THE ROLE OF JUSTICES OF THE PEACE IN QUEENSLAND

Discussion Paper

WP No 54

Queensland Law Reform Commission
May 1999

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HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary recommendations in this Discussion Paper.

Written comments and submissions should be sent to:

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Closing date: 3 September 1999

It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Discussion Paper.

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Previous Queensland Law Reform Commission publication on this reference:

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

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CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

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

> [r]eview 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 the justice of the peace has its origins in England in the fourteenth century.[1] 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 between the roles of justices of the peace in different jurisdictions.[2]

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).[3] That Act establishes:

- the various categories of justices of the peace and the office of commissioner for declarations;[4]
- the qualifications for, and disqualifications from, office as either a justice of the peace or a commissioner for declarations;[5] and
- the limitations on the powers that may be exercised by a justice of the peace or by a commissioner for declarations.[6]

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1 See pp 5-6 of this Discussion Paper for a more detailed discussion of the origins of the role.

2 See pp 43-48, 76-81, 101-104, 119-123, 132-133, 145-151, 167-169, 177-184 and 191-196 of this Discussion Paper.

3 The background to the enactment of this Act is set out at pp 7-10 of this Discussion Paper.

4 See pp 12-18 of this Discussion Paper.

5 See pp 235-236 and 244-247 of this Discussion Paper.

6 See pp 11-12 of this Discussion Paper.

3. THE ISSUES PAPER

In March 1998, the Commission released an Issues Paper *The Role of Justices of the Peace in Queensland*.[7] 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;[8]
- examined the existing categories of justices of the peace and the office of commissioner for declarations;[9]
- gave an overview of the main powers that may be exercised by justices of the peace and commissioners for declarations;[10] 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.[11]

The Issues Paper was distributed widely throughout Queensland. Over 2,200 copies of the paper have been distributed. In addition, the paper was made available on the Commission's Home Page on the Internet.[12]

4. CALL FOR SUBMISSIONS

In March 1998, the Commission made a public call for submissions in *The Courier-Mail*. It also advertised the release of the Issues Paper in *Justice Papers*, a bulletin published by the Queensland Department of Justice and Attorney-General, which is sent to all

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

8 See Chapter 2 of the Issues Paper.

9 See Chapter 3 of the Issues Paper.

10 See Chapter 5 of the Issues Paper.

11 See Chapter 8 of the Issues Paper.

12 At <http://www.qlrc.qld.gov.au>.

justices of the peace and commissioners for declarations in Queensland.[13] Calls for submissions were also published in the newsletters of two justices of the peace associations.[14]

A total of 123 submissions were received by the Commission in response to the issues raised in the Issues Paper. The overwhelming majority of submissions 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 submissions received from respondents who identified themselves as justices of the peace, commissioners for declarations or as the representative of a justices of the peace association.

Justices of the peace (magistrates court)	7
Justices of the peace (qualified)	75
Old system justices of the peace[15]	10
Justices of the peace - category not specified	10
Commissioners for declarations	2
Justices of the peace associations	3
Total	**107**

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

5. SURVEY OF MAGISTRATES COURTS

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 Chief Stipendiary Magistrate, 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

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

14 *JP News* (Issue 2, 1997); *The QJA Newsletter* (Volume 1 Issue 2, August 1997).

15 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

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 by the four Courts is set out in Appendix B to this paper.

The Commission is grateful for the co-operation of the Chief Stipendiary Magistrate, 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 Chapter 9 of this Discussion Paper.

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

Because the Commission received only a few submissions from justices of the peace (magistrates court), in July 1998, it 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 C to this Discussion Paper.

The Commission distributed 478 questionnaires and received 133 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 Discussion Paper.

7. THE PURPOSE OF THIS DISCUSSION PAPER

This paper contains the Commission's preliminary recommendations on the role of justices of the peace. At the conclusion of this reference, the Commission will report to the Attorney-General on what it considers to be the most appropriate reforms, if any, to the existing law.

In order to assist it in making its final recommendations, the Commission seeks input from members of the public, from relevant professions and from organisations and individuals with an interest or expertise in the area.

Details about how to make a submission are set out at the beginning of this paper.

CHAPTER 2

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

1. THE HISTORICAL ORIGINS OF THE ROLE 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.[16] In 1327, "conservators of the peace" were appointed in each county.[17] In the following year, conservators of the peace were given the power to punish offenders.[18] In 1344, they were empowered to hear and determine felonies and trespasses (now known as misdemeanours).[19]

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".[20] In 1363, these persons were directed to hold court hearings (with a jury) four times a year.[21] It was around this time that the title "justice of the peace" began to be used.[22]

The four court hearings became known as the courts of quarter sessions. The types of cases heard by courts of quarter sessions were very wide and included almost all criminal cases (apart from treason and difficult cases).[23] It was not until the eighteenth century that courts of quarter sessions stopped hearing cases that might be capitally

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16 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.

17 1 Edward III St 2 c 16 (1327), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

18 2 Edward III c 6 (1328), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

19 18 Edward III St 2 c 2 (1344), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 287.

20 34 Edward III c 1 (1361), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 288.

21 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.

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

23 Id at 293.

punished.[24]

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.[25]

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,[26] and they carried out functions that now would be regulated by local government or other government agencies.[27]

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".[28] In 1439, a property qualification was added.[29]

2. THE ROLE OF JUSTICE 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.[30] However, the role of Australian justices of the peace changed significantly

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24 Ibid.

25 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.

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

27 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.

28 13 Richard II St 1 c 7 (1389), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 289.

29 18 Henry VI c 11 (1439), cited in Holdsworth WS, *A History of English Law* (7th ed 1956) vol 1 at 289.

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

once the use of paid magistrates became more extensive.[31]

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,[32] 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.[33] 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.[34] In all jurisdictions, including Queensland, the role is a voluntary and unpaid one.[35]

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.[36]

(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*

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31 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.

32 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.

33 See note 2 of this Discussion Paper.

34 See pp 145 and 148 of this Discussion Paper.

35 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).

36 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 9 of this Discussion Paper.

Peace Act 1975 (Qld).[37] The 1975 Act contained a number of new provisions, including qualifications for appointment as a justice of the peace, provisions regarding the establishment of a register of justices of the peace, and provisions for the removal of a justice of the peace on grounds such as a criminal conviction, bankruptcy and 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.[38] 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.[39]

(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.[40]

(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".[41] 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

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37 See note 36 of this Discussion Paper.

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

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

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

41 Id at 1.

peace only ever witnessed signatures.[42]

- 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.[43]

- 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".[44]

- Allegations that some justices of the peace were prepared to "rubber stamp" police requests for warrants with no exercise of judicial discretion whatsoever.[45]

- The potential for serious mistakes in the issue of summonses and warrants by some justices of the peace.[46]

- 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.[47]

(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

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42 Id at 1, 5-7, 13.

43 Id at 1, 5, 17-18.

44 Id at 1.

45 Id at 17-18.

46 Id at 1, 17-18.

47 Id at 11.

warrants).[48]

- 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.[49]

- 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.[50]

- 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.[51]

- 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".[52]

- Any changes to the existing legislation should be effective immediately. There should not be any "sunset clause".[53]

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

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48 Id at 33. The question 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.

49 Id at 39.

50 Id at 44.

51 Id at 45.

52 Id at 37.

53 Id at 35.

Act adopted some of, but not all, the options discussed above.[54] The most significant changes were the abolition of the "one class" appointment system and the requirement that people appointed to the new categories of justice 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.[55]

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),[56] and by limiting the powers that may 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 do not refer to the present distinction between a justice of the peace (magistrates court) and a justice of the peace (qualified), but simply confer powers on "a justice of the peace" or on "a justice"[57] (which is commonly defined to include a justice of the peace[58]), rather than on a justice of the peace of a particular category. This is also the case with some Acts enacted after the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).[59]

Although an Act may confer powers on a "justice of the peace", the *Justices of the*

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54 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.

55 See the discussion of the training of justices of the peace in Chapter 12 of this Discussion Paper.

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

57 The term "justice" is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.

58 See, for example, the definition of "justice" in s 4 of the *Justices Act 1886* (Qld):

> **"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.

59 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".

Peace and Commissioners for Declarations Act 1991 (Qld) 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, with people appointed to the various categories of office exercising different 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]

Subsections 29(3) to (5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limit 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.[60] Section 29(7) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) further provides:[61]

> 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.

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) expressly provides, however, that the limitations imposed by subsections (3), (4) and (5) do not apply to:[62]

- a magistrate exercising jurisdiction conferred on justices of the peace;
- 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;[63] or

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60 Those 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).

61 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).

62 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6).

63 See pp 15-17 of this Discussion Paper in relation to “old system” justices of the peace.

- 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.[64]

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.[65] 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.[66]

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
>
> (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.[67] [note added]

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64 See pp 19-22 of this Discussion Paper in relation to *ex officio* justices of the peace.

65 See Chapters 9 and 10 of this Discussion Paper for a discussion of the court powers that may be exercised by justices of the peace.

66 See note 58 of this Discussion Paper.

67 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.

The types of matters that may be heard by a justice of the peace (magistrates court) are discussed in more detail in Chapters 9 and 10 of this paper. 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 of the peace (magistrates court),[68] such as charging a defendant, issuing a warrant, granting bail, remanding a defendant or adjourning a proceeding.[69]

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

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[68] See p 13 of this Discussion Paper.

[69] See the definition of "procedural action or order" at note 67 of this Discussion Paper.

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.[70]

(d) Justice of the peace

The office of "justice of the peace" is used in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) to encompass justices of the peace who hold office by two quite different means. As mentioned above, Supreme Court judges, District Court judges and magistrates are automatically, by virtue of holding those offices, "justices of the peace".[71]

More commonly, however, the office of "justice of the peace" is 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).[72] When that Act commenced on 1 November 1991, there were many justices of the peace who 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.[73] In 1996, however, the transitional period was extended until 30 June 2000.[74]

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 who held office immediately before the commencement of that Act[75] and who has not since been appointed as a justice of the peace (qualified) or a justice of the peace

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

71 See p 12 of this Discussion Paper. See also pp 19-22 of this Discussion Paper.

72 See Part 5 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

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

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

75 That is, they 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).

(magistrates court) and has not registered as a commissioner for declarations,[76] will be known simply as a "justice of the peace".[77]

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),[78] an office with a largely witnessing function. If, however, the person is a lawyer,[79] he or she is exempt from the automatic conversion to the role of justice of the peace (commissioner for declarations).[80] Such a person will continue to hold office indefinitely as a "justice of the peace".[81]

In this Discussion Paper, 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 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.[82] 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).[83] Consequently, an old system justice of the 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

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76 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.

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

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

79 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.

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

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

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

83 S 29(6) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) confirms that s 29(3)-(5) 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 of that Act and who has not converted to one of the new offices created by that Act.

pleads guilty.[84] Similarly, an old system justice of the peace has the power to conduct a committal hearing under the *Justices Act 1886* (Qld),[85] whereas a person who has been appointed as a justice of the peace (qualified) is not able to exercise that power.[86] In fact, one respondent to the Issues Paper,[87] 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.[88]

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:[89]

> 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.

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.[90] The extension of the transitional period maintains the *status quo* until the Commission presents its final report on this

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

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

86 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".

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

88 Submission 17. 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.

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

90 Ibid.

reference.[91]

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.[92]

(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, old system justices of the peace (that is, those justices of the peace who held office immediately before the commencement of the 1991 Act) who have not been appointed as a justice of the peace (qualified) or a justice of the peace (magistrates court), and who have not in the meantime applied to be registered as a commissioner for declarations and been so registered,[93] 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).[94]

The powers of a justice of the peace (commissioner for declarations) are identical to those that may be exercised by a commissioner for declarations.[95] Accordingly, a justice of the peace (commissioner for declarations):[96]

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

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91 Ibid.

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

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

94 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(1). As mentioned at p 15 of this Discussion Paper, this provision does not apply to an old system justice of the peace who is a lawyer.

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

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

desire not to take the title "justice of the peace" away from old system justices of the peace, 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:[97]

> 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.

It is possible that the title "justice of the peace (commissioner for declarations)" may cause some confusion in relation to the powers that may be exercised by a person holding that office. The title could suggest that the person still retains some powers of a judicial nature, and that the person may exercise a greater range of powers than may be exercised by a commissioner for declarations. The Commission notes that the preferred option in the 1990 Green Paper was that people previously appointed as justices of the peace should lose the use of the title of "Justice of the Peace" and instead be called "Commissioners of Affidavits" if they performed administrative duties only.[98]

7. 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 application under the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) and satisfying the relevant criteria.[99] As mentioned earlier in this chapter, 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*

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

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

99 *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 Discussion Paper.

1975 (Qld), which office has been preserved by the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld);[100]

- transferring from the office of old system justice of the peace to the office of commissioner for declarations;[101] 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.[102]

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".[103]

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.[104]

Broadly stated, judges and magistrates automatically hold office as a justice of the peace; registrars and clerks of courts automatically hold office as either a justice of the peace (magistrates court) or a justice 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.

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

Every person who holds office as a Supreme Court judge, District Court judge, or magistrate automatically holds office as a "justice of the peace".[105] Further, a person who has retired, or resigned, from office as a Supreme Court judge, District Court judge

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

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

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

103 *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").

104 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19. The provisions discussed in Chapter 12 of this Discussion Paper 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".

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

or magistrate also automatically holds office as a justice of the peace.[106]

The effect of section 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) is that such a person 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.

The limitations imposed by subsections 29(3) to (5) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)[107] 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 a justice of the peace who holds office by virtue of being a Supreme Court judge, a District Court judge, or a magistrate.[108]

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

automatically holds office as a justice of the peace (magistrates court) if the person is a legal practitioner.[109] If the person is not a legal practitioner, he or she holds office as a justice of the peace (qualified).[110]

However, if a registrar of the Supreme or District Courts 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*

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106 *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.

107 See pp 11-12 of this Discussion Paper for a discussion of these provisions.

108 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(c).

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

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

(Qld),[111] 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.[112]

(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, a District Court or a Magistrates Court, for as long as he or she is so employed, holds office as a commissioner for declarations.[113]

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),[114] 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, a District Court or a Magistrates Court.[115]

(d) Further appointment not precluded

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 position means 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).

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

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111 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 or 21 years was, by virtue of that office and without any further appointment, a justice of the peace.

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

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

114 See note 111 of this Discussion Paper.

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

Queensland has approximately 49,698 justices of the peace and approximately 14,725 commissioners for declarations.[116] The breakdown by reference to the category of justice of the peace is:

Category	**Number**
Justices of the peace (magistrates court)	518
Justices of the peace (qualified)	15,364
Old system justices of the peace	33,816
Subtotal	**49,698**
Commissioners for declarations	14,725
Total	**64,423**

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.[117] Queensland is second only to New South Wales, where the system of justices of the peace is also under review.[118]

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

116 Information provided to the Commission by the Justices of the Peace Branch of the Department of Justice and Attorney-General (Qld) (April 1999).

117 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 (as at March/April 1999).

118 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).

Jurisdiction	Justices of the peace	Bail justices	Commissioners for declarations	Total
Australian Capital Territory[119]	711	-	-	711
New South Wales[120]	100,000	-	-	100,000
Northern Territory	251	-	720	971
South Australia	16,931	-	-	16,931
Tasmania	2,820	-	2,974	5,794
Victoria[121]	3,600	400	-	4,000
Western Australia[122]	3,204	-	487	3,691

9. USE OF TERMINOLOGY IN THIS PAPER

Where in this Discussion Paper 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 peace (qualified), it uses the specific title of that category.

As mentioned earlier in this chapter,[123] the term "old system justice of the peace" is used by the Commission in this Discussion Paper to refer to those justices of the peace

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119 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 4, 5 and 9 of this Discussion Paper.

120 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 at April 1999.

121 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 4, 5 and 9 of this Discussion Paper.

122 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 (May 1999).

123 See pp 15-16 of this Discussion Paper.

appointed prior to the commencement of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) 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.[124]

[124] See pp 19-22 of this Discussion Paper for a discussion of justices of the peace and commissioners for declarations who hold office by virtue of their employment in the Supreme Court, a District Court or a Magistrates Court.

CHAPTER 3

THE COMMISSION'S APPROACH TO THIS REVIEW

1. SCOPE OF THE REVIEW

The terms of this reference require an examination of the role of justices of the peace in Queensland.[125] However, as observed in Chapter 2,[126] 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 is not possible to set out in this paper all the powers that may be exercised by justices of the peace or by commissioners for declarations. Rather, this Discussion Paper examines the main powers that they may exercise.

If there is to be a continuing role for justices of the peace in Queensland, the primary issue will be to determine what powers should be exercised by them. In the following chapters, the Commission examines the various powers that may be exercised by justices of the peace and commissioners for declarations, and the extent to which those powers are presently exercised by them.

2. GENERAL QUESTIONS RAISED BY THE TERMS OF REFERENCE

In the Issues Paper,[127] the Commission posed two questions about the role of justices of the peace:

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125 The terms of reference are set out at p 1 of this Discussion Paper.

126 See pp 13 and 14 of this Discussion Paper.

127 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 68.

- Is there a need within the communities where justices of the peace presently exercise their various powers for them to retain those powers, or are there enough other people to meet those needs (for example - in relation to bench duties - magistrates located within the community, visiting the community "on circuit" on a regular basis, or available to the community through some technological means)?

- Quite separately from the issue of need, are there other factors that make it desirable (or undesirable) for those powers to be exercised by justices of the peace?

It was anticipated that the answers to these questions might vary according to the power concerned and the locality within Queensland.[128] In the following chapters, these two questions are addressed in relation to the different powers that may be exercised by justices of the peace.

3. RELEVANT FACTORS

The office of justice of the peace now bears little resemblance to its historical origins in the fourteenth century.[129] Over time, the law has also 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.

(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 matters that could be undertaken by different categories of justices of the peace - there had been a shift in emphasis in the role undertaken by justices of the peace, with their judicial role becoming more limited.[130] In particular, it appears that justices of the peace were called upon to constitute a Magistrates Court less frequently than they once were.

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128 Ibid.

129 See the discussion of the origins of the office at pp 5-6 of this Discussion Paper.

130 See p 8 of this Discussion Paper. See also Tronc K, *Albietz - Powers and Duties of Lay Justices of the Peace in Queensland* (8th ed 1994) at 3-4.

The fact that this change has occurred must be taken into account by the Commission 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.[131] 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 Court in Queensland) that reflect certain views about how the justice system should be administered. Mr Justice Thomas observed, in relation to changes within Magistrates Courts Australia-wide, in a paper delivered in 1990:[132]

> 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 them to be appointed and hold office under that Act, rather than as public servants under the

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131 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 ...

132 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.

Public Service Management and Employment Act 1988 (Qld).[133] 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.[134]

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:[135]

> 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, whoever administers the law has training and experience appropriate 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

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133 *Stipendiary Magistrates Act 1991* (Qld) s 5. Since the repeal of the *Public Service Management and Employment Act 1988* (Qld), s 5 of the *Stipendiary Magistrates Act 1991* (Qld) refers to the *Public Service Act 1996* (Qld).

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

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

and inconvenience of requiring the witness to attend personally are not warranted.[136]

A video conference system is currently in place between the Magistrates Court at Brisbane and the Arthur Gorrie Correctional Centre. During the year ended 30 June 1998, that system was used to facilitate the hearing of 332 bail and remand applications and 94 pleas from detainees at the Arthur Gorrie Correctional Centre.[137] The system obviates the need to bring persons on remand to the Court for the hearing of these matters.[138]

Admittedly, Queensland is a large State with quite a decentralised population. Nevertheless, these advances in technology raise the issue of whether the infrastructure is available, or could be put in place, to reduce the need to have justices of the peace available within more remote communities, while still ensuring an appropriate level of access to justice. The extent to which this type of technology has filtered through to the Magistrates Courts generally, and its suitability for different types of hearings, are considered in Chapter 9 of this Discussion Paper.

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136 See the discussion of the availability of video and audio links and document display video cameras in the Supreme Court of Queensland, Supreme Court Brochure Series No 8, *Technology in Trials in the Supreme Court* (Issued October 1997 - Reviewed July 1998) <http://www.courts.qld.gov.au> (22 April 1999). See also the *Audio Visual and Audio Links Amendment Bill 1999* (Qld).

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

138 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:

> (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 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).

(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.

4. THE ALLOCATION OF POWERS: A SINGLE CLASS OR A TIERED APPROACH?

(a) Introduction

As mentioned above, in the following chapters of this Discussion Paper, the Commission examines whether the various powers that may presently be exercised by justices of the peace and commissioners for declarations should be retained 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 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:[139]

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

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139 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). In this discussion, however, the Commission is concerned with the categories of "appointed justices of the peace" and "appointed commissioners for declarations". See p 19 of this Discussion Paper in relation to those terms.

- old system justice of the peace.[140]

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 lawyer[141] - 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).[142] The Act provides that the powers of a justice of the peace (commissioner for declarations) are limited to those of a commissioner for declarations.[143] Consequently, after 30 June 2000, there will be two categories of office with identical powers.

The present regime for justices of the peace and commissioners for declarations was intended to introduce a tiered approach, with commissioners for declarations, justices of the peace (qualified) and justices of the peace (magistrates court) exercising an increasingly more significant range of powers.[144] However, justices of the peace (qualified) exercise a very broad range of powers. For example, the skills and experience that are desirable for a person who is called upon to issue a search warrant are arguably different from those that are desirable for a person attending a police interview of a juvenile. The exercise of bench duties, even where limited to the exercise of procedural powers, also requires a significant degree of expertise.

(b) Issues Paper

In the Issues Paper,[145] the Commission sought submissions on whether appointments of justices of the peace should be made for particular, specialised purposes, or whether appointments should be made conferring a broader range of powers.

(c) Submissions

The Commission received submissions addressing the breadth of powers that should

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140 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

141 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 42(3). See p 15 of this Discussion Paper.

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

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

144 See Chapter 2 for a discussion of the powers of the different categories of justice of the peace.

145 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 77.

be conferred on justices of the peace.[146] It also received several submissions addressing the future role of old system justices of the peace.

(i) The appropriate range of powers

Five respondents were of the view that the present tiered system is working and should be retained.[147]

Several respondents advocated having only one class of justices of the peace who would exercise the full range or powers.[148] That was the situation prior to the enactment of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). The Queensland Law Society suggested having only two categories of office: justices of the peace and commissioners for declarations.[149]

A number of submissions supported the appointment of justices of the peace for specialised purposes.[150] Bench duties, customs matters, juvenile interviewing and search warrants were all suggested as areas that might be appropriate as the subject of a specialised appointment.[151] One respondent commented:[152]

> 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.

On the other hand, a large number of submissions were opposed to making more specialised appointments than presently occurs.[153] These submissions raised two main concerns. It was suggested that the creation of more categories of justices of the peace would be too confusing and make the system too complicated.[154] It was also suggested that the making of more specialised appointments would make it more difficult for people to find a suitably qualified justice of the peace, especially in rural areas, and that appointments for a

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146 See p 3 of this Discussion Paper for a breakdown of respondents.

147 Submissions 31, 32, 50, 53, 103.

148 Submissions 9, 27, 56, 88, 96.

149 Submission 95.

150 Submissions 20, 21, 22, 35, 42, 47, 51, 60, 65, 94, 106.

151 Submissions 35, 94.

152 Submission 60.

153 Submissions 7, 8, 10, 11, 12, 19, 25, 30, 38, 40, 41, 43, 45, 48, 53, 88, 91, 92, 96, 97, 98, 105.

154 Submissions 7, 43, 45, 53, 88, 91, 92, 98.

broader range of powers is more practical.[155]

One respondent commented:[156]

> 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 was not, in principle, opposed to the concept of specialised appointments, but did not think that it would be practical in rural or remote communities where justices of the peace are expected to perform a range of functions:[157]

> 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.

(ii) The future role of old system justices of the peace

Several submissions addressed the issue of the future role of old system justices of the peace.

Two respondents suggested that it will be confusing to have two categories of office that have identical powers, and that, after 30 June 2000, old system justices of the peace should simply become commissioners for declarations, rather than justices of the peace (commissioners for declarations).[158]

Several other respondents thought that old system justices of the peace should be able to become commissioners for declarations only if they undertook some

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155 Submissions 10, 11, 12, 19, 25, 41, 45, 48, 91, 97, 105.

156 Submission 91.

157 Submission 112.

158 Submissions 7, 46.

form of training and assessment.[159]

A number of respondents were of the view that, after 30 June 2000, old system justices of the peace should be removed from office altogether.[160]

The Criminal Justice Commission was of the view that old system justices of the peace should be transferred to the office of commissioner for declarations immediately.[161]

(d) The Commission's preliminary view

The Commission agrees that, if appointments of justices of the peace were made for more specialised purposes than presently occurs under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), it could prove difficult for people, especially those in rural areas, to obtain the services of an appropriately qualified justice of the peace. The Commission also agrees that the creation of more categories of office could result in confusion.

On the other hand, the Commission does not favour an approach that allows all justices of the peace to exercise all the powers that the Commission recommends should be retained by justices of the peace. That 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.

For these reasons, the Commission generally favours the retention of the tiered approach and the categories of office that are created by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). In the view of the Commission, that 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 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.

Consequently, subject to the comments below in relation to the future role of old system justices of the peace after 30 June 2000, the Commission is of the view that the categories of office provided for by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be retained.

At present, the *Justices of the Peace and Commissioners for Declarations Act 1991*

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159 Submissions 38, 40.

160 Submissions 4, 57, 91.

161 Submission 113.

(Qld) provides that the office of justice of the peace (commissioner for declarations) will come into existence on 1 July 2000.[162] In the view of the Commission, 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. The Commission considers that the retention of the two roles unnecessarily complicates the system, and that it could give rise to confusion, especially in relation to the powers of a justice of the peace (commissioner for declarations). The Commission is not aware of any advantages that would result from retaining the office of justice of the peace (commissioner for declarations).

For these reasons, the Commission is of the view 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 become a commissioner for declarations, rather than a justice of the peace (commissioner for declarations).[163]

The Commission is strongly of the view that there should be no further extension of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Old system justices of the peace have had sufficient time to qualify for appointment to another category of office. Further, the Commission regards it as 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).[164]

As noted above, 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.[165] 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.

The Commission disagrees with this exemption. The Commission regards it as

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

163 Although the Commission has, in Chapter 12, made a recommendation in relation to the training requirements for the appointment of commissioners for declarations in the future, the Commission does not propose to impose those requirements on an old system justice of the peace who would, under its present recommendation, become a commissioner for declarations on the expiry of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). See p 267 of this Discussion Paper.

164 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).

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

anomalous that, merely because a justice of the peace is a lawyer, he or she should have powers that exceed those of either a justice of the peace (qualified) or a justice of the peace (magistrates court).

(e) Preliminary recommendations

The Commission makes the following preliminary recommendations:

- **The offices of commissioner for declarations, justice of the peace (qualified) and justice of the peace (magistrates court) should be retained.[166]**
- **An old system justice of the peace[167] 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).**
- **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 also hold office as a commissioner for declarations.**
- **There should be no further extension of the transitional provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).**

5. BY WHOM SHOULD PARTICULAR POWERS BE EXERCISED?

If a tiered approach is to be retained, it will be necessary to consider by whom particular powers should be exercised. In the subsequent chapters of this Discussion Paper, consideration will be given to which of the following categories of people should be able to exercise the power in question:

- a commissioner for declarations;

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166 In the subsequent chapters of the Discussion Paper, the Commission recommends which powers should be able to be exercised by people appointed to these various offices.

167 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

- a justice of the peace (qualified);
- a justice of the peace (magistrates court);
- a justice of the peace (qualified) or a justice of the peace (magistrates court) who is a member of staff at a Magistrates Court;
- a justice of the peace who is the clerk of the court of a Magistrates Court.

The appointment of clerks of the court is governed by the *Justices Act 1886* (Qld). That Act provides for the appointment of a person as a clerk of the court at a place where a Magistrates Court may be held[168] and confers various powers on clerks of the court.[169] In Chapter 2, it was noted that a clerk of the court is, by virtue of holding that office, a justice of the peace.[170] However, that is not the case where the clerk of the court is a police officer.[171]

There are a number of Magistrates Courts in Queensland where the clerk of the court is a police officer[172] and, therefore, is not, by virtue of that appointment, a justice of the peace. This of course does not prevent a police officer from being appointed as a justice of the peace (qualified) or as a justice of the peace (magistrates court). In considering whether various powers should be able to be exercised by a justice of the peace who is a clerk of the court, the situation of a clerk of the court who is a police officer requires particular attention.

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168 *Justices Act 1886* (Qld) s 22C.

169 See, for example, *Justices Act 1886* (Qld) ss 23D, 23DA.

170 See pp 20-21 of this Discussion Paper. Depending on whether the clerk of the court is legally qualified, and whether he or she held office immediately prior to the commencement of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), the clerk of the court will be either a justice of the peace (magistrates court) or a justice of the peace (qualified).

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

172 Police officers are clerks of the court at 43 locations throughout Queensland. See Appendix D to this Discussion Paper.

CHAPTER 4

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 referred to the frequency with which justices of the peace are called on to witness documents,[173] with one justice of the peace (qualified) stating that between November 1997 and May 1998 he had taken over 350 affidavits.[174] Several respondents, all justices of the peace (qualified), suggested that witnessing was the major task performed by justices of the peace.[175] 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.[176]

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.[177]

The term "witnessing" is used, however, to distinguish this part of the role of a justice of the peace from the powers that involve issuing a court process, such as a summons or a warrant.[178] 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

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

174 Submission 103.

175 Submissions 27, 64, 90 108.

176 Submission 27.

177 See pp 41-42 of this Discussion Paper.

178 See Chapter 5 of this Discussion Paper for a discussion of summonses and warrants.

in this chapter.

3. 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, by way of a statutory declaration is found in many other Acts.[179] In some cases, people may choose to make a statement by way of a statutory declaration, not because there is a legal requirement for them to do so, but because they are of the view that the statement will carry more weight as a result.

Although statutory declarations are not made on oath or affirmation, they are required to be expressed to be made pursuant to the provisions of the *Oaths Act 1867* (Qld).[180]

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.[181] If, however, 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.[182]

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.[183] A "justice"[184] and a commissioner for declarations are included among the persons

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179 See, for example, the *Bills of Sale and Other Instruments Act 1955* (Qld) s 12; the *Stamp Act 1894* (Qld) s 16; the *Traffic Act 1949* (Qld) s 44G; the *State Housing Act 1945* (Qld) Sch, Item 18; and the *Workplace Relations Act 1997* (Qld) s 162.

180 *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*.

181 *Criminal Code* (Qld) s 193.

182 *Criminal Code* (Qld) s 194.

183 *Oaths Act 1867* (Qld) s 13(2).

184 See note 57 of this Discussion Paper as to the definition of "justice".

authorised to witness a statutory declaration.[185] The other persons authorised by the Act are:

- a notary public under the law of the State, the Commonwealth or another State;
- a lawyer;
- 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.[186] A person who commits perjury is liable to imprisonment for fourteen years.[187]

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.[188] The persons authorised to witness an affidavit are the same as those authorised to witness a statutory declaration.[189] An affidavit can therefore be witnessed by a justice of the peace and by a commissioner for declarations.

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185 *Oaths Act 1867* (Qld) s 13(1).

186 *Criminal Code* (Qld) s 123.

187 *Criminal Code* (Qld) s 124. 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).

188 *Oaths Act 1867* (Qld) s 41.

189 See pp 39-40 of this Discussion Paper.

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

These powers may be exercised by a commissioner for declarations,[190] a justice of the peace (qualified),[191] a justice of the peace (magistrates court),[192] an old system justice of the peace,[193] or a justice of the peace (commissioner for declarations).[194]

4. 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,[195] an enduring power of attorney is not revoked by the subsequent legal incapacity of the principal[196] (other than by death).[197] That 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 a justice of the peace or a commissioner for declarations.[198] 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

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

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

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

193 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1)(b). See pp 15-16 of this Discussion Paper in relation to the Commission's use of the term "old system justice of the peace".

194 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).

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

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

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

198 *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.

to the witness to have the capacity necessary to make the document.[199] 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,[200] a justice of the peace (qualified),[201] a justice of the peace (magistrates court),[202] an old system justice of the peace,[203] or a justice of the peace (commissioner for declarations).[204]

5. WITNESSING SIGNATURES

Many documents are required to be witnessed by a justice of the peace or a commissioner for declarations.[205] 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.[206]

This power may be exercised by a commissioner for declarations,[207] a justice of the peace (qualified),[208] a justice of the peace (magistrates court),[209] an old system justice of the peace,[210] or a justice of the peace (commissioner for declarations).[211]

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

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

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

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

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

204 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).

205 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.

206 *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.

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

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

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

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

211 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(5), (8).

6. OTHER JURISDICTIONS

(a) Statutory declarations

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

The Commonwealth, Victoria, Western Australia, Tasmania and the Australian Capital Territory authorise people in a range of designated occupations to witness statutory declarations.[212]

Schedule 1 to the *Statutory Declarations Regulations 1993* (Cth) authorises 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, it also authorises people in the following offices or occupations:

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*
Bailiff
Bank officer with 5 or more years of continuous service
Chief executive of a Commonwealth court
Civil marriage celebrant
Clerk of a court
...
Credit union officer with 5 or more years of continuous service

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

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
Judge of a court
...
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) a 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) has been amended recently so 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.[213]

The *Evidence Act 1958* (Vic) also contains its own list of various office holders and occupational groups who may, in addition to a justice of the peace or a bail

213 A new s 131B of the *Evidence Act 1910* (Tas) was inserted by s 4 of the *Evidence Act Amendment Act 1997* (Tas).

justice, witness a statutory declaration.[214] This list is similar, but not identical, to that found in the Schedule to the *Statutory Declarations Regulations 1993* (Cth).[215] For example, whereas the Commonwealth list includes a teacher employed on a full-time basis at a school or tertiary education institution, the Victorian list includes a principal in the teaching service. Further, the Victorian list omits, among others, chiropractors, nurses, physiotherapists and psychologists.

In Western Australia, people in certain designated occupations are authorised to witness any statutory declaration or other document that is required to be signed in the presence of a justice of the peace.[216]

(ii) Any adult

In the Northern Territory, a statutory declaration may be made in the presence of a person who has attained the age of eighteen years.[217]

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* (Cth). Until recently, the prescribed application form listed people in a number of occupations.[218] 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.[219]

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

215 See pp 43-44 of this Discussion Paper.

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

217 *Oaths Act* (NT) s 23C(1)(b).

218 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.

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

(b) Affidavits

Most jurisdictions still take a fairly traditional approach in relation to the people who are authorised to witness affidavits[220] - 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 involving the exercise of federal jurisdiction may be sworn before any justice of the peace, notary public or lawyer.[221]

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 by:[222]

- a person authorised to administer oaths for the purposes of the High Court or the Supreme Court of a State or Territory;
- a Judge of the Court;
- the Registrar;
- a Deputy Registrar;
- a District Registrar or a Deputy District Registrar;
- a justice of the peace;
- a commissioner for affidavits; or
- a commissioner for declarations.

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 under the *Statutory Declarations Regulation 1959* (Cth).

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220 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.

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

222 *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).

(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:[223]

(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 registered 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);

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

(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 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 may be made in the presence of a person who has attained the age of eighteen years,[224] the witnessing of an affidavit that is required for any proceeding for any court is restricted to a justice or a commissioner for oaths.[225] 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:[226]

- 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 much more restricted than eligibility to witness a statutory declaration.

7. ISSUES PAPER

In the Issues Paper,[227] the Commission sought submissions on the following questions about the various witnessing functions of justices of the peace and commissioners for declarations:

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224 *Oaths Act* (NT) s 23C(1)(b).

225 *Oaths Act* (NT) s 13.

226 *Oaths Act* (NT) s 17.

227 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 75.

- Is there a need, or is it desirable, for the function to be performed by a justice of the peace or a commissioner for declarations, rather than by some other person in a designated occupation?

- What are the perceived advantages and disadvantages, if any, of having this function undertaken by a justice of the peace or a commissioner for declarations, rather than by a person in a designated occupation?

- Have people experienced difficulties obtaining access to a justice of the peace or a commissioner for declarations in order to have a document witnessed?

8. SUBMISSIONS

Almost all the submissions that directly addressed the issue of witnessing were of the view that it was desirable for the witnessing function to be performed by justices of the peace, rather than by other people in specified occupations.[228] The following reasons were advanced in support of this view.

(a) Knowledge of the law/training

The reason given by most respondents 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.[229] It was suggested that, as a result of the training that justices of the peace are required to undertake,[230] they would be more familiar with the documents[231] and would therefore be able to perform this task to a higher standard than other groups. As one respondent suggested:[232]

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

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228 Submissions 4, 5, 7, 10, 11, 12, 16, 18, 19, 20, 21, 28, 30, 31, 33, 35, 36, 38, 39, 41, 43, 44, 45, 46, 48, 49, 50, 51, 53, 54, 55, 57, 60, 61, 62, 63, 65, 67, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 91, 92, 93, 94, 95, 96, 97, 98, 101, 103, 105, 107, 108, 114, 117. See p 3 of this Discussion Paper for a breakdown of respondents.

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

230 Submissions 6, 7, 8, 10, 51, 108.

231 Submission 16.

232 Submission 38.

Another respondent expressed a similar view:[233]

> 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 of 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 ...

Several respondents considered that people in the designated occupations referred to in the Issues Paper[234] might lack the necessary knowledge to perform the task.[235] In particular, one of these respondents thought that allowing other groups to witness documents could lead to a number of problems:[236]

> When a document is witnessed by a properly trained JP, the public has a right to expect that the witnessing and any subsequent matters relating to it will be handled properly and correctly. The swearing of an affidavit is not a simple or casual matter, to be lightly undertaken, and incorrect witnessing or swearing can be costly. Approaching someone for one of these duties because they are on a list of designated occupations can lead to all sorts of problems if, as is often the case, these people don't know how to carry out the duty.

