹³⁵⁸ See pp 241-244 of this Report.

¹³⁵⁹ See p 234 of this Report.

¹³⁶⁰ *Domestic Violence Act 1986* (ACT) ss 4, 4A, 14.

¹³⁶¹ The jurisdiction of the Magistrates Court may be exercised only by a magistrate or by one or more special magistrates: *Magistrates Court Act 1930* (ACT) s 18(2).

¹³⁶² See the *Crimes Act 1900* (NSW) s 4 (definition of "Personal violence offence").

¹³⁶³ *Crimes Act 1900* (NSW) s 562B.

¹³⁶⁴ *Crimes Act 1900* (NSW) s 562G(1)(a).

¹³⁶⁵ *Crimes Act 1900* (NSW) s 562G(1)(b).

As noted earlier, the *Local Courts Act 1982* (NSW) provides that a magistrate sitting alone or two or more justices of the peace may, subject to certain limitations, constitute the Local Court.¹³⁶⁶ Justices of the peace may not, however, constitute the Children's Court.¹³⁶⁷

In certain circumstances, application may be made by telephone for an interim apprehended violence order. Such an application may be made only to an "authorised justice".¹³⁶⁸ The term "authorised justice" is defined to mean:¹³⁶⁹

- a magistrate; or
- a justice of the peace who is a clerk of a Local Court; or
- a justice of the peace who is employed in the Department of Courts Administration and who is declared under the *Search Warrants Act 1985* (NSW) to be an authorised justice for the purposes of that Act.

Consequently, justices of the peace from the general community do not have the power to hear applications by telephone.

C. Northern Territory

In the Northern Territory, the Court of Summary Jurisdiction has jurisdiction under the *Domestic Violence Act* (NT) to make a restraining order in the case of domestic violence.¹³⁷⁰ That Act is silent as to the constitution of the Court when making such an order. However, the *Justices Act* (NT) provides that, if there is no magistrate present who is competent and willing to act, the Court may be constituted by two or more justices.¹³⁷¹ The power to make a restraining order on application by telephone is restricted to a magistrate.¹³⁷²

¹³⁶⁶ *Local Courts Act 1982* (NSW) ss 7, 8. However, the power of justices of the peace to exercise this jurisdiction is limited in certain specified areas by s 13 of the *Justices Act 1902* (NSW).

¹³⁶⁷ *Children's Court Act 1987* (NSW) s 6. That Court is constituted by Children's Magistrates. See p 258 of this Report.

¹³⁶⁸ *Crimes Act 1900* (NSW) s 562H(1).

¹³⁶⁹ *Crimes Act 1900* (NSW) s 562H(16).

¹³⁷⁰ *Domestic Violence Act* (NT) ss 3 (definition of "Court"), 4.

¹³⁷¹ *Justices Act* (NT) s 43(1)(b).

¹³⁷² *Domestic Violence Act* (NT) s 6.

D. South Australia

In South Australia, the Magistrates Court has jurisdiction under the *Domestic Violence Act 1994* (SA) to make a domestic violence restraining order.¹³⁷³ That Act is silent as to the constitution of the Court when making such an order. However, the *Magistrates Court Act 1991* (SA) provides that, if there is no magistrate available to constitute the Court, the Court may be constituted by two justices or a special justice.¹³⁷⁴

In certain circumstances, the *Domestic Violence Act 1994* (SA) enables a complaint for a domestic violence restraining order to be made and dealt with by telephone or another telecommunication device.¹³⁷⁵ The Act does not restrict the making of such an application to a magistrate.

E. Tasmania

In Tasmania, justices of the peace may, under the *Justices Act 1959* (Tas), make a restraint order that prohibits a person from conduct such as causing personal injury or property damage, behaving in a provocative or offensive manner that is likely to lead to a breach of the peace, or stalking.¹³⁷⁶ In certain circumstances, justices may also make an interim restraint order.¹³⁷⁷ Although the *Justices Act 1959* (Tas) permits an application for an interim restraint order to be made by telephone, radio or facsimile, such an application may be made only to a magistrate.¹³⁷⁸

F. Victoria

In Victoria, the Magistrates' Court or - where an aggrieved family member is under seventeen - the Children's Court may make an intervention order.¹³⁷⁹ However, justices of the peace in Victoria are not authorised to constitute the Magistrates' Court or the Children's Court.¹³⁸⁰ Consequently, they do not have

¹³⁷³ *Domestic Violence Act 1994* (SA) ss 3 (definition of "Court"), 4. The Magistrates Court may also make a restraining order in more general circumstances under the *Summary Procedure Act 1921* (SA) Part 4, Division 7.

¹³⁷⁴ *Magistrates Court Act 1991* (SA) s 7A(2).

¹³⁷⁵ *Domestic Violence Act 1994* (SA) ss 3 (definition of "telephone"), 8(1).

¹³⁷⁶ *Justices Act 1959* (Tas) s 106B.

¹³⁷⁷ *Justices Act 1959* (Tas) s 106D.

¹³⁷⁸ *Justices Act 1959* (Tas) s 106DA.

¹³⁷⁹ *Crimes (Family Violence) Act 1987* (Vic) ss 3 (definition of "Court"), 3A, 4.

¹³⁸⁰ *Magistrates' Court Act 1989* (Vic) s 4; *Children and Young Persons Act 1989* (Vic) s 8.

the power to make intervention orders.

G. Western Australia

In Western Australia, the *Restraining Orders Act 1997* (WA) makes provision for certain types of restraining orders to be made against persons in situations not limited to domestic violence:

- A violence restraining order may be made to restrain a person who is likely to commit a violent personal offence against the applicant or behave in a manner that could reasonably be expected to cause the applicant to fear that the respondent will do so.¹³⁸¹
- A misconduct restraining order may be made to restrain a person who is likely to intimidate or offend the applicant or damage his or her property or cause a breach of the peace.¹³⁸²

If the respondent is under the age of eighteen years, application for either of these orders is to be made to the Children's Court.¹³⁸³ In any other case, application is to be made to a Court of Petty Sessions.¹³⁸⁴ Although a Court of Petty Sessions may be constituted by two or more justices of the peace,¹³⁸⁵ justices of the peace are not authorised to constitute the Children's Court.¹³⁸⁶

An application for a violence restraining order may be made by telephone, facsimile, radio, video conference, electronic mail or another similar method or by any combination of those methods.¹³⁸⁷ However, an application made by one of those methods may be made only to an "authorized magistrate".¹³⁸⁸ Consequently, although a justice of the peace may hear an application that is

¹³⁸¹ *Restraining Orders Act 1997* (WA) s 11.

¹³⁸² *Restraining Orders Act 1997* (WA) s 34.

¹³⁸³ *Restraining Orders Act 1997* (WA) ss 3 (definition of "child"), 25(2)(a), 38(2)(a).

¹³⁸⁴ *Restraining Orders Act 1997* (WA) ss 25(2)(b), 38(2)(b). Note, however, that any court before which a person charged with an offence is appearing may make a restraining order against that person or any other person who gives evidence in relation to that charge: *Restraining Orders Act 1997* (WA) s 63.

¹³⁸⁵ *Justices Act 1902* (WA) s 20.

¹³⁸⁶ The Children's Court must be constituted by a judge, a magistrate or not less than two members: *Children's Court of Western Australia Act 1988* (WA) s 6(1), subject to the exceptions in s 6(2). Members of the Children's Court may be appointed by the Governor under s 11 of the *Children's Court of Western Australia Act 1988* (WA).

¹³⁸⁷ *Restraining Orders Act 1997* (WA) s 19(b).

¹³⁸⁸ *Restraining Orders Act 1997* (WA) s 19(a).

made in person, a justice of the peace may not otherwise hear an application.

(e) Discussion Paper

It was clear from the survey conducted in the four Magistrates Courts and from the responses to the questionnaire distributed to justices of the peace (magistrates court) that justices of the peace are frequently called upon to make various procedural orders.

In the light of the large number of procedural orders made during the survey period,¹³⁸⁹ the Commission considered that there is a need for justices of the peace to be able to exercise these powers and that, at the very least, it would be inconvenient for the courts if justices of the peace could not exercise these powers.¹³⁹⁰

The powers to adjourn a matter, remand a defendant and grant or enlarge bail are often exercised as a package of orders. The Commission expressed the view that, if justices of the peace are to have the power to adjourn a matter, it may be necessary for them - depending on whether the defendant is in custody or has previously been granted bail - to remand the defendant in custody until the matter next comes on for hearing, or to enlarge or extend bail until that time.¹³⁹¹

The Commission considered it desirable, especially in communities where there is no resident magistrate, or where the sole resident magistrate is on circuit in another part of the district, for justices of the peace to be able to exercise these powers, especially where there could be some urgency attached to an application. The Commission observed, for example, that an application for bail would most commonly be made to justices of the peace in circumstances where a person had been arrested, was in custody, and had already been refused bail by the police. If an application for bail could be heard only by a magistrate, that would require the defendant to be held in custody until a magistrate was available, or to be transported to another centre where the application could be heard by a magistrate. The Commission expressed the view that it is in the interests of justice for a bail hearing to be able to be heard promptly.¹³⁹²

Similarly, the Commission considered it desirable for justices of the peace to be able to exercise their present powers in relation to the making of certain domestic violence orders. In particular, the Commission expressed the view that it is important for justices of the peace to be able to make or extend a temporary protection order when a magistrate is not readily available to hear the application. However, the Commission considered it appropriate that justices of the peace are presently precluded from

¹³⁸⁹ See p 235 of this Report.

¹³⁹⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 185.

¹³⁹¹ Ibid.

¹³⁹² Ibid.

making a final domestic violence order except in terms agreed to by the parties.¹³⁹³

Accordingly, the Commission's preliminary recommendation was that justices of the peace (magistrates court) should retain the power to make:¹³⁹⁴

- various procedural orders - for example, adjourning a matter, remanding a defendant, and hearing bail applications; and
- the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

(f) Submissions

Sixteen submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation in relation to the power of justices of the peace (magistrates court) to make various procedural orders and to make certain orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld). All of these respondents agreed with the Commission's recommendation that these powers should be retained.¹³⁹⁵

A further submission, however, raised an issue not previously considered by the Commission. The Deputy Director of Public Prosecutions queried whether it was appropriate for justices of the peace to retain their present powers under section 222 of the *Justices Act 1886* (Qld).¹³⁹⁶

That section enables a defendant who feels aggrieved by an order made by any justices or justice in a summary manner upon a complaint for an offence or breach of duty to appeal to a District Court judge.¹³⁹⁷ The provision stipulates the requirements for an appeal, including the following requirement that the appellant must:¹³⁹⁸

... within 7 days after service of the notice on the other party and the clerk of the court,

¹³⁹³ Id at 186. See also the discussion of s 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld) at pp 233-234 of this Report.

¹³⁹⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 208.

¹³⁹⁵ Submissions 6, 7, 8, 9, 14, 23, 24, 25, 26, 40, 44, 45, 47, 51, 53, 59.

¹³⁹⁶ Submission 46.

¹³⁹⁷ *Justices Act 1886* (Qld) s 222(1). Where a defendant pleads guilty or admits the truth of the complaint, the appeal is limited to the ground that the fine, penalty, forfeiture or punishment is excessive or inadequate, as the case may be: *Justices Act 1886* (Qld) s 222(2)(e).

¹³⁹⁸ *Justices Act 1886* (Qld) s 222(2)(a)(ii).

enter into a recognisance¹³⁹⁹ before a justice for the amount and with the sureties (if any) the justice may require, to appear on the hearing of the appeal and to abide the decision of the judge and pay the costs the judge may order. [note added]

The section makes provision for a justice of the peace to order the release of an appellant who is in custody pending the hearing of the appeal:¹⁴⁰⁰

- (d) subject to subsection (2D), if the appellant is in custody under the order appealed against - any justice may order the appellant's release upon the appellant entering into the recognisance and the appeal shall not operate as a stay of execution unless and until the appellant enters into such recognisance; ...

The appellant may not be released under this section if he or she is in custody having been convicted summarily of an indictable offence.¹⁴⁰¹ In those circumstances, the appropriate course is for the offender to apply to the District Court for bail under section 8 of the *Bail Act 1980* (Qld),¹⁴⁰² rather than for release on recognisance under section 222 of the *Justices Act 1886* (Qld).

The Deputy Director of Public Prosecutions queried whether it was appropriate for justices of the peace to retain the power under section 222 of the *Justices Act 1886* (Qld) to release a convicted person from custody pending the hearing of the person's appeal. In particular, the Deputy Director of Public Prosecutions referred to a recent case where a sentenced prisoner had been released on recognisance from a Queensland Correctional Centre, and suggested that, as a result of this practice, a number of released persons were failing to appear before the District Court when their appeals came on for hearing.¹⁴⁰³

I am advised that a considerable number of persons gain freedom from moderate to lengthy terms of imprisonment by entering into such a recognisance and then fail to appear before the District Court. There are, I am told, several outstanding bench warrants in that Court because of this procedure.

It was suggested by this respondent that the power to release on recognisance under section 222 of the *Justices Act 1886* (Qld) should be conferred on the District Court,

¹³⁹⁹ A recognisance is an "obligation or bond acknowledged before a court of record or authorized magistrate and later enrolled in a court of record, whereby the person bound ... is bound to secure the performance of some act such as to pay a debt, keep the peace and be of good behaviour, appear to stand trial, or otherwise": *The Oxford Companion to Law* (1980) at 1042.

¹⁴⁰⁰ *Justices Act 1886* (Qld) s 222(2)(d).

¹⁴⁰¹ *Justices Act 1886* (Qld) s 222(2D).

¹⁴⁰² S 8(1)(a)(i) of the *Bail Act 1980* (Qld) provides that a court may grant bail to a person held in custody on a charge of or in connection with an offence if the person is awaiting a criminal proceeding to be held by that court in relation to that offence. The term "criminal proceeding" is defined in s 6 of that Act to include "a hearing, trial or appeal in relation to an offence". [emphasis added]

¹⁴⁰³ Submission 46.

rather than on a justice of the peace who is given no guidelines in the legislation about the exercise of the power.¹⁴⁰⁴

The circumstances in which it is appropriate for an appellant to be granted bail pending the hearing of an appeal against conviction were considered by the Full Court of the Supreme Court of Queensland in *Ex parte Maher*.¹⁴⁰⁵ In that case, Maher was convicted and imprisoned for five years on charges of fraud. Following his conviction and sentence, he applied for bail, pending the hearing of his appeal. A chamber judge, without giving reasons for the decision, granted bail. The Director of Public Prosecutions appealed against the decision to grant bail.

The Full Court held that, after conviction, bail should be granted only if the applicant could show exceptional circumstances.¹⁴⁰⁶ The Court considered a number of circumstances that might constitute exceptional circumstances so as to justify the grant of bail pending the hearing of an appeal. The fact that an applicant appears to have “a good chance of success on appeal” may afford a sufficient reason to grant an applicant bail.¹⁴⁰⁷ The fact that an applicant is serving only a short sentence was also identified as a relevant consideration to the exercise of the court’s discretion:¹⁴⁰⁸

In some cases an appellant may inevitably be required to serve an unacceptable portion of his sentence before his appeal can be heard. This commonly occurs when the main penalty is a short custodial term. ... Indeed, experience suggests that these instances are the most common examples of favourable exercise of discretion for applicants for bail after a conviction. ...

It is perhaps significant that counsel have not been able to refer to one instance, before or after the passing of the *Bail Act*, in which an offender undergoing a sentence of twelve months or more has been granted bail on such an application.

The reason for distinguishing between the principles that apply to the grant of bail before conviction and those that apply after conviction was explained in the following terms:¹⁴⁰⁹

As Brennan J. points out in *Chamberlain v. The Queen* (No. 1) ... where a challenge is being made to the verdict on which conviction and sentence are founded, to suspend or defer the sentence before the appeal is heard is to invest the verdict of the jury with a provisional quality, as though it should take effect only after the channels of appeal have been exhausted and that to grant bail in such a case is to whittle away the finality of the

1404 Ibid.

1405 [1986] 1 Qd R 303.

1406 Id per Kelly SPJ at 305, per Thomas J at 310 and per Moynihan J at 314.

1407 Id per Thomas J at 311.

1408 Id per Thomas J at 312.

1409 Id per Kelly SPJ at 305.

jury's finding and to treat the verdict merely as a step in the process of appeal.

(g) The Commission's view

The Commission remains of the view that justices of the peace (magistrates court) should retain the power to make:

- various procedural orders - for example, adjourning a matter, remanding a defendant, and hearing bail applications; and
- the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

For the reasons outlined above, the Commission considers it desirable for justices of the peace (magistrates court) to be able to hear these matters promptly, especially applications for bail and temporary protection orders.

However, the Commission has given careful consideration to the issue of whether a justice of the peace should be able to exercise the power under section 222 of the *Justices Act 1886* (Qld) to order the release from custody of a person convicted of a non-indictable offence, pending the hearing of the person's appeal. In the Commission's view, this power is the equivalent of a grant of bail pending appeal. As noted above, the circumstances in which it is appropriate for a person who has been convicted to be granted bail pending the hearing of an appeal are extremely limited.¹⁴¹⁰ In the Commission's view, justices of the peace would not necessarily have the expertise to consider the appellant's prospects of success on appeal. Consequently, the Commission believes that a more restrictive approach should be taken in relation to the persons who should be authorised to release a person from custody under section 222 of the *Justices Act 1886* (Qld).

The Commission notes that the Deputy Director of Public Prosecutions has suggested that the power under section 222 of the *Justices Act 1886* (Qld) to release a person from custody should be conferred on the District Court. In effect, the suggestion is that, once an appeal has been filed, all matters pertaining to the case, including questions about bail, should be vested in the District Court as the appellate court. However, in the Commission's view, that question is outside the terms of this reference. The Commission's general approach to this review has been to consider whether, in relation to a particular power, it is appropriate for that power to be exercised by a justice of the peace; the Commission has not embarked on the further consideration of whether the particular power should be exercised by some other category of persons.¹⁴¹¹

¹⁴¹⁰ See pp 247-248 of this Report.

¹⁴¹¹ See the discussion of the Commission's approach to this review at pp 55 and 144 of this Report.

For the reasons expressed above, the Commission does not consider that a justice of the peace should be able to exercise the power under section 222 of the *Justices Act 1886* (Qld) to release a person from custody pending the hearing of the person's appeal to the District Court. Consequently, the Commission is of the view that section 222 of the *Justices Act 1886* (Qld) should be amended accordingly.

10. CONSTITUTING THE CHILDRENS COURT

(a) Introduction

The Childrens Court is a specialised court designed to deal with matters concerning young people. The Court has the jurisdiction conferred on it by any Act.¹⁴¹² Its jurisdiction includes both criminal proceedings where a child is charged with criminal offences, as well as certain non-criminal proceedings, such as applications concerning the welfare of a child.¹⁴¹³

In certain circumstances, the Childrens Court may be constituted by two justices of the peace. If the Court is not expressly required by an Act to be constituted by a Childrens Court judge,¹⁴¹⁴ it may be constituted by two justices of the peace, but only if neither a Childrens Court magistrate nor a stipendiary magistrate is available.¹⁴¹⁵ The limitations placed on a justice of the peace by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)¹⁴¹⁶ or by any other Act are not affected by these provisions.¹⁴¹⁷

The main reason expressed for allowing justices of the peace to decide certain matters concerning young people was to provide for a speedier resolution of those proceedings. In the second reading speech for the *Childrens Court Bill 1992* (Qld), the Honourable AM Warner MLA, the then Minister for Family Services and Aboriginal and

¹⁴¹² *Childrens Court Act 1992* (Qld) s 6.

¹⁴¹³ The principal Acts conferring jurisdiction on the Childrens Court are the *Children's Services Act 1965* (Qld) and the *Juvenile Justice Act 1992* (Qld). See, however, p 252 of this Report as to the future repeal of the *Children's Services Act 1965* (Qld).

¹⁴¹⁴ Note that the Childrens Court must be constituted by a Childrens Court judge if that is expressly required by an Act: *Childrens Court Act 1992* (Qld) s 5(2).

¹⁴¹⁵ *Childrens Court Act 1992* (Qld) s 5(3). Note, however, the effect of s 99(3) of the *Child Protection Act 1999* (Qld). Insofar as justices of the peace may constitute the Childrens Court to exercise certain specified powers under the *Child Protection Act 1999* (Qld), the exercise of those powers is restricted to justices of the peace (magistrates court).

¹⁴¹⁶ See Chapter 2 of this Report for a discussion of the limitations imposed on the powers that may be exercised by particular categories of justices of the peace.

¹⁴¹⁷ *Childrens Court Act 1992* (Qld) s 5(4).

Islander Affairs, stated:¹⁴¹⁸

In areas where a magistrate is not readily available, a court may be constituted by two justices of the peace who are trained in the conduct and proceedings of court. This will allow for matters to be brought before the court speedily, even in remote areas. I am sure most members would appreciate the urgency of having a court determine the temporary custody arrangements of children who have been removed from their parents as a result of a care and protection application.

(b) Particular powers and limitations

Because the jurisdiction of the Childrens Court is conferred by a number of Acts, the purpose of this section of the Report is simply to give a brief overview of the scope of the role of justices of the peace who may constitute the Childrens Court.

(i) Jurisdiction in criminal matters

All proceedings under the *Justices Act 1886* (Qld) for the hearing and determination of charges¹⁴¹⁹ against children for offences, including committal proceedings,¹⁴²⁰ must be heard and determined before a “Childrens Court magistrate”.¹⁴²¹ The definition of “Childrens Court magistrate” in section 5 of the *Juvenile Justice Act 1992* (Qld) includes the Childrens Court when constituted by justices of the peace.

The *Juvenile Justice Act 1992* (Qld) imposes limitations on the jurisdiction of the Childrens Court when it is constituted by two justices of the peace. In those circumstances, the Court’s jurisdiction is limited to:¹⁴²²

- hearing and determining a charge of a simple offence in a case where the child¹⁴²³ pleads guilty; and

¹⁴¹⁸ Legislative Assembly (Qld), *Parliamentary Debates* (18 June 1992) at 5935.

¹⁴¹⁹ See the general discussion of the powers of justices of the peace in the hearing and determination of charges at pp 191-223 of this Report.

¹⁴²⁰ See the general discussion at pp 224-231 of this Report of the powers of justices of the peace in relation to committal hearings.

¹⁴²¹ *Juvenile Justice Act 1992* (Qld) s 51(1). More serious matters are, depending on the nature of the offence, required to be tried in either the Supreme Court or the District Court, or before a Childrens Court judge sitting without a jury: see Part 4 of the *Juvenile Justice Act 1992* (Qld).

¹⁴²² *Juvenile Justice Act 1992* (Qld) s 54(1).

¹⁴²³ The term “child” is defined in s 5 of the *Juvenile Justice Act 1992* (Qld) to mean a person who has not turned seventeen years of age. There is provision in s 6 of that Act for the age to be increased by one year by regulation.

- taking or making a procedural action or order, for example, charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.¹⁴²⁴

Justices of the peace may not make a detention order or an immediate release order.¹⁴²⁵

These limitations do not affect a limitation imposed on the power of a justice of the peace under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹⁴²⁶ Accordingly, a justice of the peace (qualified) would not have jurisdiction to hear and determine a charge of a simple offence against a child, but would still be confined to taking or making a procedural action or order.¹⁴²⁷

(ii) Jurisdiction in non-criminal matters

A. *Children's Services Act 1965* (Qld)

At present, the Childrens Court has jurisdiction in relation to certain care and protection and care and control proceedings under the *Children's Services Act 1965* (Qld). However, that Act will be repealed when the relevant provisions of the *Child Protection Act 1999* (Qld) come into force.¹⁴²⁸

Under the *Children's Services Act 1965* (Qld), an authorised officer of the Department of Families, Youth and Community Care or a police officer may take into custody, on behalf of the Director-General of that Department, a child who appears, or who such officer suspects on reasonable grounds, to be in need of care and protection.¹⁴²⁹ Similarly, an authorised officer of the Department or a police officer may take into custody, on behalf of the Director-General, a child who appears, or who such officer suspects on reasonable grounds, to be in need of care and control.¹⁴³⁰

¹⁴²⁴ *Juvenile Justice Act 1992* (Qld) s 5 (definition of "procedural action or order").

¹⁴²⁵ *Juvenile Justice Act 1992* (Qld) s 54(2). The purpose of an immediate release order is to provide for a final option instead of the detention of a child by allowing a court to immediately suspend a detention order that has been made against a child and to release the child into a structured program with strict conditions: see *Juvenile Justice Act 1992* (Qld) ss 175, 176.

¹⁴²⁶ *Juvenile Justice Act 1992* (Qld) s 54(3).

¹⁴²⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹⁴²⁸ *Child Protection Act 1999* (Qld) s 194. The *Child Protection Act 1999* (Qld) is discussed at pp 253-255 of this Report.

¹⁴²⁹ *Children's Services Act 1965* (Qld) s 49(2).

¹⁴³⁰ *Children's Services Act 1965* (Qld) s 61(2).

The person taking the child into custody in either of those situations must, as soon as practicable after taking the child into custody, apply to the Childrens Court for an order that the child be admitted to the care and protection of the Director-General¹⁴³¹ or committed to the care and control of the Director-General.¹⁴³²

If the Childrens Court is satisfied that a child is in need of care and protection or care and control, it may order that the child be admitted to the care and protection¹⁴³³ or committed to the care and control¹⁴³⁴ of the Director-General.

As these applications are not required to be heard by a Childrens Court judge, the Childrens Court may be constituted by two justices of the peace.¹⁴³⁵ However, as mentioned above, two justices of the peace may constitute the Childrens Court only when neither a Childrens Court magistrate nor another stipendiary magistrate is available.¹⁴³⁶

B. *Child Protection Act 1999 (Qld)*

Under the *Child Protection Act 1999 (Qld)*, child protection orders will replace the care and protection orders and the care and control orders presently available under the *Children's Services Act 1965 (Qld)*.

Under the *Child Protection Act 1999 (Qld)*, an authorised officer or police officer who is investigating an allegation of harm, or risk of harm, to a child may, if the officer reasonably believes that the child is at risk of harm and is likely to suffer harm if the officer does not immediately take the child into custody, take the child into the custody of the Director-General of the Department of Families, Youth and Community Care.¹⁴³⁷ Upon doing so, the officer must, as soon as practicable, apply for a temporary assessment order for the child.¹⁴³⁸

The purpose of a temporary assessment order is to authorise the actions necessary as part of an investigation to assess whether a child is a "child in

¹⁴³¹ *Children's Services Act 1965 (Qld)* s 49(2A)(b).

¹⁴³² *Children's Services Act 1965 (Qld)* s 61(2A)(b).

¹⁴³³ *Children's Services Act 1965 (Qld)* s 49(4)(a)(iii).

¹⁴³⁴ *Children's Services Act 1965 (Qld)* s 61(4)(a)(iii).

¹⁴³⁵ *Childrens Court Act 1992 (Qld)* s 5(2), (3).

¹⁴³⁶ See p 250 of this Report.

¹⁴³⁷ *Child Protection Act 1999 (Qld)* s 18(1), (2).

¹⁴³⁸ *Child Protection Act 1999 (Qld)* s 18(5).

need of protection”¹⁴³⁹ if the consent of a parent of the child to the actions has not been able to be obtained or it is not practicable to obtain the parent’s consent.¹⁴⁴⁰

The Act provides for an application for a temporary assessment order to be made to a magistrate.¹⁴⁴¹ The term of a temporary assessment order must not exceed three days.¹⁴⁴² An application for a temporary assessment order may be made by phone, facsimile, radio or another form of communication if the officer considers it necessary because of urgent circumstances or other special circumstances, including, for example, the officer’s remote location.¹⁴⁴³

The Act also makes provision for the making of court assessment orders. The purpose of such an order is to authorise, if the consent of a parent has not been able to be obtained and it is not practicable to obtain the parent’s consent, the actions necessary as part of an investigation to assess whether a child is in need of protection, and more than three days is necessary to complete the investigation and assessment.¹⁴⁴⁴

An application for a court assessment order is to be made to the Childrens Court.¹⁴⁴⁵ The term of a court assessment order must not exceed four weeks,¹⁴⁴⁶ although the Act does make provision for the term of an order to be extended.¹⁴⁴⁷

The Childrens Court may make a child protection order only if it is satisfied of certain specified matters.¹⁴⁴⁸ Under a child protection order, a variety of different

1439 This term is defined in s 10 of the *Child Protection Act 1999* (Qld) to mean a child who -

- (a) has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm; and
- (b) does not have a parent able and willing to protect the child from harm.

1440 *Child Protection Act 1999* (Qld) s 24.

1441 *Child Protection Act 1999* (Qld) s 25(1).

1442 *Child Protection Act 1999* (Qld) s 29(1), (2).

1443 *Child Protection Act 1999* (Qld) s 30(1).

1444 *Child Protection Act 1999* (Qld) s 37.

1445 *Child Protection Act 1999* (Qld) s 38.

1446 *Child Protection Act 1999* (Qld) s 46(1), (2).

1447 *Child Protection Act 1999* (Qld) s 48.

1448 *Child Protection Act 1999* (Qld) s 57.

orders may be made, for example:¹⁴⁴⁹

- directing a parent of the child to do or refrain from doing something directly related to the child's protection;
- directing a parent not to have contact with the child;
- granting custody of the child to a member of the child's family or to the Director-General;
- granting short-term guardianship of the child to the Director-General;
- granting long-term guardianship of the child to a member of the child's family, to another person, or to the Director-General.

The Childrens Court may adjourn a proceeding for a court assessment order or a child protection order.¹⁴⁵⁰ On the adjournment of such a proceeding, the Childrens Court may make an interim order.¹⁴⁵¹

- granting temporary custody of the child, for a court assessment order, to the Director-General, or, for a child protection order, to the Director-General or a suitable family member of the child; or
- directing a parent not to have contact with the child.

The order has effect for the period of the adjournment.¹⁴⁵²

Justices of the peace may not constitute the Childrens Court to decide applications for child protection orders. For the hearing of those applications, the Childrens Court must be constituted by a judge or magistrate.¹⁴⁵³

Two justices of the peace (magistrates court) may, however, constitute the Childrens Court to:¹⁴⁵⁴

¹⁴⁴⁹ *Child Protection Act 1999* (Qld) s 58.

¹⁴⁵⁰ *Child Protection Act 1999* (Qld) s 63.

¹⁴⁵¹ *Child Protection Act 1999* (Qld) s 64(1).

¹⁴⁵² *Child Protection Act 1999* (Qld) s 64(2).

¹⁴⁵³ *Child Protection Act 1999* (Qld) s 99(2).

¹⁴⁵⁴ *Child Protection Act 1999* (Qld) s 99(3).

- decide applications for court assessment orders;¹⁴⁵⁵ or
- make interim orders¹⁴⁵⁶ on applications for court assessment orders or child protection orders or adjourn the hearing of the applications.

The Act provides that justices of the peace (magistrates court) may exercise these powers notwithstanding section 29(4) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which would otherwise limit the extent to which a justice of the peace (magistrates court) could constitute a court.¹⁴⁵⁷

(c) Justices of the peace who may exercise these powers

Section 5(3)(c) of the *Childrens Court Act 1992* (Qld)¹⁴⁵⁸ - which enables the Childrens Court, in certain circumstances, to be constituted by two justices of the peace - does not affect the limitations placed on justices of the peace by section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Accordingly, the extent to which justices of the peace of a particular category may constitute the Childrens Court will depend on the nature of the power being exercised by the Court.¹⁴⁵⁹ It is possible, depending on the purpose for which the Childrens Court is being constituted, for it to be constituted by justices of the peace (qualified),¹⁴⁶⁰ justices of the peace (magistrates court)¹⁴⁶¹ or by old system justices of the peace.¹⁴⁶²

However, as noted above, justices of the peace (magistrates court) are the only category of justices of the peace who may constitute the Childrens Court for the purpose of exercising any powers under the *Child Protection Act 1999* (Qld).¹⁴⁶³

¹⁴⁵⁵ See p 254 of this Report.

¹⁴⁵⁶ The term "interim order" is defined in Sch 4 to the *Child Protection Act 1999* (Qld) to mean an interim order under s 64 of that Act.

¹⁴⁵⁷ *Child Protection Act 1999* (Qld) s 99(4).

¹⁴⁵⁸ See the discussion of this provision at p 250 of this Report.

¹⁴⁵⁹ For example, unless specifically authorised, the powers of justices of the peace (qualified) are limited to "taking or making a procedural action or order": *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹⁴⁶⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

¹⁴⁶¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4).

¹⁴⁶² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6)(b).

¹⁴⁶³ *Child Protection Act 1999* (Qld) s 99(3).

(d) Frequency of constituting the Childrens Court

Of the four Courts surveyed during March and April 1998, only at Mount Isa did justices of the peace constitute the Childrens Court. There they did so on one day to adjourn three matters. On that occasion (as for all other matters logged at the Mount Isa Magistrates Court) the Court was constituted by two justices of the peace (magistrates court) who were employed at the Court.

Although the questionnaire distributed to justices of the peace (magistrates court) did not inquire about sitting as the Childrens Court, two justices of the peace indicated that they had on occasion sat as the Childrens Court.¹⁴⁶⁴

Information provided by the Courts Strategy and Research Branch of the Department of Justice and Attorney-General reveals that, over the last seven years, justices of the peace constituted the Childrens Court for a total of 54.9 hours. The hours recorded and the number of locations¹⁴⁶⁵ at which the Childrens Court was constituted in each year can be broken down as follows:¹⁴⁶⁶

Financial year	Number of hours	Number of locations
1992/93	3.66	5
1993/94	6.49	6
1994/95	4.99	10
1995/96	9.74	10
1996/97	15.35	8
1997/98	11.42	6
1998/99	3.25	2

The Commission was advised that, in the main, the time recorded related to various matters within the criminal jurisdiction of the Childrens Court, such as taking pleas of guilty, remanding defendants and conducting committal hearings. The data collected does not reveal whether the justices of the peace who constituted the Childrens Court on a particular occasion were from the general community or were employed at a

¹⁴⁶⁴ Q9, Q54.

¹⁴⁶⁵ If the Childrens Court is constituted by a Childrens Court magistrate, a stipendiary magistrate or justices of the peace, it may be constituted at any place at which a Magistrates Court may be held: *Childrens Court Act 1992* (Qld) s 18(1)(b). See Appendix E to this Report.

¹⁴⁶⁶ Letter from the Senior Project Officer (Statistics), Courts Strategy and Research Branch, Department of Justice and Attorney-General to the Queensland Law Reform Commission dated 9 November 1999.

Magistrates Court.¹⁴⁶⁷

The Department of Families, Youth and Community Care stated in its submission in response to the Issues Paper that it is rare for justices of the peace sitting as the Childrens Court to exercise their powers under the *Children's Services Act 1965 (Qld)*. They do so only where urgent action is required and a magistrate is not available.¹⁴⁶⁸

(e) Other jurisdictions

Most jurisdictions take quite a restrictive approach in relation to who may constitute a court to hear criminal proceedings against children or applications concerning their care and protection. In the majority of jurisdictions, justices of the peace do not have any power to constitute the relevant court.

(i) Australian Capital Territory

The *Children's Services Act 1986 (ACT)* confers jurisdiction on the Magistrates Court to hear and determine informations against children¹⁴⁶⁹ and to hear and determine other applications and proceedings under that Act with respect to children.¹⁴⁷⁰ For example, the Act deals with applications to declare that a child is in need of care.¹⁴⁷¹

When the Magistrates Court is exercising this jurisdiction, it is known as the Childrens Court.¹⁴⁷² The Childrens Court may be constituted by the Childrens Court Magistrate or by another magistrate.¹⁴⁷³ Justices of the peace are not authorised to constitute the Childrens Court.

(ii) New South Wales

The Children's Court has jurisdiction to hear and determine certain criminal proceedings where the offence is alleged to have been committed by a person

¹⁴⁶⁷ Ibid.

¹⁴⁶⁸ Submission 111 (IP).

¹⁴⁶⁹ *Children's Services Act 1986 (ACT)* s 20B(1)(a). A child for the purposes of this Act is a person under the age of eighteen: *Children's Services Act 1986 (ACT)* s 4.

¹⁴⁷⁰ *Children's Services Act 1986 (ACT)* s 20B(1)(b).

¹⁴⁷¹ *Children's Services Act 1986 (ACT)* ss 80, 83.

¹⁴⁷² *Children's Services Act 1986 (ACT)* s 20A.

