
REPORT NO 7

The Structure of the Courts

March 1989

Wellington, New Zealand

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The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advice on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

The Rt Hon Sir Owen Woodhouse KBE DSC - President
Jim Cameron CMG
Sian Elias QC
Jack Hodder
Sir Kenneth Keith KBE
Margaret A Wilson

The Director of the Law Commission is Alison Quentin-Baxter. The offices of the Law Commission are at Fletcher Challenge House, 87-91 The Terrace, Wellington.
Telephone: (04) 473 3453. Facsimile: (04) 471 0959. Postal address: PO Box 2590, Wellington, New Zealand.

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20 March 1989

Dear Minister

I am pleased to submit to you Report No 7 of the Law Commission, on The Structure of the Courts.

The Report indicates the legislation which would be needed to give effect to the proposals made in the Report if they are adopted. We would of course be pleased to help with the further elaboration of the legislation, as well as with the related critical administrative steps.

You will recall that the purposes of your reference are stated in broad terms. They include such matters as the ready access of New Zealanders to the courts. The reference itself, our discussion paper, the main submissions and our consultations, research and deliberations all emphasise the structure of the courts. At this stage it is this matter which has demanded major attention by the Law Commission. Now, having regard to the other aspects of the justice system which are currently under review and following appropriate consultation, we will proceed to determine what other aspects need to be taken up.

Yours sincerely

Owen Woodhouse
President

The Right Honourable Geoffrey Palmer MP
Deputy Prime Minister and Minister of Justice

TERMS OF REFERENCE

PURPOSE OF REFERENCE

- 1 To determine the most desirable structure of the judicial system of New Zealand in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand.
- 2 In any event, to ascertain what changes, if any, are necessary or desirable in the composition, jurisdiction and operation of the various courts in order to facilitate further the prompt and efficient despatch of their criminal, civil and other business.
- 3 Similarly, to ascertain what further changes, if any, are desirable to ensure the ready access of the people of New Zealand to the courts to determine their rights and resolve their grievances.

REFERENCE

With those purposes in mind you are asked to review the structure of the judicial system of New Zealand, including the composition, jurisdiction and operation of the various courts, having regard among other matters to any changes in law and practice consequent upon the recommendations of the Royal Commission on the Courts, and to make recommendations accordingly.

PRINCIPAL RECOMMENDATIONS

THE OVERALL STRUCTURE

- 1 There should be 3 courts of general jurisdiction -

the District Court (including the Family Court) of New Zealand;
the High Court of New Zealand; and
the Supreme Court of New Zealand.
- 2 The District Court and the High Court should continue to be courts of original jurisdiction. That jurisdiction should be divided between the 2 Courts according to its complexity and its importance to the litigants and the public.
- 3 Each Court should continue to have areas of exclusive jurisdiction. So (to mention just 3 examples), the District Court (in appropriate cases consisting of Justices of the Peace) should continue to have exclusive jurisdiction over minor offences, the Family Court should have exclusive jurisdiction over certain family matters, and the High Court should continue to have exclusive jurisdiction over applicants for judicial review of administrative action.
- 4 The District Court should have much more extensive original jurisdiction in both criminal and civil matters and as a result that Court and the High Court should have a much wider area of concurrent jurisdiction.
- 5 Matters which fall within the concurrent jurisdiction of the 2 Courts should be commenced in the District Court. They should be able to be removed into High Court by order of a Judge of the High Court on the grounds of their complexity or general importance or by consent of the parties.
- 6 Appeals from the District Court should in general be to the High Court, usually consisting of 3 Judges.
- 7 Appeals from the High Court should be to the Supreme Court consisting of a panel of at least 3 Judges. The Supreme Court should be the final court for New Zealand. It should also have, with its leave, original jurisdiction over appropriate cases of an exceptional kind.

THE BUSINESS OF THE COURTS (CHAPTER III)

- 8 The criteria proposed by the Legislation Advisory Committee for the allocation of powers of decision between the executive, the courts and tribunals in its Report on Administrative Tribunals (Report No 3, February 1989) should be adopted and applied (paras 136-137).

9 The development of appropriate structures of dispute settlement (including arbitration and mediation) should be supported by initial financial and other measures (paras 142-144).

10 Much of the barely justiciable and administrative work at present being handled by District Court Judges, especially in the criminal jurisdiction, should be dealt with by court staff. Greater attention should continue to be given to court administration in the interests of economic, efficient and effective access to justice (paras 146-151).

11 More extensive use should be made of standard fine and minor offence procedures, for example for relatively more serious offences such as transport licensing and first excess blood alcohol offences (paras 158-160).

12 Consideration should be given to a process for recording a formal warning in respect of certain criminal charges, the warning to replace prosecution but to become relevant to sentence on any later conviction. Such procedures should be subject to appropriate safeguards (paras 167, 168).

13 Those responsible for legislation which changes the substantive law should have conscious regard for the consequences of those changes upon the workload of the courts (para 170).

ORIGINAL BUSINESS (CHAPTER V)

Civil Jurisdiction

14 The District Court should have concurrent civil jurisdiction with the High Court with the exception of specified categories of cases. The exceptions should include statutory supervisory powers, judicial review of administrative action, and the inherent jurisdiction of the High Court (paras 197, 277, 281-300).

15 A High Court Judge on the application of either party should have the power to order the transfer of a civil proceeding to the High Court on the grounds of its complexity or general importance. The general statutory criteria for the exercise of that power would be amplified from time to time by regulation. If the parties consent, the trial would be transferred (paras 197, 198, 269-276, 302-304).

16 Juries should be available as of right in civil cases only in respect of fraud, defamation and false imprisonment (subject to the present exception for cases involving difficult points of law, and prolonged examination of documents or scientific or technical evidence). On application, a judge should continue to have the power to order trial by jury where that was more convenient. The role of the jury in respect of damages requires further examination (paras 321-326).

17 The District Court should have all the procedural and remedial powers of the High Court in respect of matters within its jurisdiction (paras 284-287, 316).

18 With the exceptions indicated in recommendation 14 above all civil proceedings would be filed in the District Court and would be subject to the same Rules of Court. Similarly if the facilities which are provided to litigants in the High Court by way of the

experimental Commercial List and the Masters continue, then those facilities should be available as well in the District Court (paras 311, 327, 328, 531, 536).

19 The Family Court should have jurisdiction under the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and the Status of Children Act 1969 (paternity orders) and in respect of wardship (paras 307-309).

20 Matters within the concurrent jurisdiction of the Family Court and the High Court should be commenced there but should be subject to removal in accordance with the principles outlined in recommendation 15 above for other civil matters (paras 313, 314).

Criminal Jurisdiction

21 The District Court with a jury should have jurisdiction over all criminal prosecutions where there is a right to trial by jury (paras 200, 277, 336-338).

22 A High Court Judge, on the application of the defendant or the prosecutor, should have the power to order the transfer of a jury trial to the High Court on the grounds of the complexity of the case or its general importance. The general statutory criteria for the exercise of that power would be amplified from time to time by regulation. If the parties consent, the trial would be transferred (paras 269-276, 335, 339-345).

23 At the request of the defendant, a High Court Judge should continue to have the power to order the hearing by a High Court Judge alone of a criminal prosecution where there is a right to trial by jury (paras 353(c)).

24 District Court Judges should have the same sentencing powers as High Court Judges except for the sentence of preventive detention which could be imposed only by the High Court (paras 3489-351).

Original Jurisdiction of the Supreme Court

25 In appropriate cases of an exceptional kind involving issues of general public importance the Supreme Court should be able to grant leave to decide matters originally (paras 358-360).

APPEAL BUSINESS (CHAPTER VI)

General

26 The parties to court and tribunal proceedings should be general have one right of appeal against decisions prejudicing them (para 235).

27 In particular, defendants convicted following a jury trial should have a right of appeal against conviction and sentence (paras 386-388).

28 Favourable consideration should be given to enabling the Solicitor-General, following an acquittal in a jury trial, to refer for the opinion of the Supreme Court any

question of law arising in the trial. The judgment of the Supreme Court would have no effect on the acquittal (para 234).

29 second appeal, if available, should be by leave and not of right (paras 253, 384).

30 Civil appeals on interlocutory matters should be by leave only. There should be a careful definition of interlocutory decisions (for example to exclude an order striking out proceedings), and recognition that some interlocutory decisions (for instance interim injunctions) are of major importance (paras 389, 390).

Appeals to the High Court

31 Appeals from the District Court including appeals following District Court jury trials should be heard by the High Court. With the leave of the Supreme Court, appeals might however be taken directly to that Court (paras 253, 434-444, 480, 481).

32 Appeals from the Family Court should continue to be heard by the High Court. The alternative opportunities of seeking a rehearing in or making a new application to the Family Court should sometimes be preferred, especially in cases of custody, wardship and guardianship (paras 449-454).

33 In general the High Court when hearing appeals should consist of 3 High Court Judges, but with jurisdiction in appropriate cases for 2 Judges to comprise the Court. With the consent of the parties the Court could consist of 1 or 2 High Court Judges (paras 455-461).

34 The Administrative Division of the High Court should be abolished and its jurisdiction exercised by the High Court (paras 468-474).

35 A first appeal to the High Court should usually be a general appeal. Usually that should also be the case for appeals from administrative tribunals (paras 463, 475, 478).

36 The Supreme Court should have jurisdiction over appeals against decisions of the High Court given by that Court in its original jurisdiction and on appeal, and, exceptionally, directly against decisions of other Courts and tribunals (paras 253, 480).

Appeals to the Supreme Court

37 A first appeal to the Supreme Court should be a general appeal. Second and leapfrog appeals to it should usually be limited to questions of law (paras 483-485).

38 A first appeal to the Supreme Court from final decisions of the High Court should be as of right. Appeals from interlocutory decisions, second appeals and leapfrog appeals should be by leave. In the case of interlocutory appeals leave could be granted by either the High Court or the Supreme Court. In the case of second and leapfrog appeals, only the Supreme Court could grant leave on the grounds of general public importance. The leave could be granted on conditions and might state the questions of law to be addressed (para 481).

THE JUDGES (CHAPTER VII)

39 The number of Judges in the High Court and in the District Court should be reduced (paras 518, 519).

40 A 5 hour sitting day, 5 days a week should be the normal objective for each District Court Judge (para 515).

41 The system of warranting District Court Judges for jury trial work should be reviewed in the light of the experience of the extended jurisdiction under a restructured court system (para 527).

42 The Office of Master should be reviewed in the light of the experience of the Office, of the increase and concurrent civil jurisdictions, and of its operation within the District Court, 5 years after the introduction of the proposed reforms to the civil jurisdiction (paras 536-538).

43 The Supreme Court should consist of the Chief Justice of New Zealand and up to 6 other permanent Judges. The Chief Justice, as head of the judiciary, should normally sit in the Supreme Court and would of course preside. There should be a presiding Judge of the High Court with administrative authority in respect of it (paras 489-491, 539-546).

LEGISLATIVE PROPOSALS (CHAPTER IX)

44 Legislation in the form of a new Courts Act should be enacted to implement the above proposals. The Judicature Act 1908 and District Courts Act 1947 can then be repealed. Consequential changes will need to be made to other Acts-in particular the Summary Proceedings Act 1957 and the Crimes Act 1961. (Detailed legislative proposals are contained in Chapter IX.)

I

Introduction and Summary

COURTS IN A FREE AND FAIR SOCIETY

- 1 The courts have an essential role in our system of constitutional government. They are essential to a free and fair society. With the executive and Parliament, they comprise the main branches of government. They are charged with enforcing the law, clarifying the developing it, upholding constitutional relationships, protecting New Zealanders against abuses of the power of the State, and settling disputes peacefully and according to law.
- 2 The structure of the courts must be such that they can meet those and related obligations. So together with other arrangements, the structure should facilitate the ready access by New Zealanders to the courts to determine their rights and to resolve their grievances, and the prompt and effective despatch by the courts of that business. According to Magna Carta, in a provision reaffirmed by Parliament within the past year as part of our law, no-one is to be condemned but by lawful judgment of their peers and according to due process of law; neither justice nor right is to be denied or deferred. And the International Covenant on Civil and Political Rights, accepted by the New Zealand Government in 1978, entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law for the determination of criminal charges against them and of their rights and obligations under the law.
- 3 These obligations of the State and rights of individuals relate to the duties of the judges, because the courts, it hardly needs to be said, consist of individual judges, along with others such as Justices of the Peace, jurors, expert members and assessors, and tribunal members. The judicial oath emphasise these duties. It requires judges to do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.

TWO QUESTIONS OF STRUCTURE

- 4 What resources-of people, facilities, and money- must the State provide to meet these obligations? And how are they to be organised to fulfil the obligations? That second question - of organisation or structure - is our primary concern in this Report. There are 2 main structural questions: how should the original jurisdiction of the courts be organised and how should appeals be organised? The questions - especially about appeal - are given particular point by the announcement by the government of its decision that appeals to the Judicial Committee of the Privy Council are to be terminated. This Report is written on that basis.
- 5 Those organisational and structural issues should be put into the wider context of the essential role of the courts indicated in the first paragraph. They are means to those very important ends. They are not ends in themselves. We do not address in any extensive way other important means of pursuing these ends. So one critical aspect of access to justice which is being separately handled is legal aid and the other legal services provided by the State. Similarly we do not give major attention to some of the particular areas of the work of the courts. The reference to us does emphasise the structure of the courts.

OTHER METHODS OF DISPUTE SETTLEMENT

- 6 The courts are not the only means of settling disputes and enforcing the law. Many disputes are settled by negotiation and agreement, others by informal third party processes of mediation and conciliation, and still others by systems of arbitration agreed to by the parties. And then there are the many administrative tribunals which handle disputes between government agencies, Ministers and officials on the one side and individuals on the other, and sometimes between individuals. The Law Commission has recently published a Discussion Paper on *Arbitration* (NZLC PP 7), the Legislation Advisory Committee has reported to the Minister of Justice on Administrative Tribunals, and there are other important developments and proposals relating to methods of dispute settlement including proposals for a commercial disputes centre and the recent experience with community mediation in Christchurch. The role of the courts must be related to those other methods in at least 2 broad ways. First a choice may have to be made -

by the law, by the courts or other bodies, or by the parties - between the different methods, and, secondly, if a power of decision is allocated elsewhere (for instance to a tribunal, arbitrator, Minister or official) the courts might hear appeals against or review those decisions.

CHANGES IN SUBSTANTIVE LAW

- 7 The choice of means of handling a matter might of course lead to the courts not being involved at all. The substance of the law might also be altered in such a way that the business of the courts in a particular area disappears or is drastically reduced. The change in the law relating to personal injuries illustrates the former and the changes in the grounds for divorce and the introduction of standard fine and minor offences procedure the latter. Increases in the business of the courts may also occur as a result of changes in society (as with the growth in the trials of serious criminal charges) and in legislation (such as the Fair Trading Act) and the common law (as with the development of administrative law).
- 8 The structure of the courts must, as far as possible, take account of or at least allow for these other means of dispute settlement and such changes in the substantive law and in its use. Legislators who are promoting developments in the substantive law should also of course have regard to the consequences of those developments for the courts and other dispute settlement methods. This issue was well illustrated by the close correlation between the changes in the substance of family law and in the institutions and procedures for applying that new law.

OTHER RELEVANT PRINCIPLES AND CRITERIA

The Right to Appeal

- 9 A real right of access by individuals to the courts for the enforcement of the law and the protection of rights under the law is the essential starting point for proposals about the structure of the courts and the business that they handle. Other principles are also critical. One which is prominent in the terms of reference for this review is the right to challenge decisions of courts by way of appeal. Our legal system has long set against the principles that judgments are binding and

final and that there ought to be an end to litigation the proposition that fairness and the possibility of human error often require a right of appeal.

Matching the Resources to the Tasks

- 10 The court system should so far as possible ensure that New Zealand's resources, especially the human ones, are well matched to the responsibilities of the courts. The courts handle a bewildering variety of cases, some of great complexity and major public interest, others more routine (although often still important to those involved). Different qualities and procedures are needed to meet those responsibilities. In serious criminal cases our constitutional system has long accorded the right to a trial by one's peers - a trial by jurors from the community, including at various points in our history special juries for technical and complex matters, a jury of their own nationals for alien litigants, and Maori juries for criminal and civil cases involving Maori parties. In matters involving particular expertise an expert member or assessor might sit with the judge, or an administrative tribunal might have jurisdiction. Some matters take only a short period of time - but still require fair and competent handling - while others may call for a lengthy hearing running over many days. The former usually involve only a relatively routine application of unchanged law while the latter category may present large, unresolved issues of legal principle which call for decisions by the highest court consisting of several senior judges.

The Role of the Community

- 11 As we have just mentioned, members of the community have a major role in the operation of the justice system as members of juries. They may also be decision-makers in the system as referees in disputes tribunals, as Justices of the Peace, in tenancy tribunals and in a wide range of statutory and domestic tribunals. This role has grown markedly over the last decade or so and can be seen to be related to the broader issue about the allocation of power between courts and other bodies which settle disputes.

Te ao Maori

- 12 A major question facing New Zealand - and increasingly being given answers in particular contexts - is the place in our legal and constitutional system of the Treaty of Waitangi and the rights and interests of Maori tribes and individual Maori. At the moment there is before Parliament and the people of Maori Affairs Bill providing for the continuation of the Maori Land Court and giving it greater powers, proposals for major change in the development and administration of Maori policy (including the administration of the Maori Land Court),¹ a proposal for a major Parliamentary inquiry into the constitutional position of the Maori people, and legislation, litigation and Waitangi Tribunal claims relating to particular matters. There have also been major inquiries into the Maori and the criminal justice system, most recently Part 2 of *He Whaipanga Hou* by Moana Jackson (November 1988). The Law Commission Act 1985 requires the Commission to take into account te ao Maori (the Maori dimension). The Act also requires the Commission to give consideration to the multicultural character of New Zealand society.
- 13 Our major related concern in this Report is not to prejudice such of those developments as have or may have an impact on the general legal system. We do not think that our proposals will have that effect. At this point we would call attention to the long traditions of plurality within our legal system - a single system to be true, but one allowing diversity within it. So, to mention arbitration again, we have there an institution in which the autonomy of the parties is to be weighed against public policy which might restrain that autonomy. And many organisations and groupings have extensive powers of governance over their own affairs.

Practicality and Flexibility

- 14 The careful matching of the resources to the needs of the justice system is all the more important in a small country like New Zealand with a limited number of qualified people available to undertake the most important judicial tasks. Any proposals for the structure of the courts must be practical in those terms. They must also allow for likely future developments, and within reason have some

flexibility to cope with outcomes which cannot be predicted. Practicality also involves geography. Against the advantages of centralisation and its concentration of the relevant judicial, legal and administrative talents are the disadvantages of the thin spread of our population and the need for the courts to be reasonably accessible.

The Careful Use of Resources

- 15 Resources must also be carefully used in another sense. The court system will cost the taxpayer \$124 million this year plus a large capital expenditure. The Department of Justice calculates the total cost of a District Court Judge at \$350,000 each year. Against such expenditure there are recoveries of court costs. The expenditure, which can be quantified say in costs for particular categories of case or the sitting time of individual judges, must be used in an efficient and effective way. Critical to this is good administration which in turn requires clear understandings between the executive and the courts (and within the courts as well) about the various responsibilities for our system of justice.

Simplicity

- 16 An aspect of access to the legal system and to justice and of the broad acceptance of the system is that it be as simple as possible. The overall structure of the courts should be one that can be easily grasped. It should be possible in the usual case to anticipate quickly and accurately which court is likely to handle a particular matter and what appeals (if any) are available. Procedures too should to be unnecessarily complex.

The Independence of the Judiciary

- 17 Over the centuries the judges have established their independence and Parliament and the executive have recognised it in various ways. What does the principle of judicial independence mean? What is its purpose? The courts decided disputes between individuals. They decide disputes between individuals and the State. They protect individuals from the abuse of State power. To be able to undertake those essential constitutional tasks without fear and favour and to do justice according to law, the judges in law and practice have become independent in

various ways of the Government and other political agencies. So they have permanent tenure and can be dismissed only for cause (in the case of the senior judiciary only following a parliamentary process), the salaries of the senior judiciary are permanently appropriated and not subject to reduction, judges are in general immune from legal suit in respect of their judicial functions, and they are protected from certain types of public attacks (in part through their own contempt power).

- 18 This independence must not be seen as an end in itself. It cannot be used to deny the responsibilities of the judges individually and collectively, or the broad duties of the State, to provide a system of justice and to facilitate access to that system. It must take account of matters such as those mentioned in para 15 and referred to later in paras 47 to 49.

Generalists and Specialists

- 19 A recurring matter in the submissions and in our discussions - inevitably given their emphasis on structure - has been the balance between generalist and specialist judges and courts - one original court or two? A separate Family Court or one within the District Court? An appellate family court? A separate intermediate appellate court? Specially warranted judges in the District Court for criminal jury trials and important civil matters as well as for family cases? Separate tribunal judges? A balance has to be struck between matching the resources to the tasks (to return to para 10) and the dangers of over specialisation, of ignoring general principle and the administrative inflexibility that can arise from a relatively small group of judges being divided into several distinct groups.

Building on what we have

- 20 Our legal system has been developing over a very long time. For good constitutional and practical reasons, we should build on the enduring features of that system while enabling it to adjust to the new circumstances. We must take account of the important changes made and initiated following the Report of the Royal Commission on the Courts (1978) (under the chairmanship of the (then) Mr

Justice Beattie) and more specifically of the Government's announcement that the appeal to the Judicial Committee of the Privy Council is to be removed.

Meeting Society's Needs

- 21 Much of the foregoing brings us back to the essential constitutional and social role of the courts mentioned at the outset. The courts must be so organised as to meet those heavy responsibilities as best they can. That involves a myriad of matters from a large questions of structure (our conclusions on which we set our next) to practical matters of administration (such as the efficient scheduling of cases to meet the convenience of litigants, and the use of court attendants).
- 22 There are increasing signs that many in society consider that the justice system is not adequately meeting those large responsibilities. Sir Ivor Richardson, writing as Chairman of the Royal Commission on Social Policy, said that the submissions received by that Commission fully justified the following conclusions:

There is a widespread perception, especially amongst ethnic minorities and other disadvantaged sections of the population but to some extent amongst all consumers of the legal system, that it is complex, alien and remote from the lives of ordinary people. There is also a perceived ethnocentric bias both in its procedure and in outcomes, and the feeling that the system is failing to provide an adequate service or adequate redress to significant sectors of the population, and is therefore failing to efficiently and effectively regulate relationships between citizens. (the April Report of the Royal Commission on Social Policy : Te Komihana A Te Karauna Mo Nga Ahuatanga-A-Iwi, Vol IV Social Perspectives p 18 referring to the paper by Warren Young and Caroline Bridge printed at p 195.)

- 23 As that Report indicates, steps have been taken or are being considered to answer some of those concerns - or to attempt to. We mention 4 of them here. The State's financial contribution through the legal aid scheme has greatly increased in recent years and is the subject of current review. The jurisdiction of Small Claims (Disputes) Tribunals is being substantially increased thereby facilitating the resolution of many civil disputes in a rapid, relatively informal and less costly way. Various of the services of the Family Courts - a major development of this decade - are being reviewed to see whether they may be made more effective. And the children and young persons law - including its court - have been and continue to be the subject of a lengthy review process.

OUR PROPOSALS

- 24 It is against that background that the Law Commission briefly summarises its conclusions and recommendations on the structure of the courts.

The Business of the Courts

- 25 What matters are the courts handling? Are there matters which they should not be deciding? Or matters which they ought to be, but are not? How in a general way are the decision-making powers of the State to be allocated between executive government, courts and tribunals? And how are other methods of dispute settlement to be seen and used?
- 26 The Law Commission generally supports the criteria stated by the Legislation Advisory Committee in its Report on Administrative Tribunals (Report No 3, February 1989) for the allocation of public powers of decision between the executive, the courts and tribunals. Those criteria relate to

the characteristics of the powers, the issues to be resolved, and the interests affected,

the qualities and responsibilities of the decision-makers, and

the procedures they follow.

The Law Commission also recommends that these criteria be applied more consistently. The aim is to match the business to be done with the most appropriate method of handling it. To repeat an earlier example, the Small Claims (Disputes) Tribunals can handle relatively small, high volume cases in an expeditious, less formal and less costly way than the regular courts. But more important and larger disputes about civil liability are seen to be more appropriately resolved by the more formal and deliberate methods of the District Court or even the High Court.

- 27 Administrative tribunals are not to be seen as completely distinct from the court system. Sometimes a court and a tribunal will have overlapping original jurisdiction. Members of the judiciary will sometimes be tribunal members. there

will often be a right of appeal to the courts at least on questions of law, and the Law Commission recommends that at least that right be conferred. Our work on arbitration will also involve a determination of the relationship between the courts and the arbitrators. And we need to have in mind the increasing range of international dispute settlement methods.

28 We also make proposals about much of the very routine work and about some important criminal business. The Law Commission recommends that

- (1) much of the basically administrative work handled by District Court Judges sitting in the summary criminal court be dealt with by court staff - assuming, that is, that it need be dealt with at all (for there is a growing recognition within the courts administration that some of the adjournments and remands could and should be avoided). We stress that this would not extend to the collateral issues of a justiciable kind which need to be decided by the Judges, such as name suppression and contested bail applications or the need for reference to a Judge of those administrative questions which have real significance for the parties;
- (2) more extensive use be made of standard fine and minor offence procedures, even for quite serious offences such as transport licensing and first excess blood alcohol driving offences; the automatic choice of court hearings should be replaced by a greater willingness to avoid them particularly where prosecution or defence is left with opportunities to apply for a hearing in any particular case;
- (3) consideration be given, in a development of police warning and diversion practices, to a process for recording a formal warning in respect of certain criminal charges, the warning acting to prevent prosecution but to be relevant to sentence on any later conviction.

Such changes would have important consequences for the work of the District Court Judges. So too should some of the changes which are the subject of experiments and proposals at the moment. They include pretrial conferences for defended criminal trials, different scheduling of cases (in part as a consequence of

the Report of the Controller and Auditor-General on court administration), and changes in imprisonment for debt legislation.

- 29 We now set out our conclusions concerning the organisation of court business, considering in turn the original jurisdiction and appeals.

First Instance Business

- 30 All first instance business cannot be handled at one level. The range, difficulty, importance and variety of the work is such that particular groups of judges would have to be assigned to particular work. In addition, gradations and divisions within such a single court would be required. There would as well be major transitional problems in bringing the High Court and the District Court¹ together. Finally, many of the advantages of a single original court can be achieved by having a single registry, and point of entry, a single set of rules, and a reallocation of jurisdiction with much more business being handled in the District Court. The advantages to the users of the courts and their staff of a single set of rules should be substantial. Accordingly we recommend that the District Court and High Court continue as courts of original jurisdiction.

The District Court

- 31 The District Court with a jury should now be given jurisdiction over all criminal prosecutions where there is a right of trial by jury and normally those trials should be heard in that Court. This would be subject to the right of the defendant or the prosecution to apply to a High Court Judge for an order removing the case into the High Court because of its particular significance in terms of complexity or general importance. We anticipate that directions would be made by regulation indicating the categories of case which might usually be transferred and the principles which might justify removal into the High Court. High Court Judges would exercise the removal power in terms of those directions, and the parties could consent to

¹ The position at the moment is that we have one High Court and many District Courts, although their Judges are titled District Court Judges - and include the Chief District Court Judge, Family Court Judges and the Principal Family Court Judge - and all can exercise jurisdiction everywhere in the country whatever the district. We propose that the District Court become a single Court, and accordingly we frequently use the singular in this Report.

removal. In this, as in the civil area, we would anticipate the rapid development of clear rules and understandings about the transfer of business. It would be contrary to our purpose to have large numbers of transfer applications. We propose that the system of warranting particular District Court Judges for criminal cases should continue in the meantime but that it should be reviewed in the light of the experience of the widened jurisdiction and any practical problems its inflexibility causes.

- 32 The District Court should have much wider civil jurisdiction. At the same time some matters should remain within the exclusive jurisdiction of the High Court. They include for example supervisory powers and the judicial review of administrative action. Indeed the constitutional and supervisory powers of the High Court are among the matters that put it apart from the District Court. There would be a presumption, to be stated in a direction made by regulation, that claims over a certain monetary amount - we propose \$250,000 - be heard in the High Court. Again a High Court Judge would have power to remove a matter into the High Court because of its complexity or importance. The parties would also be able to consent to removal.

- 33 The Family Court should remain part of the District Court with its Judges continuing to spend about 20 to 25 percent of their time in the general jurisdiction. The jurisdiction of the Court should be expanded. It should have wardship jurisdiction and jurisdiction under the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and in respect of paternity applications. This has to be related to the handling of other probate and wills matters. Proceedings within the concurrent jurisdiction of the Family Court (including matrimonial property applications which would all be filed there) and the High Court would be filed in the Family Court. They would be subject to removal to the High Court for reasons of complexity or general importance on the order of a High Court Judge. Again the parties would be able to consent to removal. Our expectation here, as with criminal and civil matters, would be that most cases would remain in the District Court.

- 34 The District Court would have exclusive jurisdiction in certain areas. That is already so far instance in respect of summary criminal matters and some family jurisdiction.

The High Court

- 35 The original work in the High Court would be reduced substantially by the above measures. It would still handle some criminal trials and civil cases of greater significance. For instance it would continue to decide major commercial law and public law cases and to hear the most important criminal trials. Its role in those original areas would be given added meaning by being focused in that way. At the same time (as we explain shortly) its appellate and supervisory work would be larger absolutely as well as relatively than it is now. In a word adoption of these proposals will add to the status of the High Court.

Appeal Business

- 36 The District Court has an increasing appellate function from tribunals and administrative bodies. That is consistent with the enhanced role we propose for it.
- 37 Under the Commission's proposals the High Court should have a larger appellate role. This will result from the proposed increased original jurisdiction of the District Court and a consequent increase in the number of appeals from it, our proposal that almost all appeals from criminal jury trials in the District Court be heard in the High Court, and that in general the High Court consists of 3 Judges or, in appropriate cases 2, when hearing appeals rather than 1 as at the moment. (A Court of 1 or 2 could hear appeals with the consent of the parties.) At the moment only a tenth or less of the sitting time of High Court Judges is appellate. We would anticipate a substantial increase.
- 38 The Court of Appeal - renamed the Supreme Court in our proposals - would be the final court in our system of justice. It might continue to exercise very limited original jurisdiction over major matters removed to it with its leave. Its criminal appeal work would be very substantially reduced by the above proposals. It would still however hear criminal appeals directly from High Court jury trials (which would be relatively rare) and second appeals (or, exceptionally, leapfrog appeals),

only with leave, from District Court jury trials. It would also hear direct appeals from the High Court in civil matters, and second or leapfrog appeals from District Court civil and family matters, again only with leave. As the final court in our system it would have an oversight of all areas of the law. The changes we propose would, by reducing the pressure of work, enable it fully to meet the responsibilities of being the final court. It would be able, as appropriate, to sit in panel of 3 or as a full court of 5, 6 or 7.

39 In the Law Commission's opinion these proposals would strengthen all 3 courts:

The District Court as the work horse in the system and the court handling the great volume of first instance business would have its role enhanced by the addition to its jurisdiction of important criminal trials in general, together with a significant increase in civil jurisdiction, and by further emphasis on its special strengths (for instance in the family law area).

The High Court would have a more clearly distinctive statute as the court handling the more significant original business, for instance in the commercial law and public law areas together with major criminal trials, and with an important appellate and supervisory function.

The Supreme Court would be better able to meet more fully its unique overall responsibility for the clarification and development of the law and legal policy, a responsibility which will be direct and final with the proposed abolition of appeals to the Judicial Committee.

40 The proposals, we think, provide the best possible match at this time of the resources, especially of people, to the tasks to be carried out through the court system. One important consequence should be for the recruitment of the most able and suited to the particular level of court. The proposals also have within them - with the arrangements for concurrent jurisdiction between the 2 courts of original jurisdiction and the varying types of specialisation found in those 2 courts - a flexibility to meet changing needs. The changes can be made in the light of experience.

The Judges

- 41 The proposals we make about the 3 courts - the Supreme Court, the High Court, and the District Court - would if adopted have in our opinion an inevitable impact on the question whether the Chief Justice of New Zealand could properly remain in the High Court. That Court would henceforth have a lesser function as a trial court and a greater role to fill as our appellate court. But its place in the new structure will necessarily be intermediate and, given the significance of its original jurisdiction, it will not be required as formerly to deal with the same original workload in the criminal area. For example it would continue to have important original jurisdiction but the large proportion of trials would be in the District Court. The Supreme Court would for the first time in our history be our final court and have an enhanced responsibility for clarifying and developing the law of New Zealand.
- 42 The Chief Justice of New Zealand, as the principal judicial officer of New Zealand and the head of the judiciary, should preside in that court. We think it would be anomalous for the Chief Justice of New Zealand to sit on a regular basis in an intermediate court. The High Court would of course have to have a head, called perhaps the Senior Justice of the High Court, and there would be important transitional issues to be resolved.
- 43 The proposals we make about structure indicate that we see 3 reasonably distinct tasks for the Judges who are members of each of the 3 Courts. We have however also suggested that some specialisation continue within the District Court, and it may be that the increased appellate work in the High Court will lead to some specialisation in that area. On the other hand we propose that the Administrative Division of the High Court be abolished and its jurisdiction be exercisable by all High Court Judges. The experimental Commercial List in Auckland has yet of course to be finally evaluated.
- 44 We also recall the important roll at first instance of small claims (disputes) referees, Justices of the Peace and tenancy tribunal members. Those officers - usually not legally qualified - carry out a large proportion of the work at that level. The legislation relating to small claims and residential tenancies has just been the

subject to lengthy reviews and new legislation, and a new criminal code is promised (with the associated need to examine closely criminal procedure and police powers). Accordingly, we do not make specific proposals in these areas. We do however make some suggestions about the handling of minor offences.

- 45 Our proposals also have important consequences for the numbers of judges. It is not for the Law Commission to attempt to prescribe exactly what resources of people and money are needed to meet the obligations of the various courts. We do anticipate however that the Supreme Court consisting of the Chief Justice of New Zealand and up to 6 other Judges would be able to handle the business of that Court, under our proposals, for the foreseeable future. The volume of cases to be heard by the High Court in its original jurisdiction will be substantially reduced and will not, we think, be matched by the increase in the appellate work. We anticipate a reduction of the number of Judges in that Court, perhaps to 20.
- 46 The work of District Court Judges will grow with the transfer of jurisdiction from the High Court but should be reduced substantially by the proposals relating to administrative work, minor offences procedures and warnings we mentioned earlier. We have also had support for and no disagreement with our comment that a comparison of the sitting hours of judges in other comparable and indeed more senior courts elsewhere strongly suggests that District Court Judges on average could undertake a substantially heavier work load. To be more specific, they sit on average about 3 hours each day. The figure recently proposed for High Court Judges in England is 5 hours (they in fact sit over 4 hours) and for Ontario Provincial Court Judges 5 hours. We return to the great importance in a country of limited human and financial resources to use such resources as effectively as possible. One reason, among several, for stressing it is the importance of maintaining the quality of the bar. Accordingly the Law Commission proposes that closer attention be given to the number of District Court Judges and that further appointments not be made until the relevant principles and processes are established. We certainly would anticipate that the numbers could be substantially reduced perhaps by as many as 25. We also propose that the effectiveness and role of the office of Master be reviewed, especially in the light of the increased concurrent jurisdiction.

Administrative Matters

- 47 The submissions we have read, our own work and discussions, and contemporaneous developments here and elsewhere present a series of important administrative matters. (We comment on some of them in the course of the Report.) The question of the future number of judges appears to be an instance and the administrative work in the District Court mentioned earlier certainly is. The overall purpose, to quote Mr Justice McGarvie of the Supreme Court of Victoria speaking in 1985 as Chairman of the Australian Institute of Judicial Administration, is to find the most suitable ways of having the court system operate with the maximum economy, efficiency and effectiveness which is consistent with the maintenance of an independent judiciary and high standards of justice. (AIJA, Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive (1986) p 1.)
- 48 A central constitutional issue much discussed in Canada and England as well as in Australia is the relative role in the administration of the courts of the judges on the one side and the executive on the other. Who is to have responsibility for what and how is the partnership (if that is the right word) between the 2 to operate? Further, what are to be the relationships within a court? Some aspects of these questions arise within the work of the Courts Consultative Committee.
- 49 At this stage we do not more than mention just some of the other administrative matters to give an impression of their variety and importance:
- the provision of better information to individuals attending courts, through improved form design, the court staff, the recently established attendants and in other ways;
 - the need to keep delays to a minimum (on the day of the hearing as well as the period between the initiation of a proceeding and the final decision on it);
 - the need for better information about the work of the courts, including aggregate statistics and information for case flow management;

the need for greater support services for judges, for instance in recording evidence and providing transcripts.

- 50 We also propose the enactment of new courts legislation and make proposals for more direct and consistent legislative language. That should ease administration and facilitate the preparation of legislation relating to the courts in the future. Primarily it should help litigants, their advisers and the others (especially judges and court staff) who are involved with court processes. The legislation has evolved over a very long period and has become inconsistent, obscure and outdated. One of the Law Commission's general responsibilities is of course to help make the law as accessible and comprehensible as possible.

Timing and Transition

- 51 The Law Commission considers that the principal steps involved in its proposals should, if adopted, be taken together and that they can be taken in a reasonably short period of time. We outline the principal legislation which we think is required. Further detailed legislation will be called for at a later time, for instance in respect of Rules of Court. The main legislation needed to give effect to the proposals is however a relatively straightforward matter.
- 52 Also critical is the nature of the changes we propose. They are significant we believe, but they do not involve substantial departure from the changes which followed the 1978 Royal Commission Report. That Report proposed 2 new jurisdictions in the District Court - criminal jury trials and the Family Court - while we are proposing only the extension of each. The former especially - like the increased appellate work in the High Court - would require administrative support. So too would the proposal for the establishment of single registries - a move which the Department of Justice supports as a means of simplifying court administration.
- 53 As is the case with any major change there will be a period of transition carrying with it a need to learn by experience. There will be practical difficulties. While these potential problems must be recognised, they ought never to serve in advance as an impediment to the changes need in our contemporary society in such an important area as our system of justice.

54 It is not necessary to deal with such concerns in a completely detailed and comprehensive way. It is enough to mention as an example the considerable challenges to some of the District Court Judges if the proposals relating to wider jurisdiction in criminal jury trials are adopted. But such challenges can always be met; and we point to the demonstration by many Judges of that Court in recent years of work of high quality in criminal jury trials, in important inquiries, and in administrative tribunals.

II THE COURTS IN ACTION

THE BUSINESS OF THE COURTS

55 What is it that the courts actually do? What is their business? How has that business changed, especially in the light of the reforms made following the Report of the Royal Commission on the Courts (1978)? It is necessary to have such facts in mind as we consider and propose changes to the structure of the courts.

56 A description of the courts can draw on the legislation under which they operate and on the facts about their operation. It can look at the courts as a whole, in their wider social and constitutional context, and it can look within the court system to see how the business is handled in a more particular way.

57 The general task of the courts and especially of their judges is stated in the judicial oath. Judges swear that they will well and truly serve Her Majesty, her heirs and successors according to law, in their judicial office. The oath continues:

I will do right to all manner of people after the laws and usages of New Zealand without fear of favour, affection or ill will. So help me God.

58 Section 3 of the Judicature Act, as enacted in 1908, in working that is little changed in its 1979 version, provided that

There shall continue to be in and for New Zealand a High Court of Justice ... for the administration of justice throughout New Zealand.

And, under section 16, the High Court

continues to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

While in form the statement of jurisdiction is legislative, in real terms and reference is to the historical development and to the powers of the English courts

of general jurisdiction (including the common law powers) as they were in the mid nineteenth century. That reference to the general jurisdiction of the courts of common law and equity was explicit in the 1841 and 1844 Ordinances and the 1860 Act relating to the Supreme Court of New Zealand. The jurisdiction of the District Courts by contrast is specifically statutory and limited. They have only those powers conferred by particular statutes.

A COURT MODEL

59 Appendices B, E, F and G summarise the legislative recognition or the conferral of the powers of the various courts - the District Courts (which include in law or in fact the Family Courts, the Children and Young Persons Courts, and the Small Claims (Disputes) Tribunals), the High Court, the Court of Appeal, and the Judicial Committee of the Privy Council. Appendices C and D give some statistics on their workload. Comparative and theoretical material about courts is also helpful. Our Discussion Paper on the Structure of the Courts used the following model -

a judge (usually legally qualified) independent of the parties, appointed and supported by the State but independent of it;

exercising compulsory and coercive jurisdiction over the parties;

listening to and considering in a detached way the evidence and reasoned argument presented by the parties to a dispute, through a formal adversary process;

resolving the dispute between the parties by making a binding decision about past facts and claims of right, given in accordance with law which limits the power of decision; and usually allowing the unsuccessful party of right of appeal.

This is of course very much the model of contested litigation, especially in the superior courts. As will appear, however, much of the work of the District Courts does not match it. The model is an aid to analysis, not a prescription which must be complied with. Nonetheless the lack of match does confirm our view that some

of the work of District Court Judges might better be handled elsewhere - as indeed they strongly urged.

60 The Discussion Paper indicated that the concept of courts could be given an extended meaning or scope. It must of course include the 4 tiers of the formal courts - the District Courts (including their various specialist parts and courts), the High Court, the Court of Appeal and the Judicial Committee of the Privy Council. This Report does not go beyond that group except in 2 main respects - the allocation of powers of decision between those courts and other adjudicative bodies (especially administrative tribunals), and appeals from some of those bodies and other decision-makers to the courts. One reason for our taking that definition is that administrative tribunals have been considered by the Legislation Advisory Committee (which has recently reported to the Minister of Justice on that matter), and other bodies, especially the Labour Court and the Maori Land Court, have just been or are currently the subject of intensive legislative and policy review. We make one suggestion about Maori Land Court Judges in Chapter VII.

61 In the following discussion of the business of the courts we consider

- (a) The subject matter of the business of the courts
- (b) Whether there is a dispute between parties to be resolved or handled
- (c) The preliminary, final or appellate character of the work
- (d) The number of parties - one, two or more
- (e) The role of applying and enforcing the law
- (f) The role of clarifying and developing the law
- (g) The constitutional role of the courts
- (h) The public or private character of the matter
- (i) The appeal role

Subject Matter

- 62 The legislation and the practice of the courts suggest that the following kinds of case may be the subject of court proceedings
- (1) Prosecutions for criminal offences - some serious, others of a minor character including traffic offences
 - (2) Civil proceedings (see also 3-5)
 - (3) Company law matters
 - (4) Insolvency
 - (5) Other commercial matters, including debt collection
 - (6) Family proceedings - including the custody and status of children, dissolution of marriage, matrimonial property, maintenance, family protection and domestic protection
 - (7) Other proceedings relating to children - for their care and supervision, and prosecutions against them for offences
 - (8) Probate and administration of estates and trusts
 - (9) Administrative law matters
 - (10) Industrial and intellectual property
 - (11) Admiralty.
- 63 Such a list requires much elaboration and explanation. One way of expanding it is to make some assessment, however rough, of the amount of judge time spent in each area. The following assessment (based on Appendix C) is rough and needs to be used with care. Firstly, it is based in large measure on sitting time and takes little account of time out of court. It does not include related work on parole and prison boards, as visiting justices, and on mental health matters, or the part played by New Zealand judges in various Pacific Island courts. Secondly, some of the categories are large and ill-defined. (Thus the appendix does not separate out

children and young persons work.) No doubt the statistics can and should be improved and we believe that further and early attention should be given to this matter. But in the absence of more detailed information something like the appendix and the following discussion are needed, we think, if the issues are to be seen in a comprehensive manner.

- 64 In round terms, Appendix C shows that we have included about 150 Judges, judicial offices and judge equivalents in our calculations. Fifty-six percent of that judge time is spent on criminal matters, about 22% on civil matters, about 10 in the Family Courts, about 7% other, and about 5% on appeals.
- 65 Divisions within the particular courts are also of interest. The work of the High Court is about 36% crime (and increasing), 28% civil, 28% other original jurisdiction (principally civil), and 8% appeals.
- 66 Within the District Courts a distinction is first to be made between the work done by District Court Judges and that done by other judicial officers. Justices of the Peace and Small Claims referees jointly contribute about 30% of the total sitting time of referees exceeds the combined sitting time of the High Court and District Courts in civil matters.
- 67 About one-tenth of the District Court Judges are tribunal judges, some on a full time basis. They have not been included in the above figures. The sitting time of the remainder divides roughly as follows: about 70% on criminal matters, about 18% family, and about 12% on civil and other matters. Those average percentages are misleading in that they do not take account of the fact that 2 groups of District Court Judges have particular tasks - the Judges who are members of the Family Court and those who have warrants to preside over criminal jury trials. Family Court Judges are expected to spend about 80% of their sitting time in that Court . The proportion which jury trial Judges give to their speciality is not as high. Those Judges who do not have special warrants spend a very high proportion of their sitting time handling summary crime. That work equates to the sitting time of about 53 of the District Court Judges, and is divided between the more serious matters dealt with summarily (about 40 judges), traffic cases (11), minor offences (1), and preliminary hearings (1).

Resolving Disputes or Not?

68 The large judicial effort in the criminal area is directed as matters of varying importance. Some is clearly significant, as for instance sentencing in other than minor offences. But much decision-making is relatively unimportant - in the case of many lesser offences there is not dispute about guilt so that the consequential decision is virtually automatic. In other cases the matter itself in objective terms is not important. Much of the time too - especially in the summary criminal court - is not in fact taken up with decisions. To quote one District Court Judge, the Judges in that Court for much of the time do not decide or give judgements or impose sentences. Rather they advise on rights of representation, they take and record elections and pleas, they record fixtures determined by others (often the prosecution staff), and they remand ('and remand and remand' as the same Judge said with some feeling.) He went on,

`As a variation, they from time to time make orders which the parties concur in or do not oppose, frequently by one party failing to come at all.' As we note later (paras 146-151), steps are being taken in respect of this administrative work.

69 The court model set out earlier has as one central feature the resolution of disputes. In much of the very large area of the work of the criminal courts just mentioned (including traffic, minor offences and children and young persons) there is no dispute about guilt and only rarely about sentence. Sentencing departs in other ways from the model.

Final or Note?

70 To mention another aspect of the model, the criminal area also helps make the point that much court work does not finally resolve the matter before the court. Other matters may not be capable of being finally disposed of by way of a single proceeding and a single judgement. Thus a Family Court might be concerned with the problems of a particular family group over a lengthy period and through several proceedings. The same may occasionally be true of the High Court concerned with the affairs of an insolvent company. Relief by way of injunctions and public law remedies can be forward looking and subject to adjustment. And there have been major developments in the use of interim relief in public law and commercial litigation.

One or Two or More Parties?

- 71 In the criminal court 2 parties (at least) are before the court: the prosecutor and the defendant. Legislation and practice is beginning to give greater significance to the victim's interests as well; and there is indeed a growing realisation that some matters are wrongly characterised as within the criminal jurisdiction. In practice, however, generally only the defendant in criminal matters will remain a significant party. In some other proceedings there may be only a single party (for instance in the case of certain applications for licences or approvals), although in those cases there may be others who, while not parties, have a part to play by way of the provision of information, comment or objection. If there is another party, there may not in fact be any dispute between the 2. Parties are usually concerned only with their own specific rights and interests but in some circumstances may represent a class of persons or be seeking to protect a wider public interest.

Applying and Enforcing the Law

- 72 The application of the law to particular matters and disputes emphasises another central judicial function: the courts resolve matters before them on the basis of the law as made through the established law-making systems. In that they support essential features of the public order. Enforce the law would be an overstatement of what the courts usually do. Generally they sanction, after the event, those who have not complied with the law. Most (but not all) court proceedings are based on a claim that someone has already breached the law, and that an appropriate remedy, such as damages or a penalty, should be imposed. Only occasionally is the law directly and fully enforced through court process: the equitable and public law remedies can have that effect. And indeed the sanction itself - the judgment for a debt, the penalty by way of fine - might not always be effective. The law acknowledges this situation by making separate provision for the enforcement of judgment debts, the enforcement (and remitting) of fines, and by allowing for bankruptcy and the consequent avoiding of obligations.

Clarifying and Developing the Law

- 73 Along with the resolution of the dispute and the application of the law, the court might also have the task of reaffirming, clarifying or developing the law in issue. That is seen as another principal judicial function. That clarification - stressed in a general way in the Law Commission Act - is a public function of the courts. It should of course reduce the need for potential litigants to go to court and make it easier for their lawyers to advise them. It also helps with the important principle of the equal application of the law to all subject to it.
- 74 The last 2 paragraphs assume a body of law which is to be applied, enforced, clarified and developed. The law is not of course always a single homogeneous set of rules. Extensive parts of the law are personal in their application as family law and the laws governing professions and employment demonstrate. In both these areas and others, such as sentencing, the law confers broad discretions.

Constitutional Role

- 75 The courts make their decision about what the law is and its application to the matters before them in proceedings between individuals, or between individuals and the State or its agents. The latter aspect of their function highlights the constitutional role of the High Court as the court of unlimited original jurisdiction. They decide what the law is, they decide precisely what it is that Parliament has decreed, they supervise basic features of the constitution, and they decide whether actions taken or threatened by the State are lawful. They uphold the law against the State. In this they are the heirs to Sir Edward Coke who, as Chief Justice, told King James I in 1607 that the King was under God and the law, and that it was for the King's judges and not for the King himself to decide what that law was (Prohibitions del Roy (1607) 2 Co Rep 63). It is that aspect of the courts' function that makes the judges' independence from executive interference critical.

Public or Private?

- 76 The law-declaring or law-making functions and the enforcing of the law against the State are pre-eminently public functions. In a more general way the whole of the court function is public: it is established and supported by the State, helps

enforce the law of the State, prevents private disputes from disturbing public order, and meets the entitlement of citizens to justice. But a court or tribunal proceeding can also be seen as having a private character. To characterise the matter as either private or public might have consequences, for instance for

- who can bring the proceedings;
- whether other parties (including the State) can intervene;
- whether the court sits in public or not (and whether its proceedings are reported or not);
- whether the parties can waive certain rights (for instance to have access to the court at all, to appeal, or in respect of time limits);
- the removal of the case to another court;
- the referral of the case to a less formal method of dispute settlement;
- judicial control of the proceedings;
- the grant of leave to appeal; and
- costs (including the costs to the State of the proceedings).

77 The matters just listed may appear to be rather technical. that is partly so. Some also relate however to broader aspects of the role of the court. Thus, courts might order the removal of cases from a lower jurisdiction to a higher one (when there is such a power) or grant leave to appeal (when appeal is only by leave) on the ground that the case presents a far reaching question of law or a matter of dominant public interest. Parliament or the courts themselves state such tests. Even apparently more technical matters - such as the purported waiver of time limits and attempts to withdraw appeals once lodged - might also be treated by a court as not being completely within the control of the relevant party or parties, because a broader public interest is seen to be involved in the particular case. It is for the court, as the agent of law, to protect that public interest.

Deciding Appeals

- 78 We have mentioned that about 5% of judicial sitting time is spent on appeals in the courts. That consists mainly of the work of the Court of Appeal and also the equivalent of 2 High Court Judges who, sitting separately, are hearing appeals at any given time. To that might be added the appeal work of District Court Judges who hear appeals in some occupational and administrative matters.

The Distribution of the Business

- 79 The foregoing discussion is mainly about the business of the courts as a whole rather than the individual courts or the judicial officers to be found within them - although we have already given some indication of the distribution of the business both between the courts and, within the District Courts, among different groups of adjudicators (paras 64-67). We now give greater attention to that question of how this business is distributed between and within the courts. We shall then relate that distribution to the important changes to the structure of the courts made in the early 1980s following the Royal Commission Report.
- 80 The business of the courts is distributed among a number of different courts and then within those courts it is in some cases exercisable by different people. The distribution may be made by decision of Parliament, the parties, or the courts.

By Parliament; thus by law certain offences can be dealt with either by a District Court or by the High Court, or only by one or by the other.

By the parties: thus the plaintiff might initiate a civil case involving say \$5,000 before either the District Court or the High Court and if in the High Court might or might not seek a jury trial; while a serious criminal prosecutions the prosecutor and defendant have options about the kind of trial.