Others were of the view that justices of the peace would be more likely to detect errors in documents,[237] and that witnessing by a justice of the peace would provide some assurance that execution had been undertaken in a proper manner.[238]

A registrar of a Magistrates Court in Queensland was of the view that the taking of affidavits requires specialised knowledge and that affidavits should be witnessed by a person in a new office of commissioner of affidavits (with the specific role of witnessing affidavits), although, in relation to the more general witnessing of enduring powers of

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233 Submission 53.

234 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 74.

235 Submissions 88, 96, 107.

236 Submission 88.

237 Submission 101.

238 Submissions 53, 58.

attorney, statutory declarations and other documents, he was of the view that people in designated occupations would be appropriate witnesses.[239]

As to the Northern Territory approach - where any adult may witness a statutory declaration - one respondent was of the view that this could lead to a casual attitude to witnessing, with some people being willing to witness a document in blank or a signature where they have not seen the person sign.[240]

(b) Availability

A large number of respondents expressed the view that justices of the peace would be more available to witness documents than people in the occupational groups mentioned.[241] One respondent referred to the fact that, as a justice of the peace, he occasionally performed home visits to witness documents where the age or ill-health of the person warranted this.[242] Other respondents considered that the role was of particular importance to the elderly.[243]

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:[244]

> 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 emphasised the fact that justices of the peace are available at all hours of the day.[245] Two respondents thought that many of the people in designated occupations might be available only during business hours,[246] which may not be practical for the witness in many cases:[247]

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239 Submission 114.

240 Submission 31.

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

242 Submission 47.

243 Submission 30, 33.

244 Submission 12.

245 Submissions 18, 21, 29, 44, 46, 53, 66, 85, 92, 98.

246 Submissions 21, 43.

247 Submission 44.

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

Another respondent thought that some people in designated occupations might be prevented by their employer from witnessing during working hours.[248] This problem could, however, apply equally to justices of the peace.

It was further suggested that there could be problems in obtaining access to a person in a designated occupation after hours:[249]

> 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 in, for example, the Yellow Pages (as is now proposed by the Justice Department).

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.[250]

In response to the question in the Issues Paper about whether people had experienced difficulties obtaining access to a justice of the peace or a commissioner for declarations in order to have a document witnessed, a large number of respondents said that they had heard of people having problems in locating a justice of the peace or a commissioner for declarations.[251] Significantly, however, the Commission did not receive any submissions from people who said that they had personally experienced such a problem.

Many respondents were of the view that people generally did not have any difficulty trying to locate a justice of the peace or a commissioner for declarations.[252]

Several respondents thought that there may have been some difficulty in the past, but that that should be overcome by the recent initiative of the Department of Justice and Attorney-General to publish in the Yellow Pages of the telephone directory and on the Internet the details of justices of peace who agreed to having their details so

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248 Submission 43.

249 Submission 87.

250 Submission 91.

251 Submissions 5, 7, 11, 19, 20, 33, 35, 38, 40, 42, 43, 44, 45, 46, 47, 48, 51, 58, 70, 91, 98, 117.

252 Submissions 22, 36, 39, 49, 53, 54, 55, 61, 65, 67, 87, 96, 103, 105.

published.[253]

(c) Willingness to perform the role

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.[254] One respondent summed it up in this way:[255]

> 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.

(d) Privacy

Several submissions raised the issue of privacy and confidentiality.[256] 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, witnessing their personal documents.[257] Another respondent commented:[258]

> ... 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.[259]

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253 Submissions 18, 21, 38, 43, 51, 60, 97. The relevant entry in the Yellow Pages lists justices of the peace in alphabetical order, with their suburb and telephone number. It does not, presumably for security reasons, include their address. Details can also be found on the Department of Justice and Attorney-General's Home Page on the Internet at <http://jp.justice.qld.gov.au/jpws/locatejp.html>.

254 Submissions 31, 35, 44, 46, 86.

255 Submission 46.

256 Submissions 31, 88, 92, 98.

257 Submissions 92, 98.

258 Submission 31.

259 Submissions 41, 55. 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).

(e) Solemnity and formality

A number of submissions 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.[260]

One respondent was of the view that witnessing by a justice of the peace emphasised the importance of the matter.[261] 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.[262]

It was suggested that an advantage of documents being 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.[263] However, another respondent did not share that view:[264]

> 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",[265] while other respondents suggested that a document witnessed by a justice of the peace would be more valid,[266] more authentic,[267] or would carry more weight:[268]

> 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?

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260 Submissions 7, 31, 45, 50, 51, 53, 91.

261 Submission 45.

262 Submission 91.

263 Submissions 50, 51.

264 Submission 23.

265 Submission 7.

266 For example, submission 39.

267 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84.

268 Submission 31.

(f) Established role

A number of submissions expressed the view that an advantage of retaining the witnessing function of justices of the peace was that the role was established and well known in the community. The role was variously referred to as being "accepted by the public",[269] "recognised by many relevant authorities and the public",[270] and established and accepted by the community.[271]

One respondent commented in relation to the witnessing of documents:[272]

> 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]

Another respondent was of the view that there is a widely-held "expectation that certain documents requiring a solemn declaration as to truth or accuracy" are acceptable only with the endorsement of a "government accredited" representative of the law.[273]

(g) Free service

A number of submissions emphasised the fact that justices of the peace witness documents free of charge, whereas people in the designated occupational groups might want to charge a fee for this service.[274]

(h) Various personal qualities of justices of the peace

A large number of submissions suggested that particular personal characteristics make justices of the peace the most appropriate people to undertake the witnessing of documents.[275]

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269 Submission 105.

270 Submission 35.

271 Submission 48.

272 Submission 31.

273 Submission 91.

274 Submissions 18, 28, 43, 57, 85, 86, 89, 92, 97A, 98, 107.

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

Justices of the peace were described as being persons of integrity,[276] who have respect for the law,[277] and are honest, unselfish and trustworthy.[278] It was also suggested that they are independent,[279] objective,[280] and exercise their role "without fear or favour".[281]

Concern was expressed that other witnesses might not be as "careful of the truth" as justices of the peace,[282] 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 observed that justices of the peace must pass a police check before they can be appointed,[283] whereas other potential witnesses might not necessarily satisfy all the criteria that are presently required of justices of the peace before they can be appointed.[284]

(i) Other views

A number of submissions gave some support for expanding the classes of people who can witness various types of documents.[285]

Three respondents supported allowing people in designated occupations to witness documents on the basis that it is sometimes difficult to find a justice of the peace and this might enable easier access to witnesses.[286]

Two respondents were of the view that statutory declarations were less important than other documents witnessed by justices of the peace and could be witnessed by people in certain occupational groups.[287]

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276 Submissions 5, 7, 11, 93, 102.

277 Submission 117.

278 Submission 41.

279 Submissions 5, 25, 31, 43.

280 Submission 57.

281 Submissions 31, 85.

282 Submission 41.

283 Submissions 46, 51. See Chapter 12 of this Discussion Paper in relation to the process of appointment.

284 Submission 51.

285 Submissions 22, 40, 58, 70, 114.

286 Submissions 22, 40, 58.

287 Submissions 70, 114.

Another respondent favoured the Commonwealth approach on the basis that it would no longer be necessary to retain commissioners for declarations.[288]

9. THE COMMISSION'S PRELIMINARY VIEW

(a) Introduction

At present, there are many documents that are required by law to be witnessed in a particular manner. The main types of documents have been discussed earlier in this chapter.[289] In the Commission's view, the terms of this reference[290] do not encompass a wholesale review of the general requirements for witnessing particular types of documents. For example, the question whether statutory declarations should be witnessed at all is, in the Commission's view, beyond the terms of the present reference; this is so even though a decision on that question might directly affect the witnessing function of justices of the peace by significantly reducing their role in this area.

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.

(b) The need for the witnessing role

Given the limited purpose for which affidavits are used, namely, in court proceedings, it is likely that the number of affidavits that require witnessing is considerably less than the number of statutory declarations and other documents that require witnessing. However, 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.[291]

The Commission is of the view 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. There are undoubtedly 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

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288 Submission 40.

289 See pp 39-42 of this Discussion Paper.

290 The terms of reference are set out at p 1 of this Discussion Paper.

291 See p 40 of this Discussion Paper as to persons who may witness an affidavit.

justices of the peace and commissioners for declarations could result in difficulties for those litigants in having affidavits witnessed, with the task most likely to fall to court staff, assuming they retained the powers they presently have by virtue of their employment.[292]

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. At present, the solicitor may well have a staff member who has been appointed as a justice of the peace or a commissioner for declarations who is able to witness the affidavit.

Documents other than affidavits almost certainly constitute the vast bulk of documents that are required to be witnessed. Because of the volume of documents, there is a need for an available pool of witnesses to attend to the witnessing of these documents.

While it may be possible for this need to be met, at least in part, by an expansion of the list of eligible witnesses,[293] there would seem to the Commission to be little point, if justices of the peace are to retain their witnessing role in relation to affidavits, in omitting them from any expanded list of witnesses for other types of documents.

The Commission is 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 nevertheless retained justices of the peace and commissioners for declarations in their respective lists.[294] To do otherwise could result in a significant diminution in access to an available witness, especially in communities where there may not be a person who is in a designated occupational group.

(c) Appropriateness of the witnessing role

The submissions received by the Commission in response to the Issues Paper advanced a number of arguments in support of the desirability of having justices of the peace and commissioners for declarations witness documents.[295] In general, the Commission accepts the force of these submissions.

(i) Knowledge of the law/training

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292 See pp 19-21 of this Discussion Paper.

293 See, however, the Commission's view at p 57 of this Discussion Paper as to the scope of this reference.

294 See pp 43-45 of this Discussion Paper.

295 See pp 49-56 of this Discussion Paper.

While a large number of submissions emphasised the need for justices of the peace to receive more and better training,[296] the fact remains that, at 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, they have been required to pass an examination in order to qualify for appointment. For this reason, they 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.

Of course, the same cannot necessarily be said of justices of the peace appointed prior to the 1991 Act or of commissioners for declarations appointed under the 1991 Act. Although some justices of the peace appointed before the 1991 Act did undergo training for the role,[297] there was no requirement for them to do so. Similarly, persons appointed as commissioners for declarations are not required to first pass an examination. In relation to these two groups, it is difficult to say that they are 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", there is no reason to suppose that other groups could not, with time, also gain that experience.

(ii) Availability and willingness

The Commission considers the availability and willingness of witnesses to be an important consideration. 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.

On a practical level, many potential witnesses may be unable, because of their work commitments, to witness documents during their work hours. This constraint would apply equally to justices of the peace as to persons in other occupational groups. The main difference, however, is that many justices of the peace willingly make themselves available out of hours. For example, many justices of the peace have availed themselves of the Department of Justice and Attorney-General's offer to publish their details in the Yellow Pages and on the Internet.[298]

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296 Submissions 1, 1A, 7, 10, 11, 12, 28, 38, 43, 47, 48, 49, 51, 53, 56, 60, 61, 66, 69, 70, 87, 88, 90, 91, 92, 94, 95, 96, 97, 98, 99, 102, 103, 106, 107, 108, 109, 112, 117. See the discussion of training in Chapter 12 of this Discussion Paper.

297 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.

298 See note 253 of this Discussion Paper.

If justices of the peace were excluded from performing this function in favour of people in designated occupations, it is less likely that the people in those occupational groups would be as willing to publicise details of how they could be contacted out of business hours. This would mean that people seeking a witness could well be restricted to witnesses whom they happen to know, for example, the neighbour who happens to be a pharmacist or their family doctor. This then raises the privacy issue referred to in a number of submissions.

(iii) Privacy

It was suggested that some people may feel embarrassed asking a person they know to witness personal documents.[299] Even if it is thought that such people are unusually sensitive, the Commission is of the view that some people might at least find it more awkward, and perhaps consider it more of an imposition, to ask a person such as their family doctor to witness a document than to ask a person who holds himself or herself out as willing to perform that task.

(iv) Solemnity/formality

The Commission is of the view that, while 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.

(v) Established role

The Commission accepts that the role of justices of the peace in relation to witnessing documents is widely known within the general community. If their power to witness documents were removed, this could cause confusion in relation to the witnessing of documents. Even if an expanded list of witnesses were adopted, it is unlikely that there would be the same level of awareness as to the particular groups who were authorised to witness as there presently is in relation to justices of the peace.[300]

The Commission is of the view that, if justices of the peace could not witness affidavits, in particular, this could result in confusion. Justices of the peace are authorised by Commonwealth legislation to witness affidavits for use in any Australian court involving the exercise of federal jurisdiction.[301] It would be confusing if justices of the peace were able to witness an affidavit for use in a

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299 See p 53 of this Discussion Paper.

300 See p 45 of this Discussion Paper 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.

301 *Evidence Act 1995* (Cth) s 186(1)(a). See p 46 of this Discussion Paper.

matter in a State court that involved the exercise of federal jurisdiction, but could not witness an affidavit for use in a matter in a State court that did not involve the exercise of federal jurisdiction.

(vi) Free service

Many submissions emphasised the fact that justices of the peace provide a free service and suggested that other occupational groups may not be as willing to provide a similar service for no fee.[302]

Justices of the peace are presently prohibited from charging for their services.[303] While it would be possible to prohibit people in other designated occupations from charging for witnessing documents, this may impact on the willingness of some people in those occupations to provide their time for this type of service.

(vii) Various personal qualities

Many submissions suggested that justices of the peace made ideal witnesses because of various personal qualities.[304] It is, however, difficult to make generalisations about the character of either justices of the peace or, indeed, people in various occupational groups. It is probably even more difficult to attempt to make a comparison between the two groups. Qualities such as integrity, honesty, trustworthiness and independence are very much individual qualities, which may or may not be possessed by individual people - regardless of whether they have been appointed as justices of the peace or commissioners for declarations.

Two things can, however, be said of justices of the peace and commissioners for declarations with reasonable certainty:

- Although some justices of the peace and commissioners for declarations may seek appointment for work-related reasons, for the most part, the role is one that is assumed by them voluntarily. From this, it can be inferred that the majority of justices of the peace are reasonably public spirited and committed to their role. As one respondent commented:[305]

  > ... trained JPs and Com Decs ... help their fellow citizens NOT BECAUSE

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302 See p 55 of this Discussion Paper.

303 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.

304 See pp 55-56 of this Discussion Paper.

305 Submission 61.

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.[306] People in other groups might not necessarily be able to satisfy this criterion.

Other things being equal, these two factors would tend to support the suitability of justices of the peace and commissioners for declarations for their present witnessing role.

For the reasons discussed above, the Commission is of the view that the witnessing function that is conferred on justices of the peace and commissioners for declarations by numerous Queensland Acts is an appropriate role for them to undertake. Although commissioners for declarations are not presently required to undergo any training prior to appointment,[307] the Commission is of the view that their availability and willingness to perform this role justify their retention of this role. To remove this role from them could cause considerable inconvenience to people requiring these services.

(d) Justices of the peace and commissioners for declarations who should be able to exercise the witnessing function

The witnessing of affidavits, statutory declarations and other documents may presently be undertaken by justices of the peace (magistrates court), justices of the peace (qualified), old system justices of the peace and commissioners for declarations.[308] The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that, after 30 June 2000, these functions will also be able to be undertaken by a justice of the peace (commissioner for declarations).[309]

In Chapter 3 of this Discussion Paper, the Commission has recommended that, after 30 June 2000, all old system justices of the peace who have not been appointed to another category of office and who have not registered as a commissioner for declarations should hold office as commissioners for declarations, rather than as justices of the peace (commissioner for declarations). Consequently, the Commission is of the view that, after 30 June 2000, the witnessing function of justices of the peace should be exercised by:

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306 See the discussion at pp 244-247 of this Discussion Paper of the extent to which certain criminal convictions disqualify a person from appointment as a justice of the peace or commissioner for declarations.

307 See the Commission's recommendation at p 267 of this Discussion Paper in relation to the training requirements for the appointment of commissioners for declarations in the future.

308 See pp 40-41 and 42 of this Discussion Paper.

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

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

Given that the Commission has recommended that old system justices of the peace should, after 30 June 2000, hold office as commissioners for declarations, the Commission is of the view that old system justices of the peace should retain the power to witness various documents until that time.

10. PRELIMINARY RECOMMENDATION

The Commission's preliminary recommendation is 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.**

Until 30 June 2000, old system justices of the peace should also be able to exercise these powers.[310]

[310] It is the Commission's preliminary recommendation that, after 30 June 2000, old system justices of the peace should hold office as commissioners for declarations. See p 36 of this Discussion Paper.

CHAPTER 5

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".[311]

(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.[312] 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.[313] The making of a complaint is usually the first step in having a summons issue against a defendant to answer charges.[314] 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 of the peace may issue a summons.[315]

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,[316] to answer the complaint and to be dealt with according to law.[317]

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311 Queensland Police Service, *Operational Procedures Manual* at s 3.5.4

312 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.

313 *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 p 69 of this Discussion Paper.

314 The making of a complaint may, in some circumstances, result in a warrant being issued against a person. See pp 68-69 of this Discussion Paper.

315 *Justices Act 1886* (Qld) s 53(1).

316 See the discussion of committal hearings at pp 164-170 of this Discussion Paper.

317 *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 evidence[318] or to produce documents.[319]

It has been held that, in issuing a summons, a justice of the peace must exercise a discretion in a judicial manner:[320]

> 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]

The *Police Powers and Responsibilities Act 1997* (Qld)[321] now provides an alternative means of commencing proceedings against a defendant.[322] Instead of commencing proceedings by summons, it is now possible for a police officer to serve a notice to appear on a person.

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.[323] A notice to appear must be served personally on a person.[324]

A notice to appear must satisfy the following requirements:[325]

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318 *Justices Act 1886* (Qld) s 78.

319 *Justices Act 1886* (Qld) s 83.

320 *Electronic Rentals Pty Limited v Anderson* (1971) 124 CLR 27 per Windeyer J at 39.

321 The *Police Powers and Responsibilities Act 1997* (Qld) commenced on 6 April 1998.

322 This procedure does not apply where the defendant is a child: *Police Powers and Responsibilities Act 1997* (Qld) s 40(1).

323 *Police Powers and Responsibilities Act 1997* (Qld) s 40(2).

324 *Police Powers and Responsibilities Act 1997* (Qld) s 40(3).

325 *Police Powers and Responsibilities Act 1997* (Qld) s 41(1).

(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 it[326] and filed with the clerk of the court at the Magistrates Court where the person is required to appear.[327]

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).[328]

(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).[329] 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),[330] a justice of the peace (magistrates court),[331] or an old system justice of the peace whose office is preserved by the transitional provisions of the

326 *Police Powers and Responsibilities Act 1997* (Qld) s 41(1)(d).

327 *Police Powers and Responsibilities Act 1997* (Qld) s 42(1).

328 *Police Powers and Responsibilities Act 1997* (Qld) s 45(1).

329 The definition of "procedural action or order" is set out at note 67 of this Discussion Paper.

330 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

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

Act.[332]

A single justice of the peace may grant a summons, notwithstanding that the case must be heard and determined by two or more justices.[333]

(c) Policy of the Queensland Police Service

The Operational Procedures Manual of the Queensland Police Service sets out the Service's policy in relation to various matters, including the issuing of summonses.

The Manual provides that "where it is not possible to institute proceedings by way of notice to appear proceedings should be instituted by complaint and summons".[334] The 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.[335]

It is also Queensland Police Service policy that members are not to use the services of justices of the peace in circumstances where bias or a conflict of interest may arise.[336] 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.[337]

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 Discussion Paper 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.

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332 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

333 *Justices Act 1886* (Qld) s 24.

334 Queensland Police Service, *Operational Procedures Manual* s 3.5.4.

335 Ibid.

336 Id s 3.9.15.

337 Ibid.

(b) Warrants to apprehend a person

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.[338]

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".[339] This arises from "the statutory obligations cast upon the person making the arrest to bring the arrested person before a justice".[340] 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".[341]

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.

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338 *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.

339 Id at para 5.7.

340 Ibid.

341 *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.[342]

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 warrants to apprehend people, 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 issue a warrant to have the person brought before them to testify.[343]
- 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.[344]
- 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, the justices of the peace may, upon being satisfied of certain matters, issue a

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342 *Justices Act 1886* (Qld) s 58(1).

343 *Justices Act 1886* (Qld) s 79.

344 *Justices Act 1886* (Qld) s 81.

> 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.[345]

Justices of the peace also have the power under other Acts to issue warrants to apprehend a person.[346]

(c) Search warrants

A search warrant authorises the police officers 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.[347] Under many Acts, the issuing of a search warrant is restricted to a magistrate.[348] 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 may apply to a justice of the peace for a 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.[349]

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.[350] 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.[351]

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345 *Justices Act 1886* (Qld) s 142(1)(b).

346 See, for example, the *Gaming Machine Act 1991* (Qld) s 208; the *Racing and Betting Act 1980* (Qld) s 231(2)(h); and the *Peace and Good Behaviour Act 1982* (Qld) ss 4, 7(1)(a).

347 *Hedges v Grundmann* [1985] 2 Qd R 263 per Moynihan J at 268, in discussing s 679 of the *Criminal Code* (Qld).

348 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; and the *Liquor Act 1992* (Qld) s 180.

349 *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").

350 *Police Powers and Responsibilities Act 1997* (Qld) s 28(2).

351 *Police Powers and Responsibilities Act 1997* (Qld) s 28(3).

An application for a search warrant under the *Police Powers and Responsibilities Act 1997* (Qld) must:[352]

- be sworn and state the grounds on which the warrant is sought; and
- include certain specified information about 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 warrant only if he or she is satisfied that there are reasonable grounds for suspecting 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.[353] 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). Section 679(1) of the *Criminal Code* (Qld) provides:[354]

> (1) 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:
>
> (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

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352 *Police Powers and Responsibilities Act 1997* (Qld) 28(4).

353 *Police Powers and Responsibilities Act 1997* (Qld) s 28(6).

354 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.

issue of the warrant were fulfilled.[355] 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.[356] 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:[357]

> 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",[358] these comments would also seem to apply to a warrant sought under section 28 of that Act.

In issuing a search warrant, a justice of the peace exercises a very important function. In *Parker v Churchill*,[359] 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):[360]

> 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 business affairs.

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355 *George v Rockett* (1990) 170 CLR 104 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 111.

356 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* [1985] 2 Qd R 263 that the justice must be satisfied not only that there are reasonable grounds for suspicion and belief, but that the justice must also entertain the relevant suspicion and belief, was excessive.

357 *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.

358 *Police Powers and Responsibilities Act 1997* (Qld) s 28(4)(a).

359 (1985) 63 ALR 326.

360 Id at 333. 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).

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, fax, 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 -
>
> (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 urgency"[361] or special circumstances, such as the "remote location" of the person seeking the warrant.[362] Other provisions do not even restrict the use of these procedures to particular circumstances.[363]

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 warrant to be sought and issued using some form of technology restricts the issuing of the search warrant to a magistrate.[364]

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

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),[365] a justice of the peace (magistrates court)[366] or an old system justice of the

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361 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).

362 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).

363 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).

364 See note 348 of this Discussion Paper.

365 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

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

peace.[367]

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.[368]

(e) Policy of the Queensland Police Service

The Queensland Police Service Operational Procedures Manual also sets out the 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.[369] 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.[370]

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 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.[371]

As mentioned above,[372] it is the policy of the Queensland Police Service that members are not to use the services of justices of the peace in circumstances where bias or a conflict of interest may arise.[373] 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.[374]

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367 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

368 *Justices Act 1886* (Qld) s 24.

369 Queensland Police Service, *Operational Procedures Manual* s 2.8.3.

370 Ibid.

371 Id s 3.5.13.

372 See p 67 of this Discussion Paper.

373 Queensland Police Service, *Operational Procedures Manual* s 3.9.15.

374 Ibid.

3. ISSUING WARRANTS UNDER COMMONWEALTH LEGISLATION

Justices of the peace also have powers to issue warrants under some Commonwealth legislation.[375] 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".[376] 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), 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 wider community.

For example, the *Customs Act 1901* (Cth) prescribes the circumstances in which a "judicial officer" may issue a warrant to search premises.[377] Although the definition of "judicial officer" includes a justice of the peace, it is restricted to:[378]

> a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants.

This particular power may be exercised only by a justice of the peace who is employed at a court house.[379] 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. OTHER JURISDICTIONS[380]

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375 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; the *Export Control Act 1982* (Cth) s 10; and the *Dairy Produce Act 1986* (Cth) s 116.

376 *Acts Interpretation Act 1901* (Cth) s 26(e).

377 *Customs Act 1901* (Cth) s 198.

378 *Customs Act 1901* (Cth) s 183UA. See also the *Crimes Act 1914* (Cth) ss 3C (definition of "issuing officer"), 3E.

379 See the discussion of these justices of the peace in Chapter 2.

380 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 pp 75-76 of this Discussion Paper.

(a) Australian Capital Territory

A justice of the peace is not generally authorised to issue a summons or a warrant.[381] The *Magistrates Court Act 1930* (ACT) confers jurisdiction on magistrates and registrars to issue summonses and warrants under that Act.[382] As far as the Commission is aware, most Acts restrict the power to issue a search warrant to a magistrate.[383]

(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 offence[384] or an offence that is punishable on summary conviction.[385] Alternatively, a justice may, in relation to both types of offences, issue a warrant in the first instance for the apprehension of a person.[386]

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.[387]

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

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381 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).

382 *Magistrates Court Act 1930* (ACT) s 12(1).

383 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).

384 *Justices Act 1902* (NSW) s 24.

385 *Justices Act 1902* (NSW) s 60.

386 *Justices Act 1902* (NSW) ss 23, 59.

387 *Justices Act 1902* (NSW) s 66.

mean:[388]

(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 it 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,[389] and to receive an information and issue a summons in relation to an indictable offence.[390] 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.[391]

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.[392]

A number of Acts also authorise a justice of the peace to issue search warrants.[393]

(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

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388 *Search Warrants Act 1985* (NSW) s 3.

389 *Justices Act* (NT) ss 49, 57.

390 *Justices Act* (NT) ss 101, 104.

391 *Justices Act* (NT) ss 58(2), 103.

392 *Justices Act* (NT) ss 58(3), 105.

393 See, for example, the *Police Administration Act* (NT) ss 117, 120B; and the *Consumer Affairs and Fair Trading Act* (NT) s 20(3).

summons under that Act.[394] 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.[395] The following reason has been given for this change:[396]

> 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.[397]

(e) Tasmania

A justice of the peace may issue a summons under the *Justices Act 1959* (Tas)[398] and under certain other Acts.[399]

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 apprehension in the first instance[400] and a warrant of apprehension for a person already

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394 *Summary Procedure Act 1921* (SA) ss 49, 57. S 7A 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.

395 *Miller v Police* (1997) 67 SASR 484 at 488.

396 Id at 489.

397 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).

398 *Justices Act 1959* (Tas) ss 23(a), 32(a).

399 See, for example, the *Maintenance Act 1967* (Tas) s 114; and the *Poisons Act 1971* (Tas) s 77.

400 *Justices Act 1959* (Tas) s 32(b).

summoned.[401]

A number of Acts authorise justices of the peace to issue search warrants in specific circumstances.[402] When the *Search Warrants Act 1997* (Tas) commences, justices of the peace will have 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"[403] at the premises.[404] 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.[405]

(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:[406]

> 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".[407] 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

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401 *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) and s 101 of the *Mental Health Act 1963* (Tas).

402 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.

403 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.

404 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. A search warrant that is in force in relation to premises authorises the person executing the warrant to do certain things, such as: search the premises; seize evidence; and conduct ordinary and frisk searches of a person on or near the premises who it is suspected may have any evidence or seizable items in his or her possession: *Search Warrants Act 1997* (Tas) s 6.

405 *Search Warrants Act 1997* (Tas) ss 5, 15.

406 *Magistrates' Court Act 1989* (Vic) Sch 8, cl 4.

407 *Magistrates' Court Act 1989* (Vic) s 26.

satisfied, a warrant to arrest the defendant.[408] For a "prescribed summary offence",[409] a "prescribed person"[410] may also issue a summons.[411] 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.[412] Other warrants may be issued by a registrar or a magistrate.[413] A remand warrant may be authorised by a "bail justice".[414]

(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),[415] and may issue a search warrant under section 711 of the *Criminal Code* (WA).[416]

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.[417] It referred to submissions made to it that search warrants and warrants of arrest should be issued only by stipendiary magistrates and judges.[418] The Western Australian Commission observed that judges and magistrates are not as widely and readily available as justices of the peace. It considered that the suggested change would place a significant burden on magistrates and judges.

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408 *Magistrates' Court Act 1989* (Vic) s 28(4).

409 These offences are prescribed by reg 802 of the *Magistrates' Court General Regulations 1990* (Vic).

410 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.

411 *Magistrates' Court Act 1989* (Vic) s 30.

412 *Magistrates' Court Act 1989* (Vic) s 57(5).

413 *Magistrates' Court Act 1989* (Vic) s 57(4).

414 *Magistrates' Court Act 1989* (Vic) s 57(6). See the discussion of this term at p 179 of this Discussion Paper.

415 This section is the equivalent of s 53(1) of the *Justices Act 1886* (Qld).

416 This section is similar to s 679 of the *Criminal Code* (Qld), which is set out in part at p 71 of this Discussion Paper.

417 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.

418 Ibid.

Consequently, the Commission did not recommend that any changes be made to the existing powers of justices of the peace to issue warrants.

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.[419] 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.[420]

5. ISSUES PAPER

In the Issues Paper,[421] the Commission sought submissions on the following questions about the issuing of summonses and warrants:

- How often do justices of the peace exercise these powers?
- In what localities do justices of the peace exercise these powers (for example, in metropolitan areas, country towns, or remote communities)?
- Is there a need in those localities for these powers to be exercised by justices of the peace, rather than by magistrates?
- If so, could that need be met, or at least reduced, by using the telephone and/or facsimile (or some other technological means) so that the application for the summons or warrant could be made to a magistrate in another part of the State?[422]
- What are the perceived advantages and disadvantages, if any, of having summonses and warrants issued by justices of the peace, rather than by magistrates?
- To the extent that magistrates may not be able to meet the needs of a particular locality for the issuing of summonses and warrants, should this role be undertaken by a court official, for example, the clerk of the court of a Magistrates

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419 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 30.

420 Ibid.

421 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 72.

422 The Issues Paper was published before the commencement of the *Police Powers and Responsibilities Act 1997* (Qld) and, in particular, s 129 of that Act.

Court, rather than by a justice of the peace who does not work within the court system?[423]

6. SUBMISSIONS

(a) 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.[424] It advised, however, that the availability of the procedure under the *Police Powers and Responsibilities Act 1997* (Qld) in relation to notices to appear has substantially reduced the number of summonses issued for the police.

The other submissions varied widely in their assessments of how frequently justices of the peace exercise their powers to issue summonses and warrants.[425] A large number of respondents thought that justices of the peace issued summonses and warrants quite often,[426] while other respondents thought they did so only rarely.[427] One respondent suggested that this was partly because police and various types of inspectors are instructed to apply to magistrates.[428] 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 peace.[429]

Thirty-one respondents commented on how often they had personally issued summonses and warrants:[430]

- eleven indicated that they had never been called upon to issue a summons or

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423 See pp 20-22 of this Discussion Paper for a discussion of the powers of certain court officials.

424 Submission 121.

425 See p 3 of this Discussion Paper for a breakdown of respondents.

426 Submissions 1, 5, 6, 19, 21, 62, 63, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 120.

427 Submissions 7, 30, 43, 50, 65, 105, 117.

428 Submission 50.

429 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 119.

430 These respondents were all justices of the peace who were not employed at a court.

a warrant;[431]

- ten indicated that they had done so infrequently,[432] for example, one summons and two warrants in the last five years,[433] and two summonses ever;[434]

- four indicated that they had done so occasionally,[435] for example, eight summonses and six warrants in the previous two years,[436] and one or two warrants per annum;[437]

- six advised that they did so regularly,[438] with one of these respondents having issued 83 warrants and summonses in the previous 2½ years.[439]

The respondents 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 Coolum.[440]

Two reasons emerged from the submissions in relation to the use of justices of the peace for issuing 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.[441]

- 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

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431 Submissions 14, 31, 39, 47, 57, 60, 64, 66, 69, 101, 123.

432 Submissions 9, 30, 35, 36, 38, 43, 53, 54, 100, 105.

433 Submission 38.

434 Submission 30.

435 Submissions 51, 88, 89, 90.

436 Submission 51.

437 Submission 88.

438 Submissions 1A, 20, 91, 93, 97, 103.

439 Submission 103.

440 Submissions 1A, 20, 29, 88, 89, 91, 93, 97.

441 Submissions 20, 22, 29, 51, 93, 97.

station.[442] 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:[443]

> 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.

(b) Need

A large number of respondents considered 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.[444]

On the other hand, a clerk of the court at a Magistrates Court, suggested that the procedure under the *Police Powers and Responsibilities Act 1997* (Qld) for search warrants to be issued by telephone might have an impact on the need for justices of the peace to issue warrants.[445]

The Queensland Police Service, however, was of the view that, despite recent legislative changes, there was still an important role to be served by justices of the peace:[446]

> 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.

(c) Use of technology

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442 Submission 103.

443 Submission 114.

444 Submissions 1A, 3, 5, 6, 8, 10, 11, 19, 21, 22, 30, 31, 33, 36, 38, 40, 43, 49, 50, 51, 53, 54, 57, 60, 61, 62, 63, 67, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 91, 92, 93, 95, 96, 97, 98, 103, 105, 117, 120, 121.

445 Submission 114.

446 Submission 121.

A number of respondents thought that a greater use of technology could reduce the need for justices of the peace to issue summonses and warrants.[447] Two respondents commented that, in relation to the issuing of a search warrant, a fax followed by a telephone call would cover most requirements.[448]

On the other hand, there was also a considerable body of opposition to this use of technology. A large number of respondents expressed concerns about the use of technology to issue warrants in particular.[449]

Several respondents expressed concern about the loss of face to face contact if warrants were to be issued by these means,[450] with one respondent commenting that personal contact was necessary to observe the demeanour of the applicant for a warrant:[451]

> If I was a magistrate in another part of a state and being asked to issue a warrant by telephone or fax, I would lose the ability to put questions to the Police officer and observe his demeanour when he makes his replies. I think, personally, I would hate to have a warrant issued against me when there was no personal contact between the magistrate and the policeman.

Another respondent commented:[452]

> Would the complaint be checked as thoroughly as in a face to face encounter with the complainant and the Justice of the Peace? Could the complaint be read to ensure that the contents be substantiated? ... Other things have to be done besides checking for factual evidence. The Justice of the Peace must ensure the person presenting the complaint is the actual complainant.

Several respondents also expressed concerns about the reliability of telephones and faxes[453] and security issues associated with their use.[454]

Some 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

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447 Submissions 7, 19, 30, 39, 60, 94.

448 Submissions 33, 94.

449 Submissions 1A, 5, 8, 9, 10, 28, 31, 33, 43, 47, 50, 51, 61, 67, 87, 88, 92, 98.

450 Submissions 10, 22, 28, 33, 38, 47, 61.

451 Submission 47.

452 Submission 61.

453 Submissions 1A, 5, 8, 51, 65, 103.

454 Submissions 1A, 103.

dramatically.[455] As one respondent observed:[456]

> 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 ...

(d) Advantages of having justices of the peace issue summonses and warrants

The following reasons were advanced in support of justices of the peace retaining the power to issue summonses and, in particular, warrants:

(i) Availability

A large number of respondents considered the availability of justices of the peace to be an advantage,[457] especially after hours[458] or for urgent matters.[459] It was suggested that the availability of justices of the peace enabled police to obtain summonses and warrants more quickly.[460]

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.[461]

(ii) Cost effectiveness

A number of respondents commented on the cost effectiveness of having summonses and warrants issued by justices of the peace.[462]

(iii) Reduction in workload of magistrates and court staff

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455 Submissions 41, 87, 117.

456 Submission 28.

457 Submissions 10, 33, 39, 41, 43, 50, 53, 55, 60, 93, 97, 103, 117.

458 Submissions 1A, 6, 9, 19, 20, 21, 29, 30, 33, 36, 43, 50, 51, 53, 54, 62, 63, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 93, 116A.

459 Submissions 3, 5, 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

460 Submissions 1, 6, 8, 38, 51, 60, 62, 63, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 94.

461 Submissions 33, 40, 43.

462 Submissions 1A, 19, 20, 21, 43, 50, 60, 67, 92, 97, 98, 103, 117.

Several respondents thought that the use of justices of the peace to issue summonses and warrants reduced the workload of magistrates[463] and court staff.[464]

A Clerk of the Court thought that an advantage of permitting persons, other than magistrates, to issue summonses and warrants was that it permitted a more efficient and effective use of a magistrate's time, although that respondent did qualify this comment by suggesting that the exercise of these powers should be restricted to designated court officers.[465]

Other respondents commented that the number of summonses and warrants issued on a daily basis in Queensland must be large and that, if magistrates were required to issue all of these, the court system would become even slower.[466]

(iv) Independence

Several respondents thought that the independence that justices of the peace bring to the exercise of these powers is an advantage, referring to them variously as "objective", "impartial", "independent" and "open-minded".[467]

(v) Local knowledge

Several respondents expressed the view that the local knowledge of justices of the peace was an advantage.[468] One respondent suggested that a local justice of the peace would be able to ask more searching questions than a remote magistrate:[469]

> Justices of the Peace are local people with local knowledge who ask police searching questions about the summons or warrant. I am aware of one local instance where the application for a search warrant had to be amended because of a wrong house number and in another instance there was doubt by Police which was the exact caravan in a caravan park. A magistrate in another locality would be unable to ask such questions. Having magistrates available twenty-four hours a day in Brisbane to issue possibly all police warrants and summonses is

463 Submissions 1A, 6, 28, 49, 60, 61, 97.

464 Submissions 49, 61.

465 Submission 114.

466 Submissions 51, 92.

467 Submissions 57, 60, 65, 69.

468 Submissions 43, 88, 112.

469 Submission 43.

> too horrific to contemplate. This system may greatly help Police administration but I feel true Justice would not be seen to be done.