¹⁴⁷³ *Children's Services Act 1986 (ACT)* ss 20A, 20B.

who was a child¹⁴⁷⁴ when the offence was committed and who was under the age of 21 years when charged before the Children's Court with the offence.¹⁴⁷⁵ The Children's Court also has jurisdiction to make various orders for the care and protection of children.¹⁴⁷⁶

Justices of the peace do not have the power to constitute the Children's Court. That Court may be constituted only by Children's Magistrates.¹⁴⁷⁷

(iii) Northern Territory

The Juvenile Court has jurisdiction under the *Juvenile Justice Act* (NT) to hear and determine criminal proceedings against young people under seventeen, and other related matters.¹⁴⁷⁸ The jurisdiction of the court is exercisable by a magistrate sitting alone.¹⁴⁷⁹

The Family Matters Court has jurisdiction under the *Child Welfare Act* (NT) to deal with matters including the care and protection of children. The jurisdiction of the Family Matters Court is also exercisable only by a magistrate sitting alone.¹⁴⁸⁰

(iv) South Australia

The Youth Court of South Australia has jurisdiction to deal with certain matters relating to young people. The matters that may be dealt with by the Youth Court include criminal proceedings, domestic violence restraining orders and applications for the protection or care of a child.¹⁴⁸¹

¹⁴⁷⁴ The term "child" is defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW) to mean a person who is under the age of eighteen.

¹⁴⁷⁵ *Children (Criminal Proceedings) Act 1987* (NSW) s 28.

¹⁴⁷⁶ *Children (Care and Protection) Act 1987* (NSW) Part 5. That Act will be repealed on the commencement of s 3 of the *Children and Young Persons Legislation (Repeal and Amendment) Act 1998* (NSW).

¹⁴⁷⁷ *Children's Court Act 1987* (NSW) s 6. To qualify for appointment as a Children's Magistrate, a person, in addition to satisfying certain other criteria, must also be a magistrate: *Children's Court Act 1987* (NSW) s 7.

¹⁴⁷⁸ *Juvenile Justice Act* (NT) s 19. The term "juvenile" means a child who has not, or who apparently has not, attained the age of 17 years: *Juvenile Justice Act* (NT) s 3(1).

¹⁴⁷⁹ *Juvenile Justice Act* (NT) s 15. A justice of the peace may, however, take an information or complaint, issue a summons, grant, issue or endorse a warrant or grant bail under that Act: *Juvenile Justice Act* (NT) s 20(2).

¹⁴⁸⁰ *Community Welfare Act* (NT) s 25.

¹⁴⁸¹ *Youth Court Act 1993* (SA) s 7.

Generally, the Youth Court must be constituted by a judge or a magistrate.¹⁴⁸² However, if there is no judge or magistrate available, the Court may be constituted by two justices or a special justice to exercise a limited jurisdiction.¹⁴⁸³

When the Court is constituted by two justices or by a special justice, it may not:¹⁴⁸⁴

- impose a sentence of detention in criminal proceedings; or
- hear and determine proceedings in which an order for the protection or care of a child is sought.

(v) Tasmania

A Children's Court has jurisdiction to hear and determine criminal proceedings brought against a child under the age of seventeen.¹⁴⁸⁵ A Children's Court also has jurisdiction to make orders relating to the welfare of a child who is neglected or uncontrolled.¹⁴⁸⁶ In particular, a Children's Court may make an order declaring such a child to be a ward of the State.¹⁴⁸⁷

A Children's Court must be constituted by one or more special magistrates¹⁴⁸⁸ appointed for that Court, or by a magistrate, or by a magistrate sitting together with one or more special magistrates.¹⁴⁸⁹ However, if no magistrate or special magistrate appointed for that Court is present, the Court may be constituted by two or more justices of the peace having jurisdiction at the place at which the Court is held.¹⁴⁹⁰

Where under an Act a particular charge is required to be heard and determined

¹⁴⁸² *Youth Court Act 1993* (SA) s 14(1).

¹⁴⁸³ *Youth Court Act 1993* (SA) s 14(4).

¹⁴⁸⁴ *Youth Court Act 1993* (SA) s 14(4).

¹⁴⁸⁵ *Child Welfare Act 1960* (Tas) ss 3 (definition of "child"), 13(1).

¹⁴⁸⁶ *Child Welfare Act 1960* (Tas) Part III, Division III.

¹⁴⁸⁷ *Child Welfare Act 1960* (Tas) s 34(1)(a).

¹⁴⁸⁸ The Governor may appoint one or more justices to be a special magistrate or special magistrates for the Children's Court held at any place: *Child Welfare Act 1960* (Tas) s 13(3).

¹⁴⁸⁹ *Child Welfare Act 1960* (Tas) s 13(4).

¹⁴⁹⁰ *Child Welfare Act 1960* (Tas) s 13(5A).

by a magistrate sitting alone,¹⁴⁹¹ a Children's Court hearing that charge must be constituted only by a magistrate or special magistrate sitting alone.¹⁴⁹²

Under the *Child Welfare Act 1960* (Tas), a justice of the peace may, in certain circumstances, issue a summons or a warrant to have a neglected child brought before a Children's Court.¹⁴⁹³

Under the *Child Protection Act 1974* (Tas), only a magistrate may make a child protection order, directing that a child be taken to a place of safety for up to thirty days, or a temporary child protection order, directing that a child be taken to such a place for up to seven days.¹⁴⁹⁴ However, in certain circumstances, a justice of the peace may, under that Act, issue a warrant authorising a police officer to remove a child and take the child to a place of safety.¹⁴⁹⁵

There are a number of related Acts in Tasmania that have not yet been proclaimed.¹⁴⁹⁶ On their commencement, they will make some significant changes to the hearing of criminal and non-criminal proceedings concerning children. In particular, justices of the peace will not have any power to constitute a Children's Court.

The Children's Courts will be abolished¹⁴⁹⁷ and the appointment of each justice to the office of special magistrate will be revoked.¹⁴⁹⁸ Two new divisions of the Magistrates Court will be established: the Magistrates Court (Youth Justice

¹⁴⁹¹ See note 1126 of this Report.

¹⁴⁹² *Child Welfare Act 1960* (Tas) s 14(5).

¹⁴⁹³ *Child Welfare Act 1960* (Tas) s 32(1).

¹⁴⁹⁴ *Child Protection Act 1974* (Tas) ss 10, 10A.

¹⁴⁹⁵ *Child Protection Act 1974* (Tas) s 9(3).

¹⁴⁹⁶ See the *Children, Young Persons and Their Families Act 1997* (Tas); the *Youth Justice Act 1997* (Tas); the *Magistrates Court (Children's Division) Act 1998* (Tas); the *Children, Young Persons and Their Families and Youth Justice (Consequential Repeals and Amendments) Act 1998* (Tas); and the *Children, Young Persons and Their Families and Youth Justice (Transitional and Savings Provisions) Act 1998* (Tas). The latter Acts, except for the *Youth Justice Act 1997* (Tas), are due to commence on the day on which the *Children, Young Persons and Their Families Act 1997* (Tas) commences. The *Youth Justice Act 1997* (Tas) will commence on 1 February 2000.

¹⁴⁹⁷ *Children, Young Persons and Their Families and Youth Justice (Transitional and Savings Provisions) Act 1998* (Tas) s 7(1).

¹⁴⁹⁸ *Children, Young Persons and Their Families and Youth Justice (Transitional and Savings Provisions) Act 1998* (Tas) s 7(3).

Division)¹⁴⁹⁹ and the Magistrates Court (Children's Division).¹⁵⁰⁰ Both Divisions will be constituted only by a magistrate.¹⁵⁰¹

The Magistrates Court (Youth Justice Division) will have jurisdiction to hear and determine a charge against a youth for an offence and to conduct a committal hearing where the defendant is a youth.¹⁵⁰² The Magistrates Court (Children's Division) will have jurisdiction to hear and determine all matters conferred on it by the *Children, Young Persons and Their Families Act 1997* (Tas),¹⁵⁰³ which includes the power to make a care and protection order in respect of a child.¹⁵⁰⁴ Justices of the peace will not have the power to hear and determine any matters that are heard by the Magistrates Court (Youth Justice Division) or by the Magistrates Court (Children's Division).

(vi) Victoria

The Children's Court of Victoria consists of a Criminal Division and a Family Division.¹⁵⁰⁵ The Criminal Division has jurisdiction to hear and determine all charges against children for summary offences, to hear and determine summarily all charges against children for indictable offences (subject to certain exceptions), and to conduct committal proceedings into all charges against children for indictable offences.¹⁵⁰⁶ The Family Division has jurisdiction to hear and determine a number of matters concerning the care and protection of a child, including an application for a permanent care order.¹⁵⁰⁷ The Children's Court has exclusive jurisdiction in relation to these matters.¹⁵⁰⁸

Justices of the peace do not have the power to constitute the Children's Court. The Court consists of the magistrates and registrars of the Court¹⁵⁰⁹ and,

¹⁴⁹⁹ *Youth Justice Act 1997* (Tas) s 159, which will commence on 1 February 2000.

¹⁵⁰⁰ *Magistrates Court (Children's Division) Act 1998* (Tas) s 4.

¹⁵⁰¹ *Youth Justice Act 1997* (Tas) s 160; *Magistrates Court (Children's Division) Act 1998* (Tas) s 5.

¹⁵⁰² *Youth Justice Act 1997* (Tas) s 161(1)(a), (b).

¹⁵⁰³ *Magistrates Court (Children's Division) Act 1998* (Tas) s 6.

¹⁵⁰⁴ *Children, Young Persons and Their Families Act 1997* (Tas) s 42.

¹⁵⁰⁵ *Children and Young Persons Act 1989* (Vic) s 8(3).

¹⁵⁰⁶ *Children and Young Persons Act 1989* (Vic) s 16(1).

¹⁵⁰⁷ *Children and Young Persons Act 1989* (Vic) s 15(1).

¹⁵⁰⁸ *Children and Young Persons Act 1989* (Vic) s 17(1).

¹⁵⁰⁹ *Children and Young Persons Act 1989* (Vic) s 8(2).

generally, must be constituted by a magistrate.¹⁵¹⁰

(vii) Western Australia

The Children's Court of Western Australia has exclusive jurisdiction to hear and determine a range of complaints alleged to have been committed by a child under the age of eighteen.¹⁵¹¹ It also has exclusive jurisdiction to hear and determine a number of complaints and applications concerning the welfare of a child, including applications made under the *Child Welfare Act 1947 (WA)*.¹⁵¹²

Justices of the peace are not authorised to constitute the Children's Court. The Court must be constituted by a judge, a magistrate or two or more specially appointed members.¹⁵¹³ When the Court is constituted by members only, it may not sentence a child to be detained in a detention centre or to be imprisoned, or make an order declaring a child to be in need of care and protection.¹⁵¹⁴

Where a justice¹⁵¹⁵ is satisfied by information on oath that there is reasonable ground for suspecting that a child in need of care and protection is residing on any premises or in any place, he or she may grant an order authorising certain persons to enter and inspect the premises or place and apprehend the child.¹⁵¹⁶

(f) Discussion Paper

(i) Jurisdiction in criminal matters

The Commission noted that the Juvenile Justice Branch, in its submission in response to the Issues Paper, considered it important, when dealing with children, "to ensure that the official response to offending behaviour is timely".¹⁵¹⁷ For that reason, the Juvenile Justice Branch considered it desirable

¹⁵¹⁰ *Children and Young Persons Act 1989 (Vic)* s 8(7).

¹⁵¹¹ *Children's Court of Western Australia Act 1988 (WA)* ss 3 (definition of "child"), 19.

¹⁵¹² *Children's Court of Western Australia Act 1988 (WA)* ss 3 (definition of "child"), 20.

¹⁵¹³ *Children's Court of Western Australia Act 1988 (WA)* s 6. Under s 11 of that Act, the Governor may appoint such persons to be members of the Court as the Governor considers necessary.

¹⁵¹⁴ *Children's Court of Western Australia Act 1988 (WA)* s 21(4).

¹⁵¹⁵ The term "justice" is defined in s 5 of the *Interpretation Act 1984 (WA)* to mean a "Justice of the Peace".

¹⁵¹⁶ *Child Welfare Act 1947 (WA)* s 146A.

¹⁵¹⁷ Submission 106 (IP).

to ensure that there is an alternative process for dealing quickly with children if a magistrate is not available.

The Commission observed that, in constituting the Childrens Court in its criminal jurisdiction, justices of the peace are already limited to:¹⁵¹⁸

- sentencing a child charged with a simple offence in a case where the child pleads guilty; and
- making various procedural orders as presently authorised by the *Juvenile Justice Act 1992 (Qld)*.¹⁵¹⁹

The Commission also observed that justices of the peace may not make a detention order or an immediate release order.¹⁵²⁰

In the light of the limitations that currently apply to the powers that may be exercised by justices of the peace sitting as the Childrens Court, the Commission was of the view - subject to the qualification mentioned below - that it is appropriate for justices of the peace to retain their present powers in this regard.¹⁵²¹ That view was consistent with the Commission's approach in relation to the sentencing of adult defendants and the making of procedural orders generally.¹⁵²²

The one qualification related to the issue of whether the consent of, or on behalf of, a child should be required before the child can be sentenced by justices of the peace sitting as the Childrens Court. In relation to adult defendants, the Commission had recommended that justices of the peace should have the power to sentence only when, in addition to certain other factors, both the prosecutor and the defendant agree to the matter being dealt with by justices of the peace.

The Commission considered that the same principle should also apply to the sentencing of a child.¹⁵²³ However, because of a concern about the capacity of

¹⁵¹⁸ *Juvenile Justice Act 1992 (Qld)* s 54. See p 251 of this Report.

¹⁵¹⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 197.

¹⁵²⁰ *Ibid.* See *Juvenile Justice Act 1992 (Qld)* s 54(2).

¹⁵²¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 197.

¹⁵²² *Id* at pp 157-163, 185-186.

¹⁵²³ *Id* at 197. For an example of a provision of the kind suggested, see s 8 of the *Audio Visual and Audio Links Amendment Act 1999 (Qld)*, which will amend the *Juvenile Justice Act 1992 (Qld)* by inserting a new provision, s 118A, to allow the sentencing of a child to be done over an audio visual link or audio link, but only if the prosecutor and the child agree to the use of the

a child to make this decision, the Commission considered that justices of the peace should be able to sentence a child only where the prosecutor and the child's legal representative agree for the matter to be dealt with by justices of the peace.¹⁵²⁴

The Commission's preliminary recommendation was that justices of the peace (magistrates court) should retain the power to constitute the Childrens Court in its criminal jurisdiction.¹⁵²⁵

- (a) subject to the present limitations contained in the *Juvenile Justice Act 1992 (Qld)*,¹⁵²⁶ to hear and determine a charge of a simple offence brought against a child where:
- the child pleads guilty; and
 - both the prosecutor and the child's legal representative consent to the charge being heard and determined by a court constituted by justices of the peace; and
- (b) to make procedural orders as presently authorised by the *Juvenile Justice Act 1992 (Qld)*.

(ii) Jurisdiction in non-criminal matters

The Commission considered the appropriateness of the powers of justices of the peace under the *Children's Services Act 1965 (Qld)*, although the same considerations would apply equally to the new regime to be established upon the commencement of the relevant provisions of the *Child Protection Act 1999 (Qld)*.

The Commission expressed the view that, when a magistrate is not available, it is desirable for justices of the peace to be able to hear an urgent application for the temporary care and protection or the temporary care and control of a child. However, the Commission considered that it should not be necessary for justices of the peace to hear an application for a final order, and that the making

link. The *Audio Visual and Audio Links Amendment Act 1999 (Qld)* was assented to on 6 December 1999. As at 10 December 1999, it had not been proclaimed into force.

¹⁵²⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 197-198.

¹⁵²⁵ Id at 208-209.

¹⁵²⁶ See p 251 of this Report.

of a final order should be restricted to a magistrate.¹⁵²⁷

The Commission made the following preliminary recommendations:¹⁵²⁸

- Justices of the peace (magistrates court) should retain the power to constitute the Childrens Court, when a magistrate is not available, to hear an urgent application under the *Children's Services Act 1965* (Qld) for the temporary care and protection or the temporary care and control of a child.
- The *Children's Services Act 1965* (Qld) should be amended so that, if the Court is making a final order for the care and protection or care and control of a child, it must be constituted by a magistrate.

(g) Submissions

(i) Jurisdiction in criminal matters

Sixteen submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation about the power of justices of the peace to constitute the Childrens Court in its criminal jurisdiction. Fifteen of these respondents agreed with the Commission's preliminary recommendation that justices of the peace (magistrates court) should retain the power to constitute the Childrens Court:¹⁵²⁹

- (a) subject to the present limitations contained in the *Juvenile Justice Act 1992* (Qld),¹⁵³⁰ to hear and determine a charge of a simple offence brought against a child where:
- the child pleads guilty; and
 - both the prosecutor and the child's legal representative consent to the charge being heard and determined by a court constituted by justices of the peace; and
- (b) to make procedural orders as presently authorised by the *Juvenile Justice Act 1992* (Qld).

¹⁵²⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 198.

¹⁵²⁸ Id at 209.

¹⁵²⁹ Submissions 6, 7, 8, 9, 14, 23, 25, 26, 40, 44, 45, 47, 51, 53, 59.

¹⁵³⁰ See p 251 of this Report.

One respondent expressed the view that it was preferable that only a magistrate should have the power to constitute the Childrens Court in its criminal jurisdiction.¹⁵³¹ That respondent did acknowledge, however, that, if there was a need for various procedural orders to be made and a magistrate was not available, a justice of the peace (magistrates court) should be able to make procedural orders such as adjournments and remands.

(ii) Jurisdiction in non-criminal matters

Sixteen submissions received by the Commission in response to the Discussion Paper addressed this issue. All of these respondents¹⁵³² agreed with the Commission's preliminary recommendations about the powers that justices of the peace (magistrates court) should be able to exercise when constituting the Childrens Court in its non-criminal jurisdiction.¹⁵³³

(h) The Commission's view

(i) Jurisdiction in criminal matters

Although it does not appear that justices of the peace constitute the Childrens Court on a regular basis,¹⁵³⁴ the Commission accepts that, in some circumstances, it may be desirable for justices of the peace (magistrates court) to be able to constitute the Childrens Court to deal with certain matters within the Court's criminal jurisdiction when neither a Childrens Court magistrate nor a magistrate is available.¹⁵³⁵

In relation to accepting a guilty plea from a juvenile, allowing justices of the peace to constitute the Childrens Court enables a criminal charge to be dealt with promptly in the absence of a magistrate. As noted above, when the Childrens Court is constituted by justices of the peace, the Court may hear and determine a charge against a juvenile only in relation to a simple offence and only if the juvenile pleads guilty.¹⁵³⁶ Further, justices of the peace exercising this

¹⁵³¹ Submission 24.

¹⁵³² Submissions 6, 7, 8, 9, 14, 23, 24, 25, 26, 40, 44, 45, 47, 51, 53, 59.

¹⁵³³ The Commission's preliminary recommendations are set out at p 265 of this Report.

¹⁵³⁴ See pp 256-257 of this Report.

¹⁵³⁵ See the discussion of s 5(3) of the *Childrens Court Act 1992* (Qld) at p 250 of this Report.

¹⁵³⁶ *Juvenile Justice Act 1992* (Qld) s 54(1).

jurisdiction may not make a detention order or an immediate release order.¹⁵³⁷ In the Discussion Paper, the Commission made a preliminary recommendation that the circumstances in which the Childrens Court, when constituted by justices of the peace (magistrates court), should be able to sentence a child should be further restricted to where both the prosecutor and the child's legal representative consent to the charge being heard and determined by a court constituted by justices of the peace.¹⁵³⁸

The Commission remains of the view that, subject to all these limitations, justices of the peace (magistrates court) should retain the power to hear and determine a charge of a simple offence brought against a juvenile.

At present, justices of the peace who are constituting the Childrens Court may also take or make a procedural action or order.¹⁵³⁹ This enables the Court to exercise a range of procedural powers, for example, charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding. As noted in relation to the exercise of procedural powers by justices of the peace constituting a Magistrates Court,¹⁵⁴⁰ in communities where there is no resident magistrate or where the resident magistrate is away on circuit, it is desirable for justices of the peace to be able to exercise these powers. In the Commission's view, it is in the interests of justice that the Childrens Court can be convened promptly to hear a bail application. It is also administratively efficient for justices of the peace to be able to make other types of procedural orders such as adjourning a matter or remanding a defendant.

Consequently, the Commission remains of the view that justices of the peace (magistrates court) should retain the power under the *Juvenile Justice Act 1992* (Qld) to take procedural actions and make procedural orders.¹⁵⁴¹

(ii) Jurisdiction in non-criminal matters

The Commission notes that, under the *Child Protection Act 1999* (Qld), justices of the peace (magistrates court) will have quite limited powers.¹⁵⁴² They will be

¹⁵³⁷ *Juvenile Justice Act 1992* (Qld) s 54(2). See note 1425 of this Report in relation to immediate release orders.

¹⁵³⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 208.

¹⁵³⁹ *Juvenile Justice Act 1992* (Qld) s 54(1).

¹⁵⁴⁰ See pp 245 and 248-249 of this Report.

¹⁵⁴¹ See *Juvenile Justice Act 1992* (Qld) s 54(1)(b). Note, however, that the exercise of these powers is not presently restricted to justices of the peace (magistrates court).

¹⁵⁴² See the discussion of s 99(3) of the *Child Protection Act 1999* (Qld) at p 255 of this Report.

permitted to decide an application for a court assessment order and, on an application for a court assessment order or a child protection order, to make certain interim orders or adjourn the hearing of the application. They will not have the power to decide an application for a child protection order.

Although the Commission has some concern about the fact that a court assessment order can be made for a period of up to four weeks, it acknowledges that the ability to make an order of that duration might enable a more effective regime to be put in place for the child who is the subject of the order than would be possible if the order could be made for only a much more limited period.

The Commission considers it appropriate that justices of the peace (magistrates court) will be able to make interim orders about the temporary custody of a child and about parental contact on the hearing of certain applications, but will not be able to make a final child protection order.

Consequently, the Commission is of the view that justices of the peace (magistrates court) should retain the powers that will be exercisable by them on the commencement of the relevant provisions of the *Child Protection Act 1999* (Qld).

11. EFFECT OF AVAILABILITY OF A MAGISTRATE

(a) Introduction

As noted earlier in this chapter, the effect of section 30 of the *Justices Act 1886* (Qld) is that justices of the peace are not authorised to constitute a court to hear and determine a criminal charge if a magistrate is available.¹⁵⁴³ However, the availability of a magistrate does not prevent justices of the peace from constituting a court to hear certain other matters, for example, to adjourn a matter or to grant bail.

(b) Discussion Paper

In the Discussion Paper, the Commission expressed the view that, in the light of its preliminary views as to the various purposes for which justices of the peace should be able to constitute a court, it did not consider it necessary to recommend any changes to section 30 of the *Justices Act 1886* (Qld).¹⁵⁴⁴

¹⁵⁴³ S 30(2), (3) of the *Justices Act 1886* (Qld) is set out at p 182 of this Report.

¹⁵⁴⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 204.

(c) Submissions

One submission received by the Commission in response to the Discussion Paper addressed this issue.¹⁵⁴⁵ That respondent, although agreeing that only justices of the peace (magistrates court) should be able to constitute a court, was of the view that they should have the power to do so only in the absence of a magistrate.

(d) The Commission's view

As noted above, it is already the case that justices of the peace may not constitute a Magistrates Court to hear and determine a criminal charge if a magistrate is available.¹⁵⁴⁶ Consequently, the issue is whether justices of the peace should be unable to make certain procedural orders or conduct a committal hearing if a magistrate is available.

In this Report, the Commission has recommended that only justices of the peace (magistrates court) should be able to conduct a committal hearing and that the power to do so should be restricted to the power under section 110A(6) of the *Justices Act 1886* (Qld) to commit a defendant, with the consent of the defendant's legal representative, for trial or for sentence. Under that provision, no consideration of the evidence is undertaken by the justices of the peace.¹⁵⁴⁷

Although justices of the peace would not normally constitute a Magistrates Court when a magistrate is present and available to do so, the Commission can envisage that, in some circumstances, it might be convenient for the Court to be able to be so constituted. In the light of the limited nature of the powers that may be exercised by justices of the peace in these circumstances and the Commission's recommendation in relation to restricting the type of committal hearing that may be conducted by justices of the peace (magistrates court), the Commission remains of the view that it is not necessary to recommend any changes to section 30 of the *Justices Act 1886* (Qld).

12. RECOMMENDATIONS

The Commission makes the following recommendations about the powers of justices of the peace when constituting a court:

¹⁵⁴⁵ Submission 18.

¹⁵⁴⁶ See p 183 of this Report.

¹⁵⁴⁷ See p 225 of this Report.

Justices of the peace who may constitute a court

- 10.1** Justices of the peace (magistrates court) should continue to have the power to constitute a court.
- 10.2** Justices of the peace (qualified) should not have the power to constitute a court for any purpose.
- 10.3** A justice of the peace (magistrates court) who is a member or an employee of the Queensland Police Service should not have the power to constitute a court for any purpose.¹⁵⁴⁸

Hearing and determining a charge

- 10.4** Justices of the peace (magistrates court) should be able to hear and determine a charge only where:
- (a) the defendant is charged with a simple offence (other than an indictable offence that may be heard summarily) or a regulatory offence pursuant to proceedings taken under the *Justices Act 1886* (Qld);
 - (b) the defendant pleads guilty; and
 - (c) both the prosecutor and the defendant consent to the charge being heard and determined by a court constituted by justices of the peace;
- and the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended accordingly.
- 10.5** Justices of the peace (magistrates court) should not have the power to sentence a defendant to a term of imprisonment, whether:
- (a) as the original sentence or part of the original sentence;

¹⁵⁴⁸

See also Chapter 11 of this Report for the Commission's general recommendations about the powers of a justice of the peace who is a member or an employee of the Queensland Police Service or a Volunteer in Policing.

- (b) as a suspended sentence; or
- (c) in default of paying a fine or other penalty that is imposed.

10.6 In the case of a defendant who has defaulted in the payment of a fine or other penalty, but who was not initially sentenced to a term of imprisonment in default of paying the fine or other penalty, justices of the peace (magistrates court) should not be able to constitute a court for the purpose of sentencing such a defendant to a term of imprisonment.¹⁵⁴⁹ The *Penalties and Sentences Act 1992* (Qld) should be amended to provide that only a magistrate may constitute a court for that purpose.

10.7 If the justices of the peace (magistrates court) who are hearing and determining a charge are of the opinion, or if one of them is of the opinion, that a custodial sentence is warranted, they should adjourn the matter for sentencing by a magistrate.

Conducting an examination of witnesses (conducting a committal hearing)

10.8 Justices of the peace (magistrates court) should retain the power under section 110A(6) of the *Justices Act 1886* (Qld) to commit a defendant, with the consent of the defendant's legal representative, for trial or for sentence.

10.9 The power to conduct any other type of committal hearing should be removed from justices of the peace.

Procedural orders

10.10 Justices of the peace (magistrates court) should retain the power to make:

- (a) various procedural orders - for example, adjourning a matter, remanding a defendant, and hearing bail applications; and
- (b) the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

¹⁵⁴⁹

See the *Penalties and Sentences Act 1992* (Qld) s 185.

10.11 Justices of the peace should not have the power under section 222 of the *Justices Act 1886* (Qld) to release a person from custody pending the hearing of the person's appeal to the District Court. Section 222 of the *Justices Act 1886* (Qld) should be amended accordingly.

Constituting the Childrens Court: criminal jurisdiction

10.12 Justices of the peace (magistrates court) should retain the power to constitute the Childrens Court in its criminal jurisdiction:

- (a) subject to the present limitations contained in the *Juvenile Justice Act 1992* (Qld), to hear and determine a charge of a simple offence brought against a child where:
- the child pleads guilty; and
 - both the prosecutor and the child's legal representative consent to the charge being heard and determined by a court constituted by justices of the peace; and
- (b) to take procedural actions and make procedural orders as presently authorised by the *Juvenile Justice Act 1992* (Qld).

Constituting the Childrens Court: non-criminal jurisdiction

10.13 Justices of the peace (magistrates court) should retain the power to constitute the Childrens Court for the purposes prescribed by section 99 of the *Child Protection Act 1999* (Qld).¹⁵⁵⁰

¹⁵⁵⁰

As at 10 December 1999, s 99 of the *Child Protection Act 1999* (Qld) had not commenced.

CHAPTER 11

JUSTICES OF THE PEACE WHO ARE MEMBERS OR EMPLOYEES OF THE QUEENSLAND POLICE SERVICE

1. INTRODUCTION

Under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), there is no prohibition on a person who is a police officer or who is employed by the Queensland Police Service from being appointed as a justice of the peace (magistrates court), as a justice of the peace (qualified) or as a commissioner for declarations.¹⁵⁵¹ In any event, a person could have been appointed as a justice of the peace or as a commissioner for declarations prior to becoming a member or an employee of the Police Service.

In this chapter, the Commission considers whether any general limitations should be imposed on the powers that may be exercised by a justice of the peace who is a member or an employee of the Queensland Police Service.¹⁵⁵²

2. USE OF TERMINOLOGY IN THIS REPORT

The *Police Service Administration Act 1990* (Qld) provides that the membership of the Service consists of police officers,¹⁵⁵³ police recruits and staff members.¹⁵⁵⁴

Staff members are officers of the public service assigned to perform duties in the Police Service, and are generally appointed under the *Public Service Act 1996* (Qld), rather

¹⁵⁵¹ However, if a clerk of the court or registrar of a Magistrates Court is a police officer, that person will not, by virtue of holding office as a clerk of the court or registrar, hold office as a justice of the peace (magistrates court) or as a justice of the peace (qualified): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2). See the discussion of *ex officio* justices of the peace at pp 29-30 of this Report.

¹⁵⁵² The specific limitations that have already been recommended by the Commission in this Report are summarised at pp 278-279.

¹⁵⁵³ Police officers are defined in s 2.2(2) of the *Police Service Administration Act 1990* (Qld) as:

- (a) the commissioner of the Police Service;
- (b) the persons holding appointment as an executive police officer;
- (c) the persons holding appointment as a commissioned police officer;
- (d) the persons holding appointment as a noncommissioned police officer;
- (e) the persons holding appointment as a constable.

¹⁵⁵⁴ *Police Service Administration Act 1990* (Qld) s 2.2(1).

than under the *Police Service Administration Act 1990 (Qld)*.¹⁵⁵⁵

A reference in this Report to a person who is an “employee” of the Queensland Police Service is intended to refer to a person who is classified under the *Police Service Administration Act 1990 (Qld)* as a staff member. A reference in this Report to a person who is a “member” of the Queensland Police Service is intended to refer to any person who is a police officer or police recruit within the meaning of those terms in the *Police Service Administration Act 1990 (Qld)*.

3. POLICY OF THE QUEENSLAND POLICE SERVICE

The Operational Procedures Manual of the Queensland Police Service addresses the use of justices of the peace who are members or employees of the Service.¹⁵⁵⁶

POLICY

Members¹⁵⁵⁷ are not to use the services of justices of the peace or commissioners for declarations in circumstances where bias or a conflict of interest may arise.

ORDER

Members are not to use the services of justices of the peace or commissioners for declarations who are members of the Service for any purpose associated with the performance of a function of the Service except for traffic adjudication matters and witnessing declarations under the *Oaths Act 1867* for the purpose of endorsing statements pursuant to s. 110A of the *Justices Act 1886*.

In the case of traffic adjudication matters, members may use the services of another member who is a justice of the peace performing duty at a traffic adjudication section for the purpose of issuing summonses in respect of traffic matters which have been adjudicated upon by the section to which that member is attached. [note added]

¹⁵⁵⁵ *Police Service Administration Act 1990 (Qld)* s 2.5(1)(b)(ii). See, however, s 8.3(5) of the *Police Service Administration Act 1990 (Qld)* under which the commissioner may appoint as staff members certain officers who, by reason of physical or mental infirmity, are unfit to perform the duties of office.

¹⁵⁵⁶ Queensland Police Service, *Operational Procedures Manual* s 3.9.15 (Use of justices of the peace and commissioners for declarations). The Criminal Justice Commission, in its submission in response to the Issues Paper, explained that the Operational Procedures Manual contains three levels of instructions, namely procedures, policies and orders. A policy outlines the Service’s attitude regarding a specific subject and must be complied with under ordinary circumstances, but may be departed from if there are good reasons for doing so. However, an order requires compliance with the course of action specified and must not be departed from: submission 113 (IP).

¹⁵⁵⁷ The term “member” is defined in the *Operational Procedures Manual* to include a police officer, a staff member and a police recruit. For the purposes of s 3.9.15, it also includes a person who is a Volunteer in Policing.

The Manual gives the following examples of actions that may result in bias or a conflict of interest if performed for a member of the Service by another member of the Service who is a justice of the peace or a commissioner for declarations or by some other person who may have close associations with the Service:

- the issuing of any summons or subpoena;
- the issuing of any warrant;
- acting as an independent person at interviews of suspects;
- authorising searches pursuant to the *Customs Act 1973* (Cth);
- authorising extensions of time pursuant to Part 1C of the *Crimes Act 1914* (Cth).

The Commission has recommended in Chapter 6 of this Report that a justice of the peace who is a member or an employee of the Queensland Police Service should not be able to issue a summons for any type of offence.¹⁵⁵⁸

The other exception provided for in the Order relates to the witnessing of certain declarations. Section 110A of the *Justices Act 1886* (Qld) deals with the use of tendered written statements in lieu of the oral testimony of a witness at a committal hearing.¹⁵⁵⁹ That section provides that a written statement shall not be admitted unless, in addition to certain other conditions being satisfied:¹⁵⁶⁰

... it is signed by the person making it and contains -

- (i) a declaration by the person under the *Oaths Act 1867*; or
- (ii) a written acknowledgment by the person;

that it is true to the best of the person's knowledge and belief and that the person made the statement knowing that, if it were admitted as evidence, the person may be liable to prosecution for stating in it anything that the person knew was false; ...

4. DISCUSSION PAPER

In the Discussion Paper, the Commission made a number of preliminary recommendations about whether certain specific powers should be able to be exercised

¹⁵⁵⁸ See, however, the comment at p 116 of this Report that it may be appropriate to consider an alternative means of proceeding in respect of certain types of offences.

¹⁵⁵⁹ See pp 224-231 of this Report in relation to committal hearings.

¹⁵⁶⁰ *Justices Act 1886* (Qld) s 110A(5)(c).

by a justice of the peace who is also a member or an employee of the Queensland Police Service. The Commission recommended that such a person should not:

- have the power to issue a summons or a warrant for a member of the Queensland Police Service;¹⁵⁶¹
- be authorised to act as an interview friend for a juvenile suspect;¹⁵⁶² or
- have the power to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld).¹⁵⁶³

The Commission also expressed the preliminary view that a justice of the peace who is a member or an employee of the Queensland Police Service should not be able to constitute a court for any purpose.¹⁵⁶⁴

5. SUBMISSIONS

Almost all of the respondents who addressed the Commission's preliminary recommendations about the substantive powers that should be able to be exercised by a justice of the peace agreed that each of those powers should not be able to be exercised by a justice of the peace who is a member or an employee of the Queensland Police Service.¹⁵⁶⁵

However, several respondents to the Discussion Paper expressed the view that the Commission's preliminary recommendations about the powers of a person who is a member or an employee of the Queensland Police Service should be broadened.

One respondent suggested that the Commission's recommendations about specific powers should be altered so that the prohibition on those powers being exercised by a justice of the peace who is a member or an employee of the Queensland Police Service should apply not only while the person is a serving officer, but even when the person has retired.¹⁵⁶⁶

¹⁵⁶¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 95.

¹⁵⁶² Id at 117.

¹⁵⁶³ Id at 128.

¹⁵⁶⁴ Id at 202.

¹⁵⁶⁵ See pp 112, 143-144 and 162 of this Report.

¹⁵⁶⁶ Submission 56.

Two respondents suggested that it should not even be possible for a police officer or a person with close associations with the Police Service to be appointed as a justice of the peace. One of these respondents expressed the view that such a person should not be able to be appointed as a justice of the peace (qualified).¹⁵⁶⁷

As has been pointed out in numerous places in the Discussion Paper, there are many occasions when a J.P. (QUAL) who is a police officer or a person who has close associations with the Police Service cannot exercise the authority of a J.P. (QUAL). In my opinion, these people should not be appointed to the position of J.P. (QUAL).

There are three major reasons for this statement:

1. Many Acts already exclude these people from acting in many circumstances.
2. This action would remove the possibility of conflict of interest, real or imagined.
3. If police officers or close associates are used for J.P. (QUAL) duties there is a distinct possibility of a breach of the doctrine of the separation of powers.¹⁵⁶⁸ When acting as a C.DEC none of the above problems would occur. [note added]

The other respondent expressed the view that it should not be possible for a police officer to be appointed as a justice of the peace (qualified) or as a justice of the peace (magistrates court):¹⁵⁶⁹

In reading through the Discussion Paper I was stunned to realise that a serving member of the Queensland Police Force can also be appointed a Justice of the Peace (Qual) or (Mag Ct)! ...