By the courts; thus a District Court might refer a civil matter brought before it to a Disputes Tribunal, an arbitrator or a referee, or a choice might be made administratively within the court office to allocate minor offence proceedings to Justices of the Peace.

81 The allocation by Parliament and by the courts (and presumably in some cases also by the parties) relates, at least in the best of all possible worlds, to 3 matters -

- the character of the issues to be resolved:
- the qualifications and responsibilities of the decision maker; and
- the procedure followed by the particular decision-maker.

Thus the more important the criminal matter - if a finding of guilt involves the prospect of lengthy imprisonment for a defendant in a criminal matter for example - the more likely it is that the decision will be made by a jury and that the procedure will be formal and designed to protect individual liberties. If the matter is one involving special knowledge, or demanding consistent treatment or the development of a nationwide policy, a special court or tribunal or selected judges might be used: consider the Family Courts, Labour Court and the Indecent Publications Tribunal. The example of the Family courts shows that there may also be good procedural reasons for the choice of a particular forum: the emphasis, as there, might be on informality (the jury trial for serious criminal matters with its careful safeguards provides a contrasting example).

82 In the Family Courts the procedural point also goes further into the heart of the jurisdiction: the emphasis is that area of law is now increasingly on reaching agreement - with the assistance of State conciliation and court mediation processes and expert professional input - rather than on public independent decision according to rather strict laws policed by the court and the State. The flavour of the change can be captured by comparing the rules about the public character of matrimonial proceedings as seen by the House of Lords in 1913:

... where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude *Scott v Scott* [1913] AC 417, 436.

Accordingly there was no general power for that Court to sit in private. The ground for the dissolution of marriage is now by contrast essentially in the hands of the parties and the proceedings are generally in private and unreported.

83 The procedural emphasis might be not only on informality and promoting agreement. It might also be on expedition and reducing cost as with the establishment of the Small Claims Tribunals and the Tenancy Mediators and Tribunals. Costs can also be reduced by the exclusion of lawyers from the proceedings and the narrowing of rights of appeal.

84 In a general way the legislature establishes differences in jurisdiction between institutions - for instance, between the High Court and District Courts, or between the Courts and the Indecent Publications Tribunal. But it is too simple merely to emphasise the differences between different decision makers. First, distinctions may be drawn within a single court between different decision-makers. Secondly, 2 or more bodies may have shared jurisdiction over a particular subject matter. And, thirdly, rights of appeal tend to further remove or at least blur the jurisdictional lines. We consider those 3 matters now.

Differences Within Courts

85 Legislation contains the following range of ways of establishing differences within the court and judicial system.

- (1) A court is given or has power. The individuals within it exercising that power may vary, thus -
 - (a) all members of the court (usually sitting individually but there is often power for more than one to sit) will be able to exercise the powers;
 - (b) the legislation may require more than one judge to exercise the power (as usually in the Court of Appeal, or in the High Court hearing petitions under the Electoral Act 1956);
 - (c) the court might consist of a judge and jury;
 - (d) the court might consist of a judge and lay members or lay assessors;

- (e) the judge might be specially designated to handle the particular case;
 - (f) the principal judge in the jurisdiction might issue a general warrant to individual judges to handle a category of cases (such as the Commercial List in the High Court); or
 - (g) the Executive might issue a general warrant to individual judges to handle a category of cases (such as criminal jury cases in the District Courts). (It is probable that an executive warrant will be permanent, while a warrant by the senior judge might be subject to withdrawal.)
- (2) Within the court there might be -
- (a) a separate division (such as the Administrative Division of the High Court);
 - (b) a separately named court (such as the Family Courts which as well are divisions within each District Court);
 - (c) a tribunal (possibly with members with different qualifications as in the case of the Disputes Tribunals which are divisions of the District Courts).
- (3) There might be persons with different qualifications and holding different offices within the court. Thus within our present system there are Justices of the Peace, Registrars, Referees, and Masters with particular powers, conferred by law, by decision of a judge of the court, by decision of one or other or both of the parties to the proceedings, or by some combination of the foregoing.
- (4) A separate court or tribunal might be established. The separation might be reduced by a requirement that its members be judges of the District Court or High Court, as with the Planning Tribunal and the Copyright Tribunal respectively (or that may be so in fact), or by a court registrar of the District Court providing the registry of the tribunal.

(5) The power in question might be conferred on a particular judicial officer and not on a court or tribunal as such; this is so of some powers to issue warrants and various other ad hoc jurisdictions. This can have consequences for administrative support to the officer and for rights of appeal.

86 That is to say there is not necessary or exclusive coincidence between one category or judicial officers primarily associated with a court, particularly the District Courts, have functions as members of other tribunals or courts either because of the requirements of the law or in fact. It may be, on the contrary, that some of those exercising part of the authority within a particular court will not be judges of that court but will have some lesser office. It may be too that the distinctions in function made within a particular court between individual judicial officers of the same status are made more or less firmly. Thus a comparison can be drawn between the creation of a court with a distinctive name and jurisdiction conferred, even while it belongs as a division to the District Court, on the one hand, and on the other, the case of a judge, a member of a court, who is designated to undertake a particular task within the jurisdiction of that court.

87 This profusion of methods means that a simple dichotomy between one court and another or between general court and special tribunal is misleading. It is the more misleading when the points mentioned above about concurrent jurisdiction and rights of appeal are brought into the discussion. In the former situation a market is at work. The legislature has given a choice to the parties (usually the plaintiff, but not always) and sometimes subject to the control of the courts or tribunals (the original or that to which the matter might be referred or both). This choice in fact is very widely available. So almost all criminal matters which can go to a jury can be dealt with, at the election of the defendant, by a District Court Judge alone. Next all civil claims up to \$3,000 can be commenced in a Disputes Tribunal, a District Court or the High Court and up to \$12,000 in either a District Court or the High Court. (there is a costs sanction which will usually influence such a choice.) In addition, a matter begun in the High Court can be removed by court order into the Court of Appeal and dealt with originally there. And matrimonial property claims can be brought in a Family Court or the High Court with the respondent able to request that the matter be removed. (The Court of Appeal in refusing to order removal in a recent case has referred to the impressive record of work of the

Family Court in this field, *Selkirk v Selkirk* [1987] 1 NZLR 105.) Those examples relate to choices within the court system. Such choices can also arise between a court and a tribunal, for example in the areas of taxation and unlawful discrimination.

- 88 Those two areas show as well that the distinction between different courts or between courts and tribunals may be further blurred by Parliament allowing a general appeal from the special court or tribunal to the regular courts. In many other cases the distinction between the different institutions is by contrast sharpened by allowing an appeal only on a point of law - a recognition that there is a specialised area for the expert tribunal, which is perhaps to be left to develop policy, to make decisions following a consistent pattern, or both. That point gets a particular emphasis in the provisions regulating appeals from the Labour Court to the Court of Appeal. The Court of Appeal is to have regard to the special jurisdiction and powers of the Labour Court (Labour Relations Act 1987, s 314).
- 89 The sense of gradation rather than bright lines of distinction between different bodies appears as well from a closer consideration of one aspect of the subject matter in respect of which the court or tribunal is to decide: the extent to which the decision is controlled or guided or affected by rules, standards and policies. Recall the basic proposition that courts decide according to law. At one end are hard controlling rules - a speedlimit is fixed at 50 kilometres per hour. At the other, the broadest of policies - the tribunal is deciding whether to grant a licence is to have regard to the public interest. The latter function may in effect require a tribunal to develop the law and the policy as it handles its cases. It might do this, though, with close attention to the policies of government: the relevant statute might indeed require compliance (even perhaps by a court hearing an appeal) with government policy as stated by the relevant Minister.
- 90 The role of Government can be significant in other ways. Thus the court or tribunal might have only a power of recommendation rather than a power of decision, the power of decision remaining with the Government. In addition the Government appoints members of the bodies, and may have relevant powers in respect of renewal or revocation of their appointment. We return to these matters

later in our discussion of the allocation of power between courts, tribunals and the executive (paras 135-137).

Differing Procedures

- 91 A critical variable touched on at various points in the foregoing is the procedure to be followed by the court. How does it go about its task? The usual model of a court sketched earlier in this Report (para 59) is of the parties to a dispute bringing before the detached judge, through the adversary process, their evidence presented by way of witnesses who are sworn and subject to cross-examination, and argument presented by counsel, in which the parties attempt to make out their own and counter their opponents' claims. The court's task is to resolve the claims between the parties by a decision which binds them (and usually advantages one to the symmetrical disadvantage of the other) and which is made according to law.

Sentencing

- 92 The role of the sentencing court in criminal cases also helps illuminate some of the foregoing points and other limits of the traditional adversary model of the court. There will often be no dispute about sentencing, the prosecution taking no part. Next the court is not passive. Following procedures which have their origins over a century ago, the court in the case of offenders liable to imprisonment usually directs the preparation of reports about the social and personal circumstances of the offender, the offender's means, reparation, and the psychiatric state of the offender. These reports are prepared by State officials who seek information from those able to assist. They are to be given to the offender and the offender's lawyer, and the offender can call evidence to challenge them. In that unusual event there may be an adversary process - but in response to the court's process of inquiry.
- 93 The Criminal Justice Act 1985 emphasises this inquisitorial role by empowering the court to adjourn proceedings 'for the purpose of enabling enquiries to be made or of determining the most suitable method of dealing with the case'. The process moreover can involve agreement between those directly affected rather than third party decision. This is so in respect of reparation - if possible, both the value of

the property in issue and the amount to be repaid should be agreed - and in respect of the sentence of community care. The different character of the process is emphasised further by a new provision in the Act enabling the presentation of a community view about the offender's background, a provision that has been interpreted as authorising a more flexible approach to the introduction to the court of material relevant to sentencing than the Anglo-Saxon traditions of the common law might allow, *Wells v Police* [1987] 1 NZLR 560.

- 94 Sentencing involves the exercise of discretions and of course different judges may see similar matters rather differently. Accordingly within limits sentences may vary. The judgement too involves an attempt to consider prospects for the future as well as the assessment of present and past facts. That last point appears in the willingness of appeal courts to take account of events subsequent to the original sentence, thereby departing from the rule that appeals are generally limited to the case as originally decided.
- 95 The elements of wide discretion, non-adversary inquisitorial processes, consensual as well as third party decision-making and differing composition of the court or tribunal appear as well in other jurisdictions. Thus the members of Small Claims (Disputes) Tribunals (although a division of the District Court) and of the Tenancy Tribunals (although administered through the District Courts) need not be lawyers. Relevant knowledge and experience are the alternative qualifications. The disputes Tribunals and the tenancy mediators have as primary functions bringing the parties to a dispute to an agreed settlement. Tenancy mediators are to consider matters with a view to settlement before the matters are referred to the tribunal. Both Tribunals are free from the rules of evidence and are given the power to depart from strict legal rights and obligations and legal forms and technicalities. Both are to decide according to the substantial justice and merits of the case. Lawyers are in general not to appear.

Family Matters

- 96 The Family courts legislation and practice make the same and related points. The Courts (although again divisions of District Courts) are specially constituted to District Court Judges who by reason of training, experience and personality are

suitable people to deal with matters of family law. The law and practice emphasise, in part through a team approach, methods of settlement additional to third party adjudication - legal advisers are under a duty to promote reconciliation or conciliation, counselling is to be made available, a Family Court Judge is to chair a mediation conference if requested by a party to applications for separation, maintenance, custody or access, and is to try to obtain agreement between the parties on the matters in dispute.

- 97 If matters do have to be resolved by the Court, the rules and criteria for decision provide illuminating contrasts. At one end is the ground for dissolution of marriage: the exclusive rule is living apart for 2 years immediately before the application (a rule which in practice will often give effect to the agreement of the parties). At the other is the direction given by the Guardianship Act 1968 that the welfare of the child is the first and paramount consideration. That legislation, consistent with that broad direction and the traditional responsibility of the courts in this area, also confers wide powers on the courts to call witnesses, to receive evidence whether it would otherwise be admissible in court or not, and to seek and receive reports from the Director-General of Social Welfare and from others in respect of the medical, psychiatric or psychological aspects of the case. The Court is also empowered to arrange legal representation of the child and to appoint counsel to assist it. Consistently with all these matters, Family Court proceedings are to be conducted in such a way as to avoid unnecessary formality.

Equity and Good Conscience

- 98 Differing standards for judgment and differing procedures associated with them have been part of the jurisdiction of the District Courts and their predecessors for many years. The present provision, the wordings of which goes back at least to the Resident Magistrates Act 1867, is that if the claim does not exceed \$500 the Court can receive such evidence as it thinks fit whether the same be legal evidence or not and may give such judgment between the parties as it finds to stand with equity and good conscience. The parties as if finds to stand with equity and good conscience. The parties can appeal in such cases only with leave, and such matters might now of course be referred to Disputes Tribunals which also are directed to decide according to the substantial merits and justice of the case.

99 The submissions made to us also confirm that the picture that emerges from the facts differs in part from the model of the court set out in para 59.

100 Thus for much court business -

- the members of the court or tribunal may not be legally qualified judges; recall the very large contribution of Justices of the Peace, juries in serious criminal cases, and Disputes Tribunal referees and also the lay members of courts and tribunals;
- the jurisdiction may be at least partly dependant on the consent of the parties; so they may be able to transfer the case from one court to another;
- the court procedures might be active and inquisitorial (as with much criminal work) and they might, as with tribunals, stress informality and relax the usual rules of evidence; the Family Courts give a great emphasis to getting agreement between the parties;
- there may be no dispute between the parties but rather a matter to be handled and processed; this may be so for as much as a third of the whole sitting time of the courts, and is particularly prominent in the criminal jurisdiction of the District Court;
- the proceedings might be ongoing (as in the Family Courts) rather than dispositive;
- the rules and criteria for decision set both by Parliament and the Courts might be in very broad terms and look less to findings of past fact and breach of the law but rather more to the future and to community standards and community institutions; this is true not just of tribunals concerned with the public interest but also of those resolving private matters such as small claims, tenancy matters and guardianship disputes;
- the procedures may be aimed at facilitating settlement between the parties rather than at achieving binding third party decision and the enforcement of the general public law; there may not even be a power of decision.

- 101 We must however keep the discussion in balance. As we have already said, the original model is accurate for much court work. This is so of some of the most important judicial business - contested criminal and civil trials, appeals, and some tribunal work for example. And the assessment should not be purely quantitative, counting only judge sitting time for example. In particular, the Commission emphasises the constitutional role of the court which fits closely with the original model. That role has a greater significance in our system of government and in the protection of our rights and liberties than its relatively occasional (although increasing) appearance in litigation might suggest.
- 102 The standard model is also more accurate for the Court of Appeal and the High Court than for District Courts and some tribunals. Compared with the District Courts' business, a much higher proportion of the matters in the High Court is contested, and sentencing constitutes a much smaller proportion of the whole. The discussion suggests another important difference between the High Court and the District Court and the District Courts: on the whole High Court has fewer divisions within it and is much more a general court. Juries of course sit in almost all criminal matters; there is the Administrative Division and the experimental Commercial List; in a few cases lay members or assessors sit with the Judge; and Masters and Registrars exercise some of the Court's powers. But the differences in function in the District Courts are greater and more significant. First, they have Justices of the Peace and Disputes Tribunal referees exercising (in terms of sitting time) about one-third of the total District Court jurisdiction and, second, their judges have fairly distinct groupings - those who do tribunal work, Family Court Judges, judges with criminal jury warrants, and the remainder. (There is of course overlap, with most of those in the specific groups undertaking work in the general area). And, to repeat, the divergence of the model from the facts relating to the District Courts does indicate that the judges of those Courts should not continue to handle some of that business. We return to some of these matters in the next Chapter.

RECENT CHANGES IN COURT STRUCTURE

The Position in 1978

- 103 The picture just given of the courts is essentially of the courts as they are now. The picture has changed substantially in the past 10 years as a result of the reforms following the Report of the Royal Commission on the Courts. It is important to give some sense of the changes. Any proposals put forward now must be made in the context of those recent changes and must take account of them.
- 104 The Royal Commission was asked to report on the changes that were necessary or desirable to secure the just, humane, prompt, efficient and economical disposal of the civil, criminal, and domestic business of the courts and to ensure the ready access of the people of New Zealand to the courts. In particular, it was to examine the jurisdiction of the general courts and determine whether any new courts or divisions should be created.
- 105 At the time of that inquiry, although the Magistrates' Courts dealt with the majority of cases before the courts, including summary criminal hearings, certain civil claims to \$3,000 and many family proceedings, the Supreme Court was the Court of first instance for all criminal jury trials, and for all divorce, custody and matrimonial property proceedings. It also tried all other civil actions involving claims of more than \$3,000. The civil proceedings still included a significant number of personal injury cases, although they were of course reducing by then. A large proportion of civil trials were still by jury.
- 106 The criminal jury trials and divorce jurisdiction took up large parts of the Supreme Court's sitting time - according to figures provided to the Beattie Commission between 35 and 41% for the former and 8% for the latter, with civil claims, matrimonial property actions, company and bankruptcy matters, and appeals taking up the balance, only slightly more than half of the sitting time (para 228).
- 107 The proportion of the sitting time of Magistrates in their criminal jurisdiction was greater - about 80%. The Small Claims Tribunals had been only recently

established on an experimental basis, and Justices of the Peace had long exercised a significant proportion of the jurisdiction of the Magistrates' Courts - in 1977 their sitting hours were about 16% of the total hours of those courts and had almost doubled in 10 years (para 194).

Proposals of the Royal Commission on the Courts

- 108 The Royal Commission proposed an enhancement of the status of both the Magistrates' Courts and the Supreme Court by the reallocation of work from the Supreme Court to the Magistrates' Courts. The Royal Commission was satisfied as well that a disproportionate amount of the time of Supreme Court Judges was being devoted to criminal trials to the detriment of the Court's civil work.
- 109 The transfer of jurisdiction to the lower original court (not just in the criminal area) would be accompanied by a change in name - the Magistrates' Courts would become District Courts presided over by District Court Judges. The extended jurisdiction and improved standing would, thought the Royal Commission, aid recruitment. The District Courts were still however to retain the essential nature of the Magistrates' Courts - they were to remain local courts, readily accessible to the people, equipped and staffed to provide justice speedily with a minimum of formality and expense; all sections of the community, said the Royal Commission, should be able to approach the court without apprehension or mistrust, and a with the minimum of fuss (para 258)
- 110 The transfer of original jurisdiction would also enhance the appellate and review function of the High Court (as the Royal Commission proposed to rename the Supreme Court). The Court would still exercise original jurisdiction over the most important litigation but one of its principal functions should be the oversight of lower courts and tribunals, the review of their decisions, and the upholding of the rule of law, the freedom of the individual, and the basic principles of law and justice.
- 111 More specifically the Royal Commission proposed that:
- selected District Court Judges sitting with juries have jurisdiction over electable (but not indictable) offences (recommendations 50-51);

- a separate Family Court be established as a division of the District Courts with extensive jurisdiction over family matters including divorce and matrimonial property (the latter shared with the High Court) (recommendations 71-76);
- the upper monetary limit of the civil jurisdiction of the District Courts be increased from \$3,000 to \$10,000 (recommendations 64-66); and
- Small Claims Tribunals be established on a nationwide basis as a division of the District Courts (recommendation 61).

The Legislative Response

- 112 Parliament in general adopted these important reforms and, as we now note, has taken further steps along the lines indicated by the Commission. So far as we are able to judge the reforms have been broadly successful and are generally accepted. That is especially to be seen in the 2 most important areas of change - in the Family Courts and in criminal jury work in the District Courts.
- 113 The Family Courts have developed their own ethos and practices. The Courts' emphasis on conciliation and mediation of disputes along with changes in family legislation, have changed the Courts' role in family disputes and created Courts widely respected for their expertise. Parliamentary and public confidence in the Family Courts has been recently demonstrated by a further transfer of jurisdiction from the High Court under the Protection of Personal and Property Rights Act 1988, and also by the recommendations of the Working Group on Matrimonial Property to confer wider jurisdiction (para 308 below).
- 114 Another measure of their success is the greater and continuing drop over the last 10 years in the numbers of family proceedings appeals filed - from 309 in 1978 to 198 in 1981 (when the Family Court was established) to 103 in 1984 and to 58 in 1987. The proportion of appeals allowed each year has stayed in the 35-45% range, but in absolute terms had dropped from 111 to in 1978 to just 22 in 1987 (see Appendix D).

- 115 The successful handling by the selected District Court Judges of criminal jury trials is evidenced by the comparable rates of successful appeals from District Courts and High Court trials and by the submissions made to us for a wider conferral of criminal jurisdiction on the District Courts. We make related proposals in Chapter V.
- 116 The jurisdiction of the Small Claims (Disputes) Tribunals was increased from \$500 to \$1,000 in 1985 and to \$3,000 in 1989 (or \$5,000 in the parties consent) from 1 March 1989.
- 117 The expectations of improved standing and of advantages for recruitment to the District Court Bench appear to us also to be broadly confirmed. Accordingly any changes we propose must be closely relate to those that have already occurred.

The Practical Consequences

- 118 Before considering possible changes we need to look as well at the concrete consequences of the changes that were made early in the 1980s. They are principally to be found in the reduction in criminal jury and family (divorce, matrimonial property and custody) work in the High Court and the related increase in those areas in the District Courts. Other changes were occurring in the business of the courts for other reasons over that time - such as a growth in the number of serious criminal trials, the disappearance of personal injury litigation, and the growth in major commercial and public law litigation.
- 119 The numbers of criminal jury trials heard in the High Court and the District Courts before and after the reform are as follows:

	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
High (Supreme Court)	699	635	749	523	336	357	360	461	423	536
District Court				NA	523	731	848	822	826	849
<i>Total</i>	699	635	749	NA	859	1088	1208	1283	1249	1385

In 10 years there has been a doubling of the number of jury trials, but while in the last 4 years the District Court number has grown substantially, that is by about 50% over that time. The provisional figures for 1988 show a similar trend with the

number of High Court jury trials rising by a further 16 per cent to 622, while the District Court figure (876) is only 3% higher than the 1984 and 1987 level.

- 120 The movement is also to be seen in the average number of Judges sitting in jury trials at any one time - the 1982, 1986 and 1987 District Court figures were 7, 5, 7, while the High Court figures increased from 6 to 8 to 9 - that is by half. Further, the 36% of High Court sitting time spent on criminal jury matters in 1987 is to be compared with the 35-41% figure given to the Royal Commission 10 years ago. It is also however to be compared with the reduced figure of about 25% in 1982 achieved by the introduction of the reforms in the previous year.
- 121 The main points are that regrettably much of the gain of the reforms so far as the balance of High Court criminal work is concerned has been lost over recent years, and that the number of criminal jury trials heard in the High Court and the proportion of that work are moving back to their pre-reform levels. We are in no doubt that the trends should and can be not only arrested but also reversed.
- 122 The other major change since the early 1980s between the High Court and District Courts is in family proceedings. We have mentioned that divorce cases took about 8% of High Court sitting time - or the time of about 2 Judges. That business is now handled (by way of dissolution proceedings) by the Family Courts. The following table shows a small increase in the number of dissolutions proceedings over the last 10 years but stable overall figures in other family matters:

Year	Supreme Court Divorce	Magistrates' Courts/District Courts	
		Dissolution	Domestic/Family
1978	6682		13552
1979	6870		13698
1980	7432		13503
1981	5331	2846	12485
1982		9828	10315
1983		9728	12651
1984		9396	12928
1985		8554	12985
1986		9000	13225
1987		8741	13522

The sitting hours in 1982, 1986, and 1987 in family matters are consistent with the figures, equating to 12, 15 and 15 Judges in each year. To be associated with these are the very extensive mediation and counselling activities of the Judges and the other professionals involved. The Protection of Personal and Property Rights Act

1988 will mean some increase in the business of the Family Courts, as will proposals relating to matrimonial property and connected matters, if adopted.

123 We have already said that, so far as we can judge, the reforms made in the early 1980s have been broadly successful and generally accepted. In part our proposals are designed to build on those reforms and to give further effect to their intention. In at least 3 ways those intentions have not been fully realised.

- (1) The District Courts have not developed a significant role in civil matters; indeed they appear to be handling fewer defended cases than 10 years ago and the significant growth in civil matters has been in the work of the Small Claims (Disputes) Tribunals. The establishment and extensive workload of the Tenancy Tribunals (exercising jurisdiction which was primarily the District Courts) should also be mentioned here.
- (2) The criminal jury work of the High Court is rising to levels comparable to pre-reform levels. The proportion of trials handled by the District Courts has dropped substantially.
- (3) The appellate role of the High Court has not grown in the way anticipated.

THE BROADER CONTEXT

124 Our reviews of the structure of the courts must have regard as well to several other reforms and reviews. The courts are at the centre of our legal and constitutional system. They are essential, as we have said, to the health of our society. We should here mention part of the wider context in which they operate, in some cases adding to, in others emphasising, matters already mentioned in the introduction. The courts should not be seen separately from that context.

125 A principal practical matter is the decision of the Government, announced in October 1987, to remove the right of appeal to the Judicial Committee of the Privy Council in the course of the present Government. That decision focuses attention on the role of final appellate courts and probably implies at least some change in the court structure beyond the mere removal of that final appeal. The evidence of the growing pressure on the Court of Appeal - especially if it were to

be the final court - also supports that change (see Appendix D). Submissions and our own deliberations have as well made it clear that the appellate structure cannot be sensibly considered separately from the structure for handling matters originally. It is after all only because of dissatisfaction with original determinations that we have appeals. What kind of cases and what volume must the appeal system handle? And in what way are the courts of original jurisdiction organised (for as we have seen they too have appellate jurisdiction)?

126 There is a more basic reason for giving careful attention to the original jurisdiction. It is of course the original jurisdiction that has the greatest day to day impact on individual New Zealanders. It is essential that the quality of first instance decision-making be as high as possible. The most outstanding appellate structure cannot cure a poor basis system. And indeed our terms of reference require us to propose changes desirable to ensure the ready access of the people of New Zealand to the courts to determine their rights and resolve their grievances.

127 Such ready access runs back deep in our constitutional heritage. The undertakings of 1215 and 1978 can be recalled again. King John at Runnymede in Magna Carta and his successors in its reaffirmations promised that no-one was to be condemned but by lawful judgment of their peers and according to due process of law; neither justice nor right were to be denied or deferred. The International Covenant on Civil and Political Rights entitles everyone in the determination of criminal charges against them and of their rights and obligations in a suit at law to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14(1)). Rules of court emphasise the just, speedy and inexpensive determination of proceedings. Law and practice have given increasing emphasis to State supported legal aid for those involved in court proceedings. The creation of new institutions and processes, for instance in the small claims and tenancy areas, gives further weight to such matters. The issue is as well severely practical one: are there delays and costs (including the costs of distance) which deny justice? This is not only a matter of interest for the individuals immediately involved. The State has a general interest in the peaceful settlement of disputes and orderly compliance with the law.

- 128 The new institutions and processes are also created sometimes because they are seen as more appropriate for the particular type of dispute. Thus legislation relating to the family requires attempts by way of negotiation, counselling and mediation to reconcile the parties or if that is not possible to produce a settlement of the issues in dispute. A similar emphasis is found in legislation relating to unlawful discrimination, which also provides for a special tribunal composed of persons with expert knowledge and experience. That is to say, the institutions and processes established or recognised by legislation to resolve or handle disputes and related matters take a great variety of forms depending on the nature of the dispute. Those affected will sometimes have a choice between the methods; and the methods may relate to one another in other ways.
- 129 Access to justice has of course been the subject of extensive review over recent years and continues to be so. Because of that we do not at this stage take that matter up directly in some of its forms - for instance legal aid and assistance by the Crown. But the structure of the courts must be such that the citizen can have ready access. Such a structure is a necessary if not a sufficient condition for a system of justice according to law.
- 130 Several other recent and continuing review and reforms impinge on the courts structure. They include the revision of the law relating to children resulting in the Children and Young Persons Bill currently before Parliament; commercial causes resulting in the establishment on an experimental basis of the Commercial List in the Auckland High Court (1987); the community mediation system which operated in an experimental way in Christchurch and was evaluated in 1986; pre-trial conferences in the Christchurch District Court (1987); an inquiry by the Audit Office (1987); an inquiry into violent offending (1987) leading to changes in the criminal law made by Parliament; the Maori Affairs Bill which is before Parliament and the proposals contained in Te Urupare Rangapu - Partnership Response; proposals made in 1988 by the New Zealand Committee of the Pacific Basin Economic Council for a commercial disputes settlement centre; and the inquiry into prisons. We have already mentioned our Discussion Paper on Arbitration. Our brief mention of these matters here is not intended to lessen their significance (and we do return to some of them later). Our intention is rather to

indicate that part of the context of the reform and to try to ensure, as appropriate, that our proposals do not prejudice those possible further developments.

III

The Business of the Courts: Some Changes

INTRODUCTION

- 131 The courts are one means for the resolution of disputes and the enforcement of the law. Our political and constitutional system has however long recognised that other means will sometimes be apt, indeed more apt for the handling and resolution of some disputes. (We say 'handling' since some matters are not capable of final resolution in a single proceeding or even at all.) In general terms the other methods include negotiation, good offices, conciliation, mediation, ombudsmen and related bodies, arbitration, tribunals (established by agreement as well as by statute), legislation, voting and lot. (The chart in Appendix D to the Discussion Paper on The Structure of the Courts indicates in a brief way the characteristics and varying advantages of these different methods.)
- 132 The methods of settlement or enforcement will sometimes operate largely independently of the state and autonomously, as with private arbitration and tribunals set up by agreement within professional and social organisations. Indeed even many tribunals established by statute are very much the creatures of the immediate parties. We say largely independently of the State since the general law enforced by the courts can at one stage or another usually be invoked to support or control such processes. In other cases the relationship between the particular method and the courts may be much closer. So, parties attempting to negotiate a settlement of a dispute will often do that in the knowledge that one or other of them can at any time invoke an arbitral procedure (if that is provided for in their contract) or begin court proceedings. The courts have powers, sometimes with the consent of the parties, to refer matters for a report or decision by a referee or arbitrator. They sometimes have within their own processes powers to promote compromise of claims by counselling, conciliation and mediation. And many

powers of decision of departmental officers and administrative tribunals are subject to appeal to the courts. In some cases indeed the courts and tribunals will have concurrent original jurisdiction and the parties a choice whether to bring the proceedings in one or the other.

133 This Report is primarily about the structure of the courts and the changes that should be made to it. The following 3 chapters are about that structure. But the structure has a purpose. We must have regard to what it is that the courts actually do and consider whether there should be changes in the business they handle. In the last chapter we gave an outline of that business. In this we make a limited number of proposals for changes in it.

134 We consider in turn

- the criteria for the allocation of business between the executive government, courts and tribunals;
- the role of arbitration and other methods of dispute settlement; and
- aspects of the criminal jurisdiction of the District Court.

ALLOCATION OF POWERS BETWEEN THE EXECUTIVE GOVERNMENT, THE COURTS AND TRIBUNALS

135 A moment's reflection on some area of public power reminds us that Parliament makes many allocations of powers of decision between Ministers and officials, the courts and administrative tribunals. So decisions about the permanent or temporary membership of the New Zealand community made under citizenship or immigration legislation might be made by the Governor-General, a Minister (of Immigration or Internal Affairs), an official (in the Department of Labour), any of the courts, or a tribunal (the Deportation Review Tribunal).

136 The allocation of these powers of decision - appellate as well as original - can be and often is guided by principle. The Legislation Advisory Committee published a discussion paper on this and related matters early last year and has recently reported to the Minister of Justice (Administrative Tribunals). In its Report it first indicates that the choice is not simply between the 3 bodies - since there will be

various interactions between them. It secondly sets out and discusses a series of criteria to guide the choice. And it provides examples of how the criteria might be applied. The criteria relate to

- the characteristics of the function or power, together with the issues to be resolved and the interests affected; prominent among those interests are the liberty of individuals and their other important rights;
- the qualities and responsibilities of the decision-maker; and
- the procedure to be followed.

137 Appendix I sets out relevant parts of the Report. The Law Commission endorses the recommendations made by the Legislation Advisory Committee. It considers that the more systematic application of such criteria and reasoning would result in better legislation and in the end i better decision making. The Committee's Report shows that the arrangements for the public decision-making have tended to grow up haphazardly over the years. It is possible to have a more principled and comprehensive set of institutions and procedures for the exercise of public power. That is true as well of the arrangements for appeals from administrative appeals to the Courts which at the moment are a hotchpotch. We take that up in Chapter VI (see also Appendix G for the details of the legislation).

ARBITRATION AND OTHER METHODS OF DISPUTE SETTLEMENT

138 The methods which we have just mentioned are for the next part public. They involve institutions set up by the State, exercising public powers, often for public purposes. But many matters giving rise to dispute and calling for some form of orderly resolution have a more private character. The law leaves parties to a private dispute with great freedom to settle them according to peaceful methods of their own choosing. The great majority of such disputes are resolved - if they are resolved at all - by the actions of the parties, through agreement or abandonment. The resolution in many cases is assisted by a more formal process. So agreement can be helped by third party process, such as conciliation and mediation, as appears from family law and in areas of law such as labour relations, residential tenancies, small claims and wrongful discrimination mentioned earlier. And

formal recognition, support and control or arbitration as a means of dispute resolution is provided by the Arbitration Act 1908 and various related Acts.

- 139 The increase in the monetary limits to the jurisdiction of Disputes Tribunals will make their powers to promote compromise (exercised with reference to their adjudicative powers) rather more widely available. The proposals that the Family Courts have jurisdiction in family protection and testamentary promises legislation would mean that their counselling and mediation processes will become available in these important and appropriate areas (see Chapter V).
- 140 As family law shows, those processes can be associated with decision making by courts established by the State while arbitration typically is based on agreement between the private parties. Our purpose here is not to discuss these methods of dispute settlement in any detail - we have done that in one area in our Discussion Paper on Arbitration issued last year. That describes the characteristics of arbitration and indicates its advantages compared with other methods of dispute resolution (in particular in the courts), especially the preference it gives to the autonomy of the parties.
- 141 There is a growing interest in New Zealand in the full range of methods of dispute settlement. They include the community mediation experiment in Christchurch (see the Community Mediation Service (Pilot Project) Act 1983), the establishment of an arbitration centre in Auckland, the use of mini-trials (see the very recent and most interesting accounts by Paul Cavanagh and the Honourable E M Prichard in [1989] NZLJ 23, 25), and the proposals made in December 1988 to the Minister of Justice by the New Zealand Committee of the Pacific Basin Economic Council for the establishment of a Commercial Disputes Centre along the lines of centres in Vancouver and Sydney (see Tomas Kennedy-Grant [1989] NZLJ 21).
- 142 The PBEC proposal is for a centre which could work both with the courts (with matters being referred for resolution to it by the courts as is possible now but not common) and independently. Such a centre would promote the use of arbitration and other methods to resolve commercial disputes, it would provide and help provide such services, and it would provide a forum for the resolution of trans-

Tasman and international disputes. There appears to be wide support for such an initiative including support from the Minister of Justice. The Law Commission also supports it and related proposals for the wider use of the full range of procedures for the settlement of disputes. It will consider the PBEC initiative more closely in preparing its Report on Arbitration. Such developments may require support by initial financial and other measures.

- 143 Conciliation and mediation and other related processes need not be seen as separate from those of the courts. The Family Court legislation makes counselling and mediation aimed at settling the disputes by agreement an integral part of that Court's process (for example paras 181 and 207-217). The developing concept of the 'mini-trial' - aimed at giving the parties the expert view of a neutral adviser on the issues in dispute on the basis of an abbreviated hearing - is set up by parties already engaged in litigation in part with the purpose of avoiding the costs and delays of a complex case (see the articles cited in para 141). And as Mr Justice Barker has noted in a commentary on the 'mini-trial', the new High Court Rules enable High Court Judges to help facilitate settlement in the same kind of way, in that event with the State and not the parties providing the presiding officer, the court room and recording facilities ([1989] NZLJ 25).
- 144 The growing recognition of the range of methods for resolving disputes becomes even more important as our trade continues to diversify. It will be necessary for instance to continue to give careful attention to the development of means of resolving disputes arising within the Closer Economic Relations Agreement with Australia. The agreement signed by the Attorneys-General of the two countries on 1 July 1988 includes among the matters of business law, which are to be considered with a view to their harmonisation, commercial arbitration, mutual assistance between regulatory agencies in the administration and enforcement of business laws, and the recognition and reciprocal enforcement of judgments.
- 145 The very extensive American writing on various forms of dispute resolution not only illustrates their variety and stresses their advantages, it also occasionally sounds a note of warning. The procedures of the common law courts have been built up over long centuries in part to protect liberty and to help the pursuit of justice. Proposals to remove such safeguards even with the parties' consent must

be carefully considered. (There is some American evidence that less formal and structured processes can be to the disadvantage of those who are in a weaker position in society.) And, more broadly, contained and increased attention has to be given to the choice of the means appropriate to the category of dispute. We see that in the development by statute of mediation and conciliation, by the law and practice of arbitration and other consensual processes, and in changes in the handling of minor criminal matters to which we now turn.

CRIMINAL BUSINESS OF THE DISTRICT COURT

Administrative Matters

- 146 Chapter II calls attention again to a fact widely appreciated within the District Courts - District Court Judges should not be left to handle personally much of the routine or barely justiciable administrative matters which arise in the summary criminal court (para 68). Indeed many of the matters should not arise for decision at all; they are unnecessary, often repetitive steps in the processing of criminal cases which waste not just the time of Judges and court staff, but also and more significantly the time of the defendants, their family and friends, their lawyers, witnesses and prosecution offices, and generally impede the flow of work that needs to be dealt with by the Judges.
- 147 Some of these matters have been carefully documented in the Report of the Audit Office, Department of Justice: Administration of the Courts (November 1987). The Department of Justice is addressing the recommendations of that Report, in part in consultation with the Courts Consultative Committee (mentioned later in Chapter VIII) and in discussion as well with the Justice and Law Reform Committee of the House of Representatives (see its Report, 1988 AJHR I 8D).
- 148 The steps proposed and being taken are of practical importance for the individual New Zealander. Completely unnecessary court attendances can be avoided by better scheduling. (In the Audit Office sample based on 11 criminal and traffic courts only one-third of the defendants appearing had their cases dealt with finally.) Many hours of waiting time can be saved by summoning defendants at several different times through the day on which they do have to attend and not

each and every one of them at 10am. (So the Audit study showed that a single 10am summons time meant an average wait of about 2 hours with a maximum of over 6 hours (for a hearing of 6 minutes), while a division of summoning time between 10am and 2.15pm reduced the average wait to 34 minutes and the maximum of just over an hour.)

- 149 The savings are not only for the defendants - and their lawyers and family who often attend with them in serious matters. The system as a whole also benefits. Changes in Victoria in the last few years have led to huge savings in the time of attendance at court by police officers - the figure dropped to just one-quarter of earlier levels (Law Department - Victoria. Courts Management Change Programme, Case Management in Magistrates' Courts: The Mention System November 1985, pp 11-12).
- 150 Such changes involve a third advantage - the earlier hearing of cases. They also greatly reduce judge sitting time, a matter to which we return later.
- 151 These matters are largely administrative, and as we have mentioned they are already being addressed. The Law Commission strongly supports that process in terms both of the better access of New Zealanders to their courts and the more economical and efficient operation of the courts. A further aspect of improving access, on which Victoria again has provided important leads, is the improving of the forms and written advice provided to those who are to appear in court. That is a matter which arises as well in our reference on legislation (see for instance the changed Magistrates' Courts summons form proposed in Law Reform Commission of Victoria, Plain English and the Law (1987) Appendix 3, which with related changes also has the added advantage of saving about \$500,00 in Law Department expenditure each year).

Pre-Trial Conferences

- 152 The foregoing relates mainly to the routine case which involves a guilty plea, a short hearing (once the hearing time is actually reached), and a decision on penalty. Steps are also being taken to facilitate the hearing of contested summary criminal cases. There have been and are pilot projects for pre-trial conferences which, we are informed, are very successful from all points of view. A national

scheme is now being proposed. The results of the Wellington pilot project included

- a substantial reduction in the number of witnesses required to give evidence (because of agreement on the matters that were in dispute);
- an increase in guilty pleas (presumably as a result of the disclosure by the prosecution of its evidence);
- a reduction of the time between plea and hearing from between 3 and 6 months to generally no more than 6 weeks; and
- almost all cases proceeding on the date fixed (compared with up to 70% not proceeding on the fixed date, in the past).

153 There is a clear and pressing need for such important practical administrative steps (which can be helped of course by changes in the law, including in the case the law of criminal discovery). It is of course not only the immediate parties who are advantaged by the earlier and more efficient hearing and decision. Once again the system as a whole benefits.

Minor Offences Procedures

154 The regular formal way of handling criminal offences is of course by way of prosecution leading to a public hearing in court. The court makes a finding on the question of guilt (very often on the basis of a guilty plea) and, as appropriate, imposes a penalty. But simpler, less costly and more expeditious procedures can be used for much of this business with the courts either not being involved or being involved in a less formal way. Such procedures must however comply with certain principles.

155 Uppermost is the continued right of the citizen, if simpler procedures have been initiated, to choose to have access to the court in the regular way and to require that the court make a finding on the prosecutor's allegations and, as appropriate, that the court fix the penalty. That right, when invoked, must prevail over the advantages that the less formal procedures bring, in terms of the saving of time (of

the defendant as well as the prosecution, witnesses, judges, and court staff), the saving of money and speed. But practice shows the right will very often not be invoked. Then, if the case can be handled finally and justly in the ways provided for, it will be pointless to have large numbers of busy people waiting about, sometimes for long periods, for the mention of their case.

156 Parliament has accepted this proposition since at least 1955 by the adoption of 2 main procedures. In the one it fixes a standard fine (or an 'infringement fee') for certain categories of offences or enables that to be done by regulation, Ministerial notice or the order of judicial officers. The defendant then has a choice of paying that predetermined penalty or seeking a regular court hearing. This procedure is limited to certain breaches of the Litter Act 1979, and to prescribed traffic offences; speeding, overloading of heavy vehicles, parking, having an unlicensed vehicle, driving with an expired licence and failing to produce a licence, and certain driving and equipment offences. With the exception of the overloading offences (where the maximum penalty is \$3,300) and the worst speeding offences (maximum \$300 for an excess of 35 km per hour) the penalties are low and do not extend to some of the more serious offences (such as careless driving) which were within the scope of the 1955 legislation. (For the present provisions see the Transport Act 1962, ss 42A and 69B, Litter Act 1979, s 14, and Summary Proceedings Act 1957, s 21.)

157 The second procedure which Parliament uses is the minor offences procedure. For offences for which the maximum penalty does not exceed \$500, the defendant is given notice of the relevant particulars including the summary of facts, and the possible penalties for the offences, and again is informed of the right to have a court hearing to deny the charge or in respect of penalty. The defendant can a plead guilty by notice and state the matters to be taken into account. If the defendant pleads guilty or takes no action, a District Court Judge (or in some cases 2 Justices of the Peace) may on the basis of the summary of facts and without any appearances deal with the matter as if the defendant had appeared and pleaded guilty (Summary Proceedings Act 1957, s 20A).

158 These are very worthwhile developments. They provide for the imposition of penalties for breach of the law in a more efficient, economical and expeditious

way than that involved in formal prosecution. At the same time they recognise that sometimes an apparently routine proceeding in respect of a minor offence may involve issues of significance to the defendant which the defendant will want to have considered, either in the less formal way involved in the second procedure or through regular court process. The basic rights of access of the defendant to court are thus preserved. However care must be taken to ensure that defendants are not deprived of those rights by being lulled into inaction by the absence of appropriate and relevant information (including for instance notice of possible disqualification from driving).

159 Subject to that safeguard, the Law Commission considers, along with the Royal Commission on the Courts (paras 435-443), that greater use could be made of the procedures, and we urge that the Department of Justice, the Ministry of Transport and other interested agencies further examine the matter. Several matters should be weighed.

- (1) The prosecutor has a choice whether to use regular prosecution instead of issuing an infringement notice. Is there any longer justification for that? If a speeding offence has elements of danger which the prosecutor considers justify a higher penalty the appropriate action which is available to the prosecutor appears to be to lay an information for the more serious offence of dangerous driving.
- (2) The infringement fee (or standard fine) approach could be given in a much wider application. When introduced in 1955 its possible extent covered all but the most serious offences under the Transport Act 1949 - those with a fine of up to BP50, the general penalty under that Act and the equivalent of about \$1,200 now. As we have noted already, the maximum penalty under the present scheme (leaving aside overloading offences) is \$300.
- (3) Attention should be given to the question whether more offences cannot be made the subject of infringement fees (in some cases rather than minor offences processes). Possibilities suggested by *The Judicial Statistics* are dog control, income tax and sale of liquor offences. This inquiry should

involve the question whether penalties other than monetary ones - especially disqualification from driving - might be brought within the scheme.

- (4) The level of standard fines was originally determined by judicial decision rather than by legislation or executive act. The Beattie Commission proposed that this power be reinstated. Such a change could answer the concern that legislative or executive administration of the penalty is inappropriate. The exercise of such a power could have regard to the penalties routinely applied in the district for which the penalty was determined - if it were thought appropriate to have the possibility of regional variations (as was possible originally). It could give more formal effect to the sentencing `tariff[which is often recognised to exist. Such a change might enable the inclusion of a significant range or more serious offences where heavy fines (but not imprisonment) are the norm. So among serious traffic offences where (to use the 1984 Justice Statistics - Part B pp 24-25) the penalties did not involve custodial sentences in more than a very small proportion of cases are excess blood alcohol, failing to give notice after an accident, and various road user charges offences. In some cases only first offenders might be dealt with under this scheme.
- (5) Undoubtedly it is difficult, as the Beattie Commission noted (para 441), to fix standard fines for offences which may have greatly varying degrees of culpability. For them the minor offence procedure may be more appropriate. But that procedure can be applied only when the maximum penalty is \$500 or lower. That figure was fixed in 1974. The present day equivalent is about \$2,500. Among the offences that are not now covered by the minor offence procedure because of the \$500 limit are driving without a driver's licence (an offence included in the original 1956 standard fine scheme), provision of false information in respect of a car licence, and some transport licensing and liquor licensing offences.

160 The Law Commission's general proposal is that greater use be made of these valuable processes. They can ease the load of judges, Justices of the Peace and court administrators. The statistics show some dramatic improvements in that respect (for instance in 1981 with the reintroduction of the standard fine system).

They can facilitate the proper enforcement of the law while leaving unaffected the rights of defendants. In part indeed their rights are enhanced in these processes by the routine early provision of more detailed information than a regular summons at present provides.

Diversion

161 A police officer, like any other potential prosecutor, is not obliged to prosecute, even when there is prima facie evidence that an offence has been committed. The decision may involve a very broad judgment whether to do so, with many aspects of the public interest, the circumstances of the case and the alleged offence being relevant. Of course the decision must be reached with complete detachment and on proper grounds.

162 The statistics show that the police make extensive use of this discretion by way of giving a formal warning or a caution and not prosecuting. So in 1986 they brought 135,000 prosecutions and gave warnings and cautions in about 37,000 other cases. In 1978 the figures were 101,000 prosecutions and about 24,000 warnings and cautions. The proportions of warnings and cautions vary according to the seriousness of the offence and changing policies about prosecutions for certain offences (for instance in respect of domestic assaults and possession of cannabis).

163 In 1988 the police operated a pilot project in Wellington for the diversion of certain defendants who already have been charged summarily. If the case is resolved satisfactorily the police apply to the court to withdraw the prosecution. The project has had the support of the Wellington District Court Judges, the District Courts Committee of the Wellington District Law Society and police officers. It has been regarded as very successful and is being considered for wider adoption.

164 According to an account provided to us, the main features of the Wellington scheme are as follows

The criteria which generally apply to cases which are the subject of the diversion scheme are as follows:

It applies to first offenders though in special circumstances others may be included.

The offence charged is not serious.

The offender admits guilt, shows remorse and is prepared to make full reparation where appropriate.

The victim, the officer in charge of the case and the offender agree to diversion. When the offender is dealt with under the diversion scheme, all or any of the following conditions apply:

- (1) The offender is warned by the Officer in charge of Prosecutions and advised that further offending can only be dealt with by court action
- (2) The offender personally apologises or writes a letter of apology to the victim or the officer in charge of the case or both.
- (3) Full reparation is made to the victim.
- (4) Professional counselling for alcohol, drugs or violence is undertaken.
- (5) The defendant voluntarily undertakes a period of community work.
- (6) The offender makes a voluntary donation to the charity of their choice.
- (7) In some cases other conditions may be appropriate.

[The diversion decisions are recorded on relevant police files.]

Over 250 cases have been resolved by way of the diversion scheme since it commenced. Only 2 persons have re-offended. The procedure has been readily embraced by defendants and very positive results have been achieved. In some cases the defendants have continued with their voluntary work after the agreed period has expired. The scheme has received the support of defence counsel and in fact many diversion cases are initiated by counsel.

- 165 The other expected advantages include an improved public perception of the criminal justice system and the police, the appreciation by those victims who have been involved of a more satisfactory and rapid resolution of the matter, improved

attitudes of the offender towards the police, and savings of the time of the courts, witnesses, prosecution staff and defence lawyers.

- 166 Such successful schemes are the kinds of initiative that are required to prevent steps down the path of criminal offending. This particular scheme also, consistent with recent legislation, may give a place in the handling of the matter of the victim.
- 167 The Law Commission proposes that further measures of this kind be actively considered. One might be to give the potential defendant a choice between being tried or having a formal warning recorded, probably in the record held in the Wanganui computer; the warning would prevent prosecution but it would be relevant to sentence on any later conviction. It could apply to relatively serious offences, such as shop-lifting.
- 168 Such procedures must include appropriate safeguards. Thus the proposed national scheme requires decisions to be made in general by the Officer in charge of Prosecutions, that officer may initiate the process, and the discussions are on a 'without prejudice' basis. The alleged offender must be given a clear understanding of the consequences of following the diversion procedure and a proper opportunity to take advice on it.

A CONCLUDING COMMENT

- 169 As we have said, this Report is mainly about the structure of the courts rather than about their business. But it is not possible to consider structure in the abstract. The courts are handling business which they ought not to be (and the growing caseloads of the Small Claims and Tenancy Tribunals may suggest that the opposite has also been true - and perhaps still is). Continuing attention has to be given to the business of the courts to ensure that the business is properly there. Our concern in this chapter has been to highlight some important recent developments and to make a limited number of proposals. Much more remains to be done in this area, for instance in respect of children at risk and young offenders. Such matters are being considered in the preparation of the children and young persons legislation and in discussions of the future role of the Maori Land Court.

170 It follows that when new legislative initiatives are being undertaken thought must be given at the same time to the best choice of the method for the enforcement of the new law, and in particular to the consequences for the courts. In some cases, as with the development of family law, the substantive policies and their institutional forms are worked out at one and the same time. But that is not always so.

IV The Structure of the Courts: Overall Approach

INTRODUCTION

- 171 Chapter II of this Report described the existing business and structure of the courts (including recent changes in both). Chapter III set out the Law Commission's proposals for changes in the business of the courts. The chapter explains the reasons for the general scheme with the Commission proposes, while the two that follow take up in turn the original jurisdiction and the appellate jurisdiction of the courts of New Zealand.
- 172 The Law Commission is preparing this Report against the background of the declared intention of the Government to remove the right of appeal to the Judicial Committee of the Privy Council. That decision - like the terms of reference - means that this Report give some emphasis to the appellate side of the business of the courts and to where appeals fit in the structure of the courts. As we have already said, appeals cannot be looked as independently of the original work of the courts. The appeal business after all arises only because courts have made decisions at first instance and aggrieved parties wish to challenge such decisions. Moreover, the structuring of the original business will affect the appellate structure. And, most importantly, the first instance work of the courts is by far the most significant for those affected by court proceedings, not only in volume but generally in substance as well. As a society, we must be primarily concerned with the quality of justice at that original level.
- 173 In our work on this reference we have accordingly been concerned with the best organisation and structuring of both the first instance business and the appeal business as well as with the relationship between the 2 categories. The principal submissions that we have had have also addressed those basic issues. That is particularly true of the papers which we have had from the Judges - the Court of

Appeal, the High Court, the District Courts, and the Family Courts - and the submissions from the New Zealand Law Society and from the Department of Justice and the discussions we have had with them, and their representatives. In the summary, we have already indicated our overall approach to the structure of the courts. What are the reasons for that overall approach?