The Indigenous Advisory Council, although not fundamentally opposed to the use of magistrates in another part of the State exercising these powers by telephone or facsimile, 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.[470]

(vi) Avoidance of potential conflicts of interest

One respondent thought that an advantage of having summonses and warrants issued by a justice of the peace was that magistrates did not acquire knowledge of matters that might potentially come before them in court.[471] A similar view was expressed by the Chief Stipendiary Magistrate of the Magistrates Courts:[472]

> Magistrates should not be involved in the issue of summonses. The less involvement that Magistrates have with the issue of Warrants will tend to lessen the likelihood of having subsequent hearings compromised and costs and inconvenience occasioned to all concerned.

(e) Disadvantages of having justices of the peace issue summonses and warrants

A number of submissions expressed concerns about justices of the peace exercising these powers, especially in relation to justices of the peace who are not employed as staff members at a Magistrates Court. The following disadvantages were identified in the submissions:

(i) Lack of expertise

Several respondents expressed a general concern about a possible lack of expertise of justices of the peace when performing this role.[473]

This lack of expertise was attributed by some respondents to the fact that justices of the peace are seldom used in this role, and therefore lack experience in dealing with applications.[474] Other respondents attributed it, at least in part,

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470 Submission 112.

471 Submission 105.

472 Submission 110.

473 Submissions 60, 65, 91.

474 Submissions 30, 35.

to a lack of training.[475]

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:[476]

> 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 ...

The Criminal Justice Commission was of the view that the fact that some justices of the peace have been prepared to issue search warrants without insisting on evidence to support the police officer's relevant suspicion and belief suggests that some justices of the peace do not have the necessary skills and knowledge to determine an application for a search warrant.

(ii) Compliance

A few respondents expressed concerns about justices of the peace being used to "rubber stamp" warrants or being "steamrolled".[477] The Criminal Justice Commission also thought that the issuing of search warrants without proper grounds could be due, in part, to some justices of the peace being prepared to "rubber-stamp" police documents.[478]

(f) Appropriate persons to issue summonses and warrants

A number of submissions addressed the question of whether summonses and warrants should be issued by justices of the peace who are employed at a court, rather than by a justice of the peace from the wider community. As various court officers are justices of the peace by virtue of the offices they hold[479] or have been appointed as justices of the peace, references in the following discussion to "justices of the peace" are to justices of the peace who are not staff members at a court.

Several respondents considered that a justice of the peace employed at a court house (usually the clerk of the court) was the most appropriate person to issue a summons or

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475 Submissions 36, 38, 53, 54, 113.

476 Submission 113.

477 Submissions 38, 39, 70.

478 Submission 113.

479 See pp 19-22 of this Discussion Paper.

warrant,[480] although most of these respondents also acknowledged that there was a place for other justices of the peace to issue these documents where there was no court officer available.

On the other hand, there was a considerable body of submissions that were opposed to the use of court officers to issue summonses and warrants. A number of these respondents suggested that this could lead to the development of a familiarity between the police and the court officer concerned,[481] although it was not explained why the same risk would not also apply to justices of the peace who issued summonses and warrants on a regular basis.

Other respondents were of the view that the role of issuing summonses and warrants was best undertaken by a person who was "a non court controlled person",[482]and that justices of the peace were suitable for this role because of their "independence".[483]

A number of respondents expressed a concern that court officers might not want to be disturbed out of hours.[484] Another thought it would place too great a burden on court officers if they had to be available outside normal business hours.[485]

The Criminal Justice Commission acknowledged that, in its report on police powers,[486] it had recommended that the power to issue a search warrant should be available to magistrates, justices of the peace (magistrates court) and justices of the peace (qualified). However, the Criminal Justice Commission queried whether it would now be appropriate to further restrict the categories of justices of the peace who may issue search warrants:[487]

> Given the availability of technology that can link police stations in remote areas of Queensland to metropolitan courthouses and given section 129 of the *Police Powers and Responsibilities Act 1997*,[488] there may even be an argument for further restricting the

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480 Submissions 3, 7, 38, 39, 40, 42, 51, 70, 94, 114.

481 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

482 Submission 69.

483 Submissions 6, 8, 11, 60, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

484 Submissions 33, 36, 43, 54, 97, 105.

485 Submission 93.

486 Criminal Justice Commission, *Report on a Review of Police Powers in Queensland, Volume II: Entry Search and Seizure* (1993) at 358.

487 Submission 113.

488 This provision provides that a police officer may apply for the issue of a search warrant by phone, fax, radio or another similar facility if, for any reason, it is "impracticable to apply for the [warrant] in person". See p 73 of this Discussion Paper.

> categories of JPs who should be entitled to issue search warrants - assuming, of course, that any resourcing problems can be overcome.

The Criminal Justice Commission was also of the view that the powers of justices of the peace who are employees of the Queensland Police Service should not simply be the subject of Queensland Police Service policy.[489] It suggested that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should prohibit justices of the peace who are employed by the Queensland Police Service from exercising their 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.

7. THE COMMISSION'S PRELIMINARY VIEW

(a) The need for the role

With the introduction of the notice to appear procedure under the *Police Powers and Responsibilities Act 1997* (Qld),[490] it may be that there is no longer as great a need as there once was for justices of the peace to be able to issue summonses. However, it would not be possible for magistrates to issue all the summonses that are required. Consequently, the Commission is of the view that there is still a need for justices of the peace to be able to issue summonses - certainly those who are employed at Magistrates Courts. If, in the future, the practice of issuing summonses fell entirely into disuse, it would be appropriate for the power to be removed. However, until that point is reached, the Commission is concerned that 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.

The need for justices of the peace to issue warrants seems clearer. Some Acts provide for warrants to be issued by telephone or other similar means.[491] 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. The question of the availability of people who may issue warrants is therefore of considerable importance.

Although 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, it may not be practicable to do so where the need for a warrant arises out of hours and Court staff cannot easily be contacted, or where there is no court house within a

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489 See pp 67 and 74-75 of this Discussion Paper.

490 See pp 65-66 of this Discussion Paper.

491 See pp 73-74 of this Discussion Paper.

reasonable distance of the officer seeking the warrant. The Commission is therefore of the view that there is need for justices of the peace, including justices of the peace from the wider community, to be able to issue warrants.

(b) Justices of the peace who may perform the role

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 warrants. On the other hand, it is equally important that, given the nature of the acts authorised by various warrants, the people who are authorised to issue warrants are sufficiently qualified to be able to exercise these significant powers properly.

The Commission considered whether the issuing of warrants should be restricted to justices of the peace (magistrates court). However, given that many justices of the peace (magistrates court) are members of staff at Magistrates Courts, the Commission has come to the view that this approach would be too restrictive, especially in those areas where there is no local court house.

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. Because of the relatively limited numbers of justices of the peace (magistrates court), the Commission considers that it may be futile to recommend a hierarchy when, in some cases, there will be limited availability to justices of the peace (magistrates court). In any event, 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 does not favour a hierarchical approach in relation to the issuing of warrants.

The Commission has therefore come to 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, it is important that they receive adequate training in relation to this power, both prior to appointment and on an ongoing basis.[492]

The Commission is generally of the view that the same considerations apply in relation to the issuing of summonses, and that the power to issue summonses should be able to be exercised by justices of the peace (magistrates court) and justices of the peace (qualified).

The Commission agrees with the view of the Criminal Justice Commission that a justice of the peace who is a member of the Queensland Police Service should not be authorised to exercise the power to issue a summons or a warrant, and that this issue should not simply be the subject of Queensland Police Service policy. It is important

[492] See Chapter 12 of this Discussion Paper in relation to the issue of training.

that this power be exercised only by people who are independent of the Queensland Police Service. For that reason, the Commission is of the view that, if a justice of the peace is a member of the Queensland Police Service or is employed by the Service, for example in an administrative capacity, the justice of the peace should not be authorised to issue a summons or a warrant for any purpose associated with the performance of a function of the Queensland Police Service.

Because 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 is also of the view that old system justices of the peace should not be able to issue summonses or warrants.

(c) 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. Although the Commission is generally of the view that justices of the peace should retain the power to issue search warrants, the Commission does not consider it desirable for justices of the peace to 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.

If it is necessary to use the telephone or other similar facility to apply for a search warrant, the Commission considers that 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.[493] Once it becomes necessary to make the 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.[494]

Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) imposes procedural requirements on both the person seeking the warrant and the person issuing the warrant that do not apply when a warrant is being sought and issued in

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493 Magistrates already have the power under a number of Acts to hear applications for search warrants by telephone or other means. See pp 73-74 of this Discussion Paper in relation to the applications for various search warrants that may be made to magistrates by telephone or other means.

494 See Chapter 6 of this Discussion Paper.

person:[495]

- The person issuing the search warrant must, if it is not reasonably practical 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.[496]

- 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.[497]

- On receiving these documents, the person who issued the search warrant must attach them to the prescribed authority.[498]

In the Commission's view, it is 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. Given that the documentation supporting the application must be sent to the person who has issued the warrant, the Commission considers that there would be more control over the documentation if the number of people eligible to issue a warrant by these means was relatively restricted. Further, the Commission considers 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.

Finally, given that most Acts that enable search warrants to be issued by telephone or other similar means restrict the exercise of those powers to magistrates, the Commission believes that permitting justices 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 may be made for different types of search warrants.

For these reasons, the Commission is of 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.

The Commission is not aware of any Acts other than the *Police Powers and*

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495 S 129 of the *Police Powers and Responsibilities Act 1997* (Qld) is set out in full at p 73 of this Discussion Paper.

496 *Police Powers and Responsibilities Act 1997* (Qld) s 129(6).

497 *Police Powers and Responsibilities Act 1997* (Qld) s 129(8).

498 *Police Powers and Responsibilities Act 1997* (Qld) s 129(9).

Responsibilities Act 1997 (Qld) that authorise a justice of the peace to hear an application for a search warrant by telephone or other similar means. However, the Commission is 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 warrant by those means.

The Commission is therefore of the view that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should 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 warrant by any of those means. The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should also provide that that restriction is to apply despite the provisions of any other Act unless the other Act expressly excludes the operation of that restriction.[499]

8. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations:

- **Justices of the peace (magistrates court) and justices of the peace (qualified) should retain their powers to issue summonses and warrants.**
- **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 issue a summons or a warrant for a member of the Police Service.**
- **Old system justices of the peace[500] should not have the power to issue summonses or warrants.**
- **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**

499 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 12 of this Discussion Paper.

500 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

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.

CHAPTER 6

POLICE INTERVIEWS OF JUVENILES

1. SOURCE OF POWER

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

(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]

The effect of section 9E of the *Juvenile Justice Act 1992* (Qld) has now been altered by certain provisions of the *Police Powers and Responsibilities Act 1997* (Qld), which came into operation in April 1998. That Act prohibits a police officer from questioning a suspect, if the officer reasonably suspects the person is a child, unless:[501]

- 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:[502]

- 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 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;[503]
- 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).[504]

The requirements imposed by the *Police Powers and Responsibilities Act 1997* (Qld)

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501 *Police Powers and Responsibilities Act 1997* (Qld) s 97.

502 *Police Powers and Responsibilities Act 1997* (Qld) Sch 3.

503 *Police Powers and Responsibilities Act 1997* (Qld) s 105.

504 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.

apply only to indictable offences.[505] However, in relation to those offences, the provisions of the *Police Powers and Responsibilities Act 1997* (Qld) prevail over section 9E of the *Juvenile Justice Act 1992* (Qld).[506] Consequently, justices of the peace can no longer be asked to attend police interviews of juveniles who are suspected of having committed an indictable offence unless no other person from the categories listed above is available.

2. JUSTICES OF THE PEACE WHO MAY EXERCISE THIS POWER

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),[507] a justice of the peace (magistrates court)[508] or an old system justice of the peace.[509]

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 child[510] on the ground that there is doubt as to its voluntariness or fairness.

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).

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505 *Police Powers and Responsibilities Act 1997* (Qld) s 93. See note 717 of this Discussion Paper in relation to the meaning of "indictable offence".

506 *Police Powers and Responsibilities Act 1997* (Qld) ss 8, 9, Sch 1.

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

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

509 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1). See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

510 "Child" is defined in s 5 of the *Juvenile Justice Act 1992* (Qld) as 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.

In *R v C*,[511] 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:[512]

> 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*,[513] 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*,[514] 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 parents of the juvenile were unavailable and a justice of the peace was contacted in an effort to satisfy section 9E of the *Juvenile Justice Act 1992* (Qld). In a private interview with the juvenile, the justice of the peace made some comments to the juvenile in accordance with statements contained in the training manual.

In the murder trial of the juvenile, 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. The trial judge considered that certain advice that was given to the juvenile by the justice of the peace, in which

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511 [1997] 2 Qd R 465.

512 Id at 471.

513 Unreported, McMurdo DCJ, District Court, Brisbane, 4 June 1997.

514 Unreported, Helman J, Supreme Court of Queensland, Brisbane, 12 June 1996.

the justice of the peace appears to have followed the terms of the training manual,[515] may have been construed by the juvenile to mean that he would be in trouble if he did not give his account then and there.[516]

The conduct of justices of the peace in these interviews has also been criticised in a submission to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission:[517]

> Young people are critical of the performance of some Justices of the Peace in this role because they usually tell children to assist the police by answering their questions.

The role 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.

4. 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.[518] 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 requirements where a child is in custody, for example, to permit the child to contact

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515 See p 279 of this Discussion Paper.

516 As a result of the trial judge's ruling, the charge against the juvenile was withdrawn.

517 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 501, note 238.

518 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); the *Crimes Act 1914* (Cth) s 23L; and the *Crimes Act 1958* (Vic) s 464E(2).

certain people, or to inform an adult that the child is to be questioned.[519]

(a) Australian Capital Territory

In the Australian Capital Territory, an interview friend may be any one of:[520]

- 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.

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.[521]

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.[522]

(b) Commonwealth

Under the *Crimes Act 1914* (Cth) an "interview friend" for a child under the age of eighteen is defined to mean:[523]

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519 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(2), (3). 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.

520 *Children's Services Act 1986* (ACT) s 30. An "appropriate person" is not defined in the *Children's Services Act 1986* (ACT).

521 *Children's Services Act 1986* (ACT) s 30(1)(e).

522 *Children's Services Act 1986* (ACT) s 40.

523 *Crimes Act 1914* (Cth) s 23K(3).

- a parent or guardian of the child or 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) Northern Territory

In the Northern Territory, an interview friend may be any one of:[524]

- 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.[525]

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.[526]

(d) New South Wales

In New South Wales, an interview friend may be any one of:[527]

- a person responsible for the child;

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524 *Juvenile Justice Act* (NT) s 25(1)(c).

525 *Juvenile Justice Act* (NT) s 25(1)(c).

526 *Juvenile Justice Act* (NT) s 25(1)(d).

527 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(a).

- 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 good reason for the absence of an interview friend and considers that the statement, confession, admission or information should be admitted.[528]

(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.[529]

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:[530]

- a person nominated by the Director-General of Community Welfare to represent 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.

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528 *Children (Criminal Proceedings) Act 1987* (NSW) s 13(1)(b).

529 *Summary Offences Act 1953* (SA) s 79A(1)(b)(i).

530 *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".

(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 with that person before the commencement of any questioning.[531]

5. ISSUES PAPER

In the Issues Paper,[532] the Commission sought submissions on the following questions:

- How often do justices of the peace undertake this role as compared with the other categories of people listed in section 9E of the *Juvenile Justice Act 1992* (Qld)?[533]

- Is there a need for this role to be undertaken by justices of the peace, or are the other categories of people in section 9E sufficient to meet the demand for this role?

- What are the perceived advantages and disadvantages, if any, of having this role undertaken by a justice of the peace, rather than by any of the other categories of people listed in section 9E?

- If justices of the peace were not to undertake this role, by which additional categories of people, if any, could the role be appropriately undertaken?

6. SUBMISSIONS

A number of submissions referred to the importance of the role of justices of the peace

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531 *Crimes Act 1958* (Vic) s 464E(1).

532 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 73.

533 As noted previously, at pp 98-99 of this Discussion Paper, s 9E of the *Juvenile Justice Act 1992* (Qld) has now been superseded in relation to indictable offences by the *Police Powers and Responsibilities Act 1997* (Qld).

in attending at police interviews of juvenile suspects.[534] One respondent noted:[535]

> 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.
>
> It is also important for the independent person to understand that their presence will ensure that a statement made by a child will be admissible as evidence by a court.

Another respondent observed:[536]

> 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.

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".[537] The Queensland Police Service observed that "minimal use is now made of justices of the peace in this role",[538] and suggested that this may be because justices of the peace are now placed last on the list of "interview friends". On the other hand, submissions referred to attendance at interviews in Brisbane ("many interviews"),[539] Townsville,[540] Toowoomba[541] and Maroochydore.[542]

Nonetheless, almost all the submissions that addressed the issue of the role of justices

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534 Submissions 7, 34, 37, 53, 67, 113. See p 3 of this Discussion Paper for a breakdown of respondents.

535 Submission 37.

536 Submission 7.

537 Submission 114.

538 Submission 121.

539 Submission 88.

540 Submission 61.

541 Submission 40.

542 Submission 1A.

of the peace in attending these interviews were of 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.[543] The Queensland Police Service noted:[544]

> ... 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.

However, one respondent considered that juvenile interviews were a specialised area, and that it should not be part of the role of a justice of the peace to attend.[545]

(a) Frequency of attendance

Of the submissions that directly addressed this issue, almost half were justices of the peace who said they had never attended a police interview of a juvenile.[546] Two of these respondents said that they had notified their local police station of their availability, but had not been called upon to attend.[547]

The remainder of the submissions were fairly evenly divided between those who considered that attendance at police interviews of juveniles would be frequent[548] and those who considered it would happen from time to time.[549] One respondent reported that the local Juvenile Aid Bureau had advised that justices of the peace are in attendance at approximately 20% of interviews of juveniles, with a parent present in the other 80%.[550]

(b) Reasons for retaining the role

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543 Submissions 1A, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 19, 20, 21, 22, 30, 31, 34, 35, 36, 38, 39, 40, 41, 42, 43, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 101, 103, 104, 105, 106, 108, 112, 113, 114, 117, 120, 122, 123.

544 Submission 121.

545 Submission 89.

546 Submissions 9, 11, 30, 31, 34, 35, 36, 38, 39, 47, 53, 54, 57, 60, 66, 69, 89, 100, 108, 117, 123.

547 Submissions 35, 47.

548 Submissions 19, 21, 42, 67, 88, 91, 92, 96, 98, 105.

549 Submissions 1A, 20, 22, 40, 49, 51, 61, 64, 65, 87, 103, 114.

550 Submission 40.

(i) Independence

The major reason cited for justices of the peace continuing to have a role in attending police interviews of juvenile suspects was their perceived independence.[551] Other submissions referred to the impartiality of justices of the peace,[552] their neutrality,[553] and their "objectivity, honesty and fairness".[554]

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 the interview.[555] Parents, in particular, were regarded as likely to be biased in favour of either their child or the police.[556]

However, there was also a suggestion that some justices of the peace may be "seen to be user friendly to the Police"[557] and that it "appears that some particular J.P.s may be favoured for this role".[558]

(ii) Availability

Another reason frequently given as to why justices of the peace should retain this role was their availability.[559] 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 observed that, in relation to interviews of juveniles, "a quick resolution must be a priority".[560] Another noted that a justice of the peace would usually be able to attend such an interview "at short notice and within reasonable proximity".[561] It was also considered that the availability of justices

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551 Submissions 9, 11, 35, 49, 50, 61, 96, 101, 103, 108, 120.

552 Submissions 5, 7, 9, 40, 65, 94, 97.

553 Submissions 3, 88, 94.

554 Submission 57.

555 Submissions 7, 10, 69, 87, 120.

556 Submissions 7, 87.

557 Submission 12.

558 Submissions 36, 54.

559 Submissions 5, 6, 7, 19, 20, 21, 29, 30, 40, 41, 43, 51, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 92, 96, 98.

560 Submission 70.

561 Submission 87.

of the peace would be further facilitated in areas where a roster system operated.[562]

In contrast, the other people listed in the legislation may not be readily available.[563] For example:[564]

> 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,[565] particularly in rural areas.[566]

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.[567]

However, one respondent conceded that there could sometimes be delays in commencing interviews with juveniles, "due to the time taken to secure an IP [independent person]".[568]

(iii) Cost

Many of the respondents referred to the fact that attendance by justices of the peace at police interviews of juvenile suspects is a service that justices of the peace provide free of charge.[569]

(iv) Knowledge

In keeping with the recognised significance of the role, knowledge of the responsibilities involved was also considered important. There was a widely

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562 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

563 Submissions 7, 20, 21, 40, 51.

564 Submission 7.

565 Submission 43.

566 Submissions 10, 21.

567 Submissions 21, 88, 92, 98.

568 Submission 91.

569 Submissions 21, 43, 49, 61, 87, 92, 96, 97, 98.

held belief among respondents that justices of the peace should retain the role because their training equipped them to perform it, while most other members of the community would not be aware of the nature of the role.[570] In the view of one respondent:[571]

> 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.

Two other respondents voiced a similar concern:[572]

> 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.

(v) The wishes of the child

A number of submissions put forward as a reason for justices of the peace continuing to attend police interviews of juvenile suspects the wishes of the juvenile concerned. They raised the possibility that, in some circumstances, a juvenile might not want his or her parents to be present at the interview and that the juvenile may not know another adult whose presence would be acceptable to all parties.[573] Other respondents suggested that a child may be less inclined to tell the truth in the presence of his or her parents,[574] or that the presence of a justice of the peace as an independent person may give juveniles more confidence in the interview process.[575]

(vi) Public standing

A further reason advanced in some of the submissions was the public standing of justices of the peace, which was thought to enhance the credibility of justices of the peace in undertaking this role.[576]

(c) Training

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570 Submissions 3, 7, 16, 33, 36, 43, 47, 49, 54, 61, 67, 87, 92, 94, 96, 98, 105.

571 Submission 33.

572 Submissions 36, 54.

573 Submissions 7, 29, 50, 91, 108.

574 Submission 7.

575 Submission 91.

576 Submissions 7, 35, 38.

A significant number of submissions identified a need for adequate and appropriate training in order for this role to be satisfactorily carried out.[577] 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,[578] and suggested that some of the problems that arose in the past[579] might have been avoided if the individuals concerned had been better trained.

(d) Justices of the peace who should perform this role

The submissions emphasised that the role of attending at police interviews of juvenile suspects should be undertaken only by relevantly qualified justices of the peace.[580] Respondents were generally of the view that the role should be limited to justices of the peace (qualified) and justices of the peace (magistrates court):[581]

> I believe that Justices of the Peace (Qualified) and Justices of the Peace (Magistrates Court) should be included in the list of persons to undertake this role. ... Because of the importance of this role I believe that the responsibility should NOT be extended to Commissioners for Declarations or to ... old system Justices of the Peace.

7. THE COMMISSION'S PRELIMINARY VIEW

At present, both the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) require the presence of a person from one of a number of categories specified in the legislation when a juvenile suspect is interviewed by police. The Commission has, in this chapter, 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 police interviews of juvenile suspects and, further, whether it is appropriate for justices of the peace to continue to perform that role. This is consistent with its approach in relation to other aspects of the role of justices of the peace.[582]

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577 Submissions 1A, 7, 10, 11, 12, 28, 33, 35, 36, 37, 38, 39, 48, 49, 53, 54, 60, 65, 66, 69, 70, 88, 91, 94, 95, 103, 105, 112.

578 Submissions 10, 33, 37, 69, 87, 88, 112.

579 See pp 99-100 of this Discussion Paper.

580 Submissions 6, 7, 30, 33, 34, 35, 41, 49, 50, 61, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 120.

581 Submission 7.

582 See, for example, p 57 of this Discussion Paper.

(a) The need for the juvenile interview attendance role

Under both section 9E of the *Juvenile Justice Act 1992* (Qld) and section 97 of the *Police Powers and Responsibilities Act 1997* (Qld), the role of attending at a police interview of a juvenile suspect may be undertaken by a number of people. Since the latter provision prevails over the former to the extent of any inconsistency,[583] reference will be made only to the requirements of that section. The issue to be addressed is therefore whether, in the light of the other people specified in 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 people specified in section 97 whose presence at the police interview of a juvenile suspect will satisfy the requirements of the section 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.[584]

The list of people set out in section 97 is reasonably comprehensive. Nonetheless, it is conceivable that situations may arise where it is not possible for the police to contact one of the above persons from the list to arrange for them to attend the interview.

Accordingly, the Commission's preliminary view is that the list should include justices of the peace.

(b) Appropriateness of the role

The submissions received by the Commission in response to the Issues Paper strongly supported attendance by justices of the peace at police interviews of juvenile suspects. Despite some reservations, which are outlined below, the Commission generally accepts the substance of these submissions.

(i) Knowledge/training

It is obvious 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.

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583 See pp 98-99 of this Discussion Paper.

584 *Police Powers and Responsibilities Act 1997* (Qld) s 105.

Many of the submissions 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. 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. However, the same cannot 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.

A significant number of respondents seemed to be under a misapprehension as to the nature of the role of attending at juvenile interviews. 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",[585] and commented that mere formal compliance with the requirements of the legislation would be little more than "a solemn farce".[586]

It is apparent that the misapprehension has arisen at least in part as a result of the training manual used by justices of the peace appointed under the 1991 Act.[587] While it is encouraging to note so many justices of the peace taking their position seriously and following the instructions in their manual, it is disturbing that those justices of the peace are being misinformed as to the nature of their role.

In the view of the Commission, 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.

(ii) Independence

According to the submissions, 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.

To the extent that justices of the peace are independent of the Queensland Police Service, the Commission agrees with the submissions. However, in the light of the comments made by the Court of Appeal in relation to the person

585 *R v C* [1997] 2 Qd R 465 at 470.

586 Id at 471.

587 *R v J* (Unreported, Helman J, Supreme Court of Queensland, Brisbane 12 June 1996).

present at the interview acting in support of the child, the Commission considers that these submissions may be somewhat misguided.

(iii) Availability

Clearly, 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. It is therefore 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) is reasonably accessible.

Although some justices of the peace may not, because of the work commitments, be available during normal business hours, it appears 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. Moreover, many justices of the peace willingly make themselves available out of hours when, if a parent is not available, it may be more difficult to contact a lawyer or a person employed by an agency that provides legal services. For example, many justices of the peace have accepted the offer made by the Department of Justice and Attorney-General to publish contact details in the Yellow Pages and on the Internet.[588]

The Commission is therefore of the view that, if justices of the peace were not to retain this role, it is possible that juveniles might be kept in police custody for longer than necessary or that the police may be prevented from questioning a juvenile who is suspected of committing a serious offence.

(iv) Cost

Several of the submissions referred to the fact that justices of the peace do not charge for their services.[589]

In the view of the Commission, their accessibility in terms of cost is an important factor in favour of justices of the peace retaining the role in relation to police interviews of juvenile suspects.

(c) Justices of the peace who may perform the role

Both the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 1997* (Qld) provide that only those justices of the peace who have been appointed

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[588] See note 253 of this Discussion Paper.

[589] See p 109 of this Discussion Paper. Justices of the peace are presently prohibited from charging for their services: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35.

under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) as a justice of the peace (magistrates court) or as a justice of the peace (qualified), or who were appointed as old system justices of the peace, may attend a police interview of a juvenile suspect.

As noted above,[590] old system justices of the peace are not required to have undergone training or testing prior to their appointment. It may be that some justices of the peace who have not undergone training are not fully informed about the rights of a juvenile who is being questioned by the police as a suspect.

The submissions received by the Commission in response to the Issues Paper strongly favoured the view that only justices of the peace (magistrates court) and justices of the peace (qualified), who are required to pass the relevant examination prior to their appointment, should be able to attend police interviews of juvenile suspects.

The Commission considers it appropriate that both 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 list of people who may act as an interview friend for a juvenile suspect. Earlier in this Discussion Paper, the Commission made a preliminary recommendation which, if implemented, will have the effect that the office of justice of the peace (commissioner for declarations) will not come into existence on 1 July 2000.[591] 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.

The Commission also considers it appropriate that both Acts exclude a justice of the peace who is a police officer from performing this role. It is important that this role be performed only by people who are independent of the Queensland Police Service. For that reason, the Commission is of the view that, if a justice of the peace is a member of the Queensland Police Service or is employed by the Queensland Police Service, for example in an administrative capacity, the justice of the peace should not be able to act as an interview friend for a juvenile suspect.

(d)A last resort?

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590 See p 112 of this Discussion Paper.

591 The Commission has made a 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 hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations). See p 36 of this Discussion Paper.

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, section 97 of 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. 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 view of the Commission, 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. 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 justices of the peace and, if so, by what category of justice of the peace they should be exercised.

Accordingly, the Commission does not intend to 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).[592]

8. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations:

592 A number of respondents (for example submissions 33, 34, 36, 43, 54, 67, 99, 103) stated that, as justices of the peace, they also attended police interviews of persons other than juveniles. Police interviews of some other vulnerable suspects are now regulated by the *Police Powers and Responsibilities Act 1997* (Qld) (see s 96 of that Act, 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). Under those provisions, justices of the peace can no longer attend those interviews. Another respondent (submission 113) 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. In the view of the Commission, the question of who should be able to attend police interviews of indigenous adult suspects and mentally incapacitated suspects is beyond the scope of this reference. The same respondent 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 of vulnerable suspects who are not children, indigenous or mentally incapacitated, or police interviews of other vulnerable witnesses who are not suspects. In the view of the Commission this issue is also outside the scope of its reference.

- **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.**

- **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.[593]**

- **Old system justices of the peace[594] should not be included in the list, and Schedule 3 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.**

- **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.**

593 See, however, p 115 of this Discussion Paper as to whether it will be necessary to continue to make this express exclusion.

594 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

CHAPTER 7

EXTENSION OF DETENTION FOR QUESTIONING AND INVESTIGATION

1. INTRODUCTION

Under the *Police Powers and Responsibilities Act 1997* (Qld), a police officer has the power to detain a suspect for up to eight hours for questioning about, or for the investigation of, an indictable offence.[595] An extension of the detention period may be authorised by a magistrate or by certain justices of the peace.[596]

A magistrate or a justice of the peace may extend the detention period for a reasonable time only if satisfied of the following matters:[597]

- the nature and seriousness of the offence require the extension;
- further detention of the person is necessary -
    - (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;
- the investigation is being conducted properly and without unreasonable delay; and
- the person, or the person's lawyer, has been given the opportunity to make submissions about the application.

Only a magistrate is authorised to extend the detention period if the extension would bring the total time a suspect has been questioned since the detention began to more than twelve hours.[598] The role of justices of the peace is therefore limited to extending the detention period from the initial eight hours to twelve hours.

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595 *Police Powers and Responsibilities Act 1997* (Qld) s 50.

596 *Police Powers and Responsibilities Act 1997* (Qld) s 51(2).

597 *Police Powers and Responsibilities Act 1997* (Qld) s 51(5).

598 *Police Powers and Responsibilities Act 1997* (Qld) s 51(8).

2. 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 authorise an extension of a detention period of a suspect.

An extension may be authorised by a magistrate or a justice of the peace (magistrates court) in the first instance. If there is no magistrate or justice or the peace (magistrates court) available, then the application must be made to:[599]

> 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.

3. OTHER JURISDICTIONS

Legislation in a number of Australian jurisdictions authorises police officers to detain a suspect for questioning before charging the suspect or taking him or her before a magistrate or justice. Most jurisdictions take a fairly restrictive approach in relation to the judicial officers who may extend the period of time for which a suspect may be detained.

(a) Commonwealth

Under the *Crimes Act 1914* (Cth), the maximum initial investigation period for a person who has been lawfully arrested for a Commonwealth offence is four hours, except in the case of a suspect who is or appears to be under eighteen, an Aboriginal person or a Torres Strait Islander, in which case a two hour maximum applies.[600] The investigation period may be extended for a "serious offence"[601] by up to eight hours, but must not be extended more than once.[602]

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599 *Police Powers and Responsibilities Act 1997* (Qld) s 51(2)(c).

600 *Crimes Act 1914* (Cth) s 23C(4).

601 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.

602 *Crimes Act 1914* (Cth) s 23D(5).

The *Crimes Act 1914* (Cth) sets out a hierarchy of judicial officers who may extend an investigation period. An application to extend the investigation period must be made to:[603]

- 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 an extension of the investigation period may be made by telephone, radio or radio-telephone.[604]

(b) New South Wales

In New South Wales, the maximum initial investigation period for a person who is under arrest is four hours.[605] The investigation period may be extended by a detention warrant.[606] The investigation period may be extended by up to eight hours, but must not be extended more than once.[607]

An application to extend the investigation period must be made to an "authorised justice".[608] An "authorised justice" means:[609]

- 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.

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603 *Crimes Act 1914* (Cth) s 23D(2).

604 *Crimes Act 1914* (Cth) s 23E(1).

605 *Crimes Act 1900* (NSW) s 356D(2).

606 *Crimes Act 1900* (NSW) s 356D(2).

607 *Crimes Act 1900* (NSW) s 356G(3), (4).

608 *Crimes Act 1900* (NSW) s 356G.

609 *Crimes Act 1900* (NSW) s 355 (definition of "authorised justice").

Consequently, a justice of the peace from the wider community does not have any power to extend a detention period.

An application for an extension of the investigation period may be made in person or by telephone, radio, facsimile or any other communication device.[610]

(c) 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.[611] 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.[612] A justice of the peace or court must, in determining what is "a reasonable period" of detention, take into account an extensive range of factors.[613]

(d) South Australia

In South Australia, a suspect who is apprehended without warrant must ordinarily be delivered into custody at the nearest police station without delay.[614] However, a suspect 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.[615] A magistrate may extend the detention period to not more than eight hours.[616]

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.[617]

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610 *Crimes Act 1900* (NSW) ss 355 (definition of "telephone"), 356H(1).

611 *Police Administration Act* (NT) s 137(2).

612 *Police Administration Act* (NT) s 137(2)(c).

613 *Police Administration Act* (NT) s 138. The list of factors includes: the time taken for investigators to interview the person; the number and complexity of the matters to be investigated; and the time taken by an interview friend or a legal adviser to arrive where the questioning took place.

614 *Summary Offences Act 1953* (SA) s 78(1).

615 *Summary Offences Act 1953* (SA) s 78(2)(a), (6).

616 *Summary Offences Act 1953* (SA) s 78(6).

617 *Summary Offences Act 1953* (SA) s 78(3).

(e) Tasmania

In Tasmania, a person who has been taken into custody can be detained for "a reasonable time" for the purposes of questioning the person or carrying out investigations in which the person participates.[618]

Where a person in custody is seventeen or over, the police officer conducting the investigation may, in some circumstances, deny the suspect the right to communicate with a friend, relative or legal practitioner for up to four hours.[619] A magistrate may, if satisfied upon the application of the police officer conducting the investigation that there are reasonable grounds for doing so, extend the period for which the police officer is authorised to deny the suspect communication with those persons.[620] There is no maximum time limit specified for such an extension.[621] An application to a magistrate to extend the period for which a person may be denied communication with any of those persons may be made by the police officer in person or by telephone.[622]

(f) Victoria

In Victoria, a person who is taken into custody 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.[623] Within that "reasonable time", an investigating officer may question the person to carry out investigations in which the person participates in order to determine the involvement (if any) of the person in that offence.[624] Specific matters must be taken into account in determining

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618 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4. A number of specified matters must be taken into account in order to determine what is a reasonable period: see *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4(4). 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.

619 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(3). The police officer conducting the investigation may deny a suspect communication with specified persons if the police officer believes on reasonable grounds that any communication may result in the escape of an accomplice or the fabrication or destruction of evidence or that the questioning or investigation is so urgent, having regard to the safety of other persons, that it should not be delayed.

620 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(4), (5), (6).

621 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(6).

622 *Criminal Law (Detention and Interrogation) Act 1995* (Tas) ss 6(4), 7.

623 *Crimes Act 1958* (Vic) s 464A(1).

624 *Crimes Act 1958* (Vic) s 464A(2).

what is a reasonable time to detain the suspect.[625]

Where a suspect is held in custody 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, 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.[626] The Court may, if the person being held consents, make such an order or extend any order.[627] 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.[628]

4. ISSUES PAPER

The Issues Paper[629] did not attempt to identify all the powers conferred on justices of the peace by various statutory enactments. Rather, the focus of the Issues Paper was on those powers that the Commission believed would be most frequently exercised by justices of the peace.

Although the Issues Paper did not specifically raise the issue of extending detention periods under the *Police Powers and Responsibilities Act 1997* (Qld), the Commission sought submissions providing information about significant powers, other than those discussed in the Issues Paper, that may be exercised by justices of the peace.[630]

5. SUBMISSIONS

One submission received in response to the Issues Paper referred to the exercise by

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625 *Crimes Act 1958* (Vic) s 464A(4). These factors include the period of time reasonably required to bring the person before a bail justice or the Magistrates' Court and the number and complexity of the offences to be investigated.

626 *Crimes Act 1958* (Vic) s 464B(1), (5).

627 *Crimes Act 1958* (Vic) s 464B(5), (8).