There is an old saying that "a man cannot serve two masters" and I feel that this is very much the case in the above situation.

Regardless of how many "policies" are created, I truly think it is ludicrous that a police officer can also be a Justice of the Peace.

I submit that a police officer could quite reasonably be appointed a Commissioner for Declarations but not a Justice of the Peace! [original emphasis]

¹⁵⁶⁷ Submission 23.

¹⁵⁶⁸ The purpose of the doctrine of the separation of powers is outlined briefly in Marks, the Hon K, "Judicial Independence" (1994) 68 *Australian Law Journal* 173 at 173-174:

The theory of separation of powers is that the legislative, Executive and judicial arms of government function independently of each other. Behind it, is recognition that the interests of these arms of government frequently conflict and that non-interference by one with the other is an essential of good government.

Note, however, that the Commission has recommended that a justice of the peace (qualified) should not be able to constitute a court for any purpose. See p 270 of this Report (Recommendation 10.2).

¹⁵⁶⁹ Submission 14.

The Criminal Justice Commission, in its submission in response to the Issues Paper, made a suggestion that would have a similar effect to the suggestions made by these respondents.¹⁵⁷⁰ The Criminal Justice Commission suggested that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should prohibit a justice of the peace who is employed by the Queensland Police Service from exercising his or her powers for any purpose associated with the performance of a function of the Queensland Police Service other than the power to witness a document such as a statutory declaration or an affidavit. That suggestion would have a slightly broader application than that of the two previous respondents, whose suggestions do not address the position of a person who is a justice of the peace prior to becoming a member or an employee of the Queensland Police Service.

One respondent raised the further issue of whether the Commission's recommendations would apply to a Volunteer in Policing:¹⁵⁷¹

The Queensland Police Service now have VOLUNTEERS IN POLICING (VIPs) who perform a range of duties which will complement existing police service roles - They are strictly volunteers who are not additional administrative staff nor additional police officers.

However, if they are justices of the peace could/would the police use these VIPs to issue summonses/warrants etc?

Only one respondent expressed the view that police officers should not be prohibited from exercising the various powers that were the subject of the Commission's

¹⁵⁷⁰ Submission 113 (IP).

¹⁵⁷¹ Submission 51. Volunteers in Policing ("VIPs") are recruited through the Queensland Police Service's Volunteers In Policing project. The purpose of the project is to train and place volunteers to perform duties that "will complement existing police service roles". Generally, see the information provided in relation to this project on the Queensland Police Service Commission's Web Site at <<http://www.police.qld.gov.au/qps/vip/vip.ssi>> (24 December 1999):

VIP applicants will be trained and empowered to work with the Queensland Police Service in various capacities. VIPs will not be armed, they will not be involved in the apprehension, search, question or arrest of any person; they will have no contact with prisoners and will not engage in any general operational duties. ...

VIPs participating in the project will primarily provide a support role to the community. Volunteers will actively participate in programs which focus on victim support, witness support, language services, customer support, community liaison, school support and community based policing. ...

All applicants to the VIP project will be required to successfully complete the VIP training program before they are allowed to participate in any VIP duties. ...

VIP training will be provided by the Queensland Police Service Academy.

preliminary recommendations.¹⁵⁷² That respondent suggested that a justice of the peace who is a police officer should be seen “first and foremost” as a justice of the peace.

6. THE COMMISSION’S VIEW

(a) General limitation on the exercise of powers

In this Report, the Commission has recommended that a person who is a member or an employee of the Queensland Police Service should not:

- have the power to issue a summons;¹⁵⁷³
- have the power to issue a warrant;¹⁵⁷⁴
- be authorised to act as an interview friend for a juvenile suspect under the *Police Powers and Responsibilities Act 1997* (Qld) or under section 9E of the *Juvenile Justice Act 1992* (Qld);¹⁵⁷⁵
- have the power to hear an application for the extension of a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld);¹⁵⁷⁶ or
- be able to constitute a court for any purpose.¹⁵⁷⁷

The Commission is of the view that each of these powers should be exercised only by a person who is independent of the Queensland Police Service. The Commission is also of the view that the limitations recommended in this Report should be the subject of legislative amendment and should not remain merely as the subject of an order in the Operational Procedures Manual of the Queensland Police Service.

If these recommendations are implemented, a justice of the peace who is a member or an employee of the Queensland Police Service will virtually be limited to exercising the

¹⁵⁷² Submission 22.

¹⁵⁷³ See p 119 of this Report (Recommendation 6.3).

¹⁵⁷⁴ Ibid.

¹⁵⁷⁵ See p 147 of this Report (Recommendation 7.4).

¹⁵⁷⁶ See p 168 of this Report (Recommendation 8.6).

¹⁵⁷⁷ See p 270 of this Report (Recommendation 10.2).

powers of a commissioner for declarations. This raises the question of whether, in addition to limiting the exercise of certain specific powers to persons who are independent of the Queensland Police Service, a recommendation of more general application should be made, so that a person who is a member or an employee of the Queensland Police Service is actually limited to exercising the powers of a commissioner for declarations.

Given the nature of the powers that are conferred on justices of the peace, the Commission considers that the role of justice of the peace should, generally, be performed by a person who is independent of the Queensland Police Service.

However, the risk in making recommendations only about specific powers is that, in the future, new powers might be conferred on justices of the peace without consideration being given to whether it is appropriate for those powers to be exercised by a justice of the peace who is a member or an employee of the Queensland Police Service. For this reason, the Commission believes that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that a justice of the peace who is a member or an employee of the Queensland Police Service should be limited to exercising the powers of a commissioner for declarations.

This recommendation would not affect the power of a member or an employee of the Queensland Police Service to witness a declaration under the *Oaths Act 1867* (Qld) for the purpose of endorsing a statement under section 110A of the *Justices Act 1886* (Qld),¹⁵⁷⁸ as the witnessing of such a declaration is a power that may be exercised by a commissioner for declarations.¹⁵⁷⁹

To avoid the possibility of further powers being conferred on justices of the peace without specific consideration being given to the situation of justices of the peace who are associated with the Police Service, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be further amended to provide that the limitation proposed on the powers that may be exercised by a justice of the peace who is a member or an employee of the Queensland Police Service is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that limitation.¹⁵⁸⁰

(b) Volunteers in Policing

The Commission notes that one respondent to the Discussion Paper queried whether

¹⁵⁷⁸ See Queensland Police Service, *Operational Procedures Manual* s 3.9.15. The relevant policy and order of that section are set out at p 274 of this Report.

¹⁵⁷⁹ See Chapter 5 of this Report.

¹⁵⁸⁰ For a similar provision, see s 29(7) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is set out at p 13 of this Report.

the Commission's recommendations would apply to a person who is a Volunteer in Policing.¹⁵⁸¹ The training for Volunteers in Policing is provided by the Queensland Police Service Academy¹⁵⁸² and such a person will obviously work closely with members of the Queensland Police Service. Although a Volunteer in Policing is not involved in operational duties of the Queensland Police Service,¹⁵⁸³ the Commission considers it important that the powers of a justice of the peace are exercised by persons who not only are, but are seen to be, independent of the Queensland Police Service.

The Commission is, therefore, of the view that a justice of the peace who is a Volunteer in Policing should also be limited to exercising the powers of a commissioner for declarations.

(c) Duration of limitation

In the Commission's view, the limitation that is proposed should apply only while a person is a member or an employee of the Queensland Police Service or is a Volunteer in Policing. Once a person does not hold that position, he or she should revert to being able to exercise all the powers of the category of justice of the peace held by the person.

7. RECOMMENDATIONS

The Commission makes the following recommendations:

11.1 A justice of the peace who is a member or an employee¹⁵⁸⁴ of the Queensland Police Service or who is a Volunteer in Policing¹⁵⁸⁵ should be limited to exercising the powers of a commissioner for declarations.

11.2 *The Justices of the Peace and Commissioners for Declarations Act 1991*

¹⁵⁸¹ See p 278 of this Report.

¹⁵⁸² See note 1571 of this Report.

¹⁵⁸³ Ibid.

¹⁵⁸⁴ See the discussion of these terms at pp 273-274 of this Report.

¹⁵⁸⁵ See note 1571 of this Report for a discussion of the role of a person who is a Volunteer in Policing. See also the reference to such a person in s 10.5 of the *Police Service Administration Act 1990* (Qld). The term "volunteer" is defined in s 10.5(6) of that Act to mean "a person appointed by the commissioner to perform duties for the service on an unpaid voluntary basis on conditions decided by the commissioner".

(Qld) should be amended to provide that the limitation proposed in Recommendation 11.1 is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that limitation.

CHAPTER 12

APPOINTMENT TO OFFICE

1. INTRODUCTION

Section 15(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that the Governor in Council may appoint as justices of the peace as many persons as the Governor in Council thinks necessary to keep the peace in Queensland.¹⁵⁸⁶

Section 15(3) of the Act provides that the Governor in Council may appoint as many persons as the Governor in Council thinks fit to be commissioners for declarations.

As mentioned in Chapter 2 of this Report, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) distinguishes between a person who is appointed as a justice of the peace or as a commissioner for declarations and a person who holds office as a justice of the peace or as a commissioner for declarations by virtue of another office held by the person.¹⁵⁸⁷

The distinction between a person who is an appointed justice of the peace or an appointed commissioner for declarations and a person who is an *ex officio* justice of the peace or an *ex officio* commissioner for declarations is important, because the provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) that deal with the qualifications for, and disqualifications from, office and the cessation of office apply only to an appointed justice of the peace and an appointed commissioner for declarations.¹⁵⁸⁸

2. PROCESS OF APPOINTMENT

Application by a person for appointment as either a justice of the peace (of either category) or as a commissioner for declarations is to be made in the manner prescribed by the regulations.¹⁵⁸⁹ Application for appointment must be made in the prescribed

¹⁵⁸⁶ A justice of the peace appointed under this subsection is to be appointed as either a justice of the peace (qualified) or a justice of the peace (magistrates court): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(2).

¹⁵⁸⁷ See pp 28-31 of this Report.

¹⁵⁸⁸ The terms “appointed justice of the peace” and “appointed commissioner for declarations” are defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). See also the discussion of *ex officio* justices of the peace and commissioners for declarations at pp 28-31 of this Report.

¹⁵⁸⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(5).

form.¹⁵⁹⁰

An appointment takes effect on and from when it is registered under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹⁵⁹¹ It is the obligation of the registrar of justices of the peace and commissioners for declarations to keep a register of all appointed justices of the peace and appointed commissioners for declarations.¹⁵⁹²

(a) Disclosure of convictions¹⁵⁹³

The prescribed forms require an applicant to disclose convictions for any offences. Generally, the effect of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) is that, where a certain period of time (“the rehabilitation period”¹⁵⁹⁴) has passed since the recording of a conviction against a person, the person is not obliged to disclose the conviction.¹⁵⁹⁵

However, section 9A of that Act provides that a person who applies to be a justice of the peace or a commissioner for declarations must, if requested or required to furnish information about his or her criminal history, disclose the information required by the Act, notwithstanding that the rehabilitation period in relation to a particular offence has expired. Such a person must, if requested, disclose his or her criminal history concerning contraventions of, or failures to comply with, any provision of law, whether

¹⁵⁹⁰ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 4.

¹⁵⁹¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(4).

¹⁵⁹² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 13(1). The registrar is also required to compile and deliver to the Commissioner of the Police Service from time to time lists of the names and addresses of justices of the peace residing in particular areas of the State (*Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 38(3)). In selecting a justice of the peace to perform a function of office, a police officer is to have regard, if practicable, to the list provided by the registrar (*Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 38(5)). In the Discussion Paper, the Commission considered whether police officers should be required to use justices of the peace on a rotational basis. However, in light of the policy of the Queensland Police Service in relation to that practice, the Commission did not consider it necessary to make a preliminary recommendation about that issue. The Commission also thought that a legislative provision requiring strict adherence to the practice could be difficult to enforce. For a discussion of this issue, see Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 224-225, 226.

¹⁵⁹³ The convictions that disqualify a person from appointment are discussed at pp 307-309 of this Report.

¹⁵⁹⁴ Depending on the circumstances, this will usually be five or ten years from the recording of the conviction. The term “rehabilitation period” is defined in s 3 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

¹⁵⁹⁵ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6.

committed in Queensland or elsewhere.¹⁵⁹⁶

(b) Provision of referee reports

The prescribed application forms for a person who has not previously held office require the applicant to provide two referee reports and to nominate a third referee.¹⁵⁹⁷ Referees must:

- be persons of good standing in the community;
- have known the applicant for more than five years; and
- reside in Australia.

A referee must not be related to the applicant by birth or marriage, and must not be a member of the Police Service.

(c) Nomination

The prescribed application forms for appointment as a commissioner for declarations or as a justice of the peace (qualified) where the person has not previously held office require the applicant to be nominated by a person in one of the following categories:¹⁵⁹⁸

- An applicant may be nominated by his or her member of State Parliament. In that case, the member is required to state whether or not the applicant is known to the member, and that the member is unaware of any reason to suggest that the applicant is not a fit and proper person to be appointed to the particular office.
- Where the applicant seeks appointment to carry out duties in a bank, building society, credit union, insurance office or in the Commonwealth or State public services, and for reasons of time or distance, or for business reasons, it is not

¹⁵⁹⁶ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A(1) (Table, Item 3).

¹⁵⁹⁷ Form 1 (Application for Appointment as a Commissioner for Declarations); Form 2 (Application for Appointment as a Justice of the Peace (Qualified)). The prescribed form for an applicant seeking appointment as a justice of the peace (magistrates court) requires the nomination of three referees: Form 3 (Application for Appointment as a Justice of the Peace (Magistrates Court)).

¹⁵⁹⁸ Form 1 (Application for Appointment as a Commissioner for Declarations); Form 2 (Application for Appointment as a Justice of the Peace (Qualified)). An applicant for appointment as a justice of the peace (magistrates court) is required to be nominated by a person in one of the first two categories or by another member of State Parliament: Form 3 (Application for Appointment as a Justice of the Peace (Magistrates Court)).

convenient for the applicant to call on his or her member of State Parliament, the applicant may be nominated by either the general manager of the institution or the chief executive of the government department concerned.

The person nominating an applicant who falls into one of these categories must state that he or she is satisfied that the appointment is necessary to enable the applicant to carry out the duties of his or her office and that the applicant is a fit and proper person, is familiar with and appreciates the obligations, and is suitable to be appointed as a justice of the peace or as a commissioner for declarations. The person nominating the applicant must also state why it is more convenient for the applicant to be nominated through this process, rather than by calling on his or her member of State Parliament.

- Where an applicant finds it inconvenient for reasons of time or distance to call on his or her member of State Parliament, or where the other forms of nomination are inappropriate given the particular circumstances of the applicant, the applicant may be nominated by any member of a Parliament in Australia.

In this case, the member is required to state whether or not the applicant is known to the member, and that the member is unaware of any reason to suggest that the applicant is not a fit and proper person to be appointed to the particular office.

(d) Inquiries as to fitness

The registrar is required to make inquiries and to seek character references to ascertain whether an applicant is a fit and proper person.¹⁵⁹⁹ Checks are routinely made with referees and with the Department of Transport. Police history checks are also made throughout Australia.

(e) Discussion Paper

(i) Disclosure of convictions

In the Discussion Paper, the Commission expressed the view that the decision whether or not to appoint an applicant should be made in the light of the applicant's complete criminal record.¹⁶⁰⁰ The Commission's preliminary recommendation was, therefore, that applicants seeking appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or

¹⁵⁹⁹ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 5.

¹⁶⁰⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 232.

commissioner for declarations should continue to be required to disclose their convictions for any offences.¹⁶⁰¹

(ii) Nomination requirements

A. Member of Parliament

The Commission noted that the submissions received in response to the Issues Paper had been fairly evenly divided on the issue of whether it should be necessary for an applicant to be nominated by a member of Parliament.¹⁶⁰²

Many respondents were of the view that the requirement served no purpose¹⁶⁰³ and was neither necessary nor desirable.¹⁶⁰⁴ Several respondents commented that applicants are rarely known to their local member.¹⁶⁰⁵ Two respondents, in particular, were quite critical of the existing nomination requirements. One of these respondents commented:¹⁶⁰⁶

The system of appointment through local members of Parliament has, in my opinion, led to a situation where many current J's.P. see their title as a reward for community service (often of a Political nature) rather than a necessary service for the community. Some regard it as a 'mini honours list'.

The other respondent made the following criticism:¹⁶⁰⁷

This has always been a contentious issue with JP's. Even in my own case, when I originally sought appointment as a JP in 1980-81, for the next few years I was constantly inundated with invitations from my local member's campaign group to attend fund-raising events - not exactly ethical practice!

Since it should be neither a parliamentary nor police issue, it would be far more reasonable to seek application directly through the Department of Justice, in the

¹⁶⁰¹ Id at 266. See, however, the discussion at pp 315-316 of this Report in relation to the convictions that should disqualify a person from appointment as a justice of the peace or as a commissioner for declarations.

¹⁶⁰² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 230.

¹⁶⁰³ Submissions 5 (IP), 7 (IP), 9 (IP), 33 (IP), 36 (IP), 39 (IP), 41 (IP), 42 (IP), 43 (IP), 47 (IP), 51 (IP), 54 (IP), 87 (IP), 92 (IP), 95 (IP).

¹⁶⁰⁴ Submissions 1A (IP), 10 (IP), 11 (IP), 19 (IP), 20 (IP), 22 (IP), 30 (IP), 33 (IP), 34 (IP), 38 (IP), 39 (IP), 41 (IP), 42 (IP), 48 (IP), 50 (IP), 53 (IP), 65 (IP), 67 (IP), 69 (IP), 70 (IP), 88 (IP), 91 (IP), 94 (IP), 96 (IP), 103 (IP), 120 (IP).

¹⁶⁰⁵ Submissions 7 (IP), 10 (IP), 20 (IP), 30 (IP), 39 (IP), 45 (IP), 47 (IP), 51 (IP).

¹⁶⁰⁶ Submission 43 (IP).

¹⁶⁰⁷ Submission 91 (IP).

same way as real estate and salesman's licencing is handled through Consumer Affairs. This eliminates completely any suggestion of influence or bias.

On the other hand, a large number of respondents to the Issues Paper thought that the requirement was desirable.¹⁶⁰⁸ Some of these were of the view that the requirement gave the member the opportunity to assess the character of the person making the application.¹⁶⁰⁹ Another was of the view that a member of Parliament would have access to the needs of his or her electorate.¹⁶¹⁰ Another respondent thought that the requirement did no harm:¹⁶¹¹

A little formality and traditional manners don't hurt. Many new Justices of the Peace would see it as an honour to get the handshake of a Member of Parliament. After all, it is all volunteer work we do!

In the Discussion Paper, the Commission observed that, in many cases, an applicant would not be known to the member of Parliament whose nomination was required. In those circumstances, the nomination could not serve as any assurance of the character of the applicant. Moreover, the Commission stated that it did not believe that an applicant should have to be known by a member of Parliament in order to be appointed. In the Commission's view, any purpose that could be served by the nomination requirement is better served by the present requirements that an applicant must provide reports by referees who have known him or her for at least five years, and that the registrar must make inquiries to ascertain whether the applicant is a fit and proper person.¹⁶¹²

For these reasons, the Commission's preliminary recommendation was that the present requirement that an applicant must be nominated by his or her member of State Parliament or by a member of any Parliament in Australia should be abolished.¹⁶¹³

B. General manager of a financial institution or chief executive of a government department

¹⁶⁰⁸ Submissions 3 (IP), 6 (IP), 8 (IP), 16 (IP), 21 (IP), 27 (IP), 28 (IP), 31 (IP), 35 (IP), 40 (IP), 44 (IP), 45 (IP), 49 (IP), 61 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 93 (IP), 97 (IP), 105 (IP).

¹⁶⁰⁹ Submissions 6 (IP), 62 (IP), 63 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP).

¹⁶¹⁰ Submission 21 (IP).

¹⁶¹¹ Submission 28 (IP).

¹⁶¹² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 232-233.

¹⁶¹³ *Id* at 266.

As mentioned above, where a person is seeking appointment to carry out duties in a financial institution or in a government department, the person must be nominated by either the general manager of the institution or the chief executive of the government department concerned.¹⁶¹⁴ In the Discussion Paper, the Commission expressed a doubt as to whether, in most cases, the person whose nomination was required would in fact know the applicant personally.¹⁶¹⁵ The Commission therefore recommended that the alternative nomination requirement should also be abolished.¹⁶¹⁶

(iii) Inquiries as to fitness

The Commission expressed the view that, given the nature of the duties that may be undertaken by justices of the peace and commissioners for declarations, it is important to ensure, as far as possible, that applicants are fit and proper people.¹⁶¹⁷ Consequently, the Commission's preliminary recommendation was that the registrar should continue to be required to make inquiries to ascertain whether an applicant is a fit and proper person.¹⁶¹⁸

(iv) Pre-appointment interview

The Commission noted that several respondents to the Issues Paper suggested that an applicant for appointment as a justice of the peace or as a commissioner for declarations should be interviewed prior to appointment.¹⁶¹⁹ It was suggested that this would provide an opportunity to assess the applicant's "skills, understanding and commitment".¹⁶²⁰

To the extent that a pre-appointment interview is intended to provide an opportunity to assess an applicant's skills and understanding of the role, the Commission considered that that purpose was better served by requiring an applicant to undergo a training course and pass an examination. To the extent that it is intended to provide an opportunity to assess an applicant's character, the Commission considered that that purpose was better served by the present

¹⁶¹⁴ See pp 284-285 of this Report.

¹⁶¹⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 233.

¹⁶¹⁶ Id at 266.

¹⁶¹⁷ Id at 233.

¹⁶¹⁸ Id at 266.

¹⁶¹⁹ Submissions 8 (IP), 38 (IP), 42 (IP), 70 (IP), 88 (IP), 90 (IP).

¹⁶²⁰ Submission 38 (IP).

requirements that an applicant must provide referee reports, and that the registrar is to make inquiries to ascertain whether the applicant is a fit and proper person.¹⁶²¹

In the Commission's view, the perceived advantages of a requirement that applicants be interviewed prior to appointment would be outweighed by the administrative burden that would result from such a requirement. For these reasons, the Commission did not endorse that suggestion.¹⁶²²

(f) Submissions

(i) Disclosure of convictions

Seventeen submissions received by the Commission in response to the Discussion Paper addressed the Commission's preliminary recommendation that applicants seeking appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations should continue to be required to disclose their convictions for any offences. All of these respondents agreed with the Commission's preliminary recommendation.¹⁶²³

(ii) Nomination requirements

Nineteen submissions addressed the Commission's preliminary recommendation that the present requirement that an applicant must be nominated by his or her member of State Parliament, by a member of any Parliament in Australia, or - where an applicant seeks appointment to carry out duties in a financial institution or government department - by the general manager of the institution or chief executive of the government department concerned, should be abolished.

Sixteen of the respondents agreed with the Commission's preliminary recommendation.¹⁶²⁴ One respondent commented:¹⁶²⁵

I submit that being nominated by a Member of Parliament is a form of "rubber-stamping".

¹⁶²¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 233.

¹⁶²² Id at 234.

¹⁶²³ Submissions 6, 7, 8, 9, 14, 21, 23, 24, 26, 33, 34, 40, 44, 45, 47, 51, 59.

¹⁶²⁴ Submissions 6, 7, 8, 9, 14, 21, 23, 25, 26, 33, 34, 40, 44, 47, 51, 59.

¹⁶²⁵ Submission 14.

When I applied to be a Justice of the Peace I wrote to the then current Member who subsequently nominated me.

I presumed some enquiries would have been made, by the Member, as to my character etc, however I at no time have met with or spoken to that Member.

Another respondent, although agreeing that it was no longer a useful requirement to have a member of Parliament nominate an applicant, suggested that, if an applicant was seeking appointment for a work-related purpose, there should be a statement to this effect from the applicant's employer.¹⁶²⁶

Three submissions disagreed with the Commission's preliminary recommendation.¹⁶²⁷ One of these respondents suggested the following reasons for retaining the present nomination requirements:¹⁶²⁸

The MP has access to the needs of his/her electorate in relation to JPs and C. Decs. Also a MP should act in a responsible way when considering the proposed nomination. If for only these reasons it may be desirable for a MP to be empowered to continue to perform this task.

Another respondent who disagreed with the Commission's preliminary recommendation suggested that, by requiring a member of Parliament to endorse an application, the member of Parliament would be aware of the applicant.¹⁶²⁹

(iii) Inquiries as to fitness

Sixteen submissions addressed the Commission's preliminary recommendation that the registrar should continue to be required to make inquiries to ascertain whether an applicant is a fit and proper person. All of these respondents agreed with the Commission's preliminary recommendation.¹⁶³⁰

(iv) Pre-appointment interview

Although the Commission rejected the suggestion made by several respondents to the Issues Paper that an applicant should be required to undergo a pre-appointment interview and, consequently, did not make a preliminary

¹⁶²⁶ Submission 21.

¹⁶²⁷ Submissions 24, 29, 45.

¹⁶²⁸ Submission 24.

¹⁶²⁹ Submission 29.

¹⁶³⁰ Submissions 6, 7, 8, 9, 14, 21, 23, 24, 26, 33, 40, 44, 45, 47, 51, 59.

recommendation about that issue,¹⁶³¹ one respondent to the Discussion Paper suggested that “a personal interview, with probing questions, should be part of the assessment process”.¹⁶³²

(g) The Commission’s view

(i) Disclosure of convictions

The Commission’s view on this issue remains unchanged. An applicant seeking appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations should continue to be required to disclose his or her convictions for any offences.¹⁶³³

(ii) Nomination requirements

In the Commission’s view, the present nomination requirements do not operate as any assurance of the character of the applicant or of his or her suitability for office. As the Commission observed earlier, in many cases the person whose nomination is required will not even know the applicant.¹⁶³⁴ In those circumstances, it is meaningless to require the person to state that the applicant is a fit and proper person, or that he or she is unaware of any reason to suggest that the applicant is not a fit and proper person, to be appointed.¹⁶³⁵

Consequently, the Commission remains of the view that the present nomination requirements should be abolished. It should not be necessary for an applicant to be nominated by his or her member of State Parliament, by a member of any Parliament in Australia or - where an applicant seeks appointment to carry out duties in a financial institution or government department - by the general manager of the institution or chief executive of the government department concerned.

(iii) Inquiries as to fitness

The Commission’s view on this issue remains unchanged. It is a requirement

¹⁶³¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 233-234.

¹⁶³² Submission 25.

¹⁶³³ See, however, the Commission’s recommendation at p 351 of this Report in relation to the Minister’s discretion to exempt an applicant from a disqualification that relates to a criminal conviction (Recommendation 12.9).

¹⁶³⁴ See p 287 of this Report.

¹⁶³⁵ See the discussion of the present nomination requirements at pp 284-285 of this Report.

for appointment that the Governor in Council considers an applicant to be a fit and proper person.¹⁶³⁶ The Commission is therefore of the view that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should continue to require the registrar to make inquiries to ascertain whether an applicant conforms to that requirement.

(iv) Pre-appointment interview

The Commission remains of the view that the perceived advantages of a requirement that an applicant must be interviewed before being appointed would be outweighed by the administrative burden that would result from the imposition of such a requirement. At present, an applicant is required to provide referee reports. In addition, the registrar is required to make inquiries in relation to the applicant's fitness for appointment. Further, the Commission has recommended more stringent requirements in terms of the initial training that must be undertaken by justices of the peace and by commissioners for declarations in order to qualify for appointment.¹⁶³⁷ In the Commission's view, these requirements provide a sufficient safeguard that an applicant is a fit and proper person to be appointed, without imposing the additional requirement of a pre-appointment interview.

3. QUALIFICATIONS FOR OFFICE

(a) Existing legislation

A person is not qualified to be appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) as a justice of the peace or as a commissioner for declarations unless:¹⁶³⁸

- (a) the Governor in Council considers the person to be fit and proper; and
- (b) the person is of or above the age of 18 years; and
- (c) if the Minister has approved a training course that the person is required to complete before being so appointed - the person has completed the course.¹⁶³⁹

¹⁶³⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1)(a). See p 292 of this Report.

¹⁶³⁷ See p 350 of this Report (Recommendation 12.5).

¹⁶³⁸ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1).

¹⁶³⁹ The term "training course" is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in the following terms:

"training course" includes -

[note added]

The last of these qualifications does not apply to the appointment of a lawyer as a justice of the peace or as a commissioner for declarations.¹⁶⁴⁰

In practice, the general requirements for training are:¹⁶⁴¹

- commissioner for declarations - no compulsory course or examination, although training is available;
- justice of the peace (qualified) - applicants are required to pass an examination. Training is strongly recommended, but is not compulsory;
- justice of the peace (magistrates court) - applicants are required to undertake training and pass an examination.

In addition to satisfying the requirements in relation to age and training, a person must be an Australian citizen to qualify for appointment.¹⁶⁴² However, this qualification does not apply to an old system justice of the peace¹⁶⁴³ who holds office as a result of the transitional provisions contained in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹⁶⁴⁴

(b) Discussion Paper

- (a) a training course with or without an examination; or
- (b) an examination only.

Further, s 6 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) provides, in part:

Training course qualification

- (1) This section applies if the Minister has approved a training course that a person is required to complete before being appointed to office as a justice of the peace or as a commissioner for declarations.
- (2) If 1 or more examinations are set for the training course, the person is taken to have completed the training course when the person has successfully completed the final examination. ...

¹⁶⁴⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2).

¹⁶⁴¹ Department of Justice and Attorney-General (Qld), *Justice Papers* (No 4, 1995) at 2.

¹⁶⁴² *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(1).

¹⁶⁴³ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

¹⁶⁴⁴ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(2). See pp 16-18 of this Report for a discussion of the transitional provisions of the Act.

(i) Character

The Commission expressed the view that the present requirement that the Governor in Council must consider a person to be fit and proper is a fundamental qualification for appointment.¹⁶⁴⁵ Accordingly, the Commission recommended, as a qualification for appointment, that a person should be considered by the Governor in Council to be a fit and proper person.¹⁶⁴⁶

(ii) Age**A. Minimum age**

Given that the age of majority in Queensland is eighteen,¹⁶⁴⁷ the Commission considered that to be the appropriate minimum age for appointment as a justice of the peace or as a commissioner for declarations. The Commission recognised that there may be some people of that age who are not as mature as some older people. However, the Commission did not consider that there was a particular age at which a person's maturity could ever be guaranteed. For that reason, the Commission considered that it would be discriminatory to set the minimum age higher than eighteen, as that would exclude from appointment a class of adults who might be quite suitable for the role.¹⁶⁴⁸

The Commission expressed the view that the best means of ensuring that a person appointed as a justice of the peace or as a commissioner for declarations has the necessary skills is to enhance the present requirements for training.¹⁶⁴⁹ The Commission therefore recommended, as a qualification for appointment, that a person should be of or above the age of eighteen.¹⁶⁵⁰

B. Maximum age

Generally, the Commission considered that there should be no maximum age limit for justices of the peace or commissioners for declarations. The fact that a justice of the peace or a commissioner for declarations is over a certain age

¹⁶⁴⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 240.

¹⁶⁴⁶ *Id* at 266-267.

¹⁶⁴⁷ *Law Reform Act 1995* (Qld) s 17.

¹⁶⁴⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 240.

¹⁶⁴⁹ *Ibid*. See pp 305-306 of this Report in relation to training.

¹⁶⁵⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 266-267.

does not mean that the person is not capable of performing the duties of office.¹⁶⁵¹

However, the Commission was conscious of the fact that, in Queensland, magistrates cease to hold office when they reach 65 years of age¹⁶⁵² and Supreme Court judges and District Court judges must retire when they reach 70 years of age.¹⁶⁵³

In the Commission's view, this raised the question of whether, on reaching a particular age, a person should be ineligible to be appointed to perform bench duties or, if the person already holds office, should be ineligible to continue to perform bench duties.¹⁶⁵⁴ The Commission observed that, in Tasmania, although there is no age above which a person may not be appointed as a justice of the peace,¹⁶⁵⁵ a justice of the peace who has attained the age of 70 years must not sit in a court of summary jurisdiction or do any act as an examining justice in respect of a person charged with an indictable offence.¹⁶⁵⁶

The Commission did not decide whether, on reaching a particular age, a justice of the peace should no longer be able to perform bench duties, but instead sought submissions on that issue.¹⁶⁵⁷

(iii) Citizenship

The Commission agreed with the present requirement that a person should not be eligible to be appointed as a justice of the peace or as a commissioner for declarations unless the person is an Australian citizen.¹⁶⁵⁸

(iv) Training requirements

¹⁶⁵¹ Id at 241.

¹⁶⁵² *Stipendiary Magistrates Act 1991* (Qld) s 14(d).

¹⁶⁵³ *Supreme Court of Queensland Act 1991* (Qld) s 23; *District Court Act 1967* (Qld) s 14.

¹⁶⁵⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 241.

¹⁶⁵⁵ A person may not, however, be appointed as a commissioner for declarations if the person has attained the age of 70 years: *Evidence Act 1910* (Tas) s 131A(3). In Victoria, a bail justice ceases to hold office when he or she attains the age of 70 years: *Magistrates' Courts Act 1989* (Vic) s 123(a).

¹⁶⁵⁶ *Justices Act 1959* (Tas) s 7(1).

¹⁶⁵⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 241, 269.

¹⁶⁵⁸ Id at 243. The Commission did not make a preliminary recommendation about this issue.

A. Justice of the peace (magistrates court) and justice of the peace (qualified)

The Commission observed that, although an applicant for appointment as a justice of the peace (magistrates court) is presently required to attend a compulsory training course and pass an examination, an applicant for appointment as a justice of the peace (qualified) is required only to pass an examination. Having regard to the significant powers that may be exercised by both these categories of justices of the peace, the Commission's preliminary recommendation was that, in order to be eligible for appointment to either category, an applicant must attend a mandatory training course and pass an examination.¹⁶⁵⁹

The Commission noted that lawyers¹⁶⁶⁰ are presently exempt from the training requirements that apply to other applicants.¹⁶⁶¹ Although the Commission considered that the requirements for admission as a barrister or as a solicitor should be sufficient to ensure that a lawyer is capable of carrying out the duties of a justice of the peace, the Commission expressed the view that, as a precaution, lawyers should be required to pass the same examination as other applicants in order to be appointed as a justice of the peace (magistrates court) or as a justice of the peace (qualified). However, the Commission did not consider that a lawyer should be required to attend the mandatory training that was recommended for other applicants to either of these offices.¹⁶⁶² The Commission's preliminary recommendation was that, in order to be eligible for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified), an applicant who is a lawyer must pass an examination.¹⁶⁶³

B. Commissioner for declarations

The Commission noted that there is presently no requirement that a person must attend a course or pass an examination in order to be eligible for appointment as a commissioner for declarations. The Commission expressed the view that, although the role of a commissioner for declarations is not as extensive as that of a justice of the peace (magistrates court) or a justice of the peace (qualified),

¹⁶⁵⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 241-242, 266-267.

¹⁶⁶⁰ See the definition of "lawyer" at note 105 of this Report.

¹⁶⁶¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2).

¹⁶⁶² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 242.

¹⁶⁶³ *Id* at 267.

it is still an important one. In particular, the exercise by a commissioner for declarations of the power to witness an enduring power of attorney can have significant consequences. The Commission therefore considered it important that a commissioner for declarations fully understands his or her role in that regard.¹⁶⁶⁴

The Commission expressed the view that appointment of a person as a commissioner for declarations should not be dependent simply on the person's wish to be appointed. In the Commission's view, a filtering mechanism is required to ensure that a person appointed to this office is capable of performing the role properly.¹⁶⁶⁵ Consequently, the Commission's preliminary recommendation was that, in order to be eligible for appointment as a commissioner for declarations, an applicant must pass an examination.¹⁶⁶⁶

The Commission noted that lawyers are already authorised by legislation to witness affidavits and statutory declarations.¹⁶⁶⁷ Accordingly, the Commission expressed the view that a lawyer should not be required to pass an examination in order to qualify for appointment as a commissioner for declarations.¹⁶⁶⁸

C. Application of the proposed training requirements

The Commission expressed the view that the training requirements outlined above for justices of the peace (qualified) and commissioners for declarations should apply only to new appointments to those offices.¹⁶⁶⁹

(c) Submissions

(i) General requirements for appointment

Seventeen submissions addressed the Commission's preliminary recommendation that, in order to qualify for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations, a person should:

¹⁶⁶⁴ Id at 242.

¹⁶⁶⁵ Ibid.