- 174 We should first recall the relevant principles and other matters mentioned earlier. It is against those principles that proposals should be tested. We should also recall that while a sound structure is essential to the provision of justice in our society it is not sufficient. Much depends as well for instance on the quality and contribution of the bar, prosecutors, court staff, and other immediately involved in the work of the courts and on the aid provided by the State to those who cannot afford proper legal assistance.
- 175 We repeat as well the point that the structure of the courts should not impede and if possible should facilitate other desired changes in our law and legal system, such as a wider use of other methods of dispute settlement, including arbitration, or in the criminal law. The courts must always be seen in a wider context. They are not an end in themselves.

ORIGINAL BUSINESS

- 176 We begin with the organisation of the business of the courts at first instance. Which judicial officers in which courts should handle that business? In a broad way 2 main answers were proposed in the submissions; a single court of first instance or a continuation of the present system with the District Courts and the High Court exercising the bulk of the original jurisdiction between them (but with some reallocation of business). We propose that the present system continue, but with major changes in jurisdiction which will change in significant degree the character of those 2 courts. The changes would build on those initiated following the Report of the Royal Commission on the Courts made 10 years ago.
- 177 We have already broadly indicated that the reasons for that conclusion in Chapter I: the range in the difficulty and importance of the work and its almost infinite variety; the consequent need for gradations and divisions within a single court; the

transitional problems; and the fact that many of the advantages of a single court can be gained in other ways. We now elaborate on those and related matters.

The Original Work – Its Range and Variety

- 178 We have earlier summarised the day to day work of the courts. Appendices B, C and D give further information. The submissions which we have had refer in one way or another to its great range and variety. No one suggests that all that business, whatever the category or the significance of the case (or lack of it), should or indeed could be handled by every one of numerous judges sitting in a single court of first instance.
- 179 We do not wish to belabour the point. A few examples can illustrate it. First from the criminal jurisdiction, which takes up fully half of the sitting time of judges in the courts of general jurisdiction. Minor traffic cases, possibly involving no appearance, rarely involving a not guilty plea, being handled in high volume, often by Justices of the Peace and often with very routine penalties are examples at one extreme. (They do however sometimes give rise to very difficult questions of law requiring resolution by appeal or legislation. Such cases sometimes make the point that the drafting of legislation can help ease the court's way.) At the other extreme in the criminal area are serious defended jury trials with the prospect of lengthy imprisonment in the event of conviction.
- 180 Within that area we see several different decision-makers - Justices of the Peace deciding a matter or presiding over a preliminary hearing, District Court Judges sitting alone or with a jury, High Court Judges sitting alone (or very occasionally in panels), sitting with a jury or hearing an appeal, and the Court of Appeal. In those cases, we also see almost all the varying characteristics of our courts in action - lay and professional judges; disputed and non-disputed matters; preliminary, final appellate decisions; one or more parties; the routine enforcement of the law and its review, clarification and development in difficult cases; and decisions on matters of very little or major public interest. Day in and day out in those areas the courts are also supervising the relationship as determined by the law between the State and the individual - one of their basic constitutional functions.

181 A second example is the family jurisdiction, the importance of which was marked by the establishment, on the recommendation of the Beattie Commission, of the Family Court in 1981. That Court, as we discuss elsewhere in this Report, has distinctive features. It is part of a major development in a continuing evolutionary process at work in our system of family law. Both the legislation establishing it and the Court in operation emphasise a broad approach - counselling and mediation, as well as adjudication if in the end a decision has to be imposed; the extensive use of experts; a reduced emphasis on the adversary system; and overall, to quote one of its Judges, a spirit of dedication and teamwork directed to trying to find positive solutions to often very difficult family problems. That picture which suggests perhaps an institution separate from the courts of general jurisdiction is to be balanced by a recognition that some of the matters and issues handled by Family Courts also come before the other courts. We come back to some of these issues in this and the next 2 chapters.

182 The civil jurisdiction provides a third and last example of endless variety. A total of 133,685 claims were filed in the District Courts in 1987. Fewer than 1% of those matters got to a defended hearing by a Judge - most of the rest were for simple debt (and some of them accordingly would come before a Judge at the enforcement stage by way of judgment summons). Against that rather routine - or in the case of default judgments completely routine - work, is the complex commercial dispute or the major public law case involving disputes about the extent of executive power. Compare one matter involving no controversy, no public interest (other than the general one in the regular enforcement of the law), and an absolutely straightforward use of law applied in a minimum of judicial time with the lengthy complex case involving disputed fact and law, major public and private interests, and requiring not merely an application of the law but its clarification and actual development.

Different Decision-Makers

183 The business differs greatly. Necessarily the judges will differ as well. Again there is a danger of over-emphasis. But consider the very substantial divisions within the District Courts themselves. First there is the division between the District Court Judges and the other judicial officers sitting in or associated with

the Court - Registrars, Justices of the Peace, Disputes Tribunal referees, Tenancy Adjudicators, and Motor Vehicle Disputes Tribunal members. that is to say, below and partly alongside the District Court Judges is a further group of judicial officers dealing with business of lesser importance in terms of the possible penalties (on the criminal side) or the monetary amounts involved (on the civil). Of course particular cases may have greater or less importance for the litigant and, as mentioned, they can have significance for the general law as well. Among the Judges themselves there are important differences - the Tribunal Judges (about 10), the Family Court Judges (about 25) working with an interdisciplinary team, the Criminal Jury Judges (about 21), perhaps those in the Children and Young Persons Court, and the other Judges (about 50 in all) who spend much of their time in summary criminal work, especially sentencing.

184 This great variety of tasks and the consequent specialisation of particular groups of judges in fact and often in law as well is a very strong and we believe a conclusive argument against a single court. What was put together would have to be the subject of division even within the structure of a new single court. It would be a single court only in name.

185 It is apparent from what we have said that even the initial grading of original business and Judges into 2 groups is only a first step. There will be further divisions and specialisations beyond that. But it is clear to us that that initial division is a valuable first step in the organisation of that judicial business. This becomes even more manifest, we think, when we consider the original criminal and civil business in more details as we do later in this Report.

Experience in Other Jurisdictions

186 The experience of other jurisdictions like ours also confirms use in the view of the value and perhaps inevitability of that basic distinction. Thus the Australian States have a general 3 courts of original general jurisdiction- the Supreme Court and 2 others with varying names (the more senior being the District Court or County Court in 4 of the States and the other being variously the Magistrates' Court or Court of Petty Sessions). In Canada the original jurisdiction is divided into 2, 3 or even 4 courts of general jurisdiction - the High Court, the District Court, the

Provincial Court and Municipal, Justice of the Peace and Summary Offences Courts. In England and Wales the original jurisdiction is also divided - in general between the High Court and the County Court in respect of civil matters and the Crown Court (in which High Court Judges sit), Magistrates' Courts and Justices of the Peace on the criminal side. The recently completed English Civil Justice Review (1988) considered and rejected the proposal for a single court of civil jurisdiction (paras 84-85). (It is interesting that those proposing a single court to that Review agreed that within such a court there would remain different categories of judges - High Court and County Court. And indeed the Review has proposed that there be 3 categories of judges in the County Court.) In Ireland, to mention a unitary State with a population and legal tradition comparable to ours, the original jurisdiction is divided between the High Court and the Circuit and District Courts.

- 187 We ought not to adopt a position simply because other countries have adopted it. our circumstances and needs may require or suggest other answers. But the fact that consistently (over time as well as geographically) similar jurisdictions have at least 2 tiers of courts to deal with original jurisdiction strongly suggests that its variable nature and quality requires at least that degree of division of permanent judicial officers.
- 188 The English Review is interesting in at least 2 other relevant ways. One of its general purposes - like ours - was to ensure that civil business was allocated to the various tiers in such a way as to ensure that it is handled at the best level appropriate to each case; it is only in this way that the skills of higher level judges can be concentrated on the cases for which they are required most (para 82). Too much business or low or medium level was being tried by High Court Judges (paras 90-102).
- 189 The second relevant aspect of the review is statistical. The comparisons are striking (even taking into account the serious inadequacy of the New Zealand figures and the problems of comparison between different systems). In England, County Court Judges try about 8 times as many civil cases as High Court Judges (Table 2, para 26 of the Review) while here the ratio may not even be 2:1. (The statistics for the sitting time of the groups of Judges show similar strikingly

different proportions, e.g. Appendix B and Lord Chancellors' Department, Judicial Statistics England and Wales for the Year 1987 (Cm 428, 1988) Ch 9.)

The Problems of Transition

- 190 Apart from the positive reasons for dividing the original jurisdiction between courts at 2 levels there are the transitional problems which would arise if an attempt were made to remove the present division. What would be the relative positions of the people who hold appointments in each of the 2 courts which presently exercise an original jurisdiction? In particular there is the role and status of the High Court Judges. They have a special tenure of office, expressly recognised and indeed recently enhanced in the Constitution Act 1986. Furthermore, they have at their command the inherent jurisdiction of the Queen's Judges having its essence and origin in the common law and royal powers. A wholesale extension of the jurisdiction and tenure to the full membership of a combined court not be justified. (See similarly para 115 of the Civil Justice Review.) Nor is it practicable to assume that present High Court Judges would be prepared or willing to have their present status or jurisdiction diminished.

The Problems of Recruitment

- 191 There is a related point concerned with recruitment to the courts. It is necessary that a fair share of the very best lawyers be attracted to the courts, particularly the senior courts. That would not be made easier if all the 130 or more Judges of general jurisdiction were brought together in a single court.

The Advantages Obtained in Other Ways

- 192 Earlier we said that many of the suggested advantages of a single court can be gained in other ways. We come back to our proposals for the original jurisdiction. In broad terms they are that the District Court, presided over by a District Court Judge, should have much more extensive concurrent jurisdiction with the High Court. This would make justice more widely accessible in the community; it would provide for a more principled allocation of business between High Court Judges and District Court Judges (for monetary and penalty limits are not themselves a good guide); it would enable the better matching of the work of the

courts to the qualities and abilities of different groups of judges; and it would allow a better balance of work between those groups and within them - too high a proportion of judicial business is being handled at the High Court level.

- 193 The proposal for more extensive District Court jurisdiction received support from the Court of Appeal Judges, the High Court Judges (with some difference of view about the extent of the concurrent jurisdiction), District Court Judges (although they also wanted a single court),¹ and by the New Zealand Law Society (although it expressed some caution about just how far the extension should go). The Department of Justice also supports a wider District Court jurisdiction. And proposed amendments to the District Courts Act 1947 recently introduced into the House of Representatives would extend the general monetary limit of the civil jurisdiction from \$12,000 to \$50,000 (although, as we now indicate, we do not think that is the correct way forward and we do not consider that the amendment should proceed at this stage).

CIVIL JURISDICTION

- 194 The reasons for such changes are several. We begin with the civil jurisdiction. That change included in the proposed District Courts Amendment Act can be simply justified by inflation and even more perhaps by the withering of the District Court civil work. While, as we mentioned earlier, the Royal Commission on the Courts envisaged a growth in the civil work of the District Courts (para 448) the statistics (rather exiguous though they are) show the contrary to have happened. That jurisdiction - in the sense of contested proceedings - has languished, especially by contrast with the striking growth of the Small Claims Tribunals handling claims for smaller amounts in a less formal and costly way, and with the apparently common reluctance, even with the 1980 increase of the monetary limit to \$12,000, of lawyers to advise their clients to undertake contested proceedings in that jurisdiction. The statistics in the appendices help make the point; the total annual civil sitting hours in the Magistrates'/District Courts have dropped from about 7000 in 1977 (or about 145 per Magistrate) to 4000 in 1987 (or about 50 for each District Court Judge); on any one day in 1987 only about 7 of the District Court bench were hearing civil matters (and much of that is judgment summons work) while the equivalent figure for Small Claims

Tribunal referees was 19 (and is likely to continue to increase further with the trebling of jurisdiction of the Disputes Tribunals). The present civil work of the District Court is not appropriate to the ability and experience of members of that bench. It should be expanded. But how?

195 We think that the approach included in the recent Bill of increasing the monetary maximum is too limited and as well it is wrong in principle. It is too limited since changes in the value of money and increases in the cost of litigation can soon nullify the amendment.

196 The increases in the monetary limit of the jurisdiction of the Magistrates' Courts in 1927, 1947, 1961 and 1971 roughly match increases in the consumer price index over the intervening periods. The limit increased between 1913 and 1971 from \$400 to \$3,000 and the CPI grew about 6 fold. The 1980 4 fold increase in the District Court limit to \$12,000 is to be compared with the 3 fold increase in the CPI that had occurred before that change was made. Since that change the CPI has more than doubled and the jurisdiction of the court has accordingly effectively been halved. That is to say while there is a broad correspondence in the trends throughout this century, the real monetary extent of the jurisdiction has oscillated greatly in both directions by factors of up to 4 - and that is proposed again. That is also true of the other monetary limits in the legislation, for instance in respect of the maximum rent of premises possession of which can be sought, and of transfer and appeal to High Court. Such large swings cannot be satisfactory for litigants wishing to have real access to the District Courts or to the lawyers and judges involved in their day to day work.

197 Such a rigid use of monetary amounts is also wrong in principle since they are not themselves measures of the complexity and the character of the issues to be resolved by the court. This matter is developed further in the next chapter. (We see the monetary limit to the Disputes Tribunals jurisdiction differently since when taken with the informal and inexpensive operation of those bodies - in part because of the exclusion of legal representation - the limit helps ensure independent third party settlement of legal disputes which otherwise would probably not be settled in that way simply because of their low monetary value.) A simple increase in the monetary limits also leaves us with the limits on subject

areas which now have principally a historical jurisdiction: inferior courts were progressively given jurisdiction over particular areas of law (for instance over equity) and never over some (such as the title of land). The better approach, supported in major submissions to us, is to confer the jurisdiction in positive general terms, concurrent with that of the High Court and then to limit it in 2 ways; first by the exclusion by statute of a prescribed list of matters (such as judicial review) and second by the conferral of a power on a High Court Judge to transfer matters into the High Court on the basis of their complexity and importance. We consider the detail of the limit and of the discretion in the next chapter. We also propose there the issuing of directions to guide and control the decisions whether to transfer cases.

198 Such as approach allows

- Parliament to address directly the principles which distinguish the exclusive jurisdiction of the High Court, and
- a High Court Judge to assess whether that Court should more appropriately exercise jurisdiction is concurrent. That experience would be guided by directions in the form of regulations and would help confirm or redefine both the statutory line and those directions.

199 Powers of transfer such as we propose are already to be found throughout our courts system. On the civil side, there are provisions for transfer, by decision of the relevant courts, between Disputes Tribunals, District Courts and the High Court. Parties to proceedings in the Family Courts can apply to have these removed to the High Court on the basis of their complexity. Cases set for trial by jury with a District Court Judge presiding can be transferred to the High Court (one reason is greater expedition). And District Court Judges can commit certain defendants who are before them for sentence to the High Court. Other countries also have considerable experience of such powers.

CRIMINAL JURISDICTION

200 We propose much the same approach for criminal jury trials. This approach too has wide support in major submissions made to us (again with some differences

about the extent, if any, of the exclusive jurisdiction of the High Court. Again, the next chapter provides detail.

201 In addition to enabling a more principled allocation of business, these proposals, consistent with the purposes of the Beattie Commission, would reduce - very substantially as we see it - the criminal jury work of the High Court and lead to some decrease in its civil work. As a result the balance between the High Court and the District Court in the two areas would be improved. We have already noted that the High Court jury work is rising to levels comparable with the pre-reform levels and now constitutes more than one-third of the Judges' sitting time as compared with about one-quarter earlier in the 1980s. The District Court jury trials by contrast have stayed fairly constant in number and have accordingly fallen in relative terms. We propose that the number of jury trials presided over the High Court Judges should be taken down dramatically from the present numbers.

202 Once again the law and practice in other jurisdictions is helpful. With our own recent experience it suggests as well that too much of the time of our High Court Judges is spent on criminal jury trials. In England, High Court Judges preside over only about 1 case in 40 in the Crown Court which hears all trials on indictment. Proportionately they are much more heavily involved in the most serious cases. In 1986 the figures were -

70% of Class 1 offences (including murder);

52.5% of Class 2 (including manslaughter and rape);

14% of Class 3; and

just 1% of Class 4 (although they were the largest in number of the trials presided over by High Court Judges).

(Lord Chancellor's Department, Judicial Statistics, Annual Report 1986 (1987) 48.)

(The classes are further described in Chapter V, para 339.)

- 203 Because of the greater involvement of High Court Judges in serious matters, the proportion of their sitting days is higher than the 1 in 40 proportion, but it is still only about 1 in 25. It is interesting however that the High Court Judges do sit in a large number of the least serious trials; the class is a guide rather than an absolute.
- 204 Irish legislation handles the matter in a related though less flexible way: a High Court Judge with a jury has jurisdiction over certain offences of particular gravity (including treason, murder, and certain of the offences under the Offences against the State Act); all other jury trials are presided over by a Circuit Court Judge, Morgan, *Constitutional Law of Ireland* (1985) 201. The position in Australia is comparable. According to a recent study of the Australian Court system, about 90% of all defendants tried on indictment are now tried by juries in District or County Courts. As in the other jurisdictions mentioned and in New Zealand, the provisions for juries and the applicable criminal law and procedure in the lower court generally are the same as in the State Supreme Courts, Crawford, *Australian Courts of Law* (1982) p 84. In Canada too the list of criminal jury matters that must be heard only in the High Court or equivalent has shrunk; only murder and related offences are important in practice. Other indictable matters fall within the concurrent jurisdiction of the High Court and the District Court (or equivalent) and are usually heard in the latter, for example, Honourable T G Zuber, *Report of the Ontario Courts Inquiry* (1987) para 3.12.

THE FAMILY COURT

- 205 This Court established in the major court reforms in the early 1980s is a prime example of the approach we are suggesting. Almost all family matters are filed in and determined by it (and there is no monetary limit) but there is general provisions for the transfer of particular cases to the High Court and for appeal to that Court. In the case of matrimonial property proceedings the parties have a choice of where to file their application.
- 206 The submissions and our deliberations have raised 4 major questions relating to this Court to be considered in this Report:
- (1) Should the Family Court retain its present connection with the District Court or should it become separate

- (2) Should its jurisdiction be altered?
- (3) What provision should be made in respect of the concurrent jurisdiction of the Family Court and the High Court and the transfer of business between them?
- (4) How should appeals from the Family Court be handled?

We consider the first question here, the second and third in Chapter V and the last in Chapter VI.

A SEPARATE COURT?

- 207 The Principal Family Court Judge reported to us the wish of a majority of Family Court Judges to work full-time in the family jurisdiction and their opinion that the Family Court would be able to offer the best service if it had its own separate identity and administrative support services as a separate court. The other Family Court Judges wish to continue sitting in the District Court and do not favour structural change. The more general submissions forwarded by the Chief District Court Judge also did not support such a change. Rather, as indicated, they proposed a single court of first instance and the Chief Judge also contended that the allocation of Judges to the various parts of the District Court should be done in an administrative way and not by the Governor-General.
- 208 We have briefly mentioned the special features of the Family Court as it has developed in the 1980s (para 181; see also Chapter II). The Court under its legislation and in practice is undoubtedly different from the courts of more general jurisdiction. It has been well described as having a 2 fold method of operating - by way first of the promotion of reconciliation and conciliation (a duty imposed on the lawyers and counsellors involved as well as on the Courts) and of mediation (a function for which the Judge has primary responsibility) aimed at reaching agreement on the matters in dispute; and the imposition of a determination according to law by the Court only as a last resort. The extent of the first of these functions is partly shown by some 1987 figures - almost 10,000 referrals to counselling and over 2000 Judge chaired mediation conferences. (The Report of the Department of Justice for the Year ended 31 March 1988, p 21,

shows a doubling of that figure in 4 years, while the number of applications to the Court has stayed constant. There is a related increase in spending on civil legal aid, p 7.)

- 209 This special jurisdiction also has the support of strong professional services including counselling, social work, psychology, mental health, family evaluation, and legal representation. The Court gains as well from organisations within New Zealand and outside, including growing links with the Family Court of Australia.
- 210 The Family Court is of course already separate from the District Court in important respects. In general it is only the Family Court Judges who can exercise the jurisdiction of the Court. The qualifications for their appointment (to quote the Family Courts Act, s 5) are that they are eligible to be District Court Judges and that by reason of training, experience, and personality they are suitable persons to deal with matters of family law. They are appointed permanently by the Governor-General.
- 211 We have mentioned that the legislation shows that adjudication is only one means of determination - and is a matter of final resort. The court procedures in such a case differ from those say of a contested criminal trial: the emphasis is less adversarial, the court is not bound by the rules of evidence, provision is made for counsel for the child, traditional court dress is excluded, and the hearing is to avoid unnecessary formality. The process also involves substantial public funding by way of professional fees.
- 212 The distinctiveness extends to architecture and furniture as well: the courtroom (or even the building) is separate from the rest of the courts and differently furnished to put people at their ease. (See generally Family Courts Act 1980 and Ludbrook, Tapp, O'Reilly, Ludbrook's Family Law Practice, Chapter 5.)
- 213 We agree that in such ways the Family Court is distinctive. It is different from the other parts of the District Court. But we must keep the whole matter in perspective, and our concern in this Report must be primarily with the adjudicative part of the work of the Court. (So the extensive official and voluntary non-adjudicative elements involved with the criminal justice system (such as the Probation Service, Social Welfare, Maatua Whangai, Friends of at Court and

Prisoners Aid) cannot of themselves mean that the process of determining guilt and imposing sentence in the criminal courts should be separated off from the regular courts.)

- 214 While it is true that the Court is to operate without unnecessary formality, it must also comply with the principles of natural justice and other relevant procedural rules (and indeed all courts should avoid unnecessary formality). It will after all be concerned, the conciliation and mediation process having failed to produce an agreement, with disputed issues of law and fact, which it will have to resolve in accordance with law and the regular standards of proof.
- 215 Further, the general issues of fact and law which arise and the more specific substantive law matters which the Family Court must determine will not necessarily be distinct from those arising in the general court system. Indeed, as we have already noted, there is extensive concurrent jurisdiction between the Family Courts and the High Court. The original jurisdiction conferred in 1981 had earlier been exercised by the Magistrates' Courts and the Supreme Court. Part of the new Family Court jurisdiction under the Protection of Personal and Property Rights Act 1988 was until last year exercised by the High Court. And the proposals for new Family Court jurisdiction relating to children and young persons, matrimonial property, testamentary promises and family protection all concern areas of law currently administered by the courts of general jurisdiction. Furthermore the decisions of the Family Court are subject to appeal to the High Court and the Court of Appeal.
- 216 There is also the consideration that the Court is newly established. Inquiries into particular aspects of its jurisdiction and operation are underway. And Australian experience of a separately constituted Family Court would also make us pause. Thus in 1985 the then Chief Justice of Australia, Sir Harry Gibbs, questioned the prestige of the Family Court there and said that it may have been a mistake to establish a separate court to administer the Family Law Act ((1985) 59 ALJ 522). Last year the Chief Justice of the Family Court itself was reported as stating that setting the court up a separate court rather than as a division of a larger federal court was a disastrous mistake. Unless and until there was amalgamation, the Court would continue to be treated as a poor relation and not as part of the

mainstream of the Australian court system (October 1988 Australian Law News 20).

- 217 The particular issue is to be put in the wider context of the tension between the specialist and the generalist or rather the need to get the best balance between them. (See for instance the discussion in paras 306-320 and 420-431 of the Report of the Royal Commission on the Court (1978).) As we have indicated, the Court, the Judges, its supporting professionals and staff, its law, its procedure and its administration all give the jurisdiction a particular orientation. But the Court is in the end of a court of law, following accepted procedural principles and rules, applying standards, principles and rules of law and administering law much of which has until recently and traditionally been administered by courts of general jurisdiction. We think that at this stage it would be unwise for the Family Court to be further detached from the general court system. The balance is about right. The Law Commission accordingly proposes no general change to the status of the Family Court and its relation to the District Court. Thus its Judges should continue to be appointed in the same way and on the same basis as at present.
- 218 There are some relatively minor legislative changes which could be made to mark better the present distinctive position of the Court (for instance relating to the name of the Court, the intitlement of its documents, and its seal). We take them up later (Chapter IX).

APPEAL BUSINESS

- 219 The proposals relating to the original business of the courts will mean, if adopted, a considerable increase in the work of the District Court - in criminal jury trials, civil matters and family cases. The original case load of the High Court will be correspondingly reduced. How are appeals against the decisions of those 2 courts to be handled? There are also the appeals from other bodies, especially administrative tribunals.
- 220 We first address 2 more general questions - what are the purposes of appeals, and what are the purposes of second appeals. We then set out the broad reasons for the general appellate system we propose. Greater detail about the present and proposed systems appears in Chapter VI.

COMPETING PRINCIPLES

- 221 Our legal and constitutional system has long provided methods for reviewing the decisions of courts. It recognises that courts, like other human institutions, make mistakes and that mistakes, causing injustice, should be corrected. But the law has also long emphasised the finality of decisions given following careful court process. There is a public and private interest in litigation coming to an end. Any methods for the review of court decisions must balance these competing considerations.
- 222 Parties dissatisfied with court decisions may have 4 ways of challenging them. First, most courts have the power on prescribed grounds to reopen cases which they have already decided and then to rehear them on the merits. Secondly, in some circumstances a completely new application to the court may be possible. Thirdly, the High Court has inherent jurisdiction to review and control the actions of lower courts (and other public statutory bodies) if they step outside their authority. The fourth and major method of challenge is appeal.
- 223 This part of the Report - like Chapter VI - is concerned with appeal as a method of attacking the decision of a court. The appeal power is a creature of statute (and accordingly differs from the High Court common law power of review). It is exercised by a higher court (and accordingly differs from a rehearing or a new hearing by the original court). And it is generally concerned with the merits of the decision and not simply with the extent of the powers of the lower court (and accordingly is usually wider than common law review). Its precise extent is determined by legislation (including rules of court) and especially by the appeal courts which apply that legislation.
- 224 While this section is about appeal powers, created by statute, we should keep in mind the other methods of attack on decisions. Another common provision empowers lower courts and tribunals to state a case for the opinion of the High Court (or in rare cases the Court of Appeal) on disputed questions of law arising in the course of a proceeding. The power is in the hands of the court or tribunal (and not the parties), it must be exercised before the court or tribunal decides (while appeals of course are against decisions after they have been given and

when their significance can be appreciated), and the issues are limited to matters of law (while many appeals involve the merits). In some circumstances one of those other methods might provide a better way of achieving the relevant purposes than an appeal would. We now turn to the purposes.

225 Why do we have appeals? And what are the arguments for not having them? Sometimes it is said that appeals are wasteful. The execution of the original judgment is delayed. The parties and the State are put to extra cost. The time and talent of able people are taken up in considering a matter for the second time.

226 The common law indeed had an aversion to appeals. One great Judge, speaking for the United States Supreme Court, said that the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, *Cobbledick v United States* (1940) 309 US 323. However a right of appeal is now generally taken for granted. As Appendices B, F and G indicate, appeals are an established feature of our legal system, and that is also true of other legal systems like ours. A right of appeal (or something akin to it) is indeed required of New Zealand for persons convicted of criminal offences:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed in a higher tribunal according to law. (International Covenant on Civil and Political Rights, article 14(5)).

As mentioned in the Introduction, the New Zealand Government ratified the Covenant in 1978 and is thus bound to give effect to it.

227 What are the purposes of appeals? A clearer idea of function might help us with the form. The Treaty provision just quoted indicates one reason for appeals. Under the provision only the defendant can appeal, and the provision relates only to crime. (The more general Covenant provision recognising the general right of access to justice is about first instance rights). The clear implication is of the danger to that individual of an incorrect conviction of a crime or an unjustified sentence. That is to say a basic, probably the original, reason for appeals is the opportunity for any necessary correction of the decision at the request of a person seriously aggrieved by it. That person hopes and expects that the decision on appeal will be better. At the least the opportunity is given for any complaint about the initial decision to be aired and considered.

- 228 Why is the decision on appeal likely to be more acceptable and correct? The reasons relate to the body which hears the appeal, the issues it considers, and the process it follows. The appeal court is often composed of a greater number of judges who are able to combine their several abilities. The parties, their counsel, and the appeal judges themselves will also have substantial assistance from the fact that the matter has already been heard and been the subject of a reasoned judgment or a summing-up in the case of a criminal jury trial and that the appeal process as a consequence is focused on a particular problem or problems. Moreover appeal judges should be less affected by pressures of time.
- 229 It should be appreciated that of the very many first instance decisions of a relatively significant nature which are made only a very small number are taken to appeal each year - about 1500 to the High Court and 500 to the Court of Appeal. The fact that so many decisions are accepted by the unsuccessful party may indirectly be due to the influence of the appeal process upon the work of the original court; and of course there is the record of appeal court judgments which is available to assist and control the reasoning and decisions of that original court. In both these ways the need for an appeal is made less likely.
- 230 The emphasis so far has been on the correction of the decision in the interests of the individual litigant. Such correction is not however purely a matter of private interest. The State as a whole has an interest in the law being faithfully and correctly applied by its courts. If that does not happen the substantive law will be put at risk.
- 231 Appeals may also serve another important public purpose - the clarification and development of the law. This function arises, if for no other reason, from the multiplicity of lower court decisions with the possibility of inconsistencies between them. Parliament and the courts have also expressly recognised this function in their statements of the grounds for granting leave to appeal (where appeal is not of right). The test is often that the question raised by the appeal presents question of law, general importance or a matter of significant public interest. The Secretary for Justice put the matter this way in speaking of the Court of Appeal in a submission to the Beattie Commission: its unique role ... is to act as

a custodian of the spirit of the common law and to develop that law in a harmonious, consistent and rational way (para 282).

232 This role appears to be an increasingly challenging one as the Court is faced, in the words of its President, with a continuing surfacing of policy cases; bringing home how many fundamental issues remain unsettled or reassessable in these restless years, creating a constantly strengthening awareness that our responsibility must be to aim at solutions best fitting the particular national way of life and ethos (Sir Robin Cook J. [1983] NZLJ 297). And it becomes an even more important responsibility for New Zealand judges with the removal of appeals to the Judicial Committee.

233 It is to be expected to the two purposes of correction and of clarification and development of the law will often be pursued and obtained in the one case. But that is not always so. A case on appeal might raise no general question of law at all and might turn entirely on its own facts or on the exercise of discretion. Or Parliament might make extraordinary provision for the reference of particular criminal cases to an appeal court, as it did in 1945 when it provided for the Court of Appeal and the High Court to assist the Governor-General in exercise of the prerogative of mercy by giving an opinion or determining the issues, Crimes Act 1961, s 406 (re-enacting Criminal Appeals Act 1945, s 17).

234 On the other hand, the parties to the original proceedings might no longer have any real interest in the matter when it gets to its final examination in the courts, as with the famous case of *M'Naghten* (1843) 10 Cl and Fin 200; and its modern version in the United Kingdom, the Attorney-General's right of reference following acquittal in a criminal case, Criminal Justice Act; 1972, s 36, or as in such a case of *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 CA. As that last case shows, issues can sometimes be brought to court independently of the actual dispute about particular facts. But such a procedure is not always available, especially in criminal matters. We recommend that the introduction of a power on the model of the United Kingdom on be given favourable consideration in the course of the present review of the criminal law.

- 235 History and principle together provide good reason for appeals. In general, those immediately affected by the decisions of courts and similar bodies should have one right of appeal.
- 236 We should not however forget the countervailing factors, briefly mentioned earlier. Appeals mean that the effect of the original decision is often delayed (and recall that most appeals fail), and a principle of our legal system dating back to Magna Carta is that justice must not be deferred. The cost of money terms of appeals is high; the cost factor may operate unfairly between the parties depending on their financial position (including the availability of legal aid to just one party); and costs might threaten original access to the courts (especially those set up to handle claims of small monetary value quickly and a low cost). Appeals use the time and talent of able people, a resource not to be squandered. And in some circumstances an appeal might threaten the due process of a trial which is already underway. We return to such factors in the course of Chapter VI.

SECOND APPEALS

- 237 We now turn to the matter of second appeals. As the appendices show, our legal system makes them available in a range of contexts. Why is that? How are those reasons to be related to the reasons for not having appeals - delay, lack of finality, cost and the best use of scarce resources And what does the removal of Privy Council appeals mean for second appeals within our court system?
- 238 One clear reason for a second appeal already mentioned is that the volume of appeals are such that they have to be dealt with by different courts or by different judges within a single court and that accordingly inconsistent decisions may arise (para 231). If so there should be a means for the law to be settled authoritatively by a single group of judges.
- 239 It is significant however that in general the parties do not usually have a right to appeal in such cases, or indeed when pursuing any second appeal, and that the grounds for the grant of leave as stated by Parliament and by the courts usually emphasise the public interest rather than a purely private one.

240 This leave requirement is commonly to be found in appellate systems in other common law jurisdictions. Thus leave is in general required in respect of appeals to the High Court of Australia, the Supreme Court of Canada, the House of Lords and the United States Supreme Court - Courts which usually hear second appeals. Chief Justice Taft of the United States Supreme Court put the matter this way in 1922 in respect of their 3 level federal court system

No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among intermediate courts of appeal. (Quoted in Bator and others (ed), Hart and Wechsler's *The Federal Courts and the Federal System* (2d ed 1973) 1603-1604.)

241 In the case of the Federal Courts in the United States the volume of appeal work became such that about a century ago it was necessary to insert the intermediate courts of appeal. And it is the growing volume of appellate business in the Ontario Court of Appeal which has led The Honourable Mr Justice Zuber in his Report of the Ontario Courts Inquiry (1987) para 6.25 to recommend a permanent intermediate Court of Appeal in that jurisdiction (with a population it might be noted exceeding 9 million, and with about 67 superior court Judges). But if the volume in some area of jurisdiction is such that intermediate courts of appeal are not required, is there still a jurisdiction for a second appeal? The report of the Royal Commission on the Courts mention the suggestion that 2 tier appellate system

is a significant advantage in that a second right of appeal is necessary to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined. (para 267)

242 The New Zealand Law Society has expressed this argument in its submissions to us. Having 2 appeals is, it said, an important constitutional matter. (The proposal from the District Court Judges, building on a single court of original jurisdiction, also provides for 2 appeals.) But how persuasive is this argument for 2 appeals? And what are the considerations to the contrary?

- 243 In a general way it may be that a further hearing will improve the quality of argument and judgement - but it will be true as well of a third level of appeal (or a fourth or fifth ...). At some stage however all recognise the public (and private) interest in an end to litigation. Next, many of the matters that are subject to this process of further appeals are those hard cases over which reasonable judges may and often do differ. In that sense there is no right answer. Justice Jackson of the United States Supreme Court is often quoted - 'We are not final because we are infallible, but we are infallible only because we are final', *Brown v Allen* (1953) 344 US 443, 540. He went on to say that a provision of a further appeal beyond the Supreme Court would no doubt lead to a proportion of successful appeals.
- 244 Further, it cannot be the case that it is only in the very small number of cases that are the subject of 2 appeals that the issues are fully and effectively presented. If that were so, it would mean that those litigants most at risk - defendants in serious criminal trials - would be among those least adequately protected since it is exceedingly rare for their cases to get beyond the single appeal to the Court of Appeal. We also recall that some of the most important judicial decisions can be taken at first and last instance in the final court (in Australia, Canada, the Judicial Committee, as well as our Court of Appeal). In the event there is not even a single appeal.
- 245 A related argument in favour of a second appeal take us back to the 2 reasons for appeal - the correction of error and the clarification and development of the law. The first appeal, it is said, is concerned with the former, the second with the latter; and mixing the 2 is unsatisfactory. But often the 2 reasons will relate to just the one issue - such as the one central question of law in the *Lesa and Accident Compensation Corporation* appeals in the Privy Council, [1982] 1 NZLR 165, [1988] 1 NZLR 1. In other cases the 2 matters can be handled distinctly without the one prejudicing the other. In still others the second appeal may turn principally on the facts and the court's evaluation of them and not on any wider issue of principle.
- 246 We should remember as well that opportunities for the clarification and development of the law arise not simply in the course of one particular case. The law after all has been developed down long centuries, from case to case.

Opportunity will arise in later litigation for the pursuit of this appellate purpose - and the opportunities will increasingly take advantage of the efforts of courts in other jurisdictions to clarify and develop in law. Consider for example the development of the law of Crown privilege (or public interest immunity) where the New Zealand Court of Appeal in 1962 (sitting originally as it happens) drew on developments in the courts here and elsewhere in the Commonwealth over the preceding 30 years and contributed to the law in those other jurisdictions as well as in New Zealand, *Corbett v Social Security Commission* [1962] NZLR 878. And that development has continued through a large number of cases in which the broad principles of the early 1960s have been refined. Such matters are not resolved by just 1 or 2 appeals in one case.

247 Moreover the proportion of second appeals in any system like ours is miniscule. Thus the 60 or 80 appeals a year heard in the House of Lords are to be compared with about 4200 judgments and 4800 orders made in the Queen's Bench Division; and the 1, 2, 3 and 4 Judicial Committee decisions on appeal from New Zealand each year (see Appendix H for details) are to be compared with the 500 or 600 final civil judgments and a comparable number of interlocutory and other orders given following an original hearing in the High Court. Only about 4% of the decisions of the Court of Appeal of British Columbia and New South Wales are appealed - and in about 1 case in 3 the appeal succeeds (see the Annual Reports of those Courts). A survey of leading New Zealand cases (including those decided in the Judicial Committee) makes it clear that courts hearing first appeals or indeed giving the original decision have made most significant contributions to the development and clarification of our law. That would include cases of major importance where the Court of Appeal hearing cases removed to it decides them originally and finally. Only one of those very important matters heard originally by the Court of Appeal has been the subject of an appeal to the Judicial Committee and that appeal failed.

248 It is also said that it is anomalous that less important cases may be the subject of 2 appeals while the most important may be the subject of just 1 appeal. But such a difference may of course occur whenever there are 2 first instance courts. At the moment indeed many more cases commencing in a District Court or in an administrative tribunal are the subject of 2 appeals each year than those cases

beginning in the High Court (see figures in Appendix D). Furthermore under our proposals that the District Court take over part of the High Court workload, more second appeals will be heard - including, virtually for the first time, appeals from criminal juries (since the Judicial Committee only rarely gives leave to appeal in criminal cases).

249 Another practical matter of growing importance is the increasing recourse to interim relief and appeals in respect of it. One consequence of that is that a single case may be heard several times.

250 Next there is the cost to the litigants of a further appeal hearing and the associated delays. These matters may operate unequally between different litigants depending on their means and their needs for an early decision.

251 A further critical matter is the available judicial resources. New Zealand is a small country. It has small legal profession. It will have available at any one time only a limited number of the very able lawyers who are willing to meet in a measured way the important and taxing demands of sitting in our highest courts. That scarce talent must be carefully matched to those and related demands on leading members of the profession. This is not principally a matter of money. Rather we must make the best possible use of the most able. Recent Australian reviews, including that undertaken by the Advisory Committee on the Australian Judicial System to the Australian Constitutional Commission, have opposed the introduction of another level of courts for this reason (and others). As they say the overall quality of the lower courts may decline and the value of the first appeal would decrease with the introduction of another level of appeal (Australian Judicial System (1987) para 389(6)).

252 In the end the most critical matter is that appeals in important matters should be able to be taken to the final court in our legal system and be given a full and fair hearing there. On that view (expressed to us for instance by the High Court Judges), the number of prior hearing or appeals is not seen as such a significant matter.

THE GENERAL PROPOSALS

253 It is against that background of the competing considerations that the Law Commission makes its main proposals about appeal. They are simple and straightforward:

appeals from decisions of the District Court (including decisions taken following jury trials and decisions of the Family Court) should be to High Court (usually consisting of 3 or possibly 1 or 2 Judges), with the prospect in important cases of a direct or second appeal to the Supreme Court (with its leave); and

appeals from decisions of the High Court should be to the Supreme Court sitting in panels of 3 and in larger panels when that is appropriate.

254 The reasons relate to

- the range and the particular character of the appellate jurisdiction;
- the volume of appellate business;
- the need to match the work to the judicial resources available;
- the need to give some greater emphasis to the appellate and supervisory role of the High Court; and
- the need to enable the Supreme Court, as the final Court in the New Zealand system of justice, to have the best possible opportunity to rule on the most important questions of law arising throughout the system.

Those matters and alternative proposals are considered further in Chapter VI.

255 In those last respects, we expect that our court system will be strengthened. A final court for New Zealand, consisting of a small group of permanent judges working together will have the opportunity that they have not previously had to review, clarify and, as appropriate, develop the law of New Zealand. The High Court will also be able to build up a much more distinctive appellate function, as the Beattie Commission anticipated.

V The Original Business

INTRODUCTION

- 256 This chapter concerns the allocation of original business between the District Court and the High Court. At the moment, each has some jurisdiction to the exclusion of the other and they also share jurisdiction. Our broad proposal is that the District Court should have more extensive jurisdiction in both civil and criminal matters with the consequence that the concurrent jurisdiction of the 2 courts will be wider.
- 257 The Report has already shown that the allocation of jurisdiction can be made by Parliament (or other law-makers), by the parties to the litigation (alone or jointly), or by the courts themselves (para 80, Appendix B). So, to illustrate the point again:
- Parliament has decided that only a High Court Judge, sitting with a jury, can try defendants charged with murder,
 - a defendant to civil proceedings commenced in a District Court can have the proceedings transferred to the High Court if the amount in issue exceeds \$3000, and
 - both a Family Court Judge and a High Court Judge have the power to remove matrimonial property proceedings commenced in a Family Court to the High Court.
- 258 This chapter accordingly sets out our proposals for the allocation by statute of exclusive and concurrent original jurisdiction and for the operation in practice of the concurrent jurisdiction. The allocation by Parliament and the courts (and

perhaps also by the parties) should be governed by principle. As we have indicated in Chapter II (para 81), the principal factors are the task to be done, the qualifications and characteristics of the decision-makers, and the procedures they follow - and the ways in which each of those varies. The 3 matters interact in most important ways. They are also central of course to our conclusions that it is not possible to have a single group of judges handling all the original business of the courts.

259 So the more important the matters (for instance in terms of individual liberty) or the more complex and generally important the legal issues arising in a case, the more likely it is that the case will be handled further up the judicial hierarchy (on appeal as well as originally), or that more stringent procedural and other safeguards will be available to the parties. Or, to mention just one other example, if a major social and legislative emphasis in a particular area of the jurisdiction is on promoting settlement by agreement rather than simply on third party adjudication, then procedures and institutions like those of the family proceedings legislation may well evolve.

260 We consider in turn the allocation of the original civil jurisdiction of the District Court and the High Court and then their original criminal jurisdiction. We also propose that the Supreme Court should continue to have original jurisdiction in very important cases, with its leave given in narrowly defined circumstances.

CONCURRENT JURISDICTION

The Need

261 Before turning to those matters, we should first answer the question - why have concurrent jurisdiction? Should not Parliament make a clear allocation of business to one court or another and avoid the applications and disputes that might arise where more than one court can handle a matter?

262 History, our present legislation and legislation elsewhere provide the answer. Our court system and others similar to it have long accepted the proposition that, while the general allocation of business can be effected by legislation, the particular characteristics of individual cases will sometimes dictate that they ought to be

head in a different court from the usual. (The same is true of appeal as well: exceptional particular characteristics will require special treatment.) The apparently simple case may present a major issue of law of general importance, it may involve complex issues of technical fact, or it may be of enormous importance to the litigants or to the public at large. These are not matters that can be regularly used to provide a clear legislative line that will allocate all business in advance without the need for judgment in the individual case. They are nevertheless matters which have been and are seen as relevant to the allocation of matters between courts.

Accordingly, in all the principal areas of court jurisdiction there are provisions for the removal, at the judgment of one court or another, or a particular matter to a court other than that in which it would usually be heard and decided. In some cases the removal may be of a question of law rather than of the whole case, but the principle is the same. (See for example District Courts Act 1947, ss 28G, 28J and 43, Family Courts Act 1980, ss 14, 15, Matrimonial Property Act 1976, s 22, Summary Proceedings Act 1957, ss 44, 78 and 113, Disputes Tribunals Act 1988, ss 36 and 37, Residential Tenancies Act 1986, ss 83 and 103, Judicature Act 1908, ss 26N, 64 and 69, Declaratory Judgments Act 1908, s 7, Criminal Justice Act 1985, s 75, and the Commissions of Inquiry Act 1908, s 10, and the many other statutes invoking that Act, and cases interpreting and applying those and related provisions such as *Fuehrer v Thompson* [1981] 1 NZLR 699 CA, *Re Erebus Royal Commission* [1981] 1 NZLR 614 CA and *Killalea v In Print Publishing Company* [1966] NZZLR 70.)

- 263 Practice and legislation elsewhere is to the same effect. It has not been thought possible or desirable to make a once and for all complete division by statute of all business. So, to take just one example from many, the Sheriff Court in Scotland has very extensive civil jurisdiction (without any monetary limit, incidentally) which it exercises concurrently with the Court of Session. The later discussion of particular parts of the civil and criminal jurisdiction also shows that statutory lines alone are not sufficient. We have already mentioned the problems arising from monetary limits (paras 195-197 and Appendix B).

- 264 We have another broad reason for supporting concurrent jurisdiction. It enables judgements to be made over time by reference to evolving experience, changes in court business, and changes in the pressures on various parts of the court system. The fixing by Parliament of firm lines of allocation may not be adequate to meet such changes. One example of the limited value of using that method alone is provided in the *Report of the Working Party of High Court Judges on the Role of Efficiency of the High Court* (delivered November 1985, reprinted 18 March 1986 incorporating resolutions of the Judges' Conference, 15-16 March 1986). That group was concerned at the rapid growth of criminal jury trials in the High Court (a matter we document in chapter II, paras 119-121). They proposed the transfer to District Court jury trials of some specified offences but, as they recognised, the categories amounted to only 10% of the Court's criminal jurisdiction and that was less than 1 year's increase in that jurisdiction (pp 9-10). A more flexible approach is required to meet such changing demands, as indeed the paper from the High Court Judges provided to us in the present inquiry proposes.
- 265 The approach must not however be so flexible that it is unpredictable and the cause of a great proliferation of interlocutory applications for the allocation of business from one court to another. Fairness (in terms of some consistency of allocation of similar business) and efficiency (in terms of limiting transfer applications to the difficult marginal cases) require procedures, rules and criteria for the exercise of the powers.
- 266 Before moving to the main areas of jurisdiction, we accordingly address the issues to be resolved in legislation which allocates litigation exclusively or concurrently.
- 267 Legislation can and of course does allocated jurisdiction in an exclusive way simply by saying so. Thus only the District Courts have jurisdiction over minor criminal offences and only the High Court has jurisdiction under specific statutes relating to company law and trusts (see Appendix E). Difficult issues of policy and drafting may of course arise in the determination by Parliament of such lists and later in their application and interpretation in practice by the courts. We consider those matters in the 2 parts of this chapter concerned with civil jurisdiction and criminal jurisdiction.

The Mechanism for Transfer

268 The principal issues to be addressed in legislation governing concurrent jurisdiction (one the area of concurrent jurisdiction is stated) are the following-

- Who should have the power to decide whether the matter is to be transferred (one or other or both of the courts involved, one or other or both of the parties)?
- By reference to what criteria should the courts make the allocation decisions?
- Should there be any power to refine the criteria (that is in addition to the refinement that will arise from the decisions of courts in particular cases), for instance by way of a practice direction or a regulations?

269 The allocation decision might be made by one party or by them jointly. Our proposals proceed on the basis that matters within the concurrent jurisdiction of the 2 courts ought ordinarily and as a matter of course be heard and decided in the District Court. In general that is the appropriate Court to decide the matter. One party alone ought not to be able to avoid that judgment once it is incorporated in legislation. That is already the position in some cases: for instance only a court may order the transfer from one court to another of jury trials or of family proceedings.

270 What is the position if the parties agree? Should that be decisive? The major submissions gave conflicting answers. We think that the agreement of the parties should be sufficient. The judgment of their legal advisers should in general be accepted. It would in any event be difficult for a court to reject an unopposed application. And costs and other sanctions may be available in the event of an inappropriate use of the power.

271 Legislation gives varying answers to the question whether the original court, the other court or either should have the power to make an order for transfer in the event of dispute. The Law Commission proposes that only a High Court Judge should have the power to make the order for transfer into the High Court and that

that decision should be final with no right of appeal. We have already said that unnecessary applications should be discouraged. That is one reason for only one application being made in respect of a particular case. The judgement about transfer is better made by a judge of the court into which the matter might be transferred. Some experience suggests that the judge in the lower court may too readily grant leave, while, if leave is not granted by the very court which accordingly retains jurisdiction, there may be a sense of grievance which, even if unjustifiable, should be avoided if possible. Further that smaller group of judges will be able more efficiently and quickly to establish standard approaches.

272 Those decisions will be made against the criteria of complexity and general importance set out in legislation. Such criteria are familiar in the practice of the courts and the English Civil Justice Review has recently provided the following valuable commentary:

121. A case may be important for a number of reasons; for example it may be inherently important because it raises a serious question of fraud, or the result may be likely to affect the way in which a large number of other instances are handled. Equally, a case may be complex for various reasons. Complexity may arise as a result of its facts, or as to the manner in which those facts are to be proved. It may arise from the number of relationship of the parties involved or from the nature and number of the interests involved in a series of transactions. Complexity of law may occur because of difficulties in reconciling or extending previous decisions, or in determining the manner in which the law is to be applied to unusual or complex facts. ...

(This Review also stated a criterion of substance.)

The decisions and developing practice would give greater precision to those criteria and in that way reduce the number of applications and make the allocation more predictable. Those purposes of efficient and predictable allocation should also be helped by the making of regulations which would state more precise presumptions. There is valuable English experience of the making of directions and the giving of practice notes for these purposes. We suggest some of the specific content of such directions later (paras 302-305, 339-343). Here we examine 2 aspects of them.

273 The first is who should make the directions (Related to that is the question of legal form.) The proposal of the Law Commission is that direction should be given by the Governor-General in Council by way of regulation. We envisage that the

regulation would be made following consultation with the Chief Justice of New Zealand and the presiding judges of the relevant courts. Among the alternatives are directions by the judge or courts themselves or Rules of Court made by the Rules Committee (which we would envisage would have jurisdiction in respect of all 3 courts).

- 274 We have opted for the Governor-General in Council as the method of stating such presumptions since the direction affects (if it does not amend) in an important way the allocation of jurisdiction between the 2 courts, an allocation made by Parliament. They provide a general gloss on the statutory criteria. They would affect in a real way the access of New Zealanders to the courts. They are not simply concerned with the practice and procedure of a particular court. And there should be political responsibility for such directions - in part by way of publication and tabling under the Regulations Act 1936 and the possibility of scrutiny by the Regulations Review Committee. The most significant directions in the English system are given either by the Lord Chancellor (with the concurrence of the relevant presiding officers) and published in the Statutory Instrument Series and are accordingly subject to parliamentary control, or by the Lord Chief Justice with the concurrence of the Lord Chancellor (Supreme Court Act 1981, ss 54(4)(e), 61(3) and 75; see also Matrimonial and Family Proceedings Act 1984, s 37).
- 275 The second point is that such regulations would state presumptions rather than categorical rules: for instance that certain matters should normally (or almost always) be heard by one court or another, not that that must always be so.
- 276 Our expectation would be that such directions would simplify the process of allocation (only a small proportion of the cases would need individual decisions), they could be used to take account of changing pressures in the courts and changing patterns of litigation, and they should also provide a basis for the redrawing from time to time of the statutory limit determining the exclusive jurisdiction of the High Court.

277 We now consider the allocation of the original civil and criminal jurisdiction of the District Court and High Court. We do that, if we may recall these matters, against the principles that -

- The High Court should continue to exercise the most significant original jurisdiction, by rules stated by Parliament and in accordance with criteria of complexity and general importance; it should however be rid of some of the more routine (while often still important) business which has tended to gravitate to it; and greater emphasis will be given to its supervisory and appellate role.
- The District Court should have an increased jurisdiction in respect of criminal jury trials and in civil proceedings (including family matters), in part to give effect to the reforms of the early 1980s, in some areas to restore their effect and intent, but also to carry them further.
- The structure of the courts should so far as possible be simple and predictable in its operation and should facilitate access to justice (in a geographic sense as well as others).