628 See pp 148 and 195 of this Discussion Paper.

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

630 Id at 75.

justices of the peace of the power under the *Police Powers and Responsibilities Act 1997* (Qld) to extend the detention period of a person. The Criminal Justice Commission commented:[631]

> A range of complex factors must be taken into account in authorising an extension of detention. Some of those factors are spelt out briefly in section 51(5) of the Act, including the 'nature and seriousness of the offence' and that 'the investigation is being conducted properly and without delay'. The Act envisages that the suspect's lawyer will be given the opportunity to make submissions about the application (s.51(5)(d)). Consequently, it is essential that a person with proper judicial training, such as a Magistrate, should make those decisions, since to be effective he or she will need to question police and possibly listen to opposing legal arguments. In addition, the extension period which may be granted may be quite considerable: section 51(5) provides that the extension is to be for a 'reasonable time', **which may be up to another eight hours of questioning plus 'time outs'. Time outs are not subject to any upper limit.** [original emphasis]

The Criminal Justice Commission expressed the view that it is not appropriate that an "ordinary" justice of the peace should be given the power to make these decisions. In support of its argument, the Criminal Justice Commission noted that, under section 129 of the *Police Powers and Responsibilities Act 1997* (Qld),[632] various orders and authorities may be sought and made by telephone, fax, radio or other similar facility. In the view of the Criminal Justice Commission, it was therefore "very difficult to imagine a situation where police would not have access to a Magistrate or Justice of the Peace (Magistrates Court)".

The Criminal Justice Commission proposed that only magistrates or justices of the peace (magistrates court) should be able to authorise extensions of detention periods for suspects:

> In its report on police powers in Queensland, the CJC proposed that only Magistrates should be able to grant extensions (1994, Rec 20.5). However, it may also be reasonable, given the range of other judicial functions able to be performed by Justices of the Peace (Magistrates Court), that this category of JP should be able to grant extensions of detention. Nevertheless, JPs employed by the QPS should not be empowered to grant such extensions.

The Criminal Justice Commission also expressed a concern about the fact that a justice of the peace who is a police officer is not, by legislation, excluded from exercising this power. The Criminal Justice Commission noted that, while some provisions in the *Police Powers and Responsibilities Act 1997* (Qld) and the *Juvenile Justice Act 1992* (Qld) preclude justices of the peace who are members of the Queensland Police

631 Submission 113.

632 S 129 of the *Police Powers and Responsibilities Act 1997* (Qld) is set out at p 73 of this Discussion Paper.

Service from carrying out certain functions,[633] other provisions in the *Police Powers and Responsibilities Act 1997* (Qld) that empower a justice of the peace "to carry out certain, very significant functions" - including "the power under section 51 to extend the period for which a person may be detained for questioning by the police" - are silent on the use of a justice of the peace who is a member of the Queensland Police Service.

The Criminal Justice Commission was of the view that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should prohibit justices of the peace who are employed by the Queensland Police Service from exercising their powers for any purpose associated with the performance of a function of the Queensland Police Service, other than the witnessing of documents such as statutory declarations or affidavits.

6. THE COMMISSION'S PRELIMINARY VIEW

(a) The need for the role

The Commission agrees with the following observation made by the Criminal Justice Commission:[634]

> ... 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.

It is therefore 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 is also important that the persons on whom this role is conferred should be appropriately qualified and both willing and available to perform the role. Subject to the qualifications discussed below, the Commission is generally of the view that there is a need for justices of the peace to perform this role, and that it is an appropriate role for them to perform.

(b) Justices of the peace who may perform the role

As the exercise of the power conferred by section 51 of the *Police Powers and*

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633 The Criminal Justice Commission referred to the following example: a justice of the peace employed by the Queensland Police Service cannot act as an interview friend in the police interview of a child who is suspected of having committed an indictable offence: see ss 93 and 97 and the definition of "interview friend" in Sch 3 of the *Police Powers and Responsibilities Act 1997* (Qld) and s 9E of the *Juvenile Justice Act 1992* (Qld).

634 Submission 113.

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 is of 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.[635]

However, given the relatively small number of justices of the peace (magistrates court) and the decentralised nature of Queensland's population, the Commission is concerned that, if the exercise of this power were restricted to justices of the peace (magistrates court), there may be insufficient people available to deal with these applications.

The Commission is, therefore, of the view that it is appropriate that justices of the peace (qualified) should continue, in the circumstances provided for by section 51(2)(c) of the *Police Powers and Responsibilities Act 1997* (Qld), to exercise this power. The Commission generally agrees with the hierarchical approach in section 51(2) - that is, that application should be made to a justice of the peace (qualified) only if there is no magistrate or justice of the peace (magistrates court) available. The Commission considers that a justice of the peace (magistrates court) will be more experienced in hearing these applications than a justice of the peace (qualified) and, for that reason, should take precedence over a justice of the peace (qualified).

However, the Commission is of the view that old system justices of the peace[636] should not be able to exercise this power at all.[637] 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. The Commission is conscious of the fact that, while future appointees to the offices of justice of the peace (magistrates court) and justice of the peace (qualified) will be trained in, or examined on, their 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 may not have received any training about that role. This does not dissuade the Commission from its view that these are the appropriate categories of justice of the peace to perform this role. It does, however, reinforce the Commission's view that the provision of regular refresher courses for justices of the peace is essential.[638]

The Commission considers it appropriate that section 51 of the *Police Powers and*

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635 See p 118 of this Discussion Paper in relation to the various matters of which a justice of the peace or a magistrate must be satisfied before extending a detention period.

636 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

637 An old system justice of the peace is presently encompassed by the reference in s 51(2)(c) of the *Police Powers and Responsibilities Act 1997* (Qld) to "another justice of the peace".

638 See the Commission's preliminary recommendation at p 269 of this Discussion Paper in relation to the provision of post-appointment training for justices of the peace (magistrates court) and justices of the peace (qualified).

Responsibilities Act 1997 (Qld) excludes a justice of the peace (commissioner for declarations) from extending a detention period under that Act. Earlier in this Discussion Paper, the Commission made a preliminary recommendation which, if implemented, will have the effect that the office of justice of the peace (commissioner for declarations) will not come into existence on 1 July 2000.[639] 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 who may extend a detention period under that Act.

The Commission agrees with the view of the Criminal Justice Commission that a justice of the peace who is a member of the Queensland Police Service should not be authorised to exercise the power to extend a detention period under section 51 of the *Police Powers and Responsibilities Act 1997* (Qld). As noted above,[640] although other provisions of that Act expressly exclude a justice of the peace who is a member of the Queensland Police Service from exercising particular powers, section 51 is silent on that issue. It is important that this power be exercised only by people who are independent of the Queensland Police Service. For that reason, the Commission is of 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 to exercise the power under section 51 to extend a detention period.

(c) Means by which an application to extend a detention period may be made

Section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) presently enables an application to extend a detention period to be made by means of the telephone or another similar facility. The Commission is of the view that, for the same reasons it considers that justices of the peace should not be able to issue a search warrant under that Act by telephone or other similar means,[641] justices of the peace should not be authorised to extend a detention period by telephone or other means as presently provided for by section 129 of the *Police Powers and Responsibilities Act 1997* (Qld).

If it is necessary to use the telephone or other similar means to make an application,

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639 The Commission has made a 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 hold office as a commissioner for declarations, rather than as a justice of the peace (commissioner for declarations). See p 36 of this Discussion Paper.

640 See p 124 of this Discussion Paper.

641 See pp 93-95 of this Discussion Paper.

the application should be made to a magistrate.

7. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations:

- **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).**
- **Justices of the peace (commissioners for declarations) should continue to be excluded from the list of people who may extend a detention period.[642]**
- **Old system justices of the peace[643] should not be included in the list of justices of the peace who may exercise this power, and section 51 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.**
- **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 section should be amended accordingly.**
- **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 section 129 of the *Police Powers and Responsibilities Act 1997* (Qld) should be amended accordingly.**

642 See, however, pp 126-127 of this Discussion Paper as to whether it will be necessary to continue to make this express exclusion.

643 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

CHAPTER 8

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:[644]

- all stipendiary magistrates and acting stipendiary magistrates; and
- all clerks of the court and acting clerks of the court (who are, in both cases, also justices of the peace and public service officers).

The Governor in Council may also "from time to time by notification published in the gazette appoint any persons to be coroners".[645]

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.[646]

A coroner may appoint a justice of the peace to be the coroner's deputy.[647] The appointment of a deputy coroner may be limited to a particular purpose or for a fixed time.[648] 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.[649] Unless the appointment of a deputy coroner is limited to a particular purpose, a deputy coroner shall not act as a coroner when the coroner who appointed the deputy is present, except at the direction of that coroner.[650]

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644 *Coroners Act 1958* (Qld) s 6(1)(a).

645 *Coroners Act 1958* (Qld) s 6(2).

646 *Coroners Act 1958* (Qld) s 6(1A).

647 *Coroners Act 1958* (Qld) s 6(4). That subsection provides, however, that a deputy coroner may not appoint a deputy.

648 *Coroners Act 1958* (Qld) s 6(4A).

649 *Coroners Act 1958* (Qld) s 6(4D).

650 *Coroners Act 1958* (Qld) s 6(4E).

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 persons,[651] 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.[652]

Under the Act, a coroner may order a medical practitioner to conduct a post-mortem examination of a body[653] and may require tests to be carried out on the body by an analyst or a pathologist or other qualified person.[654] 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.[655] 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.[656] Coroners also have powers in relation to the exhumation of bodies.[657]

3. JUSTICES OF THE PEACE WHO MAY EXERCISE CORONIAL POWERS

The *Coroners Act 1958* (Qld) refers merely to a "justice of the peace". However, since that Act predates the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), its effect will be modified to some extent by the provisions of the later Act.[658] The limitations imposed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the powers of the various categories of justices of the peace created by that Act will therefore determine the extent to which the jurisdiction conferred by the *Coroners Act 1958* (Qld) may still be exercised.

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651 *Coroners Act 1958* (Qld) s 10(1).

652 *Coroners Act 1958* (Qld) s 7(1).

653 *Coroners Act 1958* (Qld) s 18(1).

654 *Coroners Act 1958* (Qld) s 18(3).

655 *Coroners Act 1958* (Qld) s 7B(1).

656 *Coroners Act 1958* (Qld) s 23(1), (2).

657 *Coroners Act 1958* (Qld) s 17.

658 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29. See pp 11-12 of this Discussion Paper.

(a) Justice of the peace (qualified)

Section 29(3) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the ability of a justice of the peace (qualified) to 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 charging a defendant, the issue of a warrant, the granting of bail, the remand of a defendant or the adjournment of proceedings.[659]

As a result of this limitation, a justice of the peace (qualified) would no longer be able 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 such functions as ordering a post-mortem examination or issuing a burial order or a certificate authorising a cremation.

(b) 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.[660]

However, these powers would not encompass the conduct of an inquest. A justice of the peace (magistrates court) would therefore also be limited to coronial powers such as ordering a post-mortem examination or issuing a burial order or a certificate authorising a cremation.

(c) "Old system" justice of the peace

Justices of the peace who were appointed prior to the enactment of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) are not, at present, affected by the limitations imposed by the Act on subsequently appointed justices of the peace.

Section 41(a) of the Act provides that, subject to section 42, an "old system" justice of the peace "continues to hold office as a justice of the peace under this Act". Section 42 of the Act provides that, if at 30 June 2000 a person remains in office as a justice of the peace under section 41(a), the person ceases to hold that office and instead holds office as a justice of the peace (commissioner for declarations). However, until

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659 See the definition of "procedural action or order" at note 67 of this Discussion Paper.

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

that time, the powers of an "old system" justice of the peace are not affected by the provisions of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). A justice of the peace who held office immediately before the commencement of the Act and who has not since been appointed as either a justice of the peace (qualified) or a justice of the peace (magistrates court) or registered as a commissioner for declarations will be able to exercise all the powers that are "conferred on the justice of the peace or on a commissioner for declarations by the *Justices Act 1886* (Qld) or by any other Act".[661]

During the transitional period, an "old system" justice of the peace may therefore exercise any of the powers conferred on a justice of the peace by the *Coroners Act 1958* (Qld).

4. 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.[662]

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 assistant coroner.[663] The Tasmanian legislation provides that "the Governor may appoint persons as coroners".[664]

In Victoria, magistrates, acting magistrates, barristers and solicitors are eligible to be appointed as coroners.[665]

In the Australian Capital Territory, the Northern Territory and Western Australia, every magistrate is, by virtue of that position, also a coroner.[666] In the Australian Capital Territory there is also provision for the appointment of any person as a deputy coroner,[667] who, subject to the directions of the Chief Coroner, has and may exercise

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

662 *Coroners Act 1975* (SA) s 11(1).

663 *Coroners Act 1980* (NSW) ss 5(1), 5A(1).

664 *Coroners Act 1990* (Tas) s 10(1).

665 *Coroners Act 1985* (Vic) s 8.

666 *Coroners Act 1997* (ACT) s 5; *Coroners Act* (NT) s 4(3); *Coroners Act 1996* (WA) s 11.

667 *Coroners Act 1997* (ACT) s 8.

the powers of a coroner.[668] However, the Chief Coroner may not direct a deputy coroner to hold an inquest into a death in custody.[669] Similar provisions exist in the Northern Territory, except that the list of inquests that may not be held by a deputy coroner is more extensive.[670]

5. ISSUES PAPER

As noted in Chapter 7, the Issues Paper[671] did not attempt to identify all the powers conferred on justices of the peace by various statutory enactments. Rather, the focus of the Issues Paper was on those powers that the Commission believed would be most frequently exercised by justices of the peace.

Although the Issues Paper did not specifically raise the issue of coronial powers, the Commission sought submissions providing information about significant powers, other than those discussed in the Issues Paper, that may be exercised by justices of the peace.[672]

6. SUBMISSIONS

Only three of the submissions received in response to the Issues Paper referred to the exercise by justices of the peace of powers under the *Coroners Act 1958* (Qld).

One respondent did not agree that justices of the peace should be able to act as coroners.[673] Another respondent, a retired stipendiary magistrate, indicated that it may be necessary for the clerk of court in a country centre to act as a coroner when the magistrate is away on circuit for any length of time.[674] Otherwise, the respondent was of the view that only the power to issue post-mortem examination orders and, following a post-mortem, the power to make an order permitting burial or cremation, were necessary. Even then, the respondent suggested that police requests for a post-

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668 *Coroners Act 1997* (ACT) s 9(1).

669 *Coroners Act 1997* (ACT) s 9(2).

670 *Coroners Act* (NT) ss 5(1), 6(3), (4).

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

672 Id at 75.

673 Submission 89.

674 Submission 120.

mortem, for example, could be handled by telephone to a coroner in the nearest regional centre.

Of the responses received in answer to the questionnaire forwarded to all justices of the peace (magistrates court), only four respondents identified coronial functions as a significant power that had been exercised.[675] Each of these four respondents was a member of staff at a Magistrates Court in a country area.

Coronial powers were not exercised by a justice of the peace at any of the Magistrates Courts surveyed by the Commission during March and April 1998.[676]

7. THE COMMISSION'S PRELIMINARY VIEW

The Commission noted that the coronial powers given to justices of the peace by the *Coroners Act 1958* (Qld) were exercised only very infrequently. The Commission also noted that there were alternative options for the exercise of those powers.

The Commission believes that there is a limited need for justices of the peace to retain their coronial powers. 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.[677] 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.

Further, the Commission is concerned that the exercise of coronial powers may have serious implications. For example, if a post-mortem examination is conducted because a person has died in suspicious circumstances, cremation of the body could result in the destruction of evidence that may be required subsequently. In some cases, there may also be a need to have regard to particular cultural sensitivities.[678]

The Commission is therefore of the view that any need that may exist for justices of the peace to exercise coronial powers is outweighed by the need to ensure that those powers may be exercised only by people who are sufficiently experienced to be able to make the most appropriate decision in all the circumstances.

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675 Q3, Q57, Q69, Q70.

676 See pp 3-4 of this Discussion Paper.

677 See p 129 of this Discussion Paper.

678 See Malbon J, Airo-Farulla G and Banks C, Final Report, *Review of Queensland Coronial Law* (Prepared for the Indigenous Advisory Council, 1997).

8. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations:

- **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.**[679]

- **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.**

679 See the *Coroners Act 1958* (Qld) s 6(1)(b).

CHAPTER 9

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 Courts[680] - 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 referred to as performing "bench duties". This chapter discusses the main bench duties that may be performed by justices of the peace.

As mentioned 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",[681] 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;[682] 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:[683]

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680 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.

681 The term "justice" is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to mean a justice of the peace.

682 These types of offences are discussed at pp 143-144 of this Discussion Paper.

683 *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 170-174 of this Discussion Paper.

> ... 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.

These provisions limit not only the categories of justices of the peace who may hear various matters, but also the 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 the matter and, even then, only if the defendant pleads guilty.[684]

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 are examined in this chapter.[685]

2. MAGISTRATES COURTS IN QUEENSLAND

Queensland is divided into 37 districts for the purposes of holding Magistrates Courts.[686] Within those districts, various places are appointed for holding Magistrates Courts. At present, 125 places are designated as places for holding courts. There are not, however, Magistrates Courts with court staff established at all those places. There are presently 82 staffed court houses in Queensland at which Magistrates Courts are held.[687]

Not all Magistrates Courts have a resident stipendiary magistrate. There are 73

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684 Note, however, that that limitation does not apply to an old system justice of the peace or to a serving Supreme Court Judge, District Court Judge or Magistrate who is an *ex officio* justice of the peace: *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6).

685 The issuing of warrants is discussed in Chapter 5 of this Discussion Paper.

686 *Justices Regulation 1993* (Qld) ss 17, 18, Sch 4. See Appendix D to this Discussion Paper.

687 See Appendix D to this Discussion Paper.

magistrates in Queensland, and these are located at 30 of the court houses. In addition, fourteen clerks of the court have been appointed as acting magistrates. Their appointments are activated by the Chief Stipendiary Magistrate in appropriate circumstances on a needs basis.[688]

In order to deal with matters that are required to be heard at Magistrates Courts in centres that do not have a resident magistrate, magistrates travel on regular circuits to those centres. In most cases, centres are visited by a magistrate each month.[689] 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 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 those powers that may presently be exercised by justices of the peace were removed.

3. SOURCES OF INFORMATION

The information available to the Commission on the extent to which justices of the peace exercise various court powers has largely come from the following sources:[690]

(a) Submissions

Most of the submissions received were from justices of the peace (qualified).[691] Although justices of the peace (qualified) may constitute a court to deal with certain procedural matters, none of the justices of the peace (qualified) who made submissions indicated that they had ever been called upon to exercise any court powers.

Three submissions were, however, received from justices of the peace with personal experience of exercising bench duties. Two of these were old system justices of the

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688 Information provided by the Chief Stipendiary Magistrate (April 1999).

689 Ibid.

690 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 wider community.

691 See p 3 of this Discussion Paper.

peace[692] and the third was from a justice of the peace (magistrates court).[693]

In addition, the Commission received submissions from the Chief Stipendiary Magistrate,[694] from a retired stipendiary magistrate,[695] and from the clerks of the court at three Magistrates Courts.[696]

(b) Survey of Magistrates Courts

As mentioned in Chapter 1, the Commission conducted a survey of four Magistrates Courts during March and April 1998.[697] 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, and to specify the types of matters heard and the categories of justices of the peace who heard the 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 received only a few submissions from justices of the peace (magistrates court),[698] in July 1998, it sent a questionnaire to all the justices of the peace (magistrates court) then registered in Queensland.[699] A total of 478 questionnaires were distributed. The Commission received 133 responses.

The questionnaire posed a number of questions about the experience of justices of the

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692 Submissions 17, 40.

693 Submission 117.

694 Submission 110.

695 Submission 120.

696 Submissions 114, 116, 116A, 119.

697 A copy of the form completed at the four Magistrates Courts is set out in Appendix B to this Discussion Paper.

698 See p 3 of this Discussion Paper. The Commission received only seven submissions from justices of the peace (magistrates court).

699 A copy of the questionnaire is set out in Appendix C to this Discussion Paper.

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[700]	101
Resident of an Aboriginal or Torres Strait Islander community	16
Other	16
Total	**133**

4. ISSUES PAPER

In the Issues Paper,[701] the Commission sought submissions on the following questions about the powers of justices of the peace to constitute a court to hear and determine charges, conduct committal hearings, remand a defendant, adjourn proceedings, and grant bail:

- How often, if at all, do justices of the peace exercise these powers?
- In what localities do justices of the peace exercise these powers (for example, in metropolitan areas, country towns, or remote communities)?
- Is there a need in those localities for these powers to be exercised by justices of the peace, rather than by magistrates?
- If so, could that need be met, or at least reduced, by a greater use of technology (for example, by the use of a video link) so that a magistrate in another part of the State could deal with the matter?
- What are the perceived advantages and disadvantages, if any, of having these powers exercised by justices of the peace, rather than by a magistrate?

5. GENERAL COMMENTS ABOUT THE FREQUENCY WITH WHICH JUSTICES OF THE PEACE CONSTITUTE A COURT

700 This figure includes staff members of Magistrates Courts that are part of the Queensland Government Agency Program (QGAP).

701 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 70.

A large number of submissions in response to the Issues Paper commented on the frequency with which justices of the peace exercise court powers.[702] The general consensus of the submissions from justices of the peace (qualified) was that justices of the peace exercised their court powers infrequently,[703] and did so in rural and remote communities. Generally, no distinction was made in the submissions between the different types of powers, whereas the responses to the questionnaire, which are discussed below, revealed a marked difference between the extent to which different court powers were exercised.

The submission from the Chief Stipendiary Magistrate of the Magistrates Courts advised that the involvement of justices of the peace is minimal, and is largely confined to accepting guilty pleas in relation to minor matters, and to forfeiting bail and granting remand when a magistrate is not available.[704] A clerk of the court of a Magistrates Court made a similar comment:[705]

> 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'.
>
> There is definitely no need for any justice of the peace, qualified or magistrates court to exercise the powers of conducting committal proceedings, or hearing and determining a matter on a plea of 'not guilty'.

More detailed information about the extent to which particular court powers are exercised was obtained from the survey of the four Magistrates Courts and from the responses to the questionnaire distributed to all justices of the peace (magistrates court). This information is included in the following discussion of the various court powers that may be exercised by justices of the peace.

6. HEARING AND DETERMINING CHARGES

(a) Source of power

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702 See p 3 of this Discussion Paper for a breakdown of respondents.

703 Submissions 1A, 3, 7, 8, 9, 19, 36, 39, 40, 41, 42, 43, 50, 54, 95.

704 Submission 110.

705 Submission 114.

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".[706] Generally, proceedings under the *Justices Act 1886* (Qld) are commenced by a complaint,[707] 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)[708] and by old system justices of the peace.[709] 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.[710]

Although justices of the peace (magistrates court) may constitute a court for this purpose, they are limited to:[711]

> the hearing and determining of a charge of a simple offence or a regulatory offence[712] 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 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 brought about by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). However,

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706 *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).

707 *Justices Act 1886* (Qld) s 42(1).

708 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (4)(a).

709 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6)(b).

710 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3). See the discussion of this provision at p 14 of this Discussion Paper.

711 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(a). See the discussion of this provision at p 13 of this Discussion Paper.

712 See the *Regulatory Offences Act 1985* (Qld).

the fact those limitations do not apply to old system justices of the peace[713] 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*".[714]

The term "simple offence" is defined in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) in the following terms:[715]

> **"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:[716]

> **"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 act.
>
> **"simple offence"** means any offence (indictable[717] 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:

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713 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

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

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

716 *Justices Act 1886* (Qld) s 4.

717 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 or District Courts. However, in some cases, an indictable offence may be tried summarily - that is, in the Magistrates Court where there is no jury.

- driving under the influence of liquor;[718]
- driving without due care and attention;[719]
- being drunk in a public place;[720] and
- leaving a hotel without paying for goods or services.[721]

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 552C(3).[722] 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.[723] In that event, the matter must be heard before a magistrate. Other Acts,

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718 *Traffic Act 1949* (Qld) s 16.

719 *Traffic Act 1949* (Qld) s 17.

720 *Liquor Act 1992* (Qld) s 164(2).

721 *Regulatory Offences Act 1985* (Qld) s 6.

722 In order to be able to be appointed under s 552C(3) of the *Criminal Code* (Qld), the 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 10 of this Discussion Paper.

723 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.

however, contain no such restriction.[724] 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) 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.[725]

The results of the questionnaire distributed to justices of the peace (magistrates court) indicated that sentencing was not an unusual duty to be undertaken by justices of the peace (magistrates court). The majority of the justices of the peace (magistrates court) who responded to the questionnaire stated that they had sentenced defendants.[726] This had occurred in many towns.[727] 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.[728]

(e) Other jurisdictions

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724 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.

725 In all these cases, the sentencing was undertaken by two justices of the peace (magistrates court) who were employed at the respective Magistrates Courts.

726 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.

727 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.

728 Submission 117 and telephone conversation of 16 February 1999. This respondent advised that a magistrate visits Cloncurry for one day per month.

(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 Magistrates Court may be exercised only by a magistrate or a special magistrate.[729]

(ii) New South Wales

In some districts, justices of the peace may hear and determine some summary cases.[730] However, it is not the practice for them to do so. These matters would ordinarily be reserved for hearing by a magistrate:[731]

> 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.[732]

(iii) Northern Territory

Generally, the Court of Summary Jurisdiction is empowered to hear and determine any complaint.[733] The Court has the jurisdiction to hear and determine complaints for summary offences,[734] certain minor indictable offences[735] and certain other indictable offences that may be heard summarily.[736]

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729 *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.

730 *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.

731 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.

732 *Justices Act 1902* (NSW) ss 75B-75F.

733 *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".

734 *Justices Act* (NT) s 43(1).

735 *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 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.[737] Further, a single justice may hear and determine certain minor matters of complaint with the consent of the complainant and the defendant.[738]

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.[739]

(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.[740]

Generally, the Magistrates Court, when sitting to adjudicate on any matter, must be constituted by a magistrate.[741] However, if there is no magistrate available to constitute the Court, it may be constituted by two justices or by a special justice.[742] The definition of "justice" in the *Summary Procedure Act 1921*

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the provisions of Division 2 of Part V". Division 2 of Part V deals with certain minor indictable offences that may be heard summarily.

736 *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.

737 *Justices Act* (NT) s 43(1).

738 *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.

739 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.

740 *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).

741 *Magistrates Court Act 1991* (SA) s 7A(1).

742 *Magistrates Court Act 1991* (SA) s 7A(2).

includes a justice of the peace for the State of South Australia.[743]

(v) Tasmania

Under the *Justices Act 1959* (Tas), two or more justices of the peace may hear and determine a complaint under that Act.[744] Their jurisdiction includes certain indictable offences triable summarily,[745] as well as simple offences and breaches of duty.[746] Justices of the peace hear the majority of traffic regulation matters, with the exception of matters where the defendant pleads not guilty.[747]

Some Acts provide, however, that certain offences must be heard by a magistrate sitting alone.[748]

(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.[749]

(vii) Western Australia

In Western Australia, two or more justices of the peace may hear and determine an offence that is punishable on summary conviction.[750] 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.[751]

In its Report on Courts of Petty Sessions, the Law Reform Commission of Western Australia observed that this power was usually exercised only where

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743 *Summary Procedure Act 1921* (SA) s 4.

744 *Justices Act 1959* (Tas) s 20.

745 *Justices Act 1959* (Tas) ss 71, 72.

746 *Justices Act 1959* (Tas) Part IX.

747 Department of Justice (Tas), *Justices' Guide* (1995) at 9.

748 See, for example, the *Dental Act 1982* (Tas) s 42; the *Fire Services Act 1979* (Tas) s 129; the *Police Offences Act 1935* (Tas) ss 37A-37D; and the *Traffic Act 1925* (Tas) s 32.

749 *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).

750 *Justices Act 1902* (WA) s 20(1).

751 *Justices Act 1902* (WA) s 20(2).

a defendant had pleaded guilty:[752]

> 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:[753]

> 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 continued.[754]

The Law Reform Commission of Western Australia did, however, recommend that a statutory limitation should be imposed on the term of imprisonment or on the amount of a fine that a court constituted by justices of the peace may impose.[755] 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".[756] The 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

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752 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.

753 Id at para 2.19.

754 Ibid.

755 Id at para 2.22.

756 Id at note 60 to Chapter 2.

those cases, the sentencing should be left to be determined by a stipendiary magistrate.[757]

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.[758] 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.[759]

The Review Committee did not agree with the Western Australian Commission's earlier recommendation 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.[760]

The Review Committee also considered, and rejected, a proposal that would require a magistrate to ratify all terms of imprisonment imposed by justices of the peace.[761]

The Committee did, however, recommend that justices of the peace should be required to seek advice from their local stipendiary magistrate before sentencing a defendant to a term of imprisonment.[762] It 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.[763] The Committee acknowledged that this recommendation could not be implemented

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757 Id at note 61 to Chapter 2.

758 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.

759 Ibid.

760 Id at 26.

761 Ibid.

762 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).

763 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 27.

until arrangements with stipendiary magistrates could be put in place.[764]

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.
>
> (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

764 Ibid.

> imposed under this section by a magistrate.

(f) Submissions

The majority of respondents to the Issues Paper were in favour of justices of the peace exercising various court powers. Several, however, were of the view that justices of the peace should never exercise court powers.[765]

(i) Advantages of justices of the peace retaining the power to sentence

The following reasons were advanced in support of justices of the peace retaining the power to sentence:[766]

A. Less time in custody

A number of justices of the peace (magistrates court) who responded to the questionnaire suggested that, because justices of the peace have the power to sentence in respect of certain matters, defendants do not spend longer than is necessary in custody.[767]

One respondent to the Issues Paper commented generally in relation to the exercise of court powers by justices of the peace:[768]

> 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.

B. Convenience

Many justices of the peace (magistrates court) suggested that sentencing by justices of the peace was an issue of convenience,[769] especially for the defendants.[770] In particular, it was suggested that it avoids the need for people charged when travelling through town, especially visitors from interstate, to

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765 Submissions 27, 42, 96, all of which were from justices of the peace.

766 Many respondents to the Issues Paper gave reasons for justices of the peace retaining their court powers generally. Where relevant to the question of sentencing, those general comments have also been incorporated.

767 Q1, Q6, Q19, Q36, Q41, Q42, Q47, Q115.

768 Submission 43.

769 Q9, Q33, Q34, Q107.

770 Q11, Q13, Q14, Q16, Q19, Q35, Q36, Q48, Q59, Q61, Q116, Q121.

return on a date when the magistrate will be available.[771]

This view was also shared by three respondents to the Issues Paper.[772] As one respondent commented, "If the defendant wants to plead, it is often best to deal with the defendant".[773]

C. Speedy resolution of matters

A large number of justices of the peace (magistrates court) commented that it avoids delays and enables matters to be finalised more quickly.[774] A number of respondents to the Issues Paper were also of the view that having justices of the peace hear matters saves time and money,[775] and enables cases to be resolved more quickly, especially in relation to minor matters.[776]

D. Cost effectiveness

A large number of justices of the peace (magistrates court) commented on the cost effectiveness of sentencing by justices of the peace.[777]

A large number of respondents to the Issues Paper also commented generally on the cost effectiveness of justices of the peace being able to exercise various court powers.[778]

E. Availability

One justice of the peace (magistrates court) emphasised the availability of justices of the peace. Many of the respondents to the Issues Paper suggested that the availability of justices of the peace was an important consideration,

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771 Q7, Q15, Q29, Q36, Q58, Q65, Q72, Q78, Q83, Q92, Q116, Q120.

772 Submissions 114, 116A, 117.

773 Submission 116A.

774 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.

775 Submissions 5, 36, 43, 51, 54, 94.

776 Submissions 60, 93, 108.

777 Q20, Q23, Q32, Q43, Q45, Q48, Q69, Q82, Q92, Q96, Q115.

778 Submissions 1A, 6, 21, 28, 36, 43, 48, 49, 54, 60, 61, 62, 63, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 92, 94, 95, 96, 98, 103, 105, 117.

given that many communities do not have a resident magistrate.[779]

F. 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.[780] This view was shared by a large number of respondents to the Issues Paper in relation to the exercise of court powers generally.[781]

G. Reduction in 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.[782]

This issue was also raised by two respondents to the Issues Paper. 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:[783]

> 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.

A submission from a clerk of the court also raised this issue, although from a slightly different perspective.[784] This 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 further 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.

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779 Submissions 1A, 12, 19, 22, 30, 40, 43, 48, 50, 57, 60, 66, 92, 93, 96, 98, 117.

780 Q20, Q81, Q91, Q109, Q118, Q126, Q129, Q130.

781 Submissions 1A, 6, 22, 31, 33, 35, 60, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

782 Q65, Q99.

783 Submission 111.

784 Submission 116A.

H. Local knowledge

A number of justices of the peace (magistrates court) were of the view that the local knowledge of justices of the peace was an advantage in sentencing,[785] although others thought that this could in some cases give rise to a bias against a defendant.[786]

Several respondents to the Issues Paper also saw the local knowledge of justices of the peace - in relation to both the defendant and local factors - as an advantage when it came to exercising court powers.[787]

I. Community involvement

A few justices of the peace (magistrates court) thought that the involvement of the community in justice issues was an advantage.[788] In particular, some justices of the peace (magistrates court) were of the view that this would result in decisions that reflect community values,[789] and that a defendant would have more respect for a decision made by his or her peers.[790]

A number of respondents to the Issues Paper also raised this factor, suggesting that having justices of the peace exercise court powers generally strengthened the sense of community justice,[791] would encourage people "into believing in our justice system",[792] and would engender a greater respect for the law.[793]

(ii) Disadvantages of justices of the peace retaining the power to sentence

The following reasons were advanced against justices of the peace retaining the

785 Q17, Q58, Q87, Q90, Q92, Q111, Q112, Q122.

786 See note 809 of this Discussion Paper.

787 Submissions 8, 60, 66, 88.

788 Q17, Q37, Q106.

789 Q51.

790 Q53, Q92.

791 Submission 3.

792 Submission 31.

793 Submission 108.

power to sentence:[794]

A. Lack of expertise generally

A number of justices of the peace (magistrates court) suggested that justices of the peace are inexperienced,[795] although one justice of the peace (magistrates court) suggested that Magistrates Court employees are generally better informed than "outsiders".[796] 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.[797]

The comment was made that justices of the peace have less knowledge than a magistrate[798] and are therefore more likely to make mistakes.[799]

Two justices of the peace (magistrates court) thought that the effect of the inexperience of justices of the peace could be reduced if they were able to contact a magistrate for advice.[800]

One respondent to the Issues Paper was strongly of the view that justices of the peace should not have the power to sentence, and that any court powers should be limited to the granting of bail or remanding a defendant in custody:[801]

> From my own experience as a Police Officer I can recall occasions when a Justice of the Peace had to be asked to reconsider his determination in a matter when he gave as part of the reason for his decision his poor opinion of the defendant's father. Another occasion was when the Justice of the Peace gave a defendant in a summary matter a custodial sentence greater than the law provided.
>
> In my experience most Justices are infrequently called upon to exercise the power

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794 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.

795 Q3, Q32, Q38, Q42, Q51, Q56, Q59, Q60, Q62, Q72, Q77, Q79, Q105, Q107, Q116, Q120, Q126.

796 Q32.

797 Q70.

798 Q2, Q23, Q30, Q48, Q50, Q54, Q59, Q61, Q68, Q71, Q73, Q76, Q110, Q116, Q123, Q124.

799 Q27, Q42, Q74, Q92, Q115, Q133.

800 Q107, Q118.

801 Submission 7.

> vested in them. If they are called upon they rarely know the extent of, or restrictions to, their powers and they have to be instructed in the way they should deal with the matter and the decision they should come to by the Police, a most undesirable procedure for all concerned.

Several other respondents raised concerns about justices of the peace exercising court powers generally. These respondents were of the view that justices of the peace lacked experience and knowledge of legal matters,[802] and were "not trained to handle these matters in today's legal minefield".[803]

B. 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 options[804] and the appropriate range of penalties.[805] One justice of the peace (magistrates court) commented that it can be difficult to decide whether to record a conviction.[806] It was suggested that these factors could lead to a lack of consistency in sentencing.[807]

C. Lack of familiarity with court procedure

It was suggested that justices of the peace who were not employed at a Magistrates Court were very often unfamiliar with court procedure.[808]

D. Potential for bias

Several justices of the peace (magistrates court) thought 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.[809]

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802 Submissions 22, 30, 60, 93, 96, 120.

803 Submission 20.

804 Q3, Q46, Q63, Q75, Q104, Q128.

805 Q60, Q104, Q128.

806 Q46.

807 Q7, Q10, Q42, Q59, Q85, Q93, Q99, Q104, Q108, Q114, Q120, Q128, Q132.

808 Q75, Q77, Q98, Q116, Q123, Q126.

809 Q92, Q104, Q116.

One respondent to the Issues Paper expressed a similar concern:[810]

> 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 defendant well.[811]

(g) The Commission's preliminary view

The exercise of the power to sentence a defendant can have serious ramifications 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 imposition of a custodial sentence, which could have enormous consequences for a defendant, even when only for a short period.

Sentencing legislation[812] is now quite complex, and 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. However well-trained an individual justice of the peace may 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.

Magistrates in Queensland are required to have five years standing as a barrister or a solicitor to be eligible for appointment.[813] Further, because magistrates are sentencing defendants on a regular basis, it is easier for them to keep up to date in their knowledge of sentencing law and practice. It is obviously more difficult for a justice of the peace who is called upon to sentence a defendant only infrequently to develop or maintain a similar level of expertise. The Commission shares 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.[814] For these reasons the Commission is generally of the view that, ideally, all sentencing should be undertaken by a magistrate.

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810 Submission 38.

811 Submission 60.

812 See the *Penalties and Sentences Act 1992* (Qld); the *Corrective Services Act 1988* (Qld); and the *Juvenile Justice Act 1992* (Qld).

813 *Stipendiary Magistrates Act 1991* (Qld) s 4(1). See pp 27-28 of this Discussion Paper.