¹⁶⁶⁶ Id at 267.

¹⁶⁶⁷ Id at 242. See pp 56-57 of this Report.

¹⁶⁶⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 242.

¹⁶⁶⁹ Id at 243.

- be considered by the Governor in Council to be a fit and proper person;
- be of or above the age of eighteen; and
- have satisfied the relevant training requirements.

Fourteen respondents agreed with all aspects of the Commission's preliminary recommendation.¹⁶⁷⁰ A further three respondents agreed with the Commission's preliminary recommendation except insofar as the Commission proposed that the minimum age requirement should be eighteen years of age.¹⁶⁷¹

(ii) Age

A. Minimum age

As noted above, fourteen respondents agreed with the Commission's preliminary recommendation about eligibility for appointment, including that part of the preliminary recommendation relating to the age of the applicant.¹⁶⁷²

A further submission, although agreeing with the preliminary recommendation in relation to age, disagreed with the reasons expressed by the Commission in the Discussion Paper for retaining the minimum age requirement at eighteen years.¹⁶⁷³ This respondent, who was appointed as a justice of the peace (qualified) at the age of eighteen, commented:

I was appointed as a Justice of the Peace (Qualified) at 18 years of age, and I believe I have fulfilled this role quite adequately, having studied legal principles at a tertiary level and being quite aware of the principles of justice at this age.

If the minimum age of appointment is going to be kept at 18 years, it should be done with the acceptance that people of this age who have satisfied the other qualifications are competent, and not just because 18 years is the age of majority in Queensland.

Five respondents disagreed with the Commission's preliminary recommendation that a person should be of or above the age of eighteen in order to be eligible for appointment.¹⁶⁷⁴ Two respondents were of the view that a person should be eligible for appointment as a commissioner for declarations at eighteen, but that a higher minimum age would be more appropriate for appointment as a justice

¹⁶⁷⁰ Submissions 6, 7, 8, 9, 23, 24, 26, 33, 34, 44, 45, 47, 51, 59.

¹⁶⁷¹ Submissions 14, 21, 40.

¹⁶⁷² See note 1670 of this Report.

¹⁶⁷³ Submission 28.

¹⁶⁷⁴ Submissions 3, 14, 21, 40, 49.

of the peace.¹⁶⁷⁵ One of these respondents commented:¹⁶⁷⁶

At eighteen, I know that I was ready to sign papers - but being a third party witness for juveniles is a different matter. I believe that there should be a different minimum age requirement for this.

The other respondent expressed a similar view:¹⁶⁷⁷

I submit that eighteen years is too young to be a Justice of the Peace. I feel that twenty one years is a level where maturity really commences, and the responsibilities of a Justice of the Peace are too demanding prior to that age.

Perhaps between the ages of eighteen to twenty one a person could be appointed as a Commissioner for Declarations, and gain experience in that area prior to going on to be a Justice of the Peace.

Another respondent suggested 21 years of age as the minimum requirement,¹⁶⁷⁸ while two others suggested 25 years of age.¹⁶⁷⁹ One of the respondents who advocated a minimum age requirement of 25 years commented:¹⁶⁸⁰

Maturity and life experience are necessary attributes for the role of justice of the peace. These cannot be measured but they require time to develop. We know this is a contentious issue but feel strongly about this decision.

B. Maximum age

In the Discussion Paper, the Commission sought submissions on the following questions:¹⁶⁸¹

- Should a maximum age limit be imposed beyond which a justice of the peace may not exercise bench duties?
- If so, what should the maximum age be?

Twenty-five submissions addressed these questions. Sixteen submissions

¹⁶⁷⁵ Submissions 14, 49.

¹⁶⁷⁶ Submission 49.

¹⁶⁷⁷ Submission 14.

¹⁶⁷⁸ Submission 21.

¹⁶⁷⁹ Submissions 3, 40.

¹⁶⁸⁰ Submission 40.

¹⁶⁸¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 269.

supported a maximum age limit,¹⁶⁸² although several of these submissions expressed their support in terms of a retirement age for justices of the peace generally, rather than specifically in terms of a maximum age for the exercise of bench duties.¹⁶⁸³

Six respondents expressed the view that justices of the peace should not be able to exercise bench duties after attaining the age of 65 years, that being the retirement age for magistrates in Queensland.¹⁶⁸⁴

A further respondent suggested that a retirement age of 65 years should apply to all justices of the peace (magistrates court).¹⁶⁸⁵ If that suggestion were adopted, a justice of the peace (magistrates court) would be precluded, not only from performing bench duties after attaining that age, but also from performing other duties that do not fall within the ambit of bench duties, for example, extending a detention period in relation to a suspect.¹⁶⁸⁶

Another respondent thought it was arguable that a justice of the peace should not be able to exercise bench duties after attaining the age of 65, but was concerned that the imposition of such an age limit might mean a loss of resources in terms of retired judges and magistrates:¹⁶⁸⁷

If the mandatory age for retirement of a magistrate is 65 years and that of a Judge 70 years perhaps it could be argued that a JP should not exercise Bench duties after attaining the age of 65 years. However if this age limit were to be imposed surely a valuable resource in retired Magistrates and Judges, who wish to continue in the role of JP (Mag. Ct), would be lost. I believe that the assessments of those in a position to observe the capabilities of the JP (Mag. Ct) could be relied upon to determine the 'use by date' of the Justice.

Five respondents expressed the view that justices of the peace should not be able to exercise bench duties after attaining the age of 70 years.¹⁶⁸⁸ A further respondent suggested that 70 should be the retiring age for all justices of the peace (but not commissioners for declarations),¹⁶⁸⁹ while the respondent who suggested a retirement age of 65 for justices of the peace (magistrates court)

¹⁶⁸² Submissions 6, 8, 11, 14, 18, 21, 23, 24, 26, 30, 33, 41, 44, 47, 51, 58.

¹⁶⁸³ Submissions 14, 21, 23.

¹⁶⁸⁴ Submissions 6, 11, 24, 30, 44, 47.

¹⁶⁸⁵ Submission 23.

¹⁶⁸⁶ See Chapter 8 of this Report.

¹⁶⁸⁷ Submission 48.

¹⁶⁸⁸ Submissions 8, 18, 33, 41, 58.

¹⁶⁸⁹ Submission 14.

expressed the view that a retirement age of 70 should apply to justices of the peace (qualified) and commissioners for declarations.¹⁶⁹⁰

One respondent expressed the view that the maximum age for performing bench duties should be “the same as the normal retirement age”.¹⁶⁹¹

Two respondents suggested a higher age - “depending on health, could be around 75 years”¹⁶⁹² and “75 subject to a medical clearance for mental and physical condition”.¹⁶⁹³

Eight respondents were opposed to the imposition of a maximum age for the exercise of bench duties.¹⁶⁹⁴ One respondent commented:¹⁶⁹⁵

I hold a very strong view on this. There should not be a maximum age beyond which a justice of the peace may not exercise bench duties. In fact, I am very surprised to see this raised as an issue for consideration. It is my view that if a citizen is considered suitable to be a justice, then as a justice they should be authorised to perform all the roles of a justice. I would not be at all concerned to appear before two seventy year old justices; I would not like to appear before two twenty-one year old justices.

Another respondent expressed the view that age should not have a bearing on the performance of a justice of the peace.¹⁶⁹⁶

Age should have no bearing on performance. A person in their 80s may be better equipped to deal with his or her duties than, say, a younger person - depending on their health and mind, etc.

(iii) Training requirements

A. Justice of the peace (magistrates court) and justice of the peace (qualified)

Nineteen submissions addressed the Commission’s preliminary recommendation that, in order to qualify for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified), an applicant should have to attend

¹⁶⁹⁰ Submission 23.

¹⁶⁹¹ Submission 21.

¹⁶⁹² Submission 26.

¹⁶⁹³ Submission 51.

¹⁶⁹⁴ Submissions 9, 10, 25, 29, 31, 40, 45, 49.

¹⁶⁹⁵ Submission 25.

¹⁶⁹⁶ Submission 31.

a mandatory training course and pass an examination. All of these respondents agreed with the Commission's preliminary recommendation.¹⁶⁹⁷

Nineteen submissions addressed the Commission's preliminary recommendation that, in order to qualify for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified), an applicant who is a lawyer should have to pass an examination. Eighteen of these respondents agreed with the Commission's preliminary recommendation.¹⁶⁹⁸

A further respondent agreed that a lawyer should have to pass an examination in order to qualify for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified), but expressed the view that a lawyer should also have to attend a training course:¹⁶⁹⁹

I also believe that a lawyer who wishes to be appointed as a justice of the peace (qualified) or justice of the peace (magistrates court) should have to attend a training course, as well as pass an examination. Many lawyers would not know how to deal with an application for a search warrant because they have not completed a justices of the peace course.

B. Commissioner for declarations

Twenty submissions addressed the Commission's preliminary recommendation that, in order to qualify for appointment as a commissioner for declarations, an applicant should have to pass an examination. Sixteen of these respondents agreed with the Commission's preliminary recommendation.¹⁷⁰⁰

A further four respondents agreed that a person seeking appointment as a commissioner for declarations should have to pass an examination in order to qualify for appointment, but expressed the view that, in addition, the person should also have to attend a training course.¹⁷⁰¹

One respondent commented on, and agreed with, the preliminary view expressed by the Commission that, in order to qualify for appointment as a commissioner for declarations, an applicant who is a lawyer should not have to pass an examination.¹⁷⁰²

¹⁶⁹⁷ Submissions 4, 6, 7, 8, 9, 14, 21, 23, 24, 26, 33, 34, 40, 44, 45, 47, 48, 51, 59.

¹⁶⁹⁸ Submissions 6, 7, 8, 9, 14, 21, 23, 24, 26, 33, 34, 40, 44, 45, 47, 48, 51, 59.

¹⁶⁹⁹ Submission 56.

¹⁷⁰⁰ Submissions 6, 7, 8, 9, 14, 20, 21, 24, 26, 33, 34, 40, 45, 48, 51, 59.

¹⁷⁰¹ Submissions 23, 44, 47, 56.

¹⁷⁰² Submission 48.

C. Application of the new training requirements

One respondent commented on, and agreed with, the preliminary view expressed by the Commission that the proposed training requirements should apply only to new appointments to the offices of justice of the peace and commissioner for declarations.¹⁷⁰³

D. General comments

A number of submissions commented on the nature of the training that is currently available. Several respondents were critical of the current open-book examinations.¹⁷⁰⁴ One respondent made the following comment about the present examinations:¹⁷⁰⁵

The present system of open book examinations should change to one of setting questions which can be answered in your own phrasing with references to passages within the manuals but not necessarily parrot fashion from the manual & not have to sit for three hours and just transcribe out of the manual word for word. I do not believe that this method of testing goes any way to reinforce the role that is intended to be undertaken.

Another respondent expressed a similar view:¹⁷⁰⁶

The present three hour open book exam, in my opinion, is totally inadequate. To minimize the importance of knowledge by only having this exam to gain credentials to become a Justice of the Peace (Qualified) is an insult to the title.

To put it bluntly, any fool can copy from a book. ...

This "exam" for intending Justices of the Peace (Qualified) needs to be looked at urgently. [original emphasis]

Two other respondents also suggested that the current training course and examination were too basic and needed to be made more rigorous.¹⁷⁰⁷

On the other hand, two respondents defended the current open-book

¹⁷⁰³ Ibid.

¹⁷⁰⁴ Submissions 2, 12, 25, 59.

¹⁷⁰⁵ Submission 12.

¹⁷⁰⁶ Submission 59.

¹⁷⁰⁷ Submissions 4, 11.

examination.¹⁷⁰⁸ One of these respondents commented:¹⁷⁰⁹

I feel that the “open book” type exam is adequate and reasonable, as one still has to have a good understanding of the material and “know where to look” when answering exam questions.

(d) The Commission’s view

(i) General requirements

The Commission remains of the view that, in order to qualify for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations, a person should:¹⁷¹⁰

- be considered by the Governor in Council to be a fit and proper person;
- be an Australian citizen; and
- have satisfied the relevant training requirements.

These criteria presently apply to the appointment of a person as a justice of the peace or as a commissioner for declarations.

(ii) Age

A. Minimum age

In the Commission’s view, the minimum age requirement for appointment as a justice of the peace or as a commissioner for declarations should remain at eighteen years of age. The Commission notes that several submissions suggested that the minimum age requirement should be raised. However, in the Commission’s view, an adult who demonstrates his or her capacity to fulfil the requirements of office by undertaking the training recommended by the Commission or passing the relevant examination should not be excluded from appointment on the basis of age.

B. Maximum age

Generally, the Commission does not consider that, upon attaining a certain age, a person should be ineligible to be appointed to, or to continue in, office as a

¹⁷⁰⁸ Submissions 8, 14.

¹⁷⁰⁹ Submission 14.

¹⁷¹⁰ See the discussion of the minimum age requirement at p 304 of this Report.

justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations.

However, in the light of the fact that compulsory retirement ages apply to persons holding office in Queensland as Supreme Court judges, District Court judges and magistrates,¹⁷¹¹ the Commission has decided that there should be a maximum age beyond which a justice of the peace should not be able to constitute a court for any purpose. In the Commission's view, this limitation should apply regardless of whether a person holds office as an appointed justice of the peace (magistrates court)¹⁷¹² or as an *ex officio* justice of the peace.¹⁷¹³

The Commission has given careful consideration to the question of what the maximum age limit for the exercise of bench duties should be. Although a magistrate ceases to hold office upon reaching 65 years of age,¹⁷¹⁴ the Commission considers that 70 years of age is a more appropriate maximum age limit for the exercise of bench duties by justices of the peace. In the Commission's view, a maximum age limit of 65 would exclude too many justices of the peace from exercising these duties. On the other hand, a maximum age of 70 years is in keeping with the compulsory retirement age for judges in Queensland,¹⁷¹⁵ and would also allow a retired magistrate to continue to constitute a court in his or her capacity as an *ex officio* justice of the peace for a period of five years after retirement.

A maximum age limit for the exercise of bench duties by a justice of the peace would not, of course, affect the other powers that may be exercised by a justice of the peace after attaining the age of 70 years.

(iii) Training requirements

A. Justice of the peace (magistrates court) and justice of the peace (qualified)

The Commission remains of the view that, given the significant powers that may

¹⁷¹¹ See p 294 of this Report.

¹⁷¹² In Chapter 10 of this Report, the Commission recommended that justices of the peace (magistrates court) should be the only category of appointed justices of the peace who should be able to constitute a court. See Recommendations 10.1 and 10.2 at p 270 of this Report.

¹⁷¹³ In particular, a person who has retired or resigned from office as a Supreme Court or District Court judge or as a magistrate is, without further appointment, a "justice of the peace": *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(1A). See the discussion of this provision at p 29 of this Report.

¹⁷¹⁴ *Stipendiary Magistrates Act 1991* (Qld) s 14(d).

¹⁷¹⁵ *Supreme Court of Queensland Act 1991* (Qld) s 23; *District Court Act 1967* (Qld) s 14.

be exercised by a justice of the peace (magistrates court) and a justice of the peace (qualified), a person should attend a mandatory training course and pass an examination in order to be eligible to be appointed to either of those offices.

As noted earlier, an applicant who is a lawyer is presently exempt from the training requirements that apply to other applicants.¹⁷¹⁶ In the Commission's view, an applicant who is a lawyer should, as a precaution, be required to pass an examination in order to be eligible to be appointed as a justice of the peace (magistrates court) or as a justice of the peace (qualified). However, in view of the educational and professional requirements that a lawyer must fulfil in order to be admitted as a barrister or as a solicitor, the Commission remains of the view that it should not be necessary for an applicant who is a lawyer to attend the mandatory training course that has been recommended as a prerequisite for other applicants.

B. Commissioner for declarations

At present, there is no requirement that a person must attend a course or pass an examination in order to be eligible to be appointed as a commissioner for declarations. The Commission remains of the view that a person should be required to pass an examination in order to be eligible to be appointed as a commissioner for declarations. The Commission notes that several respondents to the Discussion Paper expressed the view that it should also be mandatory for an applicant for appointment as a commissioner for declarations to attend a training course.¹⁷¹⁷ In the Commission's view, it is a sufficient safeguard for appointment as a commissioner for declarations if an applicant is required to pass an examination without imposing the further requirement of attendance at a mandatory training course.

However, a lawyer should not be required to sit an examination in order to qualify for appointment as a commissioner for declarations. As noted earlier, a lawyer is already authorised by legislation to witness affidavits and statutory declarations.¹⁷¹⁸

C. Application of the proposed training requirements

The training requirements recommended above should apply only to persons appointed to those offices after the implementation of the Commission's recommendations. The recommendations are not intended to affect a person who has already been appointed as a justice of the peace or as a commissioner

¹⁷¹⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2). See p 292 of this Report.

¹⁷¹⁷ See note 1701 of this Report.

¹⁷¹⁸ See pp 56-57 of this Report.

for declarations.¹⁷¹⁹

D. Nature of the proposed training

The Commission notes that a number of submissions commented on the training that is presently available for justices of the peace and on the nature of the examination that is presently set for applicants for the office of justice of the peace (qualified).

The Commission regards the recommendations outlined above in relation to the training requirements for appointment to be fundamental to its earlier recommendations in this Report that justices of the peace and commissioners for declarations should continue to exercise certain powers. However, the Commission does not propose, as part of this review, to undertake an examination or evaluation of the present level of training that is provided to people wishing to apply for appointment as justices of the peace. Consequently, the Commission does not propose to comment further on this issue.

4. DISQUALIFICATIONS FROM OFFICE

(a) Existing legislation¹⁷²⁰

Both the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) contain a number of grounds of disqualification from office. Some of these grounds disqualify a person from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations. Others grounds disqualify a person only from being appointed to office and do not, of themselves, disqualify a person from continuing in office, although they might call into question whether the person's appointment should be revoked.¹⁷²¹

(i) Bankruptcy

A person who is an undischarged bankrupt or a debtor taking advantage of the

¹⁷¹⁹ See, however, the discussion of a requirement for ongoing training and the Commission's recommendation at pp 335-340 and 353 of this Report (Recommendation 12.19).

¹⁷²⁰ The grounds of disqualification discussed below apply to an "appointed justice of the peace" and an "appointed commissioner for declarations". They do not apply to a person who is, by virtue of the office held by the person, a justice of the peace or a commissioner for declarations. See pp 28-31 of this Report.

¹⁷²¹ See s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is discussed at p 318 of this Report.

laws in force relating to bankrupt or insolvent debtors is disqualified from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations.¹⁷²²

(ii) Convictions for certain offences

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that a person who is convicted of either of the following types of offences is disqualified from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations:

- an indictable offence (whether on indictment or summarily);¹⁷²³ or
- an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).¹⁷²⁴

Additional grounds of disqualification from appointment are contained in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld). These grounds relate to convictions for offences generally and, more specifically, to convictions for certain offences under the *Transport Operations (Road Use Management) Act 1995* (Qld).¹⁷²⁵

Under sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld), a person who has been convicted of any of the following categories of offences, or who has been given the specified notice, is disqualified from being appointed to office as a justice of the peace or as a commissioner for declarations:

- more than two offences other than an offence under the *Transport Operations (Road Use Management) Act 1995* (Qld);¹⁷²⁶

¹⁷²² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(a). See the discussion of the terms “appointed justice of the peace” and “appointed commissioner for declarations” at p 28 of this Report.

¹⁷²³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(b).

¹⁷²⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(d). For example, it is an offence under Part 4 of the Act to seek any reward in connection with performing the functions of office: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35.

¹⁷²⁵ The term “offence” is defined in s 3 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld). It does not include an offence in relation to regulated parking under chapter 5, part 6 of the *Transport Operations (Road Use Management) Act 1995* (Qld). Prior to 1 December 1999, those offences were located in Part 6A of the *Traffic Act 1949* (Qld). See note 663 of this Report.

¹⁷²⁶ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(a).

- within five years before appointment - an offence other than an offence under the *Transport Operations (Road Use Management) Act 1995* (Qld);¹⁷²⁷
- within five years before appointment - an offence under sections 79 or 80 of the *Transport Operations (Road Use Management) Act 1995* (Qld);¹⁷²⁸ or
- within four years before appointment - more than two offences under the *Transport Operations (Road Use Management) Act 1995* (Qld);¹⁷²⁹ or
- within five years before appointment - receipt of a notice under section 10(3) of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁷³⁰

Whereas the ground of disqualification found in section 17(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) relates to a conviction for an indictable offence, the grounds of disqualification found in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) are not so restricted. Consequently, the relevant convictions for the purposes of the Regulation include convictions for simple offences and regulatory offences.

¹⁷²⁷ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(b).

¹⁷²⁸ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(a). These offences were previously located in the *Traffic Act 1949* (Qld) as ss 16 and 16A. See note 663 of this Report.

¹⁷²⁹ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(b). The Minister may exempt an applicant for appointment as a commissioner for declarations from this disqualification if the Minister considers that special circumstances exist: *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(4).

¹⁷³⁰ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(c). S 10(3) of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) provides:

If on consideration of an application by a person for appointment as a justice of the peace or as a commissioner for declarations, the registrar determines that the applicant has been convicted, for the purposes of subsection (1)(b), of more than 6 offences under the *Transport Operations (Road Use Management) Act 1995* (Qld) within 4 years before the determination, the registrar is to give notice to the applicant that the applicant is disqualified from appointment as a justice of the peace or as a commissioner for declarations for a period of 5 years after the notice is given.

The Minister may also exempt an applicant for appointment as a commissioner for declarations from the disqualification in s 10(1)(c) if the Minister considers that special circumstances exist: *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(4).

Further, unlike the grounds of disqualification prescribed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), the grounds of disqualification prescribed by the Regulation are expressed only to disqualify a person from being appointed as a justice of the peace or as a commissioner for declarations. Accordingly, if the relevant convictions occurred after a person had already been appointed, they would not prevent the person from continuing in office.¹⁷³¹

For example, one of the grounds of disqualification in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) consists of having been convicted of more than two offences other than offences under the *Transport Operations (Road Use Management) Act 1995* (Qld).¹⁷³² At present, if a person had convictions for two or more such offences, the person would not be eligible to be appointed as a justice of the peace or as a commissioner for declarations. However, if a person was convicted of offences of that kind after he or she was appointed, then provided that the convictions were not for indictable offences, the existence of the convictions would not disqualify the person from continuing in office.

(iii) Patient under the *Mental Health Act 1974* (Qld)

A person who is a patient within the meaning of the *Mental Health Act 1974* (Qld) is disqualified from being appointed to, or from continuing in office as, an appointed justice of the peace or as an appointed commissioner for declarations.¹⁷³³ This disqualification applies only during the period for which a person is a patient under that Act.

(b) Discussion Paper

(i) Bankruptcy

In the Discussion Paper, the Commission expressed the view that the present disqualification in section 17(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in relation to bankruptcy should be retained.¹⁷³⁴

¹⁷³¹ It is possible, however, that the occurrence of these grounds after a person had been appointed could be taken into account under s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which gives the Governor in Council the power to revoke the appointment of an appointed justice of the peace or an appointed commissioner for declarations for such reason as the Governor in Council thinks fit.

¹⁷³² *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(a).

¹⁷³³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(c).

¹⁷³⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 250.

(ii) Convictions for certain offences

The Commission noted that it generally favoured the retention of the grounds of disqualification set out in section 17(b) and (d) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁷³⁵

However, the Commission considered it to be anomalous that the convictions referred to in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) disqualify a person from being appointed to office and from continuing in office, whereas the convictions referred to in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) disqualify a person only from being appointed to office. The Commission expressed the view that, as a general proposition, the grounds that disqualify a person from being appointed to office and the grounds that disqualify a person from continuing in office should be as close as possible.¹⁷³⁶

The Commission also observed that several respondents to the Issues Paper thought that the existing grounds of disqualification in terms of convictions were too onerous¹⁷³⁷ and that some respondents were particularly concerned about the impact on indigenous people of the grounds of disqualification found in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁷³⁸ The Commission agreed with the view expressed in a number of those submissions to the effect that there should be a discretion in relation to the various convictions that presently disqualify a person from appointment.¹⁷³⁹

For example, the Department of Families, Youth and Community Care commented:¹⁷⁴⁰

In relation to the section relating to disqualifications from appointment to office ... , many Indigenous people who were convicted for street offences some time ago but are now respected persons in their community are excluded from holding the office of Justice of the Peace.

¹⁷³⁵ Ibid. These provisions are set out at pp 307-308 of this Report.

¹⁷³⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 251.

¹⁷³⁷ Id at 247.

¹⁷³⁸ Id at 248.

¹⁷³⁹ Id at 250.

¹⁷⁴⁰ Submission 111 (IP).

The Act itself only excludes people with indictable offences, yet the later regulations extend this to people with [more than] two simple offences and offences under the *Traffic Act 1949*.

The disqualification has the effect of excluding many respected persons on Aboriginal and Torres Strait Islander communities and reducing the size of the pool of local JPs for constituting courts in remote areas.

The Indigenous Advisory Council expressed a similar view:¹⁷⁴¹

The Act and Regulation currently provide that a person may be disqualified from such appointment if he or she has been convicted of one indictable offence, more than two offences of any kind, or any offence within the last five years. These provisions render ineligible many Indigenous people who have for years been exemplary citizens, because in their youth they obtained criminal records for relatively minor offences.

Although the Commission generally considered that appointments should be made of persons who would not be disqualified by the present provisions, it accepted that a person who, many years ago, was convicted of an indictable offence or of more than two simple offences could now be a respected member of his or her community. The Commission therefore expressed the view that it should be possible for the Minister to exempt an applicant for appointment as a justice of the peace or as a commissioner for declarations from any of the grounds of disqualification that relate to criminal convictions where the Minister considers that special circumstances exist.¹⁷⁴²

The Commission noted that, under section 10(4) of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld), the Minister already has a discretion to exempt an applicant for appointment as a commissioner for declarations from a disqualification mentioned in section 10(1)(b) or (c) of the Regulation.¹⁷⁴³

(iii) Patient under the *Mental Health Act 1974* (Qld)

The Commission expressed the view that the present disqualification in section 17(c) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in relation to being a patient within the meaning of the *Mental Health Act 1974* (Qld) should be retained.¹⁷⁴⁴

¹⁷⁴¹ Submission 112 (IP).

¹⁷⁴² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 250-251.

¹⁷⁴³ Id at note 1305.

¹⁷⁴⁴ Id at 251.

(iv) Grounds of disqualification in one instrument

The Commission considered that it is undesirable for grounds of disqualification from office to be contained in both the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and in the Regulation made under that Act. It expressed the view that all the grounds of disqualification should be located in the Act.¹⁷⁴⁵

(v) Preliminary recommendations

The Commission made the following preliminary recommendations in relation to the grounds of disqualification from office:¹⁷⁴⁶

- A person who:
 - (a) is an undischarged bankrupt or is taking advantage, as a debtor, of the laws in force for the time being relating to bankrupt or insolvent debtors;
 - (b) has been convicted of certain offences; or
 - (c) is a patient within the meaning of the *Mental Health Act 1974* (Qld);

should not be qualified to be appointed to, or continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.

- The Minister should be able to exempt an applicant for appointment as a justice of the peace or as a commissioner for declarations from any of the disqualifications that relate to criminal convictions where the Minister considers that special circumstances exist.
- The convictions that should constitute a ground of disqualification from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations should be:
 - (a) a conviction for an indictable offence (whether on indictment or summarily);
 - (b) a conviction for an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld);

¹⁷⁴⁵ Id at 252.

¹⁷⁴⁶ Id at 267-268.

- (c) a conviction for any of the offences presently set out in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁷⁴⁷
- All the grounds of disqualification should be contained in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

(c) Submissions

(i) General grounds of disqualification

Eighteen submissions addressed the Commission's preliminary recommendation that a person who:

- (a) is an undischarged bankrupt or is taking advantage, as a debtor, of the laws in force for the time being relating to bankrupt or insolvent debtors;
- (b) has been convicted of certain offences; or
- (c) is a patient within the meaning of the *Mental Health Act 1974* (Qld);

should not be qualified to be appointed to, or continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.

Seventeen respondents agreed with the Commission's preliminary recommendation.¹⁷⁴⁸ The respondent who opposed the preliminary recommendation expressed the view that a person who has been a bankrupt or a patient within the meaning of the *Mental Health Act 1974* (Qld), or has been convicted of certain offences, should be disqualified for life.¹⁷⁴⁹

(ii) Convictions for certain offences

Sixteen respondents addressed the Commission's preliminary recommendation in relation to the particular convictions that should constitute a ground of disqualification from being appointed to, or continuing in, office as an appointed

¹⁷⁴⁷ The Commission noted that, as most of the grounds of disqualification in ss 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) refer to convictions or events occurring within a specified period prior to appointment, some modification of those grounds would be required in order to render them relevant to convictions or events occurring during the currency of an appointment: Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at note 1362.

¹⁷⁴⁸ Submissions 6, 7, 8, 9, 14, 21, 23, 24, 26, 33, 34, 40, 44, 45, 47, 51, 59.

¹⁷⁴⁹ Submission 31.

justice of the peace or as an appointed commissioner for declarations. All of these respondents agreed with the Commission's preliminary recommendation.¹⁷⁵⁰

The submissions were divided on the Commission's further preliminary recommendation that the Minister should be able to exempt an applicant for appointment as a justice of the peace or as a commissioner for declarations from any of the disqualifications that relate to criminal convictions where the Minister considers that special circumstances exist.

Fourteen respondents agreed with the preliminary recommendation.¹⁷⁵¹ However, one submission, made by an association of justices of the peace, expressed the concern of its members at the prospect of the Minister being able to exempt an applicant in special circumstances.¹⁷⁵² Three other respondents also disagreed with the Commission's preliminary recommendation.¹⁷⁵³ One of these respondents commented:¹⁷⁵⁴

Personally, if a person has been convicted of a criminal offence then I cannot see any reason why they should become a JP.

(iii) Grounds of disqualification in one instrument

Sixteen respondents addressed the Commission's preliminary recommendation that all of the grounds of disqualification should be contained in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). All of these respondents agreed with the Commission's preliminary recommendation.¹⁷⁵⁵

(d) The Commission's view

(i) Bankruptcy

The Commission remains of the view that the ground of disqualification in section 17(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be retained. A person who is an undischarged bankrupt or is taking advantage, as a debtor, of the laws in force for the time being

¹⁷⁵⁰ Submissions 6, 7, 8, 9, 14, 23, 24, 26, 33, 34, 40, 44, 45, 47, 51, 59.

¹⁷⁵¹ Submissions 6, 7, 8, 9, 14, 24, 26, 33, 34, 40, 44, 45, 51, 59.

¹⁷⁵² Submission 47.

¹⁷⁵³ Submissions 21, 23, 31.

¹⁷⁵⁴ Submission 21.

¹⁷⁵⁵ Submissions 6, 7, 8, 9, 14, 23, 24, 26, 33, 34, 40, 44, 45, 47, 51, 59.

relating to bankrupt or insolvent debtors should not be qualified to be appointed to, or to continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.

The disqualification should apply, as it does at present, only while a person is an undischarged bankrupt or while the person is taking advantage of the laws relating to bankrupt or insolvent debtors.

(ii) **Convictions for certain offences**

The Commission generally favours the retention of the present grounds of disqualification in section 17(b) and (d) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).

However, in the Commission's view, the grounds that disqualify a person from being appointed to office and the grounds that disqualify a person from continuing in office should be as close as possible.¹⁷⁵⁶ Admittedly, some of the grounds of disqualification specified in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) relate to convictions or events occurring within a specified period prior to appointment, and could not simply be transposed, without modification, as grounds of disqualification after appointment. Nevertheless, the Commission considers that the distinction drawn between the effect of convictions occurring prior to appointment and those occurring after appointment is anomalous. Consequently, some modification of the grounds in the Regulation will be necessary in order to make them relevant to convictions or events occurring during the currency of an appointment.

The Commission has given careful consideration to the issue of whether the Minister should be able to exempt an applicant from any of the grounds of disqualification relating to convictions. The Commission envisages that, in the majority of cases, the persons being appointed as justices of the peace or as commissioners for declarations would be eligible to be appointed without needing to resort to such an exemption provision.

However, the Commission recognises that there are cases where an inflexible approach in relation to this issue could be productive of injustice. Several respondents to the Issues Paper referred to the situation of people in Aboriginal

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At present, the grounds of disqualification specified in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) only disqualify a person from being appointed as a justice of the peace or as a commissioner for declarations. They do not disqualify a person who has already been appointed from continuing in office. See the discussion of this issue at pp 307-309 of this Report.

and Torres Strait Islander communities who might now be exemplary citizens, despite having been convicted in their youth of relatively minor offences.¹⁷⁵⁷ It is also possible that the effect of the present grounds of disqualification could cause hardship to a person who sought appointment for a work-related reason. For example, one respondent to the Issues Paper advised that, a result of a conviction he incurred as a student, he is not eligible to be appointed as a justice of the peace or as a commissioner for declarations.¹⁷⁵⁸ He advised that he is currently employed in an area of the public sector that involves the issuing of penalty infringement notices. In the course of his work he is often requested to witness documents, but is unable to do so. This respondent also supported a discretion in relation to the effect of “old” convictions.

The Commission remains of the view that, in order to cater for these types of situations, the Minister should be able to exempt an applicant for appointment as a justice of the peace or as a commissioner for declarations from any of the grounds of disqualification that relate to criminal convictions if the Minister considers that special circumstances exist. The Commission does not believe, however, that it should be possible to exempt a person who currently holds office from the effect of a conviction that occurs while the person holds office. The exemption should be limited to grounds of disqualification that exist when a person applies to be appointed; it should not apply to grounds of disqualification that come into existence once a person holds office.

(iii) Patient under the *Mental Health Act 1974 (Qld)*

The Commission remains of the view that the ground of disqualification in section 17(c) of the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should be retained. A person who is a patient within the meaning of the *Mental Health Act 1974 (Qld)* should not be qualified to be appointed to, or to continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.

The disqualification should apply, as it does at present, only while a person is such a patient. The fact that a person might once have been such a patient should not disqualify a person from future appointment.

(iv) Grounds of disqualification in one instrument

The Commission remains of the view that the grounds that disqualify a person from being appointed to, or from continuing in, office should be located in the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*. They should not be divided, as they are at present, between that Act and the *Justices*

¹⁷⁵⁷ See pp 310-311 of this Report.

¹⁷⁵⁸ Submissions 26 (IP), 26A (IP).

of the Peace and Commissioners for Declarations Regulation 1991 (Qld). It is important that justices of the peace and commissioners for declarations are aware of the grounds of disqualification. In the Commission's view, it is more likely that they will be aware of the relevant grounds if they are located in the one instrument.

5. CESSATION OF OFFICE

(a) Introduction

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) establishes a number of ways in which a person may cease to hold office as an appointed justice of the peace or as an appointed commissioner for declarations.

(b) Change in office

If a person who holds office as an appointed justice of the peace is subsequently appointed as a justice of the peace of another category or as a commissioner for declarations, the person ceases to hold the original office of justice of the peace.¹⁷⁵⁹ Similarly, if a person who holds office as an appointed commissioner for declarations is appointed as a justice of the peace, the person ceases to hold office as a commissioner for declarations.¹⁷⁶⁰

In both cases, the registrar is required to remove the person's name from the register as the holder of the original office and insert an entry that the person holds the later office.¹⁷⁶¹ When the entry is made, the person ceases to hold the original office and holds the office to which he or she has subsequently been appointed.¹⁷⁶²

(c) Resignation

A person who holds office as an appointed justice of the peace or as an appointed commissioner for declarations may resign from office at any time by giving written notice to the registrar.¹⁷⁶³ The person ceases to hold office when notification of the

¹⁷⁵⁹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(1)(a).

¹⁷⁶⁰ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(1)(b).

¹⁷⁶¹ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(2).

¹⁷⁶² *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(3).

¹⁷⁶³ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 23(1).

resignation is published in the Gazette.¹⁷⁶⁴

(d) Cessation on disqualification

A person who holds office as an appointed justice of the peace or as an appointed commissioner for declarations ceases to hold office on becoming disqualified from continuing in the office.¹⁷⁶⁵

(e) Cessation by revocation of appointment

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) contains a general power to revoke the appointment of a person who holds office as an appointed justice of the peace or as an appointed commissioner for declarations. Section 24 of the Act provides:

- (1) The Governor in Council, by notification published in the Gazette, may revoke the appointment of a person as an appointed justice of the peace or an appointed commissioner for declarations for such reason as the Governor in Council thinks fit.
- (2) Upon publication in the Gazette of a notification -
 - (a) the person ceases to hold office; and
 - (b) the registrar is to remove the person's name from the register;as a justice of the peace or, as the case may be, a commissioner for declarations.

The section does not prescribe specific grounds for revoking an appointment.