CIVIL JURISDICTION

278 As we have mentioned there is broad agreement that the civil jurisdiction of the District Courts should be greatly increased. AT the moment it is bounded by material limits (by its listing of contracts, torts) and monetary ones, in general of \$12,000, a figure which a Bill before Parliament would increase to \$50,000 (see further paras 192-197 above).

279 By contrast, the jurisdiction of the High Court is in general plenary. In the ample words of section 16 of the Judicature Act 1908 it has all that jurisdiction necessary to administer the law of New Zealand. That includes:

familiar areas of the common law and equity as supplemented and amended by statute (and comprehends much of the civil jurisdiction of the District Courts),

its constitutional function of controlling the exercise by public agencies of their powers,

its closely related inherent jurisdiction, and

powers conferred (often exclusively) by specific provision in a large number of statutes. (More than 70 are listed in Appendix E.)

The High Court's criminal jurisdiction could be brought under this head, but it is considered in the next section of this chapter.

- 280 That broad jurisdiction does not include all the original jurisdiction of all the courts and tribunals established in New Zealand. In some cases they will be established with exclusive powers to administer an entirely new set of legal rights and duties, as with the industrial conciliation and arbitration legislation first enacted almost 100 years ago and carried forward in the Labour Relations Act 1987, in the summary criminal jurisdiction and in the past destitute persons and domestic proceedings jurisdiction, which conferred exclusive powers on industrial relations tribunals and Magistrate' Courts.

The High Court might of course be called on to exercise its common law review powers and inherent jurisdiction to control and support such inferior tribunals and courts, or might have statutory jurisdiction to hear appeals from their decisions. In other situations pre-existing original jurisdiction might be removed from the court (as recently in the labour relations area, for instance) but again with the possibility of review and appeal.

- 281 That is to say we have 3 areas of original jurisdiction-

- (1) the High Court has exclusive jurisdiction,
- (2) the High Court and District Court (or another court or tribunal) have concurrent jurisdiction, and
- (3) the District Court (or another court or tribunal) have exclusive jurisdiction.

We now consider various areas of jurisdiction which might or might not be within the exclusive jurisdiction of the High Court. That leads into proposals for the criteria for the transfer of business which is within the concurrent jurisdiction of the District Court and the High Court.

JUDICIAL REVIEW; INHERENT JURISDICTION

- 282 We begin our discussion of the line and relationship between (1) and (2) with the High Court powers of controlling the exercise of public power (usually by way of the application of judicial review) and aspects of its inherent jurisdiction. Judicial review, in very brief terms, is used to ensure that public agencies (including inferior courts and tribunals) follow lawful and fair procedures, act inside their powers, comply with the law, and do not abuse their powers. The inherent jurisdiction of the High Court is in part a complement to that review power. The Court can use it to protect inferior courts and tribunals especially by way of its power to punish those in contempt of the courts and tribunals. Another related aspect (now largely supplemented in practice by statute) is the power to set aside arbitral awards for error of law. (The article by Master Jacob, 'The Inherent Jurisdiction of the Court' [1970] *Current Legal Problems* 23 is still the major point of reference for courts, counsel and others.)
- 283 Both powers - especially the power of review - are of major constitutional importance in our legal and political system. They relate back to the constitutional settlement of the seventeenth century and earlier. They play a vital role - whatever the frequency of their use (now increasing) - in subjecting the state to the law.
- 284 To be contrasted with those jurisdictions to control and support other agencies are what is sometimes referred to as the inherent powers of the court to regulate its own proceedings - for instance to adjourn a matter, to make an order for the protection of evidence in a case before it, to correct an incorrect record, to order the erection of one way screens to protect child witnesses, and generally to prevent an abuse of its process (especially in criminal trials). These powers do not rest on specific statutory provisions although in the case of an inferior court they are sometimes said to be implied as a matter of statutory construction from the functions, powers and duties conferred on the court by statute (for example *McMenamin v Attorney-General* [1985] 2 NZLR 273, 275 CA).
- 285 In other cases the power is put on a broader basis, for instance by Lord Denning in speaking of the Country Court in England

Every court has inherent power to control its own procedure, even though there is nothing in the rules about it. *R v Bloomsbury and Marylebone County Court* [1976] 1 WLR 362, 365, applied in *Champtaloup v Northern Districts Aero Club* [1980] 1 NZLR 673, 675-676, affirmed 678 CA.

Similarly the New Zealand Court of Appeal has said -

a Magistrate in a Magistrate's Court has an inherent power to regulate his own procedure save so far as the Court's procedure has been laid down by the enacting law. *Clifford v Commissioner of Inland Revenue* [1966] NZLR 201, 203.

The public interest in the due administration of justice necessarily extends to insuring that the processes of the Court are fairly used and that they do not lead themselves to oppression and injustice. In exercising that jurisdiction the Court is not simply protecting the interests of the parties to that case: it is also protecting its ability to function as a Court of law in the future as in the case before it, *Bryant v Collector of Customs* [1984] 1 NZLR 280, 282 CA; see also the cases cited in *R v Hughes* [1985] 2 NZLR 129, 135 CA.

And the Judicial Committee of the Privy Council (speaking of the discretion of an inferior court to allow a prosecutor to be represented by a person not specified by statute)-

the discretion ... is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court. *O'Toole v Scott* [196] AC 939, 959

286 In the case of the District Courts there are in addition important legislative supports for such powers. A District Court Judge has jurisdiction in pending proceedings to make any order or exercise any authority or jurisdiction of a High Court Judge in chambers (District Courts Act 1947, s42); the Court, when no procedure is provided for and there is none to be applied by analogy, has power to act in accordance with the High Court Rules or, if there is no relevant provision, then in such manner as is best calculated to promote the ends of justice (District Court Rules 1948, R 7(2)); and the Court in respect of matters within its jurisdiction has the same power to grant such relief, redress or remedies as the High Court (District Courts Act s41).

287 In our view, it should be clear that the District Court should continue to have powers of the kind referred to above the control matters within its jurisdiction in the interest of justice. The High Court should continue to have not only those powers, it should also continue to be able to exercise on an exclusive basis the

broader inherent jurisdiction in respect of other inferior courts and bodies in the way indicated earlier.

- 288 Accordingly, the Law Commission proposes that the exclusive jurisdiction of the High Court should include both its powers of judicial review and its inherent jurisdiction. (The major submissions to us did not disagree with the proposal.) That recognition of exclusive inherent jurisdiction should not however prejudice the inherent and similar powers of the District Court to regulate its own procedure in the interests of its effective operation and of the promotion of justice.

JUDICIAL REVIEW LEGISLATION

- 289 Associated with the common law powers of judicial review are a number of statutory powers and procedures relating exclusively to the High Court. The principal one is the Judicature Amendment Act 1972 which as its main heading indicates does not create the power of review but rather establishes a single procedure for the judicial review of the exercise or failure to exercise a statutory power. The Habeas Corpus Acts 1640, 1679 and 1816 (declared by Parliament in 1988 to be part of the law of New Zealand) regulate, along with the Judicature Act 1908, s54C (enacted in 1985 when the High Court Rules were promulgated), the powers of the High Court to issue the 'great writ' - a prerogative or common law creation. Once again the basic power is independent of the legislation which regulates the procedure. The Extradition Act 1965 and the Fugitive Offenders Act 1881 make more specific provision for the review by habeas corpus of decisions to extradite alleged offenders. Under the Bylaws Act 1910 the High Court has power under a procedure established by that Act to quash and amend bylaws essentially on judicial review grounds. The Official Information and Meetings Act 1987 make explicit the powers of judicial review of the High Court of government decisions to prevent the release of official information. And the power of the High Court to order a coroner's inquiry when one has not been set up by the responsible officials has a review implication. The relevant powers and procedures are closely related to the constitutional role of judicial review and should remain exclusively the High Court's.

- 290 Somewhat more problematic is the power of the High Court under the Declaratory Judgments Act 1908 to make declarations. This power can be and has been used to review the validity of the decisions of the public agencies: section 3 explicitly authorises an application to the High Court questioning the validity of regulations or bylaws and the interpretation of legislation. On the other hand, declaratory relief might be sought in respect of a matter clearly falling within the jurisdiction of the District Court - the meaning of a disputed clause in a contract for instance.
- 291 The Judicature Amendment Act 1972 recognises this wider scope of the Declaratory Judgments Act by providing that applications for judicial review. We would not wish to inhibit the use by the District Court of declaratory relief, already available to it under the broad provisions of the District Courts Act 1947 mentioned earlier (paras 286-287). Accordingly, we propose that in jurisdiction of the High Court under the Declaratory Judgments Act 1908 in respect of the exercise, refusal to exercise and purported or proposed exercise of a statutory power (as defined in the Judicature Amendment Act 1972) or in respect of other matters within its review jurisdiction should be exclusive.

ARBITRATION LEGISLATION

- 292 Closely related to the above powers are the powers of the High Court under arbitration legislation to support and control the arbitral process. There is the difference of course that the process being supported or controlled is the product of the consent of the parties rather than a statutory creation. The functions nevertheless are broadly analogous to those of a court reviewing statutory powers and they are of a supervisory kind. Further, the Law Commission will be reviewing this legislation more closely later in the year. Accordingly, we would not propose any change in the exclusive powers of the High Court in respect of arbitrations.

COMPANIES, INSOLVENCIES, TRUSTS

- 293 The High Court's supervisory role extends beyond public powers and arbitrations. As Appendix E shows so clearly, that role also relates to a wider range of private relationships - within companies, in respect of insolvencies, receiverships and

liquidations, and in respect of trusts and wills. The Law Commission is of course reviewing company law, including company insolvency, at the moment (and insolvency is also the subject of scrutiny by the Department of Justice). We do not propose any changes in the exclusive powers of the High Court in those and closely related areas at the moment. We do note however that Parliament has recently drawn a line within those powers by authorising Masters to exercise some of them.

- 294 Some of the powers in respect of the operation of trusts are comparable to those relating to companies (for instance the winding up of a charitable trust board, the extension of powers and variations). They are powers that have long been peculiar to the courts of chancery and later the High Court. And although some of the matters might not be important (and might not indeed appropriately require action by any court at all) we do not at this state propose any change in respect of the exclusive jurisdiction in this important supervisory area.

PROBATE AND ADMINISTRATION

- 295 The reference to the administration of trusts provides a convenient opportunity to mention the jurisdiction to grant probate and letters of administration. Historically these functions too have belonged to the High Court and its predecessors. In fact of course the matter is very often a routine one and High Court Registrars exercise much of the jurisdiction. That is one reason to suggest that the High Court need not retain exclusive jurisdiction. Another is that the Family Court may have relevant powers under the Protection of Personal and Property Rights Act 1988. Further, we later propose that it has jurisdiction under the Family Protection and Law Reform (Testamentary Promises) Acts (para 308); it makes sense for it also to be able to grant probate. And we note that in England the County Court and in Scotland the Sheriff Court have some probate jurisdiction (County Courts Act 1984, s 23(a); Walker, *The Scottish legal system* (1981) 252). Accordingly, we propose that the District Court have concurrent jurisdiction with the High Court in respect of the grant of probate and of letters of administration. Once again complex matters can be transferred to the High Court.

INTELLECTUAL PROPERTY

- 296 One group of matters which is commonly mentioned, for instance by the Court of Appeal and High Court Judges, as belonging to the High Court's exclusive jurisdiction is intellectual property cases. It is of course the case that they are often very complex. The scientific and technological aspects can be difficult, science continues to present new demands for old law (thus photocopying machines were hardly known in New Zealand when the Copyright Act was enacted in 1962), and there is a burgeoning body of international law, now dating back a century, with many national glosses by way of legislation, cases and commentary. On the other hand not all issues are complex; some are already within the District Court jurisdiction (passing off, copyright and trade secret matters could arise in tort or contract proceedings and the Court has some statutory jurisdiction under the Fair Trading Act); and the category could be very difficult to define for the purposes of exclusive jurisdiction.
- 297 It is possible nevertheless to identify and precisely list particular statutory powers within the area of intellectual property which could remain exclusive: they are already to be found in the Patents, Designs and Trade Marks Acts. The definitional problem is therefore overcome. Further, some of those statutory powers are closely related to their appellate powers of the High Court to which we would not propose any changes. Accordingly, those provisions are included in our list of exclusive High Court powers.
- 298 That is not to say however that we expect that complex intellectual property cases in which those legislative powers are not involved would in practice remain in the District Court. The complexity would of course be a principal reason for the removal of the matter into the High Court. The same point can be made in relation to very difficult commercial cases. The High Court Judges proposed that matters falling within the Commercial List should be within the High Court's exclusive jurisdiction. That seems to us to go too far. Complexity or general importance is not a criterion for entry into that list. Nor is the importance of the case to the individual parties. And many of the matters which may come within its scope fall at the moment within the regular jurisdiction of the District Courts. Once again some of the specific matters in the Commercial List are the subject of specific

exclusive High Court powers conferred by statute and we propose no change to them - applications under the Arbitration Act 1908 and proceedings relating to companies as well as case stated, appeal and related provisions under the Commerce Act 19896 and Securities Act 1978.

299 The discussion so far has principally concerned matters which are already within the exclusive original jurisdiction of the High Court and some which might be added to that jurisdiction. The Law Commission has indicated the matters which it considers should be within that exclusive jurisdiction - judicial review and inherent jurisdiction (para 288), statutory powers associated with judicial review (paras 289-291),¹ statutory powers relating to arbitration (paras 292), statutory supervisory and related powers concerning companies, insolvencies, trusts, and securities (paras 293-294) and statutory powers relating to intellectual property matters (para 297).

300 In other areas (including for instance probate) the proposal is that the jurisdiction of the 2 Courts be concurrent and that there be the power of transfer to the High Court.

CRITERIA FOR TRANSFER

301 How might the procedure for transfer operate? We have already referred to the existing provisions for transfer in New Zealand legislation and have made general proposals about the procedure: the proceedings would be filed in the District Court, they could be transferred by consent of all the parties or on application to the High Court Judge from whose ruling there would be no appeal, and regulations would guide the making of those rulings (paras 269-277).

302 The recent report of the English Review Body on Civil Justice, Civil Justice Review, and relevant English practice provides helpful guidance about such a procedure and especially about the guide or directions that could be given by regulation. The English practice is long established; for major current directions see [1987] 1 WLR 1671 (Crown Court), [1988] 1 WLR 558 (Family matters), [1988] 1 WLR 741 (Chancery matters: a direction given without a specific statutory base).

303 The Civil Justice Review proposed that there should be no upper limit on County Court jurisdiction (Recommendation 3). (That was also the recommendation of the majority of the New Zealand High Court Judges.) The review envisaged however that claims over BP50,000 would be heard in the High Court

- (i) Applications to set down for trial in the High Court, other than applications in public law cases, should be examined to see that they comply with the criteria of substance (minimum BP25,000), importance or complexity.
- (ii) Those which do not comply should be transferred to the County Court.
- (iii) Under the supervision of Presiding Judges, cases within a band above BP25,000, but not exceeding BP50,000, should be allocated flexibly between High Court and County Court.

(Recommendations 8, para 169.)

Public law matters would remain within the exclusive jurisdiction of the High Court, and the BP25,000 guide would be subject to change by practice direction. Under our proposals such a direction should be given by regulation (see para 274 above for the English legislation).

304 Other English practice shows how a direction might be written

- (1) it could state a strong presumption that the matter is to be removed (for instance if the claim exceeds \$250,000)
- (2) it could state that normally the matter is to be tried in the High Court (for instance intellectual property matters)
- (3) it could state no presumption one way or the other (as with the Civil Justice Review's recommendation in respect of the middle band).

In respect of other matters the presumption would be that the matter remained in the District Court.

305 We have already proposed a quite detailed definition of the High Court's exclusive jurisdiction. We are confident that with

- (1) the list,
- (2) the statutory criteria of complexity or general importance,
- (3) the careful statement by a regulation (prepared following consultation) of guidance,
- (4) the developing practice of the High Court Judges, and
- (5) the growing experience of counsel.

Fair and predictable patterns of allocation would develop. The practice might well lead to a change in the statutory list or in the direction given in the regulation.

FAMILY MATTERS

306 In Chapter IV we proposed that the Family Court should continue to be part of the District Court but should retain its distinctive characteristics (paras 207-218). We now consider 2 other questions stated in that chapter

Should the jurisdiction of the Family Court be altered?

What provision should be made in respect of the concurrent jurisdiction of the Family Court and the transfer of business between them? (The matter of appeals from the Family Court is addressed in the next chapter.)

307 The proposals made to us for changes in the jurisdiction related to wardship, family protection, testamentary promises and paternity under the Status of Children Act 1969 - all matters currently within the exclusive jurisdiction of the High Court. The High Court Judges' Conference of 1986 endorsed a proposal that the Family Court and the High Court should have concurrent jurisdiction in all of those areas except the last (which was not mentioned) (The role and Efficiency of the High Court (1986) pp 11-12). We agree that the present position with wardship is anomalous - it is the only aspect of the care, custody and guardianship of a child that is not within the jurisdiction of the Family Court. The Law Commission recommends that the Family Court should have jurisdiction in wardship matters.

308 The Working Group on Matrimonial Property has also suggested that in the context of a wider reform the Family Court should have jurisdiction in respect of family protection and testamentary promises matters (Report of the Working Group on Matrimonial Property and Family Protection (October 1989) pp 60-63).

As the Principal Family Court Judge notes, proceedings relating to those matters are frequently run in harness with proceedings under the Matrimonial Property Act, and issues within those scope of those 2 statutes will, he says, arise in cases coming to the Family Court under the Protection of Personal and Property Rights Act 1988. In each of the areas the special procedures of the Family Court should help facilitate settlement. The Law Commission recommends that the Family Court should have jurisdiction under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. This proposal is to be put in the context of the proposal for concurrent District Court and High Court jurisdiction over the grant of probate and letters of administration (para 295).

309 The Family Court has power to make decisions about or affecting status, for instance in applications for consent to marriage, adoption cases, applications for declarations about the validity of a marriage, applications declaring marriages void, applications for declarations of presumption of death of a party to a marriage, and applications for dissolution of marriage. It can also make a paternity order which is conclusive evidence against the respondent so far as liability for maintenance is concerned. Such an order does however have wider conclusive effect (Status of Children Act 1969, s 8(3)). This can cause practical problems in the Family Court, for instance in guardianship and property cases. The Principal Family Court Judge urged that the anomaly be removed. We agree. The High Court would continue to have concurrent jurisdiction, with the possibility of transfer in a complex case, and there would of course be a right of appeal.

310 How is the concurrent jurisdiction to be handled? The general rule of the Family Courts Act 1980 is that proceedings are commenced in the Family Court and that they can be removed by order of that Court into the High Court. Matrimonial property proceedings by contrast can be filed in either Court. Some matters may

however be only within the jurisdiction of the Family Court or a Family Court Judge (such as judicial consent to the marriage of a minor).

- 311 Our general approach in this Report is that if matters fall within the jurisdiction of both the District Court (including the Family Court) and the High Court they should be commenced in the District Court and be capable of transfer by order to the High Court.
- 312 The principal exception of this approach in the family area is matrimonial property where the parties have a choice of where to initiate the proceedings. The matter would also arise if, as proposed, the Family Court also had jurisdiction in wardship matters.
- 313 Is there reason to depart from the general approach that matters should begin in the Family Court and be transferred for good reason to the High Court by order of a High Court Judge? In the case of matrimonial property, we do not think so. The Family Court now has very extensive experience in the matrimonial property area, the great majority of cases are now commenced in that court, it is widely regarded as having handled the work in an impressive way (see for example the comment of the Court of Appeal in the Selkirk case, para 87 above and in the paper they provided to us), and if there is good reason for a High Court hearing, for instance in terms of complexity or having a comprehensive hearing or related matters, the matter can be transferred in the regular way (see for example *Fisher on Matrimonial Property* (1984) para 18.18). The Working Group on Matrimonial Property was of the same view (p 39 of its Report). Accordingly, the Law Commission recommends that matrimonial property proceedings, like other civil and family proceedings, should be commenced in the District Court and be subject to transfer to the High Court either by an order of a High Court Judge or by consent.
- 314 The wardship jurisdiction might be seen differently. Such matters can arise with great urgency and require immediate judicial action, and the Family Court does not as yet have direct experience of the jurisdiction. But the Family Court can also act with speed, simultaneous applications for transfer and for a substantive order could be made to a High Court Judge in an extreme case, and the Family Court

Judges do of course have extensive experience of all related aspects of guardianship and custody. Accordingly, the Law Commission recommends that wardship proceedings should also be filed in the Family Court and be subject to transfer (if necessary on an urgent basis) to the High Court in the general way proposed.

- 315 It is a matter of some surprise to realise that the broad wording of section 14 of the Family Courts Act 1980 may mean that matters that had been within the exclusive original jurisdiction of the Magistrates Court - such as adoption and domestic proceedings for maintenance - are now subject to transfer to the High Court. The main emphasis in this chapter is on the exclusive jurisdiction of the High Court and the concurrent jurisdiction of the Court and the District Court, but greater attention does need to be given than we have been able to give to the exclusive jurisdiction of the District Court and especially the Family Court. We have of course mentioned the very extensive exclusive criminal jurisdiction of the District Court and the exclusive jurisdiction of Tenancy Tribunals and the Labour Court. Because of the particular expertise of the Family Courts there may well be similar arguments for broadening the scope of its exclusive jurisdiction.

EQUITY AND GOOD CONSCIENCE

- 316 Chapter II mentions the long established jurisdiction of the District Courts to give judgments on the basis of equity and good conscience in claims up to \$500 (para 98). The jurisdiction now appears a quite inappropriate one for the District Court. It must in practice have become virtually a dead letter anyway given the monetary limit and the establishment of Small Claims Tribunals. From 1 March 1989 the Disputes Tribunals have that jurisdiction in essentially the same terms (up to a limit moreover of \$3,000 or \$5,000 with consent). The District Court civil jurisdiction and powers have been progressively equated to those of the High Court and our proposals would take that further. And parties to a contract or a dispute are of course free to authorise an arbitrator to decide a matter on that broad basis if they wish. Accordingly we propose that the District Court no longer have this power. As recommended earlier, it should have the same powers in respect of concurrent jurisdiction as the High Court.

CIVIL JURIES

- 317 The character of the jury has been transferred in its long history. It began as a fact finding body acting on its members' own knowledge given (as the name juror indicates) on oath. It was under such a compulsion that the Doomesday Book was prepared 900 years ago. The knowledge of jurors of a different kind - of general expertise rather than the particular case - was at the basis of special juries such as the City of London special jury used to try commercial cases.
- 318 The special jury has now gone. The special contribution they provide is instead provided by expert witnesses, expert members and assessors sitting with the judge, expert witnesses and administrative tribunals. Jurors now serve as members of the general community - and not for their specific personal expertise; knowledge of the particular case indeed disqualifies rather than qualifies. They determine guilt or innocence in about 1500 criminal jury trials each year, but in the civil jurisdiction they have almost disappeared. In the 1960s about one-third of all civil trials in the Supreme Court had juries, but by 1975 the proportion was down to one-eighth and the 1986 figure was just 3 (or well under 1% of cases proceeding to judgment).
- 319 What is the significance in our constitutional system of the jury? Lord Devlin has spoken eloquently of the protection provided against the tyrant in Whitehall: 'trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives' (Trial by Jury (1966) p 164). In his major study Professor Cornish says that juries
- may prevent the state from manipulating justice to its own ends,
 - may prevent undesirable liaison between judges and police,
 - may control prosecutions for a political offence based on inadequate evidence,
 - may mitigate the operation of a law which appears unjust or prevent its improper extension, and

- help maintain public confidence in the legal system, by providing for popular participation in that most important aspect of it. (The Jury (1970) p 138)
- 320 The emphasis - but not the sole emphasis - in these studies is on the criminal jury. (See also Lord Griffiths, *'The History and Future of the Jury'* [1987] Cambrian L J 5.)
- 321 To what extent are such arrangements persuasive in civil matters? On the face of the Judicature Act 1908, very persuasive indeed. A party to High Court proceedings is entitled to a jury where 'the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels' and the value exceeds \$3,000. A judge can nevertheless order a trial by judge alone when the proceedings involve mainly a question of law, the prolonged examination of documents, or difficult scientific, technical or professional matters. A jury trial can also be ordered if that appears to the judge to be a more convenient method of trial. The cases show that the word 'only', the qualification and the discretions give the provisions a narrower scope than at first appears, e.g. *Bearman v Dunn* [1974] 2 NZLR 405.
- 322 The wide role of the jury - so far as the statute book is concerned - has been cut back in recent years by its abolition in family matters and in respect of matters on the Commercial List. Much more dramatic than those legislative changes has been the change in practice indicated by the figures given earlier. The removal of personal injury litigation appears to be the major reason for the change, and the increase in complex commercial and public law litigation has had an impact. the greater length and expense of a jury trial may also be relevant. So too may be the lack of predictability and the lack of reasons. The handful of remaining jury cases as those involving personal reputation - especially defamation - and personal liberty - unlawful arrest and imprisonment. A Parliamentary committee is currently considering the place of juries in defamation cases as raised by the Defamation Bill.
- 323 The change in New Zealand is paralleled in other similar jurisdictions - in fact and in law. Thus under the Supreme Court Act 1981 (UK) a party has a right to trial

by jury in actions for defamation, malicious prosecution and false imprisonment or in which fraud is charged (unless the trial requires any prolonged examination of documents on any scientific or local investigation which cannot conveniently be made by a jury). There is a discretion to order a jury in other cases. The numbers of jury trials are so small that they are no longer included in the Judicial Statistics. (In Scotland in 1983 there were 3 civil juries.)

- 324 Civil juries are almost unknown in Australia outside New South Wales and Victoria - but there mainly in personal injury cases. And it appears that in Canada with that last exception the civil jury has fallen into desuetude (for example *International Encyclopaedia of Comparative Law*, Vol XVI Civil Procedure, Ch 6 Ordinary Proceedings in First Instance (1984) para 45).
- 325 Such changes relate as well to important changes in the method of trial of civil proceedings - a greater emphasis on pre-trial processes including discovery and interrogatories to narrow the issues and prevent surprise, more documentary and less oral evidence, and perhaps even a major shift in the perception of a civil trial: 'litigation is not a war or even a game. It is designed to do real justice between opposing parties and if the court does not have all the relevant information, it cannot achieve this object' (Lord Donaldson MR in *Davies v Eli Lilly & Co* [1987] 1 WLR 428, 431 original emphasis). A jury cannot of course participate sensibly in a trial which is not conducted largely orally in a single focused hearing.
- 326 The law - essentially unchanged for more than 100 years - should now be brought into closer conformity with the facts. Either the civil jury should be abolished or its role should be greatly narrowed. The character of the limited range of matters in which the jury is in fact used - involving allegations of abuse of State power invading personal liberty and the line between free speech and reputation - persuade us that the jury might be retained in those areas and be available in the District Court as well. There are also important questions about the role of the jury in determining damages in such areas, matters which may arise in our review of the law of damages. Accordingly the Law Commission recommends that a party be entitled to a civil jury trial only in respect of proceedings for fraud, defamation and wrongful imprisonment subject to the present exception for cases involving difficult questions of law and prolonged examination of documents or

scientific and technical evidence. A judge would continue to have power to order trial by jury when that was more convenient.

A SINGLE SET OF RULES

327 The proposals for an increased concurrent jurisdiction in civil matters of the District Court and the High Court, for equivalent powers, and for the filing of such proceedings in the District Court provide 2 reasons for a single set of Rules of Court applicable to that business. Another is the sheer convenience of those affected to operate with a single set, fixing such matters as time limits on a common basis.

328 We appreciate that this involves a substantial change and a great deal of checking to see whether the High Court Rules in some respects or other are in need of adaptation to handle District Court work. The comment will no doubt be made that some parts of them are inappropriate to simple litigation (say the default process for a debt) but that is of course true of some High Court litigation: many of the rules do not apply to such litigation; they are there for only particular categories. The point has also been made to us that the High Court Rules have been through a recent, very lengthy and careful process aimed at their improvement. It is really necessary in respect of the same or closely comparable litigation to have quite distinct sets of rules? We do not think so and accordingly propose that the High Court Rules be renamed the Rules of Court and extend with necessary changes to District Court litigation. We later propose that the facility of the Commercial List and of the Office of Master be similarly available for proceedings that have not been transferred from the District Court.

CRIMINAL JURISDICTION

329 Chapter II called attention to the major reform in respect of criminal jury trials introduced in 1981 and to the impact that that initially had on the number of criminal jury trials in the High Court and on the proportion of the sitting time of High Court Judges spent in the criminal jurisdiction. We noted as well that in the 1980s the balance has been substantially altered. The High Court is now handling almost as many criminal jury trials as it was before the reform, the proportion it

handles has grown and that of the District Court Judges has dropped, and the amount of High Court time now exceeds that of the District Court. We have already said that this trend should not only be arrested but also reversed (paras 103-121).

330 We have also referred to the markedly different balance in the use of the different categories of judges hearing jury trials in England, Ireland, Australia and Canada: in those jurisdictions High Court Judges or their equivalents preside over a very much smaller proportion of criminal trials than in the case in New Zealand (paras 202-204). Those jurisdictions also suggest different ways of allocating the business between different courts or judges.

331 At the moment the allocation in New Zealand is by way of a statutory line, requiring certain serious crimes always to be tried in the High Court and the remainder in a District Court (District Courts Act s 28A). The only flexibility is in a provision allowing the transfer of cases from a District Court to the High Court, but not in reverse; no general criterion is expressed other than that the case should be tried in the High Court. There is also power to transfer a case with consent for reasons of expedition (District Courts Act 1947, s 28J).

332 Accordingly a High Court Judge must preside over the jury trials of persons charged with any of a lengthy list of offences. (The principal ones are set out in Appendix E.) In addition to the most serious crimes in the statute book, treason and murder, the list includes manslaughter, rape and other serious sexual offences (although not incest and indecency with young girls and indecent assault on a woman or girl), aggravated wounding or injury and wounding with intent (but not aggravated assault or injury with intent), aggravated robbery (but not robbery), offences involving speech (such as blasphemous, seditious and criminal libel), offences relating to the administration of justice, a major drug offences. The list is partly based on penalty, with rough line being drawn below those offences for which the maximum penalty is 14 years or sometimes 7 years (but that is not followed closely). It also includes 2 other categories of offence of major public interest where the penalties are lower: offences relating to the administration of justice and offences involving speech. This is a much longer list than those to be found in the other jurisdictions mentioned.

- 333 Its length and its inclusion of some very large areas of criminal jurisdiction - especially crimes of violence and drug offences - have meant that, with the great growth of prosecutions in those areas, the amount of High Court jury work has burgeoned. The Annual Reports of the Police show increases in prosecutions between 1982 and 1986 for homicides (including manslaughter) from 65 to 138, for aggravated robbery from 194 to 374, for rape and attempted rape from 137 to 390, and for serious drug offences from 751 to 1230.
- 334 The Justice Statistics show what those increases mean in High Court trials. From 1983 to 1986 convictions in such trials for offences against the person increased from 367 to 548, for property offences from 56 to 90 and for drug offences from 87 to 128 (Department of Statistics Trial Courts and Appeals, Justice 1986, Part B Vol 1 p 29).
- 335 Two methods are available to alter this situation - and it is generally agreed that it must be altered. One is to greatly reduce the statutory list of matters handled exclusively in the High Court (an option favoured by the New Zealand Law Society and the Department of Justice). The other is to provide for extensive concurrent jurisdiction with matters being heard in the District Court unless they are transferred to the High Court (an option favoured by the Court of Appeal and High Court Judges). Our proposals relating to the civil jurisdiction show that it is possible to use both methods at once.

EXCLUSIVE HIGH COURT JURISDICTION?

- 336 As in the area of civil jurisdiction the broad criteria - for those who are responsible for preparing legislation or for making decisions transferring particular cases from one court to another - are complexity or general importance. Are there crimes which because of their complexity or general importance ought always to be tried in the High Court? In terms of complexity alone, the answer is probably no. The most serious of offences may present no real difficulty in terms of the facts and the law. In a particular case, they might be easier to handle than a less serious offence (say of fraud) which involves a great number of complex transactions.

337 The criterion of general importance is a different matter. Several have strongly urged on us that the most grave of criminal offences, particularly murder, ought always to be tried in the High Court. The allegation of the wilful taking of the life of another human being sets it aside from all other criminal proceedings. Others argued that the list should be longer. The New Zealand Law Society for instance would add armed robbery, sexual violation and serious drug offences. This latter approach seems to us to run into 2 difficulties. The first is in the drawing of the line in a general categorical way when one offence shades into another, as with the contrasts mentioned in para 332. Can it always be said that one description (in part determined by prosecution decisions in the framing of charges) of the alleged offence is of greater general importance than another in such a way as to require a different court? The second difficulty is that such an inflexible line does not allow for adjustment to meet changes in the range of serious criminal matters coming before the courts. Recent history shows that clearly.

338 Neither of the difficulties just mentioned applies however to charges of murder - there is a clear line and the numbers of prosecutions do not present any problems in terms of High Court trials. We hesitated over the question of whether murder trials should be exclusively in the High Court's jurisdiction. On balance recognising some differences within our own number, we came down against exclusive jurisdiction. Rather we propose that murder too should come down against exclusive jurisdiction. Rather we propose that murder too should come within the concurrent jurisdiction of both courts. Accordingly, the Law Commission recommends that the District Court have jurisdiction over all criminal offences where there is a right to trial by jury. A judge with a jury warrant would preside over any jury trial. We anticipate however that the judgment of complexity and especially of general importance made either by the prosecution and defence jointly or by a High Court Judge will mean that murder trials will very commonly be heard in the High Court. That for instance is the pattern in England, although not invariably so (para 202 above and the Statistics referred to there).

CRITERIA FOR TRANSFER

339 We now turn to the second of the methods of allocation mentioned above - allocation in individual cases by a High Court Judge by reference to criteria which we have proposed be stated by Parliament and by regulation. The statutory criteria have already been indicated - complexity or general importance. English practice shows how such criteria can be further developed (see direction on Crown Court business given by the Lord Chief Justice with the concurrence of the Lord Chancellor [1987] 1 WLR 1671). The current direction relating to original jury trials first creates a 4 fold classification:

Class 1: (1) any offences for which a person may be sentenced to death; (2) treason; (3) murder; (4) genocide; (5) an offence under the Official Secrets Act 1911, s 1; (6) incitement, attempt or conspiracy to commit any of the above offences.

Class 2: (1) manslaughter; (2) infanticide; (3) child destruction; (4) abortion; (5) rape; (6) sexual intercourse with a girl under 13; (7) incest with a girl under 13; (8) sedition; (9) an offence under the Geneva Conventions Act 1957, s 1; (10) mutiny; (11) piracy; (12) incitement, attempt or conspiracy to commit any of the above offences.

Class 3: all offences triable only on indictment other than those in classes 1, 2 and 4.

Class 4: (1) wounding or causing grievous bodily harm with intent; (2) robbery or assault with intent to rob; (3) incitement or attempt to commit any of the above offences; (4) conspiracy at common law, or conspiracy to commit any offence other than those included in classes 1 and 2; (5) all offences which are triable either way.

340 Business is to be allocated in accordance with those classes -

1 Cases in class 1 are to be tried by a High Court judge. A case of murder, or incitement, attempt or conspiracy to commit murder, may be released, by or on the authority of a presiding judge, for trial by a circuit judge approved for the purpose by the Lord Chief Justice.

- 2 Cases in class 2 are to be tried by a High Court Judge unless a particular case is released by or on the authority of a presiding judge for trial by a circuit judge. A case of rape, or of a serious sexual offence against a child of any class, may be released by a presiding judge for trial only by a circuit judge approved for the purpose by the Lord Chief Justice.
 - 3 Cases in class 3 may be tried by a High Court Judge or, in accordance with general or particular directions given by a presiding judge, by a circuit judge or a recorder.
 - 4 Cases in class 4 may be tried by a High Court Judge, a circuit judge, a recorder or an assistant recorder. A case in class 4 shall not be listed for trial by a High Court Judge except with the consent of that Judge or of a presiding judge.
- 341 There can be further directions by presiding judges which should make provision for the following categories -
- (a) Cases where death or serious risk of life, or the infliction or grave injury are involved, including motoring cases of this category arising from reckless driving, excess alcohol or both.
 - (b) Cases where loaded firearms are alleged to have been used.
 - (c) Cases of arson or criminal damage with intent to endanger life.
 - (d) Cases of defrauding government departments or local authorities or other public bodies of amounts in excess of BP25,000.
 - (e) Offences under the Forgery and Counterfeiting Act 1981 where the amount of money or the value of goods exceeds BP10,000.
 - (f) Offences involving violence to a police officer which result in the officer being unfit for duty for more than 28 days.
 - (g) Any offence involving loss to any person or body of a sum in excess of BP100,000.

- (h) Cases where there is a risk of substantial political or racial feeling being excited by the offence or the trial.
- (i) Cases which have given rise to widespread public concern.
- (j) Cases of robbery or assault with intent to rob where gross violence was used, or serious injury was caused, or where the accused was armed with a dangerous weapon for the purpose of the robbery, or where the theft was intended to be from a bank, a building society or a post office.
- (k) Cases the involving the manufacture or distribution of substantial quantities of drugs.
- (l) Cases the trial of which is likely to last more than 10 days.
- (m) Cases involving the trial of more than 5 defendants.
- (n) Cases in which the accused holds a senior public office, or is a member of a profession or other person carrying a special duty or responsibility to the public, including a police officer when acting as such.
- (o) Cases where a difficult issue of law is likely to be involved, or a prosecution for the offence is rare or novel.

The Beattie Commission supported an earlier version of this list, para 361. Such matters could also be relevant in individual decisions, and they would not exhaustive.

342 We have already indicated the way in which such directions operate in practice (paras 202-203 above). High Court Judges do in fact preside over trials in all 4 classes, but in a much higher proportion of the more serious ones. Even in the first class (largely murder) approved circuit court judges do preside over a significant number of trials.

343 If would not be necessary for any regulations made here to be as complex as the English direction: we have only 2 categories of judge as opposed to 4 in England

(or 5 if the 'approved' circuit court judge is added), and the volumes of work are of course greatly different. But the directions and practice do provide a valuable model which we propose should be adopted with appropriate modifications.

344 We make these recommendations for more extensive District Court criminal jury jurisdiction in part to give effect to the original purpose of the reform (or to restore that effect) and in part to take it further. We also make them in recognition of the facts that the reform is widely regarded as successful (as seen for instance in a relatively low rate of appeals and a comparable success rate for appeals as between the 2 Courts). And, as indicated, we do not consider that the seriousness of the offence should of itself prevent trials presided over by warranted District Court Judges.

345 A reform on the foregoing lines would allow a very substantial reduction in the number of criminal jury trials held in the High Court. It is not possible to put an exact figure on it, but proportions elsewhere suggest that the present figure of more than 600 a year could be reduced a long way below the 1982 low of 336 (compare the English and Australian practice mentioned in paras 203-204).

SENTENCING IN THE DISTRICT COURT

346 District Court Judges in general have full powers of sentencing. They may within the maximum penalties fixed by Parliament (and the minimum if any) impose any of the full range of available penalties. Their powers are the same as those of High Court Judges in their sentencing jurisdiction. That general concurrence of power is of course consistent with our general approach, that so far as possible the 2 courts should have the same powers in respect of those matters which fall within their concurrent jurisdiction.

347 Parliament has made one general exception to that approach. Where a defendant elects to be tried summarily for an indictable offence the sentencing powers of District Court Judges are limited: they may not impose greater penalties than 3 years imprisonment, a \$4,000 fine, or both. That is also the case for defendants who having elected trial by jury plead guilty before or in the course of the preliminary hearing. Some particular statutes also limit the sentencing powers of

the District Court as compared with the High Court in respect of prescribed offences - for example Misuse of Drugs Act 1975, ss 6(3), 9(3), 10(3) and 12(3).

348 The Beattie Commission proposed in 1978 that the 3 year limit for District Court Judges sitting without a jury should be kept in the meantime, but that in accordance with the desirability of increasing their jurisdiction over time the matter should be reviewed. If their sentencing powers were increased, any appeal against a sentence exceeding 3 years would be to the Court of Appeal (consisting of course of 3 Judges) (para 359).

349 We think that this distinction is increasingly anomalous and should now be removed. There is in general no such distinction when the maximum penalty is less than those just mentioned. Both Courts have exactly equivalent powers in respect of those penalties other than imprisonment and fines provided for in the Criminal Justice Act 1985, and that Act draws no general distinctions in the powers and directions it gives to each. That is also the case if the defendant is committed to the District Court for a jury trial and then pleads guilty or is convicted. That is to say persons convicted following a jury trial in the District Court of causing grievous bodily harm are liable to 10 years imprisonment (as in the High Court), but to 3 years if they pleaded guilty to, or were convicted by, a District Court judge sitting alone. We see no logic in that distinction; the qualifications and ability of the Judge to sentence are not affected by the process leading to conviction, or by the choices of the defendants about how to be tried or when to plead guilty.

350 There would also be the control on the exercise of a full concurrent power by way of the right of appeal. Under our proposals any appeal would now in general be heard by a court of 3 Judges (in the High Court) rather than by just 1 High Court Judge as at present.

351 Accordingly, the Law Commission recommends that in general District Court Judges have the same sentencing powers as High Court Judges in respect of defendants who are within their jurisdictions. The only exception that we would make to that would be in respect of the highly unusual and exceptional sentence of

preventive detention. If that penalty - imposed without limit of time - remains, only the High Court should have power to impose it.

A SIMPLIFICATION OF THE LAW OF CRIMINAL PROCEDURE

- 352 If such a broad equation of criminal jury jurisdictions and sentencing powers is made, the question arises whether there is any longer any need for the complex body of law arising from the distinction between indictable and summary offences. Others have commented on the obscurity of the legislation and the exhaustion and irritation it causes the reader. We too think that the relevant law could be codified into a single enactment accessible to and comprehensible by all.
- 353 Is there any reason for the law to do more than identify categories of criminal offences such as the following and then draw the consequences of those categories?
- (a) Those offences over which only a District Court Judge sitting alone has jurisdiction (Justices of the Peace would share some of the jurisdiction).
 - (b) Those offences over which, at the choice of the defendant, a District Court Judge alone or a Judge with a jury has jurisdiction (with the possibility in the latter case of the matter being transferred to the High Court either by the joint consent of the defendant and the prosecution or by order of a High Court Judge).
 - (c) Those over which, with the consent of the defendant and by order of the Judge, a High Court Judge sitting alone has jurisdiction.

The line between (a) and (b) would be determined by penalty and related matters. The choices within (b) and (c) would be made by reference to criteria and regulations discussed earlier and as indicated in the Crimes Act 1961, ss 361B and 361C. (We have not examined the question whether even without the consent of the defendant a judge alone trial could be ordered, for example on the grounds of length and complexity.)

354 Under such a scheme, the prosecutor would no longer be able to insist on the present indictable process, involving a preliminary hearing and the possibility of a jury trial. We do not however see any reason for that power if the District Court Judges have the same sentencing powers as the High Court Judges, and if their decisions are subject to appeal to a High Court of 3 Judges (by the prosecution, if the Solicitor-General agrees, as well as the defence).

355 We recommend that such a simplification be favourably considered for introduction when the law of criminal procedure is reviewed.

356 It follows from our general approach that the powers of the District Court and the High Court in respect of a jury trial should be the same. The Crimes Act 1961 and the District Courts Act 1947 as amended in 1980 to provide for District Court jury trials have indeed provided for that (s 309(2) and s 28D(3) respectively). This equal position should apply as well in respect of the review ability by rehearing or appeal and again the legislation in general so provides (Under our proposal of course the appeals would not be heard by the same court.) But a difference between the 2 Courts has arisen from the inherent powers of the High Court to review decisions of the District Court handling a jury trial. So it has reviewed some procedural decisions for instance in respect of bail. There is by contrast in general no statutory right of appeal in such areas and accordingly similar decisions of the High Court cannot be appealed to the Court of Appeal.

357 This difference is unsatisfactory. Parliament has basically equated the 2 courts in their powers in respect of jury trials and that principle should be carried through in the legislation; see, for example, Courts Act 1971 (UK) s 10(5) relating to the Crown Court. What also appears to be required is a careful examination of the procedural decisions taken in the course of a jury trial from the point of view of rehearing as well as appeal: see, for example, *R v Clarke* [1985] 2 NZLR 212. Those matters should be taken up in the review of the law of criminal procedure we mentioned earlier.

ORIGINAL JURISDICTION OF THE SUPREME COURT

358 Finally, a word about the original jurisdiction of the Supreme Court (presently the Court of Appeal). Given the Court's predominantly appellate role, and its new role

as the final court for this country, we were at first inclined to think that the Supreme Court should exercise no original jurisdiction. Indeed in keeping with the obligation in the International Covenant on Civil and Political Rights, to provide a right of appeal for criminal defendants, the Supreme Court should to be given first and last jurisdiction over criminal matters. In any event the provision in the Judicature Act 1908, s 69, for a trial at bar in the Court of Appeal of a criminal trial does appear to be a dead letter. We are unable to envisage a situation in which it would apply.

359 But, if we put criminal trials to one side, cases such as *Corbett v Social Security Commission* [1962] NZLR 878, *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147, and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 have persuaded us that sometimes there might be good reasons for having a case commenced in the District Court or High Court able to be removed into the Supreme Court and dealt with there at first instance. The particular reasons that spring to mind are cases of major public importance which are also:

(1) cases of urgency (as in the Maori Council case);

(2) cases where the matter has already been argued at the High Court level and an authoritative ruling is required but is not available by way of appeal (*Wybrow* is a case in point); and

(3) cases where there are conflicting decisions in the High Court, the point of law is clearly identified and in need of resolution, and there is nothing to be gained by a further hearing at the High Court level (as in *Corbett*).

360 Parliament has long recognised that there will be such exceptional cases by enacting provisions for the removal of cases or issues to the Court of Appeal or even for the case to be begun there (as in commissions of inquiry, national development and labour relations legislation). Supreme Courts elsewhere - in Australia, Canada, and the United States for instance - also have a rarely invoked original jurisdiction for a very limited range of cases. Accordingly, the Law Commission proposes that in appropriate cases of an exceptional kind involving issues of general public importance the Supreme Court should be able to grant leave to decide matters originally.

361 In the overwhelming proportion of cases the Supreme Court will nevertheless remain an appellate court. The advantages, in terms of the deliberate review, clarification and, as appropriate, development of the law, of having a careful assessment of the issues by counsel and a court at least once before a case gets to the Supreme Court, more than compensates for any extra cost or delay incurred in the process. That brings us to appeals, the subject of the next chapter.

VI The Appeal Business

INTRODUCTION

362 Chapter IV set out the Commission's general proposals for appeals - especially a simple hierarchical system with appeals from the District Court to the High Court, and from the High Court to the Supreme Court. This chapter provides relevant information, addresses the questions arising in the preparation of legislation relating to appeals, and then proposes details of a new appeal system.

THE PRESENT SYSTEM

363 Appendices B, D, F and G describe the appellate powers of the District Courts, the High Court, the Court of Appeal and the Judicial Committee of the Privy Council. They also give some statistical information about the range of that work and the time which the High Court and Court of Appeal spend in handling it. We draw some general conclusions from these descriptions.

364 The first and basic point has already been mentioned in Chapter IV. It bears repetition. It is the wide legislative recognition of one right of appeal within the regular court system. The right is usually in largely unconfined terms - a general appeal (by way of rehearing) and as of right. There are limits to that proposition - perhaps most significantly on the rights of prosecutors in criminal matters. (The leave requirement applicable to most defendants convicted in a jury trial has not in practice been applied as a screening device preventing argument of the substantive appeal. We later propose that the law now be aligned with the facts, para 388.)

365 Where second appeals are available they are by contrast usually limited, being only by leave (and not as a right) and sometimes extending only to questions of

law. the legislative limits point to a broader policy, already mentioned in Chapter IV and also considered later (paras 484-485).

366 Secondly, all the regular courts in our legal system exercise appellate power. While the appellate function does have special characteristics separating it from original jurisdiction, it has been found convenient (to put it at the lowest) to use the full range of courts of general jurisdiction to handle appeals against the decisions of other bodies.

367 A third point arises from the increase in the appellate work of the District Courts or their Judges (see also Legislation Advisory Committee, Report on Administrative Tribunals para 15 and Appendix 1). Such changes recognise the status and authority of those courts and are consistent with the proposals we make in this Report for a wider original jurisdiction of the District Courts, especially on the civil side.

368 Fourth is the broad distinction between that appellate business which begins in the regular court system and that which has its origins in decisions with a greater administrative character usually taken by an administrative body (in central or local government) or by an administrative tribunal. That distinction may have consequences for the composition of the appellate court (with expert members sitting with the judge in the latter case) or for the extent of the grounds of appeal or its powers (which in that case might be limited by judicial decision or by the legislation to questions of law).

369 A fifth point relates to the overall volume of the work. In a general way the statistics show that about 3 separate appeal hearings are proceeding in the New Zealand courts at any one time - 1 in the Court of Appeal and 2 before 2 High Court Judges sitting separately. That figure might from time to time be higher. Thus 2 panels of Judges might be sitting in the Court of Appeal at the same time, as happened on 63 occasions in 1988; and District Courts might also be hearing appeals.

370 The volume of appellate work is obviously a critical practical factor in any discussion of proposals relating to its reorganisation. This matter is particularly important in the case of the Court of Appeal, especially with the appeal to the

Judicial Committee of the Privy Council being removed. Although at present that body handles only a few New Zealand cases a year (see para 247 and Appendix H), we would expect that more accessible appeal facilities would be more widely used.

371 We look more closely at the Court of Appeal's workload later in this chapter (see also Appendix D). Some of the main features of that work can however be usefully mentioned here. The civil work - to mention just the number of cases - built up from an average 43 cases dealt with each year until 1970, to 95 cases in 1980, and by 1988 the number was 123. The criminal work grew even faster. Until 1970 the average of appeals disposed of was about 90. During the next 10 years the number grew to 282. By 1988 it was 348 in which year no fewer than 375 criminal appeals were heard. Consistently with those figures the sitting days of the Court increased from 84 in 1958, to 192 in 1979, to 277 in 1988. The Court had 3 permanent judges in 1958, a fourth was appointed in 1977 and a fifth in 1979. Currently there are 6 permanent Judges (not including the Chief Justice and temporary Judges).

372 In very rough average terms, each Court of Appeal Judge sits about 120 days a year, each day been about 4 hours. As we say later, those figures compare fairly closely with those of the New South Wales and British Columbia Courts of Appeal and the Scottish Superior Courts (para 490).

373 Against the background of the relevant principles and the facts of our present system we consider the various issues which have to be resolved in legislation providing for appeals. We then make proposals for change in the present system.

THE LEGISLATIVE CHOICES

374 Legislation regulating appeals relates to several matters -

- (1) the existence or not of an appellate jurisdiction;
- (2) whether the appeal is of right or by leave only;
- (3) the composition of the appeal court;

- (4) the grounds of appeal;
- (5) the procedure followed on appeal;
- (6) the powers of the court to dispose of the appeal; and
- (7) provisions for further appeals (if any), in which case the above issue recur.

375 A reading of the statute book suggests that these matters are not always addressed in a consistent way. Sometimes they are not addressed at all. Accordingly one of our purposes in this section of the Report is to propose that when appeal legislation is being prepared the above questions be addressed in the interests of producing more comprehensible legislation. A second purpose is to recommend standard answers in respect of some of them. We also make recommendations about particular jurisdictions.

376 The matters are of course interrelated. thus if an appeal is limited to questions of law (item 4) the court would usually consist of its regular judges and not include additional members expert in the subject area in question (3), it would generally not hear any evidence but proceed on the record from the hearing below(5), and it might require a power to send a matter back in the event that it found error (6). The various issues listed above arise not only for the legislator. They may also be addressed in various ways by a court handling an appeal. So legislation does not always provide full statements of the procedure to be followed or of the scope of the powers of the appeal court. And an appeal court hearing a general appeal might decide to defer to the assessment of an expert tribunal of a matter of policy (4), or to hear witnesses if the original tribunal did not (5).

377 Appeal legislation should also answer on a consistent basis a series of additional recurring questions which include the following -

- (1) Who may appeal and how are the particular categories to be defined?
- (2) Within what time is the appeal t be filed and is there power to extend that time?