814 See pp 155-156 of this Discussion Paper.

However, the fact remains that Queensland has a decentralised population and the resources of the justice system are such that not all areas of Queensland have access to the services of a resident magistrate. For example, a respondent who is a justice of the peace (magistrates court) in Cloncurry commented on the fact that a magistrate hears matters in that town for only one day each month.[815]

In the normal course of events, there will not usually be a degree of urgency attached to the sentencing of a defendant. It should therefore be possible for most matters to be listed for sentencing on a date when a magistrate will be able to hear the matter. In this respect, sentencing differs from, say, an application for a temporary care and protection order in relation to a child, where there may be a risk to the child if the order cannot be made promptly.[816] Although the survey of the four Magistrates Court did not suggest that sentencing was a much-used power of justices of the peace,[817] 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.[818]

The Commission is concerned that all defendants should have equal access to justice. However, although the opportunity to appear before a qualified person is an important factor in ensuring equality of justice to defendants, the Commission does not regard it as the only factor. In particular, the decentralised nature of the Queensland population and the present level of services for particular areas may also have an impact on some defendants' access to justice. The Commission is conscious of the fact that, if the power to sentence is removed from justices of the peace, some defendants in remote areas may 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.

The submissions in response to the Issues Paper highlighted some areas where the removal of the power to sentence could adversely affect a defendant:

- 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. 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, that 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

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815 Submission 117.

816 See pp 188-189 of this Discussion Paper.

817 See pp 144-145 of this Discussion Paper.

818 See p 145 of this Discussion Paper.

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 will develop a history of bail breaches in the first place. As one respondent commented, if it is necessary to adjourn a matter to a date when a magistrate is available to sentence, this invites the risk that the defendant might inadvertently fail to appear on the next hearing date.[819] If a defendant has breached bail on a number of occasions, that may prejudice the likelihood that the defendant will on a future occasion be granted bail.

- 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.[820] 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 acknowledges that, although it regards it as preferable for sentencing to be undertaken by magistrates, some injustices could result if the power to sentence were removed altogether from justices of the peace. Consequently, the Commission is of the view that the power of justices of the peace to sentence should be retained in some form. The Commission considered the following options as safeguards for the proper exercise of the power to sentence:

(i) Sentencing on a guilty plea

At present, justices of the peace (magistrates court) are restricted to hearing and determining charges where the defendant pleads guilty.[821] As observed earlier in this chapter, this restriction does not apply to old system justices of the peace.[822] These justices of the peace may presently hear and determine a charge that is defended, although it is not the practice for them to do so.

In the view of the Commission, it is not appropriate for any justices of the peace to be conducting trials of defended matters. The Commission agrees with the observations of the Law Reform Commission of Western Australia that justices

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819 Submission 116A. See pp 153-154 of this Discussion Paper.

820 See p 152 of this Discussion Paper.

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

822 See note 684 of this Discussion Paper. Old system justices of the peace will lose this power from 1 July 2000.

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.[823]

(ii) 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*".[824] As observed earlier in this chapter,[825] 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 the *Criminal Code* (Qld).[826] The exclusion in the Code does not, however, prevent them 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 regards it as 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.

(iii) Consent of the defendant

Although the Commission has reservations about justices of the peace having the power to sentence, it accepts that, in some circumstances, it may be to the advantage of a defendant for justices of the peace to be able to constitute a Magistrates Court promptly in order to sentence a defendant, rather than for the matter to be adjourned until a magistrate is available. However, if a defendant does not wish to be sentenced by justices of the peace, the Commission is of the view that the matter should be adjourned to a date when a magistrate will be

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823 See p 148 of this Discussion Paper. In Queensland, it has become more difficult in recent times for defendants to obtain legal aid to secure representation in criminal matters in the Magistrates Courts: see Criminal Justice Commission, *Criminal Justice System: Monitor Series* (Vol 4, February 1999) at 1.

824 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 3, 29(4)(a).

825 See pp 143-144 of this Discussion Paper.

826 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 10 of this Discussion Paper.

available to hear the matter.

(iv) Consent of the prosecutor

There may be some cases where, although a defendant is willing to be sentenced by justices of the peace, the prosecutor is 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.

The Commission is of the view that, while the consent of the defendant should be required for a matter to be heard before justices of the peace, it should not be the sole determining factor. The Commission is of the view that the consent of the prosecutor should also be required before a defendant can be sentenced by justices of the peace.

(v) Restrictions on sentencing

The Commission does not consider the requirement that a defendant must consent to being sentenced by justices of the peace to be a sufficient safeguard on its own, as some defendants may not receive advice to enable them to exercise their right of election in an informed way.

At present, if justices of the peace have the power to hear a matter, they may impose the same penalties as a magistrate; there is no restriction on either the amount of the fine or on the term of imprisonment that may be imposed by them.[827] The Commission is concerned that justices of the peace may impose a custodial sentence or, alternatively, may impose a fine, the non-payment of which could result in a defendant serving a term of imprisonment.[828] The Commission has therefore given consideration to the following recommendations that have been either made or implemented in Western Australia as a restraint on the sentencing power of justices of the peace:

- 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;[829]

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827 Some charges that may, on a guilty plea, be heard by justices of the peace carry substantial penalties. For example, under s 15 of the *Traffic Act 1949* (Qld), a person convicted of driving without a driver's 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.

828 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.

829 See p 149 of this Discussion Paper.

- the recommendation of the Western Australian Justice of the Peace Review Committee that justices of the peace should consult a magistrate before sentencing a defendant to a term of imprisonment;[830] 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.[831]

The Commission does not favour a regime whereby one judicial officer is required to consult another judicial officer before sentencing, or to have his or her sentences confirmed by another judicial officer. The Commission is of the view that the former regime, in particular, could be cumbersome in practice.

More importantly, however, the Commission considers 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 are 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 seems to the Commission that the various approaches are all underpinned by a concern about the propriety of this power being exercised by justices of the peace.

The Commission is 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 is more appropriate to remove that power from justices of the peace altogether. This seems to the Commission to be the most effective way to address its concerns about custodial sentences being imposed by justices of the peace. This approach also avoids the administrative burdens that 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.

At present, the *Penalties and Sentences Act 1992* (Qld) 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. Section 182A(1) provides:

> A court that orders an offender to pay a penalty 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 under subsection (2)(a).

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830 See p 150 of this Discussion Paper.

831 S 38 of the *Sentencing Act 1995* (WA) is set out at pp 150-151 of this Discussion Paper.

The court may impose a term of imprisonment of up to fourteen days for each penalty unit[832] that the person is ordered to pay.[833]

The Commission is of the view that justices of the peace who are sentencing a defendant 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.

This would not affect the range of other orders that might, depending on 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.

Under the *Penalties and Sentences Act 1992* (Qld), 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 order the offender to be imprisoned for a prescribed period.[834] The Commission is of the view that, for this purpose, a Magistrates Court should only be able to be constituted by a magistrate.

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 have the matter heard by justices of the peace - that a custodial sentence is warranted. In those circumstances, the justices of the peace should be required to adjourn the matter for sentencing by a magistrate.

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832 The value of a penalty unit is $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.

833 *Penalties and Sentences Act 1992* (Qld) s 182A(2).

834 *Penalties and Sentences Act 1992* (Qld) ss 183, 185.

7. CONDUCTING AN EXAMINATION OF WITNESSES

(a) Source of power

The *Justices Act 1886* (Qld) authorises a single "justice"[835] to conduct an examination of witnesses in relation to an indictable offence.[836] This is commonly referred to as conducting a "committal hearing".

(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 hear a committal. The latter Act provides that this power may be exercised by a justice of the peace (magistrates court),[837] 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.[838] 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,[839] an old system justice of the peace may also exercise the power under the *Justices Act 1886* (Qld) to conduct a committal hearing.

(c) Nature of the hearing

Some indictable offences may be heard summarily, that is, by a magistrate sitting alone, rather than before a judge and jury.[840] However, most indictable offences are

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835 See note 58 of this Discussion Paper for the definition of "justice" in the *Justices Act 1886* (Qld).

836 *Justices Act 1886* (Qld) s 104(1)(a). 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).

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

838 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

839 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(6)(b).

840 See Chapter 58A of the *Criminal Code* (Qld) (Indictable offences dealt with summarily).

required to be heard before a judge and jury in either the District Court or the Supreme Court.

The purpose of a committal hearing is for the justice to determine whether there is sufficient evidence for the defendant to be tried. Evidence is called on behalf of the prosecution[841] and may also be offered by the defendant if the defendant wishes.[842]

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).[843]

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, or any one of them, 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.[844] 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.[845]

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.[846]

If, having considered all the evidence called in relation to the indictable offence, the justice is of the opinion that the evidence is sufficient for the defendant to be put on trial, the justice 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.[847]

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841 *Justices Act 1886* (Qld) s 104(2).

842 *Justices Act 1886* (Qld) s 104(4).

843 *Justices Act 1886* (Qld) s 104(1)(b). The only exception to this requirement is where the court is authorised by s 40 of the *Justices Act 1886* (Qld) to remove the defendant on the grounds that he or she is disrupting the proceedings.

844 *Justices Act 1886* (Qld) s 104(2).

845 *Justices Act 1886* (Qld) s 113.

846 *Justices Act 1886* (Qld) s 104(4).

847 *Justices Act 1886* (Qld) s 108(1) .

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.[848] This procedure cannot be followed if the defendant, or one of the defendants, is not represented by a barrister or a solicitor.[849] Further, a written statement cannot be admitted unless the prosecution and the defence agree to its admission and certain other criteria are satisfied.[850]

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.[851]

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.[852]

(d) Frequency of conducting committal hearings

In none of the Magistrates Courts surveyed during March and April 1998 did justices of the peace conduct a committal hearing. This result is consistent with the responses to the questionnaire distributed to justices of the peace (magistrates court).

Of the 133 responses received to the questionnaire, seventeen justices of the peace (magistrates court) indicated that they had heard all the matters the subject of the questionnaire.[853] 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

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848 *Justices Act 1886* (Qld) s 110A.

849 *Justices Act 1886* (Qld) s 110A(4).

850 *Justices Act 1886* (Qld) s 110A(5).

851 *Justices Act 1886* (Qld) s 110A(6).

852 *Justices Act 1886* (Qld) s 110A(10).

853 Q5, Q14, Q35, Q36, Q37, Q40, Q47, Q50, Q70, Q71, Q76, Q81, Q103, Q106, Q125, Q128, Q130.

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.[854] This view was shared by one of the respondents to the Issues Paper.[855] 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.[856]

(e) 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.[857] 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,[858] it is unusual for them to do so. Similar to the practice in New South Wales in relation to hearing and determining summary offences,[859] committal hearings are ordinarily reserved for hearing by a magistrate.[860]

(iii) Northern Territory

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854 Q12, Q77.

855 Submission 40.

856 Submission 50.

857 See p 145 of this Discussion Paper.

858 *Local Court Act 1982* (NSW) s 8 and *Justices Act 1902* (NSW) ss 32-48I.

859 See pp 145-146 of this Discussion Paper.

860 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.

Where a person is charged with an indictable offence, a justice may, under the provisions of the *Justices Act* (NT), conduct a preliminary examination.[861]

Where a defendant is charged with an indictable offence that may, in certain circumstances, be tried summarily, the defendant may, at any stage of the proceedings, plead guilty to the offence charged against him.[862] However, only a magistrate may take a guilty plea in these circumstances.[863]

(iv) South Australia

The Magistrates Court has jurisdiction to conduct a preliminary examination of a charge of an indictable offence.[864] Generally, the Magistrates Court, when sitting to adjudicate on any matter, must be constituted by a magistrate.[865] However, if there is no magistrate available to constitute the Court, it may be constituted by two justices or by a special justice.[866]

(v) Tasmania

Although justices of the peace are authorised to conduct committal hearings,[867] the practice is that they deal only with "appropriate uncontested committals".[868] Committal hearings in relation to some charges may be conducted only by a magistrate sitting alone.[869]

(vi) Victoria

The power to conduct a committal hearing was removed from justices of the peace in 1984.[870]

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861 *Justices Act* (NT) ss 105B, 106, 109-112, 134, 135.

862 *Justices Act* (NT) s 106A(1).

863 *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) s 3, which amended s 106A of the principal Act.

864 *Magistrates Court Act 1991* (SA) s 9(a); *Summary Procedure Act 1921* (SA) ss 104-107.

865 *Magistrates Court Act 1991* (SA) s 7A(1).

866 *Magistrates Court Act 1991* (SA) s 7A(2).

867 *Justices Act 1959* (Tas) s 23(e), Part VII, Division 2.

868 Department of Justice (Tas), *Justices' Guide* (1995) at 9.

869 See, for example, the *Criminal Code* (Tas) s 185 (rape).

870 *Magistrates' Courts Act 1971* (Vic) s 18A, inserted by s 4 of the *Magistrates' Courts (Jurisdiction) Act 1984* (Vic).

(vii) Western Australia

Justices of the peace are authorised to conduct committal hearings,[871] 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.[872] 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 continued.[873]

In 1994, the Justice of the Peace Review Committee in Western Australia recommended that this practice should be formalised, and that the power of justices of the peace to conduct preliminary hearings should be removed.[874] The Committee did, however, recommend that the power of justices of the peace to commit defendants under the expedited committal process available in Western Australia[875] should remain.[876]

(f) Submissions

Only three respondents commented on the merits of justices of the peace conducting committal hearings.[877] All were of the view that this is a function that should not be undertaken by justices of the peace.

(g) The Commission's preliminary view

It would seem from the submissions to the Issues Paper and from the responses to the

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871 *Justices Act 1902* (WA) Part V, Division 2.

872 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.

873 Id at para 2.19, note 52.

874 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.

875 The *Justices Act 1902* (WA) contains a procedure for an expedited committal 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.

876 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 28.

877 Submission 120 (retired stipendiary magistrate); Q12, Q83.

questionnaire distributed to justices of the peace (magistrates court) that it is extremely rare for justices of the peace to conduct a committal hearing.

Just as the Commission considers it is inappropriate for justices of the peace to conduct a trial of a defended charge,[878] the Commission also considers 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 is of the view that the power to conduct a contested committal hearing should be removed from justices of the peace.

As mentioned earlier, 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.[879] The Commission does not have the same concerns in relation to the procedure found in section 110A(6) of the *Justices Act 1886* (Qld) as it has in relation to justices of the peace conducting a contested committal hearing. 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 procedure does not require the justices of the peace to consider the evidence before the court.

The Commission is of the view that 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.

8. PROCEDURAL POWERS

(a) Remands, adjournments and bail

(i) Sources of power

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

878 See pp 159-160 of this Discussion Paper.

879 This procedure is discussed at pp 165-166 of this Discussion Paper.

eight days at any one time.[880]

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 power on a justice of the peace to hear and determine an application for a remand or adjournment of a case.[881]

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:[882]

> 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
>
> (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.

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880 The justices also have the power under s 8 of the *Bail Act 1980* (Qld) to grant the defendant bail. See pp 171-172 of this Discussion Paper.

881 See, for example, the *Health Act 1937* (Qld) s 145(2); and the *Penalties and Sentences Act 1992* (Qld) s 182(4).

882 *Bail Act 1980* (Qld) s 8(1). Generally, see Queensland Law Reform Commission, Report, *The Bail Act 1980* (R 43, 1993).

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.[883] 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.[884] 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.[885] Such a grant of bail discharges the duty of taking the person before a justice to be dealt with according to law.[886]

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.[887] If bail is refused to a defendant who is already in custody, the defendant must be remanded in custody.[888]

(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).[889] They are, therefore, powers that may be exercised by a justice of the peace (qualified),[890] a justice of the peace (magistrates court), [891]or an old system justice of the peace.[892]

(b) Certain domestic violence orders

(i) Source of power

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883 *Bail Act 1980* (Qld) s 6.

884 *Acts Interpretation Act 1954* (Qld) s 36.

885 *Bail Act 1980* (Qld) s 7(1).

886 *Bail Act 1980* (Qld) s 7(4).

887 For some offences, however, such as murder, only a Supreme Court Judge may grant bail: *Bail Act 1980* (Qld) s 13.

888 *Bail Act 1980* (Qld) s 8(2).

889 The definition of "procedural action or order" is set out at note 67 of this Discussion Paper.

890 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

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

892 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

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 violence[893] committed by a "respondent spouse".

The Act provides for two types of domestic violence orders: protection orders and temporary protection orders.[894] A "temporary protection order" is an order made for a short period until the court decides whether or not to grant a protection order.[895] Application for a protection order may be made only by:[896]

- an aggrieved spouse;
- a person authorised by an aggrieved spouse to appear on behalf of the aggrieved spouse; or
- a police officer who has investigated a case of suspected domestic violence and, after the investigation, reasonably believes that the person is an aggrieved spouse and that there is sufficient reason for the officer to take action.

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.[897] 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:[898]

(a) to make a domestic violence order in terms agreed to by, or on behalf of, an aggrieved spouse and a respondent spouse; or

(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

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893 "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).

894 *Domestic Violence (Family Protection) Act 1989* (Qld) s 13(2).

895 *Domestic Violence (Family Protection) Act 1989* (Qld) s 13(3).

896 *Domestic Violence (Family Protection) Act 1989* (Qld) s 14.

897 *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(2).

898 *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(3).

> (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).[899]

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:[900]

- has taken a person suspected of committing domestic violence into custody; or
- has investigated a case of suspected domestic violence and reasonably believes that the person is an aggrieved spouse and that there is sufficient reason for the officer to take action and believes 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,[901] be constituted by a justice of the peace (qualified),[902] a justice of the peace (magistrates court),[903] or an old system justice of the peace.[904] A justice of the peace (commissioner for declarations) is expressly excluded from constituting a Court for these purposes.[905] That approach is consistent with the limitations imposed by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) on the powers of a justice of the peace

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899 *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(4).

900 *Domestic Violence (Family Protection) Act 1989* (Qld) s 54.

901 *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(4).

902 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

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

904 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

905 *Domestic Violence (Family Protection) Act 1989* (Qld) ss 3 (definition of “justice”), 4(3).

(commissioner for declarations).[906]

(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.[907]

	Gladstone	Proserpine	Mount Isa	Innisfail
Remands	0	0	4	0
Adjournments	7[908]	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.[909]

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

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

907 These figures exclude the number of orders made in relation to various types of domestic violence applications, which are discussed separately at p 176 of this Discussion Paper.

908 This included the adjournment of proceedings against four defendants involving 120 charges of indictable offences.

909 Q70.

responded to the questionnaire indicated that they heard these matters.[910] 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 did not exercise these powers.[911] These justices of the peace tended to be located at larger centres where there is more than one stipendiary magistrate, such as Beenleigh,[912] Brisbane[913] and Southport.[914] 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.[915]

(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.[916] This had occurred in many towns.[917]

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910 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.

911 Q45, Q48, Q86, Q96, Q98, Q104.

912 Q45.

913 Q86, Q96.

914 Q98.

915 Ibid.

916 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.

917 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.[918] 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.[919]

(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.[920] Consequently, they do not have the power to make procedural orders.

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.[921] When a hearing is adjourned, justices of the peace may remand a defendant in custody.[922] However, in certain districts, only magistrates may exercise these powers.[923]

Under of 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.[924] Consequently, justices of the peace who are not employed in the Department of Courts Administration

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[918] Submission 40.

[919] Submission 117 and telephone conversation of 16 February 1999. This respondent advised that the magistrate visits Cloncurry for one day per month.

[920] See p 145 of this Discussion Paper.

[921] *Justices Act 1902* (NSW) ss 30, 33, 41, 48G, 65, 66G, 68.

[922] *Justices Act 1902* (NSW) ss 34, 69.

[923] *Justices Act 1902* (NSW) s 13.

[924] *Bail Act 1978* (NSW) s 23.

(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.[925] 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.[926] 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.[927]

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.[928]

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.[929] The power of the justice to grant bail is limited.[930] 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.

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.[931]

Under the *Summary Procedure Act 1921* (SA), the Magistrates Court may

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925 *Justices Act* (NT) s 65.

926 *Justices Act* (NT) ss 113, 114. The remand period is initially limited to fifteen days.

927 *Bail Act* (NT) s 22.

928 *Justices Act* (NT) s 124.

929 *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.

930 *Bail Act* (NT) s 21.

931 *Magistrates Court Act 1991* (SA) s 15(b), (c).

remand a defendant in a number of situations.[932] As noted earlier, the Magistrates Court may be constituted by two justices or by a special justice if a magistrate is not available.[933]

A court before which an "eligible person"[934] 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).[935] 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.[936]

E. Tasmania

Under the *Justices Act 1959* (Tas), justices of the peace are authorised to adjourn proceedings in a number of situations.[937] 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.[938] Where justices of the peace find a person guilty of an offence, they may remand that person for sentencing by themselves or by other justices.[939]

Justices of the peace are authorised to hear and determine applications for bail.[940]

F. Victoria

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932 *Summary Procedure Act 1921* (SA) ss 59, 103, 112.

933 See p 147 of this Discussion Paper.

934 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.

935 *Bail Act 1985* (SA) s 5(1)(b), (c).

936 *Bail Act 1985* (SA) s 15(1).

937 *Justices Act 1959* (Tas) ss 21(1)(b), 31(4), 42, 50B, 56A(2A), 106F.

938 *Justices Act 1959* (Tas) ss 58, 74B.

939 *Justices Act 1959* (Tas) s 50C.

940 *Justices Act 1959* (Tas) s 35; *Bail Act 1994* (Tas) s 11.

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,[941] when the more specialised role of "bail justice" was created by the *Magistrates' Court Act 1989* (Vic).[942] That Act also amended the *Bail Act 1977* (Vic) to enable a bail justice to grant bail.[943]

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.[944] Justices of the peace may also adjourn the hearing of a charge of an indictable offence.[945]

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.[946]

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.[947]

(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.[948] 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,[949] a more

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941 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.

942 *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.

943 *Bail Act 1977* (Vic) s 12.

944 *Justices Act 1902* (WA) s 86. See also *Justices Act 1902* (WA) ss 134-136.

945 *Justices Act 1902* (WA) s 79.

946 *Justices Act 1902* (WA) ss 79, 80.

947 *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.

948 See pp 180-184 of this Discussion Paper.

949 See pp 173-174 of this Discussion Paper.

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 to restrain a person from conduct that constitutes domestic violence.[950] However, as mentioned above, justices of the peace in the Australian Capital Territory are not authorised to constitute the Magistrates Court for any purpose.[951] 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,[952] molestation, harassment, intimidation or stalking.[953] 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.[954] However, if the defendant is under the age of eighteen at that time, application must be made to the Children's Court.[955]

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.[956] Justices of the peace may not, however, constitute the Children's Court.[957]

In certain circumstances, application may be made by telephone for an interim apprehended violence order. Such an application may be made only to an

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950 *Domestic Violence Act 1986* (ACT) ss 4, 4A, 14.

951 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).

952 See the *Crimes Act 1900* (NSW) s 4 (definition of "Personal violence offence").

953 *Crimes Act 1900* (NSW) s 562B.

954 *Crimes Act 1900* (NSW) s 562G(1)(a).

955 *Crimes Act 1900* (NSW) s 562G(1)(b).

956 *Local Courts Act 1982* (NSW) ss 7, 8. However, the power of justices of the peace to exercise this jurisdiction is limited by s 13 of the *Justices Act 1902* (NSW).

957 *Children's Court Act 1987* (NSW) s 6. That Court is constituted by Children's Magistrates. See p 192 of this Discussion Paper.

"authorised justice".[958] The term "authorised justice" is defined to mean:[959]

- 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 do not generally 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.[960] 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.[961] The power to make a restraining order on application by telephone is restricted to a magistrate.[962]

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.[963] 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.[964]

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958 *Crimes Act 1900* (NSW) s 562H(1).

959 *Crimes Act 1900* (NSW) s 562H(16).

960 *Domestic Violence Act* (NT) ss 3 (definition of "Court"), 4.

961 *Justices Act* (NT) s 43(1)(b).

962 *Domestic Violence Act* (NT) s 6.

963 *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.

964 *Magistrates Court Act 1991* (SA) s 7A(2).

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.[965] 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.[966] In certain circumstances, justices may also make an interim restraint order.[967] 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.[968]

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.[969] However, justices of the peace in Victoria are not authorised to constitute the Magistrates' Court or the Children's Court.[970] Consequently, they do not have 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 an offence of personal violence 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.[971]

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965 *Domestic Violence Act 1994* (SA) ss 3 (definition of "telephone"), 8(1).

966 *Justices Act 1959* (Tas) s 106B.

967 *Justices Act 1959* (Tas) s 106D.

968 *Justices Act 1959* (Tas) s 106DA.

969 *Crimes (Family Violence) Act 1987* (Vic) ss 3 (definition of "Court"), 3A, 4.

970 *Magistrates' Court Act 1989* (Vic) s 4; *Children and Young Persons Act 1989* (Vic) s 8.

971 *Restraining Orders Act 1997* (WA) s 11.

- 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.[972]

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.[973] In any other case, application is to be made to a Court of Petty Sessions.[974] Although a Court of Petty Sessions may be constituted by two or more justices of the peace,[975] justices of the peace are not authorised to constitute the Children's Court.[976]

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. However, an application made by one of those methods may be made only to an "authorized magistrate".[977] Consequently, although a justice of the peace may hear an application that is made in person, a justice of the peace may not otherwise hear an application.

(e) Submissions

Many of the submissions for and against justices of the peace being able to sentence defendants apply equally to the question of whether justices of the peace should be able to make various procedural orders.[978] In particular, the authority to grant bail could have a significant impact on the time a defendant spends in custody, if it is not otherwise possible to take the defendant before a magistrate.

A number of submissions addressed the question of whether justices of the peace should be able to make various procedural orders. One respondent was of the view that the only court powers needed were for clerks of the court to be able to grant bail

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972 *Restraining Orders Act 1997* (WA) s 34.

973 *Restraining Orders Act 1997* (WA) ss 3 (definition of "child"), 25(2)(a), 38(2)(a).

974 *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.

975 *Justices Act 1902* (WA) s 20.

976 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).

977 *Restraining Orders Act 1997* (WA) s 19(a).

978 See pp 151-157 of this Discussion Paper.

and remand a defendant in custody when a magistrate was not available.[979] Another stated that it was in the interests of justice for justices of the peace to be able to hear bail applications - to deal with cases where a person has been refused bail by the police - and temporary domestic violence orders.[980] This view was shared by another respondent, who considered it preferable for justices of the peace to hear bail applications, rather than to have lengthy remand periods occur.[981]

A clerk of the court at a Magistrates Court considered it important for a person in custody that justices of the peace have the powers of remand, adjournment and granting of bail.[982] A submission from a retired magistrate stated that he did not have any difficulty with justices of the peace exercising these powers, although he was generally opposed to them exercising more extensive court powers.[983]

As one respondent observed in relation to the exercise by justices of the peace of court powers generally, although it is perhaps most relevant to the exercise of procedural powers:[984]

> [T]he need is predicated by the availability of magistrates in the respective areas. Until such time ... that more magistrates reside in such areas and be available, or a suitable alternative procedure for conducting such courts [is implemented], there can be no valid reason for eliminating this role from JP's - where such circumstances arise.

(f) The Commission's preliminary view

It is 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 particular, the large number of procedural orders made during the survey period[985] would suggest 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.

The powers to adjourn a matter, remand a defendant and grant or enlarge bail are often exercised as a package of orders. If justices of the peace are to have the power to

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979 Submission 110.

980 Submission 40.

981 Submission 43.

982 Submission 114.

983 Submission 120.

984 Submission 91.

985 See p 175 of this Discussion Paper.

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.

In communities where there is no resident magistrate, or where the sole resident magistrate is on circuit in another part of the district, it is desirable for justices of the peace to be able to exercise these powers, especially where there may be some urgency attached to the application.

For example, an application for bail will most commonly be made to justices of the peace in circumstances where a person has been arrested, is in custody, and has 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 is of the view that it is in the interests of justice for a bail hearing to be able to be heard promptly.

Similarly, the Commission is of the view that it is desirable for justices of the peace to be able to exercise their present powers in relation to domestic violence orders. In particular, it is important that justices of the peace are able to make or extend a temporary protection order when a magistrate is not readily available to hear the application. However, the Commission considers it appropriate that justices of the peace are presently precluded from making a final domestic violence order except in terms agreed to by the parties.[986]

Consequently, the Commission is of the view that justices of the peace should retain their present powers to make various procedural orders, in particular:

- the powers to adjourn a matter, remand a defendant and grant bail; and
- the power to make the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

9. 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.[987] Its jurisdiction ranges from criminal proceedings involving young people charged with

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986 *Domestic Violence (Family Protection) Act 1989* (Qld) s 4(3).

987 *Childrens Court Act 1992* (Qld) s 6.

criminal offences to non-criminal proceedings, such as applications for the care and protection of young people.[988]

(b) Source of power

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,[989] it may be constituted by two justices of the peace, but only if neither a Childrens Court magistrate nor a stipendiary magistrate is available.[990] This does not, however, affect the limitations placed on a justice of the peace by the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld)[991] or by any other Act.[992]

The main ground 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, the then Minister for Family Services and Aboriginal and Islander Affairs, stated:[993]

> 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.

(c) 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 paper 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

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988 The principal Acts conferring jurisdiction on the Childrens Court are the *Children's Services Act 1965* (Qld) and the *Juvenile Justice Act 1992* (Qld).

989 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).

990 *Childrens Court Act 1992* (Qld) s 5(3).

991 See Chapter 2 for a discussion of the limitations imposed on the powers that may be exercised by particular categories of justices of the peace.

992 *Childrens Court Act 1992* (Qld) s 5(4).

993 Legislative Assembly (Qld), *Parliamentary Debates* (18 June 1992) at 5935.

All proceedings under the *Justices Act 1886* (Qld) for the hearing and determination of charges[994] against children for offences, including committal proceedings,[995] must be heard and determined before a "Childrens Court magistrate".[996] 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:[997]

- hearing and determining a charge of a simple offence in a case where the child[998] pleads guilty; 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.

Justices of the peace may not make a detention order or an immediate release order.[999]

These limitations do not affect a limitation placed on the power of a justice of the peace under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).[1000] Accordingly, a justice of the peace (qualified) would not have jurisdiction to hear and determine a charge against a child, but would still be

994 See the general discussion at pp 141-144 of this Discussion Paper about the powers of justices of the peace in the hearing and determination of charges.

995 See the general discussion at pp 164-166 of this Discussion Paper about the powers of justices of the peace in relation to committal hearings.

996 *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 a District Court, or before a Childrens Court judge sitting without a jury: see Division 2 of Part 4 of the *Juvenile Justice Act 1992* (Qld).

997 *Juvenile Justice Act 1992* (Qld) s 54(1).

998 "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.

999 *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.

1000 *Juvenile Justice Act 1992* (Qld) s 54(3).

confined to taking or making procedural actions and orders.[1001]

(ii) Jurisdiction in non-criminal matters

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 of that Department, a child who appears, or who such officer suspects on reasonable grounds, to be in need of care and protection.[1002]

Similarly, an authorised officer of the Department or a police officer may take into custody, on behalf of the Director, a child who appears, or who such officer suspects on reasonable grounds, to be in need of care and control.[1003]

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 either to the care and protection of the Director[1004] or to the care and control of the Director.[1005]

If the Childrens Court is satisfied that a child is in need of care and protection or care and control it may:

- order that a child be admitted to the care and protection of the Director of the Department of Families, Youth and Community Care;[1006] or
- order that a child who is in need of care and control be committed to the care and control of the Director of the Department of Families, Youth and Community Care.[1007]

As these matters are not required to be heard by a Childrens Court judge, the Court may be constituted by two justices of the peace.[1008] However, as mentioned above, two justices of the peace may hear these matters only when neither a Childrens Court magistrate nor another stipendiary magistrate is

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1001 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

1002 *Children's Services Act 1965* (Qld) s 49(2).

1003 *Children's Services Act 1965* (Qld) s 61(2).

1004 *Children's Services Act 1965* (Qld) s 49(2A)(b).

1005 *Children's Services Act 1965* (Qld) s 61(2A)(b).

1006 *Children's Services Act 1965* (Qld) s 49(4)(a)(iii).

1007 *Children's Services Act 1965* (Qld) s 61(4)(a)(iii).

1008 *Childrens Court Act 1992* (Qld) s 5(2), (3).

available.[1009]

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

As mentioned above,[1010] section 5(3)(c) of the *Childrens Court Act 1992* (Qld), which enables two justices of the peace to constitute the Childrens Court, is expressed not to affect the limitations placed on justices of the peace under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Accordingly, the question as to which powers of the Childrens Court may be exercised by two justices of the peace will depend on the nature of the power itself.[1011]

Depending on the nature of the particular power in question, it could be exercised by a justice of the peace (qualified)[1012] or a justice of the peace (magistrates court),[1013] or, in either case, by an old system justice of the peace whose office is preserved by the transitional provisions of the 1991 Act.[1014]

(e) Frequency of constituting a Childrens Court

Of the four Courts surveyed during March and April 1998, only at Mount Isa did justices of the peace constitute a 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 courts) 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.[1015]

A submission from the Juvenile Justice Branch of the Department of Justice advised that, during 1997, justices of the peace sat as a Childrens Court for a total of 15.52

1009 See p 186 of this Discussion Paper.

1010 See pp 186-187 of this Discussion Paper.

1011 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).

1012 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

1013 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4).

1014 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(1), (6).

1015 Q9, Q54.

hours.[1016] Of this figure, 9.5 hours were recorded at one locality, Murgon, with the balance of the time at other Courts being quite small. Of the seven other areas where sitting time was recorded during 1997, only two exceeded one hour of court time.[1017]

Figures for 1998 reveal that justices of the peace sat as a Childrens Court for only 3.5 hours, with the time divided between two centres - Cunnamulla and Maryborough.[1018]

The data in relation to the number of hours during which justices of the peace constituted a Childrens Court does not distinguish between juvenile justice matters and care and protection matters. However, the submission from the Juvenile Justice Branch of the Department of Justice indicated that, during the 1996/1997 financial year, there was a matter heard in Mount Isa where a Childrens Court constituted by two justices of the peace sentenced a juvenile. The Juvenile Justice Branch was not aware of any similar cases in the 1997/1998 financial year.

The Department of Families, Youth and Community Care stated that it is rare for justices of the peace sitting as a 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.[1019]

(f) 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 criminal proceedings against children[1020] and to hear and determine other applications under that Act with respect to children.[1021] For example, the Act deals with applications to declare that a child is in need of

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1016 Submission 106.

1017 Mount Isa 1.42 hours; St George 1.1 hours.

1018 Information provided by the Courts Strategy and Research Branch, Department of Justice and Attorney-General.

1019 Submission 111.

1020 *Children's Services Act 1986* (ACT) s 20(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.

1021 *Children's Services Act 1986* (ACT) s 20(b).

care.[1022]

When the Magistrates Court is exercising this jurisdiction, it is known as the Childrens Court.[1023] As noted earlier, justices of the peace are not authorised to constitute the Magistrates Court.[1024] Consequently, they 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 who was a child[1025] when the offence was committed and who was under the age of 21 years when charged before the Children's Court with the offence.[1026] The Children's Court also has jurisdiction to make various orders for the care and protection of children.[1027]

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.[1028]

(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.[1029] The jurisdiction of the court is exercisable by a magistrate sitting alone.[1030]

1022 *Children's Services Act 1986* (ACT) ss 80, 83.

1023 *Children's Services Act 1986* (ACT) s 20.

1024 See p 145 of this Discussion Paper.

1025 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.

1026 *Children (Criminal Proceedings) Act 1987* (NSW) s 28.

1027 *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).

1028 *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.

1029 *Juvenile Justice Act* (NT) s 19.

1030 *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).

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.[1031]

(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.[1032]

Generally, the Youth Court must be constituted by a judge or a magistrate.[1033] 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.[1034]

When the Court is constituted by two justices or by a special justice, it may not:[1035]

- 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.[1036] A Children's Court also has jurisdiction to make orders relating to the welfare of children who are neglected or uncontrolled.[1037] In particular, a Children's Court may make an order declaring such a child to be a ward of the State.[1038]

1031 *Community Welfare Act* (NT) s 25.

1032 *Youth Court Act 1993* (SA) s 7.

1033 *Youth Court Act 1993* (SA) s 14(1).

1034 *Youth Court Act 1993* (SA) s 14(4).

1035 *Youth Court Act 1993* (SA) s 14(4).

1036 *Child Welfare Act 1960* (Tas) ss 3 (definition of "child"), 13(1).

1037 *Child Welfare Act 1960* (Tas) Part III, Division III.

1038 *Child Welfare Act 1960* (Tas) s 34(1)(a).

A Children's Court must be constituted by one or more special magistrates[1039] appointed for that Court, or by a magistrate, or by a magistrate sitting together with one or more special magistrates.[1040] 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.[1041]

Where under an Act a particular charge is required to be heard and determined by a magistrate sitting alone,[1042] a Children's Court hearing that charge must be constituted only by a magistrate or special magistrate sitting alone.[1043]

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.[1044]

Under the *Child Protection Act 1974* (Tas), only a magistrate may make a temporary child protection order, directing that a child be taken to a place of safety for up to seven days, or a child protection order, directing that a child be taken to such a place for up to thirty days.[1045] 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.[1046]

There are, however, a number of related Acts in Tasmania that have not yet been proclaimed.[1047] On their commencement, they will make some significant

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1039 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).

1040 *Child Welfare Act 1960* (Tas) s 13(4).

1041 *Child Welfare Act 1960* (Tas) s 13(5A).

1042 See note 748 of this Discussion Paper.

1043 *Child Welfare Act 1960* (Tas) s 14(5).

1044 *Child Welfare Act 1960* (Tas) s 32(1).

1045 *Child Protection Act 1974* (Tas) s 10.

1046 *Child Protection Act 1974* (Tas) s 9(3).

1047 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 are due to commence on the day on which the *Children, Young Persons and Their Families Act 1997* (Tas) commences.