(f) Suspension from office

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) enables the Governor in Council, by notification published in the Gazette, to prohibit an appointed justice of the peace or an appointed commissioner for declarations from acting in office for a period defined in the notification.¹⁷⁶⁶

¹⁷⁶⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 23(3).

¹⁷⁶⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

¹⁷⁶⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 25.

6. VALIDATION OF ACTS DONE BY JUSTICES OF THE PEACE OR COMMISSIONERS FOR DECLARATIONS

(a) Introduction

As noted above, a person ceases to hold office as an appointed justice of the peace or as an appointed commissioner for declarations when the person becomes disqualified from continuing in office.¹⁷⁶⁷ It is possible that a person who has ceased to hold office might continue to exercise the powers of that office. The person might simply be unaware that the change in his or her circumstances had the result that the person was no longer qualified to continue in office.

This raises the issue of whether the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should contain a provision to validate the acts performed by a justice of the peace or a commissioner for declarations who, as the result of a particular ground of disqualification, no longer holds office.

For example, in Tasmania, where a justice of the peace may not perform bench duties after attaining 70 years of age,¹⁷⁶⁸ legislation validates the acts performed by a justice of the peace who, by reason of age, is no longer authorised to perform bench duties. Section 7(2) of the *Justices Act 1959* (Tas) provides:

No finding, decision, or order of a court of summary jurisdiction may be impugned, reversed, or invalidated on the ground that a justice sitting in the court had attained the age of 70 years, and no act of a justice to which subsection (1)(b) applies shall be invalidated or may be impugned on the ground that the justice had attained that age when he did that act.

Similarly, in Tasmania, a commissioner for declarations ceases to hold office on attaining 70 years of age.¹⁷⁶⁹ Legislation also validates the acts of a person who no longer holds office as a commissioner for declarations. Section 131D of the *Evidence Act 1910* (Tas) provides:

A declaration made or a document signed is not invalidated by reason only of the fact that the person before whom it was made or signed is no longer a commissioner for declarations.

(b) Discussion Paper

In the Discussion Paper, the Commission expressed the view that it is desirable for the

¹⁷⁶⁷ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

¹⁷⁶⁸ *Justices Act 1959* (Tas) s 7(1).

¹⁷⁶⁹ *Evidence Act 1910* (Tas) s 131A(3).

Justices of the Peace and Commissioners for Declarations Act 1991 (Qld) to include a provision to the effect that acts performed by a justice of the peace or a commissioner for declarations are not invalidated by reason only of the fact that the justice of the peace or the commissioner for declarations no longer holds that office.¹⁷⁷⁰

The Commission observed that the Tasmanian provisions referred to above apply where a person was initially validly appointed as a justice of the peace or commissioner for declarations, and has since ceased to hold that office. The Commission noted, however, that it was possible that a person might be appointed notwithstanding that the person was not qualified for appointment.¹⁷⁷¹ That possibility was contemplated by a respondent to the Issues Paper, who expressed a concern about the effect of section 9 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).¹⁷⁷² This respondent advised that she was aware that some people held the view that a conviction by an Aboriginal Court¹⁷⁷³ did not constitute a conviction for the purposes of section 9 of the Regulation. It was suggested that the position of justices of the peace who had been appointed notwithstanding such convictions should be clarified.

This raised a question about the validity of acts performed by justices of the peace or commissioners for declarations who were not validly appointed, as opposed to the validity of acts performed by justices of the peace and commissioners for declarations who were validly appointed, but who subsequently ceased to hold office.

The Commission expressed the view that, if a person is appointed as a justice of the peace or as a commissioner for declarations, despite the fact that he or she is not eligible for appointment, the acts performed by that person should not be invalidated by reason only of the fact that the person was not eligible to be appointed and did not validly hold office.¹⁷⁷⁴

The Commission's preliminary recommendation was that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should include a provision to the effect that acts performed by a justice of the peace or a commissioner for declarations are not invalidated by reason only of the fact that:¹⁷⁷⁵

¹⁷⁷⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 256.

¹⁷⁷¹ Ibid.

¹⁷⁷² Submission 122 (IP). See Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 249.

¹⁷⁷³ See the discussion of Aboriginal Courts in Chapter 2 of this Report.

¹⁷⁷⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 257.

¹⁷⁷⁵ Id at 268.

- the justice of the peace or the commissioner for declarations no longer holds that office; or
- the justice of the peace or the commissioner for declarations was not eligible to be appointed.

(c) Submissions

Sixteen respondents addressed this preliminary recommendation. Fifteen of these respondents agreed that, in the circumstances specified, an act performed by a justice of the peace or by a commissioner for declarations should not be invalidated.¹⁷⁷⁶ However, one of these respondents expressed some concern about the effect of the preliminary recommendation on the actions of certain old system justices of the peace:¹⁷⁷⁷

I have witnessed an old style Justice of the Peace standing up in a public meeting, stating “he was appointed a Justice of the Peace for life and no one was going to take that away from him”. This person, I believe, will continue to witness documents for the rest of his life as a Justice of the Peace irrespective of any amendments or new Acts to abolish that position.

I am concerned that the validating provisions above will only assist Justices of the Peace and Commissioners for Declarations to continue on without training and examinations.

The submission that disagreed with the Commission’s preliminary recommendation was from an association of justices of the peace and expressed a similar concern:¹⁷⁷⁸

These two recommendations would appear to possibly discredit the intention of providing professional service and seem to undermine recommendations in the [Discussion] Paper relating to ongoing training. ...

We ... are concerned that there appears to be a body of Justices of the Peace who believe that they have been appointed for life and intend to continue to be Justices of the Peace no matter what may be approved.

(d) The Commission’s view

The Commission notes the concern expressed in two of the submissions about the consequences of including a validating provision in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). However, the purpose of the recommendation is not to protect a justice of the peace who knowingly exercises a

¹⁷⁷⁶ Submissions 6, 7, 8, 9, 14, 23, 24, 26, 33, 34, 40, 44, 45, 51, 59.

¹⁷⁷⁷ Submission 44.

¹⁷⁷⁸ Submission 47.

power that he or she is not authorised to exercise, but to protect the interests of persons who might otherwise be affected if an act performed by a justice of the peace is invalidated by reason of the fact that the justice of the peace does not actually hold the relevant office to enable him or her to perform the act in question (either because of the occurrence of a supervening disqualifying factor or because the person's initial appointment was, for some reason, invalid).

For example, a justice of the peace (magistrates court) might be appointed notwithstanding that he or she has several very old convictions that would disqualify the person from being appointed. The justice of the peace might not recall the exact details of the convictions and they might not be revealed when the pre-appointment checks are undertaken. The purpose of the Commission's recommendation in relation to the validation of acts is to ensure that, for example, orders made by the justice of the peace (magistrates court) while constituting a Magistrates Court are not challenged simply on the basis that the justice of the peace was not validly appointed.

The Commission considered whether its preliminary recommendation about a validating provision should be modified so that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) would validate an act performed by a person who, by reason of a particular ground of disqualification, does not hold office, but would not operate to validate an act performed by a person who, as a result of the transitional provisions of the Act, no longer holds the office that he or she once held. However, given that the purpose of the validating provision is to protect the interests of persons who might be affected if the act in question could be invalidated by reason of the fact that the justice of the peace or the commissioner for declarations who performed the act did not, at the time, hold the necessary office, the Commission can see no basis for distinguishing between a person who does not hold office because of the effect of a ground of disqualification and a person who does not hold a particular office because of the effect of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

Concern has been expressed about the possibility that some old system justices of the peace may, after 30 June 2000, deliberately flout the provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) by purporting to exercise the full powers of a justice of the peace, instead of exercising only those powers that may be exercised by a commissioner for declarations.¹⁷⁷⁹ However, the Commission considers that the liability of such an old system justice of the peace is sufficiently addressed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which creates an offence in relation to wrongfully acting as a justice of the peace or commissioner for declarations. Section 34 of the Act provides:

Wrongfully acting as justice of the peace or commissioner for declarations

¹⁷⁷⁹ Submissions 44, 47. These submissions are discussed at p 321 of this Report. The powers of a justice of the peace (commissioner for declarations) are discussed at pp 18-19 of this Report.

- (1) A person who assumes to act in the office of justice of the peace or commissioner for declarations that the person does not hold commits an offence against this Act.

Maximum penalty - 20 penalty units or imprisonment for 1 year.

- (2) In any proceedings evidence that a person caused to appear or allowed to remain immediately beneath, beside or close to the person's signature on an instrument or document an imprint or a mark that under section 31 is evidence that the person duly signed the instrument or document in the performance of the functions of the office indicated by the imprint or mark, is evidence, if the person did not hold the office, that the person assumed to act in the office.

The Commission does not propose any change to that provision. After 30 June 2000, an old system justice of the peace who is not a lawyer will automatically hold office as a justice of the peace (commissioner for declarations) or, if the Commission's recommendation in this regard is implemented, as a commissioner for declarations.¹⁷⁸⁰ If a justice of the peace (commissioner for declarations) purported to issue a search warrant and placed the mark "J.P. (C.dec)" near his or her signature on the warrant,¹⁷⁸¹ it would be apparent to the police officer that the justice of the peace was not authorised to issue the warrant. If the justice of the peace (commissioner for declarations) placed any other prescribed mark near his or her signature on the warrant, that fact would be evidence that the justice of the peace had assumed to act in an office that he or she did not hold.

Earlier in this chapter, the Commission expressed the view that a justice of the peace should not be able to perform bench duties after attaining the age of 70 years.¹⁷⁸² However, the Commission did not recommend that that age should constitute a general retirement age for justices of the peace. Consequently, a justice of the peace (magistrates court) or an *ex officio* justice of the peace who attains the age of 70 will still hold office, but will not be able to constitute a court. If a justice of the peace inadvertently constituted a court after attaining that age, the terms of the Commission's preliminary recommendation in relation to the validation of certain acts would not operate to validate the acts performed by the justice of the peace, as he or she would still hold that office. Accordingly, the Commission is of the view that its preliminary recommendation should be modified so that it will also apply to a person who still holds the office in question, but is limited, by reason of age, in respect of the powers that he or she may exercise.

7. FIXED-TERM APPOINTMENTS

¹⁷⁸⁰ See pp 49-50 of this Report.

¹⁷⁸¹ The prescribed mark of office of each office created by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is set out in s 31 of the Act.

¹⁷⁸² See pp 304-305 of this Report.

(a) Introduction

Appointments made under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) are unlimited in duration. Unless a justice of the peace or a commissioner for declarations changes office, resigns, becomes disqualified from continuing in office, or has his or her appointment revoked or suspended, the appointment will continue indefinitely.¹⁷⁸³

(b) Discussion Paper

(i) Fixed-term appointments

The Commission noted that, at present, if a justice of the peace or a commissioner for declarations no longer wishes to continue in office and does not resign from office, the registrar of justices of the peace and commissioners for declarations has no means of knowing that the person no longer wishes to hold that office. For example, a person could have become a justice of the peace many years ago for work-related reasons, but have no present need or desire to continue in the office.¹⁷⁸⁴

The Commission also noted that, unless a justice of the peace advises the registrar that he or she is no longer qualified to continue in office, for example, because the person has become a bankrupt, the registrar will not know that the register should be amended accordingly.¹⁷⁸⁵

The Commission considered that a requirement for justices of the peace and commissioners for declarations to re-register periodically could assist in ensuring that the register remains up to date and consists only of those people who wish to continue in office. In the Commission's view, the imposition of a requirement to re-register periodically could also provide an opportunity to check that justices of the peace and commissioners for declarations continued to be eligible to remain in office.¹⁷⁸⁶

For these reasons, the Commission's preliminary recommendation was that justices of the peace and commissioners for declarations should be appointed for a fixed term and should be required to re-register before the expiry of that

¹⁷⁸³ The various ways in which an appointment may cease are discussed at pp 317-318 of this Report.

¹⁷⁸⁴ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 261.

¹⁷⁸⁵ Ibid.

¹⁷⁸⁶ Ibid.

term in order to continue in office.¹⁷⁸⁷

The Commission considered whether justices of the peace and commissioners for declarations should be required to attend a training course or pass an examination as a condition of re-registering. Although the Commission stated that it strongly supports the provision of ongoing training, it expressed the concern that, if training were linked to the re-registration requirement in this way, it would be likely to discourage training from occurring more frequently than people were required to re-register.¹⁷⁸⁸ The Commission considered it important that training is provided, not at arbitrary intervals, but whenever there are significant changes in the law or procedures with which justices of the peace and commissioners for declarations should be familiar. For these reasons, the Commission decided that re-registration should not be made conditional on attending a training course or on passing an examination.¹⁷⁸⁹

(ii) Application to re-register

The Commission considered that, in applying to re-register, justices of the peace and commissioners for declarations should be required to disclose whether, since last re-registering, they had undergone any change of circumstances that would disqualify them from continuing in office, for example, whether they had become a bankrupt or had been convicted of an indictable offence.¹⁷⁹⁰

The Commission thought it would also be a useful source of information for the Department of Justice and Attorney-General if, when re-registering, justices of the peace and commissioners for declarations were required to disclose their level of activity during the intervening period and details of any training undertaken.¹⁷⁹¹

(iii) Duration of appointments

The Commission noted that the majority of respondents to the Issues Paper who favoured a requirement to re-register suggested that justices of the peace should be appointed for five year terms. The Commission noted that the Green Paper had also suggested that justices of the peace should be required to renew

¹⁷⁸⁷ Id at 268.

¹⁷⁸⁸ Id at 263.

¹⁷⁸⁹ Ibid. See the discussion of ongoing training and the Commission's recommendation about that issue at pp 335-340 and 353 of this Report (Recommendation 12.19).

¹⁷⁹⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 261.

¹⁷⁹¹ Ibid.

their registration every five years.¹⁷⁹²

Although the Commission favoured a requirement that justices of the peace and commissioners for declarations should re-register every five years, it was nevertheless concerned that such a requirement might impose too great an administrative burden on the Department of Justice and Attorney-General and that a longer period, such as ten years, might be more feasible. Consequently, rather than make a preliminary recommendation about the length of the term for which appointments should be made, the Commission sought submissions on that issue.¹⁷⁹³

(iv) Transitional arrangements

Because of the large numbers of justices of the peace and commissioners for declarations who already hold office, a requirement that justices of the peace and commissioners for declarations re-register periodically could result in over 60,000 applications to re-register being received at approximately the same time. In order to stagger the processing of these applications, the Commission suggested that justices of the peace and commissioners for declarations who hold office prior to the implementation of the Commission's recommendation should be required, initially, to re-register within three years of the implementation of the recommendation. At that point, their terms of office would be extended for a full term.¹⁷⁹⁴

(v) Preliminary recommendations

The Commission made the following preliminary recommendations:¹⁷⁹⁵

- Justices of the peace and commissioners for declarations should be appointed for a fixed term and should be required to re-register before the expiry of that term in order to continue in office.
- When re-registering, justices of the peace and commissioners for declarations should be obliged to disclose:
 - (a) whether their circumstances have undergone any changes that would disqualify them from continuing in office;

¹⁷⁹² Id at 261-262. See Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 44.

¹⁷⁹³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 262, 269.

¹⁷⁹⁴ Id at 262.

¹⁷⁹⁵ Id at 268.

- (b) details of their level of activity during the intervening period; and
 - (c) details of any training undertaken by them during the intervening period.
- Justices of the peace and commissioners for declarations who hold office prior to the implementation of this recommendation should be required, initially, to re-register within three years of the implementation of this recommendation. At that point, their terms of office should be extended for a full term.

(c) Submissions

(i) Fixed-term appointments

Thirty-one respondents addressed the Commission's preliminary recommendation that justices of the peace and commissioners for declarations should be appointed for fixed terms and should be required to re-register periodically to continue in office. Twenty-eight of these respondents agreed with the Commission's preliminary recommendation.¹⁷⁹⁶ One respondent acknowledged a practical reason for having fixed-term appointments:¹⁷⁹⁷

Some people no longer wish to continue, but do not take the steps to resign from office.

Another respondent commented:¹⁷⁹⁸

Periodic re-registration is a very good proposal. It would ensure that people holding office are consciously aware of their position, and encourage people to keep abreast of new developments in the ever-changing world of law.

Several respondents who supported the concept of fixed-term appointments suggested that, as a condition of being re-registered, justices of the peace should have to satisfy certain requirements. Four respondents were of the view that justices of the peace should have to pass an examination or undergo some form of assessment before being re-registered.¹⁷⁹⁹ Two other respondents suggested that justices of the peace should first have to complete a refresher

¹⁷⁹⁶ Submissions 2, 3, 5, 6, 7, 9, 10, 11, 14, 18, 20, 21, 23, 24, 25, 26, 28, 30, 33, 34, 40, 44, 45, 47, 48, 51, 58, 59.

¹⁷⁹⁷ Submission 3.

¹⁷⁹⁸ Submission 28.

¹⁷⁹⁹ Submissions 2, 9, 14, 25.

course or complete some form of ongoing training.¹⁸⁰⁰

On the other hand, a respondent who supported the concept of re-registration was concerned about the possibility of justices of the peace being required to pass an examination.¹⁸⁰¹

Do those Justices of the Peace seeking reregistration need to sit for another examination conducted by the Department of Justice and Attorney-General? One would hope not. Maybe an approved training course would suffice.

Another respondent expressed the view that there should be no charges attached to the re-registration process.¹⁸⁰²

Two respondents disagreed with the Commission's preliminary recommendation that justices of the peace and commissioners for declarations should be appointed for a fixed term and should be required to re-register periodically.¹⁸⁰³ One of these respondents thought that a system of this kind would impose an unnecessary burden on the system without any tangible benefit.¹⁸⁰⁴

As to appointments for a fixed term this would be imposing an unnecessary burden on the administration of the system and would in my view serve no useful purpose. Any changes of address could be obtained by computer reference to electoral enrolments if the electoral record had an indication that the elector was a justice of the peace and convey any change of address etc. to the Registrar. The requirement to re-register seems an onerous requirement on a Justice and not for any perceivable reason that could not be met by other means.

Another respondent, although not directly opposed to the preliminary recommendation, was also concerned about the difficulties of administering a system with fixed-term appointments.¹⁸⁰⁵

Fixed-term appointments are an option to regulate the number of Justices of the Peace but, surely, if continuing education is instituted and made mandatory with regular examinations, the need for, and the administrative nightmare of, fixed terms would dissipate overnight.

¹⁸⁰⁰ Submissions 5, 47. A large number of respondents to the Issues Paper also expressed the view that re-registration should be made conditional on the justice of the peace having completed a refresher course or having passed a competency test: submissions 10 (IP), 20 (IP), 24 (IP), 25 (IP), 30 (IP), 38 (IP), 40 (IP), 43 (IP), 45 (IP), 51 (IP), 67 (IP), 88 (IP), 113 (IP).

¹⁸⁰¹ Submission 30.

¹⁸⁰² Submission 45.

¹⁸⁰³ Submissions 29, 38.

¹⁸⁰⁴ Submission 29.

¹⁸⁰⁵ Submission 8.

(ii) Duration of appointments

Twenty-two submissions responded to the question asked in the Discussion Paper about the period of time for which fixed-term appointments should be made.¹⁸⁰⁶ The submissions suggested a range of possible terms, although the most commonly suggested term was five years.¹⁸⁰⁷

- two respondents suggested three to five years;¹⁸⁰⁸
- one respondent suggested four years;¹⁸⁰⁹
- nine respondents suggested five years;¹⁸¹⁰
- one respondent suggested five years for justices of the peace (qualified) and seven years for justices of the peace (magistrates court);¹⁸¹¹
- one respondent suggested five to ten years;¹⁸¹²
- one respondent suggested seven years;¹⁸¹³
- one respondent suggested seven to ten years;¹⁸¹⁴ and
- five respondents suggested ten years.¹⁸¹⁵

A respondent who supported five year terms expressed the following reason for

¹⁸⁰⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 269.

¹⁸⁰⁷ This was also the term suggested by a large number of submissions received in response to the Issues Paper: submissions 20 (IP), 40 (IP), 43 (IP), 62 (IP), 63 (IP), 66 (IP), 71 (IP), 72 (IP), 73 (IP), 74 (IP), 75 (IP), 76 (IP), 77 (IP), 78 (IP), 79 (IP), 80 (IP), 81 (IP), 82 (IP), 83 (IP), 84 (IP), 113 (IP).

¹⁸⁰⁸ Submissions 23, 44.

¹⁸⁰⁹ Submission 33.

¹⁸¹⁰ Submissions 5, 6, 10, 11, 18, 25, 26, 48, 58.

¹⁸¹¹ Submission 47.

¹⁸¹² Submission 9.

¹⁸¹³ Submission 40.

¹⁸¹⁴ Submission 54.

¹⁸¹⁵ Submissions 14, 24, 30, 45, 51.

doing so.¹⁸¹⁶

I think it is accepted that a large percentage of JP's (Qual) are in the ranks of the retired community, as I am myself. A ten year re-registration requirement would give a false belief in the number of JP's (Qual) available to assist the community when you take into account deaths, senility, loss of interest.

However, a respondent who supported ten year terms thought that a shorter term might impose too great an administrative burden.¹⁸¹⁷

One respondent thought that the length of the term should be left to the administering department to decide, having regard to its capacity to process the applications for renewal:¹⁸¹⁸

As to the number of years for re-registration, I believe that that should be left to the relevant department to look at, as they only know what their working capacity is. If all Justices of the Peace are on the computer system, the updating of registration should not be as onerous as the old "paper" system.

(iii) Application to re-register

Eighteen respondents addressed the Commission's preliminary recommendation that, when re-registering, justices of the peace and commissioners for declarations should be obliged to disclose:

- (a) whether their circumstances have undergone any change that would disqualify them from continuing in office;
- (b) details of their level of activity during the intervening period; and
- (c) details of any training undertaken by them during the intervening period.

Fifteen respondents agreed with the Commission's preliminary recommendation.¹⁸¹⁹ However, several of these respondents expressed some concern about the requirement for justices of the peace and commissioners for declarations to provide details of their level of activity since their appointments were made or last renewed. One respondent commented:¹⁸²⁰

Point (b) could prove to be an administrative nightmare - who is to decide what is

¹⁸¹⁶ Submission 48.

¹⁸¹⁷ Submission 51.

¹⁸¹⁸ Submission 59.

¹⁸¹⁹ Submissions 6, 7, 8, 21, 23, 24, 26, 33, 34, 40, 44, 45, 47, 51, 59.

¹⁸²⁰ Submission 23.

an acceptable level of activity and what proof would be required?

Another respondent suggested that the reference to “activity” in paragraph (b) of the preliminary recommendation should be changed to “availability”.¹⁸²¹

A third respondent, although agreeing with the preliminary recommendation, thought that it might present some administrative difficulties:¹⁸²²

While I fully support the above requirements to re-register, it could become an administrative nightmare. Perhaps to assist in (b), it would assist to have use of a logbook made compulsory for all Justices of the Peace and Commissioners for Declarations.

The two respondents who disagreed with the preliminary recommendation were also concerned about the requirement to provide details of the applicant’s level of activity.¹⁸²³ These respondents, like the other respondents who were concerned about the information required to be disclosed, seem to infer from the recommendation that this information might be used to decide not to renew an applicant’s appointment. One of these respondents expressed his concern in the following terms:¹⁸²⁴

I agree with re-registering within a period of time of 5 years. However I do not agree that detailing their levels of activity should be relevant in considering the re-registration application. For instance members of the Police would have little or no activity by virtue of being excluded by legislation and internal policy. Yet they would still be highly experienced given the duties of occupation, more so than many members of the public including the legal profession who only occasionally exercise their duties.

The other respondent expressed a similar concern, pointing out that the level of activity of a justice of the peace would be affected by the need of the particular community:¹⁸²⁵

I do not believe that the ‘Activity’ of the JP should be the criteria for determining commitment or suitability for a person to the role of JP because, as is pointed out in the discussion paper, activity will depend on the need of the community and its will to seek out the JP. However demonstrated willingness to undertake training and updating in the requirements of the role of JP could be a measure of one’s commitment to the role.

1821 Submission 40.

1822 Submission 44.

1823 Submissions 11, 48.

1824 Submission 11.

1825 Submission 48.

One respondent, while neither agreeing nor disagreeing with the preliminary recommendation, also appeared to be concerned about the provision of details concerning the level of activity of the justice of the peace or commissioner for declarations:¹⁸²⁶

Activity Tests: How would these be administered and what criteria would be applied?

(iv) Transitional arrangements

Fourteen submissions addressed the Commission's preliminary recommendation that justices of the peace and commissioners for declarations who hold office prior to the implementation of the recommendation concerning re-registration should be required, initially, to re-register within three years of the implementation of that recommendation, at which point their terms of office should be extended for a full term. All of these respondents agreed with the Commission's preliminary recommendation.¹⁸²⁷

(d) The Commission's view

(i) Fixed-term appointments

In the Commission's view, it is important that the register of justices of the peace and commissioners for declarations remains up to date and consists only of those people who wish to continue in office and are still eligible to continue in office. It is more efficient for a police officer who is seeking the services of a justice of the peace if the list of available justices of the peace does not include persons who are no longer interested in acting in that role.¹⁸²⁸ It is also more efficient and cost-effective for the Department of Justice and Attorney-General, which has the responsibility of administering justices of the peace and commissioners for declarations, if the register more accurately reflects the numbers of justices of the peace and commissioners for declarations who actually wish to continue in office.

In the Commission's view, it would be easier to achieve this purpose if appointments were to be made for a fixed term with the onus on the justice of the peace or the commissioner for declarations to renew his or her appointment than it is under the present system, where the onus is on the individual office holder to notify the Department if he or she wishes to resign from office.

¹⁸²⁶ Submission 4.

¹⁸²⁷ Submissions 6, 7, 8, 9, 14, 23, 26, 33, 34, 40, 44, 47, 51, 59.

¹⁸²⁸ See note 1592 of this Report for a discussion of the list of justices of the peace that the registrar is required to compile.

A system of fixed-term appointments would afford justices of the peace and commissioners for declarations an opportunity to review their circumstances and to decide whether they wish to continue in office. It would also provide an opportunity for the registrar to check that a person has not, subsequent to his or her appointment, become disqualified from continuing in office. For these reasons, the Commission remains of the view that justices of the peace and commissioners for declarations should be appointed for a fixed term, which should be capable of being renewed upon application by the relevant office holder.

(ii) Duration of appointments

The Commission has given consideration to the length of time for which a fixed-term appointment should be made. In the Discussion Paper, the Commission favoured a five year term, but was concerned about the administrative burden that would be imposed on the Department of Justice and Attorney-General and thought that a longer term might, for this reason, be more feasible.¹⁸²⁹ The Commission sought submissions on this issue.¹⁸³⁰ The Commission notes that the term most favoured was five years, with the next most favoured term being ten years.¹⁸³¹

In the Commission's view, a term of appointment of seven years for justices of the peace (magistrates court) and justices of the peace (qualified) would be an appropriate compromise. It would ensure that the register is regularly updated, without imposing as great an administrative burden as would result if five year terms were adopted.

In relation to commissioners for declarations, the Commission is of the view that ten year appointments would be appropriate.

(iii) Application to renew appointment

The Commission remains of the view that, when applying to renew their appointments, justices of the peace and commissioners for declarations should be required to disclose:

- whether their circumstances have undergone any changes that would disqualify them from continuing in office;
- details of their level of activity during the intervening period; and

¹⁸²⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 262.

¹⁸³⁰ See pp 325-326 of this Report.

¹⁸³¹ See pp 328-329 of this Report.

- details of any training undertaken by them during the intervening period.

The Commission does not believe that the renewal of a person's appointment should be conditional on the person having passed a particular examination or having undertaken a particular course. The Commission's concern is that, if eligibility to be re-appointed is linked to training in this way, the provision of training is likely to be driven by the number of justices of the peace whose terms are due for renewal, rather than by the more fundamental need to ensure that all justices of the peace are provided with the opportunity to undertake training as developments occur in the law.

However, the Commission nevertheless regards the provision and undertaking of ongoing training as essential if justices of the peace and commissioners for declarations are to retain many of their present powers.¹⁸³² For that reason, the Commission holds the view that justices of the peace and commissioners for declarations should be required to disclose details of any training undertaken by them. The unreasonable refusal of a justice of the peace or a commissioner for declarations to undertake training that was provided, particularly in relation to new legislation, would be a relevant consideration for the purpose of deciding whether the person continued to be a fit and proper person to hold office.

The Commission also believes that justices of the peace and commissioners for declarations should be required to disclose their level of activity when applying to renew their appointments. The level of activity would also be relevant to the question of whether a person is a fit and proper person to hold office. The Commission accepts, however, that a person might be inactive as a justice of the peace or as a commissioner for declarations through no fault of his or her own. The inactivity of an office holder should not, therefore, constitute a bar to the renewal of a person's appointment.

(iv) Transitional arrangements

The Commission is conscious of the fact that, if its recommendation in relation to fixed-term appointments is implemented, it could result in a large number of appointments falling due for renewal at about the same time. Consequently, the Commission remains of the view that, to assist in staggering the number of appointments that are due for renewal at any given time, justices of the peace and commissioners for declarations who hold office prior to the date on which the Commission's recommendation is implemented should be required to renew their appointments within three years of that date. At that time, the appointment of a justice of the peace (magistrates court) or a justice of the peace (qualified) should be renewed for a full seven year term and the appointment of a commissioner for declarations should be renewed for a full ten year term.

¹⁸³²

See the discussion of ongoing training at pp 335-340 of this Report.

(v) Costs

The Commission notes that one respondent expressed the view that a justice of the peace or a commissioner for declarations should not be required to pay any charges to have his or her appointment renewed.¹⁸³³ The Commission regards this issue as a question of policy for the Department of Justice and Attorney-General to decide. Consequently, the Commission does not propose to make a recommendation about this issue.

8. ONGOING TRAINING AFTER APPOINTMENT

(a) Introduction

Generally, there is no requirement for a person appointed as a justice of the peace or as a commissioner for declarations to undergo any training after appointment. There is provision under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) for the Minister to approve, in relation to an office provided for by the Act, a training course that is to be completed by a person or class of person while holding office.¹⁸³⁴ If a justice of the peace or a commissioner for declarations is required to complete such a course while holding office but fails to do so, he or she may be required to show cause why the appointment should not be revoked. Section 14 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) provides:

Completion of course in office

- (1) The Minister, in relation to a course approved under section 32 of the Act to be completed by a person or class of person while holding office as an appointed justice of the peace or as an appointed commissioner for declarations, may require -
 - (a) that the course be completed within a specified period; and
 - (b) that a person who completes the course is to give notice in a specified form and within a specified period to the registrar.
- (2) If the registrar does not receive a notice required under subsection (1)(b) from a person required to complete a training course, the registrar may give the person a notice to show cause to the registrar as specified why the person's appointment under the Act should not be revoked.
- (3) If the person fails to show cause or sufficient cause the registrar is to report the matter to the Minister.

¹⁸³³ See p 328 of this Report.

¹⁸³⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 32(b).

However, the Commission is not aware of any case where a justice of the peace or a commissioner for declarations has been required, while holding office, to complete a course of training under these provisions.

(b) Discussion Paper

The Commission agreed with the view expressed in many submissions received in response to the Issues Paper that, for justices of the peace and commissioners for declarations to be able to discharge their duties properly, they must continue to receive ongoing training after their appointments.¹⁸³⁵ For example, the Indigenous Advisory Council, in its submission in response to the Issues Paper, made the following comment about the importance of ongoing training:¹⁸³⁶

Appropriate training and development is essential for JPs to enable them to discharge their responsibilities in accordance with the high standards of justice expected by the public. Under present arrangements these standards are partly assured by way of the qualifying examinations, however qualifying examinations are no security against gradual loss of knowledge or failure to keep abreast of current developments. It is therefore submitted that the initial qualification by examination should be followed up by subsequent examinations (or other forms of assessment) at appropriate intervals, say every five years, to ensure that knowledge and skills are maintained. Suitable refresher training should be provided accordingly.

The Commission stated that, in its view, it is impossible for the initial training of justices of the peace, however comprehensive it may be, to equip them to deal with developments in the law and changes in procedures that occur subsequent to their appointments. For example, the Commission noted that, only recently, the enactment of the *Police Powers and Responsibilities Act 1997* (Qld) had resulted in a need for justices of the peace to receive training about those aspects of their roles that were affected by that Act.¹⁸³⁷

The Commission expressed the view that there is a public interest in ensuring that the knowledge and skills of justices of the peace and commissioners for declarations are maintained. Consequently, the Commission formed the view that the Department of Justice and Attorney-General should ensure that, as the need arises, ongoing training is provided to justices of the peace and commissioners for declarations. The Commission did not envisage that the need for training for commissioners for declarations would arise as frequently as it would for justices of the peace. However, the Commission recognised that there would still be occasions when commissioners

¹⁸³⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 262.

¹⁸³⁶ Submission 112 (IP).

¹⁸³⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 262.

for declarations would need further training in particular aspects of their role, such as there was when the *Powers of Attorney Act 1998* (Qld) commenced.¹⁸³⁸

As mentioned earlier, the Commission decided that re-registration should not be made conditional on attendance at a particular training course or on completion of an examination.¹⁸³⁹ However, the Commission considered that, if a justice of the peace or a commissioner for declarations unreasonably refused to attend a training course, that fact might nevertheless be a factor to be taken into account in deciding whether the person's appointment should be revoked.¹⁸⁴⁰

The Commission's preliminary recommendation was that the Department of Justice and Attorney-General should, as the need arises, provide ongoing training to justices of the peace and commissioners for declarations.¹⁸⁴¹

(c) Submissions

Twenty-nine submissions addressed the Commission's preliminary recommendation on this issue. Twenty-seven of these respondents agreed with the Commission's preliminary recommendation.¹⁸⁴² As one respondent commented:¹⁸⁴³

Training and ongoing, or continuing, education is an essential ingredient to ensure that all Justices of the Peace are positioned to provide the services to which they gave their oath on appointment.

Another respondent commented:¹⁸⁴⁴

The point I am making is that training is the only answer ...

All human beings make mistakes. That is a fact of life. But every effort must be made to

¹⁸³⁸ Id at 262-263. S 31 of the *Powers of Attorney Act 1998* (Qld) authorises justices of the peace and commissioners for declarations to witness enduring powers of attorney and advance health care directives.

¹⁸³⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 263.

¹⁸⁴⁰ See s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is set out at p 318 of this Report.

¹⁸⁴¹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 269.

¹⁸⁴² Submissions 2, 3, 4, 6, 7, 8, 9, 11, 12, 14, 17, 20, 21, 23, 25, 26, 28, 32, 33, 34, 40, 44, 45, 48, 51, 54, 59.

¹⁸⁴³ Submission 8.

¹⁸⁴⁴ Submission 59.

lessen these mistakes.

Another respondent recognised the practical difficulties in providing ongoing training, but nevertheless considered that such training should be provided:¹⁸⁴⁵

Given the geographic diversity and size of Queensland, the cost and effective delivery of such training is obviously a major issue. These aspects should not detract from decisions in principle being taken about desirable refresher training.

The consequences of the lack of ongoing training were highlighted by one respondent, who recounted his personal experience of being unfamiliar with new legislation:¹⁸⁴⁶

I was recently called upon to issue a warrant to search for drugs for a Constable at a one-man Police Station near my home. It was on a Sunday and I had not previously issued a search warrant. I refreshed my memory of the provisions of the 'Drugs Misuse Act 1986-1987' from my copy of 'A Manual for Queensland Justices of the Peace' only to find when the Constable arrived that the Act no longer applied and the warrant was issued under the 'Police Powers and Responsibilities Act 1997' and was in quite a different form.

Two respondents who generally agreed with the Commission's preliminary recommendation were of the view, however, that it should be mandatory for justices of the peace and commissioners for declarations to undertake ongoing training.¹⁸⁴⁷ One of these respondents expressed the following view:¹⁸⁴⁸

I would leave out the words "As the need arises". The Department of Justice and Attorney General is responsible for the standards of Justices of the Peace and Commissioners for Declarations, and the only way standards will be maintained or improved will be by requiring mandatory ongoing training.

One respondent was critical of the concept of "formal classroom training", although he acknowledged the usefulness of attending seminars when developments in the law occurred.¹⁸⁴⁹

Another respondent seemed to regard it as the responsibility of the individual justice of the peace to keep up to date with developments in the law:¹⁸⁵⁰

I read of calls for refresher training, and wonder what these persons are really doing with their time. If you have gone to the trouble to learn the myriad requirements of the position, it is then incumbent upon you to keep up to date, as is the case in most other like positions.

¹⁸⁴⁵ Submission 6.

¹⁸⁴⁶ Submission 48.

¹⁸⁴⁷ Submissions 23, 44.

¹⁸⁴⁸ Submission 23.