(3) What effect does the filing of an appeal have on the decision being challenged?

(4) What power does the appeal body have in respect of costs (including costs in the lower court)?

Legislative answers vary - not so far as we can see always on any basis of principle. So 'persons aggrieved', 'persons affected' and named categories of litigants are variously given rights of appeal. Sometimes there is no express power to extend times for appeal and in others there is no power to suspend the effect of a decision depriving a person of a licence.

The Appeal Business

378 The general reasons for having appeals have not persuaded legislatures that appeals should be able in respect of each and every decision taken by a court. In some related cases the legislation will not go so far as to preclude an appeal but rather will require the appellant to obtain leave before the appeal is dealt with, this being considered under the next heading.

379 The reasons for the denial of an appeal power include the following.

(1) The attitude of the parties. Legislation has sometimes precluded appeals when the parties have consented to the order in issue, have agreed not to appeal, or have not defended the proceedings in question. The appropriate remedy in the last case might be to allow for an application for rehearing in the original court. These reasons however are not applied in a comprehensive way. In some cases there may have been a judgment that broader public policy denies parties to litigation the power to waive their legal rights in that way.

(2) The lack of finality of the decision. Legislation or court practice will often require that a final decision be reached in the litigation before there can be an appeal. That approach helps facilitate the prompt and orderly conduct of a trial once it is underway. So only some decisions taken in the course of criminal trials are subject to appeal - usually those which have an immediate

effect which could not be reversed in the course of a trial such as a refusal to suppress the name of the defendant or to order a change of venue. By contrast a decision to admit evidence might be of no consequence (if the evidence was proffered by the prosecution and the defendant is acquitted for instance), and, if it might have been of consequence, its impact can be better assessed after the trial is over.

- (3) In many common law jurisdictions interlocutory decision in civil matters are not subject to appeal or can be appealed only with leave. One major exception to that bar or limit, to be found for instance in the relevant United Kingdom legislation, is where the liberty of the individual is involved.
- (4) The protection of liberty. The matter just mentioned gets a more general reflection in those parts of the criminal law which impose limits on the right of the prosecution to appeal. So the prosecutor cannot in general appeal against an acquittal by a jury, can appeal only on a point of law against the dismissal of a summary prosecution, and can appeal against sentence only if the Solicitor-General agrees and in the case of appeals of the Court of Appeal that Court also grants leave. Principles of individual liberty, double jeopardy and the limited role of the prosecution in relation to sentences have long been asserted against such Crown appeals.
- (5) Relative unimportance. The low monetary value of a judgment and the effective operation of the court handling those modest claims might be put at risk if they are subject to extensive appeal processes with their associated cost. So there is often a monetary limit on appeal. Costs orders, especially if fixed on a discretionary basis, are sometimes excluded from rights of appeal. The very limited scope of the right of appeal from Small Claims and Disputes Tribunals and the leave requirements (rather than a complete bar) for appeals in respect of amounts below a monetary limit also reflect the point.
- (6) Need for early finality. This is a factor in some of the statutes just mentioned, but it might also be seen to apply to much more substantial matters, as with electoral petitions where the original decision of the High

Court Judges is final and proceedings under the now repealed national development legislation where matters were heard only in the Court of Appeal. We note that the Royal Commission on the Electoral System has recommended a right of appeal in the former case (Report (1986) para 9.1415).

- (7) Need for an authoritative ruling. The need for an authoritative ruling appears as a paradoxical reason for curbing appeals since it is usually cited as a jurisdiction for further appeals. What we have in mind is the rare case which is removed into or initiated in the final court and is heard only there. Sometimes the need for early finality may be a reason for such a procedure. In others the importance of the issue and the need to have an authoritative resolution of it (where for instance there is no decisive ruling in the lower courts) are more decisive. We have mentioned relevant Australian, Canadian and American as well as New Zealand practice in Chapter V (paras 358-360).
- (8) Relative expertise. The fact that the original body has a special expertise or a role in making decisions consistently throughout New Zealand might be seen by some people as a reason for denying an appeal or limiting it to questions of law. That general matter relates back to the criteria for the allocation of decisions between courts, tribunals and the Government proposed in Chapter III.

380 Another case sometimes expressly excluded from appeal is where the penalty is fixed by law. There is of course no point in a right of appeal against sentence in such a case.

381 We should note as well that general provisions enabling appeals from one court to another have sometimes been held not applicable to particular decisions of judicial officers because of the way the power has been conferred (for instance on a judge rather than on a court), because of the character of the decision, or because the appeal provisions are read as applicable only to one category of business and not to another, for example *R v Clarke* [1985] 2 NZLR 212 CA, and *Re Lee's*

Appeal [1965] NZLR 507, and the cases they refer to. In some such cases those responsible for the legislation may not have adverted to the appeal issue.

382 We recommend that the above matters be taken into account when appeal provisions are drafted, for instance in the review of aspects of criminal procedure (including the law of bail which has been the subject of some comment recently). We also consider that civil appeals in interlocutory matters be subjected to some controls. We take that matter up under the next heading (paras 389-390).

Appeal Only With Leave

383 We have already indicated 3 possible reasons for a leave requirement:

- the matter may be interlocutory and to allow an appeal as of right may conflict with the orderly and expeditious carrying through of the trial as a whole;
- the position of the defendant in criminal cases places limits on prosecutor's appeals; and
- the issue may not in a general way be important enough to justify an unfettered right of appeal; one instance is the monetary limits on appeals as of right from the District Court to the High Court.

384 Another principal reason for the appeal to be by leave rather than as on right is that the appeal in question is a second one. There is a broad acceptance of the proposition that, while litigants in general have one right of appeal, a second appeal should be a matter of leave. Such an appeal is less concerned, in the overall order of things, with correcting error in the particular case and more with the clarification and development of the law - a matter to be assessed by the courts rather than the parties. And if the justification is the correction of error then a very special case will in general be required to justify a further appeal and a third judicial examination of the particular dispute. Accordingly, the Law Commission recommends that second appeals be by leave and not as of right.

Criminal jury appeals

- 385 The main category of appeal only with leave under the present law, additional to the above 4, is the first appeal following criminal jury trials (Crimes Act 1961, s 383). A defendant may appeal as of right only if the appeal is against conviction and is solely on a question of law. One 1986 sample of 111 cases (one-third of all criminal appeals that year) had only 13% in this category. All other appeals are with leave. If the appeal against conviction is on fact or mixed law and fact the appeal is with leave of the Court of Appeal or upon the certification of the trial or sentencing Judge that it is a fit case for appeal; and the Court of Appeal may grant leave on any other ground which appears to it to be sufficient. Sentencing appeals by the defendant or the Solicitor-General are also with the leave of the Court of Appeal.
- 386 These provisions are essentially those which were created in 1945 on the model of the United Kingdom legislation of 1907 when general appeals following jury trials were first provided for. The question arises whether, so far as the defendant is concerned, the leave requirement should be retained. The defendant convicted following a summary trial has an unfettered first right of appeal (possibly in respect of exactly the same offence and sentence). In general indeed all litigants in our courts have an unfettered first right of appeal. Furthermore, the International Covenant on Civil and Political Rights requires that those convicted of criminal offences have a right to challenge the conviction and the sentence (para 226 above). In practice, as well, the leave requirement is not applied as a filtering device; the Court of Appeal hears the substance of the appeal before deciding on the leave application. (The handling of legal aid applications can be important in this area.) And the volume and the nature of the work is now known and within reason can be predicted. That is to say, any concern that might have existed in 1945 that the courts might be overwhelmed can now be measured against the facts. A final consideration is that the large bulk of the appeals that we are discussing will, in terms of our general proposals, be not in the final court in our system but rather in the High Court.
- 387 The Crimes Act 1961 and related legislation are being reviewed. That might suggest that such aspects of the criminal process as rights of appeal be considered

within that review. On the other hand questions of appeal relate very closely to the overall court structure and should be seen against the general system of rights of appeal and not, as in 1945 and 1961 when this matter was last considered, simply in the context of criminal law and procedure (and even then prosecutions on indictment and not all prosecutions).

- 388 Accordingly the Law Commission proposes that appeals by persons convicted following a jury trial against conviction, sentence or both of right. In accordance with related recommendations the appeal will be to the High Court if the jury trial was in the District Court and to the Supreme Court if the jury trial was in the High Court.

Civil interlocutory appeals

- 389 There is one area in which we propose that matters which can currently be appealed as of right should become subject to leave - appeals in interlocutory matters from the High Court. The District Courts Act 1947, consistently with legislation and practice in many other jurisdictions, allows interlocutory appeals only with leave. So too does the legislation relating to the Commercial List in the High Court. (It also expressly allows an agreement not to appeal.) As mentioned already, legislation in the criminal law area provides for appeals only on a limited range of interlocutory matters and then generally only with leave. The lack of any control in the general provisions of the Judicature Act 1908 (the provisions of which have been unchanged for more than a century) is out of line with those provisions and practice. United Kingdom legislation requires leave of the original court or tribunal or the Court of Appeal for an appeal from an interlocutory, order or judgment, with certain exceptions. Exceptional cases where the appeal is of right include those involving the liberty of the subject. The New South Wales and British Columbia Courts of Appeal also handle interlocutory appeals only with leave.

- 390 Interlocutory matters make up (on 1982 and 1986 figures) about 25-30% of the civil case load of the Court of Appeal. It is sensible for such issues as the right to an interlocutory injunction to be taken almost as a matter of course on appeal rather than being heard substantively and equally early at first instance? No doubt some

of these matters handled in interlocutory proceedings should be decided by the court: consider the striking out of a statement of claim. We would indeed propose that such decision fall within the definition of a final decision to make the point clear. It does after all dispose of the proceeding and is not merely an interim step in the procedure. It will as well sometimes be the case that an interlocutory decision - to give an interim injunction for instance - will be of fundamental importance. It may also be difficult to get an early fixture for the main hearing. No doubt such matters will be taken into account when the court is considering whether or to grant leave. And it may be that Parliament could make specific exceptions to the general leave requirement, see for instance Supreme Court Act 1981 (UK), s 18(1)(h). But, in general, there does not appear to us to be any good reason for the civil jurisdiction of the Court of Appeal to differ in that respect from the general situation here and elsewhere. Accordingly, the Law Commission recommends that civil appeals from interlocutory decisions from the High Court should be by leave. Once consequence will be a reduction in appellate business.

Who grants leave? The standards for grant

- 391 If leave to appeal is to be required, 2 further questions have to be answered - who should have the power to grant leave and what should be the standard to be met for the grant of leave? For reasons which will appear it is convenient to consider the questions together. The legislation appears to provide a great variety of answers to each question but that is in major part a consequence of inconsistent drafting practice rather than different policies.
- 392 To the question of who should grant leave there are 2 main answers - the original court or if it refuses the appeal court; or simply the appeal court. We see no reason for the 3 other formulae which sometimes appear - power conferred equally on the original court and the appeal court (if the original court is to have the power, there should be an obligation to try that court first); the appeal court if the application is not made in time to the original court (any power to extend time should be exercisable by the court considering the matters); or the original court only (for it cannot be fair to potential appellants to limit the power to grant leave simply to the court which had decided against them). Sentencing appeals by the prosecution require the decision of the Solicitor-General - as well as the Court of Appeal if the

appeal is to that court. Those limits on that relatively rarely exercised and significant power appear to us to be appropriate if the power is to exist.

393 Some statutes regulating the grant of leave state no standard to be met or even matters to be taken into account by the court which is considering whether to grant leave. They simply provide that the appeal is with 'the leave' (or 'the special leave') of the court in question. It is left entirely to the court to make the judgment and establish as appropriate, the standards. Other statutes by contrast

- (1) expressly confer a discretion on the court;
- (2) state the judgment that it is to reach;
- (3) set out the broad standards; and
- (4) list matters relevant to the exercise of the judgment or the discretion or do some of these things.

394 The provision regulating second appeals in summary criminal matters from the High Court to the Court of Appeal is the most important example of the second approach. It has been adopted in at least 20 other appeal provisions. It contains (1)-(3) of that list. The relevant court

- (1) may grant leave
- (2) if in its opinion the question of law in issue ought to be submitted to the Court of Appeal for decision
- (3) because of its general or public importance or for any other reason (Summary Proceedings Act 1957, s 144).

395 Some statutes regulating appeals from administrative tribunals move directly to (4) and do not expressly state the relevant standard of judgment. For instance under the Commerce Act 1986 the High Court or Court of Appeal in deciding whether to grant leave for appeals from the Administrative Division is to have regard to a number of matters -

- whether a question of law or general principle is involved;

- the importance of the issues to the parties;
- the amount of money in issue; and
- such other matters as the court thinks fit (s 97; a similar provision is included in at least 5 other statutes).

Such provisions appear not to be adequate since they do not state the test to be applied but merely list relevant matters, the matters would without doubt be considered in any event, and the list is expressly not exhaustive.

- 396 The statute book presents a haphazard appearance on the statement of criteria. Against the 20 or more express provisions regulating second appeals on the model of the Summary Proceedings Act there is to be put the silence of the provisions of the Judicature Act 1908 and the Family Proceedings Act 1980 relating to second appeals to the Court of Appeal in civil and family matters. For appeals to the Privy Council the position is reversed - there is an express discretion, judgment and standard for civil matters but noting for criminal matters. And while many appeals by leave in administrative matters are governed by the express provisions of the Summary Proceedings Act 1957 or by similar provisions, not all are. It is also noticeable that almost all provisions for leave in respect of first appeals (for instance in interlocutory matters and in a real sense in criminal jury appeals) are silent on this matter.
- 397 These provisions present 2 questions, one of policy, the other of technique - what judgments and standards should govern the grant of leave, and can legislation help set them out in a useful way? For the most part the policy as stated in the legislation and the cases is to confer or recognise a broad power. So the words 'or otherwise' in the provision in the Summary Proceedings Act and similar words in the Privy Council Rules have been read as enabling the grant of leave even when no matter of general or public interest is raised. The words cover the effect of the decision on the circumstances of the potential appellant, *Clifford v Commission of Inland Revenue* (No. 2) [1963] NZLR 897 CA (a decision under the Summary proceedings Act referring to judgments to the same effect on the Privy Council Rules). The Court of Appeal said that its powers were unfettered.

- 398 The position in respect of second civil appeals to the Court of Appeal appears to be essentially the same. The relevant provision of the Judicature Act, it will be recalled, places on legislative fetter on the Court. The courts have referred to the requirements of justice and asked whether there is some interest, private or public, sufficient to outweigh the cost and delay of a further appeal, *Rutherford v Waite* [1923] GLR 34, *Cuff v Broadlands* [1987] 2 NZLR 343.
- 399 Another feature of the cases should be mentioned before we return to the policy and drafting questions raised. The courts over the years have referred to a great diversity of matters as relevant to their judgment whether a further appeal hearing should be allowed - including the division of judicial opinion, rare occurrence of facts, the general impact of the decision on those involved, the lack of a real issue any longer between the parties, the value of a decision for disposing of other disputes etc. Such matters cannot of course be captured in a comprehensive way in statutory language, and no legislation we know of attempts that.
- 400 There appears to be only one possible major reason for a legislative direction - to confine the power so that leave is granted only for reasons of the public interest. While a court (like the Judicial Committee in criminal appeals) could itself establish such a standard by its own interpretation and application of its power, Parliament may wish to give that narrower direction itself, particularly in respect of appeals to a final court. It could also of course give a broader direction if it wished to preclude or to reverse such a narrower judicial reading.
- 401 Once the scope of the power is determined however the statutory standards do not on our reading of the cases and legislation appear to give real help to the parties or the court in following the relevant judgment and exercising the discretion. We see it as significant that standards are very rarely included in legislation relating to first instance appeals and that their inclusion in second appeal provisions is inconsistent. In general the legislation states the obvious and the real judgment and discretion remain with the court.
- 402 We return to the question of who should have the power to grant leave. The most common formula - the original court and, if it refuses, the appeal court - is an appropriate one. The original court can make effective use of the knowledge it

already has of the case, and the power of the appeal court in the event of refusal adds a balancing and fair element to the process.

403 Should leave to take a matter to the final court - the Supreme Court of New Zealand under our general proposals - be seen differently? Should only that court be able to grant leave perhaps with the assistance of a certificate of the court below? That is the position for instance with second appeals to the Court of Appeal in family and domestic protection proceedings. Such a limit would be imposed for the broad reason that the court is best able to assess which cases it should be considering from the point of view of the overall clarification and development of the law. That is now the general position of the Supreme Court of Canada and the High Court of Australia. We think that such a control over the Supreme Court's agenda conforms with its proposed enhanced role.

404 Accordingly the Law Commission recommends that when leave to appeal is required

- (a) in general in respect of first appeals the original court or (if it refuses) the appeal court should have the power to grant leave.
- (b) only the Supreme Court should have power to grant leave in respect of second and leapfrog appeals to it.
- (c) in general no criteria or standards for the grant of leave need be stated in legislation; the only exception may be if the legislature wishes to give a narrow, public interest scope to the power, especially for final appeals.

The Composition of the Appeal Court

405 Legislative practice presents 4 main choices. The appeal is decided by

- (1) one judge of the particular court,
- (2) more than one judge,
- (3) a judge of a particular division of the court, or

(4) a judge with additional expert members or assessors.

406 The first is the standard provision for appeals to the District Court and to the High Court. We later propose that the High Court when hearing appeals should in general consist of 3 or possibly 2 judges (paras 446-452).

407 The specialisation involved in the third and fourth options is principally relevant to appeals from tribunals and other administrative bodies. The legislative practice varies. It does not appear to follow consistent principle with assessors being used in some situations and not in others, and the voting powers and titles of the additional members varying. We later propose that the Administrative Division of the High Court be abolished. The composition of an appeal court is to be related to the next matter, the nature of the appeal. If the appeal is limited to questions of law then option 4 in para 405 has no point.

The Grounds of Appeal

408 Parliament has used the following 6 formulae (at least) to determine the scope of the appeal. The scope becomes narrower as we proceed down the list:

- (1) a general appeal (or simply an `appeal');
- (2) appeal as if from the exercise of a discretion;
- (3) appeal on the ground that the requirements of the act have not been complied with or that the decision is unreasonable;
- (4) appeal on law or on general principle;
- (5) appeal on a point of law;
- (6) appeal on the ground that the manner of handling the case was unfair and prejudiced the result.

The range of the powers of the court on appeal may be even wider than that list indicates. To anticipate the next heading - the procedure followed on appeal - in some cases the appeal court hears all relevant evidence and handles the matter as if it were originally before it. The decision below may be of no significance at all.

That range of course indicates different balances between the principles and other matters mentioned earlier - including the purposes of correction of the decision, the clarification and development of the law, the relative expertise of the 2 bodies, and the cost and delays of further hearings.

409 As Appendices F and G show, general appeal (1) and appeal on law (5) are by far the most common. Good reason can be given for the narrow unfairness ground (6) in terms of finality, speed and the saving of cost, in the one case in which it is used, for the Disputes Tribunals. Although essentially the same control could be obtained by way of judicial review without statutory appeal, there is a difference that the particular statutory appeal is to a District Court rather than to the High Court which of course has the common law review jurisdiction. That narrow provision has a very particular context and has just been reviewed and re-enacted. We do not suggest any change at this time.

410 We understand the reasons for the second and third provisions. They both indicate the need for the court to have regard to the character of the decision taken and the expertise and special knowledge of the body which has made the decision. There is however no consistency in that usage. Thus the provision in (2) was first introduced into the statute book in 1963 for appeals from the Indecent Publications Tribunal to the High Court (of 3 Judges) the decision of which is final; by contrast the provisions for appeals in the films and video recording legislation empower the Administrative Division of the High Court (and the Court of Appeal) to hear appeals on the basis of error of law. (This second formula has been used in only 2 other contexts - for broadcasting appeals, but the relevant provision is being repealed, and for some deportation appeals where it has been repealed). The formula in (3) has been used in a number of provisions relating to scientific expertise but again not in all. Rather, in some cases, that matter is addressed through the special composition of the appeal court, through the limitation of the appeal to questions of law, or through the deference which the general court may show to the decisions of expert bodies on matters within their special area of competence.

411 So far as we are aware the fourth provision has been used only in the Passport Act 1980 which enables persons dissatisfied with Ministerial decision about their

passports to appeal to the High Court (a general appeal), and then provides for an appeal to the Court of Appeal with leave but only if a question of law or general principle is involved. It may be that the formula states the criteria for granting leave rather than the grounds for the appeal.

412 The legislative statement of the ground for appeal, while critical, is not the only matter relevant in practice to the scope of an appeal. Also relevant are the procedures followed by each body, the character of the issues raised by the appeal and the relative expertise of the bodies in relation to those issues. There is a vast amount of judicial experience of the weighting of those matters especially in the hearing of general appeals. The courts also have long administered law-only appeal jurisdictions. The question for us is whether legislative direction and guidance in the statements of the grounds for appeal can be given as precisely as the 6 different formulae set out above suggest. Against the other relevant matters and the judicial practice we do not think that the additional formulae do help (subject to what we have already said about the Disputes Tribunals legislation). Parliament indeed largely accepts that as well.

413 The Law Commission recommends that the legislative statement of the ground should be either general or restricted to a point of law. The choice between them is something that we addressed separately (paras 475-478, 483-485). Any departure from those 2 formulae should be carefully justified.

The Procedure Followed on Appeal

414 What procedures should the appeal court follow? In our court system generally the hearing process is full, with the evidence being actually heard, only at one level, usually the first. There will as well usually be a complementary power at the appeal level to rehear the evidence if the record is considered to be inadequate or if there is good reason to supplement the original record.

415 In 1947 and 1957 Parliament moved firmly in that direction in respect of both civil and criminal appeals from the Magistrates' Court to the then Supreme Court. In general it also makes the same provision in respect of appeals from tribunals.

- 416 That limit on the procedure on appeal recognises the need to control costs and to save time. Even more it reflects a confidence that the original decider, having heard the witnesses and followed a fair procedure, is in general fully competent to find the facts accurately. The parties should also be encouraged to prepare carefully and present their cases properly at first instance. They should not have the opportunity of treating that stage merely as a preliminary skirmish. That would not be consistent with the authority of the first instance judges. For such reasons it would be unusual for the legislature to depart from the general pattern that evidence is not heard on appeal.
- 417 We recommend that in general in the case of the regular courts there should be no change from the pattern established in the 1940s and 1950s. That is to say the second hearing should generally speaking not involve the hearing of evidence but proceed on the basis of the notes of evidence and the documentary material presented in the court original. There should continue to be a power in the appeal court to rehear and to take new evidence where the requirements of justice demand. We think that the legislation could be more direct on this matter and not say that the appeal is by way of rehearing. That is a misleading description. (We realise that there may be a temporal issue arising from this suggestion.) We consider this issue in the specific context of guardianship later in this chapter.
- 418 In the case of administrative appeals we face a more varied situation. In some cases the original decision-maker may follow an administrative or a somewhat summary procedure. The appeal state may in fact provide the first real hearing. In that case there is clear justification for a full hearing with witnesses being heard at that state. This will obviously have consequences for the perception by the appeal court of the weight which it is to give to the decision taken at first instance. The main instances of this are appeals from local government bodies in planning matters and from officials and Ministers in varied situations. In such situations provision should generally be made for a full hearing at the appeal level. It should not be left to the discretion of the appeal court.
- 419 Administrative tribunal legislation commonly enables the tribunal the decision of which is being appealed to provide background material to the decision either in its discretion or if required by the appeal court (for example High Court Rules, r

695). That can be of value in practice. Again we recommend that it routinely be included in legislation relation to tribunal appeals.

Powers of Disposition

420 The general provisions usually empower the appeal body to allow or dismiss the appeal and state that the appeal court has all the powers of the body below. There is generally an added power to send the matter back with directions to the original court.

421 In some cases the interaction between general legislation, for example that relating to the Administrative Division of the High Court, and other legislation is not clear especially in the area of the power to send back. In principle that power should be conferred unless, to refer to the long argument about powers in the criminal appeal area, a judgment is made that finality is so important that any power to require a new trial is inappropriate.

AN APPEAL SYSTEM FOR THE FUTURE

Appeals to the District Court

422 A large number of statutes provide for appeals to a District Court Judge, sometimes with additional members or assessors being named by the parties of the appeal. Some of the provisions can be grouped as follows-

- decision taken by registration and disciplinary bodies;
- local government decisions (often involving the reasonableness of requirements and compensation for damage);
- departmental decision in areas in which a District Court is in general competent (such as road traffic disqualifications).

In many of these cases there will have been no hearing or no full hearing below and the District Court might hear the matter afresh (and indeed might be required to). In that sense the jurisdiction might be seen as original rather than appellate. The first decision will also in general not have been taken by a legally qualified

person. The District Court also hear appeals from the Disputes Tribunals, Tenancy Tribunals, and Motor Vehicles Disputes Tribunals.

423 The Government has recently accepted proposals made by the Legislation Advisory Committee for the rationalisation of some of these provisions by their being conferred on a District Court consisting of a Judge sitting alone. The powers in question were ones which generally appeared to involve no particular administrative or technical expertise - at least beyond that which could not be provided by expert witnesses when required (para 367 above).

424 Such reform - although a minor practical impact in terms of the volume of the cases - is consistent with the general emphasis which we place on the importance of the District Court. The only remaining matters are to note the need to provide for the procedure to be followed (probably by invoking the regular civil procedure of the District Court) and to consider the question whether the District Court decision should be subject to further appeal. While the High Court will be able to review such decisions under its common law powers, there can be practical convenience (for instance in terms of time limits for appeals and specifying who may challenge the decision) in providing directly for rights of appeal for error of law in such cases. Particularly in those cases in which the District Court decision is effectively the first independent judicial decision, we consider that at least such a provision for appeal should be made. The countervailing argument would be that a particular matter is too insignificant or that early finality is required.

Appeals to the High Court

425 The High Court hears appeals in 4 major areas

- civil matters from the District Courts;
- criminal matters (both convictions and sentences) handled summarily in District Courts and Children and Young Persons Courts;
- family proceedings handled in Family Courts;
- administrative matters from tribunals, Ministers and officials.

Appendices F and G give more detailed information and Appendix D some statistics. We draw some general conclusions from those facts.

426 The first relates to the proportion of the sitting time of High Court Judges spent on appeals. It is only about 8% or 10 % of the total sitting time - that is the sitting time of about 2 of the 25 or so Judges sitting in that Court at any one time. It is rare that more than 1 Judge sits on a particular appeal (a handful of statutes require 3 Judges) and accordingly, as we have mentioned, at any one time about 2 appeal hearings are proceeding within the High Court.

427 Those facts do not reflect the expectation expressed about 10 years ago to and by the Beattie Commission that the High Court should fulfil a more substantial appellate and supervisory function than it than performed. Similarly the Secretary for Justice wrote in early 1980 that -

The High Court, while not ceasing to be a court of original jurisdiction, will be concerned more with appellate and review matters and with cases where major questions of law are involved than the Supreme Court which it replaces. (Annual Report of the Department of Justice for the Year Ended 31 March 1980, p 13).

428 The second point relates to the range of the High Court's appellate work. The great bulk of it, in numbers, is in the criminal area. The figures suggest that that work absorbs about two-thirds of the sitting time on appeal. (there are difficulties with different sets of statistics since some collect individual appellants while other count charges.) The civil business - just 51 cases heard in 1987 - is consistent with the very small number of judgments given following contested hearings in the District Courts each year. We have already proposed that the District Courts exercise much wider civil jurisdiction. One consequence of that would be more hearings in that Court and more appeals to the High Court (in number and possibly also proportionately, given the greater amounts at stake.)

429 Family proceedings appeals - 42 heard in 1987 - have been falling steadily since the formation of the Family Courts in 1981 when 152 were heard. That continuing decline in challenges to Family Court decisions is relevant to the proposals we mentioned earlier to extend and strengthen the jurisdiction of the Family Court (paras 306-315).

- 430 The figure given in Appendix D for administrative appeals heard - 28 in 1987 - is generally consistent with other research relating to the Administrative Division of the High Court. In its 20 years of existence it has heard only about 30 cases a year, with little change in volume over that period (although the type of case has varied somewhat). Fully half of those cases have been heard by just 3 Judges through that period.
- 431 A third point concerns geography and the important concern that justice be accessible in that sense. About one-third of the 1987 appeals were heard in centres without resident High Court Judges, the largest proportion relating to sentence (in 1987, 42%). They include only 15 civil, 18 family and 1 administrative appeals.
- 432 The fourth matter relates to the rate of success of appeals. About half the family appeals and one-third of criminal appeals which are heard succeed. Quite large proportions of appeals do not proceed to a decision.

The appeal business

- 433 We now consider 3 of the principal legislative choices listed in para 374. The first is what should be the business of the High Court on appeal. We have already indicated in para 428 that we expect a significant increase in civil appeals as a result of the proposals for the widening of the District Courts' original civil jurisdiction. A widening of their original family law jurisdiction may also have that consequence, although probably not to the same extent.

Appeals from District Court criminal jury trials

- 434 The major increase in appellate work which we propose is in respect of criminal jury trials in the District Courts. When that jurisdiction was established. Parliament, in an exception to the general rule which has appeals going from one court to the next in the structure, provided that appeals in that one area should go directly to the Court of Appeal. The general rule is and was for appeals from the District Court to go to the High Court and only exceptionally and by way of second appeal to the Court of Appeal. (Only about one appeal in 20 in the Court of Appeal is a second appeal.) So a defendant who chooses summary trial and who is convicted and sentenced has an appeal against conviction or sentence

heard in the High Court (usually by 1 High Court Judge). Had the defendant chosen trial by jury on the same charge the appeal would be to the Court of Appeal (of 3 Judges one of whom might be a High Court Judge). The anomaly is even greater if the summary trial is on a more serious offence.

435 The Beattie Commission gave as its reason for this acknowledged anomaly its opinion that 'the permanent appellate court be entrusted with overall supervision of directions to juries and, likewise, the reviewing of lengthier sentences' (para 360). We agree entirely with the reason. The criminal business of the Courts is of exceptional importance. But for the Supreme Court to maintain the proper oversight we do not think it necessary for the anomaly to remain.

436 The final appellate court would be able to continue to exercise that overall supervision and control in respect of jury directions and important sentencing questions even if appeals did not come routinely and directly to it from District Court jury trials: (1) it could hear second appeals by leave in such cases; (2) it could hear direct leapfrog appeals by leave; and (3) it would continue to hear direct appeals in High Court jury trials. Moreover, if overall supervision of the resolution of important questions of law required direct appeals as of right then that would appear to be equally true for many civil and administrative appeals. The Law Commission agrees with those who submitted that the critical matter is that the final appellate court continues to have the opportunity to exercise overall control over the major areas of law and legal policy for which the courts are responsible.

That opportunity can be exercised through second appeals as well as through first appeals - and of course the final court's rulings will have general preventive as well as direct curative consequences for both original courts.

437 That the appeal from District Court jury trials should go as in the normal case to the High Court, the next court in the system, and not directly to the final court is supported by 4 other matters (at least). In the particular case the parties and possibly as well a High Court Judge have made the judgment, on the basis of the legislative scheme, that the particular trial should proceed in the District Court - and not in the High Court. It is not of that degree of complexity or general

importance requiring an original hearing in the High Court; it appears to follow that the appeal should not go directly to the final appellate court.

- 438 The second matter relates to the status of the High Court. It will be handling at the original, jury level only the most serious criminal offences. It would emphasise its distinctive character, if as anticipated 10 years ago, it also had a much enhanced appellate jurisdiction in the criminal area. Its members in handling that particular appellate business would be drawing on their experience of criminal jury trials over which they would continue to preside. They would also be drawing on their growing general appellate experience.
- 439 The existence of that appellate jurisdiction in the High Court had a third attraction. The High Court Judges will be hearing the appeals from another bench and handling matters on appeal which they do not general decide originally. In general it is undesirable for judges of the same court to sit on appeals from their colleagues. And the decision for a permanent court of appeal that was taken in principle in New Zealand 30 years ago was of course to provide for an appeal from one court to a district group of judges sitting permanently for the purpose of handling the appeal in that other court.
- 440 The final reason for proposing that District Court jury appeals go the High Court and not to the final court relates to the work load of the final court. At present the Court of Appeal hears about 350 criminal appeals each year. Because the High Court would have a much lighter criminal jury load direct appeals from it to the final court would be much reduced. Second and leapfrog appeals in respect of District Court trials would, we expect, be small in number - although they would raise major issues of principle. The final court would this be freed from a large volume of the more routine - although still important - criminal appeal business.
- 441 The major alternative proposal about appeals following criminal jury trials was put to us by the Court of Appeal Judges and the High Court Judges. It was for a Criminal Appeal Division of the Supreme Court (to use the title we propose for the final court). The Division would consist 1 Supreme Court Judge and High Court Judges all of whom would be assigned from time to time. It would hear the great majority of appeals following criminal jury trials. In appropriate cases the

appeal could go directly from the trial court to the final court and, in one form of the proposal but not the other, there could be a second appeal to the final court.

442 This proposal is designed to relieve the Court of Appeal of a considerable portion of its criminal work, to enable it to sit more frequently as a court of 5, to give High Court Judges a larger input into criminal appeals, and to let the face of criminal justice be seen in the centres, by the Court being peripatetic.

443 Our proposal, we think, achieves all those purposes, it is rather simpler in its structure, and it does not involve judges of one court sitting on appeals from the colleagues.

444 The appeal is of course in respect of important matters - individual liberty is usually at stake as a result of conviction, the direction to the jury or the jury's finding might be in question, and in some case the sentence will raise major issues of principle (and again involves individual liberty). Such appeals - whether heard in a High Court or final appellate court - are regularly heard by 3 judges. That was the position before and after the 1958 and 1981 changes and we propose no alternation to that. Accordingly the Law Commission proposes that all appeals following District Court jury trials be heard in the High Court and without exception by 3 Judges.

445 We have already recommended that the defendant convicted in jury trials be able to appeal as of right. The leave requirement should be removed.

Appeals from the Family Court

446 At the moment, as we have described, appeals from the Family Court are to the High Court and are usually heard by 1 Judge. Appeals under the Guardianship Act 1968 and the Protection of Personal and Property Rights Act 1988 involve the rehearing of the evidence of appeal. (IN other appeals the general regime applies - the appeal is usually on the notes of evidence taken in the original court, para 414 above). They may then proceed to the Court of Appeal on a law only basis with the leave of that Court. Matters commencing in the High Court are subject to appeal to the Court of Appeal.

- 447 Should the provision in respect of appeals from the Family Court be altered? The Family Court Judges have for some years been of the view that a Family Appellate Court should be established comprising 3 Family Court Judges with the Principal Judge an ex officio member to which there would be a right of general appeal from any final order of the Family Court. There would be a further appeal to the Court of Appeal on a point of law with the leave of the Family Appellate Court or the Court of Appeal. The Family Court Judges express their concern that the one to one appeal is inappropriate, particularly where the appeal is by way of rehearing and involving the exercise of a discretion from a specialist to a non specialist Judge. And they call for the repeal of the requirement of an actual rehearing of the evidence in guardianship cases.
- 448 The broad reasons for the proposed appellate court relate to the distinctive character of the Family Courts, the qualifications and experience of the Family Court Judges, and the special facilities and procedure of the Court. They are in a general way the reasons for making the Family Court separate from the District Court - a proposal which we have already rejected.
- 449 For the same kind of reasons which we have already given in Chapter IV for keeping the Family Court within the District Court we do not support the general proposal made by the Family Court Judges (paras 207-220). One of those matters might be stressed here: the present legislation (which we propose should be continued with limited changes) enables matters to be transferred into the High Court. The transfer decision would determine whether the first appeal should be heard by a special court or a general one. We cannot see the justification for that discrepancy.
- 450 Indeed in the case of appeal the reasons for distinction and separation are less strong, since the issues on appeal are in practice more likely to be general ones of law and principle, the court hearing the appeal has the advantage of the judgement of the Family Court, and in it can give appropriate weight to the significance of the Family Court Judge's qualities in the particular case. Moreover, as the High Court Judges say, there are dangers in allowing the development of a self contained particular jurisdiction operating within but in isolation from the overall structure. Furthermore, that isolation could not be complete since occasionally,

depending in part on the accidents of litigation, there would be decisions by the final court in the system.

451 We have more general reasons for opposing such a collegiate appellate court. In his influential Melbourne speech of 35 years ago Lord Evershed, having said that not too much importance should be attached to the proposition that judges sitting temporarily on appeal over one another may think over much of what may happen later when their own cases come up for review, went on to stress that the appellate function is a distinct function ((1952) 28 NZLJ 41). As the High Court Judges say, there is much to be said for another perspective to be brought to bear on appeals. And, as we have mentioned a number of times, this opinion was acted on in a most important way with the creation of a permanent separate Court of Appeal.

452 Accordingly, we would see appeals from the Family Court continuing to be heard by the High Court. However we propose 2 changes to the present system - appeals should usually be heard by 3 Judges, and there could in exceptional cases be a direct appeal to the Supreme Court (with its leave).

453 A further question about appeals in family matters remains: should the standard method of hearing appeals, that is without rehearing the evidence, also be followed in guardianship cases? This question led to a division of opinion of the Beattie Commission, paras 503-512. The Guardianship Act 1968 requires that every general appeal to the High Court is by way of rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court. The evidence is actually heard afresh. The reasons for such an exceptional provision are presumably (1) the paramount importance of the issues especially to the child and also to the other parties, (2) the greatly reduced significance of an appeal confined to the notes of evidence when so much turns on the facts and on the court's assessment of the witnesses, and (3) changes in circumstances between the time of the original decision and the appeal hearing.

454 The second and especially the third of these matters suggest that very often an application for a rehearing or an entirely new application to the original court with its expertise and support systems are more appropriate remedies than appeals; this is a situation that evolves and where the ordinary concepts of res judicata are less

relevant. The remedy of an entirely new application is not of course usually available to those wanting to challenge judicial decisions. Restricting the appeal hearing would also give proper weight to the special qualities of the Family Court with its expert team. And to recall reasons given for the general restraint on the appeal process, the parties would not be able to treat the first hearing as a trial run for the appeal, and costs and delays (and related anxieties) would be lessened. These are power full arguments for restricting the appeal hearing, as well as for using new applications on rehearings. We are not however persuaded that when there is a general appeal the present provision for an actual rehearing should be altered; the considerations mentioned in the preceding paragraph remain very strong.

The Composition of the Court - One Judge or More?

455 We have proposed that the court handling the criminal jury trial appeals consist of 3 judges because of the importance of that business, as shown in part by the historical record.

456 There are other reasons relating to the business, the judges and the litigants for proposing that in general appeals from the District Court to the High Court should be heard by more than 1 Judge. The first is the importance of some appeal business - other, that is, than the criminal jury business. Consider matters heard on appeal from the Taxation Review Authority ad the Planning Tribunal; or many family appeals. Moreover, even much of the business of the District Court might instead originate in the High Court, and in that event and first appeal would go to 3 Court of Appeal Judges. Next we are proposing wider original jurisdiction for the District Court - and accordingly matters that would now be heard on first appeal by 3 Court of Appeal Judges would, in the absence of consequential change, be heard on appeal by only 1 Hugh Court Judge.

457 A second reason relates to the position in our legal system of the District Court Judges. The status, qualification and jurisdiction of the District Court Judges have been progressively enhanced. We are making further proposals in that direction. It does not appear to us to be consistent with that for appeals from the decision of 1 of them to be heard by just 1 High Court Judge. It is significant that in England

Divisional Courts and Courts of Appeal consisting of 2 or 3 judges hear appeals from county courts and other courts and tribunals. (By contrast, a single High Court Judge may hear appeals from officials, Masters and some tribunals).

458 The third and important way of looking at the matter is from the point of view of the litigants. An unsuccessful respondent may feel justifiably aggrieved if a single judge, possibly with less experience in the relevant area than the first instance judge, overturns a decision on a most important matter. On the other hand an unsuccessful appellant may justifiably feel deprived of a real right of appeal if in such a case the single appeal Judge defers, perhaps inappropriately, to that experience and to the possible advantages that the trial Judge had.

459 Two main arguments are made against changing the present system of appeals. The first is that much relatively slight business may not seem to justify more than 1 judge. That argument is however of reduced force when the changes in civil and criminal jurisdiction which we are proposing are taken into account. And those who make it agree that some of the appeals, for instance in the administrative and family jurisdictions, can be of major importance and would certainly justify more than 1 judge. Moreover, we think that the significance of criminal appeals should not be underestimated. They may appear routine to the outside observer. For the defendant appealing against a conviction or a prison term the perception of what is at stake is likely to be different.

460 The second argument against having more than 1 judge is the limited availability of 2 or 3 High Court Judges in circuit centres. That is an important practical problem emphasised for instance by the High Court Judges and the Department of Justice. We have already noted that about a third of appeals are heard in such centres. Three answers to the problem suggest themselves. First, the appeal might be heard in another centre - much litigation is after all transferred for reasons of the convenience of counsel, the court and others. (So there Court of Appeal has only rarely sat outside Wellington.) Secondly, an additional Judge might in fact be able to be available for appeal hearings (in 1987 Dunedin, Napier and Rotorua had 2 Judges during 1, 3 and 2 months respectively). And, thirdly, the parties might be enabled by legislation to consent to their matter being heard by 1 Judge.

461 Accordingly, the Law Commission recommends that in general appeals from the District Court to the High Court be in general heard by 3 Judges. For instance, the court would consist of 3 Judges for appeals from jury trials (as already recommended), and for administrative appeals and family proceedings appeals. In other cases a senior Judge should have power to determine that the Court should comprise 2 rather than 3 Judges on the ground that the matter is not so complex or of such importance as to require Judge court. The parties could agree to a court of 1 or 2 Judges. If a 2 Judge court disagreed then the appeal would fail. Such disagreement appears to be uncommon in jurisdictions which use 2 Judge courts - and indeed the proportion of dissents in 3 Judges panels in the Court of Appeal is very low as well. (One alternative would be for such a case to be re-argued before a 3 Judge Court; for example Supreme Court Act 1981 (UK), s 54(5)(b) for the Court of Appeal but compare s 66 for a Divisional Court of 2 where the decision below stands.)

Expert members and assessors

462 The legislature has sometimes recognised the special character of the decisions to be taken by the High Court on appeal by providing for additional members with appropriate qualifications. So they are added for appeals from decisions of

- the Equal Opportunities Tribunal in respect of illegal discrimination;
- Land Valuation Tribunals;
- the Commerce Commission;
- the Animal Remedies Board (assessors named by the parties rather than members named by the Court or the executive);
- the Fishing Industry Board (on the same model as animal remedies);
- the Director-General of Health in respect of clean air requirements.

In general the decision of the Judge is the decision of the Court.

463 Such recognition of the special character of such decisions does not however appear to be consistent. In this area as in others relating to appeals we have a hotchpotch of appeals. Thus, to be contrasted to animal remedies appeals (which are general) are those relating to medicines and pesticides where the appeal is to the Administrative Division (without additional members) and is not general but is limited grounds - that the decision was taken unreasonably or in breach of the Act. A further contrast appears with toxic substance decisions where there is no appeal at all. In the fishing area, appeals from the Fisheries Authority go to the Administrative Division (without additional members) and are general while there is no appeal at all from the ITQ Appeal Authority.

464 The Law Commission is not in a position to propose specific changes in areas such as these. We agree with the Legislative Advisory Committee that a more principled and consistent approach should be adopted, Administrative Tribunals (1989) paras 56-71. Thus where there is a strong argument that the expert element of the original decision should be given significant weight, the right of appeal might be limited to questions of law (with a possibility of the expert body being directed to reconsider the matter in the event that it has misunderstood the law). If 3 Judges comprise the Court hearing the appeal we do not think that provision should be made for additional members to be added automatically. Rather the Court should have power as appropriate to involve experts in a particular matter as witness or referees.

The Administrative Division

465 The Administrative Division of the Supreme Court (as it was then) was established in 1968. It was a first attempt to bring some order into the system of appeals from administrative tribunals. According to the Public and Administrative Law Reform Committee which proposed the setting up of the Division the law was unsatisfactory - inconsistent, complex, apparently unplanned, or possibly the result of different plans at different times; there was 'a bewildering variety of appeal rights (or lack of them), of types of appellate bodies, of constitutions, procedures and jurisdictions'. The status of the appeal bodies was not readily understood and recruitment was difficult as a result. Moreover much of the appeal business raised issues of first class importance in modern society - matters that

should be dealt with by a court of appropriate status. For the Attorney-General of the day, the Supreme Court would no longer be bypassed but would now become directly involved in some of the most important judicial questions to be decided (356 New Zealand Parliamentary Debates 1067).

466 While those matters led the Law Reform Committee and the Government to the conclusion that the Supreme Court should have a much greater role in handling tribunal appeals, both were also persuaded to of the importance in this context of special knowledge and experience. According to the Committee in its first Report (1968)

while the value of special knowledge and experience can be exaggerated in this context, we have no doubt that real advantages are to be gained by ensuring that administrative appeals are dealt with by a limited number of judges specialising inter alia in the field of administrative appeals. This would make for consistency of judicial policy and approach and for the ready acquisition of skill and experience in dealing with the problems of administrative law. It would also make for economy of effort.

467 The intention accordingly was to attempt to gain the advantages of the qualities, authority, and status of the Supreme Court on the one hand and of relevant expertise and specialisation on the other. That expertise would be enhanced as the limited number of Divisional Judges handled the new jurisdiction and built up their knowledge of it. The Committee also saw specialisation occurring within the Division. Again the issue is the best balancing of specialisation and general judicial qualities and skills.

468 It is now possible to measure the facts against the expectations. The Committee's proposals was for permanent appointments to the Division by the Government. The legislation however gives that power to the Chief Justice and the number of positions had been increased from 4 to 7. Nineteen Judges have been appointed to the Division in its 20 year history and about one-tenth of the cases have been decided by non-Division Judges. Those numbers of Judges are significant when the volume of cases is considered. (Most of the information in this and the following paragraph is from a 1988 paper by Professor S Legomsky, Specialist Justice, a study of the Administrative Division.)

469 The volume of cases is affected by a second departure from another original proposal - that extensive jurisdiction be conferred on the Division at the outset

(including transport licensing and town and country planning). The initial legislation merely established the Division and left it for other statutes to confer jurisdiction. Fifty-seven statutes (at least) now confer jurisdiction (see Appendix G) and there is now as a consequence a somewhat greater consistency in the appeal arrangements than there was in 1968. But the anticipated volume of work and related specialisation has not occurred. Division Judges give only about 30 decisions each year (with a low of 16 in 1975 and a high of 47 in 1984; the 1986 and 1987 figures were 19 and 21). The median per Judge per year is only about 4.5 cases. Some Judges have decided a reasonable number of cases in the areas of planning, land valuation and liquor licensing. Of those 3 areas (which make up about 60% of the total business) appeal in the first is on law only (and accordingly is not greatly different from common law review) and the 2 other areas were being handled by Supreme Court Judges in 1968 in any event.

470 That is to say, the establishment of the Division has not meant a built up in the volume of administrative law work or (in general) in related expertise and specialisation for the Division members. Moreover, High Court Judges now have more experience of handling administrative law matters (and they will generally have had that experience before appointment as well). Thus of 26 case raising public law issues included in the 1987 volumes of the New Zealand Law Reports only 8 were Administrative Division cases (so far as the Reports indicate) - 5 planning, 2 Commerce Commission and 1 public works. Accordingly, the subject matter is not to be seen as 'special' as some saw it 20 years ago.

471 Next, Parliament does not appear to have a completely clear policy to use the Division rather than the Court in administrative areas - we have already mentioned the inconstancies in respect of censorship appeals (para 410); social security and accident compensation appeals go to the Division, legal aid to the High Court, and tertiary (education) grants and some war pension matters have no express appeal provision; registration and disciplinary appeals relating to chiropractors, dietitians, doctors, electricians, surveyors and psychologists go to the Division while architects, dentists, lawyers, plumbers and veterinarians appeal to the High Court; plant variety appeals go to the Division while other intellectual property appeals go to the High Court; transport licensing and charges appeals go to the High Court but most other licensing matters to the Division.

472 We have no doubt that public law, including the judicial review of, and statutory appeals against, administrative decisions, has grown in importance in the last 20 or more years. That growing importance appears outside the court system as well. We do not see this as a special development which at the appellate and review level ought to be kept separate, within the regular court system. Rather this business is part of the constitutional role of the Queen's Judges constituting the High Court of determining the scope of executive power and protecting the citizen from the abuse of that power.

473 There is also a practical consideration. If as we propose the High Court hearing administrative appeals should normally consist of 3 Judges the requirement that only particular Judges may sit on those appeals may create administrative difficulties.

474 Accordingly the Law Commission recommends that the Administrative Division be abolished and that its jurisdiction be exercised by the High Court. In general, in accordance with our earlier recommendations, the High Court handling that important appellate business will consist of 3 Judges.

The grounds of appeal

475 We recommended earlier that the legislative choice of the ground of appeal should be limited to general or law only. Unless there is good reason to the contrary, appeals from the District Court or any other Court to the High Court should be general appeals - although in the usual case without evidence actually being heard on appeal. One good reason to the contrary requiring a narrow right of appeal is the limit on prosecutors appeal in summary cases to question of law. We see no reason to propose any change to that, although the right of the defendant in such cases to appeal on a point of law appears to be something of an historical relic and no longer justified given that the general right of appeal is conferred in broad terms. We recall the proposal we made earlier that the Crown have a power to refer questions of law to the Supreme Court following an acquittal in a jury trial (para 234).

476 The legislation also suggests a second major category of appeals limited to questions of law - second appeals - or at least the legislation dealing with

particular jurisdictions does; by contrast the general provisions of s 67 of the Judicature Act 1908 dealing with second appeals are not limited. Given the principal purpose of a second appeal such a limit can be justified, but in practice it probably makes little or no difference given the reluctance of a court at that stage to examine questions of fact. We come back to that matter in considering the Supreme Court.

477 Should the appeal from tribunals be general or limited? Appendix G shows that in a large number of cases the appeal right has been limited. In a few cases, where the appeal is general, additional expert members sit with the Administrative Division Judge. In those 2 groups of cases Parliament has presumably made the judgment that for reasons of expertise, consistency and possibly expedition and costs the appeal should be limited. They are the reasons, discussed in Chapter III, for assigning the functions in question to a tribunal rather than a court.

478 The legislation also shows however that in a large number of cases - if not in a majority - the first right of appeal is a general one. This is particularly true for occupational and professional registration and disciplinary appeals. Parliament presumably has recognised the great importance of such decisions to the particular member of the profession or occupation. In those areas the issues could be of a particular character, such as the standards and methods of a profession. Expert matters might also arise in other tribunal areas, such as air services licensing, customs and taxation, and some liquor licensing matters, where also the right of appeal is conferred in general terms. That broad grant presumably is done in recognition of the facts (1) that in areas where specialist and expert knowledge is important, the appeal court will be informed and helped by the expert decisions already given and by the argument presented to it (courts after all in their general jurisdiction deal with many complex scientific, technological and commercial matters), and (2) that the court may, against the background of requiring there appellant to find significant error in the decision, defer to the expert judgment of the tribunal. It is not far us at this stage to propose changes to the scope of particular appeal provisions. We do however caution against too easy an acceptance of the proposition that appeals against tribunal decision should be limited to questions of law. We also recall that another way of handling the matter may be to add assessors to the court - as with some intellectual property matters

and wider appeal provisions concerned with medical and scientific matters. So far as possible one full right of appeal should be conferred.

APPEALS TO THE SUPREME COURT

479 The Supreme Court under our proposals would be the final court in the New Zealand system of justice. It would have the final responsibility, to the extent appropriate for a court, for clarifying and developing the law, and of course for determining the appeals and other matters brought before it. That is a major and critical responsibility in our system of constitutional government. The Court must be put in a position, so far as legislation and other means can achieve that, in which it is able to meet that responsibility. But those measures while necessary are not sufficient. Also essential are the calibre and quality of the senior Judges who comprise the Court, along with the ability of counsel who appear before them. The proposals we make are designed to facilitate the meeting of the responsibilities. A central element in that is the overall workload of the Court. It must be such that the Judges have the proper opportunity to meet their serious responsibilities. We have touched on that matter already (paras 370-372). We discuss it more fully in this section.