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 abolished[1048] and the appointment of each justice to the office of special magistrate will be revoked.[1049] Two new divisions of the Magistrates Court will be established: the Magistrates Court (Youth Justice Division)[1050] and the Magistrates Court (Children's Division).[1051] Both Divisions will be constituted only by a magistrate.[1052]

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.[1053] 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),[1054] which includes the power to make a care and protection order in respect of a child.[1055] 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.[1056] 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

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1048 *Children, Young Persons and Their Families and Youth Justice (Transitional and Savings Provisions) Act 1998* (Tas) s 7(1).

1049 *Children, Young Persons and Their Families and Youth Justice (Transitional and Savings Provisions) Act 1998* (Tas) s 7(3).

1050 *Youth Justice Act 1997* (Tas) s 159.

1051 *Magistrates Court (Children's Division) Act 1998* (Tas) s 4.

1052 *Youth Justice Act 1997* (Tas) s 160; *Magistrates Court (Children's Division) Act 1998* (Tas) s 5.

1053 *Youth Justice Act 1997* (Tas) s 161(1)(a), (b).

1054 *Magistrates Court (Children's Division) Act 1998* (Tas) s 6.

1055 *Children, Young Persons and Their Families Act 1997* (Tas) s 42.

1056 *Children and Young Persons Act 1989* (Vic) s 8(3).

children for indictable offences.[1057] 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.[1058] The Children's Court has exclusive jurisdiction in relation to these matters.[1059]

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 Court[1060] and, generally, must be constituted by a magistrate.[1061]

(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.[1062] 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).[1063]

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.[1064] 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.[1065]

Where a justice of the peace[1066] 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

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1057 *Children and Young Persons Act 1989* (Vic) s 16(1).

1058 *Children and Young Persons Act 1989* (Vic) s 15(1).

1059 *Children and Young Persons Act 1989* (Vic) s 17(1).

1060 *Children and Young Persons Act 1989* (Vic) s 8(2).

1061 *Children and Young Persons Act 1989* (Vic) s 8(7).

1062 *Children's Court of Western Australia Act 1988* (WA) ss 3 (definition of "child"), 19.

1063 *Children's Court of Western Australia Act 1988* (WA) ss 3 (definition of "child"), 20.

1064 *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.

1065 *Children's Court of Western Australia Act 1988* (WA) s 21(4).

1066 The term "justice" is defined in s 5 of the *Interpretation Act 1984* (WA) to mean a "Justice of the Peace".

apprehend the child.[1067]

(g) Submissions

The submission from the Juvenile Justice Branch stated that it was important, when dealing with children, "to ensure that the official response to offending behaviour is timely".[1068] For that reason, it considered it desirable to ensure that there is an alternative process for dealing quickly with children if a magistrate is not available.

On the other hand, this respondent also recognised that the juvenile justice area is a specialised one and that, if justices of the peace are to continue to be able to constitute a Childrens Court, their skills should be enhanced.

A similar view was expressed by Youth Advocacy Centre Inc, a specialist community legal and social welfare organisation for young people under the age of seventeen years.[1069] This respondent considered it vital that justices of the peace, when constituting a Childrens Court, be well trained in the application of the *Juvenile Justice Act 1992* (Qld), the *Childrens Court Act 1992* (Qld) and the requirements of dealing with children. Of particular concern to this respondent was the fact that old system justices of the peace - for whom there is no training requirement - are still able to constitute a Childrens Court.

(h) The Commission's preliminary view

(i) Jurisdiction in criminal matters

The Commission notes that, in constituting a Childrens Court in its criminal jurisdiction, justices of the peace are already limited to:[1070]

- sentencing a child[1071] 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).

1067 *Child Welfare Act 1947* (WA) s 146A.

1068 Submission 106.

1069 Submission 37.

1070 *Juvenile Justice Act 1992* (Qld) s 54.

1071 See pp 187-188 of this Discussion Paper.

The Commission also notes that justices of the peace may not make a detention order or an immediate release order.[1072]

Subject to one qualification, the Commission is of the view that, having regard to the limitations that currently apply to the powers that may be exercised by justices of the peace sitting as a Childrens Court, it is appropriate for justices of the peace to retain their present powers in this regard. This view is consistent with the Commission's approach in relation to the sentencing of adult defendants and the making of procedural orders generally.[1073]

In relation to adult defendants, the Commission recommended that justices of the peace should have the power to sentence only when, among other factors, both the prosecutor and the defendant agree to the matter being dealt with by justices of the peace. The Commission considers that that principle should also apply to the sentencing of a child.[1074] However, because of a concern about the capacity of the child to make this decision, the Commission is of the view 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.

(ii) Jurisdiction in non-criminal matters

The Commission is of 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 under the *Children's Services Act 1965* (Qld) for the temporary care and protection or the temporary care and control of a child. However, the Commission is of the view that it should not be necessary for justices of the peace to hear an application for a final order, and that justices of the peace should not have the power to make a final order. The making of a final order should be restricted to a magistrate.

10. PERSONS WHO SHOULD EXERCISE THESE VARIOUS COURT POWERS

(a) Introduction

At present, justices of the peace (magistrates court) and justices of the peace

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1072 *Juvenile Justice Act 1992* (Qld) s 54(2).

1073 See pp 157-163 and 185-186 of this Discussion Paper.

1074 For an example of a provision of the kind suggested, see cl 8 of the *Audio Visual and Audio Links Amendment Bill 1999* (Qld), which proposes an amendment to the *Juvenile Justice Act 1992* (Qld) 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 link.

(qualified) both have the power to constitute a court for various purposes, the latter category being restricted to "taking or making a procedural action or order".[1075]

In the light of the Commission's preliminary view that justices of the peace should continue to exercise particular court powers, it is necessary to consider the category or categories of persons on whom those powers should be conferred.

(b) Issues Paper

In the Issues Paper,[1076] the Commission sought submissions on whether, to the extent that magistrates may not be able to meet the needs of a particular locality in relation to the exercise of these court powers, it would be more appropriate for the powers to be exercised by:

- a court official, for example, the clerk of the court of a Magistrates Court, rather than by a justice of the peace who does not work within the court system; or

- a barrister or solicitor practising in the area who has no connection with the case.

(c) Submissions

Two respondents were strongly of the view that the exercise of court powers should be restricted to the clerk of the court.[1077] One of these respondents, himself a justice of the peace (qualified), commented:[1078]

> 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. If a situation such as is posed existed you could be fairly certain that any Justice of the Peace servicing the locality would have little occasion to gain experience in carrying out these duties.

A number of other respondents were of the view that court powers should be exercised

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1075 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

1076 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 71.

1077 Submissions 7, 110.

1078 Submission 7.

by a clerk of the court or another court officer.[1079] One respondent was of the view that a justice of the peace from outside the court should be used only if no court officer was available.[1080]

Another respondent commented:[1081]

> 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.
>
> 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 respondent who is a clerk of the court at a Magistrates Court acknowledged that he has sometimes had to call on a justice of the peace who is not employed at the Court, but did not consider this to be the ideal situation:[1082]

> Justices of the Peace (Magistrates Court) external to Magistrates Courts Offices will rarely, *if ever*, receive the experience which is necessary to fully develop their skills. I opine that these difficulties result in a poor *investment in training to maintenance of competency* ratio.
>
> The only practical hope for an effective, efficient and properly qualified alternative to an absent magistrate are full-time professionals within magistrates courts. [original emphasis]

Several other respondents also expressed a concern about whether justices of the peace had the necessary expertise to constitute a court.[1083] One respondent was of the view that justices of the peace (qualified) should not be able to exercise any bench duties.[1084]

A number of respondents considered that it was appropriate for a clerk of the court to

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1079 Submissions 3, 8, 39, 42, 47, 48, 51, 70, 93, 94, 95, 96, 114, 120. This was also the view of the majority of justices of the peace (magistrates court) who responded to the questionnaire distributed to them: Q1, Q2, Q3, Q6, Q7, Q8, Q10, Q11, Q13, Q14, Q15, Q16, Q19, Q21, Q22, Q23, Q24, Q25, Q27, Q28, Q30, Q31, Q32, Q33, Q34, Q36, Q38, Q41, Q42, Q43, Q45, Q46, Q47, Q48, Q49, Q50, Q54, Q55, Q56, Q57, Q59, Q60, Q61, Q63, Q65, Q66, Q67, Q68, Q69, Q70, Q71, Q72, Q74, Q75, Q77, Q82, Q83, Q84, Q85, Q87, Q88, Q89, Q93, Q95, Q96, Q97, Q98, Q99, Q100, Q103, Q104, Q107, Q108, Q110, Q113, Q114, Q116, Q118, Q119, Q120, Q121, Q123, Q125, Q126, Q127, Q128, Q132, Q133.

1080 Submission 38.

1081 Submission 40.

1082 Submission 116.

1083 Submissions 95, 97, 120.

1084 Submission 43.

constitute a court with a justice of the peace external to the court.[1085]

On the other hand, a number of respondents were opposed to the use of a court officer[1086] and favoured a justice of the peace who was not employed at a Magistrates Court.[1087] Some of these respondents were of the view that a court officer was not as independent or impartial as a justice of the peace from outside the court.[1088]

A number of submissions addressed the question of using a barrister or solicitor to constitute a court. Although there was some support for that suggestion,[1089] most respondents to the Issues Paper who addressed this issue were opposed to the concept.[1090]

Several respondents were of the view that this would not be a viable proposition as there are few, if any, legal practitioners in the areas where justices of the peace are needed to perform these duties.[1091] Other respondents were concerned about the cost of such a proposal, as they did not think that this was a role that would be likely to be undertaken without remuneration.[1092]

The main concern raised, however, related to whether a legal practitioner was sufficiently independent to perform this role, or would be seen as such. A number of submissions suggested that a legal practitioner was not independent and could have a conflict of interest in undertaking such a role.[1093]

One respondent commented:[1094]

> In so far as a barrister or solicitor being called upon to perform these duties, it may be that

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1085 Submissions 8, 41, 50, 67, 92, 98.

1086 Submissions 11, 88, 117.

1087 Submissions 5, 10, 12, 19, 33, 35, 49, 57, 61, 65, 87, 93. This view was also shared by a number of justices of peace (magistrates court) who responded to the questionnaire distributed to them: Q9, Q17, Q37, Q52, Q53, Q64, Q79, Q81, Q86, Q91, Q106, Q109, Q111, Q112, Q117, Q129, Q130, Q131.

1088 Submissions 5, 11, 57, 88.

1089 Submissions 3, 30, 41, 47, 48, 92, 98; Q26, Q35, Q46, Q51, Q62, Q73, Q78, Q90, Q105, Q126, Q133.

1090 Submissions 1A, 7, 10, 11, 40, 43, 49, 50, 57, 61, 67, 70, 88, 94, 105, 117, 120.

1091 Submissions 10, 50, 57, 117, 120; Q9, Q92.

1092 Submissions 19, 41, 47, 50, 94; Q9.

1093 Submissions 7, 11, 49, 61, 67, 70, 88.

1094 Submission 7.

> such a person would be competent to do so, but 'Justice must not only be done, it must be seen to be done'. It is my contention that it would be as difficult for a barrister or solicitor to be convincing in his impartiality as it would be for a police officer called on to perform the same duty. Further, I doubt that a solicitor or barrister would want to be placed in that position.

Another respondent commented:[1095]

> I consider the use of both of these categories of people [court officers and legal practitioners] to be inappropriate, on the grounds that they lack the appearance of impartiality, and barristers, who are often in adversarial roles in a court room, should not step up to the bench, unless it be permanently.

(d) The Commission's preliminary view

As noted earlier, justices of the peace (magistrates court) and justices of the peace (qualified) both have the power to constitute a court for various purposes, as do old system justices of the peace. Although the Commission has identified a number of purposes for which justices of the peace should be able to constitute a court, the question remains as to which categories of justices of the peace should be authorised to do so.

Justices of the peace (qualified) did not constitute a Magistrates Court for any purpose at any of the Magistrates Courts surveyed by the Commission during March and April 1998.[1096] In three of the four Courts surveyed, the Courts were constituted, on all occasions when justices of the peace heard matters, by justices of the peace (magistrates court) who were employed at the Court.[1097] To the extent that justices of the peace heard matters in the fourth Court,[1098] the Court was constituted during one of the two months of the survey by a justice of the peace who was employed at the Court and by an old system justice of the peace. During the other month, it too was constituted by two Court-employed justices of the peace (magistrates court).

Further, although the Commission received 75 submissions from justices of the peace (qualified), none of those respondents indicated that they had ever performed any bench duties.

Although the court powers of justices of the peace (qualified) are limited to "taking or making a procedural action or order",[1099] the Commission is not satisfied that there is

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1095 Submission 88.

1096 See p 139 of this Discussion Paper.

1097 Magistrates Courts at Innisfail, Proserpine and Mount Isa.

1098 The Gladstone Magistrates Court.

1099 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3).

a demonstrated need for justices of the peace (qualified) to retain even these more limited powers. As noted earlier in this Discussion Paper, the Commission considers it undesirable for powers that are not exercised by justices of the peace to remain vested in them.[1100] The infrequent exercise of court powers makes it less likely that justices of the peace will develop the necessary experience and expertise in the exercise of those powers. This could lead to a lack of consistency in the decisions made by justices of the peace when constituting a Court.

Further, if large numbers of justices of the peace are, at least theoretically, authorised to exercise a range of court powers, it makes it virtually impossible to keep all of them up to date with the frequent developments in the relevant law and procedure. The Commission considers 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.

For these reasons, the Commission is of the view that the exercise of court powers should be restricted to justices of the peace (magistrates courts). Justices of the peace (qualified) and old system justices of the peace should not be able to exercise these powers. The Commission is also of the view that, for the reasons expressed in Chapters 5, 6 and 7,[1101] 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 is not aware of this ever having occurred, the Commission does not believe that it is appropriate for this issue to be addressed only by Queensland Police Service policy.

The submissions received by the Commission were fairly evenly divided on the question 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 from the wider community.

The Commission agrees with those submissions that suggested that, in these circumstances, it was most appropriate for the Court to be constituted by justices of the peace who are clerks of the court of a Magistrates Court or are employed at a Magistrates Court. The Commission considers 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 called upon to exercise various court powers.

The Commission does not accept the force of those submissions that were opposed to the use of justices of the peace who are staff members at a Magistrates Court. The Commission is not satisfied that there is any basis for the suggestion that justices of the peace who are court officers are not as independent or impartial as justices of the peace from the wider community.

1100 See p 27 of this Discussion Paper.

1101 See pp 93, 115 and 127 of this Discussion Paper.

In fact, the Commission considered whether, in view of their greater experience, the exercise of court powers should be restricted to justices of the peace (magistrates court) who are staff members at a Magistrates Court. However, the Commission is aware that, in some communities, the number of court staff is very small and, consequently, there may be a need in those communities for a justice of the peace (magistrates court) from the wider community to constitute the Court with the clerk of the court or another justice of the peace (magistrates court) who is a staff member at the Court.

Accordingly, although the Commission is of the view that the exercise of court powers should be restricted to justices of the peace (magistrates court), it does 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.

In light of this decision, the Commission does not consider it necessary to give further consideration to the question whether barristers or solicitors should be able to constitute a Magistrates Court for various purposes.

11. 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 significant 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 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 that the court must be constituted by a magistrate, rather than by justices of the peace, if a magistrate is present and available.

In light of the Commission's preliminary views in relation to the various purposes for which justices of the peace should be able to constitute a court, the Commission does not consider it necessary to recommend any changes to section 30 of the *Justices Act 1886* (Qld).

12. POTENTIAL FOR USE OF TECHNOLOGY

(a) Present resources

Although the Magistrates Court at Brisbane has a video link to the Arthur Gorrie Correctional Centre,[1102] it is not equipped to deal with remote courts by video link.[1103] 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. Whether that may be possible at some time in the future is ultimately a question of resources. In Western Australia, the Justice of the Peace Review Committee made the following comment about the impact of resourcing on the potential for reform of the role of justices of the peace:[1104]

> ... if Western Australia had a more structured form of electronic communication for court administration then many of the powers within the jurisdiction of Justices of the Peace could be dealt with by Stipendiary Magistrates. However, it is accepted that this is a resource issue.

At present, however, the means of communication between Magistrates Courts consist of telephones and facsimiles.

(b) Submissions

Although a number of the submissions were generally in favour of the use of video link technology,[1105] a number of submissions expressed the view that the frequency of use of such facilities would not warrant the expense involved in putting the necessary infrastructure in place.[1106]

A large number of submissions either opposed, or raised concerns about, the use of technology as a substitute for people appearing personally in court.[1107] The main concerns expressed were:

1102 See pp 28-29 of this Discussion Paper.

1103 Submission 110 (Chief Stipendiary Magistrate).

1104 The Justice of the Peace Review Committee (WA), *Report on Justices of the Peace and Commissioners for Declarations in Western Australia* (1994) at 29.

1105 Submissions 19, 30, 38, 39, 42, 47, 48, 50, 51, 65, 91, 95.

1106 Submissions 1A, 6, 7, 21, 34, 114.

1107 Submissions 9, 11, 28, 31, 36, 40, 41, 49, 54, 67, 69, 88, 92, 96, 98, 105.

- the loss of human contact,[1108] with some respondents suggesting that it would be dehumanising[1109] and inappropriate for people to be sentenced in this way;[1110]
- the great cost involved;[1111]
- the unreliability of the equipment;[1112]
- the unavailability of people qualified to operate and maintain the equipment;[1113] and
- the security and confidentiality issues involved.[1114]

The views of those who were opposed to the use of video links with a magistrate at another Court are summarised in this submission from a clerk of the court at a Magistrates Court:[1115]

> Yes, of course matters *could* be heard in this way.
>
> There are, however, some concerns which militate against these methods of providing the services of judicial officers to small communities:
>
> - In the case of telephone link, the parties not present with each other (eg magistrate/defendant, magistrate/prosecutor &c) are each faceless to the other/s. How would you feel to have justice meted out by a disembodied voice from a conference pad or 'phone.
> - Video conferencing, whilst an improvement, does not convey appropriate levels of decorum or authority to the functions of the court. Subtleties and nuances unmistakeably present in personal dealings may be lost over the link. An admonishment delivered from afar could not possibly carry the same weight as one delivered personally.
> - Cost: Whilst teleconference facilities are relatively inexpensive, in my view they are not acceptable. Video conferencing is rather expensive. In small communities which are less accessible to the magistrate, telecommunications

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1108 Submissions 1A, 10, 28, 33, 36, 40, 41, 57, 60, 66, 69, 88, 103, 114.

1109 Submissions 41, 60.

1110 Submission 105.

1111 Submissions 1A, 6, 7, 21, 34, 40, 49, 55, 61, 67, 92, 93, 98, 105, 120.

1112 Submissions 92, 93, 98, 103.

1113 Submissions 8, 112.

1114 Submissions 33, 47, 60.

1115 Q70.

infrastructure is often unsuitable and the facilities for the care and maintenance of the video equipment may not be present at all.

- ... I personally believe (and I am confident that the community believes) we are entitled to the physical presence of our judicial officer/s or at least a personal appearance before our judicial officer/s.

Several submissions made the point that, even if the technology were available, it may still be difficult to organise a magistrate to hear the matter. One justice of the peace (magistrates court) said that magistrates would already be conducting court in their own centres.[1116] Another suggested that, for this system to work, it would be necessary to appoint more magistrates.[1117]

(c) The Commission's preliminary view

The Commission is of the view that, in light of its approach in relation to the different types of matters that should be able to be heard by justices of the peace, it is unnecessary to give further consideration to the question of using technology to enable a matter to be heard by a magistrate in another part of the State.

If, however, that question is to be reviewed in the future, the Commission is of the view that it would be more appropriate for the question to be considered in the context of a specific review about the use of technology in the courts, rather than in the context of a review that is primarily concerned with the powers of justices of the peace.

13. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations about the powers of justices of the peace when constituting a court:

Justices of the peace who may constitute a court

- **Only justices of the peace (magistrates court) should have the power to constitute a court.**

Hearing and determining a charge

1116 Q99.

1117 Submission 114.

- **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) who are sentencing a defendant 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.**

Conducting an examination of witnesses (conducting a committal hearing)

- **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.**

Procedural orders

- **Justices of the peace (magistrates court) should retain:**

  (a) the power to make various procedural orders - for example, adjourning a matter, remanding a defendant, and hearing bail applications; and

  (b) the power to make the types of orders permitted under section 4(3) of the *Domestic Violence (Family Protection) Act 1989* (Qld).

Constituting a Childrens Court: criminal jurisdiction

- **Justices of the peace (magistrates court) should retain the power to constitute a Childrens Court:**

  (a) subject to the present limitations contained in the *Juvenile Justice Act 1992* (Qld),[1118] 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).

[1118] See pp 187-188 of this Discussion Paper.

Constituting a Childrens Court: non-criminal jurisdiction

- **Justices of the peace (magistrates court) should retain the power to constitute a 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 a Magistrates Court making a final order for the care and protection or care and control of a child must be constituted by a magistrate.**

CHAPTER 10

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

1. INTRODUCTION

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.[1119]

Other Queensland legislation, however, 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 that defendant, whereas other justices of the peace (magistrates court) do not have any jurisdiction in relation to those offences.

- 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 charges, even where a defendant pleads not guilty, whereas justices of the peace (magistrates court) who constitute a Magistrates Court may only hear charges where a defendant pleads guilty.

These powers are discussed below.

2. RECENT DEVELOPMENTS IN ABORIGINAL, TORRES STRAIT ISLANDER AND REMOTE COMMUNITIES

(a) 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

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[1119] See pp 11-18 of this Discussion Paper.

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:[1120]

> 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 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.

(b) 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)[1121] 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 certain justices of the peace may, in limited circumstances, constitute a Magistrates Court for the purpose of dealing summarily with an indictable offence under Chapter 58A of the Code.[1122] The jurisdiction of these justices of the peace in relation to such an offence is limited in that:[1123]

1120 Explanatory Notes to the *Aboriginal, Torres Strait Island and Remote Communities (Justice Initiatives) Amendment Bill 1997* (Qld) at 3.

1121 S 552C was inserted by s 96 of the *Criminal Law Amendment Act 1997* (Qld).

1122 *Criminal Code* (Qld) s 552C(1).

1123 *Criminal Code* (Qld) ss 552C(2), 552H(1)(b).

- 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 units[1124] 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.

(c) 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 the person has "appropriate qualifications".[1125]

The justice of the peace (magistrates court) may be appointed by the Attorney-General for a place specified in a gazette notice.[1126] The notice may specify a place appointed for holding a Magistrates Court only if:[1127]

- the place is within a trust area under the *Community Services (Aborigines) Act 1984* (Qld) or the *Community Services (Torres Strait) Act 1984* (Qld); 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).[1128] 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);

1124 See note 832 of this Discussion Paper.

1125 *Criminal Code* (Qld) s 552C(4).

1126 *Criminal Code* (Qld) s 552C(3).

1127 *Criminal Code* (Qld) s 552C(5).

1128 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).

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.

(d) The current pilot projects

It is intended that the Magistrates Courts constituted by justices of the peace in Aboriginal and Torres Strait Islander communities will have a high level of support from their supervising Magistrates Court registry:[1129]

> 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:[1130]

> 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.[1131] The experience at Bamaga has been described as follows:[1132]

1129 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.

1130 Id at 9-10.

1131 Information provided by the Justices of the Peace Branch, Department of Justice and Attorney-General (Qld) (May 1999).

1132 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) Court* (August 1998) at 84.

> 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.

3. ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITY COURTS

(a) 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.[1133] The Acts further provide that the Governor in Council may approve an Aboriginal Council and an Island Council to govern trust areas[1134] under each Act.[1135] There are 31 Aboriginal or Torres Strait Islander communities governed by these two Acts.[1136]

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.[1137] For that purpose, Councils may make by-laws[1138] 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 supply, housing and welfare

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1133 *Community Services (Aborigines) Act 1984* (Qld) s 15; *Community Services (Torres Strait) Act 1984* (Qld) s 15.

1134 "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).

1135 *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).

1136 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.

1137 *Community Services (Aborigines) Act 1984* (Qld) s 25(1); *Community Services (Torres Strait) Act 1984* (Qld) s 23(1).

1138 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).

of the area.[1139] A by-law of a Council may impose a penalty in respect of any breach of a by-law of up to $500 or not more than $50 per day.[1140]

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.[1141] For this purpose, a "justice of the peace" is defined to mean:[1142]

- 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;[1143] or
- a justice of the peace (magistrates court).

These Courts are referred to in this chapter as "Community Courts".

(b) Jurisdiction of a Community Court

A Community Court has jurisdiction to hear and determine the following matters:[1144]

- 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 areas as a matter rightly governed by the usages and customs of that community; and

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1139 *Community Services (Aborigines) Act 1984* (Qld) s 25(2)(a); *Community Services (Torres Strait) Act 1984* (Qld) s 23(2)(a).

1140 *Community Services (Aborigines) Act 1984* (Qld) s 25(6); *Community Services (Torres Strait) Act 1984* (Qld) s 23(6).

1141 *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: *Community Services (Aborigines) Act 1984* (Qld) s 42(2)(b); *Community Services (Torres Strait) Act 1984* (Qld) s 40(2)(b).

1142 *Community Services (Aborigines) Act 1984* (Qld) s 42(4); *Community Services (Torres Strait) Act 1984* (Qld) s 40(4).

1143 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

1144 *Community Services (Aborigines) Act 1984* (Qld) s 43(2); *Community Services (Torres Strait) Act 1984* (Qld) s 41(2).

(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:[1145]

> 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.

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 brought in Community Courts includes common assault, vandalism, stealing and disorderly conduct.[1146] The decision as to whether a matter is prosecuted in a Community Court or a Magistrates Court is usually made by the Officer in Charge of the State Police Service covering the particular community.[1147]

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 of the peace (magistrates court) do not apply where the justice of the peace is sitting on a Community Court.[1148] 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.

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.[1149]

1145 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.

1146 Id at 59, 67.

1147 Id at 25.

1148 *Community Services (Aborigines) Act 1984* (Qld) s 42(5); *Community Services (Torres Strait) Act 1984* (Qld) s 40(5).

1149 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.

(c) Differences between Magistrates Courts constituted by justices of the peace and Community Courts

The following differences have been identified between a Magistrates Court constituted by two justices of the peace and Community Courts:[1150]

	Magistrates Court	Community Court
Membership	2 Justices of the Peace (Magistrates Court)	2 Justices of the Peace (Magistrates Court) Must be Aboriginal or Torres Strait Islander resident
Guilty pleas	Can hear and determine	Can hear and determine
Not guilty pleas	Must adjourn for the Stipendiary Magistrate	Can hear and determine
Offences	Criminal Code etc By-laws	By-laws only
Sentencing options	Fine and Fine Option Orders Imprisonment Community Service Orders Intensive Correction Orders	Fine and Fine Option Orders only
Procedure	Magistrates Court *Justices Act*	Magistrates Court *Justices Act*
Jurisdiction	Magistrates Court District	DOGIT only[1151]
Clerk of Court	Police Sergeant or a delegated Officer	Council Employee
Matters regarding juveniles	Can hear and determine where there is a guilty plea but must remand on a not guilty plea to the Circuit Stipendiary Magistrate who convenes a Childrens Court	Cannot be dealt with in a Community Court

1150 Id at 22 (note added).

1151 "DOGIT" is the abbreviation for Deeds of Grant in Trust: see 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 6.

(d) Review of Aboriginal and Torres Strait Islander Community Courts

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. 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.[1152]

The stated objective of the review and its methodology were as follows:[1153]

> ... to critically examine the jurisdiction and effectiveness of Community Courts and their interaction with justice mechanisms such as Justice Groups, Police, JP Magistrates Courts and Circuit Courts. The methodology for the review was underpinned by extensive consultation in a broad cross-section of communities, Indigenous Community residents, officers from local and state government, justice and court related and welfare agency staff and volunteers all contributed to the review.

The review team consulted with nineteen separate communities. These were ten Aboriginal communities in trust areas, seven Torres Strait Islander communities in trust areas, and the communities of Mornington Island and Thursday Island, which are not in trust areas.

As noted above, Community Courts are now operating in only a few communities.[1154] The Report of the Community Council Support Branch of the Department of Aboriginal and Torres Strait Islander Policy and Development identified a number of factors that it considered had contributed to the decline in usage of Community Courts:

- inadequate training, lack of support and resources;[1155]
- the absence of any formal training or standardised records systems for the keeping of Court records by the Council-appointed clerks of the Community Courts;[1156]
- the erosion of the public perception of “legitimacy” of the Community Courts. Between 1992 and 1997, a concern arose about the legality of orders made by

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1152 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).

1153 Id at 7.

1154 See p 216 of this Discussion Paper.

1155 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.

1156 Id at 35.

> the Community Courts. This culminated in a directive from the Queensland Police Service in June 1997 to cease executing warrants. Although the situation was subsequently remedied by legislation, the review team was of the view that this situation tarnished the perception of the Community Courts.[1157]

Of particular concern was the fact that, unlike Magistrates Courts constituted by justices of the peace (magistrates courts), Community Courts have jurisdiction to hear trials of defended matters:[1158]

> Because of existing legislative provisions, such a trial must be in accordance with the provisions of the *Justices Act 1886*. The consequences of this are that formal Magistrates Court procedures have to be followed, and the strict rules of evidence have to be observed. This is an onerous task for JPs with only basic training, no legal background, and in many cases only limited education. Essentially, in cases where the defendant has pleaded "not guilty", the JPs are required to perform the functions of a Stipendiary Magistrate. It is unlikely that JPs with their lack of legal knowledge and limited training will be able to meet all the requirements of a *Justices Act* trial. Furthermore, these technical requirements are not appropriate in the light of the community court's intended function as a culturally appropriate mechanism for dealing with minor law and order matters on Indigenous communities.

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.[1159]

4. ISSUES PAPER

In the Issues Paper,[1160] the Commission sought submissions on the following question about the exercise by justices of the peace of court powers:

> Is there a special case in Aboriginal and Torres Strait Islander communities for having Aboriginal and Torres Strait Islander justices of the peace exercise these powers?

5. SUBMISSIONS

1157 Id at 30.

1158 Id at 36.

1159 Id at 46.

1160 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 71.

A large number of respondents to the questionnaire distributed to justices of the peace (magistrates court) supported the use of courts constituted by justices of the peace in Aboriginal and Torres Strait Islander communities,[1161] as did a large number of respondents to the Issues Paper.[1162]

On the other hand, many of the respondents to the questionnaire distributed to justices of the peace (magistrates court) were of the view that there was not a special case for having justices of the peace constitute courts in Aboriginal and Torres Strait Islander communities.[1163] This view was shared by several of the respondents to the Issues Paper.[1164] A few respondents expressed a concern about what they perceived as a "second stream of the legal system".[1165] One respondent was of the view that an Aboriginal or Torres Strait Islander community was just another remote community, and that there was not a special case for justices of the peace in those communities having different powers from justices of the peace generally.[1166]

The Indigenous Advisory Council supported the continuing use of justices of the peace in Aboriginal and Torres Strait Islander communities.[1167]

> The Indigenous Advisory Council affirms that there is a continued role for JPs in Queensland, at least in Aboriginal and Torres Strait Islander communities. Whilst it is appreciated that magistrates may be able to fulfil the necessary functions, either by regular visits to communities or through use of technology, there would still be good reasons for trained local people to serve as JPs. These reasons ... have to do with both efficiency and community ownership of the justice process ...

It did not consider the use of technology to be a viable alternative in those communities to appearing personally before the court:[1168]

> The use of technology to enable cases to be heard by magistrates from other parts of the

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1161 Q2, Q7, Q9, Q13, Q16, Q17, Q19, Q20, Q26, Q27, Q28, Q31, Q34, Q37, Q39, Q44, Q46, Q51, Q52, Q53, Q58, Q60, Q62, Q63, Q64, Q66, Q68, Q69, Q71, Q77, Q81, Q84, Q86, Q87, Q90, Q91, Q93, Q96, Q101, Q103, Q106, Q108, Q109, Q111, Q112, Q114, Q115, Q117, Q122, Q124, Q125, Q126, Q129, Q133.

1162 Submissions 3, 6, 9, 12, 22, 30, 31, 38, 40, 41, 42, 43, 47, 48, 49, 51, 55, 57, 61, 62, 63, 65, 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 88, 92, 93, 94, 96, 98. 99, 105, 111, 112, 114, 117, 122. See p 3 of this Discussion Paper for a breakdown of respondents.

1163 Q5, Q10, Q12, Q15, Q22, Q23, Q25, Q32, Q33, Q35, Q36, Q38, Q40, Q42, Q45, Q49, Q50, Q54, Q55, Q65, Q67, Q76, Q83, Q89, Q95, Q105, Q110, Q116, Q128, Q130, Q132.

1164 Submissions 8, 10, 39, 110, 120.

1165 Submissions 8, 120; Q56, Q118.

1166 Submission 39.

1167 Submission 112.

1168 Ibid.

> State may in certain situations be an efficient and effective way of administering justice, although the remoteness and lack of facilities and expertise in Indigenous communities may make this technology, at least for the present, an uneconomic and unworkable proposition; also not every community will necessarily accept such technology as a proper alternative to personal appearance.

The Council acknowledged that there might be instances where it was more appropriate for a magistrate, rather than justices of the peace, to hear a matter:[1169]

> This will be so, for example, in cases requiring a greater knowledge of law and capacity to make judicial decisions than could be expected of a JP. It might also be so in highly contentious cases where a person from outside the local community might supply the necessary objectivity.

As a general principle, however, the Council's preference was for justice to be administered in indigenous communities by appropriately qualified people from within those communities, and advanced the following reasons for this preference:[1170]

- local JPs are more likely to be aware of the relevant cultural factors and other special circumstances surrounding cases in their area, and are therefore more likely to be able to make appropriate decisions;
- language difficulties are minimised by the use of local JPs;
- decisions made by a local JP are more likely to be understood and accepted by the community including offenders; and
- this understanding and acceptance will give greater community ownership of the justice process, leading to more effective rehabilitation and crime prevention.

Similar reasons were advanced by the Department of Families, Youth and Community Care for having Aboriginal and Torres Strait Islander justices of the peace constitute courts.[1171]

The Indigenous Advisory Council was of the view that, in light of the fact that the current pilots had not yet run their course and there had not been sufficient time to evaluate the results, the current arrangements in Aboriginal and Torres Strait Islander communities should not be disturbed at present.[1172]

The Queensland Law Society expressed a similar view, suggesting that a decision on the question of the role of justices of the peace in Aboriginal and Torres Strait Islander communities should be made after considering the results of the pilot projects that are

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1169 Ibid.

1170 Ibid.

1171 Submission 111.

1172 Submission 112.

currently in place.[1173]

6. THE COMMISSION'S PRELIMINARY VIEW

The pilot projects that are being conducted in Aboriginal, Torres Strait Islander and remote communities using justices of the peace to constitute Magistrates Courts are still in their relative infancy. It will obviously take some time before an evaluation of the projects can determine matters such as the effect of the projects on the level of crime and the extent to which there has been a reduction in recidivism in those communities. The Commission notes that the pilot projects include an evaluation of their achievements.[1174]

It is the preliminary view of the Commission that it would be premature at this stage to attempt to evaluate the results of the pilot projects. Further, as evaluations of the pilot projects are intended to be conducted by other bodies, it would also be a duplication of effort for the Commission to undertake an evaluation of the pilot projects in this review.

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

1173 Submission 95.

1174 See Department of Justice and Attorney-General (Qld), *Aboriginal and Torres Strait Islander Communities: Profile - Justices of the Peace (Magistrates Court) Training and Instituting Court Sittings in Remote Communities* (February 1999) at 9-10.

CHAPTER 11

SAFEGUARDS

1. INTRODUCTION

If justices of the peace are to continue to exercise a number of significant powers, it is important to consider what safeguards can be built into the system to ensure, as far as possible, that their powers are properly exercised, and are not subject to abuse.

2. ISSUES PAPER

In the Issues Paper,[1175] the Commission sought submissions on the following questions in relation to possible safeguards for the exercise by justices of the peace of various powers:

- What, if any, safeguards should be implemented to ensure that the powers of justices of the peace are properly exercised?

- What changes could be made to the system to enhance the independence of justices of the peace? For example, in relation to powers such as the issuing of warrants or the attendance at juvenile interviews, could a rolling roster of justices of the peace be implemented, to avoid the situation where there can be a suggestion that certain justices of the peace are being cultivated by some police officers?

3. SUBMISSIONS

(a) Training

A significant number of respondents nominated training and, in particular, ongoing training, as one of the most important safeguards against the improper exercise of various powers by justices of the peace.[1176] The Indigenous Advisory Council commented:[1177]

1175 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 77.

1176 Submissions 3, 6, 7, 12, 21, 28, 30, 33, 35, 36, 38, 39, 40, 43, 47, 48, 49, 54, 60, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 91, 92, 93, 95, 96, 97, 98, 103, 112, 120. See p 3 of this Discussion Paper for a breakdown of respondents.

1177 Submission 112.

> Improper exercise of powers may ... occur simply through lack of knowledge. Ongoing training and competence assessment is therefore highly recommended.

The issue of training is discussed in more detail in Chapter 12.

(b) Rotational use of justices of the peace

A number of submissions addressed the issue of a rolling roster, or the rotational use of justices of the peace. The submissions were generally supportive of this practice.[1178] In fact, a number of respondents advised that this practice is being employed by the police in a number of locations and is working well.[1179] One respondent commented:[1180]

> I believe that the example given as an illustration of the police cultivating some JP's to be very accurate. The rolling roster is being utilised in some areas I understand and it appears to be of considerable benefit in overcoming the negation of the independence of JPs.