¹⁸⁴⁹ Submission 29.

¹⁸⁵⁰ Submission 42.

A number of submissions commented on how ongoing training might be provided and on particular methodologies for training.¹⁸⁵¹ The suggestions made included the provision of training through “court and police establishments throughout the State”,¹⁸⁵² the provision by the Department of Justice and Attorney-General of regular updates,¹⁸⁵³ the provision of new or amended legislation or extracts of such legislation,¹⁸⁵⁴ attendance at meetings or seminars with other justices of the peace or guest speakers,¹⁸⁵⁵ attendance at training courses¹⁸⁵⁶ and undertaking a correspondence course.¹⁸⁵⁷ Another respondent suggested a greater use of role plays and case studies.¹⁸⁵⁸

(d) The Commission’s view

(i) The provision of ongoing training

The Commission regards the provision of ongoing training to justices of the peace and commissioners for declarations as fundamental to its earlier recommendations in this Report that justices of the peace and commissioners for declarations should continue to be able to exercise various powers. The Commission regards the provision of such training as important both to maintain existing skills and to familiarise justices of the peace and commissioners for declarations with new developments in the law.

Consequently, the Commission remains of the view that the Department of Justice and Attorney-General should, as the need arises, provide ongoing training for justices of the peace and for commissioners for declarations.¹⁸⁵⁹

¹⁸⁵¹ Submissions 6, 9, 12, 17, 19, 23, 25, 28, 29, 43, 48.

¹⁸⁵² Submission 6.

¹⁸⁵³ Submissions 9, 17, 25, 28, 43, 48.

¹⁸⁵⁴ Submissions 19, 43, 48. One of these respondents advised that he had obtained prices from Goprint, the government publisher, of the main Acts referred to in the training manuals published by the Department of Justice and Attorney-General for justices of the peace. The cost of the relevant legislation was in excess of \$300: submission 43.

¹⁸⁵⁵ Submissions 9, 12, 17, 29.

¹⁸⁵⁶ Submissions 23, 48.

¹⁸⁵⁷ Submission 22.

¹⁸⁵⁸ Submission 57.

¹⁸⁵⁹ See the Commission's recommendation at p 391 of this Report that the government should bear the cost of providing this training (Recommendation 14.3).

(ii) Mandatory ongoing training?

The Commission notes that several respondents suggested that the Commission should also recommend that it should be mandatory for justices of the peace and commissioners for declarations to undertake the training that is provided.¹⁸⁶⁰ In the Commission's view, it is not necessary to make a recommendation to this effect.

As noted earlier in this chapter, the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) already enable the Minister to approve a training course that is to be completed by a person or class of person while holding office, and a person can be required to complete such a course.¹⁸⁶¹ In the event that the person does not complete the course within a specified period, the registrar can require the person to show cause why the person's appointment should not be revoked.¹⁸⁶²

Further, the Commission has already expressed the view that, when a justice of the peace or a commissioner for declarations applies to have his or her appointment renewed, the person should be required to provide details of any training undertaken.¹⁸⁶³ The information provided could be taken into account in deciding whether a person's appointment should be renewed.

Consequently, the Commission does not propose to recommend, as such, that it should be mandatory for justices of the peace and commissioners for declarations to undertake training. In the Commission's view, the situation of a justice of the peace or a commissioner for declarations who unreasonably refuses to undertake training has already been sufficiently addressed.

(iii) The nature of ongoing training

The Commission notes that a number of submissions received in response to the Discussion Paper seemed to infer from the terms of the preliminary recommendation that the primary means of providing the recommended training would be by means of a training course. The Commission does not intend, by its use of the term "training", to suggest that the provision of such training should be restricted to a formal training course. The Commission considers that training and development for justices of the peace and commissioners for declarations might be delivered by a variety of means. The particular means

¹⁸⁶⁰ See note 338 of this Report.

¹⁸⁶¹ See p 335 of this Report.

¹⁸⁶² *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 14(2).

¹⁸⁶³ See pp 333-334 of this Report.

that would be suitable in any given case would depend, in part, on the subject matter to be covered.

Although a number of submissions made suggestions about possible ways of providing training,¹⁸⁶⁴ the Commission does not propose, as part of this review, to examine or make recommendations about the various means of providing such training.

9. APPOINTMENT ON THE BASIS OF NEED

(a) Introduction

Queensland has a large number of justices of the peace and commissioners for declarations compared with the number appointed in other Australian jurisdictions. There are presently approximately 50,000 justices of the peace and approximately 15,000 commissioners for declarations.¹⁸⁶⁵ Of course, the fact that the number of office holders is high does not, by itself, mean that there are more justices of the peace and commissioners for declarations than are needed. It does, however, raise the question of whether consideration should be given to the community's need when appointments are being made. At present, there is no general requirement that appointments of justices of the peace or commissioners for declarations must be made on the basis of need, although the Commission is aware that it is the current policy of the Department of Justice and Attorney-General to train and appoint justices of the peace (magistrates court) on this basis.¹⁸⁶⁶

(b) Discussion Paper

As a general proposition, the Commission favoured a requirement that future appointments of justices of the peace should be made on the basis of need. In the Commission's view, the greater the number of justices of the peace who are appointed, the less likely it is that, for reasons of both cost and the administrative work involved, ongoing training will be provided to them as often as it should. Further, the Commission considered that, if the number of justices of the peace more closely

¹⁸⁶⁴ See pp 338-339 of this Report.

¹⁸⁶⁵ Details of the number of justices of the peace in Queensland and in other Australian jurisdictions are set out at pp 31-32 of this Report.

¹⁸⁶⁶ Form 3 (Application for Appointment as a Justice of the Peace (Magistrates Court)), Explanatory Notes. The Justices of the Peace Fact Sheet published by the Department of Justice and Attorney-General states that the appointment of justices of the peace (magistrates court) is currently restricted to remote Aboriginal and Torres Strait Islander communities where there is no resident magistrate to conduct court hearings: <<http://www.justice.qld.gov.au/pubs/07fact.html>> (12 December 1999).

reflected the community's need, the services of those justices of the peace would be more likely to be utilised regularly, which should assist justices of the peace to develop a greater expertise than if their services are called upon only rarely.¹⁸⁶⁷

However, the Commission had some concerns about how a requirement that appointments be made on the basis of need would be implemented. For example, the Commission thought that it would be unfair to require an individual applicant, in his or her application, to establish that a need existed in the locality where the applicant resided or worked. In many cases, the applicant would be unaware of relevant factors, such as how many justices of the peace already resided or worked in that area.¹⁸⁶⁸

On the other hand, the Commission did not want to burden the registrar of justices of the peace and commissioners for declarations by stipulating various criteria that the registrar would have to consider in every case.¹⁸⁶⁹

The Commission was also conscious of the fact that, in some situations, the need for an appointment might not be obvious. For example, although there could appear to be a sufficient number of justices of the peace in a particular area, a need could still exist if the justices of the peace in that area were not active in their roles.¹⁸⁷⁰

For these reasons, the Commission did not make any preliminary recommendations about this issue. Instead, the Commission sought submissions on the following question:¹⁸⁷¹

- If the appointment of justices of the peace is to be made on the basis of need:
 - (a) who should determine whether a need exists; and
 - (b) what factors should be considered in deciding whether a need exists?

(c) Submissions

A large number of submissions either provided responses to the question asked in the Discussion Paper about how appointments might be made on the basis of need, or commented generally on the issue of whether it was desirable for justices of the peace

¹⁸⁶⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 265.

¹⁸⁶⁸ Ibid.

¹⁸⁶⁹ Id at 266.

¹⁸⁷⁰ Ibid.

¹⁸⁷¹ Id at 270.

to be appointed on the basis of need.¹⁸⁷²

Four respondents expressed the view that appointments should be made on the basis of need.¹⁸⁷³ One of these respondents commented:¹⁸⁷⁴

It is really silly to keep appointing more and more JP's if there are already enough in various areas. I believe it lessens the value of the role we play in society to have an over supply.

The submissions offered the following suggestions as to who should determine whether a need exists for the appointment of a justice of the peace:

- the Department of Justice and Attorney-General;¹⁸⁷⁵
- the registrar of justices of the peace and commissioners for declarations;¹⁸⁷⁶
- the Minister for Justice and Attorney-General;¹⁸⁷⁷
- the Governor in Council, after receiving petitions from local governments, members of Parliament, the Police Service and concerned citizens;¹⁸⁷⁸
- the Magistrates Court for the relevant district;¹⁸⁷⁹
- the local member of State Parliament;¹⁸⁸⁰
- the justices of the peace council;¹⁸⁸¹ and
- the police and the general community.¹⁸⁸²

¹⁸⁷² Submissions 8, 11, 14, 18, 21, 23, 25, 26, 30, 33, 34, 38, 40, 41, 44, 45, 47, 48, 51, 54.

¹⁸⁷³ Submissions 21, 25, 34, 45.

¹⁸⁷⁴ Submission 21.

¹⁸⁷⁵ Submissions 41, 44, 48.

¹⁸⁷⁶ Submissions 30, 51, 54.

¹⁸⁷⁷ Submissions 23, 47.

¹⁸⁷⁸ Submission 14.

¹⁸⁷⁹ Submission 18.

¹⁸⁸⁰ Submission 26.

¹⁸⁸¹ Submission 51.

¹⁸⁸² Submission 33.

The submissions also suggested a range of factors that should be considered in deciding whether a need exists for the appointment of a justice of the peace. These included:

- the number of existing or active justices of the peace or commissioners for declarations in the area;¹⁸⁸³
- the population of the area;¹⁸⁸⁴
- the population growth of the area;¹⁸⁸⁵
- the level of activity or workload of justices of the peace in the area,¹⁸⁸⁶ including the frequency with which justices of the peace issue summonses and warrants after hours, attend juvenile interviews, witness documents and perform various other duties;¹⁸⁸⁷
- the availability of justices of the peace to the police, the public and Magistrates Courts;¹⁸⁸⁸
- any representations from the police, the clerk of the court, members of Parliament or local government, the Law Society and financial institutions;¹⁸⁸⁹ and
- the number of, and reasons for, complaints by the community or the police about the difficulty in obtaining the services of a justice of the peace.¹⁸⁹⁰

A respondent who supported the concept of appointments being made on the basis of need suggested that a simple formula could be used, based on a certain percentage of the population in a council area.¹⁸⁹¹

One respondent suggested that the relevant area for the purpose of identifying need

¹⁸⁸³ Submissions 14, 26, 30, 54.

¹⁸⁸⁴ Submissions 14, 45.

¹⁸⁸⁵ Submission 26.

¹⁸⁸⁶ Submissions 25, 48.

¹⁸⁸⁷ Submission 30.

¹⁸⁸⁸ Submission 41.

¹⁸⁸⁹ Submission 44.

¹⁸⁹⁰ Submissions 23, 48.

¹⁸⁹¹ Submission 34.

should be an electorate or, alternatively, a Magistrates Court district.¹⁸⁹²

If a decision is made that there is a shortage of Justices of the Peace within a particular electorate then numbers could be increased for that electorate but not for the whole of Queensland. This would be similar to the system used by the Commonwealth Government for the appointment of Marriage Celebrants. It may be possible to use Magistrate Court District boundaries instead of electoral boundaries for this consideration.

Two other respondents also thought that the question of need should be determined by assessing the requirements of each Magistrates Court district.¹⁸⁹³ One of these respondents commented:¹⁸⁹⁴

The present system of Electoral Boundaries Areas should be abolished and the Dept of Justice and Attorney General should use Magistrates Court Districts for administration purposes. ...

Appointment of Justices of the Peace and Commissioners for Declaration must be removed from the Political arena.

A respondent who supported the making of appointments on the basis of need considered that identifying whether a need existed would be a difficult task.¹⁸⁹⁵

It is my view that appointments should be made on the basis of need, although the formula for determining the need remains a mystery to me. There are far too many justices of the peace in Queensland at this time. That is clear. The identified need in 1999 might not be the need in 2004. It would be extremely unfair to an applicant if they had to convince any authority, firstly, that they were a suitable applicant, and secondly, that there was a need in their suburb, city, electorate or whatever boundary might be considered. The relative activity of individual justices of the peace within the community should also be considered, however the problem of monitoring activity/performance is huge.

One respondent suggested that the “need” for justices of the peace could not be satisfactorily measured, as this would involve the consideration of many factors that would be continually changing.¹⁸⁹⁶

Another respondent commented that it would be difficult to decide how many justices of the peace are sufficient for a particular area, as virtually all workplaces need either a justice of the peace or a commissioner for declarations.¹⁸⁹⁷

¹⁸⁹² Submission 23. The Magistrates Court districts in Queensland are listed in Appendix E to this Report.

¹⁸⁹³ Submissions 44, 47.

¹⁸⁹⁴ Submission 44.

¹⁸⁹⁵ Submission 25.

¹⁸⁹⁶ Submission 40.

¹⁸⁹⁷ Submission 54.

On the other hand, a submission received by the Commission in response to the Issues Paper distinguished between the need for justices of the peace and the need for commissioners for declarations, suggesting that the need for commissioners for declarations was probably greater than for either justices of the peace (qualified) or justices of the peace (magistrates court), and that the number of appointments made should take this into account.¹⁸⁹⁸

It seems to me that the powers vested in Commissioners for Declarations meet the vast majority of the community's needs and the extra powers vested in Justices of the Peace (Qualified) and (Magistrates Court), whilst being of considerable importance, are far less frequently called upon. If my assumptions in this respect are correct then the number of Justices of the Peace (Qualified) and (Magistrates Court) needed to satisfy the demands of the community, would be far lower than the need for Commissioners for Declarations, and perhaps lower than the number currently available. If so, the cost of training would be considerably reduced. A further advantage in my propositions above would be that Justices of the Peace (Qualified) would have a greater opportunity to carry out the function of their office and thereby maintain a better standard of expertise. ...

There might ... be a case to consider the number of Justices within the community where the applicant seeks appointment. I would not think this provision would apply to the appointment of Commissioners for Declarations but it may be a consideration when the cost of training of Justices of the Peace is taken into account.

Three respondents expressed the view that appointments should not be made on the basis of need.¹⁸⁹⁹ One respondent thought that, if a person fulfilled all the requirements for appointment, the person should be accepted.¹⁹⁰⁰

I do not agree with restricting the number of Justices of the Peace in a community. If a person who applies for this civic duty is found to be suited for these duties, prepared to be trained and tested, and demonstrates a commitment and motivation to service then he/she should be accepted. After all, with the average Australian citizen remaining in the one district for no more than seven years, there will always be some districts with an overload and other districts where the incumbent Justices of the Peace are regularly overworked.

Another respondent thought that it was undesirable for appointments to be made on the basis of need as that might limit people's choice of justice of the peace, especially in a small town.¹⁹⁰¹ However, the concern raised seems to relate more to the consequences of limiting the number of commissioners for declarations, rather than to the consequences of limiting the number of justices of the peace.¹⁹⁰²

For the public - having a choice of a number of JPs is as important as having a choice of

¹⁸⁹⁸ Submission 7 (IP).

¹⁸⁹⁹ Submissions 8, 11, 38.

¹⁹⁰⁰ Submission 8.

¹⁹⁰¹ Submission 38.

¹⁹⁰² Ibid.

a number of doctors. Some documents are of a sensitive or personal nature and therefore I believe it is important that the member of the public has a choice in the JP called on to witness them. This is of particular importance in a small town.

- (a) A set quota for particular areas could disadvantage the public should any of the appointed JPs move from the area.
- (b) If a JP moves into an area where the quota is full - would he/she then be unable to continue serving the Public?

The concern expressed in that submission that having a set quota would disadvantage a justice of the peace who moved into an area where the quota was already full would be relevant only if the question of need was relevant to whether a justice of the peace should continue to hold office. A justice of the peace would not be disadvantaged in the way suggested, however, if the quota applied only in relation to the initial appointment of the justice of the peace.

The third respondent who was opposed to the concept of making appointments on the basis of need was also concerned that this proposal might prejudice a justice of the peace who already held office, especially if the services of the justice of the peace were not called upon very often:¹⁹⁰³

I do not agree that appointments should be made on the basis of need. The perception of need is in the mind of the person who decides he wants to serve the community. If he then finds his duties are minimal it is usually because of policy procedures of the Queensland Police Service which prohibit the use of Justices of the Peace to a point of ... last resort.

(d) The Commission's view

In the Commission's view, there are several advantages to making appointments on the basis of need. As noted previously, if the number of justices of the peace more closely reflects the community's need, the services of those justices of the peace are likely to be called upon more regularly, with the result that they are more likely to develop experience and expertise in relation to the discharge of their duties.¹⁹⁰⁴ On the other hand, if the services of some justices of the peace are rarely used, those individuals are unlikely to become proficient in carrying out their duties.

Further, the cost to government of administering justices of the peace and commissioners for declarations obviously increases as the number of people holding office increases. Even though applicants pay for their own initial training and materials and pay a fee to defray the costs of processing their applications,¹⁹⁰⁵ there is still a cost

¹⁹⁰³ Submission 11.

¹⁹⁰⁴ See p 341 of this Report.

¹⁹⁰⁵ See pp 368-369 of this Report.

involved in maintaining the present number of justices of the peace and commissioners for declarations. For example, the Department of Justice and Attorney-General publishes an annual bulletin, *Justice Papers*, which is sent to all registered justices of the peace and commissioners for declarations to keep them informed of various matters relevant to their offices. The printing and postage costs of distributing that publication are directly related to the number of persons holding office.

In this Report, the Commission has recommended that ongoing training should be provided for justices of the peace and commissioners for declarations.¹⁹⁰⁶ The extent to which such training can be provided will no doubt be affected by the number of persons who hold office. It is arguably not the most effective deployment of resources if training is being provided to persons whose services are not utilised.

However, the Commission also recognises some practical difficulties with the concept of making appointments on the basis of need. Even if there were prescribed criteria for the assessment of “need”, the Commission believes that, in practice, it would be difficult to apply those criteria. For example, a relevant criterion might be the extent to which the community is already served by justices of the peace. However, to assess the extent to which a community is so served, a person would need information not only about the number of office holders in an area, but also about the level of service provided by the existing office holders.

Even if the Department had some information about the extent to which the particular services of individual justices of the peace were being used,¹⁹⁰⁷ it would be difficult to determine from that information whether there was a sufficient need in the community to warrant the making of further appointments. For example, the collation of the information provided by individual justices of the peace might reveal that, say, ten justices of the peace in an area are acting as an interview friend for a juvenile suspect once per fortnight. Even with that information, it would be extremely difficult, in the Commission’s view, to determine what should be the appropriate benchmark for such duties.

Further, given that applicants for appointment generally pay for their initial training, the Commission believes that it would be unfair if, after having paid for the training and expended the time and effort to attend a training course and pass an examination, the application of a person who was otherwise eligible to be appointed was refused on the basis that there was no present need for the person’s services. If some limitation were ultimately to be placed on the number of appointments made, in fairness to prospective applicants, that limitation should be imposed before a person embarks on the initial training.

¹⁹⁰⁶ See p 353 of this Report (Recommendation 12.19).

¹⁹⁰⁷ See the Commission’s recommendation at pp 352-353 of this Report that, on applying to renew a term of appointment, a justice of the peace or a commissioner for declarations must provide information about his or her level of activity during the intervening period (Recommendation 12.16(b)).

If the Commission's recommendations in this Report are implemented, it is likely that the number of justices of the peace will have peaked. In particular, the recommendations that applicants for the office of justice of the peace (qualified) must attend a training course in addition to passing an examination, that appointments be made for a fixed term, and that ongoing training be provided to justices of the peace are likely to result in a diminution in the number of justices of the peace. Consequently, the Commission does not consider that the administrative difficulties that would inevitably be faced in attempting to put in place a regime under which justices of the peace are appointed on the basis of need are justified.

In the Commission's view, it would be even more difficult to determine the question of need in relation to the appointment of commissioners for declarations. In many workplaces, it is a question of convenience to have an employee hold office as a commissioner for declarations so that there is always someone available to witness relevant documents. The Commission considers that it would be virtually impossible, having regard to the use of commissioners for declarations in the workplace, to assess what would be an adequate number of commissioners for a particular locality. The Commission also agrees with the respondent who suggested that, if the number of people who could witness documents were restricted, this would raise privacy issues for the people in need of those services, especially for people in a small town who might be quite limited in their choice of a witness.¹⁹⁰⁸

Consequently, the Commission is of the view that it is not appropriate to require the appointment of commissioners for declarations to be made on the basis of need.

10. RECOMMENDATIONS

The Commission makes the following recommendations:

Process of appointment

- 12.1 An applicant seeking appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations should continue to be required to disclose his or her convictions for any offences.**
- 12.2 The present requirement that an applicant must be nominated by his or her member of State Parliament, by a member of any Parliament in Australia, or - where an applicant seeks appointment to carry out duties in a financial**

¹⁹⁰⁸

Submission 38. See p 346 of this Report.

institution or government department - by the general manager of the institution or chief executive of the government department concerned, should be abolished.

12.3 The registrar should continue to be required to make inquiries to ascertain whether an applicant is a fit and proper person.

Qualifications for appointment

12.4 In order to qualify for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations, a person should:

- (a) be considered by the Governor in Council to be a fit and proper person;
- (b) be of or above the age of eighteen;
- (c) be an Australian citizen; and
- (d) have satisfied the relevant training requirements.

12.5 The relevant training requirements for an appointment made after the implementation of this recommendation should be as follows:

- (a) for appointment as a justice of the peace (magistrates court) or as a justice of the peace (qualified) - the applicant must attend a mandatory training course and pass an examination;
- (b) if a lawyer seeks appointment as a justice of the peace (magistrates court) or as justice of the peace (qualified) - the applicant must pass an examination;
- (c) for appointment as a commissioner for declarations - the applicant must pass an examination;
- (d) if a lawyer seeks appointment as a commissioner for declarations - there should be no training requirement.

Limitation on the performance of bench duties

12.6 A justice of the peace, whether an *ex officio* justice of the peace¹⁹⁰⁹ or a justice of the peace (magistrates court),¹⁹¹⁰ should not be eligible to constitute a court for any purpose after attaining the age of 70 years.

Disqualifications from office

12.7 A person who:

- (a) is an undischarged bankrupt or is taking advantage, as a debtor, of the laws in force for the time being relating to bankrupt or insolvent debtors;**
- (b) has been convicted of certain offences;¹⁹¹¹ or**
- (c) is a patient within the meaning of the *Mental Health Act 1974 (Qld)*;**

should not be qualified to be appointed to, or continue in, office as an appointed justice of the peace or as an appointed commissioner for declarations.¹⁹¹²

12.8 The criminal convictions that should constitute a ground of disqualification from being appointed to, or continuing in, office as an appointed justice of the peace or as an appointed commissioner for declarations should be:

- (a) conviction for an indictable offence (whether on indictment or summarily);**
- (b) conviction for an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*;**
- (c) conviction for the offences presently set out in sections 9 and 10 of the *Justices of the Peace and Commissioners for Declarations***

¹⁹⁰⁹ See the discussion of *ex officio* justices of the peace at pp 28-29 of this Report.

¹⁹¹⁰ See the recommendation at p 270 of this Report that justices of the peace (qualified) should not have the power to constitute a court for any purpose (Recommendation 10.2).

¹⁹¹¹ But see Recommendation 12.9 at p 351 of this Report.

¹⁹¹² See the explanation of the terms “appointed justice of the peace” and “appointed commissioner for declarations” at p 28 of this Report.

Regulation 1991 (Qld).¹⁹¹³

12.9 If the Minister considers that special circumstances exist, the Minister should be able to exempt an applicant for appointment as a justice of the peace (magistrates court), justice of the peace (qualified) or commissioner for declarations from any of the grounds of disqualification that relate to criminal convictions.

12.10 All the grounds of disqualification should be contained in the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*.

Validation of certain acts

12.11 The *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should include a provision to the effect that an act performed by a person who purports to act as a justice of the peace or as a commissioner for declarations is not invalidated by reason only of the fact that:

- (a) the person no longer holds office as a justice of the peace or as a commissioner for declarations;
- (b) the person was not eligible to be appointed as a justice of the peace or as a commissioner for declarations.

12.12 The *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* should include a provision to the effect that no finding, decision, or order of a Magistrates Court or of a Childrens Court may be impugned, reversed or invalidated on the ground that a justice of the peace constituting the court has attained the age of 70 years.

Fixed-term appointments

12.13 An appointment of a person as a justice of the peace (magistrates court) or as a justice of the peace (qualified) should be made for a term of seven years.

¹⁹¹³

Some of the grounds of disqualification in ss 9 and 10 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991 (Qld)* refer to convictions or events occurring within a specified period prior to a person's appointment. It will be necessary for those grounds of disqualification to be modified in order to make them relevant to convictions or events occurring after a person has been appointed.

12.14 An appointment of a person as a commissioner for declarations should be made for a term of ten years.

12.15 A justice of the peace (magistrates court), a justice of the peace (qualified) or a commissioner for declarations who wishes to continue in office should be required, before the expiry of his or her current term of office, to apply to the Department of Justice and Attorney-General to renew his or her appointment.

12.16 When applying to renew an appointment, a justice of the peace (magistrates court), a justice of the peace (qualified) or a commissioner for declarations should be required to disclose:

- (a) whether his or her circumstances have undergone any changes that would disqualify the person from continuing in office;
- (b) details of the level of activity during the intervening period; and
- (c) details of any training undertaken during the intervening period.

12.17 A justice of the peace (magistrates court) or a justice of the peace (qualified) who holds office prior to the implementation of Recommendation 12.13 should be required, initially, to renew his or her appointment within three years of the implementation of that recommendation. At that point, the appointment of the justice of the peace should be renewed for a further term of seven years.

12.18 A commissioner for declarations who holds office prior to the implementation of Recommendation 12.14 should be required, initially, to renew his or her appointment within three years of the implementation of that recommendation. At that point, the appointment of the commissioner for declarations should be renewed for a further term of ten years.

Ongoing training after appointment

12.19 The Department of Justice and Attorney-General should, as the need arises, provide ongoing training for justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations.

CHAPTER 13

LIABILITY

1. THE EXISTING LEGISLATION

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the extent to which a civil action may be brought against a justice of the peace or a commissioner for declarations.

Section 36 of the Act provides:

- (1) A person injured -
 - (a) by an act done by a justice of the peace or a commissioner for declarations purportedly in the performance of the functions of office but which the justice of the peace or commissioner for declarations knows is not authorised by law; or
 - (b) by an act done by a justice of the peace or commissioner for declarations in the discharge of the functions of office but done maliciously and without reasonable cause;

may recover damages or loss sustained by the person by action against the justice of the peace or commissioner for declarations in any court of competent jurisdiction.
- (2) Subject to subsection (1), action is not to be brought against a justice of the peace or commissioner for declarations in respect of anything done or omitted to be done in, or purportedly in, the performance of the functions of office.

The effect of section 36 is to protect a justice of the peace or a commissioner for declarations against liability for injury resulting from the way the office holder performed his or her duty. If a justice of the peace or a commissioner for declarations is sued by a person claiming to have been injured by an act done by the justice of the peace or by the commissioner for declarations, the justice of the peace or commissioner for declarations will have a good defence to that action unless:

- the justice of the peace or commissioner for declarations knew that the act was not authorised by law;¹⁹¹⁴ or
- the justice of the peace or commissioner for declarations did the act maliciously and without reasonable cause.¹⁹¹⁵

The protection afforded to justices of the peace and commissioners for declarations

¹⁹¹⁴ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 36(1)(a).

¹⁹¹⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 36(1)(b).

relates only to where the act in question was done by the justice of the peace or the commissioner for declarations in, or purportedly in, the performance of, or in the discharge of, the functions of office. If a justice of the peace is sued in respect of an act that is not part of the “functions of office”, for example, giving legal advice, he or she will be liable to the same extent as any other person would be, if sued in respect of that act. Section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not apply in those circumstances.

Section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) deals only with the civil liability of justices of the peace and commissioners for declarations. It does not afford any protection in respect of criminal liability.

2. STATUTORY INDEMNITY FOR COSTS OF DEFENDING PROCEEDINGS

Because of the protection afforded by section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), the potential liability of a justice of the peace or a commissioner for declarations in respect of an act done in the performance of that office is relatively small. Unless the justice of the peace or the commissioner for declarations knew that the act in question was not authorised by law, or, in relation to an authorised act, did the act both maliciously and without reasonable cause, the justice of the peace or commissioner for declarations will not be held liable in a civil action.

However, although a justice of the peace or a commissioner for declarations might successfully defend an action, he or she would invariably incur legal costs in doing so. Even though the court would usually make an order that the unsuccessful plaintiff must pay the costs of the justice of the peace or commissioner for declarations who successfully defended the action, the extent to which the justice of the peace or the commissioner for declarations could recover these costs would depend on the plaintiff’s financial situation. In any event, the actual costs of the justice of the peace or commissioner for declarations might exceed the amount able to be recovered under the court order. It is possible that the justice of the peace or the commissioner for declarations could be left substantially out of pocket as a result of the court proceedings.

Although section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the circumstances in which a justice of the peace or a commissioner for declarations will be held liable, if sued, the Act does not contain a provision requiring the government to indemnify a justice of the peace or a commissioner for declarations in respect of his or her legal costs, not even if he or she is successful in defending an action.

The Commission is aware that some justices of the peace have taken out professional indemnity insurance policies. An association of justices of the peace has provided the

Commission with a copy of a Master Professional Indemnity Insurance Policy negotiated for its members. Not surprisingly, the policy expressly excludes a claim that arises from an act that the justice of the peace knew was not authorised. It also excludes a claim that arises from an act that was done by a justice of the peace maliciously and without reasonable cause. Given that, in respect of all other acts, a justice of the peace or a commissioner for declarations would be protected by section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), this raises the question of the purpose of the policy.

Under the particular policy that was provided to the Commission, the insurer agrees to indemnify the justice of the peace in respect of a claim covered by the policy, including costs and expenses incurred with the written consent of the insurer in the investigation, defence or settlement of a claim covered by the policy. The main effect of the policy, therefore, is that an insured justice of the peace will be indemnified against the costs incurred in the defence of a claim, provided that the justice of the peace has not knowingly done an unauthorised act or done an authorised act maliciously and without reasonable cause.

Unlike the situation in Queensland, legislation in the United Kingdom provides that, in certain circumstances, a justice of the peace must be indemnified in respect of “relevant amounts” incurred in connection with proceedings brought against the justice of the peace in respect of anything done or omitted in the exercise, or purported exercise, of his or her duty as a justice of the peace.¹⁹¹⁶

Where the duty being exercised, or purportedly exercised, by the justice of the peace relates to “criminal matters”, the justice of the peace must be indemnified in respect of “relevant amounts” unless it is proved, in respect of the matters giving rise to the proceedings or claim, that the justice of the peace acted in bad faith.¹⁹¹⁷ Where the duty in question does not relate to “criminal matters”, the justice of the peace must be indemnified in respect of “relevant amounts” if, in respect of the matters giving rise to the proceedings or claim, the justice of the peace acted reasonably and in good faith.¹⁹¹⁸

The following expenses are defined as “relevant amounts” in relation to a justice of the peace:¹⁹¹⁹

- (a) any costs which he reasonably incurs -
 - (i) in or in connection with proceedings against him in respect of anything

¹⁹¹⁶ *Justices of the Peace Act 1997* (UK) s 54.

¹⁹¹⁷ *Justices of the Peace Act 1997* (UK) s 54(1), (2)(a).

¹⁹¹⁸ *Justices of the Peace Act 1997* (UK) s 54(1), (2)(b).

¹⁹¹⁹ *Justices of the Peace Act 1997* (UK) s 54(1).

- done or omitted in the exercise (or purported exercise) of his duty as a justice of the peace ... ; or
- (ii) in taking steps to dispute any claim which might be made in such proceedings;
 - (b) any damages awarded against him or costs ordered to be paid by him in any such proceedings; and
 - (c) any sums payable by him in connection with a reasonable settlement of any such proceedings or claim ...

3. DISCUSSION PAPER

In the Discussion Paper, the Commission considered the extent to which a justice of the peace should be protected from, or indemnified against, liability in respect of acts done in the performance of his or her duties.¹⁹²⁰

Although a small number of respondents to the Issues Paper considered that the protection given by the existing legislation was satisfactory,¹⁹²¹ the majority of respondents who addressed the issue of liability agreed that, provided their actions were within the scope of legislative protection, justices of the peace should be indemnified against the costs of any action brought against them arising from the performance of their duties.¹⁹²² Several respondents argued that justices of the peace might not be in a position to be able to afford insurance and, in any event, should not have to bear the cost themselves.¹⁹²³ The submissions emphasised that justices of the peace perform a service to the community on a voluntary basis and receive no financial reward for their efforts.¹⁹²⁴

In particular, some respondents favoured indemnity in respect of costs reasonably incurred in defending criminal proceedings, unless it is proved that the justice of the peace acted in bad faith.¹⁹²⁵ A submission from one justice of the peace advised that

¹⁹²⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 275-276.

¹⁹²¹ Submissions 41 (IP), 44 (IP), 45 (IP), 50 (IP), 53 (IP), 105 (IP).

¹⁹²² Submissions 1A (IP), 3 (IP), 7 (IP), 8 (IP), 10 (IP), 11 (IP), 15 (IP), 16 (IP), 20 (IP), 21 (IP), 30 (IP), 31 (IP), 33 (IP), 35 (IP), 36 (IP), 39 (IP), 43 (IP), 47 (IP), 54 (IP), 57 (IP), 65 (IP), 66 (IP), 68 (IP), 87 (IP), 88 (IP), 89 (IP), 91 (IP), 92 (IP), 93 (IP), 94 (IP), 96 (IP), 97 (IP), 98 (IP), 120 (IP).

¹⁹²³ Submissions 19 (IP), 33 (IP), 36 (IP), 43 (IP), 54 (IP), 85 (IP).

¹⁹²⁴ Submissions 7 (IP), 19 (IP), 33 (IP), 36 (IP), 40 (IP), 43 (IP), 47 (IP), 51 (IP), 54 (IP), 85 (IP).

¹⁹²⁵ Submissions 10 (IP), 16 (IP), 40 (IP), 49 (IP), 61 (IP), 103 (IP).

he had been charged over an allegation of backdating a warrant for the Australian Federal Police. Although he was initially committed for trial, the Commonwealth Director of Public Prosecutions later withdrew the charges. By this time, the legal costs of the justice of the peace were in the vicinity of \$25,000.¹⁹²⁶

The Commission expressed the view that justices of the peace and commissioners for declarations perform an integral role in the administration of justice in this State, particularly in rural and remote areas, but also in regional centres and cities. If it were not for the functions that are performed voluntarily and free of charge by justices of the peace, the government would incur considerable costs in providing equivalent services to members of the community.¹⁹²⁷

For that reason, the Commission was of the view that it seems unduly harsh that, even when a justice of the peace or a commissioner for declarations successfully defends proceedings or the proceedings are withdrawn or discontinued, the justice of the peace or the commissioner for declarations should have to bear the legal costs of defending those proceedings¹⁹²⁸ or the cost of insuring against those legal costs. The Commission expressed the view that, where the proceedings - whether of a criminal or a civil nature - are withdrawn or are successfully defended, justices of the peace and commissioners for declarations should be indemnified in respect of their legal costs.¹⁹²⁹

The Commission's preliminary recommendation was that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide an indemnity for justices of the peace and commissioners for declarations who successfully defend civil or criminal proceedings that are brought against them as a result of their exercise of power, and that such an indemnity should also be available if the proceedings are withdrawn or discontinued.¹⁹³⁰

The Commission considered the further possibility that a civil claim against a justice of the peace or a commissioner for declarations might be concluded by settlement. There could be a number of reasons for this. For example, it may be that, in view of the size of the claim, the costs of defending it are not warranted and the sensible commercial decision is to reach a compromise solution, even though the justice of the peace or commissioner for declarations has acted with complete propriety in the exercise of his

¹⁹²⁶ Submission 68 (IP).

¹⁹²⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 275.

¹⁹²⁸ As noted at p 355 of this Report, even though a justice of the peace or a commissioner for declarations might successfully defend an action, he or she might not be able to recover all or any of those costs from the plaintiff.

¹⁹²⁹ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 276.

¹⁹³⁰ Ibid.

or her powers. The Commission noted that the Master Policy provided to the Commission included an indemnity in respect of costs and expenses incurred in the settlement of a claim covered by the policy.¹⁹³¹

The Commission did not form a preliminary view on this issue. Rather, it sought submissions on whether the indemnity that was proposed in the Commission's preliminary recommendation should also apply in the situation where a justice of the peace or a commissioner for declarations had incurred costs and expenses in the settlement of a claim that did not arise from an act that the justice of the peace or the commissioner for declarations knew was not authorised or from an act that was done maliciously and without reasonable cause.¹⁹³²

4. SUBMISSIONS

Twenty-eight submissions received by the Commission in response to the Discussion Paper commented on the Commission's preliminary recommendation that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide an indemnity for justices of the peace and commissioners for declarations who successfully defend civil or criminal proceedings that are brought against them or who are the subject of proceedings that are subsequently withdrawn or discontinued.