480 We have already indicated the major area of Supreme Court jurisdiction under our proposals-

- (1) first appeals from decisions of the High Court given in its original jurisdiction both in civil and criminal matters;
- (2) first, leapfrog appeals from decisions of the District Court (including the Family Court) and administrative tribunals;
- (3) second appeals from decisions of the District Court (including the Family Court) and administrative tribunals, the first appeal having been heard in the High Court, probably by 3 Judges.

Right of leave?

481 First appeals from final decisions would in general be of right while appeals from interlocutory decisions and second appeals would be by leave. We have already

given the broad reasons for the leave requirement. Leave in respect of interlocutory appeals would be granted by the High Court or, if it refused, by the Supreme Court. It would be for the Supreme Court alone to decide whether to grant leave in the other cases - that is second appeals and leapfrog appeals. It could be assisted in those cases by a certificate from the Court from which the appeal is being brought, as with other final courts such as the House of Lords. The reason for giving the leave power exclusively to the Supreme Court and not conferring it as well on the lower court is to be found in the role of the final appeal court in such a case. It has the role of clarifying and developing the law and when the appeal is not a matter of right that Court should determine whether or not the case is appropriately before it. That view had been broadly accepted in respect of the final national courts in Australia, Canada and the United States.

A final court in respect of all courts and related bodies.

- 482 It should be possible for matters originating in any court or tribunal to come before the Supreme Court if the issue is one of major public importance. (this is subject to the qualification mentioned earlier that some decisions might not be to the subject of any appeal at all.) At the moment prohibitions on appeals beyond the High Court can cause inconsistencies in the law which the superior courts may find difficult or impossible to resolve. Appendix G indicates 2 areas where that problem has arisen - the tests of indecency, and matters arising under the Sale of Liquor Act 1962. As to the former, matters originating in District Courts and the Films and Videos Boards of Review can proceed to the Court of Appeal while those originating in the Indecent Publications Tribunal cannot be moved beyond the High Court of 3 Judges. Appeals under the Sale of Liquor Act 1962 cannot proceed beyond the Administrative Division of the High Court with the possible consequence of inconsistent decisions being reached by individual Judges of that Division and there being no methods of resolving that. Under our proposals, the matters mentioned here would in general get to the Supreme Court only with its leave. It would follow that all the specific sections providing for a second appeal would be unnecessary. If any appeal were not to be provided for in a particular case express statutory denial would be required.

Grounds of appeal

- 483 If the appeal is a first appeal (as the matters which originate in the High Court) then the appeal should be general but, as at present, evidence should not in general be heard at that stage.
- 484 Should second appeals be limited to questions of law? As we have said, the statute book at the moment provides conflicting answers. The general, residual provisions of s 67 of the Judicature Act 1908 relating to second appeals are not restricted, nor is the power of the Judicial Committee of the Privy Council. By contrast, as Appendices F and G show, specific sections providing for a second appeal following a general appeal almost always limit that appeal to questions of law. (If the first appeal was on law only then it follows even in the absence of an express provision that the second appeal is similarly limited.) That limit does of course recognise the special character of the second appeal: the emphasis is on the court's role of reviewing, clarifying and, if appropriate, developing the law and less on the particular case.
- 485 The question does arise whether the limit to law only makes a practical difference for a second appeal to a final court with that public function. In general it may not - the court will be emphasising the questions of law and principle and will consider itself less able to question findings of fact. But there are cases in which courts hearing second appeals have reached different findings on the facts from the intermediate court. Should that continue to be possible? Or should Parliament emphasise the special character of a second appeal to final court by limiting it to questions of law? We think that that narrower emphasis is appropriate. It will often be given an even sharper focus by the conditions on which leave is granted. Accordingly the Law Commission proposes that second appeals be limited to questions of law.

The likely volume of the business

- 486 The appellate business of the Supreme Court would differ in various ways from the present business of the Court of Appeal. With the increased civil jurisdiction of the District Court and with a leave requirement for interlocutory matters the volume of civil appeals should drop somewhat. (So the introduction in 1985 of a

leave requirement for interlocutory matters in the British Columbia Court of Appeal screened out half of the interlocutory appeals that year; the leave process itself does of course involve some - but much less - judge time.) The extent of the decrease on the civil side is a matter of some conjecture. Without any doubt the criminal appeals would drop substantially. Almost all criminal appeals from the District Court would be heard by the High Court (and not the Supreme Court), and the numbers of jury trials in the High Court and accordingly as well. At the moment the Court of Appeal decides about 350 criminal appeals a year. Under our proposals the Supreme Court would as a consequence be deciding a much smaller number of criminal cases - although the appeals it would hear would be of greater difficulty and would continue to include some from District Court trials (by way of a second or leapfrog appeal).

487 Any speculation about case loads is hazardous. But the civil appeals determined each year might reduce to about 120 and the number of criminal appeals be perhaps even lower. The reduction of business is not as large as suggested by the raw figures since the civil cases on average require much greater attention in terms of time.

488 The change in the balance of cases being handled in the Supreme Court as compared with the current work of the Court of Appeal might suggest that we regard criminal matters as of less importance. We do not. Indeed compare with the Judicial Committee and some other final courts such as the House of Lords and the High Court of Australia the Supreme Court would handle a larger proportion of criminal cases. And we anticipate that under our arrangements a larger number of criminal matters would be the subject of 2 appeals than is currently the case. Indeed for first time there will be a real likelihood of a second appeal in criminal jury matters. The Supreme Court would continue to have before it the most important issues of criminal liability, criminal justice process and sentencing. It would have overall control of them. Because of some reduction in its business and because some of the cases would already have been the subject of one appeal it would be in a better position to handle them.

The composition of the court

489 The changed business is to be put against the numbers of Judges available to handle, it. At the moment 6 permanent Judges deal with the great bulk of the work. (The seventh permanent position provided for in 1987 has not yet been filled.) The Chief Justice has sat only rarely in recent years, but High Court Judges and retired Judges have at times increased the number sitting throughout the year by up to the equivalent of about 1 Judge. A permanent complement of 7 Judges appears to us to be capable for the foreseeable future of handling the business with the reductions we propose. We would not envisage the appointment of temporary Judges except in extreme situations. That is to say, we regard as important the real essence of the decision that was made more than 30 years ago to have a permanent group of appellate judges meeting in a way the responsibilities of the final court of our system of justice.

490 One measure of the ability of a court of 7 Judges to handle the business is the recent statistical record of the Court of Appeal to which we have referred. Another measure is comparative. The New South Wales Court of Appeal consists in practice of 7 permanent Judges. (The Chief Justice may also sit and Supreme Court Judges are also named as additional Judges for certain proceedings, but in 1986 and 1987 they are involved in only 2% and 5% of the work of the Court as measured in sitting days.) The Court does not have criminal jurisdiction. In 1987 it gave judgments in 294 civil cases (to be compared with the New Zealand Court of Appeal figures of 111 civil and 312 criminal cases). Each Judge participated in about 120 cases (we omit those who did not serve the whole year) - that was also approximately the 1986 figure. Each case had an average hearing time of 3.2 hours (3.7 in 1986). The New Zealand Court sits between 200 and 250 days per year and therefore each Judge on average sits about 120 days each year. On average the New South Wales Judges sit about the same number of days. A recent inquiry into the Scottish courts showed that superior courts judges (including appeal judges) there sit up to 150 days a year (*Report of the Review Body on Use of Judicial Time in the Superior Courts in Scotland*, Chairman: the Honourable Lord Maxwell, Scottish Courts Administration 1986). That figure has regard to the time required for preparation for cases and for writing reserved judgments. Some Canadian figures are also instructive. The British Columbia Court of

Appeal in 1985 had 13 permanent members, generally sitting in panels of 3. They disposed of 513 civil cases (that is about 4 times the New Zealand figure) and 344 criminal (about the same as New Zealand), with each Judge sitting about 30 weeks a year. The Ontario Court of Appeal of 16 Judges disposed of a similar number of civil cases (448) and about 3 times as many criminal appeals (993) (see the 1985 Report of the Court of Appeal of British Columbia).

- 491 In a broad way therefore the projected case load and sitting time of the members of the Supreme Court appear to be reasonable. One matter -relatively intangible - which distinguishes them from the groups of Judges just mentioned and which must be taken into account is the fact that they will be members of the final court in our system of justice.

Three Judge and full courts

- 492 An important related matter is the number of Judges who should sit in the Supreme Court on each particular case. The practice of the Court of Appeal is instructive. In the large proportion of cases it sits as a court of 3. Increasingly throughout the 1980s it has sat as a court of 5 (or even larger) when the situation appears to demand. there proportion of civil cases with the panel of more than 3 was about 4% in 1982 and 10% in 1986. In 1988, a larger panel sat in 45 cases out of a total 523 heard - criminal as well as civil.
- 493 That practice in part reflects the 2 different functions of an appeal court mentioned earlier - the correction of the particular decision and the review, clarification and development of the law. It also reflects an assessment of the public importance of the case. So major cases in which a 5, 6 or 7 Judge court has sat include central issues of criminal procedure, important sentencing issues, challenges to the procedures of Commissions of Inquiry, challenges to the validity of economic stabilisation regulations, liability for negligence of Ministers of the Crown, the Maori Council case about the principles of the Treaty of Waitangi, the role of the Labour Court, and the method of voting in general elections. The Court of Appeal has also indicated that when one of its decisions is to be challenged in an appeal it is to have notice of that and that the matter ought not to be dealt with expect by a court of 5, *Shing v Ashcroft* [1987] 2 NZLR 154, 157.

- 494 We expect that the occasions for a larger panel would continue to increase under our proposals: the Supreme Court would be hearing some (second) appeals from High Courts of 3 Judges and it will of course be sitting as the final court in our legal system. We would however expect that 3 Judge panels would continue to handle many matters, such as first appeals following jury trials in the High Court. It is not common in systems like ours or an appeal to go from a court of 1 Judge to a court of 5 or more.
- 495 We do not think that there is advantage at this stage in trying to formalise the criteria and process for forming a larger panel. That can be left to practice of the kind that is developing. And it might be expected that the Supreme Court in granting leave on public interest grounds for a second or leapfrog appeal might assess whether a full court is required.
- 496 We mention one other matter relevant to the composition of the Court. British Judges and very occasionally senior judges from other parts of the Commonwealth have formed the final court in our system, the Judicial Committee of the Privy Council. That will no longer be so when appeals to the Judicial Committee end. The question has been raised nevertheless whether in the future the final New Zealand court might occasionally include judges from other jurisdictions. There are of course other precedents for that. Some New Zealand judges have sat in the Judicial Committee. They and others from the region serve in various courts in independent Pacific countries, and the South Pacific Forum has recently called for that practice to be put on a more organised basis.
- 497 There may be some attraction in the proposal. We would continue to benefit from the legal and judicial experience of senior judges from larger jurisdictions within our tradition, and it would be a guard against isolation. We think however that those advantages would not be great and are likely to be available in other ways. Even more they are outweighed by the disadvantages. The underlying motive for ending Judicial Committee appeals is that the final New Zealand court responsible for clarifying and developing the law of New Zealand should be composed of senior New Zealand judges who are part of our community and closely familiar with our historical, social and legal history. Moreover they should be part of a permanent court, made up of judges regularly working together as a collegiate

group. To repeat the point, it is now 30 years since we accepted in a broad way the proposition that we should have the final court actually sitting in New Zealand with permanent New Zealand members. A court with occasional members and drawn from outside New Zealand would contradict both those purposes.

498 In addition other ways are available, and increasingly available, to ensure that we continue to benefit from legal experience from elsewhere and that our legal system does not become isolated. Counsel and judges increasingly draw on authority and ideas from other jurisdictions in arguing and deciding cases. Our judges participate in conferences and seminars with their colleagues in other countries such as the Australian Institute of Judicial Administration and the Association of Family and Conciliation Courts. Our Parliament is also affected extensively by international standards - one estimate is that as many as one-quarter of our statutes are affected by treaty and related standards (Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report No 1, 1987), Appendix B). An increasing number of New Zealand lawyers deal with lawyers in other countries (and their law).

499 These influences are growing rapidly with the much greater diversity of our trade and the movement of people, as seen especially in the Closer Economic Relations Agreement with Australia. That has been given greater emphasis by the Memorandum of Understanding about the harmonisation of business law signed by the Attorneys-General of the 2 countries on 1 July 1988. Such developments affect not only our judges, our legislators, and our lawyers. They also have consequences for methods of dispute settlement. They to are becoming transnational and international with the development for instance of international arbitration and of such bodies as the International Centre for the Settlement of Investment Disputes established within the World Bank. We do not see any real prospect of our legal system, judges and lawyers becoming isolated. The evidence is strongly in the opposite direction.

VII The Judges

INTRODUCTION

500 This chapter and the next are shorter than earlier ones. That does not indicate that their subject matter is less important. On the contrary, the best scheme in the world will not work justly, effectively and efficiently unless the judges and others responsible for working within it are of quality - and unless good administrative arrangements are in place. The comparative lengths of the chapters are in part a reflection of the facts that this Report gives major emphasis to the structure of the courts and that it has in any event already given major attention to the need to match the available judicial talent to the varying tasks facing the courts.

501 The emphasis of the Report, along with the submissions made to us, means for instance that we have not given close attention to such matters as:

part-time judges; we note that some tribunal members are part-time, as are many arbitrators, and that Masters can be;

the use of judicial officers who are not necessarily legally qualified and who handle matters of less apparent importance (this matter has of course been recently addressed in the small claims and residential tenancies areas; we do make proposals which could widen the jurisdiction of Justices of the Peace over minor offences, para 160 above);

the representative character of the judiciary (a matter touched on in para 521);

the use of special panels for sentencing;

the role of the Maori Land Court;

the selection of judges; and

judicial training (on which there are developments in New Zealand and elsewhere).

502 The proposals in this Report involve the drawing of a clearer line between the 3 courts of general jurisdiction. They are aimed to match the qualities, talents and experience of those groups of judges to the work which they are to do. Accordingly, we would see each of those groups of judges remaining within their particular court, although we see as well some continued specialisation, especially in the District Court and there is of course the possibility of promotion. Within or associated with the Court are also the Justices of the Peace, Dispute Tribunals referees and the Tenancy mediators and adjudicators - judicial officers who play a significant role in the day to day delivery of justice in New Zealand.

503 We consider in turn

- (a) the numbers of Judges;
- (b) recruitment of Judges;
- (c) specialisation;
- (d) Masters;
- (e) the Chief Justice of New Zealand;
- (f) certain administrative matters.

NUMBERS OF JUDGES

504 The principal matter considered here is the absolute number of Judges. (We have called attention through the Report to the balance between the courts, especially the 2 courts of general original jurisdiction.) Attention has often enough been called to the overall growth in the total numbers of Judges. Some figures help set the scene. We repeat again the point about the inadequacy of justice statistics, a matter which we are pleased to see is being addressed (paras 556-559 below). We can however learn some important lessons from the facts we have. (We have already looked at some of the Court of Appeal statistics relevant to the number of Judges, paras 371-372, 486-491.)

	Population (Million)	SC/HC Judges	SM/DC Judges
1947	1.8	10	35
1957	2.2	13	35
1962	2.5	15	40
1967	2.7	16	45
1972	2.9	17	50
1977	3.1	23	60
1972	3.2	27	85
1987	3.3	31	96

(The figure for Supreme Court and High Court Judges is of permanent Judges actually appointed; it includes (since 1958) the members of the Court of Appeal. The Magistrates' - District Court figure is that fixed at the relevant time by statute and includes those carrying out tribunal functions. The 3 Masters of the High Court could also be added. Late in 1988 Parliament increased the maximum number of High Court (including Court of Appeal) Judges to 32 and of District Court Judges to 98.)

- 505 Over the 40 year period the population has increased by about 80% while the total number of Judges has almost trebled. In the past 25 years or so the population has increased by about 30% while the number of Judges has more than doubled. We must of course take account of the increase in the judicial business. It has grown (in some areas at least) more rapidly than the population. So since 1962 the numbers of persons indicated and seeking jury trials has more than trebled. Summary criminal work has also grown rapidly (although with changes introduced by infringement fee and minor offence procedures).
- 506 On the other hand, as we have seen, the civil work of the District Courts has, if anything, fallen in recent years and the number of family proceedings in the Magistrates' and Family Courts has not altered greatly (apart of course from the dissolution jurisdiction, transferred from the Supreme Court) - although there is an increasing and heavy mediation role for the Family Court Judges. And then, while the civil statistics of the High Court side are not adequate, the number of civil trials recorded show no increase (430 civil trials in 1962 and 417 in 1985) although they have undoubtedly changed in character and perhaps in complexity, and there is now an equal amount of other civil business which does not come within the figures.

- 507 More significant perhaps than the numbers of cases in particular categories are the sitting hours of groups of judges. On the basis of those figures it is possible to make some comparisons over time, between different groups of judges, and with other similar jurisdictions. The sitting time is of course only an initial statistic. To get a full picture there has to be added information about work done out of court. (Regard has to be had as well to such matters as the other commitments of judges - to inquiries for instance - and to their leave, and, on the other side, to the contribution of temporary judges.)
- 508 The only full published detailed inquiry into judicial time that we are aware of is that recently undertaken in respect of the Superior Courts in Scotland, Report of the Review Body of the Use of Judicial Time in the Superior Courts of Scotland (1986) (also mentioned earlier, paras 490). That involved the Judges in the Inner and Outer Houses of the Court of Session keeping a detailed personal record of time spent out of court on judicial and extra-judicial work over about 3 months. The Review body also gathered information about their sitting times and comparative material from England and Wales. Such an inquiry could be undertaken here with considerable advantage. In the meantime however we can make use of the sitting hours - as indeed have the Scottish Committee, the English Civil Justice Review and the Ontario Courts Inquiry each of which have reported over the last 3 years.
- 509 In each recent year the average number of sitting hours for each District Court Judge has been between 600 and 650 (Appendix C). That can be translated to about 3 hours a day on the basis of 200-220 sitting days a year. The High Court yearly figure is a little lower. However, if sitting days are fewer (as for good reason they are likely to be) then the daily average for actual sitting days would be higher. The Auckland Masters estimate that they sit 20-25 hours a week.
- 510 The figures are to be compared with those just mentioned. The Scottish Review Body found that the Superior Court Judges there were allocated judicial duties on 194 days, 169 of which were sitting days, 3 days overall for preparation and 22 writing days. They were in general allocated court business on the basis of a 5 hour bench day (or 845 hours a year) but during the 3 months survey period sat 3.9 hours a day (or 660 a year). On the basis of these figures and the information

about the out of court work, the Review Body concluded that the amount of time contributed by the Scottish Judges to their judicial duties was fully acceptable; it bore favourable comparison to their English and Welsh counterparts. They thought as well that better use could be made of the in-court judicial time already allocated and proposed relevant administrative changes (paras 2.2a and b).

511 The Honourable Mr Justice T Zuber of the Ontario Court of Appeal published his Report of the Ontario Courts Inquiry in 1987, the year following the Scottish Report. He proposed that the normal sitting hours each day be as follows:

appellate court judge - 4 hours (the proposed Supreme Court sitting 1 week in every 2, the proposed Court of Appeal 2 in every 3);

superior court judge - 4 hours (sitting 3 weeks in every 4);

provincial court judge (5 hours with judgment weeks as required).

(para 7.29, p 171, and recommendation 81, p 284.)

512 Mr Justice Zuber referred in the Report to practice and recommendations elsewhere (including 4 hours for the Supreme Court of British Columbia). In the context of the Provincial Courts he arrived at the important conclusion that an average sitting day of only 3 hours is unacceptably low (p 170).

513 The English Civil Justice Review which was published in 1988 recommended that for both the Country Court and the High Court a 5 hour sitting day, 5 days a week should be the normal objective (R 44, para 335). (The figures for courtroom use - not quite the same as Judge sitting hours - were 3.5 and 4.2 hours respectively.) circuit judges normally sit for 210 days a year and High Court sittings normally last for 188 days. The Review Body recommended no change in the High Court figures (R 45, para 336). That is to say the total hours for Circuit Judges could be up to 1000 a year and the High Court figure comparable to the 1977 New Zealand Supreme Court figure.

514 The changes in the New Zealand High Court figures over the years, in the nature of High Court work, and in the character of litigation lead us to make only one proposal relating to the High Court figures: that there should be a more systematic

and careful examination of the work of the High Court Judges so that a better and continuing judgment can be made about the allocation of that work and about the judicial and other human resources required to handle it. The Scottish study provides a possible model although (as it recognises) the process should be an ongoing one.

- 515 The real point that is demonstrated by the figures is in respect of the District Court Judges. Their average workload is low. A number of them have indeed indicated that they were not only willing but wished to do more. We propose that this should happen. A 5 hour sitting day, 5 days a week should be the normal objective for each District Court Judge. A closer calculation of the desirable number of sitting days in each year should be made, but there appears to be no reason why it should not be assessed at the English County Court figure of 210 at least.
- 516 The proposal mentioned earlier about a minimum of 2 different summoning times for summary criminal work is relevant to such an increase. We appreciate that different categories of business (such as the family jurisdiction) might require more extensive out-of-court work. The more substantial jurisdiction that we propose would also increase preparatory and reserved judgment time, but that will mean that the task of the District Court Judges will become more comparable to that of the Circuit Judges in England.
- 517 We also take the point that it is necessary to consider particular courts and areas of New Zealand. The matter is not simply one of taking an overall national figure. The New Zealand position cannot be equated to that of England, which is heavily populated and has a substantially centralised court system. On the other hand modern means of transport help, Ontario too has problems of distance, and some evidence suggests that average sitting times are sometimes in fact lower in the major cities.
- 518 We now turn to the impact that the changes we have proposed might have on the workload of the High Court and District Court. The criminal jury work of the High Court should drop substantially. At the moment, as we have noted, it occupies in constant terms the equivalent of 9 of the 25 Judges. Depending, of course, on the extent of the criminal business which is transferred to the High

Court we think that figure could be reduced by two-thirds and certainly by more than a half. There will also be considerable relief effected by removal of the less significant civil business (a matter already partly achieved by the Masters) and by reduction in respect of some family litigation. On the other hand there will be an increase in appellate work. The present equivalent of 2 Judges hearing appeals will grow with the wider appellate jurisdiction in criminal matters, the greater amount of District Court business giving rise to appeals, and the requirement of multi-judge courts. The original work will still comprise the larger part of the business of the Court but the decrease in that original business should exceed the increase in appeal work. Thus, overall the business will be reduced with a consequential and significant reduction in the present number of Judges, perhaps to 20.

519 We have proposed that significant parts of the work (in terms of time) of the District Courts in their criminal jurisdiction should no longer be handled by District Court Judges. The growth in other methods of dispute settlement may also reduce the size of those Judges' workload. These changes too should help reduce the numbers of Judges. When taken with the proposal we make about increased sitting hours we would expect a very substantial drop over time in the number of District Court Judges perhaps by 25 or more.

520 Such reductions in numbers of the Judges are important for several reasons. They mean that scarce human resources, both the judges on the Bench and lawyers still in practice, are being better matched to the needs of our legal system. Lawyers who are appointed at a later age and in smaller numbers to the Bench will have had more experience and probably be of higher quality. The courts will have the assistance of a better quality bar. The State will be saved significant cost (we recall the Justice Department estimate of an all up figure of \$350,000 a year for the support of a District Court Judge, a figure which does not include provision for superannuation).

521 There is one important matter which will need to be kept in mind concerning this overall proposal for a reduction in the size of both courts and consequently for a reduced number of appointments in the near future. It should be appreciated that our judges are still chosen from a narrow professional section of our society. It is

valuable that there has been a marked increase in the number of women District Court Judges (including the new Chief District Court Judge); and that some District Court Judges of non European origin have been appointed. If the proposed changes are made there will be a somewhat more restricted opportunity for continuing this process and so enabling the present imbalance to be addressed. We merely observe that the need to address it will continue to be important.

RECRUITMENT

- 522 We have already said that we have not given close attention to the processes for the appointment of judges. We would however further emphasise one matter, mention one other element of the attractiveness of judicial office, and touch on one procedural issue.
- 523 The matter to be emphasised again is the matching of talents to the task. We have attempted, building on the leads given by the reforms based on the Beattie Report, to give a clearer, more distinct definition of the task of each court. That should help with recruitment to each of them.
- 524 Part of that definition is provided by the salaries, including the differential between the different courts. The salaries must recognise the real differences in responsibilities. That matter may require further attention if the changes we propose are made. And we would stress the added responsibilities in each court.
- 525 The procedural matter mentioned above is just one aspect of the appointment process. The Attorney-General and Minister of Justice last year announced a rather more formal way of soliciting indications of interest in appointment to the District Court bench. (With the Masters, the further step of public advertising has been taken.) One result is the building up of information about potential judicial appointments. With the growth in the size of the profession that should help bring a greater pool of possible candidates to the attention of the Attorney-General and Minister of Justice.

SPECIALISATION

- 526 The balance between general judicial skills and specialisation has arisen at various points in this Report, for instance in the discussions of the Family Court and appeals from it, the Administrative Division, warrants for District Court jury trial Judges and in a broader way in the allocation of business between courts, tribunals and the executive government. It was also a prominent feature of the deliberations of the Beattie Commission (paras 306-320, 341-343, 420-431).
- 527 We mention 3 aspects of the matter here. We have considered whether a distinction should continue to be drawn within the District Court bench between those Judges who are warranted to sit with juries in criminal trials and the other Judges. Might not that process of selection be better left to wise administration which could have regard to the jury trial business coming into the Court and to the experience and skills of the Judges? However, the work calls for a particular expertise and for a time it is probably desirable for it to be handled by only a proportion of a numerous Bench, particularly since our proposals mean that it will extend to a wider range of criminal offences including the most important. Accordingly we propose that the warranting system should continue but on the basis that the need for it should be reviewed in about 4 years in the light of the experience of the extended jurisdiction. In the meantime new warrants should be for a 5 year period.
- 528 We mentioned at the outset that the main focus of this Report is on the courts of general jurisdiction. We have not looked in any direct way at special courts such as the Courts Martial Appeal Court, the Labour Court and the Maori Land Court and Appellate Court, although the appeal and review powers of the High Court and the Court of Appeal are of course relevant to them.
- 529 Issues relevant to the Maori Land Court have however arisen in the course of this inquiry. the Government has announced that the servicing of that Court should now be undertaken by the Department of Justice which does of course have the basic registry responsibilities for courts in New Zealand and also services they Waitangi Tribunal (*Te Urupare Rangapu : Partnership Responses* (1988) 18). Proposals have been raised, in part in the context of proposed Maori affairs and

children and young persons legislation, for wider jurisdiction for the Court and its Judges. Such matters have to be addressed directly and in a different context from this inquiry. Finally, the relationship between the Maori Land Court and the District Court has been raised. Until now they have been seen as quite distinct, for instance in their functions, their methods of operation and their process of appointment. Should there be closer links? That question relates to the broad matters considered by the Royal Commission of Inquiry into the Maori Land Courts (1980). It is the subject as well as of the Maori Affairs Bill and provisions in the Law Reform (Miscellaneous Provisions) Bill which are now before Parliament.

- 530 There is however one question about the relationship between the Maori Land Court Judges and the District Court Judges which might be considered here. Any general decision that all Maori Land Court Judges should be District Court Judges (as say with the Family Court) can be decided only as part of broader conclusions about the character and jurisdiction of the Maori Land Court and about changes that should be made to that Court. However it may be appropriate for some District Court Judges with relevant experience to be appointed in addition as Maori Land Court Judges. Such a step could help meet the pressures of work on a court with a small bench. Individual District Court Judges have of course often had such additional appointments.
- 531 Within the High Court, formal specialisation is to be found in the provisions for the Administrative Division which we have proposed should be repealed and in the provisions for the Commercial List established in 1987. The Commercial List which operates in Auckland on an experimental basis is to be reviewed after 4 years. We are in no position to pre-empt that review. We note only that the facilities of the List should be available to commercial litigation which has not yet been transferred to the High Court, and that there are arguments on both sides of the question for making such special arrangements available for just one particular class of civil litigation. The experience of the List to date also illustrates some of the improvements that can be made in the processing of litigation. There are wider lessons to be learned from it (see Commercial List, High Court, Auckland, First Annual Report to 1 April 1988 (1988)).

MASTERS

- 532 Provision was made for the appointment of Masters of the High Court in 1986 (Judicature Act, ss 26C-26R). The first appointments were made in 1987-2 in Auckland and 1 in Christchurch - and Parliament approved a fourth position (to be taken up in Wellington) late last year. In 1978 the Beattie Commission recommended such an office, possibly servicing all 3 Courts (paras 289, 790-795), and The Report on the Role and Efficiency of the High Court (pp 25-32) in 1986 made concrete proposals for Masters in the High Court. The new Office involves a fourth tier of judicial officer. It makes the court system more complex.
- 533 The qualification for appointment is the same as for judges, the appointment is by the Governor-General by warrant, the tenure is the same as for District Court Judges except that appointments are for 5 years, and the appointments can be part time. The salaries of Masters are a little below those of District Court Judges and provision is made for superannuation.
- 534 The Masters have and exercise all the powers of the High Court or a High Court Judge in relation to a number of civil matters, including applications for summary judgment, certain proceedings under the Companies Act 1955, the Insolvency Act 1967 and the Land Transfer Act 1952, the assessment of damages, and the making of orders by consent. Rules of Court confer further jurisdiction within limits; thus no jurisdiction can be conferred in respect of criminal proceedings (with some exceptions), habeas corpus, judicial review, injunctions and guardianship:
- 535 The practical consequences of this development are important. The Masers handle a large number of high volume matters, especially summary judgments, bankruptcy petitions and winding up petitions. Some of these proceedings involve substantial sums of money; in the Auckland Registry most defended applications for summary judgment are in the \$40,000 to \$200,000 range. In a 9 month period the 2 Auckland Masters delivered 264 judgments. The Judges of the High Court in the relevant centres are as a consequence freed from those matters and can give their full attention to the remainder of the business of the Court. There is a better matching of their qualities and experience to the business they handle. The Office reduces the pressure for even further increases in the numbers of High Court

Judges. The Judges have certainly welcomed the new Office in those terms. Also relevant are the safeguards on the exercise of the Master's power: a particular matter can be transferred to a Judge because of its complexity, the Judges retain their jurisdiction, a Chambers decision can be reviewed by the Court, and the other decisions are subject to appeal in the Court of Appeal.

536 We have already indicated that we would be proposing that under our general scheme these powers should be available in respect of civil matters which are pending in the District Court. In this area, as in others, the High Court has facilities for the prompt and effective handling of civil litigation not available to the District Court. The proceedings should not have first to be removed into the High Court; indeed the criteria of complexity or general importance would not usually be met. (The Beattie Commission originally proposed that the Masters have jurisdiction in the District Court, the New Zealand Law Society has made a similar recommendation to us, and there is evidence that matters which would come within the District Court jurisdiction are being filed in the High Court to take advantage of the summary judgment jurisdiction.) One consequence would be that their title might become Masters of the Courts of New Zealand.

537 That proposal relates to and answers in part our concern about the introduction of a fourth category of judicial office into the general court system consisting as it does of 3 courts. How is it to be related to the other categories? Does it create an unnecessary complication? The public record indicates uncertainty about such matters, and it is not surprising to us that the Scottish Review Body mentioned earlier opposed the proposal for the introduction there of Masters on the English model (Report, paras 8.3-8.7).

538 It is too early to make a general assessment of how the new Office fits into the overall system which we propose. It is an unnecessary complication in what would be a rather simple court structure? We are not certain that it will be needed. We propose that the Office of Master be reviewed in the light of the experience of the Office, of the increase in concurrent jurisdiction, and of its operation within the District Court, 5 years after the introduction of the reforms proposed here. It may be that some of the holders of the Office could with advantage exercise instead or as well the increased civil jurisdiction of the District Court.

THE CHIEF JUSTICE OF NEW ZEALAND

- 539 The Judicature Act 1908 and other official documents recognise that the Chief Justice of New Zealand is the head of the judiciary and the principal judicial officer of New Zealand. In law, when the Chief Justice sits in the Court of Appeal, the Chief Justice presides. Since the permanent Court of Appeal was set up in 1957 it happens that the Chief Justice has not often presided in that Court. To the extent that the other duties of the office allow, he has usually sat in the High Court.
- 540 We have already indicated that we think it would be anomalous for the Chief Justice of New Zealand to sit on a regular basis in an intermediate court. The Supreme Court (in terms of the Government's decision to end appeals to the Judicial Committee of the Privy Council and our proposals) will for the first time in our history be the final court for New Zealand with enhanced responsibilities for settling the law of New Zealand. In our view it is in that Court that the Chief Justice of New Zealand should regularly sit and preside.
- 541 The Chief Justice, in addition to sitting as a judge, has of course important representational, leadership and administrative roles in relation to the public, the government, and the courts as a whole. Those functions ought properly to be exercised by the senior judge regularly presiding in the senior court, at the apex of the system.
- 542 Because of the importance of this matter we set out some of the principal views expressed to us on it. To the Judges of the Court of Appeal it

seems elementary that the Chief Justice of New Zealand should be the working head of its highest Court. As well, in matters that affect the judiciary and the administration of justice as a whole he or she should speak if necessary of the whole judiciary and be consulted by the Government and make any necessary representations to the Government. There are also some administrative matters affecting to some extent all Courts (for example: senior judicial appointments, judicial education, computerisation, judicial salaries); these should be the ultimate responsibility of the Chief Justice of New Zealand, so far as they are a judicial responsibility, but the Chief Justice would naturally delegate them except for major decisions. He should have, however, no direct responsibility for the day-to-day administration of other Courts.

Above all the head of the judiciary should be, and should manifestly be seen to be, a Judge presiding virtually continuously over the final Court and participating in

the decisions that necessarily shape New Zealand law. Any suggestion to the contrary is based on eras now past and would perpetuate an anomaly. Apart from the basic point of principle the present system causes difficulties and misunderstandings in practice.

543 The New Zealand Law Society accepts the proposition that on the structure and jurisdiction of the Supreme Court and High Court put forward here the Chief Justice should be a member of the Supreme Court. There would be a separate office of President or Senior Justice of the High Court.

544 High Court Judges supported the status quo. They did not think that

the qualities needed for the office of Chief Justice are necessarily the same as those desirable for the head of the highest appellate Court. In other words, whilst the Chief Justice should be a sound lawyer, his prime qualification should include administrative and leadership skills. For the judicial officer heading the Court of Appeal, pre-eminence in legal scholarship is of greater importance.

They stress that the Chief Justice should be a public figure presiding over important trials. They refer as well to the practice of the last 30 years to appoint the next most senior member of the Court of Appeal as President. They see no good reason to change that practice but it would mean that the Chief Justice was not being appointed for administrative skills, leadership qualities and 'public relations'. they refer to the Beattie Commission report (paras 290 and 303) as being in harmony with their thinking.

545 Those comments are, we think, to be related principally to the functions of the Chief Justice at the senior Judge of the High Court. So under the present law the Chief Justice has functions in respect of appointments of the Judges of the Administrative Division and of the Commercial List and temporary High Court Judges. Indeed until 1913 the title of the office was Chief Justice of the Supreme Court. Such tasks are comparable to those performed by others who preside over other particular courts and would require the appointment of a presiding Judge in the High Court. To avoid confusion we propose the title Senior Justice of the High Court for that position.

546 In making this proposal and others, we do of course understand that questions of transition have to be handled. That is not something that we can usefully address in a specific way.

CERTAIN ADMINISTRATIVE MATTERS

547 According to Alexander Pope

For forms of government let fools

contest;

Whate'er is best administered is best

Essay on Man

This Report demonstrates that we do not accept the first half of Pope's famous couplet. We do however accept the essential importance of the second. We mention some administrative matters in the next chapter and we have stressed the importance of good administration at various points in the Report, for instance in Chapter III.

548 Here we wish only to identify 2 major aspects of court administration that have constitutional importance - the relationship between the courts as whole (or individual courts) and the government, and the relationships within the courts themselves.

549 Those relationships raise critical issues about the independence of the judiciary. The Government is responsible to see that independent courts are available so that New Zealanders may have a fair hearing for the determination of criminal charges brought against them and of their rights and obligations under the law. Neither justice or right is to be denied or deferred. On the other hand, neither the Government nor other judges for that matter may interfere with the responsibilities of the individual judge deciding the particular case. That is to say, the overall responsibility to the State and the responsibility of the individual judge to do justice according to law in the particular case have to be balanced. That brings us to the next chapter.

VIII Administrative Matters

INTRODUCTION

550 This chapter has 2 broad purposes. First it emphasises the critical importance of good administration to the effective, efficient and just operation of the courts, a matter which has been stressed in submissions and comments made to us. Secondly, it mentions some specific aspects of judicial administration. It is not a sustained discussion of the issues, and it does not make detailed proposals. We wish rather to suggest possibilities for others to consider. We can however underline the significance of these administrative matters by mentioning the importance of for our proposed reforms of their arrangements relating to the single point of entry for most civil business and the single set of rules applicable to it. The Department of Justice confirms that those steps would facilitate court administration. Their introduction would have to be carefully prepared and implemented.

551 Judicial administration is the subject of increasing attention, analysis and action. There is much that we can learn. To take a few developments in 4 jurisdictions more or less at random:

The English Civil Justice Review has a most interesting and valuable chapter of judicial administration addressing for example the responsibilities first within the courts and second between the courts and the Departments of State, judicial training, and the Judicial Council (consisting of High Court Judges);

The Australian Institute of Judicial Administration has undertaken studies into the partnership of the judiciary and the executive and the administration of justice, the financing of the courts, costs and delays, and statistics for higher civil courts;

The Report of the Ontario Courts Inquiry (1987) discusses the management of the courts in a lengthy chapter which, like several of the other studies, emphasises the balance between the independence of the individual judge and the administration of the whole court system, and makes concert proposals for changes in management;

In New Zealand the Audit Office has undertaken an inquiry into the administration of the summary criminal work of the District Courts (mentioned already in para 147 above), the Department of justice published late last year A Strategy for the Introduction of Technology into the Courts, and questions are increasingly being raised about the funding of the courts (for instance on the civil side, through the fees payable by litigants).

- 552 Some of this activity has led to improvements in the justice system. Chapter 3 gives the examples of different summonising times and practices, pre-trial conferences and (although it runs beyond administrative improvements) the changes in police diversion policies and practices. Such changes can enhance our court system and result in real savings of time and money for litigants, witnesses, lawyers, judges, court staff and the taxpayer. They address in part the twin evils of costs and delays.
- 553 We mention here just one other change which, while relatively modest, has valuable practical advantages - the introduction of court attendants in District Courts. They replace police and Ministry of Transport orderlies in the courtroom and escort jurors, and thereby emphasise the independence of the courts. They help remove the appellation of 'police' courts from the summary criminal court, and raise incidentally a further question: need police and Ministry of Transport prosecutors appear in their uniforms? They also help members of the public attending the courts by providing information and in other ways, they help the prosecutors (for instance by taking over the calling of defendants and the presentations of lists of previous convictions), and they aid the court takers. In those ways they enable specialised officers to concentrate on the main functions. Some of these undoubted advantages can also be costed in direct terms - for instance police and transport officers who are paid at a higher rate than court attendants are released to carry out their regular functions.

554 The scheme, originally set up as a pilot in the Wellington area and since extended to other areas but not nationwide, is widely regarded as a success (see Davey & Neale, *The Role and Value of Court Attendants: and Evaluation of the Pilot Scheme ...*, Department of Justice (May 1986)). According to 1 Judge, the scheme

has given a balanced, softening approach to the courts. It [had] always seemed to be the establishment against the rest.

And for Mongrel Mob members -

it is a good job they are doing now. We are in favour of continuing the scheme, but we would like a few more young [court attendants].

555 We support such practical administrative reforms in the interests of independent, humane and efficient justice. Decisions on the funding of extensions should take account of the overall savings of the Government and not be assessed purely in departmental terms.

INFORMATION

556 One matter which is critical to improved administration is better information. The Department of Justice and the Department of Statistics do of course collect and publish valuable statistics, as this Report shows. But it is widely accepted that improvements are required. We have already indicated that that is our view as well.

557 The Department of Justice's strategy for the introduction of technology is relevant to such improvements, and work is being done as well within the Courts Consultative Committee (see below para 566). The High Court Judges in their 1986 Report called for better statistics to facilitate case management. And the Audit Office Inquiry and its follow-up have shown gaps and inadequacies in the information available to the Courts Division; for instance the Audit Office found that a group of 22 court rooms were in use on average only just over two hours a day while the Department 'simply did not believe the ... finding [Their] records show that the courts do sit in excess of four hours per day...' (*Report of the Justice and Law Reform committee on ... the Report of the Audit Office ... 1988* AJHR I 8D p 6).

- 558 The Audit Office's more general findings were that there were weaknesses in the provision of information for management and accountability purposes; and that there were limitations on the range and quality of the information on the Courts found throughout the audit (para 547; see also paras 321, 437 and 550).
- 559 Courts themselves can also publish relevant and helpful information about their operations. They need not leave the matter entirely to the Departments of State. Some, such as the High Court of Australia, are required by statute to publish annual reports. Others have chosen to publish such reports, such as the Courts of Appeal of British Columbia and New South Wales; we earlier mentioned the report on the first year of the Commercial List of the High Court established in Auckland (para 531). Such annual accounts are of value in providing information and assisting evaluation and reform. We propose that favourable consideration be given to the preparation of such reports. Their preparation would of course again require appropriate statistical and other support.

JUDICIAL FINANCE

- 560 One aspect of information about the courts not greatly emphasised in the above reports is judicial finance. We have mentioned the overall gross cost of the justice system (and the Audit Office Inquiry Report does of course bear on that). This Report does emphasise savings that can be made by streamlining court processes and reducing the number of judges. It is probably the case that resources should be redirected to administration.
- 561 Comparisons of court spending can be made over time and with other similar systems. The recent Australian research carried out by the Institute of Judicial Administration suggests the studies that might be undertaken and the changes that might be made as a consequence. It shows that Australians in real terms now spend two and a half times as much per head on their justice system as they did in 1950. It evidences as well very large differences in Australia (with Victoria for instance spending only about half the Australian average). And it indicates greatly different amounts of recoveries, for example by way of fees. The study also emphasises the deficiencies in the relevant public accounts and the consequent difficulties in making comparisons (see the account in AIJA News, Issues No 2,

October 1988, of the paper by Dr Alan Barnard and Professor Glen Withers). Detailed comparisons with New Zealand are accordingly hazardous and we do not attempt them here.

562 Such comparisons will become more significant if emphasis is put, as it increasingly appears to be, on recovering parts of the costs of the court system from its users. Such an approach requires a close analysis of the costs of particular areas of jurisdiction and an application of the relevant principles, beginning with the basic right of access of New Zealanders to the courts for the resolution of their disputes. It also runs into the important matter of legal services including legal aid. That matter has been the subject to lengthy reviews, including with the Department of Justice, designed to produce new legislation. There have also been expressions of Departmental concern about large expenditure increases (see the Report of the Department of Justice of the year ended 31 March 1988, pp 7, 21).

563 We also mention one other matter brought to our attention by the New Zealand Law Society in which the emphasis on cost recovery from individual litigants may be reversed. Are there situations, falling outside the legal aid schemes, in which the State or some general fund should meet all or some of the costs of individual litigants? Australian jurisdictions have systems under which some or all of the costs of a successful appellant and of a resulting new trial may be met from a general fund rather than specifically from the unsuccessful respondent. The underlying principle is that the respondent should not necessarily be held responsible for the extra step in the litigation, caused, it could be said, by a State Institution (the court below) making an error.

564 We do not pursue specific aspects of judicial finance here. Rather we stress the topic as an important and evolving area in the analysis and reform of judicial administration. We know that the Department of Justice is addressing some aspects of that. We support that process.

TECHNOLOGY

565 It is a commonplace for newly appointed judges to compare unfavourably the office facilities in their courts with those to which they were accustomed in practice. The great potential of new technology is often stressed, for instance in

the 1986 High Court Judges Report. It is reflected in the developing strategy of the Department of Justice for the introduction of technology into the courts. The matter in various forms is also before the Courts Consultative Committee (discussed below) and the Justice and Law Reform Committee of the House of Representatives. Accordingly we do no more than stress, as have others, the great advantages arising from the wise use of technology (advantages already realised for instance in Australia and Canada) for such matters as statistical purposes and case flow management. We mention just one specific matter arising from our proposal that much more civil work be undertaken in the District Court. That requires adequate facilities for the taking and recording of evidence, a matter which has often been emphasised, for instance 10 years ago by the Beattie Commission (paras 809-844).

A RECENT INSTITUTIONAL DEVELOPMENT

566 We have mentioned several times the balance that is to be struck between the independence of the individual judge and the administration of the court system as a whole. One significant new element is the establishment and development of the Courts consultative Committee. It consists of the Chief Justice of New Zealand, the President of the Court of Appeal, a High Court Judge, the Chief District Court Judge, the Principal Family Court Judge, the Solicitor-General, the Secretary for Justice, the Assistant Secretary (Courts), 2 New Zealand Law Society representatives, and 2 lay members. Its terms of reference are:

To maintain an overview of the operations of the various courts;

To promote the speedy, economic and effective transaction of all courts business;
and

To consider and make recommendations on existing and likely future requirements of the court system.

567 This development is another recognition of the need to examine in a careful way the day to day challenges to court administration and related matters. It is a particular manifestation of the partnership in the delivery of justice between the court and the executive. According to the Justice Department that partnership is

also developing in most court centres in New Zealand and is working well. But, as indeed recent and continuing actions of the Department have shown, there is undoubtedly much more to be done to improve the effective, efficient and economic operation of the courts in a way that facilitates the independent administration of law and justice in New Zealand.

IX Legislative Proposals

INTRODUCTION

- 568 Legislation would be needed to give effect to the proposals contained in the foregoing chapters. This chapter outlines the principal legislative consequences. It also refers to matters that have not been discussed earlier but which arise from existing legislation.
- 569 The major statutes that would be affected are the Judicature Act 1908 and the District Courts Act 1947. The proposals would also have a substantial impact on the Summary Proceedings Act 1957, the Crimes Act 1961, the Family Courts Act 1980 and the Family Proceedings Act 1980. The repeal of the primary and secondary legislation relating to the Judicial Committee of the Privy Council is to course a consequence of the Government's decision to end appeals to Her Majesty in Council.
- 570 The Law Commission thinks that its proposals also provide opportunity to prepare more comprehensible and accessible legislation. The Judicature Act 1908 is essentially still the 1882 Act with more than 100 years of deletion, addition and amendment. It has long been in need of consolidation. The District Courts Act 1947 has been the subject of a name change, major excision, major grafting and much amendment since it was enacted. Moreover, with the proposals for greater concurrent jurisdiction and for common Rules of Court, it is appropriate for the 2 statutes to be brought together. In this chapter we call the single proposed statute the Courts Act. That Act would mainly be relevant to the civil jurisdiction of the 2 courts.
- 571 The criminal jurisdiction is handled at the moment in the Summary Proceedings Act and the Crimes Act, and to a limited extent in the District Courts Act. We

propose that the relevant provisions of the District Courts Act be included in the other 2.

OUTLINE OF A NEW COURTS ACT

572 A new Courts Act should contain the following parts (or something akin to them):

- (1) Preliminary
- (2) The Courts of New Zealand
- (3) The Judges
- (4) Original Jurisdiction
- (5) Appeal Jurisdiction
- (6) Procedure
- (7) Court offices, officers and administration
- (8) Termination of appeals to Her Majesty in Council
- (9) Repeals, consequential amendments, savings, and transition

Preliminary Matters

573 Recurring phrases or words that may require definition or elaboration in particular context (depending on the actual wording of the legislation) include civil proceedings (as opposed to criminal proceedings and including family proceedings), interlocutory and final decisions (mainly in the context of appeal, para 390 above), and inferior court in relation to inherent jurisdiction and appeal. Another matter is the exercise of powers, by a named court or its judges.

The Courts of New Zealand

574 This part should continue or constitute the 3 courts of general jurisdiction. It could state quite simply that

The Courts of New Zealand of general civil and criminal jurisdiction are

- (a) the Supreme Court of New Zealand,
- (b) the High Court of New Zealand, and
- (c) the District Court of New Zealand.

575 The phrase 'of general jurisdiction' is included to make it clear that this draft is not primarily concerned with courts exercising specific jurisdiction, such as Courts Martial and the Courts Martial Appeal Court, the Labour Court, and the Maori Land Court and Appellate Court, nor with tribunals. Those bodies cannot be put completely to one side, since the Courts listed above may have authority in respect of them by way of appeal, judicial review and case stated. Later provisions make it clear that the expression 'courts of general jurisdiction' does not mean unlimited jurisdiction. The jurisdiction, especially of the District Court, is limited in various ways.

576 Provisions in this part or in the transitional part should say that

- (1) The Supreme Court of New Zealand is the same superior court of record as that which before the commencement of the new Act was called the Court of Appeal of New Zealand.

(See Judicature Act 1908, s 57(1); Constitution Act 1986, s 14(2).)

- (2) The District Court of New Zealand is a court of record constituted of the several District Courts which existed before the commencement of the new Act.

(See District Courts Act s 3.)

there should also be transitional provisions providing that the Judges of the Court of Appeal become Judges of the Supreme Court and the Judges of the District Courts become Judges of the District Court (see for example Judicature Amendment Act 1979), s 13, and District Courts Amendment Act 1979, s 19). A similar provision would be needed in the Family Court legislation. No parallel transitional provisions appear to be required for the High Court since it is unaffected in name and constitution.

The Judges

- 577 This Part should deal with the judges who will constitute the Courts of general jurisdiction. Specifically it would state the maximum number of judges for each court, the method of appointment, their qualifications, and their tenure and provide for their salaries and superannuation (see Judicature Act ss 4-10, 12, 13 and 57 and District Courts Act ss 5-7).
- 578 Provision should also be made of the position of the Chief Justice of New Zealand as the head of the judiciary of New Zealand, who normally sits in the Supreme Court and presides over any Court in which that Judge sits. There should be provision for a Senior Justice of the High Court (a new position) and there should continue to be a Chief District Court Judge and a Principal Family Court Judge. There could also be provision for someone to act in the position of those officers in the event of a vacancy in the office or absence (se Judicature Act ss 5, 57(7), District Courts Act s 5A(4), Family Courts Act s 7(1)).
- 579 There should be a statement to the powers of these presiding judges - compare Judicature Act ss 4, 5, 11B, 24C, 25, 26, 26D(2),26H(6), 51F, 51C, 52, 57, 58, 58A, 60 (Chief Justice of New Zealand); and ss 57, 58,58A, 60,60A (President of Court of Appeal); District Courts Act, ss 5A, 9, 10A(4), 22(1); Family Courts Act ss 6, 9; and Town and Country Planning Act 1977, s 131A (subsection (2) of which confers an interesting general responsibility and power on the Principal Planning Judge of the orderly and expeditious discharge of the business of the Planning Tribunal).
- 580 There should be provision for the appointment of temporary Judges in the District Court and the High Court to help deal with any backlog or fill any vacancies for the time being in the number of permanent Judges (se Judicature Acts 11-11B, 58, District Courts Act, ss 10-10A).
- 581 The warranting of District Court Judges to preside over criminal jury trials in the District Court should be provided for: see s 28B of the District Courts Act. We propose that new warrants be for 5 years and that the operation of and need for warranting be assessed in about 4 years in the light of the extended jurisdiction. The other provisions for District Court Jury Trials in the District Courts Act (ss

28A, and 28C-28J) should be transferred to the Crimes Act for the time being, pending the review of the Crimes Act including the law of criminal procedure.

- 582 The present provisions for appointment of Family Court Judge, Tribunal Judges and Judges warranted to sit in Children and Young Persons Courts should remain in the related Acts (see Appendix B for details).
- 583 Provision should continue to be made for the appointment and tenure of Masters. As indicated, they should also be able to exercise their authority in respect of matters which had not been removed into the High Court. We have already proposed that their role should be reviewed in the light of their experience and of the operation of concurrent jurisdiction.
- 584 Some statutory provision concerning judicial immunity will continue to be required. Under the common law judges of superior courts including the Court of Appeal and the High Court are absolutely immune from civil proceedings for acts done in the exercise of their judicial office. This is so even if they act with gross carelessness or be moved by actual malice or hatred. (They can of course be made to answer in a proper case in criminal proceedings, steps can be taken in Parliament towards dismissal, and appeal and habeas corpus are available to the person aggrieved.) What acts are within and what are outside the exercise of the judicial office might be disputed but in real terms the immunity is absolute. The Judicature Act extends the 'protections, privileges and immunities of a Judge' to former Judges sitting temporarily, s 11A(4).
- 585 The protection of District Court Judges is different. No civil action may be brought against them unless they have exceeded their jurisdiction or acted without jurisdiction, Summary Proceedings Act s 193, District Courts Act s 119. Any Judge against whom judgment is entered for damages or costs for acting outside jurisdiction is entitled to be indemnified by the Crown, Summary Proceedings Act s 196A. A Justice of the Peace is entitled to such an indemnity only if a High Court Judge testifies that the Justice acted in good faith and ought to be excused, as s 197. Under recent developments, jurisdictional error can be given a very broad reading.