The Criminal Justice Commission advised that it is already Queensland Police Service policy that officers should utilise justices of the peace and commissioners for declarations in their area on a rotational basis where possible.[1181] It advised that it has been informed that, for various reasons, this policy is not always followed:[1182]

> The CJC has been advised by one police officer that some police officers do not always follow the QPS's policy set out in section 3.9.15 of the QPS OPM [Operational Procedures Manual]. JPs are not always used on a rotational basis and some police officers are not even aware that a complete list of the names, addresses and qualifications of all Queensland JPs is available (in electronic format) on the QPS Bulletin Board.
>
> This police officer advised the CJC that he and his fellow officers at a particular station each have a list of four JPs who are regularly used for matters such as warrants, summonses and police interviews. He pointed out that his list of "preferred JPs" is comprised of people who are prepared to make themselves available to the police and who fully understand how to exercise the powers and responsibilities of a JP. He argued that it would be inefficient to use JPs on a rotational basis because some JPs do not wish to be called upon by the police and others do not have the skills and knowledge to deal with matters such as warrants, summonses and police interviews. He suggested that the use of JPs who are prepared to "rubber-stamp" documents has diminished because police officers have realised that, ultimately, it is their responsibility to ensure that documents such as search warrants 'stand up in court.' This police officer did concede that some JPs who are regularly used by police officers 'start to feel as if they are a part of the QPS

1178 Submissions 5, 7, 9, 11, 21, 30, 31, 33, 34, 35, 36, 38, 40, 41, 43, 47, 48, 49, 50, 53, 54, 60, 69, 88, 93, 94, 97, 103, 105, 112, 120.

1179 Submissions 41, 50, 97.

1180 Submission 41.

1181 Submission 113.

1182 Ibid.

> system and can become biased towards prosecutors.'

The Criminal Justice Commission suggested that, if the Queensland Police Service policy were strictly enforced, there would be less scope for police officers to cultivate "their own" justices of the peace. The Commission qualified this comment in one important respect. It stated that it did not believe that police officers should be forced to use "untrained, incompetent and/or unwilling" justices of the peace. In particular, it did not believe that police officers should be required to use old system justices of the peace.

Several other respondents thought that there could be some problems with the rotational use of justices of the peace. One respondent thought that, because many justices of the peace do not want to fulfil any duties, a rolling roster could be unworkable.[1183] The Indigenous Advisory Council advised that, although it generally supported the concept, its effectiveness may be limited in communities where there are relatively few justices of the peace.[1184]

(c) Other safeguards

A number of other possible safeguards were raised by the submissions.

The Criminal Justice Commission suggested that justices of the peace should be monitored in the performance of their duties by, for example, examining a random sample of warrants issued by them.[1185]

Another respondent suggested that justices of the peace should undertake some kind of reporting system so that the Department of Justice and Attorney-General is aware of the activities being carried out.[1186] This respondent was also of the view that justices of the peace should keep records in relation to the powers they exercise.

The Indigenous Advisory Council made the following suggestion:[1187]

> A more effective mechanism in Aboriginal and Torres Strait Islander communities might be review by the community justice groups established under the auspices of the Department of Equity and Fair Trading's Local Justice Initiatives Program.

1183 Submission 70.

1184 Submission 112.

1185 Submission 113.

1186 Submission 60.

1187 Submission 112.

4. THE COMMISSION'S PRELIMINARY VIEW

The Commission agrees with the many respondents who suggested that the training of justices of the peace - both before and after appointment - is an important factor in ensuring that justices of the peace exercise their powers properly. The issue of training is discussed in more detail in Chapter 12 of this Discussion Paper.

The Commission is of the view that it is generally desirable for police officers to use the services of 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 does not consider it necessary to make a preliminary recommendation about this issue. A legislative provision requiring strict adherence to the practice could be difficult to enforce. Further, the Commission is of the view that there must be some flexibility in relation to the selection of justices of the peace for particular tasks, so that the police are not forced to use justices of the peace who are unwilling or, in their opinion, unsuitable for the task.

The Commission does not propose to make preliminary recommendations in relation to the other safeguards suggested by the submissions. In the view of the Commission, it would be difficult to assess the validity of a sample of warrants issued without access to the material supporting the applications for those warrants. As to the suggestion that justices of the peace should report their activities to the Department of Justice and Attorney-General, the Commission does not believe that this would provide any guarantee that the activities undertaken had been carried out properly. Further, the processing of these reports would constitute a considerable administrative burden for the Department.

As the Commission has decided not to make a preliminary recommendation about the powers of justices of the peace in Aboriginal, Torres Strait Islander or remote communities,[1188] the Commission does not consider it appropriate to make such a recommendation in relation to the suggestion made by the Indigenous Advisory Council regarding review by community justice groups.[1189]

[1188] See pp 221-222 of this Discussion Paper.

[1189] See p 225 of this Discussion Paper.

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.[1190]

Section 15(3) of that Act provides that the Governor in Council may appoint as many persons as the Governor in Council thinks fit to be commissioners for declarations.

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.[1191] Application for appointment must be made in the prescribed form.[1192]

(a) Disclosure of convictions[1193]

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"[1194]) has passed since the recording of a conviction against a person, the person is not obliged to disclose the conviction.[1195]

1190 A justice of the peace appointed under this subsection is to be appointed either as a justice of the peace (qualified) or as a justice of the peace (magistrates court): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(2).

1191 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 15(5).

1192 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 4.

1193 The convictions that disqualify a person from appointment are discussed at pp 244-246 of this Discussion Paper.

1194 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).

1195 See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6.

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 committed in Queensland or elsewhere.[1196]

(b) Provision of referee reports

The prescribed forms for persons who have not previously held office require an applicant to provide two referee reports and to nominate a third referee.[1197] 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 forms for persons who have not previously held office require an applicant to be nominated by a person in one of the three following categories:[1198]

- 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

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1196 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A(1).

1197 Application for Appointment as a Commissioner for Declarations - Form 1; Application for Appointment as a Justice of the Peace (Qualified) - Form 2.

1198 Ibid.

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 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 to ascertain whether the applicant is a fit and proper person.[1199] Checks are routinely made with referees and with the Department of Transport, as well as police history checks throughout Australia.

(e) Issues Paper

In the Issues Paper,[1200] the Commission sought submissions on the following questions:

- At present, a person wishing to be appointed as a justice of the peace or a commissioner for declarations generally requires the nomination of his or her member of State Parliament. What purpose does this requirement serve?

- Is this requirement necessary or desirable?

1199 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 5.

1200 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 78.

(f) Submissions

The Commission received a number of submissions about the present requirement for an applicant to be nominated by his or her local member of State Parliament, as well as about other aspects of the appointment process.[1201]

(i) Nomination by member of Parliament

A large number of submissions commented on the present requirement for an applicant to be nominated by a member of Parliament. The submissions were fairly evenly divided on this issue.

Many respondents were of the view that the requirement served no purpose[1202] and was neither necessary nor desirable.[1203] Some respondents commented that applicants are rarely known to their local member.[1204] Other respondents were more critical of this requirement. One respondent commented:[1205]

> 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'.

Another made the following criticism:[1206]

> 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 same way as real estate and salesman's licencing is handled through Consumer Affairs. This eliminates completely any suggestion of influence or bias.

1201 See p 3 of this Discussion Paper for a breakdown of respondents.

1202 Submissions 5, 7, 9, 33, 36, 39, 41, 42, 43, 47, 51, 54, 87, 92, 95.

1203 Submissions 1A, 10, 11, 19, 20, 22, 30, 33, 34, 38, 39, 41, 42, 48, 50, 53, 65, 67, 69, 70, 88, 91, 94, 96, 103, 120.

1204 Submissions 7, 10, 20, 30, 39, 45, 47, 51.

1205 Submission 43.

1206 Submission 91.

On the other hand, a large number of respondents thought the requirement was desirable.[1207] 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.[1208] Another was of the view that a member of Parliament would have access to the needs of his or her electorate.[1209]

One respondent thought that the requirement did no harm:[1210]

> 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!

(ii) Pre-appointment interview

Five respondents were of the view that an applicant for appointment as a justice of the peace or a commissioner for declarations should be interviewed prior to appointment.[1211] It was suggested that this would provide an opportunity to assess the applicant's "skills, understanding and commitment".[1212] One respondent suggested that the interview should be conducted by a panel of practising justices of the peace.[1213]

(iii) Willingness to assume responsibilities of office

Three respondents were of the view that willingness to serve the community should be a requirement of office.[1214] One respondent suggested that, prior to appointment, an applicant should be required to complete a questionnaire about his or her availability to the public and his or her willingness to be listed in the Yellow Pages of the telephone directory and on the Internet.[1215] Another

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1207 Submissions 3, 6, 8, 16, 21, 27, 28, 31, 35, 40, 44, 45, 49, 61, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 93, 97, 105.

1208 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

1209 Submission 21.

1210 Submission 28.

1211 Submissions 8, 38, 42, 70, 88, 90.

1212 Submission 38.

1213 Submission 88.

1214 Submissions 70, 88, 91.

1215 Submission 70. See note 253 of this Discussion Paper in relation to the publication of the contact details of justices of the peace.

respondent suggested that, before being appointed, an applicant should be required to sign an undertaking indicating his or her willingness to carry out the duties of office.[1216]

(iv) Targeting and selection of suitable candidates

The Office of Rural Communities, part of the Queensland Department of Local Government and Planning thought that some consideration should be given to the targeting and selection of justices of the peace who had specific skills, rather than simply making appointments from those who undertake the required training and seek appointment:[1217]

> With Justices of the Peace in rural communities, having the ability to exercise a broad range of powers would be a definite advantage. Some consideration needs to be given to the area of commissioning Justices, in that currently anyone who undertakes the course and meets the criteria can become a Justice of the Peace. It would be beneficial to target specifically the range of skills required to carry out the role of Justice of the Peace, so that those who take on this role have the breadth of experience to cover any situation that may arise, from signing affidavits to attending an interview with a young person.

Another respondent suggested that the selection of justices of the peace and commissioners for declarations should be made through the advisory council.[1218]

(g) The Commission's preliminary view

(i) Disclosure of convictions

The Commission is of the view that the present requirement for applicants to disclose all their convictions for offences - regardless of when they occurred - should be retained. The Commission believes that the decision whether or not to appoint an applicant should be made in the light of the applicant's complete criminal record.[1219]

(ii) Nomination requirements

1216 Submission 88.

1217 Submission 12.

1218 Submission 67. See *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 4. The advisory council consists of members appointed by the Minister. The purpose of the council is to advise the Minister.

1219 See, however, the discussion at pp 250-251 of this Discussion Paper in relation to which convictions should disqualify a person from appointment as a justice of the peace or commissioner for declarations.

As several respondents pointed out, in many cases, an applicant will not be known to the member of Parliament whose nomination is required. In those cases, the nomination cannot serve as any assurance as to the character of the applicant. Moreover, the Commission does not believe that an applicant should have to be known by a member of Parliament in order to be appointed. The Commission considers that any purpose that could be served by this requirement is better served by the present requirements for an applicant to provide reports by referees who have known him or her for at least five years, and for the registrar to make inquiries to ascertain whether the applicant is a fit and proper person.

For these reasons, the Commission is of the view that the present requirement for an applicant to be nominated by his or her member of State Parliament or by a member of any Parliament in Australia should be abolished.

As mentioned earlier, where a person is seeking appointment to carry out duties in a financial institution or a government department, that person must be nominated by either the general manager of the institution or the chief executive of the government department concerned.[1220] The Commission doubts whether, in most cases, the person whose nomination is required would in fact know the applicant personally. The Commission is therefore of the view that this alternative nomination requirement should also be abolished.

(iii) Inquiries as to fitness

The Commission is of the view that the present requirement for the registrar to make inquiries to ascertain whether an applicant is a fit and proper person should be retained. 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.

(iv) Pre-appointment interview

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 considers that that purpose is better served by requiring an applicant to undergo a training course and pass an examination.[1221] To the extent that it is intended to provide an opportunity to assess an applicant's character, the Commission considers that that purpose is better served by the present requirements for an applicant to provide referee reports, and for the registrar to make inquiries to ascertain whether the applicant is a fit and proper

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1220 See pp 228-229 of this Discussion Paper.

1221 See the Commission's recommendations in relation to training at p 267 of this Discussion Paper.

person.

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 does not endorse this suggestion.

(v) Statement of willingness to carry out duties of office

At present, a person must, before performing any of the functions of office as a justice of the peace, take an oath or make an affirmation of allegiance and office.[1222] The person must swear or affirm that he or she "will well and truly serve Her Majesty ... in the office of justice of the peace and do right to all manner of people according to law without fear or favour, affection or ill-will".

Similarly, a person must, before performing any of the functions of office as a commissioner for declarations, take an oath or make an affirmation[1223] to the effect that he or she "will truly and honestly discharge all the duties of a commissioner for declarations according to the best of ... [his or her] knowledge and ability".[1224]

In the view of the Commission, a requirement that applicants must sign a statement or undertaking to perform the duties of office would add little, if anything, to the oaths and affirmations that are required to be taken before performing the duties of office.

While the taking of an oath or the making of an affirmation cannot guarantee that a person will willingly perform the duties of office, the Commission does not consider that a requirement that applicants sign a statement or undertaking before appointment would provide any greater guarantee of their willingness. Generally, however, the Commission considers that it must be assumed that a person who applies for appointment to a voluntary office is willing to carry out the duties of that office.

Consequently, the Commission does not favour a requirement that applicants be required to sign a statement or an undertaking as to their willingness to carry out the duties of office.

(vi) Targeting and selection of suitable candidates

1222 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 20(1).

1223 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 20(5).

1224 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 12.

It is the view of the Commission that the targeting of prospective applicants probably occurs already on an informal basis. For example, one respondent to the Issues Paper advised that she had been encouraged by the police in her area to apply for appointment as a justice of the peace (qualified).[1225]

The Commission does not regard this as an issue requiring legislative reform.

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 -[1226]

(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.[1227] [note added]

The last of these qualifications does not apply to the appointment of a lawyer as a justice of the peace or a commissioner for declarations.[1228]

1225 Submission 89.

1226 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(1).

1227 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 -
> (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.

1228 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2).

In practice, the general requirements for training are:[1229]

- 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; and
- justice of the peace (magistrates court) - applicants are required to undergo training and take 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.[1230] However, this qualification does not apply to an old system justice of the peace who holds office as a result of the transitional provisions contained in the 1991 Act.[1231]

(b) Issues Paper

In the Issues Paper,[1232] the Commission sought submissions on the qualifications that should apply to ensure that justices of the peace and commissioners for declarations are appropriately qualified to exercise particular powers.

(c) Submissions

Several respondents generally supported the retention of the existing qualifications for appointment.[1233] The Commission also received a number of submissions that addressed specific criteria.

(i) Age

A number of submissions referred to the existing age requirement. Three respondents were concerned that the minimum age of eighteen years was too

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1229 Department of Justice and Attorney-General (Qld), *Justice Papers* (No 4, 1995) at 2.

1230 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(1).

1231 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 7(2). See pp 15-18 of this Discussion Paper for a discussion of the transitional provisions of the Act.

1232 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 77.

1233 Submissions 31, 38, 41, 53, 88.

young.[1234] One of these respondents commented:[1235]

> Without denigrating youth, maturity and wisdom come with age and experience. Whereas one would not say that age automatically brings wisdom or experience; however without 'mature age' we could not have the experience required to deal with the vagaries of justice. We do not need vacillators, who are unable to determine a correct solution to a particular problem, albeit caused through lack of experience in the real world.

Another respondent commented:[1236]

> My main concern with the appointing of JPs is the lower age limit of 18 years. ...
>
> I personally feel that justice and life go hand in hand. In that respect experience in every day life contributes immensely to an appreciation of justice.
>
> It seems to me that 18 years of age is too young to charge an appointee with the responsibilities of this volunteer office.

The other submissions that referred to the issue of age raised the possibility of an upper age limit.[1237] One respondent suggested an upper age limit of 75 years,[1238] while four others suggested 70 years.[1239] Two respondents suggested that, if an upper age limit of 70 years were imposed, it should be possible, in a particular case, to extend the appointment if required.[1240]

(ii) Training

A large number of submissions addressed the issue of a training requirement. Only one respondent, who identified himself as an old system justice of the peace, disagreed with the present requirement for persons wishing to be appointed as a justice of the peace (qualified) to pass an examination.[1241] All the other respondents who addressed this issue agreed that a person should have to satisfy a training requirement in order to be eligible for appointment as a

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1234 Submissions 35, 69, 102.

1235 Submission 102.

1236 Submission 69.

1237 Submissions 7, 27, 43, 92, 96, 98.

1238 Submission 7.

1239 Submissions 27, 92, 96, 98.

1240 Submissions 92, 98.

1241 Submission 118.

justice of the peace.[1242] As one respondent observed:[1243]

> The greatest concern I have is not so much the intentional abuse of the position, but rather the unintentional mistakes, oversights, etc that arise where a JP is not experienced in that duty and/or not suitably trained. ...
>
> To safeguard against unprofessional or inappropriate conduct of JPs, it is necessary to put in place a system which encourages those who are serious about the office and discourages those who hold the title but do not respect it!

Many respondents were of the view that, in a number of respects, the present training requirements should be more stringent and should be reviewed.

- A number of respondents thought that it was not enough that applicants wishing to be appointed as justices of the peace (qualified) were required only to pass an examination. They were of the view that it should also be compulsory for them to attend a training course.[1244]

- Several respondents disagreed with the present system whereby applicants wishing to be appointed as commissioners for declarations are not required to undergo any training. They thought that they too should have to undergo a compulsory training course and pass an examination.[1245]

- A number of respondents were critical of the fact that the present examination for potential justices of the peace (qualified) is conducted as an open-book examination.[1246] One respondent commented:[1247]

  > One does not have to be the brightest light on the ferris wheel to pass the open book type exam for JPs. A reading of the index [of the training manual] is enough for some aspirants.

  A similar view was expressed by another respondent:[1248]

  > While I do not claim to be overly intelligent, any person straight off the

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1242 Submissions 1A, 6, 11, 14, 22, 31, 38, 40, 41, 44, 45, 47, 48, 50, 51, 53, 62, 63, 64, 65, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 92, 94, 97, 98, 107, 109, 120.

1243 Submission 53.

1244 Submissions 1A, 14, 38, 40, 45, 51, 64, 65, 67, 92, 97, 98, 107, 109, 120.

1245 Submissions 38, 41, 107.

1246 Submissions 9, 39, 43, 87, 109, 118.

1247 Submission 9.

1248 Submission 109.

street with the manuals could pass with ease.

- One respondent was of the view that the questions in the examination should be more demanding.[1249]

- One respondent thought that the TAFE course was far too short.[1250]

- Several respondents stated that the information contained in the training manuals provided by the Department of Justice and Attorney-General are out of date.[1251] In particular, the Criminal Justice Commission commented that, because the manuals have not been updated since the *Police Powers and Responsibilities Act 1997* (Qld) came into operation, there were now several major inaccuracies and omissions in the training manuals and the instructors' handbooks contained several answers that were partially or completely wrong.[1252]

(iii) Citizenship

Only one submission addressed the question of citizenship.[1253] That respondent agreed with the present requirement that a person must be an Australian citizen in order to be eligible for appointment.

(iv) Minimum standard of education or literacy

One respondent thought that a minimum standard of literacy should be imposed as a requirement for appointment.[1254] Another thought that a minimum standard of education should be set: either passing grade 12 or completion of a course at tertiary level.[1255]

(v) Initial appointment to a particular office

Several submissions raised the issue of whether a person should be able to be appointed directly as a justice of the peace (qualified) or as a justice of the peace (magistrates court) if the person had not previously been appointed as a

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1249 Ibid.

1250 Submission 120.

1251 Submissions 24, 49, 61, 103, 113.

1252 Submission 113.

1253 Submission 102.

1254 Submission 65.

1255 Submission 87.

commissioner for declarations or as a justice of the peace (qualified).

Several respondents thought that all new appointments should be made as commissioners for declarations and that, only after a specified time, should a person be eligible to be appointed as a justice of the peace (qualified).[1256] Two respondents thought that a person should have to serve two years as a commissioner for declarations before being eligible to be appointed as a justice of the peace (qualified).[1257] One respondent suggested a five year period as a commissioner for declarations.[1258] Another respondent suggested that, to be eligible for appointment as a justice of the peace (qualified), a person should have to serve five years as a commissioner for declarations or, alternatively, be at least 25 years of age.[1259]

Two respondents thought that a person should also have to serve two years as a justice of the peace (qualified) before being eligible to be appointed as a justice of the peace (magistrates court).[1260]

(d) The Commission's preliminary view

(i) Character

The Commission is of 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.

(ii) Age

A. Minimum age

Given that the age of majority in Queensland is eighteen,[1261] the Commission considers that to be the appropriate minimum age for appointment as a justice of the peace or commissioner for declarations. In the Commission's view, although there may be some people of that age who are not as mature as some older people, there is no particular age at which maturity can ever be

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1256 Submissions 14, 33, 36, 54, 102.

1257 Submissions 36, 54.

1258 Submission 14.

1259 Submission 102.

1260 Submissions 36, 54.

1261 *Law Reform Act 1995* (Qld) s 17.

guaranteed. For that reason, the Commission considers that it would be discriminatory to set the minimum age higher than eighteen, thereby excluding a class of adults who may be quite suitable for the role.

In the Commission's view, the best means of ensuring that a person appointed as a justice of the peace or a commissioner for declarations has the necessary skills is to enhance the present requirements for training.[1262]

B. Maximum age

Generally, the Commission is of the view 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 does not mean that the person is no longer capable of performing the duties of office.

However, the Commission is conscious of the fact that, in Queensland, magistrates cease to hold office when they reach 65 years of age,[1263] and that Supreme Court judges and District Court judges must retire when they reach 70 years of age.[1264]

This raises the question of whether, on reaching a particular age, justices of the peace should be ineligible to be appointed to perform bench duties or, if they already hold office, they should be ineligible to continue to perform those duties. In Tasmania, for example, although there is no age above which a person may not be appointed as a justice of the peace,[1265] 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.[1266]

The Commission has not formed a preliminary view on this issue and seeks submissions on whether, once a justice of the peace reaches a particular age, he or she should no longer be able to perform bench duties.

(iii) Training requirements

1262 See pp 241-243 and 262-263 of this Discussion Paper.

1263 *Stipendiary Magistrates Act 1991* (Qld) s 14.

1264 *Supreme Court of Queensland Act 1991* (Qld) s 23; *District Court Act 1967* (Qld) s 13.

1265 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).

1266 *Justices Act 1959* (Tas) s 7(1).

A. Justices of the peace (magistrates court) and justices of the peace (qualified)

At present, although applicants for appointment as justices of the peace (magistrates court) are required to attend a compulsory training course and pass an examination, applicants for appointment as justices of the peace (qualified) are required only to pass an examination. Given the significant powers that may be exercised by both justices of the peace (qualified) and justices of the peace (magistrates court), the Commission is of the view that, in order to be eligible for appointment to either category, an applicant should have to attend a training course as well as pass an examination.

Lawyers[1267] are presently exempt from the training requirements that apply to other applicants.[1268] 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. However, the Commission is of the view that, as a precaution, lawyers should be required to pass the same examination as other applicants for appointment as a justice of the peace (magistrates court) or justice of the peace (qualified), although they should not be required to attend the mandatory training that has been recommended for other applicants.

B. Commissioners for declarations

At present, there is no requirement that a person attend a course or pass an examination in order to be eligible for appointment as a commissioner for declarations. In the Commission's view, 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), 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, and it is important that a commissioner for declarations fully understands his or her role in that regard.

The Commission considers that appointment as a commissioner for declarations should not simply be dependent on the applicant's wish to be appointed. A filtering mechanism is required to ensure that a person appointed to this office is capable of performing the role properly. Consequently, the Commission is of the view that, in order to be eligible for appointment as a commissioner for declarations, a person should be required to pass an examination.

Lawyers are already authorised by legislation to witness affidavits and statutory

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1267 See the definition of "lawyer" at note 79 of this Discussion Paper.

1268 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16(2).

declarations.[1269] Accordingly, the Commission is of the view that a lawyer should not be required to pass an examination in order to qualify for appointment as a commissioner for declarations.

C. Application of the new training requirements

The Commission is of the view that the new training requirements for justices of the peace (qualified) and commissioners for declarations outlined above should apply only to new appointments to those offices.[1270]

(iv) Citizenship

The Commission agrees 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.

(v) Minimum level of education or standard of literacy

The Commission considers that a mandatory minimum level of education could arbitrarily exclude from appointment people who would otherwise be suitable for appointment as a justice of the peace or commissioner for declarations.

The Commission acknowledges that a certain standard of literacy is required for a person to discharge the duties of office effectively. However, rather than specify an additional qualification for office, the Commission considers that a person who is able to complete a training course and/or pass an examination should, if the training course and examination are properly structured, have the literacy skills necessary to discharge the duties of office.

(vi) Initial appointment to a particular office

In areas where there is a particular need for justices of the peace of a certain category to be appointed, it may be impractical to require prospective appointees to serve a specified term in another category of office before being appointed. Such a requirement would need to be subject to certain exceptions, which may defeat the purpose of having the requirement at all.[1271]

1269 See pp 39-40 of this Discussion Paper.

1270 See, however, the Commission's discussion of the requirement of post-appointment training at pp 262-263 of this Discussion Paper.

1271 Prior to an amendment to the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) in 1996, s 8 of the Regulation provided that a person was not qualified to be appointed as a justice of the peace (magistrates court) unless, immediately before being appointed, the person held office as an appointed justice of the peace (qualified). That qualification was not necessary if the appointment of a person as a justice of the peace (magistrates court) was "desirable to serve the needs of a remote area or a community of

The Commission acknowledges that, assuming a commissioner for declarations or a justice of the peace (qualified) is active in that office, he or she is likely to gain experience that would be useful if he or she were being appointed as a justice of the peace (qualified) or a justice of the peace (magistrates court) respectively. However, it is also possible that a person could serve a number of years in one of those offices without performing any of the duties of office. In that case, appointment in the first instance to a particular category of office would be no guarantee of experience.

For this reason, the Commission is of the view that it should not be necessary for a person to have to serve a specified period as a commissioner for declarations before being eligible for appointment as a justice of the peace (qualified). Nor should a person have to serve a specified period as a justice of the peace (qualified) before being eligible for appointment as a justice of the peace (magistrates court).

4. DISQUALIFICATIONS FROM OFFICE

(a) Existing legislation[1272]

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 a justice of the peace or 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 is a fit and proper person to hold office and whether the person's appointment should be revoked.[1273]

(i) Bankruptcy

A person who is an undischarged bankrupt or a debtor taking advantage of the laws in force relating to bankrupt or insolvent debtors is disqualified from being appointed to, or continuing in, office as a justice of the peace or as a

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Aborigines or Torres Strait Islanders".

1272 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 persons who are, by virtue of the offices held by them, justices of the peace or commissioners for declarations. See pp 19-22 of this Discussion Paper.

1273 See s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is discussed at p 254 of this Discussion Paper.

commissioner for declarations.[1274]

(ii) Convictions for certain offences

Disqualifications in relation to convictions are found in both the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and in the Regulations made under that Act.

Under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), a person who is convicted of either of the following types of offences is disqualified from being appointed to, or continuing in, office as a justice of the peace or as a commissioner for declarations:

- an indictable offence (whether on indictment or summarily);[1275] or
- an offence defined in Part 4 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).[1276]

Additional grounds of disqualification are contained in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld). These grounds relate to convictions for offences generally (that is, offences other than offences under the *Traffic Act 1949* (Qld)) and, more specifically, to convictions for certain offences under the *Traffic Act 1949* (Qld).[1277]

Under 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 given the notice specified, 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 *Traffic Act 1949* (Qld);[1278]
- within five years before appointment - an offence other than an offence

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1274 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(a).

1275 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(b).

1276 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(d). For example, it is an offence under Part 4 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.

1277 S 3 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) defines "offence" to exclude an offence in relation to regulated parking under Part 6A of the *Traffic Act 1949* (Qld).

1278 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(a).

under the *Traffic Act 1949* (Qld);[1279]

- within five years before appointment - an offence under sections 16 or 16A of the *Traffic Act 1949* (Qld);[1280] or
- within four years before appointment - more than two offences under the *Traffic Act 1949* (Qld);[1281] 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).[1282]

Whereas the disqualification found in section 17(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) applies in relation to a conviction for an indictable offence, these disqualifications are not so restricted and therefore apply in relation to convictions for simple offences and regulatory offences.

Further, unlike the disqualifications in the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), these disqualifications are not expressed to disqualify a person from continuing in office as a justice of the peace or commissioner for declarations - only from being appointed as a justice of the peace or commissioner for declarations.

Consequently, these grounds would not disqualify a person who had previously been appointed as a justice of the peace or as a commissioner for declarations

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1279 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(b).

1280 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(a).

1281 *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).

1282 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 10(1)(c). The Minister may also 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).

S 10(3) 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 *Traffic Act 1949* 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.

from continuing in that office. The existence of these grounds of disqualification would be relevant only at the appointment stage.[1283]

(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 holding office as, a justice of the peace or commissioner for declarations.[1284] This disqualification applies only while a person is a patient under that Act.

(b) Issues Paper

In the Issues Paper,[1285] the Commission sought submissions on the grounds, if any, that should disqualify a person from being appointed to, or from continuing in office as, a justice of the peace.

(c) Submissions

Several respondents thought that the existing disqualifications from appointment were appropriate.[1286] However, one respondent thought that the grounds of disqualification from appointment and the grounds of disqualification from continuing in office should be the same.[1287]

The Commission received a number of submissions that addressed particular grounds of disqualification.

(i) Criminal record

A number of respondents thought that a person should be disqualified if he or

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1283 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 a justice of the peace or commissioner for declarations for such reasons as the Governor in Council thinks fit.

1284 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 17(c).

1285 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 78.

1286 Submissions 7, 10, 19, 22, 28, 33, 40, 41, 44, 47, 48, 49, 50, 53, 69, 91, 94, 97, 105.

1287 Submission 57.

she had been convicted of any criminal offence.[1288]

On the other hand, quite a few respondents thought that the existing grounds of disqualification were too harsh. Whereas, at present, a conviction for an indictable offence constitutes an indefinite bar to appointment, one respondent thought that such a conviction should only disqualify a person for five years.[1289] Two other respondents were also of the view that there should be a discretion in relation to convictions.[1290] One of these respondents, a retired stipendiary magistrate, suggested that the present disqualifications in relation to convictions are too onerous.[1291] He suggested that there should be a discretion in relation to the effect of convictions: disclosure of all offences should be required when a person applies to become a justice of the peace, but a person should not have to pay for an offence for the rest of his or her life.

Several other respondents were particularly concerned about the impact on indigenous people of the grounds of disqualification found in section 9 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).[1292] The Department of Families, Youth and Community Care commented:[1293]

> 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.
>
> 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.

For that reason, the Department of Families, Youth and Community Care suggested that either section 9 of the Regulation should be repealed or the Attorney-General should have a discretion, on specified grounds, to override the grounds of disqualification in section 9.

1288 Submissions 1A, 8, 11, 20, 30.

1289 Submission 39.

1290 Submissions 26A, 120.

1291 Submission 120.

1292 These grounds are set out at p 245 of this Discussion Paper.

1293 Submission 111.

The Indigenous Advisory Council expressed a similar view:[1294]

> 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.

The Indigenous Advisory Council suggested that section 9(a) of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) should be repealed. Alternatively, it suggested that the Attorney-General should have a discretion to override that section in cases where it had been demonstrated that the person was of good character and high standing in the community. The Council was of the view, however, that a person should be free of convictions of any kind for at least the previous five years.

Another respondent also expressed a concern about the effect of section 9 of the Regulation.[1295] This respondent advised that she was aware that some people did not think a conviction by an Aboriginal Court[1296] constituted a conviction for the purposes of section 9 of the Regulation. It was suggested that it would be desirable to clarify the position of justices of the peace who have been appointed notwithstanding their convictions in an Aboriginal Court.

(ii) Inactivity or failure to perform duties

Several respondents were of the view that justices of the peace who were inactive should be disqualified from continuing in office.[1297] Another respondent suggested that inactive justices of the peace should be transferred to the office of commissioner for declarations.[1298]

Two respondents commented on the records that should be maintained by justices of the peace. One suggested that justices of the peace should be required to make an annual return to the Department of Justice and Attorney-General to demonstrate their level of activity.[1299] The other suggested that justices of the peace should be required to keep a diary or log book of their

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1294 Submission 112.

1295 Submission 122.

1296 See the discussion of Aboriginal Courts in Chapter 10 of this Discussion Paper.

1297 Submissions 20, 35, 44, 56.

1298 Submission 43.

1299 Submission 67.

services, which should be submitted as requested by the Department.[1300]

Two respondents were of the view that a failure to perform the duties of office should be a ground of disqualification,[1301] or should at least be a basis for transferring the person to the office of commissioner for declarations.[1302]

(iii) No longer resident of Queensland

Two respondents were of the view that a person who moved permanently to another jurisdiction should be disqualified from continuing in office as a justice of the peace or as a commissioner for declarations.[1303]

(iv) Grounds in one instrument

One respondent was of the view that the grounds of disqualification, which are presently found in both the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and the Regulation made under that Act, should, for reasons of clarity, be located in the one instrument.

(d) The Commission's preliminary view

(i) Bankruptcy

The Commission is of the view that the present disqualification in section 17(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be retained.

(ii) Convictions for certain offences

Generally, the Commission favours 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).[1304]

1300 Submission 44.

1301 Submissions 88, 117.

1302 Submission 117.

1303 Submissions 8, 70. The prescribed application forms for appointment as a justice of the peace or a commissioner for declarations inquire as to whether the applicant is correctly enrolled on the Queensland State electoral roll and as to the electoral district in which the applicant is enrolled.

1304 These provisions are set out at pp 245-246 of this Discussion Paper.

However, the Commission agrees with the view expressed in a number of submissions to the effect that there should be a discretion in relation to the various convictions that presently disqualify a person from appointment. A person who, many years ago, was convicted of one indictable offence or more than two simple offences may now be a respected member of his or her community.

While generally it is considered that appointments should be made of persons who would not be disqualified by the present provisions, the Commission is of the view that there should be a provision for the Minister to exempt an applicant for appointment as a justice of the peace or commissioner for declarations from any of the disqualifications that relate to criminal convictions where the Minister considers that special circumstances exist.[1305]

As observed earlier in this chapter,[1306] 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, while the convictions referred to in the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) only disqualify a person from being appointed to office. Consequently, a person who has been convicted of more than two offences is disqualified from being appointed to office.[1307] However, if a person is already appointed before being convicted of those offences, the person will not, if the convictions relate to simple offences, be disqualified from continuing in office.

As a general proposition, the Commission is of the view that the grounds that disqualify a person from being appointed to office should be as close as possible to the grounds that disqualify a person from continuing in office. Given that, with one exception, the grounds of disqualification in sections 9 and 10 of the Regulation 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.

(iii) Patient under the *Mental Health Act 1974* (Qld)

The Commission is of the view that the present disqualification in section 17(c) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be retained.

1305 Under s 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 s 10(1)(b) or (c).

1306 See pp 245-246 of this Discussion Paper.

1307 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 9(a).

(iv) Inactivity or failure to perform duties

There may be a number of reasons why a person is inactive as a justice of the peace or as a commissioner for declarations. Some of these reasons might justify a person's removal from office, while others might not. For example, a person might be inactive for the simple reason that no-one seeks out his or her services. For this reason, the Commission is of the view that it could be unfair if inactivity or failure to perform duties were to disqualify a person from continuing in office.

Further, given that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that a person ceases to hold office on becoming disqualified from continuing in office,[1308] the adoption of inactivity or failure to perform the duties of office as a ground of disqualification from continuing in office could make it difficult to ascertain at what point a person ceased to hold that office.

The Commission is therefore of the view that inactivity or failure to perform duties should not be a specific ground of disqualification. It might, however, be a factor to be taken into account in deciding whether a person's appointment should be revoked.[1309]

(v) No longer resident of Queensland

The Commission sees some merit in the suggestion that a person should be disqualified from continuing in office if the person is not a resident of Queensland.[1310] However, it can sometimes be difficult to determine at what point a person has ceased to reside in a particular place. Because of the uncertainty that could arise if ceasing to be a resident of Queensland were a specific ground of disqualification from office, the Commission is of the view that ceasing to reside in Queensland should not be a specific ground of disqualification.

It might, however, be a factor to be taken into account in deciding whether a person's appointment should be revoked.[1311]

1308 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

1309 See s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is set out at p 254 of this Discussion Paper.

1310 The Commission notes that, in Tasmania, the appointment of a person as a justice of the peace is deemed to be revoked if the person ceases to reside in that State: *Justices Act 1959* (Tas) s 4(2).

1311 See note 1039 of this Discussion Paper.

(vi) Grounds of disqualification in one instrument

The Commission considers it is undesirable for the 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. In the Commission's view, all the grounds of disqualification should be located in the Act.

5. CESSATION OF OFFICE

(a) Change in office

If a person who holds office as a justice of the peace is subsequently appointed to another category of justice of the peace or as a commissioner for declarations, the person ceases to hold the original office of justice of the peace.[1312] Similarly, if a person who holds office as a commissioner for declarations is appointed as a justice of the peace, the person ceases to hold office as a commissioner for declarations.[1313]

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.[1314] 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.[1315]

(b) Resignation

A person who is appointed as a justice of the peace or as a commissioner for declarations may resign from office at any time by giving written notice to the registrar. The person ceases to hold office when notification of the resignation is published in the Gazette.[1316]

(c) Cessation on disqualification

1312 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A. However, ss 42 and 44 of the Act provide transitional arrangements for certain office holders to become a justice of the peace (commissioner for declarations) or a commissioner for declarations.

1313 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A.

1314 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(2).

1315 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 24A(3).

1316 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 23.

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.[1317]

(d) 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 as a justice of the peace or 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 grounds for revocation are not prescribed by this section.

(e) Suspension from office

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) enables the appointment of an appointed justice of the peace or an appointed commissioner for declarations to be suspended for a period of time.[1318] Upon notification being published in the Gazette, the suspended person ceases to hold office.[1319]

(f) Submissions

Only one submission addressed the question of cessation of office. The Criminal Justice Commission raised a concern about how complaints about justices of the peace are received and investigated.[1320] In particular, it was concerned that the registrar of justices of the peace and commissioners for declarations conducts the investigation

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1317 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

1318 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 25.