Twenty-six of the submissions agreed with the Commission's preliminary recommendation.¹⁹³³ One respondent commented:¹⁹³⁴

No JP or Commissioner for Declarations should be out of pocket if they can successfully defend an action against them while carrying out their duties under the Act ...

The same respondent was concerned about what costs would be encompassed by the term "indemnity" and suggested that the preliminary recommendation should be altered to refer to "a full indemnity", so that there could be no "debate about the amount of indemnity intended".

Another respondent suggested that any indemnity should be subject to the approval of the Minister for Justice.¹⁹³⁵

¹⁹³¹ Ibid.

¹⁹³² Id at 277.

¹⁹³³ Submissions 6, 7, 8, 9, 10, 18, 21, 23, 24, 25, 26, 29, 30, 33, 34, 37, 38, 40, 44, 45, 48, 51, 53, 54, 56, 59.

¹⁹³⁴ Submission 10.

¹⁹³⁵ Submission 29.

A respondent who agreed with the preliminary recommendation thought that the proposed indemnity should be extended so as to apply in some cases where the justice of the peace was unsuccessful in defending the proceedings:¹⁹³⁶

It clearly is in the best interests of Justices of the Peace that the legislation be amended to provide indemnity for Justices of the Peace, even if the case before the court is lost by the Justice of the Peace. I state even the losses because, unless the Justice of the Peace or Commissioner for Declaration has openly stated that they knew their action was unauthorised, malicious or without reasonable cause, it must be realised that an error in judgement can even be made in a court of law in relation to a verdict. [original emphasis]

Several respondents, although agreeing with the Commission's preliminary recommendation, were nevertheless concerned about the financial capacity of justices of the peace to defend any proceedings that were brought against them.¹⁹³⁷ One respondent commented:¹⁹³⁸

... the problem arises when a JP is served with a writ and cannot afford to defend it.

That respondent suggested that, to avoid this problem, the Justice Department should take over the defence of the proceedings. Another respondent suggested that Crown Law should defend justices of the peace "when they have acted in a proper manner".¹⁹³⁹ It was suggested that:¹⁹⁴⁰

... this would take away the concern of justices having to pay legal expenses, if action was taken against them ...

Another respondent expressed a similar concern about whether justices of the peace would be able to afford the costs of defending proceedings brought against them:¹⁹⁴¹

Some consideration could also be given to a method of financial assistance for a Justice of the Peace to prepay Counsel costs as required so that the Justice of the Peace without sufficient financial means is not disadvantaged in the course of justice and can afford adequate legal representation.

Two respondents who commented on this issue did not agree with the Commission's preliminary recommendation about the extent to which justices of the peace should be indemnified in respect of costs incurred in defending legal proceedings.

¹⁹³⁶ Submission 59.

¹⁹³⁷ Submissions 8, 24, 34, 48.

¹⁹³⁸ Submission 34.

¹⁹³⁹ Submission 24.

¹⁹⁴⁰ Ibid.

¹⁹⁴¹ Submission 8.

One of these respondents, a justice of the peace association, shared the concern raised by a number of submissions about the viability of indemnifying justices of the peace in respect of their defence costs if they cannot afford to outlay that money in the first place.¹⁹⁴² This respondent commented:

Whilst the Preliminary Recommendation ... provides indemnity for those who successfully defend civil or criminal proceedings brought against them, we do not feel that the recommendation is completely adequate.

... Who pays the up-front legal costs of a Justice of the Peace or Commissioner for Declarations successfully defending an action? Surely it should be mandatory for Crown Law to provide the defence? Many Justices of the Peace and Commissioners for Declarations would be unable to afford to defend themselves.

The same respondent suggested that Crown Law should initially defend the justice of the peace or commissioner for declarations and that, if the conduct of the justice of the peace or commissioner for declarations was subsequently found not to be protected by section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), the justice of the peace or commissioner for declarations should be personally responsible for those costs.¹⁹⁴³

The other respondent who did not agree with the Commission's preliminary recommendation thought that the protection afforded by section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) was adequate.¹⁹⁴⁴

I submit that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does truly and fairly cover the responsibilities of those appointed. Any person is liable for acts contrary to the law, done maliciously etc and appointees should be no exception.

I, personally, have never seen the need to join an Association, or take out insurance for duties performed as a Justice of the Peace. I feel that a Justice of the Peace is, and should be seen as, a truly "independent person" in the community, and in the performance of his/her duties.

This respondent did not advert, however, to the fact that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not protect a justice of the peace or a commissioner for declarations in respect of the costs of defending an unmeritorious claim that is brought against him or her.

Eighteen submissions responded to the question asked in the Discussion Paper about whether the proposed indemnity should also apply in the situation where a justice of the peace or a commissioner for declarations has incurred costs and expenses in the settlement of a claim that does not arise from an act that the justice of the peace knew

¹⁹⁴² Submission 47.

¹⁹⁴³ Ibid.

¹⁹⁴⁴ Submission 14.

was not authorised or from an act that was done maliciously and without reasonable cause.¹⁹⁴⁵ All of these respondents agreed that, if a justice of the peace or a commissioner for declarations against whom proceedings were brought had not knowingly done an unauthorised act or done an act maliciously and without reasonable cause, he or she should still be indemnified in respect of the costs and expenses of defending the proceedings if the claim was settled.¹⁹⁴⁶

One respondent commented:¹⁹⁴⁷

It could well be that the costs involved in settling a claim would be considerably less than that of defending a claim through the court system. I believe indemnity should be applicable when a claim is settled.

Defending a charge in Court, when a JP has acted in good faith and with propriety, would be a horrific situation to be in. The option of settling a claim, where financially viable, would perhaps relieve somewhat the anxiety caused by this situation. The law must protect, by all means possible, a JP who is acting in good faith in the performance of his duties.

Another respondent commented:¹⁹⁴⁸

As many JPs, particularly those who have retired or those who have families etc, are in no position to withstand any financial claims against them resulting from their bona fide actions as a JP, it is essential that the proposition raised ... should be included in the recommendations. A failure for this provision to be made could see a marked reluctance of JPs to perform their full and honorary duties.

5. THE COMMISSION'S VIEW

The Commission remains of the view that, where a justice of the peace or a commissioner for declarations successfully defends a proceeding, whether civil or criminal, or where such a proceeding is brought against a justice of the peace or a commissioner for declarations and is then discontinued or withdrawn or is otherwise terminated, the justice of the peace or the commissioner for declarations should be indemnified in respect of the legal costs and expenses incurred in defending the proceeding.

The Commission does not agree with the suggestion made by one respondent that the approval of the Minister for Justice should also be required before a justice of the

¹⁹⁴⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 277.

¹⁹⁴⁶ Submissions 6, 8, 10, 18, 23A, 24, 26, 30, 34A, 38, 40, 41, 45, 48, 51, 54, 56, 59.

¹⁹⁴⁷ Submission 38.

¹⁹⁴⁸ Submission 48.

peace or a commissioner for declarations is indemnified in these circumstances.¹⁹⁴⁹ In the Commission's view, it should be sufficient that a justice of the peace or a commissioner for declarations has successfully defended the proceeding or that the proceeding has been discontinued or withdrawn or has otherwise been terminated. A justice of the peace or a commissioner for declarations should not have to satisfy any additional criteria in order to be indemnified in respect of the legal costs and expenses incurred in defending such a proceeding.

In the Discussion Paper, the Commission sought submissions on the further question of whether a justice of the peace or a commissioner for declarations should be entitled to be indemnified in respect of costs and expenses incurred in the settlement of a civil claim if the claim did not arise from an act that the justice of the peace or the commissioner for declarations knew was not authorised or from an act that was done maliciously and without reasonable cause.¹⁹⁵⁰

The Commission accepts that, in some circumstances, a claim against a justice of the peace or a commissioner for declarations might be settled, even though the justice of the peace or the commissioner for declarations has acted with complete propriety, because the costs that will be incurred in defending the claim and proceeding to trial are likely to exceed the amount that the plaintiff is willing to accept in settlement of the claim. In those circumstances, the issue of settling the claim becomes a commercial decision. In the Commission's view, it would be unfair if a justice of the peace or a commissioner for declarations who would not, if the matter proceeded to trial, be found to be liable were not indemnified in respect of the legal costs and expenses involved in settling a claim, simply because the claim was concluded by settlement, rather than by a judgment in favour of the justice of the peace or the commissioner for declarations.

Accordingly, the Commission is of the view that a justice of the peace or a commissioner for declarations should be entitled to be indemnified in respect of any legal costs and expenses incurred in the settlement of a civil claim if the claim does not arise from:

- an act that the justice of the peace or the commissioner for declarations knew was not authorised; or
- an act that was done maliciously and without reasonable cause.

In these circumstances, the justice of the peace or the commissioner for declarations should be indemnified not only in respect of the legal costs and expenses incurred in defending the claim until it is settled, but also in respect of any settlement moneys paid under the settlement agreement.

¹⁹⁴⁹ See p 359 of this Report.

¹⁹⁵⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 277.

The Commission notes that several respondents to the Discussion Paper, although agreeing with the Commission's preliminary recommendation in relation to indemnifying justices of the peace and commissioners for declarations in respect of certain legal costs and expenses, were concerned that some justices of the peace and commissioners for declarations might not have the financial capacity to defend proceedings that were brought against them.¹⁹⁵¹

The Commission accepts that indemnifying a justice of the peace or a commissioner for declarations in respect of costs and expenses incurred is of little assistance if the relevant office holder is unable to afford to pay for legal representation in the first place. Accordingly, the Commission has given careful consideration to the question of how legal representation might be able to be provided for a justice of the peace or a commissioner for declarations against whom a proceeding is brought.

Where a civil claim is brought against a justice of the peace or a commissioner for declarations, the Commission is of the view that the Crown should provide legal representation for the justice of the peace or the commissioner for declarations concerned. However, the Crown should not be obliged to provide representation, and should be entitled to withdraw, at any stage of the proceeding, representation that has been provided, if it appears that, in respect of an act giving rise to the claim, the justice of the peace or the commissioner for declarations knew that the act was not authorised by law or did the act maliciously and without reasonable cause.

Further, if it is found, or conceded, that the justice of the peace or the commissioner for declarations knew that the act was not authorised by law or did the act maliciously and without reasonable cause, the Crown should be able to recover from the justice of the peace or from the commissioner for declarations the amount of the costs and expenses incurred in providing the legal representation.¹⁹⁵²

¹⁹⁵¹ See pp 360-361 of this Report.

¹⁹⁵² A useful model for such a provision is s 10.7 of the *Police Service Administration Act 1990* (Qld), which provides:

Provision of legal representation

- (1) The commissioner may provide legal representation on behalf of any officer, staff member or recruit against whom any action, claim or demand or proceeding in respect of an offence is brought or made otherwise than by or on behalf of the Crown in any of its capacities on account of any action done or omission made by the officer, staff member or recruit acting, or purporting to act, in the execution of duty.
- (2) If it is found, or conceded, in relation to any such action, claim, demand or proceeding that the officer, staff member or recruit, was not acting in the execution of duty in doing the action or making the omission on which the action, claim, demand or proceeding is based, the commissioner may recover from the officer, staff member or recruit the amount of costs and expenses incurred by the commissioner in providing legal representation under subsection (1) in any court of competent jurisdiction as a debt due and payable

However, where a criminal prosecution is brought against a justice of the peace or a commissioner for declarations, the Commission does not consider it appropriate for the Crown to provide legal representation for the justice of the peace or the commissioner concerned.¹⁹⁵³

If the Commission's recommendations in this respect are implemented and the Crown provides legal representation for a justice of the peace or for a commissioner for declarations and judgment is ultimately entered against the justice of the peace or the commissioner for declarations concerned, the Crown will not be liable to pay any damages that are awarded against the justice of the peace or the commissioner for declarations. Given the terms of section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), a justice of the peace or a commissioner for declarations will be liable in a civil proceeding only if the court finds that the office holder knew that the act giving rise to the proceeding was not authorised or did the act maliciously and without reasonable cause. If such a finding is made, the justice of the peace or the commissioner for declarations will be personally liable for any award of damages that is made against him or her. Further, the justice of the peace or the commissioner for declarations will be liable to repay to the Crown the amount of the legal costs and expenses incurred by the Crown in providing legal representation on his or her behalf.

The Commission has considered the possibility that, by the time a proceeding - civil or criminal - is brought against a person in respect of an act done or omitted to be done in, or purportedly in, the performance of the functions of office, the person may no longer hold office as a justice of the peace or as a commissioner for declarations. The person may have resigned from office or may have decided not to renew his or her appointment.¹⁹⁵⁴ In the Commission's view, where a proceeding is brought against a person in respect of anything done or omitted to be done while the person held office as a justice of the peace or as a commissioner for declarations, the person should have the same entitlement to an indemnity in respect of legal costs and expenses and to legal representation as if the person still held the relevant office.

6. RECOMMENDATIONS

by the officer, staff member or recruit to the commissioner and unpaid.

¹⁹⁵³ Note, however, the Commission's recommendation that, if the justice of the peace or the commissioner for declarations is acquitted or if the criminal proceeding is discontinued or withdrawn or is otherwise terminated, the justice of the peace or the commissioner for declarations is to be indemnified in respect of the legal costs and expenses incurred in defending the proceeding. See pp 365-366 of this Report (Recommendation 13.1(b)).

¹⁹⁵⁴ See the discussion of fixed-term appointments at pp 323-334 of this Report.

The Commission makes the following recommendations:

13.1 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that, where a proceeding is brought against a justice of the peace or a commissioner for declarations in respect of an act done, or omitted to be done, by the justice of the peace or by the commissioner for declarations in, or purportedly in, the performance of the functions of office, the Crown is to indemnify the justice of the peace or the commissioner for declarations against a liability for legal costs and expenses incurred by the justice of the peace or the commissioner for declarations in relation to the defence of:

- (a) a civil proceeding in which judgment is given in favour of the justice of the peace or the commissioner for declarations, or which is discontinued or withdrawn or is otherwise terminated;
- (b) a criminal proceeding in which the justice of the peace or the commissioner for declarations is acquitted, or which is discontinued or withdrawn or is otherwise terminated; or
- (c) a civil proceeding that is settled, including the payment of any settlement moneys, provided that the proceeding does not arise from an act that the justice of the peace or the commissioner for declarations:
 - (i) knew was not authorised by law; or
 - (ii) did maliciously and without reasonable cause.

13.2 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to provide that:

- (a) the Crown must provide legal representation on behalf of a justice of the peace or a commissioner for declarations against whom any civil proceeding is brought in respect of an act done, or omitted to be done, by the justice of the peace or by the commissioner for declarations in, or purportedly in, the performance of the functions of office unless it appears in respect of an act giving rise to the proceeding that the justice of the peace or the commissioner for declarations:

- (i) knew that the act was not authorised by law; or
 - (ii) did the act maliciously and without reasonable cause;
- (b) the Crown may, at any stage of a civil proceeding, withdraw the legal representation referred to in paragraph (a) of this Recommendation if it appears in respect of an act giving rise to the proceeding that the justice of the peace or the commissioner for declarations:
 - (i) knew that the act was not authorised by law; or
 - (ii) did the act maliciously and without reasonable cause;
- (c) if it is found, or conceded, in relation to any such proceeding that the justice of the peace or the commissioner for declarations:
 - (i) knew that the act was not authorised by law; or
 - (ii) did the act maliciously and without reasonable cause;

the Crown may recover from the justice of the peace or the commissioner for declarations the amount of the legal costs and expenses incurred by the Crown in providing legal representation on his or her behalf.

13.3 Where a proceeding, civil or criminal, is brought against a person in respect of anything done or omitted to be done by the person in, or purportedly in, the performance of the functions of office as a justice of the peace or as a commissioner for declarations, but the person no longer holds office as a justice of the peace or as a commissioner for declarations, Recommendations 13.1 and 13.2 should apply as if the person still holds the relevant office.

CHAPTER 14

REIMBURSEMENT OF EXPENSES

1. INTRODUCTION

Under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), it is unlawful for a justice of the peace or a commissioner for declarations to “seek or receive, directly or indirectly, any reward in connection with the performance of the functions of office”.¹⁹⁵⁵ The term “reward” is defined to include “charge, fee, gratuity or any consideration”.¹⁹⁵⁶

This provision reinforces the notion of the role of justice of the peace as a voluntary service to the community, by preventing the payment of any form of remuneration for carrying out such activities as witnessing documents or exercising certain court powers.

However, the Act is silent on the issue of reimbursement to justices of the peace of expenses incurred by them in the performance of their duties, or expenses that are incidental to the performance of their duties.

2. EXPENSES INCURRED BY JUSTICES OF THE PEACE

(a) Training costs

An applicant for appointment as a justice of the peace (magistrates court) is required to undergo training and to pass an examination.¹⁹⁵⁷ At present, training is not compulsory for appointment as a justice of the peace (qualified), although it is strongly recommended by the Department of Justice and Attorney-General.¹⁹⁵⁸

The cost of any training undertaken is generally borne by the individual applicant.

(b) Application fees

An applicant for appointment as a justice of the peace or as a commissioner for

¹⁹⁵⁵ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(1).

¹⁹⁵⁶ *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(2).

¹⁹⁵⁷ Department of Justice and Attorney-General (Qld), *Justice Papers* (No 4, 1995) at 2.

¹⁹⁵⁸ *Ibid.* See p 350 of this Report for the Commission’s recommendation in relation to the training of justices of the peace and commissioners for declarations (Recommendation 12.5).

declarations is required to pay an application fee.¹⁹⁵⁹ The application fee for an applicant who does not currently hold office as either an appointed justice of the peace or an appointed commissioner for declarations is \$80. The application fee for an old system justice of the peace¹⁹⁶⁰ who wishes to be appointed to another category of office is \$29.¹⁹⁶¹

The Minister may exempt a person or class of person from payment of these fees.¹⁹⁶²

(c) Materials

The Department of Justice and Attorney-General publishes training manuals for the training of commissioners for declarations, justices of the peace (qualified) and justices of the peace (magistrates court). These manuals are available for purchase by applicants for appointment.¹⁹⁶³ They can also be borrowed from a person's local member of State Parliament.¹⁹⁶⁴

Justices of the peace and commissioners for declarations do not have access to resources such as the Department of Justice and Attorney-General library to enable them to keep up to date with legislative developments affecting their powers and functions. If a justice of the peace or a commissioner for declarations wants a copy of relevant legislation, he or she must purchase it unless a copy is otherwise available to the justice of the peace or to the commissioner for declarations.¹⁹⁶⁵

¹⁹⁵⁹ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 16.

¹⁹⁶⁰ See the explanation of the Commission's use of this term at pp 16-17 of this Report.

¹⁹⁶¹ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 16.

¹⁹⁶² *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 18.

¹⁹⁶³ Manual 1 (*Administrative Duties of Commissioners for Declarations and Justices of the Peace*) and Manual 2 (*A Manual for Queensland Justices of the Peace (Qualified)*) presently cost \$6.00 each. In addition, Student Notes 1 (*The Duties of Commissioners for Declarations*) and Student Notes 2 (*The Duties of Justices of the Peace (Qualified)*) cost \$16.00 and \$18.00 respectively: Department of Justice and Attorney-General, *JP Publications Order Form* <http://www.justice.qld.gov.au/order_pub.html> (8 December 1999). The Department of Justice and Attorney-General recommends that a person wishing to be appointed as a commissioner for declarations or as a justice of the peace (qualified) should buy the relevant manual and the accompanying student notes: Department of Justice and Attorney-General, *Justices of the Peace Fact Sheet* <<http://www.justice.qld.gov.au/pubs/07fact.html>> (8 December 1999).

¹⁹⁶⁴ Department of Justice and Attorney-General, *Justices of the Peace Fact Sheet* <<http://www.justice.qld.gov.au/pubs/07fact.html>> (8 December 1999).

¹⁹⁶⁵ See p 374 of this Report.

(d) Administrative costs

It is likely that an active justice of the peace or commissioner for declarations would incur some administrative costs. For example, it is not hard to imagine that the exercise of a justice's powers would involve costs such as stationery and other office supplies and, in particular, telephone calls.

(e) Travel expenses

Justices of the peace who exercise court powers would incur costs in travelling to and from the court house. Similarly, attendance at police interviews could involve costs in travelling to and from the police station. These costs could be considerably more in regional and remote areas because of the greater distances involved.

3. OTHER JURISDICTIONS

(a) Australia

No other Australian jurisdiction currently has legislation to cover the reimbursement of expenses incurred by justices of the peace.

However, the issue of reimbursement was raised for consideration by the Law Reform Commission of Western Australia. In its Discussion Paper on Courts of Petty Sessions,¹⁹⁶⁶ the Commission noted that it would be possible:¹⁹⁶⁷

... to reimburse justices for expenses incurred in presiding over courts, and perhaps pay them an allowance for doing so. This would go some way to compensating justices who had to leave a business for a time while presiding over a court.

Most respondents to the Western Australian Discussion Paper were in favour of reimbursement of "out of pocket" expenses, but few were of the view that justices of the peace should be paid an allowance.¹⁹⁶⁸ The Law Reform Commission of Western Australia concluded:¹⁹⁶⁹

As to the payment of an attendance allowance, the Commission agrees with the majority

¹⁹⁶⁶ Law Reform Commission of Western Australia, Discussion Paper, *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1984).

¹⁹⁶⁷ Id at para 2.29.

¹⁹⁶⁸ Law Reform Commission of Western Australia, *Report on Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1986) at para 2.25.

¹⁹⁶⁹ Id at para 2.27.

of commentators that no such allowance should be paid. While an allowance may encourage persons to accept appointment who would otherwise be financially unable to do so, the Commission considers that it is important to preserve the present tradition of honorary service.

In response to a submission from the Western Australian Crown Law Department that it was the practice of the Department “to meet the expenses of justices in attending training courses, including air fares, accommodation and meals where appropriate”,¹⁹⁷⁰ the Law Reform Commission of Western Australia endorsed this approach and recommended that it “be extended to expenses involved in attending a court sitting”.¹⁹⁷¹

Reimbursement of expenses of this nature serves to encourage people to undertake judicial duties, thus increasing the pool of available justices, particularly in the more sparsely populated areas of the State. So that justices know where they stand, the Commission recommends that payment of such expenses be put on a statutory footing by empowering the Governor to make regulations for this purpose.

(b) The United Kingdom

Justices of the peace in England and Wales are entitled to receive the following allowances:¹⁹⁷²

- a travelling or subsistence allowance where expenditure on travelling or, as the case may be, on subsistence is necessarily incurred for the purpose of enabling a justice of the peace to perform any of his or her duties as a justice of the peace; and
- a financial loss allowance where, for that performance, the justice of the peace incurs any other expenditure to which he or she would not otherwise be subject, or suffers any loss of earnings or of social security benefit that he or she would otherwise have made or received.

4. DISCUSSION PAPER

In the Discussion Paper, the Commission considered whether justices of the peace should be reimbursed for any of the expenses incurred by them in the performance of the functions of office.¹⁹⁷³ Some of the submissions received in response to the Issues

¹⁹⁷⁰ Id at para 2.26.

¹⁹⁷¹ Ibid.

¹⁹⁷² *Justices of the Peace Act 1997* (UK) s 10(1).

¹⁹⁷³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 284-286.

Paper observed that justices of the peace provide a service to the community¹⁹⁷⁴ and that, while the service was willingly provided on a voluntary basis, justices of the peace should not be left out of pocket.¹⁹⁷⁵ One respondent commented:¹⁹⁷⁶

As a general principle, while the role of JP might be voluntary and attract no remuneration in itself, holders of that office should not be expected to bear additional costs from their own pocket, especially when those costs are onerous.

The Commission stated that, as a matter of general principle, justices of the peace should be entitled to compensation for at least some of the expenses incurred by them in the performance of the role. The Commission expressed the view that, while the role of justice of the peace is a voluntary one, it is nonetheless an important component of the Queensland system of administration of justice and that members of the community who undertake it should not be left out of pocket for the contribution that they make to our society. Moreover, the Commission considered that the cost to government of compensating justices of the peace was likely to be significantly less than the cost of providing an alternative means of delivering the services provided free of charge by justices of the peace, such as the appointment of more locally based magistrates.¹⁹⁷⁷

However, the Commission also acknowledged that the administrative cost of compensating all justices of the peace for every expense incurred would be considerable. As a result, the Commission concentrated on the expenses that it believed would be most commonly incurred by justices of the peace.¹⁹⁷⁸

(a) Training costs

In the Discussion Paper, the Commission expressed the view that adequate training for justices of the peace is essential to ensure that they are able to fulfil the requirements of their role satisfactorily.¹⁹⁷⁹ The Commission gave careful consideration to the question of how the costs of providing that training should be borne.

The Commission was concerned at the potential public cost of providing free training to all the people who wish to become justices of the peace (qualified),¹⁹⁸⁰ which is the

¹⁹⁷⁴ Submissions 14 (IP), 17 (IP), 109 (IP), 112 (IP).

¹⁹⁷⁵ Submission 109 (IP), 112 (IP).

¹⁹⁷⁶ Submission 112 (IP).

¹⁹⁷⁷ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 284.

¹⁹⁷⁸ Ibid.

¹⁹⁷⁹ Ibid.

¹⁹⁸⁰ Ibid.

office to which the greatest number of appointments are made.¹⁹⁸¹ The Commission was conscious of the fact that there is no guarantee that those who undertake a training course will complete it or, if they do, will sit for and pass the prescribed examination. Nor is it certain that those who pass the examination will become active justices of the peace. The Commission was of the view that, to the extent that candidates fail to complete the training course or to pass the examination, or to become actively involved as justices of the peace, the cost to the public of providing free training to those people would be thrown away.¹⁹⁸²

The Commission expressed the view that the provision of free training to all potential justices of the peace (qualified) may not be an effective use of resources, which could be better employed in other ways. Further, in the Commission's view, requiring potential justices of the peace (qualified) to meet the costs of their own initial training is some indication of their commitment to perform the role.¹⁹⁸³

However, the Commission recognised that, once a person has been appointed as a justice of the peace (qualified), there is a public interest in the continuing education of that person to enable him or her to keep abreast of current developments and legislative changes that may affect the performance of his or her duties. For that reason, the Commission formed the view that justices of the peace (qualified) should not have to bear the cost of ongoing training.¹⁹⁸⁴

The Commission also expressed the view that there is a public interest in ensuring that there are sufficient numbers of properly trained justices of the peace (magistrates court) to undertake the higher duties of that office, particularly in regional and rural areas. Consequently, the Commission was of the view that justices of the peace (magistrates court) should not have to bear the cost of either pre-appointment or post-appointment training. The Commission considered that such training should be provided at public expense.¹⁹⁸⁵

The Commission was also of the view that any ongoing training that is provided to commissioners for declarations should be provided at public expense.¹⁹⁸⁶

¹⁹⁸¹ See p 31 of this Report.

¹⁹⁸² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 284.

¹⁹⁸³ Ibid.

¹⁹⁸⁴ Id at 285, 286. See Chapter 12 of this Report for the Commission's recommendations in relation to training.

¹⁹⁸⁵ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 285.

¹⁹⁸⁶ Ibid.

The Commission made the following preliminary recommendations in relation to the costs of training justices of the peace and commissioners for declarations:¹⁹⁸⁷

- Justices of the peace (qualified) and commissioners for declarations should not be reimbursed for the cost of training prior to their appointment.
- Training prior to the appointment of justices of the peace (magistrates court) should be provided at public expense.
- Ongoing training for justices of the peace (qualified) should be provided at public expense.
- Ongoing training for justices of the peace (magistrates court) should also be provided at public expense.
- Any ongoing training considered necessary for commissioners for declarations should be provided at public expense.

(b) Materials

The Commission expressed the view that the provision of continued training would significantly reduce the need for justices of the peace to provide their own materials in order to keep up to date. The Commission envisaged that this training would include the provision of materials necessary for justices of the peace to become familiar with developments that affect the exercise of their powers.¹⁹⁸⁸

The increasing availability of Internet access would also assist in putting relevant information, including legislation, within the reach of justices of the peace. The Commission did not assume that all, or even most, justices of the peace would have private facilities to enable them to access this information. However, the Commission observed that many public libraries now provide Internet facilities free of charge.¹⁹⁸⁹

Accordingly, the Commission did not make a preliminary recommendation about the cost of materials.

(c) Travel expenses

The Commission expressed the view that many of the functions of a justice of the peace

¹⁹⁸⁷ Id at 286-287.

¹⁹⁸⁸ Id at 285.

¹⁹⁸⁹ Ibid.

can be performed in the justice's own home, and therefore do not involve any transportation costs. However, it noted that there are some functions for which it may be necessary for a justice of the peace to travel to a police station or a court house. The Commission observed that, while the costs of this travel are likely to be relatively minor in city and regional areas, they may be considerably higher for justices of the peace providing a service in rural and remote communities.¹⁹⁹⁰

The Indigenous Advisory Council, a respondent to the Issues Paper, had drawn attention to the situation in remote communities where justices of the peace may reside at some distance from the township.¹⁹⁹¹ The respondent explained that this may mean either that justices of the peace have to pay significant expenses from their own pocket, or that they are being under-utilised because of the distance and the cost.¹⁹⁹² In particular, the respondent noted the case of a long standing justice of the peace who is frequently called upon to travel from his home at a remote outstation to the township of Aurukun to serve on the bench.¹⁹⁹³

The distance involved is considerable and can cost over \$200 one way if a charter flight is used. Even the alternative means of travel - by car over a bush track and then barge - is costly.

The respondent proposed that, in order to overcome any possible fear in relation to the overall cost to the State of reimbursing justices of the peace for their expenses, "a rule might be adopted whereby only expenses above a certain limit may be reimbursed".¹⁹⁹⁴

Although the Commission expressed the view that it is undesirable that any justice of the peace should be out of pocket as a result of carrying out the functions of the office, it nonetheless acknowledged that, where the amounts of money involved are relatively small, the administrative costs of attempting to reimburse all justices of the peace for their travel expenses may make such a proposal impractical.¹⁹⁹⁵

The Commission's preliminary recommendation was that the government should develop guidelines for the reimbursement of reasonable travel costs incurred by justices of the peace in carrying out their functions of office.¹⁹⁹⁶

1990 Ibid.

1991 Id at 283. Submission 112 (IP).

1992 Submission 112 (IP).

1993 Ibid.

1994 Ibid.

1995 Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 286.

1996 Id at 287.

(d) Subsistence costs and financial loss

The Commission noted that justices of the peace in England and Wales are entitled to receive a travelling or subsistence allowance and a financial loss allowance.¹⁹⁹⁷ The Commission did not make a preliminary recommendation as to whether justices of the peace should be entitled to similar allowances, but, instead, sought submissions on the following questions:¹⁹⁹⁸

- Should a justice of the peace be entitled to be reimbursed for subsistence costs necessarily incurred for the purpose of enabling the justice of the peace to perform any of the duties of office?
- Should a justice of the peace be entitled to receive payments by way of a financial loss allowance where expenditure is incurred to which the justice of the peace would not otherwise be subject, or where the justice of the peace suffers any loss of earnings that the justice of the peace would otherwise have received?

(e) Definition of “reward”

This issue was originally raised by the Indigenous Advisory Council in its submission in response to the Issues Paper. The Council informed the Commission that it was aware of a case where a claim by a justice of the peace for reimbursement of travel expenses had been denied on the basis that it would contravene the statutory prohibition on justices of the peace receiving any “reward”.¹⁹⁹⁹ The Council suggested that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify the distinction between the concepts of “reward” and reimbursement of expenses.²⁰⁰⁰

The word “reimburse” is defined in the Australian Concise Oxford Dictionary to mean “repay (a person who has expended money)” and “repay (a person’s expenses)”.²⁰⁰¹ The Commission considered it difficult to understand how the concept of repayment of costs incurred by a person could be confused with the notion of “reward” as defined in

¹⁹⁹⁷ Id at 281.

¹⁹⁹⁸ Id at 287.

¹⁹⁹⁹ Id at 283. *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(1).

²⁰⁰⁰ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 282.

²⁰⁰¹ *The Australian Concise Oxford Dictionary* (2nd ed 1992) at 962.

the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).²⁰⁰²

However, to overcome the apparent reluctance to recognise costs incurred by justices of the peace, the Commission made the preliminary recommendation that the definition of “reward” in section 35(2) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify that it does not include any amount reimbursed to a justice of the peace as repayment for expenses incurred in carrying out that role.²⁰⁰³

5. SUBMISSIONS

(a) General comments

The Commission received a number of submissions in response to the Discussion Paper that commented on the question of reimbursement generally, rather than on the reimbursement of particular expenses.

One respondent suggested that each application for reimbursement should be decided on its merits by the Minister on the advice of the Registrar.²⁰⁰⁴

Several respondents were generally opposed to the concept of reimbursement.²⁰⁰⁵ One respondent suggested that the reimbursement of expenses would inevitably lead to some abuse of the system:²⁰⁰⁶

I am convinced that there should be NO re-imbusement of any kind towards the carrying out of the functions of C.Decs and JPs (Qual).

Partial or comprehensive re-imbusements for any function would sooner or later lead to some form of abuse by some of our colleagues which would bring us all into disrepute - knowing the weaknesses of human nature.

Therefore no opening whatsoever should be created by the authorities even if they are well meaning and good intentioned. We are doing voluntary work to serve the people and

²⁰⁰² Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 286. The definition of the term “reward” is set out at p 368 of this Report.

²⁰⁰³ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 287.

²⁰⁰⁴ Submission 29.

²⁰⁰⁵ Submissions 6, 20, 34, 39, 41.

²⁰⁰⁶ Submission 20. This respondent did qualify this comment by suggesting that all forms of training, lectures, exams and refresher courses should be provided by the Department of Justice free of charge.

therefore ask for nothing in return. This has been so for many years in the past. [original emphasis]

(b) Training costs

(i) Initial training for justices of the peace (qualified) and commissioners for declarations

Twenty-three submissions commented on the Commission's preliminary recommendation that justices of the peace (qualified) and commissioners for declarations should not be reimbursed for the cost of training prior to their appointment.

Nineteen of these respondents agreed with the Commission's preliminary recommendation.²⁰⁰⁷ On the other hand, four respondents opposed the recommendation,²⁰⁰⁸ with one of these respondents commenting:²⁰⁰⁹

 Becoming a justice of the peace is a public-spirited gesture for which the justice of the peace receives nothing. It is an asset for the community that people become justices of the peace and commissioners for declarations. The Government should bear the training costs and the costs of appointment.

(ii) Initial training for justices of the peace (magistrates court)

Twenty submissions commented on the Commission's preliminary recommendation that the training of justices of the peace (magistrates court) prior to their appointment should be provided at public expense.

Nineteen of these respondents agreed with the Commission's preliminary recommendation.²⁰¹⁰ Only one respondent was opposed to the preliminary recommendation.²⁰¹¹

(iii) Ongoing training for justices of the peace (qualified), justices of the peace (magistrates court) and commissioners for declarations

There was unanimous support, among those respondents who commented on the issue, for the Commission's preliminary recommendations about the cost of

²⁰⁰⁷ Submissions 4, 6, 7, 8, 9, 14, 18, 21, 23, 24, 25, 26, 31, 33, 40, 42, 44, 47, 53.

²⁰⁰⁸ Submissions 3, 19, 20, 34.

²⁰⁰⁹ Submission 3.

²⁰¹⁰ Submissions 6, 7, 8, 9, 14, 18, 19, 20, 21, 23, 24, 25, 26, 33, 34, 40, 44, 47, 53.

²⁰¹¹ Submission 31.

ongoing training.

Twenty-two respondents agreed with the Commission's preliminary recommendations that ongoing training for justices of the peace (qualified) and justices of the peace (magistrates court) should be provided at public expense.²⁰¹² One respondent also suggested that the travel costs incurred by a justice of the peace (qualified) in attending training should also be reimbursed.²⁰¹³

Twenty-one respondents agreed with the Commission's preliminary recommendation that any ongoing training considered necessary for commissioners for declarations should also be provided at public expense.²⁰¹⁴

(c) Travel expenses

Twenty-five submissions commented on the Commission's preliminary recommendation that the government should develop guidelines for the reimbursement of reasonable travel costs incurred by justices of the peace in carrying out their functions of office.