- 586 Masters who act or purport to act in good faith as a Master have all the protections, privileges and immunities of a Judge, Judicature Act, s 26Q .
- 587 There are also provisions relating to bailiffs, sheriffs and police officers and related common law rules (for example District Courts Act, ss 107-108, Judicature Act s 32 and Police Act 1958 s 39).
- 588 Some of these matters are probably best considered in a broader examination of the legal liability of the Crown and of officers of the Crown. (One wider issue for instance is the right of a person who has been found inappropriate proceedings, including the exercise of the prerogative of mercy, to have been wrongly imprisoned under a court order, not just to be released but also to have compensation). For the moment, however, we propose that the distinction in respect of immunity between the Judges of the superior courts and the District Court should be removed or at least narrowed, see for instances *Sirroos v Moore* [1975] QB 118 CA. In large parts of their business they are dealing with matters which can come before the High Court, that will be the more so if our proposals are adopted, and as already indicated there are remedies available to those aggrieved (including in extreme cases remedies against the Judge). The legislation relating to retired High Court Judges acting as temporary Judges and to the Masters provides models.

Original Jurisdiction

- 589 This part should focus mainly on civil jurisdiction since the original criminal jurisdiction of the District Court and High Court is extensively regulated by other statutes to which, as indicated, changes are proposed. It would deal with the jurisdiction of the District Court, the High Court and the Supreme Court.
- 590 The High Court's jurisdiction is the base since the jurisdiction of the other 2 Courts relates to and depends on it. Its jurisdiction should be put in terms such as the following:

The High Court of New Zealand continues as a superior court of record to have all the jurisdiction which it had before the commencement of this Act and all

jurisdiction which may be necessary for the administration of law and justice in New Zealand [subject to the provisions of this Act and of other enactments].

591 See Judicature Act ss 3 and 16, Supreme Court Act 1970 (NSW), s 23. The bracketed phrase would make it clear for instance that where this statute or another confers exclusive or prior jurisdiction on another court, that other provision has effect notwithstanding the broad language of the first part of the draft. But ordinary principles about the relationship between a general statute and a particular one may be sufficient. Further the words do no more than state the issue in hard cases; they do not help with the answer.

592 The draft does not expressly include the substance of section 17 of the Judicature Act which confers jurisdiction in respect of persons of unsound mind. The provision was narrowed by the exclusion of the references to infants when the Guardianship Act 1968 was enacted and the Mental Health Bill (before the House of Representatives) proposes its real, cl 111(2).

593 The simpler, declaratory language of s 16, largely repeated above, plainly extends as appropriate and subject to other legislation to all the powers exercised by High Court and its predecessors and including the inherent jurisdiction of the superior courts in England, for example *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 CA and the discussion in Chapter V.

594 The District Court's jurisdiction should be stated to be concurrent with that of the High Court and then subjected to 2 limits - the exclusive jurisdiction of the High Court (see para 597) and the power of transfer of proceedings to the High Court (see para 598). So it might be provided that

The District Court has the original civil jurisdiction of the High Court (as reorganised and conferred by this Act and other enactments) with the exceptions set out in [para 597] and subject to the power of a Judge of the High Court [para 598] to transfer to that Court proceedings commenced in the District Court.

595 The provision could continue, on the model of existing legislation, to confer powers on the District Court to exercise that jurisdiction:

The District Court or a District Court Judge has all the powers in respect of pending civil proceedings and civil proceedings before the Court or the Judge to make such order, exercise such authority or jurisdiction or grant such relief or remedy as the High Court or a High Court Judge respectively has.

See District Courts Act, ss 41, 42, District Court Rules 1948, r 7, and the discussion of inherent power (as opposed to inherent jurisdiction) in Chapter V. Sections 41 and 42 do not have the word 'civil' in their text. They are however in context and in origin very much concerned with civil jurisdiction and the word might well be written in even if not expressed. That would not of course imply that there are no inherent or similar powers in the criminal jurisdiction: see Chapter V, above.

596 The legislation might also recognise that The District Court has such other original civil jurisdiction as is conferred on it by enactment.

597 The High Court is to have jurisdiction to the exclusion of the District Court in certain areas (discussed in Chapter V). The Act might list these as follows:

- (1) any application for judicial review whether made by reference to the [Judicial Review Procedure Act 1989] or any other enactment or not;
- (2) any proceeding for a writ or order of or in the nature of mandamus, prohibition, certiorari, or quo warranto;
- (3) any application for a writ of habeas corpus whether made by reference to legislation or not;
- (4) any matter which falls within the inherent jurisdiction of the High Court;
- (5) the matters in respect of which powers are conferred on it by the Acts listed in [see Part 2 of Appendix E].

The Judicial Review Procedure Act 1989 is a suggested new title for the Judicature Amendment Act 1972. That Act in fact stands alone (with its sections numbered separately for instance), and the Act which it amends would no longer

exist under our proposals. The title to the Ontario Act from which it was adopted better indicates its content in any event.

598 While proceedings within the concurrent jurisdiction are to be filed in the District Court, they are subject to transfer to the High Court. the relevant provision should state the criteria, confer the power to order transfer, and authorise the making of regulations which will guide the exercise of the transfer power. It might have provisions to the following effect;

Transfer to High Court

- (1) Either party to civil proceedings commenced i the District Court which also fall within the jurisdiction of the High Court may apply to a Judge of the High Court for an order that the proceedings be transferred to the High Court for hearing and determination by it.
- (2) The application must be made within the time prescribed or such longer period allowed by the Judge.
- (3) The Judge shall make an order for the transfer of the proceedings if all the parties to the proceedings consent.
- (4) The Judge may make such an order if satisfied that the proceedings raise issues of low or fact or both of such complexity or general importance that they ought to be transferred.
- (5) The decision of the Judge on an application for transfer is final

Directions governing transfer

- (1) Decisions about the transfer of proceedings shall be made in accordance with the directions (if any) given under subsection (2).
- (2) The Governor-General in Council may make regulations giving directions regulating the exercise of the power [of transfer ...].

See Chapter V, paras 628-277 and the United Kingdom legislation and recommendations referred to there.

599 The Report contemplates that in very limited cases the Supreme Court could hear matters originally. That could be provided for in terms such as the following:

- (1) The Supreme Court may exercise original jurisdiction to determine civil proceedings commenced in the District Court or the High Court only if it decides on an application made to it by a party to the proceedings that it ought to transfer the proceedings into the Supreme Court.
- (2) In such a case, the Supreme Court has all the powers of the High Court in respect of the proceedings and, in addition, it has the power to refer the proceedings back to the Court in which they were pending with such instructions as the Supreme Court thinks fit.

See the Judicature Act ss 64, 65, and the discussion in paras 358-361. The provision might expressly state criteria, but it should always be understood that this is an exceptional procedure. As in related areas (such as appeal by leave) the criteria may be better left to be worked out by the Courts.

Appeal Jurisdiction

600 The legislation could state that the District Court has such appeal jurisdiction as is conferred on it by enactment.

601 The High Court should have jurisdiction to hear appeals from decisions of the District Court both originally and on appeal. Such general provisions will of course be subject to particular provisions in other statutes (which might, say, prevent a further appeal or limit it to a matter of law). The legislation should also recognise that it has jurisdiction under other enactments to hear appeals from other bodies, such as administrative tribunals. It could read something like the following:

- (1) Any party to civil proceedings originally determined in the District Court may appeal to the High Court against any decision of the District Court
 - (a) if the decision is final, as of right, or

- (b) if the decision is interlocutory, with the leave of the District Court or (if that leave is refused) with the leave of the High Court.
- (2) Any party to civil proceedings determined by the District Court on appeal may appeal to the High Court against any decision of the District Court with the leave of the District Court or (if that leave is refused) with the leave of the High Court.
- (3) An application for leave shall be filed in the manner and within the time prescribed or such longer period allowed by the Court to which the application is made.
- (4) No appeal may be brought under this section if the parties agreed before the decision was made, in writing in the prescribed manner, that the decision would be binding on them.
- (5) The High Court has such further jurisdiction to hear and determine appeals as is conferred on it by any other enactment.
- (6) If another enactment provides that there is no appeal or a limited right of appeal against a decision referred to in subsection (1) or subsection (2), that enactment prevails.

District Courts Act ss 71 and 71A. The present provision requires leave if the amount in issue is under \$500. We have omitted that monetary limit since the parties can avoid the extra cost of appeals by bringing their proceedings to a Disputes Tribunal or having them transferred there: Disputes Tribunals Act 1988, s 37.

602 The Family Courts Act 1980 and related legislation at the moment regulate appeals in the family law area, and the Summary Proceedings Act and the Crimes Act in the criminal law area; see further paras 622-630 below. Regulations or Rules of Court would continue to govern the procedure followed on appeal, see Chapter VI.

603 The Act should also regulate the numbers of Judges sitting on appeal. It would provide that in general in civil matters 3 Judges would sit, but the parties could

agree to a court of 1 or 2 Judges, and a Judge of the High Court could order a hearing before 2 Judges on the grounds that the matter is not so complex or of such general importance as to require 3 Judges. The same provision would be made for appeals in the family, administrative, and summary criminal jurisdiction; appeals following District Court jury trials would always be heard by a High Court of 3 (or more).

- 604 Provision should also be made, on the lines indicated in Chapter VI, for appeals to the Supreme Court.

PROCEDURE

- 605 The original jurisdiction and appeal jurisdiction provisions proposed above would be complemented by procedural provisions. Specifically, provision should be made for the commencement of civil proceedings either in the High Court (those within its exclusive jurisdiction) or in the District Court (all other proceedings). We have already suggested provisions for transfer of proceedings within the concurrent jurisdiction from the District Court to the High Court by order of a High Court Judge or by consent of the parties.
- 606 The current provisions for the Commercial List, the powers of Masters and civil juries should be continued in much their present form and be available also in the District Court (see Judicature Act ss 19A-19C, 24A-24G, 26C-26R, 54A and 54B). An amendment should be made to the provision for civil juries to specify that the procedure can be involved only in cases involving a claim in respect of fraud, defamation or false imprisonment or if the Judge determines that the proceeding can be tried more conveniently by a Judge and jury.
- 607 We have already proposed that the High Court Rules should be renamed the Rules of Court and extend with necessary changes to the District Court. A consequence would be that many of the purely administrative provisions of the District Courts Act (to be provided for in the Rules) could be repealed (see especially Part IV, Part VI and Part VII ss 109-116). The District Courts Rules could be repealed. The Rules Committee would have to be appropriately reconstituted. Empowering provisions such as those in the Judicature Act ss 51-51F, 52 and 100A (which empowers the Government to fix Court fees) would be required. (Such a change

would mean that such legislation as separate provisions in the current Law Reform (Miscellaneous Provisions) Bill giving the District Court powers already held by the High Court in respect of the taking of evidence abroad and for the enforcement of judgment debts would not be required.)

608 Miscellaneous provisions about costs (Judicature Act ss 51G, 99A, District Courts Act s110), the payment of interest (Judicature Act s 87, District Courts Act ss 62B, 65A), the execution of documents to give effect to a Court order (Judicature Amendment Act 1910, s 3), the ordering of medical examinations (Judicature Act s 100), and the arrest of defendants about to quit New Zealand (Judicature Act s 55, District Courts Act ss 109-110) are contained in the present Acts. There are some related provisions in the rules, including the Court of Appeal Rules. Such provisions should be continued in a consolidated form applicable to both Courts.

609 Court processes are protected by the law of contempt which has a common law origin but also takes various legislative forms. The legislation concerns principally

- (1) Contempt in the face of the court - wilfully interrupting proceedings, wilfully insulting the Judge or witness, or wilfully and without lawful excuse disobeying an order made in the course of the proceeding (Judicature Act s 56A, District Courts Act s 112, Crimes Act s 401, Summary Proceedings Act s 206);
- (2) Refusal to respond to a witness summons, to be sworn, to give evidence or to produce documents, without lawful cause (Judicature Act ss 56A and 56B, District Courts Act s 54, Summary Proceedings Act ss 20, 39);
- (3) Breach of orders relating to the publication of evidence, suppression of names and related matters (Crimes Act s 375A, Criminal Justice Act ss 138-140, Family Proceedings Act s 169).

(We have listed only the provisions of general applications.)

Several of these provisions make this Acts in question an offence rather than a matter to be treated summarily by contempt proceedings. That may have

advantages in terms of the procedure followed and rights of appeal (although this can be conferred separately, District Courts Act s 78A, Crimes Act s 384).

610 In addition, as mentioned in Chapter V, the High Court has inherent jurisdiction to handle other contempt including the contempt of inferior courts and tribunals. This relates particularly to contempt not in the face of the court, such as a public attack on the integrity of the judicial process, for instance *Solicitor-General v Radio Avon Ltd* [197] 1 NZLR 225 CA. We have proposed that that jurisdiction remain within the exclusive jurisdiction of the High Court.

611 The statutory provisions mentioned above should be in part consolidated, and, to the extent that they are not they should be made more consistent. Their relationship to the common law requires careful examination.

Court Offices, Officers and Administration

612 Both the Judicature Act and the District Courts Act contain a mixture of provisions concerning court offices, their officers, and related matters:

Offices and sitting (Judicature Act ss 23, 23A and 60(1), District Courts Act ss 4, 21, 22);

Registrars, Deputy Registrars and other officers (Judicature Act, ss 27, 72 (Court of Appeal), District Courts Act, ss 12, 14, 20);

The powers of Registrars (Judicature Act, ss 28, 51F, 55(4), 73 (Court of Appeal), Judicature Amendment Act 1910, s 3, District Courts Act s 122(3)(f);

Sheriffs and Deputy Sheriffs of the High Court and Bailiffs and Deputy Bailiffs of the District Courts (Judicature Act, ss 29, 32-36, 42, District Courts Act, ss 15-17, 105-108);

Offences relating to officers (District Courts Act, ss 18-19, 105);

Court seals (Judicature Act, ss 50 and 74 (Court of Appeal), District Courts Act, s 116);

Commissioners of oaths (Judicature Act, ss 47-49).

613 Like other provisions in the legislation, these have been added to over the years and have not been the subject of consolidation within the Judicature Act or of reconciliation (as appropriate) between the 2 statutes. It would appear to be possible to have a shorter, more consistent set of sections providing for

Court offices and sittings;

The appointment of Registrars and other offices (such as sheriffs and bailiffs);

The conferral of powers on them; and

Court seals.

Provisions for commissioners of oaths could be included in the Courts Act or in the Evidence Act 1908.

614 The questions of offences by and in relation to officers and of the protection of officers is dealt with inconsistently between the 2 Acts. The offence provisions appear to be unnecessary since the matters are adequately covered by other criminal offences. The provisions for the protection of officers were mentioned earlier along with the law relating to the protection of judges and judicial officers.

Termination of Appeals to Her Majesty in Council

615 This part of the legislation is designed to give effect to the decision of the Government announced in October 1987 to terminate appeals to the Judicial Committee of the Privy Council. Recent Australian legislation suggests a provision on the following lines:

Termination of appeals to Her Majesty in Council

(1) No appeal to Her Majesty in Council lies from any decision of a New Zealand Court, as of right or with leave or special leave granted by any court or by Her Majesty in Council or in any other way and whether under any Act of the Parliament of the United Kingdom or of New Zealand, the Royal Prerogative or otherwise, except as provided in subsection (3).

- (2) The enactments and orders listed in the second schedule are no longer part of the law of New Zealand, except to the extent required by subsection (3).
- (3) The foregoing provisions of this section do not affect an appeal from a decision of a New Zealand court
 - (a) instituted before the coming into force of this Act, or
 - (b) instituted after that time in accordance with
 - (i) leave granted by a New Zealand court on an application made before that time, or
 - (ii) special leave granted by Her Majesty in Council on a petition made before that time.

See the Australia Act 1986, s 11.

Subsection (2) repeals and revokes, so far as the law of New Zealand is concerned, the imperial legislation relating to the Privy Council which is still part of the law of New Zealand, see the Imperial Laws Application Act 1988, s 3(1) and Schedules 1 and 2; the provisions are printed in *Imperial Legislation in Force in New Zealand* (NZLC R1 1987) pp 88-125.

Subsection (3) is designed to protect any appeal already underway at the time when the right of appeal is terminated by the proposed legislation coming into force.

Repeals, Consequential Amendments, Savings and Transition

- 616 On the above basis Parts I and II of the Judicature Act could be repealed; some of Part III is covered by the above proposals, but some miscellaneous rules of law would remain: ss 84-86 (sureties), s 88 (actions on lost instruments, see also District Courts Act s 118), s 90 (stipulations not of the essence of contracts), s 92 (discharge of debt by part payment), s 94 (judgment against one of persons jointly liable not a bar to action against others), ss 94A and 94B (payment under mistake), s 99 (equity to prevail over common law). They could be gathered in a single statute or, as appropriate, incorporated into other statutes such as the

Mercantile Law Act 1908 or the Bills of Exchange Act 1908 in the case of ss 84-86, 88, 90 and 92. Section 56 which relates to the reciprocal enforcement of judgments might be incorporated in the Reciprocal Enforcement of Judgments Act 1934.

617 The provisions inserted in 1968 relating to the Administrative Division would be repealed if the jurisdiction of that Division is transferred to the High Court. We have already proposed that the Judicature Amendment Act 1972 establishing the new judicial review remedy could be a separate statute, the Judicial Review Procedure Act.

618 The foregoing proposals could also allow the repeal of all of the District Courts Act 1947 except part IIA concerned with criminal jurisdiction in respect of indictable matters. We come to that later.

619 The 1979 enactments which implemented the Beattie Commission Report provide models for savings and transition in respect of the judges and offices of the various courts, the actual offices of the courts, and litigation pending in them, District Courts Amendment Act 1979, ss 18-19, and Judicature Amendment Act 1979, ss 12-13. They also provided both generally and by more particular provision for the substitution of the changed names of the courts (in that case - District Courts for Magistrates' Courts and High Court for Supreme Court).

620 Some consequential amendments have been indicated in Appendix E: the jurisdictional provisions which are not to remain exclusive to the High Court should be amended to indicate that either that Court or the District Court may now have jurisdiction.

621 Other consequential amendments would be required to related legislation about

The Judges, for example of Constitution Act 1986, the Oaths and Declarations Act 1957, and the Higher Salaries Commission Act 1977;

The jurisdiction of the Supreme Court (involving replacement of the reference to the Court of Appeal in many appeal provisions: Appendices F and G) the jurisdiction of the District Court (rather than the District Courts) although in many

statutes a general reference to the court exercising jurisdiction will be adequate (for instance Partnership Act 1908, s 2).

CRIMINAL JURISDICTION

- 622 The 1980 amendments enabling some jury trials in a District Court provide the basis for giving effect to the principal proposal about criminal jurisdiction - that the District Court, consisting of a jury with a District Court Judge warranted for that purpose, having concurrent jurisdiction with the High Court: See the District Courts Amendment, Summary Proceedings Amendment and Crimes Amendment (No 2) Acts of 1980. The proposal for completed concurrence could be given effect to by replacing the schedule to the Summary Proceedings Act which lists the matters the District Court can try with a general provision to that effect. A more limited proposal (keeping treason and murder within the exclusive jurisdiction of the High Court for instance) could be effected simply by amending the first schedule to the Summary Proceedings Act.
- 623 We also propose that the provisions in Part IIA of the District Courts Act relating to jury trials should be included in the Crimes Act with the other provisions concerning jury trials. It is inconvenient to have them divided.
- 624 The present provisions for the transfer of trials from the District Court to the High Court (s 28J) would be replaced by provisions stating criteria and authorising the making of regulations as discussed in Chapter V and by reference to the proposals for civil proceedings made above para 598.
- 625 The main legislative consequences of the other proposals can be noted briefly:
- (1) The equation of the procedural powers and the review of the exercise of those powers, paras 352-357 above: see for example the Courts Act 1971 (UK), s 10(5), referred to there, except that appeal from the District Court (if provided for) would be to the High Court: (3) below;
 - (2) The equation of sentencing powers (except preventive detention), para 351 above: Summary Proceedings Act s 7 to be amended;

(3) Appeal following District Court Jury trial to be by 3 High Court Judges, para 444 above; Part XIII of the Crimes Act to be amended.

626 We also proposed that in the context of a wider review of the law of criminal procedure the current complexity of the present categories of offences be reduced. In such a context the continued need for the Inferior Courts Procedure Act 1909 could also be examined in the light, among other things, of the close relationship of the jurisdiction and powers of the District Court with those of the High Court.

FAMILY JURISDICTION

627 The proposals made in Chapter V involve using the expression Family Court, rather than Family courts, throughout the statute book. The 1980 legislation relating to the District Courts provides a model.

628 The proposals relating to the Family Protection Act 1955, Matrimonial Property Act 1976, Law Reform (Testamentary Promises) Act 1949 and the Status of Children Act 1969 require amendment to those 4 Acts (para 308). The proposals about wardship would affect the Guardianship Act 1968 (para 307).

629 The question whether there should in law be a greater exclusive jurisdiction in the Family Court (to match the law to the practice and the understandings) should be addressed (para 315). The provisions for transfer and for appeal could be consolidated (including the requirement that appeals be heard by a 3 Judge court).

630 Provision should be made for a seal of the Family Court of New Zealand and for the appropriate intitlement of its documents.

APPENDIX A²

The Law Commission received the reference on the Structure of the Courts on 29 April 1986. Following some initial informal consultation the Commission in a newspaper advertisement published throughout the country in October 1986 sought an indication of interest in the project and suggestions about the procedure to be followed. A number of helpful suggestions were received.

In December 1987 the Commission published its Discussion Paper on the Structure of the Courts (NZLC PP 4) and distributed it to more than 1000 people and organisations. Two months before the Attorney-General, speaking at the New Zealand Law Conference, had announced that the Government would 'move to remove the right of appeal of the Privy Council in the term of this Government', [1987] NZLJ 314, 315. The Discussion Paper and the subsequent process have proceeded on that basis. That aspect of the matter must however be kept in perspective because, as the submissions and the Report show, that aspect is just one part of the overall set of issues to be considered in a review of the structure of the courts.

Papers and written submissions were received from the following:

Accident Compensation Corporation
M Alano
W D Baragwanath QC
P H E Bloomer
M Brew
J E Butler
Cambridge Borough Council
M R Camp
R S Chambers

² Appendix A of the Discussion Paper *The Structure of the Courts* provides a bibliography of reports, texts and articles on the courts. Other references, especially the recent publications, can be found in the text of this Report.

Christchurch Community Law Centre
Christian Women's Fellowship
C A Clark
B J Connolly
G M Coxhead
Court of Appeal Judges
C Curtis
Department of Justice
District Court Judges
Equal Parental Rights Society
Family Court Judges
Federation of Business & Professional Women's Clubs
Federation of NZ Parents Centres Inc
D Firth
J T S Francis
S R L Fraser
G J Fuller
J A L Gibson
Judge J M Green
M Grundy
High Court Judges
Hon Mr Justice Holland
P J H Jenkin
D B Kincaid
Labour Court Judges
Judges F F Latham and J M Green
M Lynch
E McIntyre
The Hon J K McLay
Rt Hon Mr Justice McMullin
Manawatu District Law Society
Maori Land Court Judges
High Court Masters
Mental Health Foundation of New Zealand
G S Orr
National Council of Women of NZ (Inc)
New Zealand Law Society
C R Pidgeon QC
C L Riddet
A G V Rogers
Royal Federation of New Zealand Justices' Associations (Inc)
L Smith
T P Snow
Rt Hon Mr Justice Somers, Rt Hon Mr Justice Casey and Rt Hon Mr
Justice Bisson
South Canterbury Law Society
K G Stone
G D S Taylor
Tokoroa & Districts Women's Support Centre
A B Townsend

Chief Judge P J Trapski
Wellington District Law Society
D J White
Judge A A P Willy
D M Wilson

It is understandable, given the importance and complexity of some of the issues, that some of the most significant papers and submissions were not available until the second half of 1988. That had an effect on the timing of some of our consultations, our deliberations, and the completion of this Report.

We are grateful for the submissions and papers provided to us and the willingness to many people within the Judiciary, the profession, the relevant departments (including the Police and Department of Justice) and elsewhere to discuss the matters with us. In particular we had the opportunity of attending the conferences of the Judges of the Court of Appeal and High Court in 1987, the Family Court Judges in 1988 and the District Court Judges in 1988. Separate consultations were held with Judges to the Court of Appeal, the High Court (who formed a Committee of their members to assist the process) and the District Court. We are grateful also to members of the Otago, Canterbury, Wellington, Manawatu and Auckland District Law Societies who organised and attended meetings at which the issues were discussed. We had valuable discussions with representatives of the New Zealand Law Society.

We also benefit from advice given to us by Judges, lawyers and administrators from Australia, England and Canada.

The Rt Hon Sir Thaddeus McCarthy, formerly President of the Court of Appeal, and Mr W M Wilson, Barrister and Solicitor of Wellington, acted as consultants to us. We greatly value their sage advice and express our gratitude to them.

APPENDIX B

COURTS OF GENERAL JURISDICTION: A SUMMARY OF LEGISLATION³

INTRODUCTION

- 1 The courts of New Zealand comprise
 - (1) the courts of general jurisdiction - the District Courts, the High Court, the Court of Appeal, and the Judicial Committee of the privy Council; and
 - (2) a number of courts of special jurisdiction such as the Labour Court, the Maori Land Court and Maori Appellate Court, and the Courts Martial Appeal Court.
- 2 Within the District Courts and High Court, the courts of general original jurisdiction, there are special divisions, differing groups of Judges, and others who have some of the courts' powers. That variety is indicated later.
- 3 The courts of special jurisdiction are not capable of precise definition especially if, as should be the case, they are considered along with administrative tribunals from some of which they are not easily distinguishable. The tribunals exercise statutory powers and make decisions affecting the rights and interests of particular individuals. They are not in general called courts - although a principal one, the Planning Tribunal, is expressly established as a Court of record. Their functions are similar to those of the courts, and they often link into the court system through common membership, overlapping jurisdiction, and rights of appeal. The work of the Legislation Advisory Committee on tribunals has brought together some of the relevant material (see its Discussion Paper (January 1988) and Report (February 1989)). To be added to the courts and tribunals are other dispute resolution mechanisms such as arbitration, medication and conciliation which may be set up by statute or agreement and which may operate largely independently of, or at a time before, court process. This appendix summarises the principal legislation relating to the courts of general jurisdiction. Appendices F and G provide more detailed legislative information about appeals. Appendices C and D give relevant statistical information.

³ Part I of the *Report of the Royal Commission on the Courts* (1978) provides a valuable history of the New Zealand Courts.

DISTRICT COURTS

- 4 The District Courts are constituted under District Courts Act 1947 (formerly the Magistrates' Courts Act 1947), and came into existence on 1 April 1980, replacing the Magistrates' Courts.

Unlike the High Court and Court of Appeal, which are each one court for New Zealand, District Courts are established as separate entities in various localities throughout New Zealand as determined by the Governor-General. The Act currently provides for the appointment of up to 98 permanent District Court Judges to exercise jurisdiction within New Zealand. One District Court Judge is appointed as the Chief District Court Judge. Acting Judges can also be appointed.

- 5 Some judges are appointed by the Governor-General
 - as Family Court Judges to exercise the jurisdiction of Family Courts
 - to exercise jurisdiction in Children and Young Persons Courts
 - as trial judges to exercise the criminal jury jurisdiction of the District Courts

The family and children legislation set out express criteria of suitability of those to be appointed. Also a number of District Court Judges, as a matter of law or in fact, are members of our constitute administrative tribunals - the Planning Tribunal, the Taxation Review Authority, Land Valuation Tribunals etc. In addition there are a number of other persons who exercise functions within the District Courts. These include Small Claims Tribunal Referees (after 1 March 1989 to be known as Disputes Tribunal Referees) who exercise jurisdiction over small civil claims, Justice of the Peace who exercise some of the District Courts' minor criminal jurisdiction, members of juries in some criminal matters, and registrars who can, for instance, enter judgment by default in civil proceedings.

Civil jurisdiction

- 6 District Courts have a wide-ranging civil jurisdiction with a monetary limit, in general, of \$12,00. The jurisdiction is not conferred in a general way, but under specific headings including (1) actions founded on contract, tort, or statute; (2) actions for the recovery of land where the yearly rent does not exceed \$6,000 or the value of the land \$50,000 (if not rent is payable); (3) building society disputes; and (4) equity, including specific enforcement and rectification of agreements relating to property, and proceedings for the enforcement of liens. In the specified areas of the District Courts and their judges may also grant the relief, redress and remedies available to the High Court. the following table indicates the changes in the monetary limit of the court during the century.

Changes in the maximum civil jurisdiction of the District (Magistrates') Courts compared with changes in the Consumer Price Index

	CPI (1983 = 1000)	Monetary Limit \$	Ratio
1913	40	400	1:10
1927	67	600	1:9
1947	80	1,000	1:12.5
1960	156		1:6.4
1961	149	2,000	1:13
1970	219		1:9
1971	233	3,000	1:13
1979	585		1:5
1980	686	12,000	1:17.5
1987	1,584		1:17.5

(source for CPI: *New Zealand Yearbook* 1968, 1988-89)

- 7 Some of this jurisdiction is concurrent with that of the Small Claims (Disputes) Tribunals, which were first established under the Small Claims Tribunals Act 1976 as divisions of the District Courts. They may deal with claims in contract, quasi-contract, and damage resulting from negligent use of a motor vehicle. Under the Disputes Tribunals Act 1988, the present \$1,000 limit on their jurisdiction will be extended to \$3,000 (or \$5,000 if the parties consent). District Court Judges may exercise the jurisdiction of a Tribunal. However normally the Tribunals' powers are exercised by referees appointed under the Act, who need not be qualified lawyers, provided they have the special knowledge or experience necessary to perform their functions. Also, the procedural and evidential rules for Tribunals are more informal than for District Courts. The parties are not allowed legal representation, and are normally expected to present the case themselves. If appropriate the Disputes Tribunals are to assist the parties to the dispute to reach an agreed settlement. If that fails, they are to decide according to the substantial merits and justice of the case having regard to the law but without being bound to give effect to the strict legal rights or obligations or the legal forms or technicalities. The Tenancy Tribunals, established under the legal forms or technicalities. The Tenancy Tribunals, established under the Residential Tenancies Act 1986, and the Motor Vehicle Disputes Tribunals, established under the Motor Vehicles Dealers Act 1975, should also be mentioned here. They exercise significant first instance civil jurisdiction (limited to a maximum of \$3,000 in the second case) within their scope of activity, which in substantial part was previously exercised by the District Courts.
- 8 District Courts are also given civil jurisdiction under various specific statutes (sometimes concurrently with the High Court or Disputes Tribunals or both). These include the Shipping and Seamen Act 1952, Electoral Act 1956, Insolvency Act 1967, Minors Contracts Act 1969, Illegal Contracts Act 1970, Hire Purchase Act 1971, Admiralty Act 1973, Contractual Mistakes Act 1977 and Contractual Remedies Act 1979.
- 9 A District Court's jurisdiction can be extended beyond the statutory monetary limits, either by the plaintiff abandoning part of the claim or by agreement between the parties. Also, High Court proceedings which come within the District Court jurisdiction can be transferred to a District Court on application of a party to the High Court or alternatively the parties can agree that the District Court shall have jurisdiction.

Family jurisdiction

- 10 The family law jurisdiction of the District Courts is principally exercised by the Family Courts which were introduced by the Family Courts Act 1980. The courts are established as a division of every District Court. Family Court Judges are appointed by the Governor-General as being, by reason of their training, experience, and personality, suitable to deal with matters of family law. They are also appointed as District Court Judges if they are not already. A Principal Family Court Judge is also appointed.
- 11 The Family Courts have jurisdiction under the principal family law statutes - the Marriage Act 1955 (consent to marriage and related matters), Adoption Act 1955, Guardianship Act 1968 (guardianship and custody), Domestic Actions Act 1968 (property disputes arising out of agreements to marry), Matrimonial Property Act 1976 (disputes about matrimonial property and separation and dissolution of marriage), the Family Proceedings Act 1980 (separation, dissolution of marriage, paternity and maintenance), the 1980 amendments to the Social Security Act 1964 (relating to the liable parents scheme), the Domestic Protection Act 1982 (providing for non-violence orders and non-molestation orders, etc), and the Protection of Personal and Property Rights Act 1988.
- 12 In some cases the jurisdiction is concurrent with that of the District Courts (as with liable parent schemes and domestic protection) or the High Court (Domestic Actions, Guardianship and Matrimonial Property Acts). The High Court also retains its inherent powers. In addition the Family Courts have a general power under the Family Courts Act to transfer proceedings to the High Court because of their complexity. There is a similar more specific power in the Guardianship Act 1968 and two of the property statutes given an additional power to the High Court to order the removal of proceedings.
- 13 The Family Courts Act (as well as the statutes which confer jurisdiction on the Family Courts, in particular the Family Proceedings Act) places considerable emphasis on counselling, conciliation, and mediation. Provision is made for the appointment within the Department of Justice of counsellors to facilitate the work of the Family Courts. The Act also requires Family Court proceedings to be conducted in such a way as to avoid undue formality. The particular legislation conferring jurisdiction takes that emphasis further by providing generally that the hearings are to be in private, the proceedings are not to be published except by leave to the court, and evidence can be received even although not usually admissible in court proceedings.

Criminal jurisdiction

- 14 The criminal jurisdiction of the District Courts is regulated principally by the Summary Proceedings Act 1957 and for jury trials by the District Courts Act and Crimes Act 1961. This jurisdiction can be divided into 4 categories:
- 15 First are minor offences, minor traffic offences and other summary offences which can be dealt with by a District Court Judge sitting alone. They are offences for which the maximum penalty is not more than \$500 fine. If the defendant does not seek a hearing, the court can deal with minor offences matters on the basis of the

prosecution's summary of facts as if the defendant had pleaded guilty. Two Justices of the Peace sitting together can exercise much of this minor jurisdiction.

- 16 Second are the more serious summary offences and most indictable offences (with the exceptions indicated in para 17) prosecuted summarily which can be dealt with by District Court Judges sitting alone subject to the right of the defendant to elect trial by jury if the maximum penalty of for the offence exceeds 3 months imprisonment. Subject to the maximum penalties in the particular area, the maximum penalty under this head is 3 years imprisonment or a \$4,000 fine. The judge may commit the defendant charged with an indictable offence to the High Court for sentencing (if the defendant has pleaded guilty or been convicted) or treat the matter as an indictable offence not triable summarily.
- 17 Third, if the defendant chooses trial by jury for a summary offence or is charged with a purely indictable offence to be tried by the High Court, the District Court holds a preliminary hearing to determine whether there is sufficient evidence to put the defendant on trial. With the exception of case involving sexual violation when a District Court Judge must preside, 2 Justices of the Peace may preside over preliminary hearings.
- 18 Fourth, jury trials in respect of indictable offences, except the most serious (such as murder, manslaughter, sexual violation and serious drug offences which must be tried in the High Court) proceed in selected District Courts with a jury chosen in the same way as in the High Court and in general subject to the same rules and with the same sentencing powers. The Governor-General appoints the trial Judges from among the District Court bench. In the case of indictable prosecutions either party can ask the High Court to remove the matter to that Court. The District Court Judge can commit to the High Court for sentence a defendant to such a proceeding who pleads guilty or is convicted.

Children and Young Persons Courts

- 19 Special provision is made for dealing with offences committed by children and young persons and with related matters. The Children and Young Persons Act 1974 provides for the establishment of Children and Young Persons Courts to deal with alleged offences by, and complaints about the care of, children (under the age of 14) and young persons (between the ages of 14 and 17). The jurisdiction is exercised by District Court Judges appointed by the Governor-General for their special interest, experience, or qualifications.
- 20 The Courts deal with complaints relating to the care, protection and control of children and young persons. The catalogue of possible complaints includes allegations that (1) a child's or young person's development is being avoidably prevented or neglected; (2) its physical or mental health, or emotional state, is being avoidably impaired or neglected; (3) its behaviour is beyond the control of its parent or guardian or the person of the time being having care of it and is of such a nature and degree as to cause concern for its well being or social adjustment, or for the public interest.
- 21 The Children and Young Persons Act further provides that young persons charged with summary offences, or indictable offences punishable summarily (where they

do not elect trial by jury), must normally be dealt with in a Children and Young Persons Court, and that children cannot be charged with criminal offences other than, for children or over 10 years, murder or manslaughter. In the case of young persons charged with indictable offences not punishable summarily, and children of or over the age of 10 years charged with murder or manslaughter, the preliminary hearing must take place in a Children and Young Persons Court, and (except in the case of a charge of murder or manslaughter) the accused may be given the right to forgo trial by jury and to have the matter dealt with in a Children and Young Persons Court as if the offence were punishable summarily.

- 22 The Children and Young Persons Courts are to follow special evidential and procedural provisions. The proceedings are not open to the public, there are restrictions on the publication of reports of the proceedings, the informant (or a person acting on its behalf) is to consult with a social worker prior to charging a young person with an offence other than murder or manslaughter, and the Courts are in all proceedings to have access to a social worker's report. In addition the Act provides for preliminary enquiries to be made by a Children's Board before a Court deals with the matter.
- 23 The Courts have wide powers to make orders in respect of complaints which are made out or charges which are proved. They include (1) admonishment; (2) discharge without further order or penalty; (3) placing the child or young person under the guardianship or supervision of the Director-General of Social Welfare; (4) ordering the child or young person (or parent or guardian as the case may be) to pay compensation; and (5) (in the case of offences committed by young persons) ordering the young person to pay a fine.

Appellate jurisdiction of District Courts and District Court Judges

- 24 District Courts and their Judges (sometimes sitting with additional members) have appeal jurisdictions under a number of statutes. The Courts can hear appeals from Disputes Tribunals on the limited ground that the manner in which the matter was handled was unfair and prejudiced the result. There is a full right of appeal from Motor Vehicle Disputes Tribunals (consisting of 3 members) if the amount in issue is over \$500 and on a law alone if it is not. That decision on that appeal is final. There is also a full appeal from decisions of Tenancy Tribunals (if the amount involved is \$1,000 or more), in this case with further appeals on matters of law to the High Court and, with leave, to the Court of Appeal.
- 25 Many decisions made by local authorities are subject to appeal to a District Court - such as those relating to the licensing of public and residential buildings, the removal of unsafe buildings, drainage, and the removal of overhanging trees, of nasella tussock and of scrub which might cause fires. The decisions of a large number of trade and occupational licensing bodies and officials are subject appeal to a District Court Judge usually sitting with additional members. The legislation relates to such matters as dairy factory management, fertiliser registration, electricity linemen certificates of competency, the registration of electricians, physiotherapists, pharmacists, occupational therapists, clerks of works, engineers, engineers associates and quantity surveyors, and construction certificates of competency.

HIGH COURT

- 26 The High Court (whose name dates from 1 April 1980) was first created as the Supreme Court in 1841. It is now constituted under the Judicature Act 1908. Although there is only one High Court of New Zealand, it sits in various centres (the Judges are stationed in Auckland, Hamilton, Wellington and Christchurch, and travel on circuit to the other localities). The statutory qualification for appointment as a High Court Judge is to hold a practising certificate as a barrister or solicitor for at least 7 years. The Judicature Act empowers the Governor-General in the name and on behalf of Her Majesty to appoint the Chief Justice of New Zealand (the principal judicial officer of New Zealand) and 32 other permanent High Court Judges. Judges of the Court of Appeal are also High Court Judges and are included within that number. Provision is also made for the appointment of temporary Judges. Although normally one Judge may exercise the powers of the Court, more than one judge may sit, and some statutes require more than one; so, under the Electoral Act 1956, the trial of an election petition must take place before 3 Judges. Almost all criminal trials are by judge and jury, and very wide provision is made for jury trials in civil cases (although they are rarely used). And lay members and assessors sit with the Judge in a few cases, as appears in part i Appendix I.
- 27 Recently, provision has been made in the Judicature Act for the appointment of up to 4 Masters of the High Court (with the legal qualifications and experience necessary for appointment as a judge) to exercise certain of the High Court's powers concurrently with High Court Judges. These include dealing with applications for summary judgment, certain company and land transfer matters, the assessment of damages where liability has been determined, and the trial of proceedings in which only the amount of the debt or damage is disputed. Registrars are also sometimes given powers under the Act and the High Court Rules. These include the power to hear and determine applications to enlarge or abridge the time for filing a statement of defence or a notice of interlocutory application, to adjourn a trial (reserving the question of costs to the Court), to order a stay of proceedings pending the disposition of an application, and to make consent orders on interlocutory applications in proceedings.

Civil jurisdiction

- 28 The original jurisdiction of the High Court in civil matters is virtually unlimited. The Judicature Act provides that the Court has all judicial jurisdiction which may be necessary to administer the laws of New Zealand. Any case which is outside the jurisdiction of the District Courts may be commenced in the High Court as well as cases which are within the District Courts' jurisdiction (subject to their removal to a District Court on a party's application under the District Courts Act). Also, under the District Courts Act, a case which has been commenced in a District Court may, on application of the defendant, be removed to the High Court if the amount at stake is more than \$3,000. Further a High Court Judge can, on application of a party, order the removal of proceedings commenced in a District Court if the Judge thinks it desirable that the proceedings should be heard and determined in the High Court.

- 29 A large part of the High Court's jurisdiction is a common law - including its important inherent jurisdiction. Some High Court civil jurisdiction is explicitly provided for by a range of statutes, dealing with contracts, sale of goods, hire purchase, dispositions of land, insolvency, trusts and wills, companies, partnership, admiralty matters, and so on. (A list is provided in Appendix E.) In addition the High Court has powers to issue declaratory judgments under the Declaratory Judgement Act 1908, supplementing its normal common law and equitable remedies of damages, injunction, specific performance, restitution, etc.
- 30 Jury trials are available in the High Court for certain civil matters although they are increasingly rarely used. This is a matter of right if the debt or damage or value of chattels claimed exceeds \$3,000 (although the Judge may refuse on the basis that the case involves difficult questions of law, or will require prolonged examination of documents or accounts, or that difficult questions regarding scientific, technical, business or professional matters are likely to arise). In addition the Judge has a discretion in other cases to decide that proceedings would be more conveniently tried with a jury.
- 31 In 1968 the Administrative Division of the High Court was established. Its membership of up to 7 High Court Judges is assigned from time to time by the Chief Justice. Its jurisdiction is partly appellate - in excess of 30 statutes provide for appeals to the Division - and partly deciding applications for judicial review which can be referred to it by the Chief Justice. Lay members and assessors are provided for in some of the appeal provisions. The 1972 amendment to the Judicature Act regulates aspects of the remedies available in review applications.
- 32 A recent development in the High Court is the establishment in 1987 of a Commercial List at the Auckland Court on a trial basis. The aim is to enable a range of commercial matters to be dealt with speedily and efficiently at all stages up to the substantive hearing by High Court Judges who are assigned from time to time by the Chief Justice.

Criminal jurisdiction

- 33 The High Court exercises jurisdiction over criminal matters of the most serious kind. (It will be recalled that selected District Court Judges sitting with juries deal with the next most serious category: para 17 above.) The Court deals principally with cases which have been referred to it for trial after a preliminary hearing in a District Court, as well as cases in a District Court where the accused has pleaded guilty or has been found guilty and which are referred to it for sentencing.
- 34 A 1979 Amendment to the Crimes Act maintained trial by jury as the general rule in High Court criminal proceedings. In the case of offences where the maximum penalty is death or imprisonment for life or a term of 14 years or more, the accused must be tried by jury. In other cases the 1979 amendment allows the accused to apply for trial before a High Court Judge alone and a Judge to consent to that.

Appellate jurisdiction

- 35 The High Court had power to hear appeals from the District Courts in civil and criminal matters. The District Courts Act provides for a right of appeal in civil cases where the amount of the claim or the value of the property or relief claimed or in issue exceeds \$500, and with leave of the District Court for lesser amounts and in respect of interlocutory decisions. All such appeals are by way of rehearing but, under the High Court Rules, the evidence is normally produced by way of written record from the court below (although the High Court may rehear evidence if it thinks the record is materially incomplete, and has the discretion to receive further evidence on questions of fact, by oral evidence or by affidavit). Similar appeal rights exist from the Family Courts under the statutes which confer jurisdiction on them. The High Court's appellate power in the administrative law area - largely exercised in the Administrative Division - was mentioned earlier (para 31).
- 36 Regarding criminal appeals from District Courts, the Summary Proceedings Act provides that either the defendant or the informant may appeal on a question of law by way of case stated. The defendant has a general right of appeal against conviction or sentence or both. The informant also has the right to appeal against sentence, provided the consent of the Solicitor-General is obtained. Appeals from conviction and sentence following a District Court jury trial are to the Court of Appeal. All general appeals are to be dealt with by way of rehearing, which takes the same form as the rehearing in civil cases, i.e., it is usually confined to the papers.
- 37 The High Court also has jurisdiction to hear appeals from the Children and Young Persons Courts, provided for in the Children and Young Persons Act. These include general appeals by children and young persons, in some cases parents, and (in more limited circumstances) other persons (including a complainant), against the court's findings, sentence or order. Also there is provision for appeal on a point of law to the High Court by an informant as well as by the persons entitled to make a general appeal.
- 38 The District Courts and a number of tribunals have, in areas specified by statute, the power to seek the opinion of the High Court on a question of law arising in the course of the proceedings. This power is, for instance, conferred on the District Courts in summary criminal cases, the Family Courts, the Maori Land Court and Maori Appellate Court, and the large number of administrative tribunals which have the power of commissions of inquiry under the Commission of Inquiry Act 1908. This power is comparable to an appeal in that it leads to a higher court considering the matter. But it is different in that (1) the power is exercised before the lower court or tribunal has decided the case; and (2) whether the question is to be referred and the form of the question is determined by the court or tribunal and not by the parties.

COURT OF APPEAL

- 39 The Court of Appeal has existed in one form or another since 1846, but until 1957 was not a permanent Court. The present Court is constituted under the Judicature Act principally as amended in 1957. It is based in Wellington and almost

invariably sits there. The Court consists of the Chief Justice of New Zealand the President of the Court of Appeal and 5 other permanent Court of Appeal Judges, all of whom are also Judges of the High Court. Additional Judges may be appointed on a temporary basis. The power of the Court must normally be exercised by 3 or more Judges except that any 2 Judges may deliver a judgment or hear an application for leave to appeal to the Privy Council. Following a 1977 amendment to the Judicature Act, the Court can now sit in divisions.

- 40 The Court of Appeal is principally an appeal court. It does however have some original jurisdiction. The Judicature Act empowers the High Court on the ground of extraordinary importance or difficulty to order the removal of a criminal prosecution into the Court of Appeal for it to be tried at bar by the Court of Appeal with a jury. A case stated on a question of law in a summary criminal matter by the District Court for the opinion of the High Court can also be removed into the Court of Appeal for the original determination of that matter. Some cases stated under the Commissions of Inquiry Act 1908 are also dealt with originally in the Court of Appeal. For certain civil proceedings the Judicature Act empowers the High Court or Court of Appeal. In practice this is the most significant area of original jurisdiction.

Civil jurisdiction

- 41 In its civil appeal jurisdiction (provided for the Judicature Act) the Court of Appeal determines appeals from the High Court. However in the case of High Court decisions on appeals from District Courts or other inferior courts, leave to appeal must be granted by the High Court or the Court of Appeal before the Court of Appeal can hear the appeal. In some cases particular statutory provisions will prevent any further appeal. Thus in general the decisions of the Administrative Division on appeal are final. The Court of Appeal Rules provide that appeals are to be by way of rehearing. However, although the Court has the discretion to receive further evidence on questions of fact by oral examination or by affidavit or depositions, it is only in exceptional cases that such evidence is admitted, and the appeal is usually dealt with on the record of the proceeding below.
- 42 The Court of Appeal also has a limited jurisdiction to hear appeals from certain specialist courts, such as the Labour Court established under the Labour Relations Act 1987 (replacing the Arbitration Court). Any party who is dissatisfied with any decision of the Court (other than a decision on the construction of an award or agreement) as being erroneous in point of law, may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law. The Court of Appeal is to have regard to the special jurisdiction and powers of the Labour Court.

Criminal jurisdiction

- 43 In its criminal jurisdiction the Court hears appeals from both the High Court and District Courts. Under the Crimes Act any person who is convicted either in a High Court or District Court jury trial may appeal against the conviction, without leave on questions of law alone, or with the leave of a High Court Judge or the Court of Appeal on questions of fact or questions of mixed law and fact or any other ground which appears to the Court of Appeal to be sufficient ground of

appeal. Also, a person convicted in the High Court may appeal, with the leave of the Court of Appeal, against the sentence unless it is fixed by law. (And the Solicitor-General may, with leave of the Court of Appeal, appeal against a sentence passed in the High Court unless the sentence is one fixed by law.) The Court of Appeal normally relies on the record of the trial in the Court below, but it has supplemental powers to re-examine witnesses and to receive new evidence.

- 44 Under the Summary Proceedings Act, criminal appeals to the High Court on questions of law by way of case stated may be removed to the Court of Appeal by order of the High Court, and the Court of Appeal then has the same power to adjudicate on the proceedings as the High Court had. Criminal appeals on questions of law from High Court decisions on appeal from District Courts are also possible where leave is given by the High Court or (failing that) the Court of Appeal, in which case again the Court of Appeal has the same power to adjudicate on the proceedings as the High Court had.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

- 45 The Judicial Committee of the Privy Council is technically not a court at all but an adviser to the Queen in her Privy Council. It evolved out of the old Committee of Trade and Plantations which originally heard petitions from British overseas possessions which were made to the Crown. Its position, membership and powers were formalised by the Judicial Committee Act 1833, and for many years it remained the final appeal court for the Empire and later for independent Commonwealth countries. It still has that function from New Zealand, although most other Commonwealth countries, including Canada and Australia, have now abolished the appeal. The Privy Council sits in London and in practice comprises mainly the English and Scottish Law Lords. Judges or former judges of the superior courts of certain Commonwealth countries may also be appointed to the Privy Council.
- 46 Civil appeals from New Zealand courts to the Privy Council are currently regulated by an Order in Council made in 1910, as amended in 1972. An appeal from the Court of Appeal lies as of right from any final judgment where the value of the amount involved, directly or indirectly, is \$5,000 or more. Appeals from other judgments of the Court of Appeal, final or interlocutory, are at the discretion of that Court. Leave may be granted if the Court considers that the question involved is one which by reason of its great general or public importance, or otherwise, ought to be submitted. Appeals are also possible directly from final judgments of the High Court, if that Court considers that the question is one which by reason of its great general or public importance or of the magnitude of the interests affected or for any other reason, ought to be submitted. The Privy Council may also, under its prerogative powers, grant special leave to appeal. The jurisdiction has been invoked in Maori Land Court (formerly Native Land Court) appeals. In criminal matters leave to appeal will not normally be granted unless there is a major point of law involved.
- 47 Although the Judicial Committee has the power to take new evidence on appeal it does so very rarely. It generally gives a joint opinion (but dissents may now be published) which is transmitted to the Queen, and given effect to by means of an

Order in Council. A list of New Zealand Privy Council Cases is included in Appendix H.

APPENDIX C

THE COURTS: GENERAL STATISTICS

The following figures are mainly based on the Development of Justice Annual Reports and the Courts Division's Consolidated Annual Reports for High Court and District Court business. In some cases figures from the Justice Statistics prepared by the Department of Statistics are taken into account (and it is indicated where this is done). A substantial amount of the work has already been done by the Audit Office in preparation for its Report on the Administration of the Courts and this is gratefully acknowledged. Reference should also be made to Hong, Incoming District Court Workload (Department of Justice, 1988).