1319 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 25(3).

1320 Submission 113.

and, in effect, makes the decision about a person's removal from the register:[1321]

> It is possible for a JP's appointment to be revoked or suspended (see ss.24 and 25 of the Justices of the Peace Act). A decision to revoke or suspend a JP's appointment is made by the Attorney-General acting on the advice of the Justices of the Peace Registrar. The CJC understands, from speaking with the Registrar, that it is fairly rare for an appointment to be revoked or suspended.
>
> ... the person who effectively makes the decision to revoke or suspend a JP's appointment is the same person who receives and investigates complaints against JPs (i.e. the Justices of the Peace Registrar).

The Criminal Justice Commission was of the view that the roles of decision-maker and investigator should be kept separate. It queried whether the advisory council[1322] would be an appropriate body to make recommendations to the Attorney-General about the revocation or suspension of the appointment of a justice of the peace. Although the Criminal Justice Commission did not express a final view about whether the advisory council should assume that role, it was nevertheless strongly of the view that the responsibility for making recommendations to the Attorney-General about these matters should be given to someone other than the registrar.

(g) The Commission's preliminary view

(i) The role of the registrar

In the view of the Commission, an examination of the role of the registrar in making recommendations to the Attorney-General about the removal or suspension of justices of the peace is outside the terms of this reference. Therefore, the Commission does not propose to comment further on this issue.

(ii) Validation of acts done by justices of the peace or commissioners for declarations

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.[1323] It is possible, however, that a person who had ceased to hold office might continue to exercise the powers of that office. A person could simply be unaware that he or she was no longer qualified to continue in office.

This raises the issue of whether the *Justices of the Peace and Commissioners*

1321 Ibid.

1322 See note 1218 of this Discussion Paper.

1323 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 18.

for Declarations Act 1991 (Qld) should contain a provision to validate acts performed by justices of the peace or commissioners for declarations when, technically, they no longer hold office.

In Tasmania, a justice of the peace may not exercise bench duties after attaining 70 years of age.[1324] Legislation validates the acts of a justice of the peace that are performed by a justice of the peace who is no longer authorised to exercise those powers. 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. Legislation also validates the acts of such 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.

In the view of the Commission, it is desirable for the *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.

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. It may be, however, that a person is appointed notwithstanding that the person is not qualified for appointment.

Earlier in this chapter, the Commission referred to a submission from a respondent who suggested that some people were of the view that a conviction by an Aboriginal Court did not constitute a ground of disqualification under section 9 of the *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld).[1325] The respondent suggested that the position of justices of the peace who had been appointed notwithstanding such a conviction should be clarified.

1324 *Justices Act 1959* (Tas) s 7(1).

1325 See p 249 of this Discussion Paper.

This raises a question in relation to the validity of acts performed by justices of the peace or commissioners for declarations whose appointments have never been valid.

The Commission is of 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 he or she was not eligible to be appointed and did not validly hold office. The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to include a provision to that effect.

6. LIMITED APPOINTMENTS AND REQUIREMENTS OF OFFICE

(a) Existing legislation

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) provides that justices of the peace and commissioners for declarations acting within the scope of their respective capacities are justices of the peace or, as the case may be, commissioners for declarations, for the whole State.[1326] Appointments are presently unlimited in relation to duration and locality. Unless a justice of the peace or commissioner for declarations becomes disqualified from continuing in office,[1327] the appointment will usually continue for life.

There is, however, 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.[1328] If a justice of the peace or commissioner for declarations is required to complete 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 -

1326 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 28.

1327 The grounds of disqualification are discussed at pp 244-247 of this Discussion Paper.

1328 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 32.

(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.

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) Issues Paper

In the Issues Paper,[1329] the Commission sought submissions on whether appointments should be subject to any limitations. In particular, the Commission noted that, in the Northern Territory, appointments may be limited for a fixed period or conditional upon the person residing in a particular locality.[1330]

(c) Submissions

A number of submissions addressed this issue. Eleven respondents were of the view that appointments should not be made subject to any limitations.[1331] Three respondents rejected any suggestion that appointments should be for a fixed period.[1332] It was suggested that such a change would take away from the commitment of justices of the peace[1333] and would result in a loss of a valuable resource to the justice system.[1334] Two respondents were of the view that appointments should not be limited to a

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1329 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 78.

1330 *Justices of the Peace Act* (NT) s 5(2). Such a person ceases to hold office if the appointment was subject to a condition and the condition ceases to be fulfilled; or if the appointment was for a specified period which has expired: *Justices of the Peace Act* (NT) s 9(c), (d). In practice, appointments are made for life, or for five or ten year terms (information provided to the Commission by the Statutory Appointments Officer, Northern Territory, February 1998).

1331 Submissions 11, 33, 41, 50, 88, 91, 93, 94, 97, 103, 120.

1332 Submissions 9, 11, 31.

1333 Submission 31.

1334 Submission 11.

particular locality within the State.[1335]

On the other hand, a large number of respondents were of the view that appointments should be made for a fixed period and that justices of the peace should be required to re-register periodically. Some respondents were also of the view that re-registration should be made conditional on completing a course of training or undergoing some kind of competency assessment.

(i) Re-registration

A significant number of submissions were of the view that justices of the peace should be appointed for a fixed term and should have to re-register at the end of that term.[1336]

An advantage of making appointments for a set period with a requirement for justices of the peace to re-register periodically is that it would help to ensure that the register remained up to date. The Commission received a number of identical submissions from justices of the peace who commented:[1337]

> In the area of Hervey Bay during a meeting of the Q.J.A. [Queensland Justices Association] many invitations to the meeting were returned due to:- Dementia, Deceased or no longer wish to continue.

Another respondent who supported the concept of compulsory re-registration suggested that, if the number of justices of the peace were reduced and only those who were serious about their role remained, it would be possible to provide real training for them.[1338]

(ii) Re-registration conditional on satisfying a competency assessment

A large number of respondents emphasised the need for training for justices of the peace after their appointment. In fact, many respondents were of the view that, not only should appointments be made for a fixed number of years, re-registration should be made conditional on the justices of the peace having completed a refresher course or a competency assessment of some kind.[1339]

1335 Submissions 10, 47.

1336 Submissions 5, 6, 10, 25, 39, 40, 43, 62, 63, 66, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 89, 113.

1337 Submissions 6, 62, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84.

1338 Submission 89.

1339 Submissions 10, 20, 24, 25, 30, 38, 40, 43, 45, 51, 67, 88, 113.

The most commonly suggested interval for re-registration was five yearly.[1340]

A typical comment was:[1341]

> I believe that requiring justices of the peace to undergo training and to sit for an exam would ensure that they are appropriately qualified. I also favour having justices of the peace complete refresher courses, say, every five years and this could be a condition for re-registration.

The Criminal Justice Commission, which advocated compulsory re-registration, was also of the view that justices of the peace should be required to attend training sessions on all new legislation that has a significant impact on their powers.[1342] The Criminal Justice Commission acknowledged the cost implications of such a requirement:[1343]

> The CJC acknowledges the cost implications of a recommendation that all JPs be required to attend training sessions on all new legislation that has a significant impact on their powers. There are, for example, over 48,000 JPs whose powers have been increased or changed by the Police Powers Act. However, if the Department of Justice insists on having such an extraordinary number of JPs, it must be prepared to take responsibility for their training (including continuing training). It goes without saying that the costs of training JPs would be substantially reduced if the number of JPs more accurately reflected the number of JPs that are actually used and/or needed in Queensland.

(iii) Post-appointment training

A large number of other respondents, though not addressing the question of re-registration, nevertheless expressed a strong desire for refresher training to be provided periodically after appointment.[1344]

The Indigenous Advisory Council commented on the importance of post-appointment training in the following terms:[1345]

> 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

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1340 Submissions 20, 40, 43, 62, 63, 66, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 113.

1341 Submission 40.

1342 Submission 113.

1343 Ibid.

1344 Submissions 7, 18, 19, 20, 45, 48, 66, 103, 107, 108, 112.

1345 Submission 112.

> 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.

Again, the most commonly suggested interval for refresher courses was five yearly.[1346]

(d) The Commission's preliminary view

(i) Re-registration

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.

Similarly, 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.

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. It could also provide an opportunity to check that justices of the peace and commissioners for declarations continue to be eligible to remain in office.

For these reasons, the Commission is of the view that justices of the peace and commissioners for declarations should be appointed for a limited term and should be required to re-register before the expiry of that term in order to continue in office.

In applying to re-register, justices of the peace and commissioners for declarations should be required to disclose whether, since last re-registering, they have undergone any change of circumstances that would disqualify them from continuing in office, for example, whether they have become a bankrupt or have been convicted of an indictable offence. 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

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1346 Submissions 7, 18, 20, 107, 108, 112.

required to disclose their level of activity during the intervening period and details of any training undertaken.

The majority of respondents who favoured a requirement to re-register suggested that justices of the peace should be appointed for five year terms. The Green Paper also suggested that justices of the peace should be required to renew their registration every five years.[1347] The Commission favours a requirement that justices of the peace and commissioners should be required to re-register every five years. However, the Commission is concerned that a requirement of five-yearly re-registration 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. The Commission has not formed a preliminary view on the issue of how often justices of the peace and commissioners for declarations should be required to re-register and seeks submissions on this issue.

Because of the large numbers of justices of the peace and commissioners for declarations who already hold office, a requirement to 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 is of the view that 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 would be extended for a full term.

(ii) Ongoing training after appointment

The Commission agrees with the view expressed in many submissions that, for justices of the peace and commissioners for declarations to be able to discharge their duties properly, they must receive ongoing training after their appointments. It is impossible for their initial training, 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, only recently, the enactment of the *Police Powers and Responsibilities Act 1997* (Qld) resulted in a need for justices of the peace to receive training in aspects of their roles that were affected by that Act.

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 is of 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

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[1347] Office of the Attorney-General (Qld), *A Green Paper on Justices of the Peace in the State of Queensland* (1990) at 44.

does not envisage that the need for training for commissioners for declarations would arise as frequently as it would for justices of the peace. However, there will still be occasions when commissioners for declarations need further training in particular aspects of their role, such as there was when the *Powers of Attorney Act 1998* (Qld) commenced.[1348]

The Commission considered whether justices of the peace and commissioners for declarations should be required to attend training courses or pass an examination as a condition of re-registering. Although the Commission strongly supports the provision of ongoing training, it is concerned that, if training were linked to the re-registration requirement in this way, it would be likely to discourage training occurring more frequently than people were required to re-register. It is important that training be 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 is of the view that re-registration should not be made conditional on attendance at a training course or completion of an examination.

If, however, a justice of the peace or commissioner for declarations unreasonably refused to attend a training course, that might nevertheless be a factor to be taken into account in deciding whether a person's appointment should be revoked.[1349]

7. APPOINTMENT ON THE BASIS OF NEED

(a) Introduction

In Queensland, there is no general requirement that appointments of justices of the peace or commissioners for declarations be made on the basis of need.[1350]

(b) Submissions

1348 That Act authorises justices of the peace and commissioners for declarations to witness enduring powers of attorney and advance health care directives: *Powers of Attorney Act 1998* (Qld) s 31.

1349 See s 24 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), which is set out at p 254 of this Discussion Paper.

1350 The Commission notes, however, that it is the present policy of the Department of Justice and Attorney-General to restrict the appointments of justices of the peace (magistrates court) to Aboriginal and Torres Strait Islander communities: <http://www.justice.qld.gov.au/pubs/07fact.pdf> (30 April 1999).

The Commission received several submissions that referred to the large number of justices of the peace in Queensland[1351] and raised the question of whether appointments should be made on the basis of need.

Two respondents referred to the "formidable numbers" and the "inordinately large number" of justices of the peace in Queensland.[1352]

One respondent thought that there were too many justices of the peace, many of whom would never be asked to provide their services.[1353] Another thought that the number of justices of the peace in all categories was excessive.[1354] This situation was attributed, by one respondent, to the encouragement given to people to undertake training with a view to appointment, without any consideration being given to whether there was a need for those appointments:[1355]

> It seems that Queensland has a very large number of JPs. I see advertisements in papers encouraging people to undertake the studies. This is encouraging people to undertake the role regardless of need for any particular area.

A number of respondents were of the view that appointments should be made only where there was an area of need.[1356] Several suggested that there should be some limit on the appointment of justices of the peace or a quota set for particular areas.[1357]

One of these respondents commented:[1358]

> Appointments should be reduced gradually to a more acceptable number of a predetermined level. There are presently too many JsP and Commissioners for the present rate of appointment to be continued. A needs basis could be implemented by Clerks of the Court offices.

One respondent thought that the need for commissioners for declarations was probably greater than for either justices of the peace (qualified) or for justices of the peace (magistrates court) and that the numbers of appointments made should take this into

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1351 See pp 22 and 23 of this Discussion Paper where the numbers of justices of the peace and commissioners for declarations in Queensland and other Australian jurisdictions are set out.

1352 Submissions 41, 42.

1353 Submission 1A.

1354 Submission 35.

1355 Submission 48.

1356 Submissions 4, 7, 16, 40, 48, 50.

1357 Submissions 1, 20, 41, 50, 67, 95, 109.

1358 Submission 50.

account:[1359]

> 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.

Several other respondents were also of the view that, by limiting the number of justices of the peace, it would be possible to provide them with better training.[1360] One respondent commented:[1361]

> ... what is needed is better qualified and motivated [justices of the peace (qualified)], fewer in number, in conjunction with an acceptable number of suitably qualified and motivated commissioners for declarations, all of whom are committed to being readily accessible to the community. Those appointees currently in the system, who are not prepared to accept these conditions, should be removed, thus forming a dependable database of available persons.

(c) The Commission's preliminary view

As a general proposition, the Commission favours a requirement that future appointments of justices of the peace should be made on the basis of need. 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, 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 utilised more regularly, which should assist justices of the peace to develop a greater expertise than if their services are called upon only rarely.

However, the Commission has some concerns about how a requirement that appointments be made on the basis of need would be implemented.

1359 Submission 7.

1360 Submissions 1A, 38, 47, 89, 91, 113.

1361 Submission 91.

In the Commission's view, it would be unfair if an individual applicant, in his or her application, were required 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.

On the other hand, the Commission does not wish to burden the registrar of justices of the peace and commissioners for declarations by stipulating various criteria that the registrar should have to consider in every case.

Further, the Commission is 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.

The Commission has not formed a preliminary view on this issue and seeks submissions on how this requirement could be implemented.

8. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations:

Process of appointment

- **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.**

- **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.**

- **The registrar should continue to be required to make inquiries to ascertain whether an applicant is a fit and proper person.**

Qualifications for future appointments

- **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; and

  (c) have satisfied the relevant training requirements.

- **The relevant training requirements should be as follows:**

  (a) for a justice of the peace (magistrates court) or justice of the peace (qualified) - the applicant must attend a mandatory training course and pass an examination;

  (b) for a commissioner for declarations - the applicant must pass an examination;

  (c) for a lawyer seeking appointment as a justice of the peace (magistrates court) or justice of the peace (qualified) - the applicant must pass an examination.

Disqualifications from office

- **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, although 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);

  (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).[1362]

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

Validating provision

- **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:**

  (a) the justice of the peace or the commissioner for declarations no longer holds that office; or

  (b) the justice of the peace or the commissioner for declarations was not eligible to be appointed.

Requirement to re-register

- **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.**

1362 As most of these grounds of disqualification refer to convictions or events occurring within a specified period prior to appointment, some modification of those grounds will be required in order to render them relevant to convictions or events occurring during the currency of an appointment.

- **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;

  (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.**

Ongoing training after appointment

- **The Department of Justice and Attorney-General should, as the need arises, provide ongoing training to justices of the peace and commissioners for declarations.**

9. ISSUES FOR CONSIDERATION

Age

- **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?**

Length of term of appointment

- **The Commission has made a 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 before the expiry of that**

term in order to continue in office. For what period of time should fixed-term appointments be made?

Appointment on the basis of need

- **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?

CHAPTER 13

LIABILITY

1. EXISTING LEGISLATION

(a) Introduction

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 a 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.

This statutory regime of liability essentially deals with two situations:

- where an act is knowingly done without, or in excess of, jurisdiction; and
- where an act is within jurisdiction, but is done maliciously and without reasonable cause.

(b) Acts knowingly done without, or in excess of, jurisdiction

A justice of the peace who purports to exercise a power that he or she does not at law have, will be liable to a person injured by that act only if the justice of the peace knows that the act is not authorised at law.[1363] If, however, the justice of the peace does not know that the act is not authorised, he or she will be protected from liability by section

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[1363] *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 36(1)(a).

36(1)(a) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

For example, if a justice of the peace purported to issue an arrest warrant that could not be issued by that particular class of justice of the peace, a person who was injured by that act could recover damages from the justice of the peace, but only if the justice of the peace knew that the issuing of the warrant was not authorised by law.

(c) Acts within jurisdiction, but done maliciously and without reasonable cause

Even if a justice of the peace does an act that he or she is empowered to do, the justice of the peace may nevertheless be liable to a person who is injured by that act if it was done maliciously and without reasonable cause. The justice of the peace will not be liable if the act is simply done without reasonable cause. The act must also be done maliciously for the justice of the peace to be liable under section 36(1)(b) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).

(d) Criminal liability

The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) does not afford any protection to a justice of the peace in respect of criminal liability.

2. INSURANCE ISSUES

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 in respect of acts done in the performance of that office is relatively small. Unless the justice of the peace knows that a particular act is not authorised by law, or, in relation to an authorised act, does it both maliciously and without reasonable cause, the justice of the peace will be protected from liability in civil actions.

Notwithstanding this, a number of justices of the peace have taken out professional indemnity insurance policies. The Commission has been provided with a copy of a Master Professional Indemnity Insurance Policy negotiated for the members of a justices of the peace association.

Not surprisingly, the policy expressly excludes a claim arising from an act described in section 36(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) and actually committed by the justice of the peace. That is, a justice of the peace will not be indemnified under the policy if found liable for an act that the justice

of the peace knew was not authorised, or for an act that was done maliciously and without reasonable cause.

Given that section 36 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) protects a justice of the peace except in certain limited circumstances, and that a claim arising under those limited circumstances is excluded by the policy, this raises the question of the purpose of the policy.

A justice of the peace who is sued might successfully defend the action on the basis that the act alleged to give rise to the plaintiff's claim is not one within section 36(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). Even though the justice of the peace succeeds in defending the claim, he or she might nevertheless incur legal costs in doing so. The justice of the peace might not be able to recover all or any of those costs from the plaintiff, depending on the plaintiff's financial situation.

Under the Master Policy that has been 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.

3. STATUTORY INDEMNITY FOR COSTS OF DEFENDING PROCEEDINGS

In the absence of insurance to cover the costs of defending an action brought against a justice of the peace, a justice of the peace will be solely responsible for meeting those costs. 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 may be sued, the Act does not contain a provision that would result in a justice of the peace being indemnified in respect of his or her legal costs, not even if the justice of the peace successfully defends an action.

Unlike the situation in Australian jurisdictions, legislation in the United Kingdom provides for justices of the peace, in certain circumstances, to be indemnified in respect of costs reasonably incurred in connection with proceedings taken against the justice of the peace.

Generally, a justice of the peace may be indemnified in respect of the matters giving rise to the claim for the following:[1364]

[1364] *Justices of the Peace Act 1997* (UK) s 54(1).

> (a) any costs which he reasonably incurs -
>
> (i) in or in connection with proceedings against him in respect of anything 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 ...

Where the exercise or purported exercise by the justice of the peace relates to a criminal matter, the justice of the peace will be indemnified in respect of those 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.[1365] Where the exercise or purported exercise of the justice's duty relates to other matters, the justice of the peace will be indemnified if, in respect of the matters giving rise to the proceedings or claim, the justice of the peace acted reasonably and in good faith.[1366]

4. ISSUES PAPER

In the Issues Paper,[1367] the Commission sought submissions on 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.

5. SUBMISSIONS

A small number of respondents considered that the protection given by the existing legislation was satisfactory.[1368] According to one submission, the present indemnification:[1369]

1365 *Justices of the Peace Act 1997* (UK) s 54(1), (2)(a).

1366 *Justices of the Peace Act 1997* (UK) s 54(1), (2)(b).

1367 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998) at 78.

1368 Submissions 41, 44, 45, 50, 53, 105. See p 3 of this Discussion Paper for a breakdown of respondents.

1369 Submission 50.

> ... ensures that JsP act in good faith and according to their role as prescribed by law.

Some submissions expressed the view that it should be the responsibility of individual justices of the peace to take out indemnity insurance against liability "in respect of acts done in the performance of his/her duties".[1370]

However, a number of other respondents were strongly opposed to this view. They argued that justices of the peace may not be in a position to be able to afford insurance and, in any event, should not have to bear the cost themselves.[1371] Several submissions emphasised that justices of the peace performed a service to the community on a voluntary basis and received no financial reward for their efforts.[1372]

The majority of submissions that 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 against them arising from the performance of their duties.[1373] 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.[1374]

A justice of the peace advised that 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.[1375]

6. THE COMMISSION'S PRELIMINARY VIEW

In the view of the Commission, 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.

1370 Submissions 6, 63, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 , 84.

1371 Submissions 19, 33, 36, 43, 54, 85.

1372 Submissions 7, 19, 33, 36, 40, 43, 47, 51, 54, 85.

1373 Submissions 1A, 3, 7, 8, 10, 11, 15, 16, 20, 21, 30, 31, 33, 35, 36, 39, 43, 47, 54, 57, 65, 66, 68, 87, 88, 89, 91, 92, 93, 94, 96, 97, 98, 120.

1374 Submissions 10, 16, 40, 49, 61, 103.

1375 Submission 68.

Where proceedings are brought against a justice of the peace or a commissioner for declarations in respect of a power exercised by that person and the proceedings are either withdrawn or successfully defended, it seems unduly harsh that the justice of the peace or the commissioner for declarations should have to bear those legal costs[1376] or the cost of insuring against those legal costs. The Commission believes that, where the proceedings - whether of a criminal or a civil nature - are withdrawn or successfully defended, justices of the peace and commissioners for declarations should be indemnified in respect of their legal costs.

In some circumstances, a civil claim against a justice of the peace or a commissioner for declarations may be concluded by settlement. There may 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 or her powers. The Master Policy provided to the Commission includes indemnity in respect of costs and expenses incurred in the settlement of a claim covered by the policy. The Commission has not formed a preliminary view on this issue and seeks submissions on whether the indemnity that it proposes should include the costs of a claim that is settled.

7. PRELIMINARY RECOMMENDATION

The Commission's preliminary recommendation is 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.

[1376] As noted at p 273 of this Discussion Paper, even though a justice of the peace might successfully defend an action, he or she might not be able to recover all or any of those costs from the plaintiff, depending on the plaintiff's financial situation.

8. ISSUE FOR CONSIDERATION

Should the indemnity that is proposed in the Commission's preliminary recommendation 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 was not authorised, or an act that was done maliciously and without reasonable cause?

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".[1377] "Reward" is defined to include "charge, fee, gratuity or any consideration".[1378]

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

To qualify for appointment as a commissioner for declarations, as a justice of the peace (qualified) or as a justice of the peace (magistrates court), a person other than a lawyer must, if the Minister has approved a required training course, complete that course.[1379] Applicants for appointment as justices of the peace (qualified) are required to pass an examination but, although it is strongly recommended by the Department of Justice and Attorney-General, at present training is not compulsory.[1380] Applicants for appointment as justices of the peace (magistrates court) are required to undergo training and to pass an examination.[1381]

The cost of any training undertaken is generally borne by the individual applicant.

1377 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(1).

1378 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(2).

1379 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 16.

1380 See pp 267 and 269 of this Discussion Paper for the Commission's recommendations in relation to the training of justices of the peace.

1381 Department of Justice and Attorney-General (Qld), *Justice Papers* (No 4, 1995) at 2.

(b) Application fees

An applicant for appointment as a justice of the peace or as a commissioner for declarations is required to pay an application fee.[1382] The application fee for an applicant who does not currently hold office as either an appointed justice of the peace or as an appointed commissioner for declarations is $80. The application fee for an old system justice of the peace[1383] who wishes to be appointed to another category of office is $29.[1384]

The Minister may exempt a person or class of persons from payment of these fees.[1385]

(c) Materials

The Department of Justice and Attorney-General issues 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.

Justices of the peace 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 wants a copy of relevant legislation, he or she must purchase it.

(d) Administrative costs

It is likely that an active justice of the peace 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) Transport

Justices of the peace who exercise court powers would incur transport costs in travelling to and from the court house. Similarly, attendance at police interviews would involve the travelling costs to and from the police station. These costs could be considerably more in regional and remote areas because of the greater distances

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1382 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 16.

1383 See pp 15-16 of this Discussion Paper in relation to the Commission's use of this term.

1384 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 16.

1385 *Justices of the Peace and Commissioners for Declarations Regulation 1991* (Qld) s 18.

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 was raised for consideration by the Law Reform Commission of Western Australia. In its Discussion Paper on Courts of Petty Sessions,[1386] the Commission noted that it would be possible:[1387]

> ... 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.[1388] The Law Reform Commission of Western Australia concluded:[1389]

> As to the payment of an attendance allowance, the Commission agrees with the majority 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",[1390] the Law Reform Commission of Western Australia endorsed this approach and recommended that it "be extended to expenses involved in attending a court sitting":[1391]

1386 Law Reform Commission of Western Australia, Discussion Paper, *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II, 1984).

1387 Id at para 2.29.

1388 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.

1389 Id at para 2.27.

1390 Id at para 2.26.

1391 Ibid.

> 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:[1392]

- 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;

- a financial loss allowance where, for that performance, the justice of the peace incurs any other expenditure to which the justice of the peace would not otherwise be subject, or suffers any loss of earnings or of social security benefit that the justice of the peace would otherwise have made or received.

4. ISSUES PAPER

The Issues Paper[1393] did not directly refer to the question of whether justices of the peace should be reimbursed for costs incurred in performing their role. However, the issue was raised in a number of the submissions received by the Commission in response to the Issues Paper.

5. SUBMISSIONS

A number of submissions were strongly in favour of the reimbursement of expenses.[1394] Some of these submissions observed that justices of the peace provide a service to the community[1395] and that, while the service was willingly provided on a voluntary basis,

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1392 *Justices of the Peace Act 1997* (UK) s 10.

1393 Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998).

1394 Submissions 2, 2A, 4, 13, 14, 17, 23, 24, 39, 100, 109, 112. See p 3 of this Discussion Paper for a breakdown of respondents.

1395 Submissions 14, 17, 109, 112.

justices of the peace should not be left out of pocket.[1396] One respondent commented:[1397]

> 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.

It was suggested that people's financial circumstances may have an impact on their decision to participate in the role of justice of the peace,[1398] and that any funds expended in reimbursing costs would be minimal when compared with the benefits to the community.[1399]

One submission 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".[1400]

The same respondent also suggested that the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) should be amended to clarify the distinction between "reward" and reimbursement.

(a) Training

Several respondents considered that the costs of training justices of the peace should be borne by the community, as should examination and registration fees.[1401]

On the other hand, some respondents expressed the view that justices of the peace should have to pay for their own training and that meeting the costs of becoming a justice of the peace was an indication of commitment to community service.[1402]

1396 Submission 109, 112.

1397 Submission 112.

1398 Submission 100.

1399 Submission 109.

1400 Submission 112.

1401 Submissions 14, 17, 21, 23, 39, 67, 99, 109. Two submissions also proposed that justices of the peace should not be charged for changes to personal details on the register (such as change of address or change of name on marriage) (Submissions 2A, 24).

1402 Submissions 27, 46.

(b) Materials

The cost of obtaining the materials necessary to keep abreast of legislative developments that affect the powers of justices of the peace was a concern to some respondents.[1403] Two respondents suggested that justices of the peace should have access to the Department of Justice library.[1404]

(c) Administrative costs

One respondent referred to the costs of keeping records of the exercise of powers.[1405] Another expressed the view that the administrative costs incurred in the performance of the role of justice of the peace should be borne by the Department of Justice.[1406]

(d) Transport

One respondent, the Indigenous Advisory Council, drew attention to the situation in remote communities where justices of the peace may reside at some distance from the township. 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.[1407]

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:[1408]

> 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 informed the Commission that a claim for reimbursement had been denied because it would contravene the statutory prohibition on justices of the peace receiving any "reward".[1409]

1403 Submissions 2, 13, 14.

1404 Submissions 2, 24.

1405 Submission 24.

1406 Submission 17.

1407 Submission 112.

1408 Ibid.

1409 *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 35(1).

6. THE COMMISSION'S PRELIMINARY VIEW

The Commission believes 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. It is the view of the Commission 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 cost to government of compensating justices of the peace is 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.

However, the Commission also acknowledges that the administrative cost of compensating all justices of the peace for every expense incurred would be considerable. As a result, the Commission has concentrated on the expenses that it believes are most commonly faced by justices of the peace.

(a) Training

In the view of the Commission, adequate training for justices of the peace is essential to ensure that they are able to fulfil the requirements of their role satisfactorily. The Commission has given careful consideration to the question of how the costs of providing that training should be borne.

The Commission is concerned at the potential public cost of providing free training to all the people who wish to become justices of the peace (qualified). This is the office to which the greatest number of appointments are made.[1410] However, there is no guarantee that those who undertake a training course would complete it or, if they did, sit for and pass the prescribed examination. Nor is it certain that those who pass the examination will become active justices of the peace. 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.

The Commission believes 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.

[1410] See p 22 of this Discussion Paper.

However, the Commission believes 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 is of the view that justices of the peace should not have to bear the cost of the ongoing training that has been recommended by the Commission.[1411]

The Commission also believes 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 is 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. Such training should be provided at public expense.

The Commission is also of the view that any ongoing training that is provided to commissioners for declarations should be provided at public expense.

(b) Materials

In the view of the Commission, the provision of continuing 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 envisages 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.

The increasing availability of Internet access would also assist in putting relevant information within the reach of justices of the peace. The Commission does not assume that all, or even most, justices of the peace would have private facilities to enable them to access this information. However, many public libraries now provide Internet facilities free of charge.

Accordingly, the Commission does not intend to make a preliminary recommendation in relation to the cost of materials.

(c) Travel

Many of the functions of a justice of the peace can be performed in the justice's own home, and therefore do not involve any transportation costs. However, 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. 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.

[1411] See Chapter 12 of this Discussion Paper.

Although the Commission believes 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 acknowledges 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.

In the view of the Commission, the preferable approach would be for the government to develop a set of workable guidelines for the reimbursement of travel expenses incurred by justices of the peace in the exercise of their role.

(d) Definition of "reward"

The word "reimburse" is defined by the Australian Concise Oxford Dictionary to mean to "repay a person who has expended money, a person's expenses".[1412] In the view of the Commission, it is 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 the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld).[1413]

However, to overcome the apparent reluctance to recognise costs incurred by justices of the peace, the Commission considers that the definition of "reward" should be amended to clarify the fact that it does not include the reimbursement of expenses.

7. PRELIMINARY RECOMMENDATIONS

The Commission makes the following preliminary recommendations in relation to expenses incurred by justices of the peace and commissioners for declarations:

Training

- **Justices of the peace (qualified) and commissioners for declarations should not be reimbursed for the cost of training prior to their appointment.**

- **Ongoing training for justices of the peace (qualified) should be provided at public expense.**

1412 *The Australian Concise Oxford Dictionary* (2nd ed 1992) at 962.

1413 See p 283 of this Discussion Paper.

- **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 (magistrates court) should also be provided at public expense.**

- **Any ongoing training considered necessary for commissioners for declarations should be provided at public expense.**

Travel

- **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.**

Definition of "reward"

- **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.**

8. ISSUES FOR CONSIDERATION

- **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?**

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, C dec
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

SURVEY OF MAGISTRATES COURTS

COURT MATTERS DEALT WITH BY JUSTICES OF THE PEACE

Magistrates Court at .....

Date	**Type of hearing** *(eg adjournment, remand, grant of bail, sentencing, committal, trial)*	**Type of offence** *(please tick whichever is appropriate)*		**Category of justice of the peace** *(please tick whichever is appropriate)*				
		Non-indictable offence	**Indictable offence heard summarily**	**JP (MAG CT)** *Court employed*	**JP (Qual)** *Court employed*	**JP (MAG CT)** *Appointed*	**JP (Qual)** *Appointed*	**JP** *Under old system*

APPENDIX C

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 courts) 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.

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APPENDIX D

APPOINTMENT OF PLACES FOR HOLDING MAGISTRATES COURTS

Magistrates Court Districts[1414]	Place(s) for holding a Magistrates Court[1415]	Staffed Magistrates Courts[1416]	Resident Stipendiary Magistrate(s)[1417]
Beaudesert	Beaudesert	Beaudesert	-
Beenleigh	Beenleigh	Beenleigh	Beenleigh (3)
Bowen	Bowen	Bowen	Bowen (1)
Brisbane, Central Division	Brisbane-City	Brisbane	Brisbane (22)[1418]
Brisbane, Holland Park Division	Holland Park	Holland Park	Holland Park (1)
Brisbane, Inala Division	Inala	Inala	Inala (1)
Brisbane, Sandgate Division	Sandgate	Sandgate	Sandgate (1)
Brisbane, Wynnum Division	Wynnum	Wynnum	Wynnum (1)
Bundaberg	Bundaberg Childers	Bundaberg Childers	Bundaberg (1)
Caboolture	Caboolture Petrie	Caboolture Petrie	Caboolture (1) Petrie (1)

1414 *Justices Regulation 1993* (Qld) s 17, Sch 4.

1415 *Justices Regulation 1993* (Qld) s 17, Sch 4. Information in relation to clerks of court has been provided by the Magistrates Court Branch of the Department of Justice and Attorney-General (Qld) (May 1999).

1416 Information provided by the Magistrates Courts Branch of the Department of Justice and Attorney-General (Qld) (May 1999).

1417 Information provided by the Chief Stipendiary Magistrate (April 1999).

1418 This figure includes two relieving magistrates, one coroner, one Childrens Court magistrate, and one referee, Small Claims Tribunal: information provided by the Chief Stipendiary Magistrate (April 1999).

Cairns	Atherton Cairns Chillagoe [P] Croydon [P] Einasleigh [P] Georgetown Kowanyama [P] Mareeba Mossman Pormpuraaw [P] Yarrabah [P]	Atherton Cairns Georgetown Mareeba Mossman 	Cairns (4) Mareeba (1)
Charleville	Adavale [P] Charleville Eromanga [P] Quilpie Tambo [P]	 Charleville Quilpie 	 Charleville (1)
Charters Towers	Charters Towers Greenvale [P] Pentland [P]	Charters Towers	-
Clermont	Clermont Moranbah	Clermont Moranbah	-
Cleveland	Cleveland	Cleveland	-
Cloncurry	Cloncurry Dajarra [P] Julia Creek Kynuna [P] McKinlay [P] Normanton	Cloncurry Julia Creek Normanton	-
Cooktown	Aurukun [P] Coen [P] Cooktown Lockhart River [P] Weipa	 Cooktown Weipa	-
Cunnamulla	Cunnamulla Hungerford [P] Thargomindah [P] Wyandra [P]	Cunnamulla	-
Dalby	Chinchilla Dalby Meandarra [P] Tara [P] Taroom	Chinchilla Dalby Taroom	 Dalby (1)
Emerald	Blackwater Duaringa [P] Emerald	Blackwater Emerald	 Emerald (1)
Gladstone	Gladstone	Gladstone	Gladstone (1)

Gold Coast	Coolangatta Southport	Coolangatta Southport	Southport (7)
Goondiwindi	Bollon [P] Dirranbandi [P] Goondiwindi Mungindi [P] St George	 Goondiwindi St George	-
Gympie	Gympie	Gympie	Gympie (1)
Hughenden	Hughenden Richmond	Hughenden Richmond	-
Innisfail	Innisfail Tully	Innisfail Tully	Innisfail (1)
Ipswich	Gatton Ipswich Toogoolawah	Gatton Ipswich Toogoolawah	Ipswich (3)
Kingaroy	Kingaroy Murgon Nanango	Kingaroy Murgon Nanango	Kingaroy (1)
Longreach	Alpha [P] Barcaldine Blackall Isisford [P] Jundah [P] Longreach Muttaburra [P] Windorah [P] Winton Yaraka [P]	 Barcaldine Blackall Longreach Winton	-
Mackay	Mackay Proserpine Sarina St Lawrence [P]	Mackay Sarina	Mackay (1)
Maroochydore	Caloundra Landsborough Maroochydore Nambour Noosa Pomona	Caloundra Landsborough Maroochydore Nambour Noosa Pomona	Maroochydore (4)
Maryborough	Gayndah Hervey Bay Maryborough	Gayndah Hervey Bay Maryborough	Hervey Bay (1)

Mount Isa	Bedourie [P] Birdsville [P] Boulia [P] Burketown [P] Camooweal [P] Doomadgee [P] Mornington Island [P] Mount Isa	Mount Isa	Mount Isa (1)
Redcliffe	Redcliffe	Redcliffe	Redcliffe (1)
Rockhampton	Baralba [P] Biloela Rockhampton Yeppoon	Biloela Rockhampton Yeppoon	Rockhampton (2)
Roma	Roma	Roma	-
Stanthorpe	Stanthorpe	Stanthorpe	-
Thursday Island	Bamaga [P] Thursday Island	Thursday Island	
Toowoomba	Oakey Pittsworth Toowoomba	Oakey Pittsworth Toowoomba	Toowoomba (2)
Townsville	Ayr Great Palm Island [P] Ingham Townsville	Ayr Ingham Townsville	Townsville (5)
Warwick	Warwick	Warwick	Warwick (1)

Legend

[P] Denotes that a police officer acts as the clerk of the court.