Fifteen respondents agreed with the Commission's preliminary recommendation,²⁰¹⁵ although two of these respondents were of the view that the reimbursement of travel expenses should not be available in relation to witnessing duties.²⁰¹⁶

Two respondents made suggestions as to the basis on which reimbursement might be made. One respondent suggested that the Queensland Police Service guidelines for the reimbursement of travel expenses for witnesses could be amended so as to apply to justices of the peace.²⁰¹⁷ The other respondent suggested that, where a justice of the peace was required to travel more than five kilometres one way to perform the duties of office, he or she should be reimbursed for the total distance travelled at the current government rate for the use of a private motor vehicle.²⁰¹⁸

A further five respondents, although not opposed to the reimbursement of travel

²⁰¹² Submissions 4, 5, 6, 7, 8, 9, 14, 18, 20, 21, 23, 24, 25, 26, 31, 33, 34, 40, 44, 47, 53, 54.

²⁰¹³ Submission 40.

²⁰¹⁴ Submissions 4, 5, 6, 7, 8, 9, 14, 18, 20, 21, 23, 24, 25, 26, 33, 34, 40, 44, 47, 53, 54.

²⁰¹⁵ Submissions 6, 7, 8, 9, 11, 14, 18, 23, 24, 25, 33, 44, 47, 48, 53.

²⁰¹⁶ Submissions 23, 44.

²⁰¹⁷ Submission 44.

²⁰¹⁸ Submission 48.

expenses, expressed some concerns about the recommendation.²⁰¹⁹ Two respondents thought that the recommendation would be more relevant in country areas,²⁰²⁰ with one respondent commenting:²⁰²¹

In most cases (within town or city limits) when dealing with the police personnel, the police will provide a car to pick up the Justice of the Peace and, upon completion, return the Justice of the Peace to their home. So, unless it is an extraordinary case, there should be no need to reimburse any Justice of the Peace for petrol or otherwise. Of course, I recognise that in country/rural areas this situation is different, with Justices of the Peace often travelling many, many kilometres to complete their task.

One respondent thought that any reimbursement would need to be checked carefully to avoid any misappropriation of funds.²⁰²² Another respondent also suggested that the reimbursement of travel expenses would have to be looked at very closely and on an individual basis.²⁰²³ A third respondent, while acknowledging the special situation of justices of the peace in country and rural areas, was of the view that it would be difficult to implement a system that would be able to be monitored thoroughly.²⁰²⁴

Five respondents were opposed to the Commission's preliminary recommendation.²⁰²⁵

(d) Subsistence costs

Twenty-one submissions responded to the question asked in the Discussion Paper about whether a justice of the peace should be reimbursed for subsistence costs necessarily incurred for the purpose of enabling the justice of the peace to perform any of the duties of office.²⁰²⁶ The submissions were fairly evenly divided on this question.

Eleven respondents were of the view that justices of the peace should be reimbursed for subsistence costs necessarily incurred,²⁰²⁷ although two of these respondents qualified their support for such a proposal. One of these respondents suggested that

²⁰¹⁹ Submissions 21, 26, 31, 56, 59.

²⁰²⁰ Submissions 31, 59.

²⁰²¹ Submission 59.

²⁰²² Submission 21.

²⁰²³ Submission 56.

²⁰²⁴ Submission 59.

²⁰²⁵ Submissions 20, 34, 39, 40, 41.

²⁰²⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 287.

²⁰²⁷ Submissions 9, 11, 14, 21, 25, 30, 31, 32, 33, 48, 54.

such reimbursement should apply only in country areas where meals and overnight stays might be necessary.²⁰²⁸ The other respondent considered that the issue applied only to justices of the peace (magistrates court).²⁰²⁹

On the other hand, a submission from a justice of the peace (qualified) who lives in Brisbane illustrated how such costs might be incurred by a justice of the peace in a metropolitan area. Although that respondent did not comment generally on the issue of subsistence costs, she raised an issue that might be considered to fall within that category of costs, namely, expenses incurred in relation to food and beverages.²⁰³⁰ This respondent advised that she had attended at a police station for the interview of a juvenile suspect from 4.00 pm one afternoon until after 3.00 am the next morning.²⁰³¹

As time and procedures progressed, time went on and it was at approximately 3:00 am next morning before I was able, after giving another police officer who was on a break at the City Watchhouse some of my money to go and buy me some form of food, to eat to enable me to keep awake and stop the hunger pains. It embarrasses me to say, but at this particular time I did not have much money on me and I had to scrape through loose change in my purse even to get enough money for a McDonald's burger - an expense that I could have done well without at that time as there was plenty of food in my cupboard at home. Please be assured that the police were always very thoughtful and provided me with cups of tea.

The issue I raise is that there should be some form of system set up where if a Justice of the Peace is "on duty" (for want of a better term) and is unable to go home to prepare food, that particular Justice of the Peace is to be provided with food. I realise that not many Justices of the Peace have ever, or will ever, find themselves in this situation, but I have on many occasions. It is not good enough when one gives up their time voluntarily and has to go hungry, often for many hours.

A respondent who supported the concept of reimbursing subsistence costs suggested that there should be a schedule of fees or costs similar to the travelling allowance schedules common within the Queensland public sector.²⁰³²

Ten respondents opposed the reimbursement of subsistence costs.²⁰³³ One respondent expressed the view that the reimbursement of these costs would be difficult to administer.²⁰³⁴

2028 Submission 31.

2029 Submission 21.

2030 Submission 59.

2031 Ibid.

2032 Submission 25.

2033 Submissions 6, 18, 20, 23, 34, 39, 40, 41, 45, 47.

2034 Submission 6.

However, one respondent who generally opposed the reimbursement of subsistence costs suggested that it should be possible to reimburse a justice of the peace in respect of these costs in an extraordinary case where the costs were specifically approved by the Minister.²⁰³⁵

(e) Financial loss allowance

Twenty submissions responded to the question asked in the Discussion Paper about whether a justice of the peace should be entitled to receive payments by way of a financial loss allowance where expenditure is incurred to which the justice of the peace would not otherwise be subject, or where the justice of the peace suffers any loss of earnings that the justice of the peace would otherwise have received.²⁰³⁶

Seven respondents were of the view that justices of the peace should be compensated in these circumstances,²⁰³⁷ although one of these respondents qualified his view by suggesting that a justice of the peace should not be compensated if the loss was incurred by the voluntary attendance to the duties of office when another justice of the peace was available and could have undertaken the task.²⁰³⁸

Thirteen respondents were opposed to the concept of justices of the peace receiving a financial loss allowance.²⁰³⁹ Several respondents were of the view that the payment of a financial loss allowance would be difficult to administer²⁰⁴⁰ and could provide an opportunity for abuse of the system.²⁰⁴¹

Two respondents, although supporting the reimbursement of justices of the peace for the cost of lengthy travel²⁰⁴² and “basic expenses”,²⁰⁴³ did not think that a financial loss allowance should be paid. One of these respondents commented:²⁰⁴⁴

²⁰³⁵ Submission 47.

²⁰³⁶ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 287.

²⁰³⁷ Submissions 9, 14, 30, 33, 41, 48, 54.

²⁰³⁸ Submission 48.

²⁰³⁹ Submissions 6, 8, 11, 18, 20, 23, 25, 34, 39, 40, 45, 47, 59.

²⁰⁴⁰ Submissions 6, 25.

²⁰⁴¹ Submission 23, 25.

²⁰⁴² Submission 8.

²⁰⁴³ Submission 25.

²⁰⁴⁴ Submission 8.

... common sense would also have to prevail and where a Justice of the Peace may lose wages or income in the pursuance of his/her duties, perhaps another Justice of the Peace could be selected on this particular occasion.

The other respondent expressed a similar view:²⁰⁴⁵

Basic expenses should be offered; financial loss payments should not be offered. There are enough justices in the system to locate one who will act without seeking to claim financial loss.

Another respondent suggested that it would be rare for justices of the peace to suffer a loss of earnings, as opposed to a loss of time, from the performance of their duties:²⁰⁴⁶

... if the JP or Com. dec. is self employed (like myself) and the police and the public come to their working premises (like myself), the onus is on the JP or Com. dec. to either state "could you come back after I've finished with my client" or "won't be a moment, take a seat". Most JP or Com. dec. tasks in relation to witnessing, authorising or certifying do not take hours therefore, unless the JP or Com. dec. has a client waiting, there is in reality, no loss of earnings - only a loss of time which would normally be given up in the first place.

One respondent who was generally opposed to any payment of a financial loss allowance qualified his comments, suggesting that perhaps it should be paid in exceptional circumstances and where approved by the local Magistrates Court.²⁰⁴⁷

(f) Other expenses

Several submissions commented on a number of types of expenses that the Commission had not recommended should be the subject of reimbursement.

(i) Minor administrative expenses

The Commission did not make a preliminary recommendation in the Discussion Paper about the reimbursement of the minor administrative expenses incurred by justices of the peace and commissioners for declarations, as it considered that the cost of compensating all justices of the peace for every expense incurred would be considerable.²⁰⁴⁸

Several respondents agreed with the general proposition that minor

²⁰⁴⁵ Submission 25.

²⁰⁴⁶ Submission 59.

²⁰⁴⁷ Submission 18.

²⁰⁴⁸ Queensland Law Reform Commission, Discussion Paper, *The Role of Justices of the Peace in Queensland* (WP 54, 1999) at 284.

administrative expenses should not be reimbursed.²⁰⁴⁹ One of these respondents commented:²⁰⁵⁰

No Justice of the Peace should be “out-of-pocket” in the performance of his/her duties. Naturally, there has to be a bottom-line and, I believe that most Justices of the Peace are willing to absorb petty cash type expenditure.

Another respondent expressed her strong disagreement with the suggestion by some justices of the peace that they should even be reimbursed for the cost of their stamps and stamp pads.²⁰⁵¹

On the other hand, one respondent proposed that stamps and stamp pads should be provided at two yearly intervals unless justices of the peace are permitted to charge for their services.²⁰⁵²

(ii) Application fees

Several respondents did not agree with the fact that prospective justices of the peace are required to pay an application fee.²⁰⁵³ One of these respondents, an old system justice of the peace, objected in particular to the fact that an old system justice of the peace must pay an application fee in order to be appointed as a justice of the peace (qualified).²⁰⁵⁴ This respondent advised that he had therefore decided not to seek appointment as a justice of the peace (qualified).²⁰⁵⁵

I wish to make it very clear that I fully support the three level rank of JPs and I believe that the required level of knowledge, (demonstrated by examination) is absolutely essential. The Government is to be commended for that initiative. What I vehemently object to is the formal re-application (but do not object to an examination) and the personal costs ... imposed upon the individual “old” (or for that matter “new”) JPs who have or wish to serve the people of Queensland (free of charge). [original emphasis]

Another old system justice of the peace expressed a similar view:²⁰⁵⁶

2049 Submissions 8, 29, 59.

2050 Submission 8.

2051 Submission 59.

2052 Submission 4.

2053 Submissions 3, 19, 52, 59.

2054 Submission 19.

2055 Ibid.

2056 Submission 52.

Old system Justices of the Peace (particularly those like myself) who have freely given service for more than 20 years should not be expected to pay anything (\$29.00 proposed) to be computer-listed to another category of still FREE SERVICE (at their inconvenience) for the public convenience and ease of access. [original emphasis]

(g) Remuneration

Several submissions raised the issue of remuneration for justices of the peace. One respondent thought that, if the role of justice of the peace was retained, consideration should be given to paying justices of the peace a small stipend for their services.²⁰⁵⁷ Another respondent suggested that justices of the peace (magistrates court) should be considered for “token remuneration when carrying out duties akin to those of Stipendiary Magistrates on request by the authorities”.²⁰⁵⁸

A third respondent suggested that justices of the peace should be able to charge for witnessing work, although not for police work:²⁰⁵⁹

- a. Having lived for quite some time in the United States of America, I have often paid for the services of a JP or Notary to sign documents.
- b. Some documents I have dealt with for people have been so lengthy and involved that I have had to seek assistance from lawyer friends over the telephone. I have spent over 1.5 hours on one document alone.
- c. I propose that Justices of the Peace (Qual) should have a scale of fees and charges published by the State Government, ranging from a minimum \$5.00 for witnessing to a maximum of say \$20.00 for a lengthy document. No charges applicable for Police Work. Justices would not be allowed to ‘discount’ their fees. Any caught doing so to be ‘struck off’ immediately.

On the other hand, several other respondents expressed the view that justices of the peace should not be paid for carrying out their duties.²⁰⁶⁰ One respondent commented:²⁰⁶¹

I submit that the centuries old tradition of a Justice of the Peace serving the community, in an honorary form, is a noble and honourable tradition.

I feel that the only “reward” applicable is the heart-warming, personal satisfaction of serving one’s State and community.

²⁰⁵⁷ Submission 3.

²⁰⁵⁸ Submission 20.

²⁰⁵⁹ Submission 4.

²⁰⁶⁰ Submissions 14, 21, 25, 56, 59.

²⁰⁶¹ Submission 14.

(h) Definition of “reward”

Fourteen submissions commented on the Commission’s preliminary recommendation that the definition of “reward” in section 35(2) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify that it does not include any amount reimbursed to a justice of the peace as repayment for expenses incurred in carrying out that role.

Thirteen respondents agreed with the Commission’s preliminary recommendation.²⁰⁶² Only one respondent was opposed to the preliminary recommendation.²⁰⁶³

6. THE COMMISSION’S VIEW

(a) General approach

Given the voluntary nature of the role performed by justices of the peace and commissioners for declarations, the Commission is of the view that, as a matter of general principle, there are some expenses that justices of the peace and commissioners for declarations should not be required to incur. The Commission is also of the view that there are some other expenses for which justices of the peace and commissioners for declarations should be reimbursed, if those expenses are incurred in the performance of the functions of office.

The Commission’s concern is that some expenses could inhibit justices of the peace and commissioners for declarations from undertaking the training that has been recommended by the Commission,²⁰⁶⁴ or could inhibit them from exercising certain powers, especially where the expenses involved are significant. It is also possible that some expenses might be such as to constitute a barrier to persons who might otherwise seek appointment.

However, the Commission does not consider it to be part of its present review to formulate the basis on which justices of the peace and commissioners for declarations should be reimbursed for particular types of expenses. Rather, the Commission considers it more appropriate for the government to develop guidelines to address the specific issue of how justices of the peace and commissioners for declarations should be reimbursed for certain types of expenses. The guidelines should also address the question of which department should be responsible for reimbursing a justice of the peace or a commissioner for declarations in respect of certain matters.

²⁰⁶² Submissions 6, 7, 8, 9, 18, 23, 24, 25, 26, 33, 44, 47, 53.

²⁰⁶³ Submission 40.

²⁰⁶⁴ See the discussion about the requirement for ongoing training at pp 335-340 of this Report.

Accordingly, the Commission will confine itself to the broader issue of whether certain expenses are of a kind for which justices of the peace or commissioners for declarations should be reimbursed.

(b) Training costs

(i) Initial training for justices of the peace (qualified) and commissioners for declarations

As the Commission has noted previously, there is no guarantee that a person who undertakes a training course will complete it or that a person who sits an examination will pass it. In either case, there is no guarantee that the person, once appointed, will become active as a justice of the peace or as a commissioner for declarations.²⁰⁶⁵ For that reason, the Commission does not believe that the provision of free training for prospective applicants is the most effective use of resources.

Further, the Commission is aware that some people who apply to be a justice of the peace (qualified) or a commissioner for declarations do so primarily for a work-related purpose, rather than for the primary purpose of serving the general community.

Consequently, the Commission remains of the view that any costs associated with fulfilling the requirements for appointment as a justice of the peace (qualified) or as a commissioner for declarations (whether in terms of a training course or an examination) should generally be borne by the individual applicant.²⁰⁶⁶

(ii) Initial training for justices of the peace (magistrates court)

The Commission notes that the policy of the Department of Justice and Attorney-General is to appoint justices of the peace (magistrates court) on the basis of need in a particular area.²⁰⁶⁷ In the Commission's view, it is important to ensure that there are sufficient numbers of justices of the peace (magistrates court) to undertake the duties of that office, especially in regional and rural areas. Consequently, the Commission remains of the view that a person who is undertaking the training necessary to be appointed as a justice of the peace

²⁰⁶⁵ See pp 372-373 of this Report.

²⁰⁶⁶ In Chapter 12 of this Report, the Commission has recommended that an applicant for appointment as a justice of the peace (qualified) must undertake a training course and pass an examination and that an applicant for appointment as a commissioner for declarations must pass an examination.

²⁰⁶⁷ See p 341 of this Report.

(magistrates court) should not be required to pay for that training. Such training should be provided at government expense.²⁰⁶⁸

(iii) Ongoing training

As stated in Chapter 12 of this Report, the Commission considers its recommendation that ongoing training should be provided to justices of the peace and commissioners for declarations to be fundamental to its recommendations that they should retain various powers.²⁰⁶⁹ In relation to the cost of ongoing training, the Commission's primary concern is that all justices of the peace and commissioners for declarations should have the opportunity to develop and maintain their skills. Consequently, the Commission remains of the view that ongoing training for justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations should be provided at government expense.

(c) Travel expenses

The Commission referred earlier to the case of a justice of the peace who incurred travel expenses in excess of \$200 to charter a flight when he was called upon to perform bench duties.²⁰⁷⁰ In the Commission's view, it is unreasonable to expect a justice of the peace to bear expenses of that kind. The government should develop guidelines to provide for the reimbursement of justices of the peace for significant travel expenses incurred in carrying out the duties of office.

If the Commission's recommendation in relation to ongoing training is implemented,²⁰⁷¹ justices of the peace and commissioners for declarations may incur, depending on where they reside and where the training is provided, significant travel expenses in order to attend the training. In the Commission's view, significant travel expenses that are incurred by a justice of the peace or a commissioner for declarations in attending ongoing training that is provided by the Department of Justice and Attorney-General should also be covered by the recommended guidelines.

The Commission does not consider, however, that a justice of the peace or a commissioner for declarations should be reimbursed for travel expenses that are not significant. In the Commission's view, the administrative costs alone of compensating

²⁰⁶⁸ In Chapter 12 of this Report, the Commission has recommended that an applicant for appointment as a justice of the peace (magistrates court) must undertake a training course and pass an examination.

²⁰⁶⁹ See p 339 of this Report.

²⁰⁷⁰ See pp 374-375 of this Report.

²⁰⁷¹ See p 353 of this Report (Recommendation 12.19).

every justice of the peace and every commissioner for declarations for every travel expense incurred would be considerable.

Further, in the Commission's view, the guidelines should not extend to reimbursing a justice of the peace or a commissioner for declarations for travel expenses incurred in relation to witnessing a document. It should be the responsibility of the person whose signature is to be witnessed to travel to the justice of the peace or to the commissioner for declarations. The government should not be expected to reimburse a justice of the peace or a commissioner for declarations where the relevant office holder incurs expenses by agreeing to travel in order to witness a document.

(d) Subsistence costs

In the Commission's view, government guidelines should be developed to address the question of the types of subsistence costs for which a justice of the peace should be reimbursed, for example, meals, the circumstances in which a justice of the peace should be eligible to be reimbursed for those costs, and the basis for reimbursement.

(e) Financial loss allowance

The offices of justice of the peace and commissioner for declarations are voluntary ones. Accordingly, the Commission is of the view that justices of the peace and commissioners for declarations should not be reimbursed for any loss of earnings, income or other financial benefit that might be attributable to carrying out the functions of office. To do otherwise, would be akin to paying justices of the peace and commissioners for declarations for the time spent by them in carrying out those functions. In the Commission's view, the reimbursement of justices of the peace or commissioners for declarations for these types of expenses is inconsistent with the voluntary nature of these offices.

As one respondent pointed out, if a justice of the peace will lose wages or income by performing certain duties, the appropriate course is for another justice of the peace to be selected on that occasion.²⁰⁷²

(f) Minor administrative expenses

The Commission remains of the view that justices of the peace and commissioners for declarations should not be reimbursed for minor administrative expenses incurred by them.

²⁰⁷² See p 382 of this Report.

(g) Application fees

In the Commission's view, an application fee is an expense related to a person's initial appointment and should be borne in the same way that the Commission has recommended that initial training costs should be borne.²⁰⁷³ The application fee for appointment as a justice of the peace (qualified) or as a commissioner for declarations should generally be borne by the individual applicant. A person who is being appointed as a justice of the peace (magistrates court) should not be required to pay an application fee.

The Commission notes that, in any event, the Minister has the power under the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) to exempt a person or a class of person from payment of an application fee.²⁰⁷⁴

(h) Remuneration

Although the Commission accepts that justices of the peace and commissioners for declarations should be reimbursed for some expenses, the Commission is strongly of the view that the offices of justice of the peace and commissioner for declarations should remain as voluntary roles. The Commission is therefore of the view that justices of the peace and commissioners for declarations should not be remunerated for carrying out the functions of office.

(i) Definition of "reward"

As noted earlier in this chapter, section 35 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) prohibits a justice of the peace or a commissioner for declarations from seeking or receiving any "reward" in connection with the performance of the functions of office.²⁰⁷⁵ Given that the Commission has recommended that justices of the peace and commissioners for declarations should be reimbursed for certain expenses, the Commission considers it important that the definition of "reward" in section 35 of the Act is amended so that it is clear that the term does not include any amount reimbursed to a justice of the peace or a commissioner for declarations in respect of an expense incurred in carrying out the role.

7. RECOMMENDATIONS

²⁰⁷³ See pp 386-387 of this Report.

²⁰⁷⁴ *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 18.

²⁰⁷⁵ See p 368 of this Report.

The Commission makes the following recommendations:

Training

- 14.1** The cost of fulfilling the training requirements that have been recommended for appointment of a person as a justice of the peace (qualified) or as a commissioner for declarations should generally be borne by the individual applicant.²⁰⁷⁶
- 14.2** The cost of fulfilling the training requirements that have been recommended for appointment of a person as a justice of the peace (magistrates court) should be borne by the government.²⁰⁷⁷
- 14.3** Ongoing training for justices of the peace (magistrates court), justices of the peace (qualified) and commissioners for declarations should be provided at government expense.

Application fees

- 14.4** The application fee for appointment as a justice of the peace (qualified) or as a commissioner for declarations should generally be borne by the individual applicant.
- 14.5** A person who is being appointed as a justice of the peace (magistrates court) should not be required to pay an application fee.

Guidelines for the reimbursement of expenses

- 14.6** The government should develop guidelines to deal with the following matters:
- (a)** reimbursing a justice of the peace in respect of significant travel expenses incurred by the justice of the peace in carrying out the duties of office, other than the witnessing of a document;

²⁰⁷⁶ See p 350 of this Report (Recommendations 12.5(a), 12.5(b) and 12.5(c)).

²⁰⁷⁷ See p 350 of this Report (Recommendations 12.5(a) and 12.5(b)).

- (b) reimbursing a justice of the peace or a commissioner for declarations in respect of significant travel expenses incurred in attending ongoing training that is provided by the Department of Justice and Attorney-General;
- (c) reimbursing a justice of the peace in respect of subsistence expenses incurred by the justice of the peace in carrying out the functions of office; and
- (d) the question of which department should be responsible for reimbursing a justice of the peace or a commissioner for declarations in respect of certain matters.

14.7 Justices of the peace and commissioners for declarations should not be reimbursed for:

- (a) the loss of earnings, income or a financial benefit; or
- (b) minor administrative expenses.

14.8 Justices of the peace and commissioners for declarations should not be remunerated for carrying out the functions of office. The offices of justice of the peace and commissioner for declarations should remain as voluntary offices.

Definition of "reward"

14.9 The definition of "reward" in section 35(2) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify that it does not include any amount reimbursed to a justice of the peace or a commissioner for declarations for expenses incurred in carrying out the functions of office.

APPENDIX A

LIST OF RESPONDENTS TO THE ISSUES PAPER

ACT Justices of the Peace Association Inc
Armstrong, Mr JPM, JP (Qual)
Baldwin, RW, JP
Barbagallo, SN, JP (Qual)
Bates, Mr D, JP
Bates, GR, JP (Qual)
Beardwood, Ms M, JP
Berry, Ms R, JP (Qual)
Bills, PJ, JP (Qual)
Bond, Mr P
Bontoft, FF, JP
Bopf, Mr C, JP
Bougoure, Mrs C, JP (Qual)
Boyle, Ms L, JP (Qual)
Bradbury, Mr OJC, JP (Qual)
Bright, Mr R, JP (Qual)
Brown, Mr MD, JP (Qual)
Buchanan, Mr JM, JP (Qual)
Buckham, Mr GP, JP (Qual)
Burgess, Ms M
Burnet, Mr JW, JP (Qual)
Burnet, Mrs JM, JP (Qual)
Champney, Ms SM, JP (Qual)
Coglan, PD, JP
Coles, Mr DFE, JP (Qual)
Cosgrove, Mr D, JP (Qual)
Cox, Mr E, JP (Qual)
Criminal Justice Commission
Crouch, A, JP (Qual)
Daly, Mr GM, C dec
Deer CSM, Mr SJ
Department of Families, Youth and Community
Care
Deshon, Mr R, JP
Dinning, Mr HJ, JP (Qual)
Edwards, Mr K, JP
Elder, Mr RL, JP (Qual)
Farrow, CR, JP
Ferguson, Mr J, JP (Qual)
Ferrerio, L
Fisher, Mr WF, JP
Fisk, Mr GV, JP (Qual)
Forsyth, Mrs S, JP
Fuller, Mr BG, JP (Qual)
Gibson, Mr LL, JP (Qual)
Graham, Mr JC, JP (Qual)
Grattidge, Mr R
Harper, Mr EG, JP (Qual)
Henwood, Mr DR, JP (MAG CT)
Hillan, Mr G, JP (MAG CT)
Hite, Mr BP, JP (Qual)
Holder, Ms J, JP (Qual)
Holland, Mr JW, JP (Qual)
Hull, D, JP (Qual)
Indigenous Advisory Council
Jackson, Mr N, JP (Qual)
Jackson, Mr PR, JP (MAG CT)
Jodaikin, M, JP (Qual)
Justice of the Peace Society Queensland Inc
Juvenile Justice Branch, Department of Justice
Kell, Ms RJ, JP (Qual)
Kenny, D, JP (MAG CT)
Kischkowski, Mr G, JP (Qual)
Kreher, AJ, JP (Qual)
Lapthorne, Mr GC, JP
Lascelles, GG, JP (Qual)
Lean, Mr M, JP (Qual)
Mardaunt, L, JP (Qual)
Martin, Mr B, JP (Qual)
McCarthy, Mr B
McCarthy, Mr R, JP (Qual)
McLay, SJ, JP (Qual)
McLean, Mr S, JP (Qual)
McMillan, Mrs P, JP (Qual)
McQuillian, Mr J, JP (Qual)
Middleton, Ms R, JP
Mullins, Mr P, JP (Qual)
Murray, RA, JP (MAG CT)
Nolan, Mr, JP
O'Neill, Ms K, JP
O'Sullivan, Mrs R, JP (Qual)
Passey, Mr TA, JP (Qual)
Paterson, BA, JP (Qual)
Patten, Mr J, JP (Qual)
Patterson, Mr KW, JP (Qual)
Payne, Mr PG, JP (Qual)
Philippi, LF, JP
Porter, Mr C, JP
Queensland Department of Local Government
& Planning incorporating Rural Communities
Queensland Justices' and Community Legal
Officers' Association Inc
Queensland Law Society Inc
Queensland Police Service, Operations Support
Command
Radford, Mr JW, JP (Qual)
Richardson, Mr MA, JP (Qual)
Ridley, Mr BN, JP
Robertson, Mr JA, JP (Qual)
Rooskov, Mr GC, JP (Qual)
Simpson, Mr W
Skinner, Mr GW, JP (MAG CT)
Slaney, Mr HR, JP (Qual)
Steele, SW, JP (Qual)
Strong, MR, JP (Qual)
Strudwick, Mr M, JP (Qual)

Taylor, Mr AR, JP (MAG CT)
Taylor, Mr LA, JP (Qual)
Thompson, Mr ER, JP (Qual)
Tiley, Mr PA, JP (Qual)
Vandenberg, JG
Ventura, MA, JP (Qual)
Wacker, Ms S, JP (Qual)
Weeks, Dr P, JP (Qual)
Whaites, Mr A, JP (Qual)
Wheeler, Mr GP, JP
Wilkinson, JF, JP (Qual)
Williams, Mr, JP (Qual)
Williams, Mr R, JP (Qual)
Wilson, Mr MR, JP (Qual)
Wilson, Mr R, JP (Qual)
Woodbridge, Mr J, JP (Qual)
Young, Mr CB, JP (Qual)
Youth Advocacy Centre Inc

APPENDIX B

LIST OF RESPONDENTS TO THE DISCUSSION PAPER

Bates, Mr D, JP
Bluff, Mr JJ, JP (Qual)
Bodmer, C, JP (Qual)
Boersch Mr HW, JP (Qual)
Bower, Mr RN, JP
Buchanan, Mr JM, JP (Qual)
Byrne QC, Mr M
Clancy, Ms M, JP (Qual)
Coleman, Mr N, JP (Qual)
Coles, Mr DFE, JP (Qual)
Cook, M, JP (Qual)
Costello, Mr R, JP (Qual)
Cox, Mr E, JP (Qual)
Cox, Dr JW, JP
Mr Cuk, J, JP and Mrs Cuk, J, C dec
Doessel, Mr IF
Drake, Mr JW, JP (Qual)
Drake, WJ JP (Qual)
Dunstan, Mr R, JP (Qual)
Edwards, Mr K, JP
Fisk, Mr GV, JP (Qual)
Fryer, Mr B JP (Qual)
Fullerton, I, JP
Hart, Mr MR, JP (Qual)
Hite, Mr B, JP (Qual)
Jackson, Mr PR, JP (MAG CT)
Jodaikin, Mr M, JP (Qual)
Johnston, C, JP (Qual)
Justice of the Peace Society Qld Inc
Justices' Support Group Maryborough
Kaczmarowski, Mr M, JP (Qual)
Kearse, Mr PD, JP (Qual)
Krosch, Mr B, JP (Qual)
Krueger, M, JP (Qual)
McCarthy, Mr RC, JP (Qual)
McFarlane, Mr BS, JP (Qual)
Manuel, Mr P, JP (Qual)
Martin, Mr B, JP (Qual)
Moore, Mrs J, JP (Qual)
Paterson, Ms BA, JP (Qual)
Patten, Mr J, JP (Qual)
Patterson, Mr KW, JP (Qual)
Posthuma, Mr D, JP (Qual)
Ray, Ms P-A, JP (Qual)
Reitano, Mr FV, JP
Rooskov, Mr GC, JP (Qual)
Sandr, Mrs BR, JP (Qual)
Seeney, Mr K, JP
Skinner, Mr GW, JP (MAG CT)
Taylor, Mr LA, JP (Qual)
Thompson, Mr J, JP
Tiley, Mr PA, JP (Qual)
Torgau, JCD, C dec
Tronson, Mr AD, JP (Qual)
Turak, Miss D, JP (Qual)
Vandenberg, Mr JG
Walker, Mr GM, JP (Qual)
Wall, Mr J, JP
Weeks, Dr P, JP (Qual)
Whipps, Mr M, JP (Qual)
Wilkinson, JF, JP (Qual)
Williams, Mr O, JP (Qual)
Worton, Mr NS, JP
Youth & Family Service (Logan City) Inc

APPENDIX D

QUESTIONNAIRE FOR JUSTICES OF THE PEACE (MAGISTRATES COURT)

1. What was the reason for your appointment as a justice of the peace (magistrates court)?

- I am a staff member at a Magistrates Court in Queensland.
- I am a staff member at a QGAP Office in Queensland.
- I am a resident of an Aboriginal or Torres Strait Islander community.
- Other.

Under the *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)*, justices of the peace (magistrates court) may constitute a Magistrates Court to hear a number of different types of matters, including:

- **hearing and determining charges (that is, sentencing);**
- **conducting committal hearings;**
- **remanding a defendant and adjourning proceedings; and**
- **granting bail.**

In relation to each of these types of matters - and any other significant matters not listed above - could you please answer the following questions.

2. Have you ever heard any of these types of matters? If so, please specify which ones.

3. At which Magistrates Court do you hear these matters (eg Gladstone, Thursday Island)?

4. In what circumstances do you hear these matters?

- No resident magistrate
- Resident magistrate is absent from town (eg on circuit or for another reason)
- Volume of matters on court list requires it, even when magistrate is available to hear matters.

- For any other reason - please specify.
5. If you are hearing matters because there is no available magistrate, could any of these matters be heard by a magistrate in another part of the State through a greater use of technology (for example, telephone or video link)?
6. What are the advantages, if any, of having these matters heard by justices of the peace (magistrates court), rather than by a magistrate?
7. What are the disadvantages, if any, of having these matters heard by justices of the peace (magistrates court), rather than by a magistrate?
8. Is there a special need in Aboriginal and Torres Strait Islander communities for having justices of the peace (magistrates court) hear these matters?
9. If, for whatever reason, a magistrate is not able to hear all the matters in a particular locality, who would be the most appropriate person to hear the matters?
- a court official employed at a Magistrates Court
- a justice of the peace (magistrates court) who is not employed at a Magistrates Court
- a barrister or solicitor practising in the area who has no connection with the case
- other - please specify.

APPENDIX E

APPOINTMENT OF PLACES FOR HOLDING MAGISTRATES COURTS

Magistrates Court Districts ²⁰⁷⁸	Place(s) for holding a Magistrates Court ²⁰⁷⁹	Resident Stipendiary Magistrate(s) ²⁰⁸⁰
Beaudesert	Beaudesert	
Beenleigh	Beenleigh	Beenleigh (3)
Bowen	Bowen	Bowen (1)
Brisbane, Central Division	Brisbane-City	Brisbane (22) ²⁰⁸¹
Brisbane, Holland Park Division	Holland Park	Holland Park (1)
Brisbane, Inala Division	Inala	Inala (1)
Brisbane, Sandgate Division	Sandgate	Sandgate (1)
Brisbane, Wynnum Division	Wynnum	Wynnum (1)
Bundaberg	Bundaberg Childers	Bundaberg (1)
Caboolture	Caboolture Petrie	Caboolture (1) Petrie (1)
Cairns	Atherton Cairns Chillagoe Croydon Einasleigh Georgetown Kowanyama Mareeba Mossman Pompuraaw Yarrabah	Cairns (4)
		Mareeba (1)

²⁰⁷⁸ *Justices Regulation 1993* (Qld) s 17, Sch 4.

²⁰⁷⁹ *Justices Regulation 1993* (Qld) s 17, Sch 4.

²⁰⁸⁰ Information available from the Department of Justice and Attorney-General as at December 1999.

²⁰⁸¹ This figure includes one Childrens Court magistrate: information available from the Department of Justice and Attorney-General as at December 1999.

Charleville	Adavale Charleville Eromanga Quilpie Tambo	Charleville (1)
Charters Towers	Charters Towers Greenvale Pentland	
Clermont	Clermont Moranbah	
Cleveland	Cleveland	
Cloncurry	Cloncurry Dajarra Julia Creek Kynuna McKinlay Normanton	
Cooktown	Aurukun Coen Cooktown Lockhart River Weipa	
Cunnamulla	Cunnamulla Hungerford Thargomindah Wyandra	
Dalby	Chinchilla Dalby Meandarra Tara Taroom	Dalby (1)
Emerald	Blackwater Duarina Emerald	
Gladstone	Gladstone	Gladstone (1)
Gold Coast	Coolangatta Southport	Southport (8)
Goondiwindi	Bollon Dirranbandi Goondiwindi Mungindi St George	
Gympie	Gympie	Gympie (1)

Hughenden	Hughenden Richmond	
Innisfail	Innisfail Tully	Innisfail (1)
Ipswich	Gatton Ipswich Toogoolawah	Ipswich (3)
Kingaroy	Kingaroy Murgon Nanango	Kingaroy (1)
Longreach	Alpha Barcaldine Blackall Isisford Jundah Longreach Muttaborra Windorah Winton Yaraka	
Mackay	Mackay Proserpine Sarina St Lawrence	Mackay (1)
Maroochydore	Caloundra Landsborough Maroochydore Nambour Noosa Pomona	Maroochydore (4)
Maryborough	Gayndah Hervey Bay Maryborough	Hervey Bay (1)
Mount Isa	Bedourie Birdsville Boulia Burketown Camooweal Doomadgee Mornington Island Mount Isa	Mount Isa (1)
Redcliffe	Redcliffe	Redcliffe (1)

Rockhampton	Baralba Biloela Rockhampton Yeppoon	Rockhampton (3)
Roma	Mitchell Roma	
Stanthorpe	Stanthorpe	
Thursday Island	Bamaga Thursday Island	
Toowoomba	Oakey Pittsworth Toowoomba	Toowoomba (2)
Townsville	Ayr Great Palm Island Ingham Townsville	Townsville (5)
Warwick	Warwick	Warwick (1)