The primary focus is on the number of judges and judge-equivalents occupied in each jurisdiction. This is largely based on sitting hours of judges, Small Claims Referees and Justices of the Peace as recorded in the above reports and figures. For the High Court, it also takes account of recorded time spent in Chambers. For the High Court Judges and District Court Judges the total number of Judges (based on the list in the New Zealand Law Register but excluding tribunal judges) is divided between the various categories of work in proportion to the sitting time. The judge-equivalent figures in the District Court for Justices of the Peace and small Claims Referees are determined simply by dividing the actual sitting hours (about 10,000 each in 1987) by the average sitting time of District Court Judges (about 630 hours/year in 1987). The figures for the number of Judges in the court of Appeal are based on the actual appointments to the bodies (with the Chief Justice's ex officio membership of the Court of Appeal indicated in brackets).

The figures do not reflect vacancies for part of the year in the courts, leave, special assignments or temporary appointments. They do not distinguish those tasks for which the time out of court is substantial and those for which it is not. Closely related functions such as parole and prisons board work are not included. In some cases the figures are approximations. In some cases (such as Other in the High Court) the information should be further refined. In others there are definite possibilities of error, either in the collection or analysis of the data. In general, however, they give a clear indication of the overall balance of work of the courts.

**Court Business – Number of judges and judge equivalents
occupied in each jurisdiction**

	1982	1986	1987
<i>Criminal</i>			
High Court	6	8	9
District Court jury trials	7	5	7
Preliminary Hearings – District Court Judge	1	1	1
Justice of the Peace	5	4	4
General – District Court Judge	33	40	40
Justice of the Peace	1	1	1
Traffic Court – District Court Judge	10	11	11
Justice of the Peace	3	4	5
Minor Offences – District Court Judge	1	1	1
Justice of the Peace	5	7	6
Total High Court	6	8	9
Total District Court Judges	52	58	60
Total JP (Judge equivalents)	14	16	16
Total (Combined)	72	82	85
<i>Civil</i>			
Civil – High Court	7	7	7
Civil – District Court	7	6	7
Small Claims Referees (Judge equivalents)	7	16	19
Total	21	29	33
<i>Family</i>			
Family – Family Court (District Court Judges)	12	15	15
Total	12	15	15
<i>Other First Instance</i>			
Other – High Court	7	8	7
Other District Court	2	3	3
Total	9	11	10
<i>Appeals</i>			
Court of Appeal	5(/6)	5(/6)	6(/7)
High Court	2	2	2
Total	7	7	8
Grand Total	121	144	151
<i>Summary</i>			
Court of Appeal Judges	5(/6)	5(/6)	6(/7)
High Court Judges	22	25	25
District Court – Judges	72	82	85
- JPs	14	16	16
- Referees	7	16	19
Grand Total	121	144	151

Court Business – sitting hours per year

	1982	1986	1987
<i>Criminal</i>			
High Court	3773	4932	5225
District Court jury trials	4558	3249	4279
Preliminary Hearings – District Court Judge	479	636	549
Justice of the Peace	3154	2847	2709
General – District Court Judge	22266	25777	25072
Justice of the Peace	531	720	675
Traffic Court – District Court Judge	7129	7227	7179
Justice of the Peace	1746	2372	2873
Minor Offences – District Court Judge	793	553	568
Justice of the Peace	3484	4468	2873
Total High Court	3773	4932	5225
Total District Court Judges	35226	37442	37665
Total JP (Judge equivalents)	8915	10407	10015
<i>Total (Combined)</i>	<i>47914</i>	<i>52781</i>	<i>52905</i>
<i>Civil</i>			
Civil – High Court	4630*	4272	4221
Civil – District Court	4762	4242	4165
Small Claims Referees (Judge equivalents)	4653	10566	11791
<i>Total</i>	<i>13595</i>	<i>19080</i>	<i>20177</i>
<i>Family</i>			
Family – Family Court (District Court Judges)	8122	9946	9588
<i>Total</i>	<i>8122</i>	<i>9946</i>	<i>9588</i>
<i>Other First Instance</i>			
Other – High Court	4700*	4336	3961
Other District Court	1524	2125	2185
Other JP	14	21	-
<i>Total</i>	<i>5780</i>	<i>6482</i>	<i>6146</i>
<i>Appeals</i>			
Court of Appeal	771 days	597 days	618 days
High Court	1487 hrs*	1372 hrs	1184 hrs
<i>Average sitting hours/Judge</i>			
High Court Judges	663	596	584
District Court Judges	680	656	630

Note: for Court of Appeal, average sitting days/judge varies depending on whether counted as 4, 5 or 7 Judges

* Estimate based on assumption that relationship of civil/other/appeal work the same in 1982 as in 1986 (where more precise figures given)

Court Business – cases

	1982	1986	1987
<i>Criminal</i>			
High Court jury trials			
- number of trials	323	544	651
- trials held		409	519
District Court jury trials			
- number of trials	505	824	825
- trials held		682	
District Court cases -			
- summary cases	462,833	540,749	546,066
- traffic offences (incl)	312,787	370,463	350,418
<i>Civil</i>			
Civil – High Court			
- proceedings	3,297	4,213	5,249
- cases tried	436*	481*	NAV**
- judgments	709*	738*	NAV**
- District Court			
- complaints	118,445	150,933	133,685
- judgments	61,103*	70,496*	64,086*
Small Claims applications	4,104	9,114	10,934
<i>Family</i>			
Applications for Dissolutions	9,828	9,000	8,741
Other Applications	10,315	13,225	13,522
<i>Appeals</i>			
Court of Appeal			
- appeals lodged	525,557	581	
- appeals heard	410	465	423
High Court			
- criminal appeals lodged	1,728*	1,742*	1,653*
- family appeals	113*	80*	58*

* Figures taken from Justice statistics

** Figures not available. Estimates of 500-800 for cases tried

1977 Figures

Judges/judge equivalents

Criminal –	
Magistrates	39
Justices of the Peace	10
Civil – Magistrates	10
Criminal, Civil, Chambers, etc –	
Supreme Court	19
Appeals – Court of Appeal	3 (/4)
Total	81

Hours

Criminal –	
Magistrates	27,185
Justices of the Peace	6,790
Civil – Magistrates	7,186
Criminal, Civil, Chambers etc –	
Supreme Court	16,585
Appeals – Court of Appeal	459 days

Average Sitting Hours/Judge

Supreme Court Judges	873*
Magistrates	701

Cases

Criminal – Supreme Court jury trials	662
Criminal – Magistrates' Court –	
Summary cases	509,369
Traffic offences (incl)	21,554
Civil – Supreme Court –	
Civil proceedings	3,593
Cases tried	(498)**
Appeals – Court of Appeal –	
Appeals lodged	338
Appeals heard	218
Appeals – Supreme Court –	
Appeals heard	(1,304)**

* Compare with 731 hrs/J for 1976 and 826 hrs/J for 1978

** 1976 figures from Tables 37, 44 and 45, Department of Justice submissions to Royal Commission on the Courts, Appendix to Part I, 1977

APPENDIX D

THE COURTS: APPEAL STATISTICS

The following figures are based on the Report of the Royal Commission on the Courts, Department of Justice Annual Report, the Courts Division's Monthly Returns and Consolidated Annual Returns, the Justice Statistics prepared by the Department of Statistics, and figures obtained directly from the Court of Appeal. The figures showing the source of civil appeals in the Court of Appeal, and time spent on civil and criminal appeals in the Court of Appeal are derived from the results of a survey carried out at the Court of Appeal Registry in 1988.

The table summarise the work of the Court of Appeal since 1958, and provide more detailed information about the numbers and types of appeals filed and heard since 1978. A comparison is made between the sources of civil appeals and the time spent on both criminal appeals in 1982 and 1986 (the results of the court survey).

The High Court tables set out the criminal and family appeals filed and heard in the High Court since 1978. A snapshot view of the appeals work of the High Court in 1987 is also provided.

There are gaps in the statistics. For instance civil appeals to the High Court are considered so small that they are not normally recorded (although we did obtain figures for 1987). In some cases, as with the first instance statistics, there are possibilities of error. But in general the figures give a picture of the appeal business of the Court of Appeal and of the High Court.

	Permanent Judges*	Sitting days	Criminal	Civil
1958	3	84	51	31
1960		106	99	39
1965		112	84	44
1970		119	104	51
1975		138	132	78
1976		139	164	52
1977	4	153	168	57
1978		129	214	81
1979	5	192	216	93
1980			282	95
1971			295	110
1982			306	104
1983		218	251	91
1984		257	300	132
1985		248	306	109
1986	6	199	340	112
1987		206	312	111
1988		277	348	123

*Actual appointments are listed in front of the New Zealand Law Reports. The figures here do not take account of absences for part of the year, leave, special assignments or temporary appointments. (The powers to make temporary appointments to the Court of Appeal were expanded by amendments to the Judicature Amendment Acts 1979 and 1981.) Nor do they take account of the ex officio appointment of the Chief Justice to the Court of Appeal.

Court of Appeal: Civil appeals filed and heard; backlog, 1978-1988

Year	Filed	Heard	Allowed	Refused	% Allowed	End of year backlog
1978	160	85	28	53	32.9	60
1979	172	96	29	64	30.2	52
1980	186	99	42	53	42.4	54
1981	177	121	32	78	26.4	59
1982	209	119	45	59	37.8	43
1983	199	109	41	50	37.6	NAV*
1984	216	132	50	82	37.9	61
1985	194	117	40	69	34.2	58
1986	224	125	42	70	33.6	54
1987	213	111	40	72	36.0	45
1988	254	148	41	82	27.7	32

* Not available

Source: Court of Appeal

Court of Appeal: Criminal appeals filed and heard; backlog, 1978-1988

Year	Filed	Heard	Allowed	Refused	% Allowed	End of year backlog
1978	206	214	69	145	32.2	96
1979	230	227	51	175	22.5	99
1980	299	285	85	197	29.8	115
1981	272	300	56	239	18.7	86
1982	316	308	90	216	29.2	93
1983	291	264	67	196	25.4	NAV*
1984	329	300	97	198	32.3	120
1985	316	306	65	227	21.2	127
1986	333	340	60	282	17.6	121
1987	368	312	66	232	21.2	165
1988	408	375	72	276	19.2	186

* Not available

Source: Court of Appeal

Time spent in court on civil appeals, 1987

APPEAL IN A MATTER RELATING TO										
	Tort	Contract	Commercial	Fam Prot etc	Probate etc	Administrative	Tax	Real Property	Other	Total
<i>Court Hours</i>										
Number of cases	12	28	20	8	5	18	4	8	14	117
Total time in Court	44h00m	98h47m	54h35m	21h05m	19h20m	76h56m	15h15m	22h26m	55h55m	409h52m
Minimum	40m	01m	05m	1h00m	1h55m	01m	15m	01m	05m	01m
Median	3h15m	3h05m	2h55m	2h43m	4h00m	3h48m	2h18m	2h05m	2h50m	2h50m
Maximum	8h00m	10h50m	8h05m	4h00m	5h20m	20h35m	10h25m	9h00m	16h00m	20h35m
<i>Median Hours when Leave refused (3):</i>	-	2h30m	-	-	-	-	-	05m	1h30m	1h30m
Appeal allowed (41)	2h30m	4h00m	2h45m	3h37m	4h00m	6h55m	2h40m	2h00m	2h15m	3h15m
Appeal dismissed (62)	3h30m	2h58m	3h10m	2h38m	3h38m	2h00m	15m	2h15m	3h15m	2h43m
Judgment reserved (4)	4h45m	4h40m	-	-	-	4h15m	-	-	3h35m	4h28m
Withdrawn etc (6)	-	01m	05m	-	-	01m	-	01m	-	01m
<i>No of Judges</i>										
3	10	27	18	7	5	12	4	8	11	102
4	2	1	0	1	0	0	0	0	1	5
5	0	0	2	0	0	6	0	0	2	10
<i>Total</i>	12	18	20	8	5	18	4	8	14	117
<i>Total Judge Hours</i>	148h00m	296h28m	185h15m	66h50m	58h00m	314h16m	45h45m	67h18m	220h00m	1401h52m

Source: Court of Appeal

Time spent in court on criminal appeals, 1987

	Appeal against				
	Conviction & sentence	Sentence	Conviction	Other	Total
<i>Court Hours</i>					
Number of cases	55	145	64	21	285
Total time in court	72h48m	86h04m	71h00m	21h37m	251h29m
Minimum	01m	01m	01m	01m	01m
Median	1h05m	35m	1h00m	40m	-
Maximum	7h25m	2h50m	5h00m	3h25m	7h25m
<i>Median Court Hours when</i>					
Leave refused	15m	20m	45m	52m	
Appeal allowed	1h45m	45m	1h00m	40m	
Appeal dismissed	-	-	1h05m	-	
Withdrawn etc	-	01m	01m	-	
<i>No of Judges</i>					
2	0	0	1	0	1
3	51	136	54	21	262
4	0	2	1	0	3
5	4	7	8	0	19
<i>Total</i>	55	145	64	21	285
<i>Total Judge Hours</i>	238h16m	267h34m	218h14m	64h51m	788h55m

Source: Court of Appeal

Origins of civil appeals, 1982 and 1986

	1982		1986	
	No	%	No	%
<i>Appeal from</i>				
High Court	199	96.0	215	96.0
Other	7	3.5	7	3.0
Not Known	1	0.5	3	1.0
<i>Total</i>	207	100.0	225	100.0
<i>Appeal</i>				
First	173	84.0	191	85.0
Second	13	6.0	10	4.0
Case removed	1	0.5	3	1.0
Direct to CA	1	0.5	-	-
Not known	19	9.0	21	9.0
<i>Total</i>	207	100.0	225	100.0

Source: Court of Appeal

Route of second civil appeals 1982 and 1986

First Tribunal	First Appeal	Second Appeal	Number
1982			
District Court	High Court	Court of Appeal	9
Commissioner of Patents	High Court	Court of Appeal	1
District Land Registrar	High Court	Court of Appeal	1
Accident Compensation Appeal Authority	High Court	Court of Appeal	1
Disputes Committee	Arbitration Court	Court of Appeal	1
1986			
District Court	High Court	Court of Appeal	2
Planning Tribunal	High Court	Court of Appeal	3
Taxation Appeal Authority	High Court	Court of Appeal	1
Land Valuation Tribunal	High Court	Court of Appeal	1
Disputes Committee	High Court	Court of Appeal	1
Not Known	High Court	Court of Appeal	2

Source: Court of Appeal

High Court: criminal appeals filed and heard 1978-1987

Year	Filed	Allowed (quashed)	Dismissed	Abandoned, withdrawn	% allowed
1978	1,448	444 (228)	850	154	30.7
1979	1,473	529 (252)	731	203	36.2
1980	1,596	520 (188)	913	163	32.6
1981*	1,708	580 (188)	929	199	34.0
1982	1,728	617 (223)	815	296	35.7
1983	1,775	528 (167)	973	274	29.7
1984	1,892	636 (193)	978	278	33.6
1985	1,734	516 (141)	934	284	29.8
1986	1,842	595 (192)	858	289	34.2
1987	1,653	486 (171)	838	329	29.4

* Introduction of District Court jury trials

Source: Department of Statistics *Justice Statistics*

High Court: family proceedings appeals filed and heard 1978-1987

Year	Filed	Allowed	Dismissed	Abandoned, withdrawn	% allowed
1978	309	111	132	66	35.9
1979	234	91	98	45	38.9
1980	165	76	59	30	46.1
1981*	198	70	82	46	35.4
1982	1134	39	52	22	34.5
1983	116	47	40	29	40.5
1984	103	37	47	19	35.9
1985	83	29	32	22	34.9
1986	80	36	26	18	45.0
1987	58	22	20	16	37.9

* Introduction of Family Court

Source: Department of Statistics *Justice Statistics*

High Court Appeals – 1987

	On hand 1.1.87	New ones set down	Heard	Settled etc	On hand 31.12.87
Civil	140	68	51	12	145
Criminal					
- conv	471	563	522	46	466
- sent	325	797	705	84	333
Family proc	112	56	53	15	100
Admin	78	37	28	6	81
<i>Total</i>	1,126	1,521	1,359	163	1,125

Source: Monthly Returns to Courts Executive, Department of Justice

APPENDIX E

HIGH COURT: EXCLUSIVE ORIGINAL JURISDICTION

PART 1: CIVIL

The following Acts contain provisions which explicitly confer some or all of their original jurisdiction of the High Court exclusively. (Appellate jurisdiction is covered in Appendices F and G.) We have not included in this list the provisions which confer jurisdiction on a High Court Judge alone (for instance to issue warrants). Nor do we include provisions for the determination of jurisdictional issues or questions of law referred by tribunals, since these are closer to appeals (although as we point out in Appendix G they are not really appeals either). Some Acts may have been left out because the provisions involved are so slight or minor. And no doubt there are Acts which implicitly confer exclusive jurisdiction on the High Court by virtue of the fact that District Court does not have general jurisdiction under the District Court Act 1947 in respect of their provisions.

The main focus of the exclusive jurisdiction provisions is summarised;

Administration Act 1969 - Probate and supervision of administration of wills.

Admiralty Act 1973 - In rem and prize.

Agriculture and Pastoral Societies Act 1908 - Winding up of agricultural and pastoral societies.

Arbitration Act 1908 - Supervision of arbitrations.

Arbitration (Foreign Agreement And Awards) Act 1982 - Orders for enforcement of foreign arbitral awards.

Building Societies Act 1965 - Supervision of building societies.

Bay laws Act 1910 - Quashing or amending of invalid bylaws.

Charitable Trusts Act 1957 - Supervision of charitable trusts.

Chateau Companies Act 1977 - Supervision of Chateau companies.

Commerce Act 1986 - Injunctions, damages and pecuniary penalties regarding restrictive trade practices, mergers and takeovers.

Companies Act 1955 - Supervision of companies.

Companies Special Investigations Act 1958 - Supervision of certain company receiverships and winding ups.

Contracts (Privity) Act 1982 - Effects of third party contracts worth more than \$12,000.

Contractual Mistakes Act 1977 - Contractual mistakes where contracts worth more than \$12,000.

Contractual Remedies Act 1979 - Remedies for misrepresentation and breach of contracts worth more than \$12,000.

Co-operative Companies Act 1956 - Supervision of co-operative companies.

Cornish Companies Management Act 1974 - Supervision of statutory managers appointed to certain companies.

Coroners Act 1988 - Ordering a post-mortem examinations.

Credit Contracts Act 1981 - Credit contracts over \$12,000.

Declaratory Judgments Act 1908 - Declaratory judgments.

Defamation Act 1954 - Consolidation of actions.

Designs Act 1953 - Disputes as to Crown use of designs.

Distress and Replevin Act 1908 - Writs of replevin.

Estate and Gift Duties Act 1968 - Orders regarding statements and accounts, enforcement of charges.

Evidence Act 1908 - Examination of witnesses at request of overseas court.

Extradition Act 1965 - (Where brought before High Court on writ of habeas corpus) restrictions on surrender.

Fair Trading Act 1986 - Injunctions, orders for disclosure and order over \$12,000 regarding misleading and deceptive conduct etc, consumer information, product safety and safety of services.

Family Protection Act 1955 - Determination of applications for provision out of the estate of a deceased person.

Forestry Encouragement Act 1962 - Enforcement of charge for money payable under registered forestry encouragement agreement.

Friendly Societies and Credit Unions Act 1982 - Supervision of friendly societies and credit unions.

Fugitive Offenders Act 1881 (UK) - Discharge of fugitive offenders.

Gas Act 1982 - Injunctions restraining breach of Chief Inspecting Engineer's requirements.

Guardianship Act 1968 - Making of wards of the Court.

Habeus Corpus Acts 1640, 1679, and 1816 - Habeus corpus.

Hire Purchase Act 1971 - Jurisdiction in respect of hire purchases when case price of goods of or over \$12,000.

Housing Act 1955 - Variation or cancellation of easement certificates.

Human Rights Commission Act 1977 - Granting of remedies on reference by Tribunal.

Illegal Contracts Act 1970 - Illegal contracts worth more than \$12,000.

Incorporated Societies Act 1908 - Supervision of incorporated societies.

Industrial and Provident Societies Act 1908 - Supervision of industrial and provident societies.

Insolvency Act 1967 - Supervision of bankruptcies and insolvencies.

Insurance Companies' Deposits Act 1953 - Orders for realisation of securities comprising of forming part of deposits under Act.

Judicature Amendment Act 1977 - Application for judicial review.

Land Drainage Act 1908 - Injunctions staying construction of works if compensation not paid.

Land Settlement Promotion and Land Acquisition Act 1952 - Orders as to payment of compensation.

Land Transfer Act 1952 - Miscellaneous jurisdiction in respect of land.

Law Practitioners Act 1982 - Orders regarding admission, commencement in private practice, striking off and suspension of practitioners.

Law Reform (Testamentary Promises) Act 1949 - Enforcement of testamentary promises.

Licensing Trusts Act 1949 - Winding up of licensing trusts.

Life Insurance Act 1908 - Supervision of insurance companies.

Local Authorities Loan Act 1956 - Appointment and supervision of receivers in event of default on loans.

Local Government Official Information and Meetings Act 1987 - Review of local authority resolution regarding non-disclosure of information.

Marine Pollution Act 1974 - Admiralty jurisdiction in respect of liability for pollution damage.

Minor Contracts Act 1969 - Minor's contracts worth more than \$12,000.

Mortgagors and Lessees Rehabilitation Act 1936 - Orders in respect of certain mortgages and leases.

Mutual Insurance Act 1955 - Winding up of mutual insurance associations.

National Expenditure Adjustment Act 1932 - Authorisation of reduction of annuities or other periodical payments.

Official Information Act 1982 - Review of orders in council directing non-disclosure of information.

Partnership Act 1908 - Dissolution of special partnerships.

Patent Act 1953 - Supervision of patents (extension, revocation, disputes, etc).

Perpetuities Act 1964 - Cypres modifications, restrictions on acceptance of resulting trusts.

Property Law Act 1952 - Order in respect of mortgages, leases (other than dwelling houses), partitions of land (and division of chattels worth more than \$16,000), discharge of encumbrances of sale, etc.

Public Trust Office Act 1957 - Consent to appointment of Public Trustees.

Rating Powers Act 1988 - appointment of receivers in respect of unpaid rates (by a judge), and for cessation of receivers' powers.

Reciprocal Enforcement of Judgements Act 1934 - Orders for enforcement of foreign court judgements.

Reserve Bank of New Zealand Act 1964 - Supervision of statutory managers, prohibition of dealings with stock.

Securities Act 1978 - Supervision of the offering of securities to the public and related matters.

Shipping and Seamen Act 1952 - Orders regarding salvage claims and property over ships.

State-Owned Enterprises Act 1986 - Supervision of state-owned enterprises (application of Companies Act).

Status of Children Act 1969 - Service of warning notices, paternity orders.

Town and Country Planning Act 1977 - Injunctions regarding objectionable elements where capital value of land exceeds \$40,000.

Trade Marks Act 1953 - Supervision of trade marks (removal from register, restrictions of registered trademark, rectification of register, etc).

Trustee Act 1956 - Supervision of trusts.

Trustee Companies Act 1967 - Supervision of trustee companies (appointment of trustee companies, application of Trustee Act).

Trustee Companies Management Act 1975 - Supervision of certain trustee companies (authorisation of claims by beneficiaries, application of Companies Act).

Unit Titles Act 1972 - Appointment of administrators, cancellation of unit plans.

Unit Trusts Act 1960 - Supervision of unit trusts.

Wills Amendment Act 1955 - Probate over seamen's wills.

PART 2

Suggested list of Acts where the High Court's exclusive original jurisdiction provisions should be retained because of the supervisory function they entail. (Note - limited aspects of the companies and insolvency jurisdiction can already be exercised by High Court Masters pursuant to s 261 of the Judicature Act 1908 - and this may be a basis for extending that jurisdiction to the District Court as well).

1 Review and related powers

Arbitration Act 1908

Arbitration (Foreign Agreements and Awards) Act 1982

Bylaws Act 1910

Coroners Act 1988

Declaratory Judgements Act 1908 (limited to applications involving the exercise of a supervisory power)

Extradition Act 1965

Fugitive Offenders Act 1881 (UK)

Habeas Corpus Acts

Judicature Amendment Act 1972

Local Government Official Information and Meetings Act 1987

Official Information Act 1982

Reciprocal Enforcement of Judgements Act 1934

2 Companies and Related Bodies

Agricultural and Pastoral Societies Act 1908

Building Societies Act 1965

Chateau Companies Act 1977

Companies Act 1955

Co-operative Dairy Companies Act 1949

Friendly Societies and Credit Unions Act 1982

Incorporated Societies Act 1908

Industrial and Provident Societies Act 1908

Life Insurance Act 1908

State-Owned Enterprises Act 1986

3 *Receiver and Liquidators*

Companies Special Investigations Act 1958

Cornish Companies Management Act 1974

Insolvency Act 1967

Insurance Companies Deposits Act 1953

Licensing Trusts Act 1949

Local Authorities Loans Act 1956

Mutual Insurance Act 1955

Partnership Act 1908

Reserve Bank of New Zealand Act 1964

Unit Titles Act 1972

4 *Trusts and wills*

Administration Act 1969 (with the exception of probate)

Charitable Trusts Act 1957

Perpetuities Act 1964

Trustee Act 1956

Trustee Companies Act 1967

Unit Trusts Act 1960

5 *Intellectual property*

Designs Act 1953

Patents Act 1953

Trade Marks Act 1953

6 *Other*

Law Practitioners Act 1982

Securities Act 1978

PART 3: CRIMINAL

The following offences (compiled by reference to the 1st schedule to the Summary Proceedings Act 1957) are purely indictable and therefore within the exclusive jurisdiction of the High Court:

Crimes Act 1961

ss 73-79	Treason and other crimes against the Queen and the State
ss 80-85	Seditious offences
s 90	Riotous damage
ss 92-97	Piracy
s 98	Slave dealing
ss 99-106	Bribery and corruption
s 109	Perjury
s 113	Fabricating evidence
ss 115, 116	Conspiring to bring false accusation and to defeat justice
s 117	Corrupting juries and witnesses
s 123	Blasphemous libel
ss 128, 129	Sexual violation
ss 142, 143	Anal intercourse, bestiality
ss 158-180	Homicide, murder, manslaughter, etc
s 182	Killing unborn child
s 183	Procuring abortion
s 188	Wounding with intent
s 191	Aggravated wounding or injury
s 197	Disabling
s 198	Discharging firearm or doing dangerous act with intent
s 19[9]	Acid throwing
s 200(1)	Poisoning with intent to cause grievous bodily harm
s 201	Infecting with disease
s 203(1)	Endangering transport with intent to injury or endanger
s 204	Impeding rescue
s 209	Kidnapping
ss 211-216	Crimes against reputation
s 235	Aggravated robbery

Misuse of Drugs Act 1975

s 6	Dealing with class A or B controlled drugs.
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APPENDIX F

PROVISIONS FOR APPEAL TO ONE COURT FROM ANOTHER

This appendix notes the principal legislation providing for an appeal from one court to another. The next appendix does the same for appeals from a tribunal or similar body to a court.

The provisions can be divided into 3 - the general, regulating the usual course of appeal from one court to another, those regulating family appeals, and the particular, concerned with a narrower area of law. They are summarised in Appendix B, relating to the courts of general jurisdiction, paras 24-25 (including appeal to District Courts from Disputes Tribunals, Motor Vehicle Disputes Tribunals, and Tenancy Tribunals - which we do not include in the following information), 35-38 and 41-47.

Table of abbreviations

DC	District Court
HC	High Court
CA	Court of Appeal
JC	Judicial Committee of the Privy Council
G	general appeal
L	appeal only law only
l	appeal by leave
r	appeal as of right
F	express statutory finality provision

The general provisions (civil and criminal)

Statute	Original Court	Appeal Court	Category	Right, leave	Further Appeal
District Courts Act 1947 S 71A	DC	HC	G	r/l	(see Judicature Act)
Summary Proceedings Act 1957 ss 107, 144 ss 115, 144	DC	HC	L	r	CA 1 L(F)
	DC	HC	G	r	CA 1 L (F)
Judicature Act 1908 s 66 s 67 s 65	HC	CA	G	R	(see JC Rules)
	HC (on appeal)	CA	G	L	(see JC Rules)
	CA	JC	G	L	
Crimes Act 1961 s 379A s 381 s 383	HC/DC	CA	Pre trial orders	l	
	HC/DC	CA	L	l	
	HC/DC	CA	L	r	

	HC/DC	CA	G	I	
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Five specific aspects of Judicature Act provisions might be mentioned.

- (1) Section 66 has been consistently interpreted as applying only to civil matters. Accordingly appeals in criminal and related proceedings must be brought under other legislation, e.g. *R v Clarke* [1985] 2 NZLR 212 CA.
- (2) Express provision is made for appeal by any party to an application for review to the Court of Appeal against any final or interlocutory order, Judicature Amendment Act 1972, s 11. That provision might sometimes be used to avoid the limited scope of s 66.
- (3) Appeals against interlocutory decisions in respect of proceedings entered in the commercial list are with leave only (s 24(4)).
- (4) Decisions of Appeal to the Administrative Division of the High Court are final unless provision is made otherwise (s 26(4)).
- (5) Section 68 provides for a leapfrog appeal in civil and criminal proceedings from an inferior court having extended jurisdiction. It is inoperative at the moment since District Court cannot be described in that way (or at least could not before recent changes), e.g. *Kidd v Markholm Construction Company* [1970] NZLR 867 CA.

The Judicial Committee order of 1910 as amended in 1972 regulates appeals in civil matters, as indicated in para 46 of Appendix B. Criminal appeals are by special leave of the Judicial Committee only. Order in Council Regulating Appeals to His Majesty in Council from the Court of Appeal and from the Supreme Court of New Zealand 1910 No. 70 (L.3) and the New Zealand (Appeals to the Privy Council) (Amendment) Order 1972 SI 1972 No 1994 (printed in consolidated form in SR 1973/181; also NZLC R1, pp 100, 106), and e.g., (on criminal appeals) Halsbury's Laws of England (4th ed) vol 10, paras 774, 786, 826.

THE FAMILY LAW PROVISIONS

The Family Courts Act 1980 provides that the District Courts Act 1947 is to apply with necessary modifications of Family Courts and their Judges as it applies to District Courts and their Judges, it follows that the provisions of the 1947 Act for appeal to the High Court and beyond summarised above would apply to the Family Court and to its various separate statutory jurisdictions, mentioned in para 11 of Appendix B.

The provisions are not however easily capable of direct application and accordingly most of the relevant statutes include specific provisions, mainly based on the 1947 Act. The Family Proceedings Act 1980 (concerned with separation, dissolution of marriage, paternity and maintenance), the Domestic Protection Act 1982, the Guardianship Act 1968, the Matrimonial Property Act 1976, and the Protection of Personal and Property Rights Act 1988 contain closely related provisions. Parties to proceedings brought under them in the Family Court or District Court may appeal to the High Court in

accordance with the District Courts Act (with some exclusions of inappropriate provisions). With the leave of the Court of Appeal, they may appeal to that Court from the High Court on a question of law. Its decision is final (Family Proceedings Act, s 173, Domestic Protection Act, s 38, Guardianship Act, s 31 (see requirement for an actual rehearing), Matrimonial Property Act, s 39 (except that further appeals are subject to the general provisions of the Judicature Act Privy Council Rules), Social Security Act, s 27T (except that the Social Security Commission's appeal is limited to questions of law) and Protection of Personal and Property Rights Act 1988, s 83 (requirement for actual rehearing)).

If the proceedings are heard originally in High Court, parties have a right of appeal to the Court of Appeal, the decision of which is final (Family Proceedings Act, s 175, Guardianship Act, s 31(5), (7), and Protection of Personal and Property Rights Act 1988, s 85 (again actual rehearing), but see Matrimonial Property Act, s 39(2) and (3) which apply to the general provision of the Judicature Act and Privy Council Rules; the appeal provisions in the Domestic Protection and Social Security legislation do not contemplate original High Court proceedings).

The Adoption Act 1955 provides in several of its provisions for appeals from decisions of the Family Court or District Court to the High Court (ss 8(5A), 12(1A), (1B), 13A and 20(5); see also the provisions for application (rather than appeal) to the High Court to revoke an order: s 8(b) and (7)). The form of the appeal is not regulated in any way, and no express provision is made for a further appeal.

The Marriage Act 1955 confers powers on the High Court in respect of marriages which would otherwise be prohibited (s 15(2)) and on Family Court Judges in respect of refusals by parents to consent to the marriage of minors (s 19(1)). No express provision is made for an appeal, and it has been held (but before the enactment of the general provisions of the Family Court Act 1980) that the second power of decision is not within the appeal provisions of the District Courts Act 1947, *Wong v Hatton* [1958] NZLR 955.

THE SPECIFIC PROVISIONS

About another 20 statutes (at least) provide for an appeal from one court to another in a specific area of law. (We leave for the next appendix proceedings which begin with an official, a tribunal or other body and which might be later heard on appeal in 2 courts: Taxation Review Authority proceedings provide an example.)

In general they adopt 1 of 3 approaches - they apply the provisions for civil appeals included in the District Courts Act and the Judicature Act, the provisions for criminal appeals included in the Summary Proceedings Act and sometimes the Crimes Act, or they make special provision. The general legislation might of course be applied with amendment (as we have seen with the family legislation). The provisions are accordingly listed under these 3 headings.

Civil provisions

Admiralty Act 1973, s 13 - General provisions apply.

Mining Act 1971, s 238 - District Courts Act applies), s 239 (appeal to Administrative Division.

Shipping and Seamen Act 1952, s 359 - District Court Act applies.

Official Information Act 1982, s 32C, and Local Government Official Information and Meetings Act 1987, s 34 - Appeal from judicial review decisions of the High Court, in accordance with Judicature Act, s 66.

Criminal provisions

Alcoholism and Drug Addiction Act 1966, s 23 - Appeal under Summary Proceedings Act as if person sentenced to detention under that Act.

Children and Young Persons Act 1974, ss 53-56 - Rights of appeal from decisions of Children and Young Persons Court by child, young person, parents and complainant; Summary Proceedings Act applied.

Civil Aviation Act 1964, s 249 - Flying disqualification order imposed by District Court or by High Court subject to appeal under Summary Proceedings Act and Crimes Act respectively.

Family Proceedings Act 1980, s 130 - Contempt, appeal as if convicted and sentenced in the District Court.

Indecent Publications Act 196, s 25(5) - Appeal in respect of District Court order for destruction under Summary Proceedings Act.

Mining Act 1971, s 214 - Appeal against decision of a Court of Inquiry in which the cancellation or suspension certificate of competency was in question, in accordance with the Summary Proceedings Act).

Transport Act 1962, s 41 - Appeal against decisions relating to drivers licence in accordance with Summary Proceedings Act and Crimes Act).

Special provisions

Arbitration Amendment Act 1938, s 11 - Opinion of High Court subject to appeal under Judicature Act, but only with leave.

Declaratory Judgements Act 1908, s 8 - Appeal of Court of Appeal against any judgment or order under this Act.

Gaming and Lotteries Act 1977, s 65 - Appeal against decisions of District Court Judge to High Court (Administrative Division) in respect of licence decisions - refusals, suspensions and cancellations.

Immigration Act 1987, ss 115 and 116 - Appeals in respect of decisions made on application in the District Court for removal orders to the High Court (Administrative Division) and Court of Appeal (the latter on law only).

Judicature Amendment Act 1972, s 11 - Appeal to Court in Appeal against order in respect of review application, in accordance with s 66 Judicature Act.

Local Government Act 1974, s 625 - Decision by District Court, or objection to requirement by local authority, subject to appeal on point of law only to High Court; Summary Proceedings Act applies.

Local Government Official Information and Meetings Act 1987, s 35 - As with Judicature Amendment Act 1972.

APPENDIX G

PROVISIONS FOR APPEAL TO COURTS FROM TRIBUNAL AND RELATED DECISIONS

This appendix summarises legislative provisions conferring rights of appeal from the divisions of tribunals, related bodies (including those involved with occupational licensing and discipline) and Ministers. The list is not complete; there are for instance a number of provisions in the energy and environment areas which are part of the current programme for resource management law reform. The Report of the Legislative Advisory Committee on Administrative Tribunals (Report No 3 1988) Appendix 1 lists several other provisions conferring rights of appeal to District Court Judges (see also para 25 of Appendix B).

We have not included provisions which allow cases to be stated. Sometimes they are allowed expressly by the particular Act and in many others it is a consequence of the tribunal having the powers of a Commission of Inquiry. The case stated power is distinct from appeal : it is exercised during the original proceeding rather than after a decision is given; the original body rather than the parties have a right to initiate it; and it is limited to questions of law (whereas some appeals are general).

Table of Abbreviations

TO	(appeal body)
DC	District Court
HC	High Court
AD	Administrative Division of High Court
Arb	Arbitrator
X	No appeal

- A The court includes 2 assessors. The decision of the court is the decision of the judge.
- B The court may include people chosen for their expertise.
- C The court includes 1 or 2 additional members. The decision of the judge or judges is the decision of the court.
- D 3 judges
- E 3 judges in some cases
- F Included only where the particular statute expressly states that the decision is at first appeal final. Where the Administrative Division is concerned this is a repetition of s26(4) of the Judicature Act 1908.

Category

L	Law
G	General
G1	General over a specified monetary limit
G2	But does not include disciplinary matters
S1	Where proceedings unfair
S2	If Act not complied with or decision unreasonable
S3	As if from the exercise of a discretion

Further Appeal

CA	Court of Appeal
<i>l</i>	Leave required
<i>r</i>	Right
CA1	Only if split decision below

The schedule lists only the express provisions in the particular statutes. The general provisions of the Judicature Act 1908 may be applicable.

<i>Body</i>	<i>To</i>	<i>Category</i>	<i>Further Appeal</i>
<i>Disputes Between Individuals</i>			
Copyright Tribunal	XF		
Equal Opportunities Tribunal	AD ^a	G	CA ¹
Commissioner of Trademarks	HC	G	
Commissioner of Designs	HC	G	CA <i>l</i>
Commissioner of Patents	HC	G	CA <i>l</i> or <i>r</i>
Motor Vehicles Disputes Tribunal	DCF	G ¹ or L	
Small Claims (disputes) Tribunal	DC	S ¹	
Residential Tenancy Tribunal	DC	G ¹	HC <i>r l</i> CA/L
Plant Varieties Rights Commissioner	DC ^b	L	
Registrar-General of Land	HC	G	
<i>Environmental and Planning</i>			
Planning Tribunal	AD	L	CA <i>l</i> L
Soil Conservation & Rivers Control Tribunal	HC	L	CA <i>l</i> L
Land Valuation Tribunal	AD ^c	G	CA ¹
D-G of Health (Clean Air Act Licenses)	AD ^c	G	CA ¹
<i>Economic Matters</i>			
Commerce Commission	AD ^b	G	CA <i>l</i> or CA ¹
Securities Commission	HC	L	CA ¹
Transport Charges Appeal Authority	HC	L	CA <i>l</i> L
<i>Scientific/Technical</i>			
Animal Remedies Board	AD ^d	G	
Medicines Review Committee	AD	S ²	CA <i>l</i> G
Pesticides Board	AD	S ²	CA <i>l</i>
Medical Officer of health (Toxic Substances)	AD	S ²	CA <i>l</i>
<i>Censorship bodies</i>			
Film Censorship Board of Review	AD	L	CA <i>r</i> L
Indecent Publications Tribunal	HC ^{dF}	S ³	
Video Recordings Board of Review	AD	L	CA <i>r</i> L
<i>Welfare and Benefits</i>			
Accident Compensation Appeal Authority	AD <i>l</i>	LG	CA <i>l</i> L
Legal Aid Appeal Authority	HC	L	
Social Security Appeal Authority	AD	L	CA <i>l</i> L
War Pensions Appeal Board	XF		
Tertiary Assistance Grants Appeal Authority	XF		
<i>Taxation</i>			
Taxation Review Authorities	HC	L or G ¹	CA <i>r</i>

<i>Body</i>	<i>To</i>	<i>Category</i>	<i>Further Appeal</i>
Commission of Inland Revenue			
1 Income Tax Assessment	HC	G	
2 Estate & Gift Duties	HC	G	
3 Stamp and Cheque Duty	HC	G	
Comptroller of Customs	AD	G	CA / L
Collector of Customs	AD	G	CA / L
Tariff Classification Mediator	AD	G	
Co-op Pig Marketing Companies Tax Appeal Authority	XF		
Co-op Dairy Companies Income Tax Appeal Authority	XF		
Co-op Milk Marketing Companies Income Tax Appeal Authority	XF		
<i>Licensing of Activity</i>			
Air Services Licensing Authority	AD	G	CA / L
Transport Licensing Appeal Authority	HC	L	CA / L
Broadcasting Tribunal	AD F	S ³	
Berryfruit Marketing Licensing Authority	Arb	G	AD L
NZ Horticulture Export Authority	Arb	G	AD L
Game Industry Authority	Arb	G	AD L
NZ Milk Authority	Arb		
Fisheries Authority	AD	G	CA / L
Fisheries Quota Appeal authority	XF		
NZ Fishing Industry Board	AD ^a	G	
Shop Trading Hours Commission	XF		
Wine Makers Licensing Committee Chairman	AD	G	
Wine Makers Licensing Control Commission	AD	L	
(Liquor) Licensing Committee Chairman	ADF	G or L	
(Liquor) Licensing Control Commission	ADF	G or L	
Co-operative Dairy Companies Tribunal	AD	L	CA /
Deportation Review Tribunal	AD	L	
Hydatids Board of Appeal	XF		
Registrar of Private Investigators & Security Guards	F		
<i>Occupational Licensing and Discipline</i>			
Architects Education & Registration Board	HC	G	
Chiropractic Board	AD	G	
Dental Council of NZ	AD	G	CA / L
Dentists Disciplinary Tribunal	AD	G	CA / L
Clinical Dental Technicians Disciplinary Tribunal	AD	G	CA / L
Dental Technicians Disciplinary Tribunal	AD	G	CA / L
Dental Technicians Board	AD	G	CA / L
Dietitians Board	AD	G	
NZ Law Practitioners Disciplinary Tribunal	HC ^e	G	
NZ Medical Council	HC ^e	G	
Nursing Council of NZ	AD	G	
Opticians Board	AD	G	
Psychologists Board	AD	G	
Veterinary Surgeons Board	HC F	G	
Survey Board	AD	G	
Institute of Registered Music Teachers of NZ	DC F	G	
Motor Vehicle Dealers Board/Authority	AD	G ²	CA / L
Plumbers, Gasfitters & Drainlayers Board	AD	G	
Real Estate Agents Licensing Board	AD	G ²	CA r L
Pharmacy Authority	AD	G	
Engineers Registration Board of Appeal	DC	G	
Engineer Associates Appeal Tribunal	XF		
Electrical Registration Board of Appeal	AD	G	
Occupational Therapy Board of Appeal	XF		

<i>Body</i>	<i>To</i>	<i>Category</i>	<i>Further Appeal</i>
Physiotherapy Board of Appeal	XF		
<i>Labour</i>			
Parental Leave & Employment Protection Complaints Committee	LC ^c	G	CA r L
Union Membership Exemption Tribunal	LC	L	CA r
Registrar of Unions	LC	G	CA r
<i>Registration</i>			
Registrar of Companies	HC	G	
Registrar of Incorporated Societies	HC	G	
Registrar of Building Societies	HC	G	
Registrar of Friendly Societies	HC	G	
<i>Others</i>			
Abortion Supervisory Committee	AD	L	CA r L
Mortgagees & Lessees Adjustment Commission	HC		
Local government Commission	AD	L	
Government Actuary (Superannuation Scheme)	AD	G	
Land Settlement Board	HC or AD		
Police Officers (Arms Act)	DC	G	HC L
Governor-General (Electric Power Boards)	HC F	G	
<i>Ministers' Decisions</i>			
Internal Affairs Passports	AD	G	CA I G
<i>Immigration</i>			
Revocation of Residence Permit	AD F	G	
Deportation Order	AD F	G	
<i>Energy</i>			
Revocation of Petroleum Licence	AD		
Revocation of Gas Licence	AD	G	CA I L
Grant of Coal Mining Right	DC	L	
Forfeiture of Coal Mining Right	AD	G	
<i>Customs</i>			
Distillation Licence	AD	G	
<i>Environment</i>			
Water & soil Conservation	HC	L	CA I L

APPENDIX H

A CHRONOLOGICAL LIST OF APPEALS FROM NEW ZEALAND DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The following list is based on the *New Zealand Privy Council Cases 1840-1932*, the *New Zealand Law Reports* and the *Weekly Law Reports*. For purposes of standardisation some changes have been made to the citations used in the Reports. No doubt there are gaps - for instance of unreported cases and in particular of unsuccessful petitions for leave.

The Queen v Clarke (1849-51) NZPCC 516. Prerogative of Crown - Land Claims Ordinance. Appeal allowed.

Bunny v Hart (1857) NZPCC 15. Bankruptcy - adjudication. Appeal withdrawn by consent.

Bunny v The Judges of the Supreme Court of New Zealand (1862) NZPCC 302. Law practitioner - suspension. Appeal dismissed.

Maclean v MacAndrew (1874) NZPCC 349. Cancellation of lease under Goldfields Act 1866, Otago Waste Lands Act 1866. Appeal dismissed.

Bell v Receiver of Land Revenue of Southland (1876) NZPCC 216. Application to purchase rural land - price. Appeal dismissed.

Pearson v Spence (1879) NZPCC 222. Application to purchase rural and - price. Appeal dismissed.

Daniell v Sinclair (1881) NZPCC 140. Reopening of accounts under mortgage. Appeal dismissed.

Rhodes v Rhodes (1882) NZPCC 708. Construction of will. Appeal allowed.

Ward v National Bank of New Zealand Ltd (1883) NZPCC 551. Guarantee - defence of release of co-surety without knowledge and consent. Appeal dismissed.

The Queen v Williams (1884) NZPCC 118. Crown suit - negligence. Appeal dismissed.

Plimmer v Wellington City Corporation (1884) NZPCC 250. Compensation for public taking of licensed land. Appeal allowed.

Shaw Savill & Albion Co Ltd v Timaru Harbour Board (1889-90) NZPCC 180. Liability of Harbour Board for actions of harbourmaster as pilot. Appeal dismissed.

Donnelly v Broughton (1891) NZPCC 566. Validity of Maori will. Appeal dismissed.

Buckley (Attorney-General for New Zealand) v Edwards (1892) NZPCC 204. Power to appoint Supreme Court Judges. Appeal allowed.

Cameron v Nystrom (1893) NZPCC 436. Negligence - employer's liability. Appeal dismissed.

Ashbury v Ellis (1893) NZPCC 510. New Zealand Constitution - validity of Supreme Court Code rule authorising proceedings against defendant absent from New Zealand. Appeal dismissed.

Black v Christchurch Finance Co Ltd (1893) NZPCC 448. Negligence - liability of principal for agent. Appeal allowed.

Union Steam Ship Co Ltd v Claridge (1894) NZPCC 432. Negligence - employer's liability. Appeal dismissed.

Barre Johnston and Co v Oldham (1895) NZPCC 101. Contract - subcontractor's obligations. Appeal dismissed.

Annie Brown v Attorney-General for New Zealand (1897) NZPCC 106. Criminal law - party of offence - defence of martial control. Appeal dismissed.

Eccles v Mills (1897-8) NZPCC 240. Landlord and tenant - lessor's covenant. Appeal allowed.

Southland Frozen Meat & Product Export Co Ltd v Nelson Bros Ltd (1898) NZPCC 77. Contract - construction. Appeal dismissed.

Union Bank of Australia Ltd v Murray - Aynsley (1898) NZPCC 9. Bank - trust fund - knowledge of character of customer's account. Appeal allowed.

Barker v Edger (1898) NZPCC 422. Jurisdiction to rehear case under Native Land Court Act 1886. Appeal allowed in part and judgment varied accordingly.

Dilworth v Commissioner of Stamps, Dilworth v Commissioner for Land & Income Tax (1898) NZPCC 578. Tax - exemption from death duties, land tax. Appeals allowed.

Coats (Receiver for Debenture-Holders of the New Zealand Midland Railway Co Ltd) v R (1890) NZPCC 651. Railways debentures - construction. Appeal dismissed.

Wasteney v Wasteney (1890) NZPCC 184. Deed of separation - provision for annuity. Appeal allowed. 1

Fleming v Bank of New Zealand (1900) NZPCC 525. Principal and agent - agent's authority. Appeal allowed. 1

Allan v Morrison (1900) NZPCC 560. Probate of lost will. Appeal dismissed.

Jellicoe v Wellington District Law Society (1900) NZPCC 310. Suspension of solicitor. Appeal dismissed.

Nireaha Tamaki v Baker (1900-01) NZPCC 371. Native Land Court - cognizance of Maori customary law. Appeal allowed.

Te Teira Te Paea v Te Roera Tareha (1901) NZPCC 399. Native lands - confiscation by Crown. Appeal dismissed.

Wellington City Corporation v Johnston, Wellington City Corporation v Lloyd (1902) NZPCC 644. Public works - compensation for taking. Appeals dismissed.

Commissioner of Trade and Customs v R Bell & Co Ltd (1902) NZPCC 146. False trade description - forfeiture by Customs. Appeal allowed.

Wallis v Solicitor-General (1902-03) NZPCC 23. Charitable trust. Appeal allowed.

Jackson v Commissioner of Stamps (1903) NZPCC 592. Tax - death duties (estate duty). Appeal dismissed.

Mitchell v New Zealand Loan & Mercantile Agency Co Ltd, Ex parte Mitchell (1903) NZPCC 495. Petition for special leave to appeal in forma pauperis. Leave refused.

D Henderson & Co Ltd (In liquidation) v Daniell (1904) NZPCC 48. Company law - arrangement with creditors. Appeal dismissed.

Smith v McArthur (1904) NZPCC 323. Licensing - polls and elections. Appeal allowed.

Lodder v Slowey (1904) NZPCC 60. Termination of contract - power of re-entry and seizure - quantum meruit. Appeal dismissed.

Wellington City Corporation v Lower Hutt Borough (1904) NZPCC 354. Municipal Corporations Act 1900 - contribution to cost of bridge. Appeal dismissed.

Helsop v Minister of Mines (1904) NZPCC 344. Compensation for lands injured by mining. Appeal dismissed.

Riddiford v R (1904-05) NZPCC 109. Surrender of lands to Crown - adverse possession. Appeal dismissed.

Assets Co Ltd v Mere Roihi (1904-05) NZPCC 275. Consolidated appeals - irregularities in Native Land Court proceedings - effect on registration under Land Transfer Act. Appeals allowed.

Graham v Callaghan (1905) NZPCC 330. Licensing laws - regulation of local elections. Appeal allowed.

New Zealand Loan & Merchantile Agency Co Ltd v Reid (1905) NZPCC 82. Contract - fraud. Appeal allowed.

Clouston and Co Ltd v Corry (1905) NZPCC 336. Master and servant - wrongful dismissal. Appeal allowed.

Commissioner of Taxes v Eastern Extension Australasia & China Telegraph Co Ltd (1906) NZPCC 604. Income tax - profits from transmission of messages from New Zealand for part of route outside New Zealand. Appeal dismissed.

Ward Bros v Valuer-General for New Zealand (1907) NZPCC 174. Power of Supreme Court to control Valuer-General. Appeal dismissed.

Lyttelton Times Co Ltd v Warners Ltd (1907) NZPCC 470. Nuisance - construction of building resulting in noise. Appeal allowed.

R v Badger, Ex Parte Badger (1907) NZPCC 501. Criminal law - Petition for special leave to appeal. Leave refused.

Lovell and Christmas Ltd v Commissioner of Taxes (1907) NZPCC 611. Income tax - profits from goods sold on commission in London. Appeal allowed.

In re The Will of Wi Matua (deceased), *Ex Parte Reardon & Te Pamoia* (1908) NZPCC 522. Native Land Court Act 1894 - petitions for special leave to appeal from decision of Native Appellate Court. Leave refused.

Commissioner of Stamps v Townend, In re Moore (deceased) (1909) NZPCC 597. Tax - death duties (gift duty). Appeal dismissed.

Hamilton Gas Co Ltd v Hamilton Borough (1910) NZPCC 357. Purchase of gasworks and plant by Borough council - price. Appeal allowed.

Greville v Parker (1910) NZPCC 262. Lease - option for renewal. Appeal allowed.

Allardice v Allardice (1911) NZPCC 156. Family protection. Appeal dismissed.

Massey v New Zealand Times Co Ltd (1912) NZPCC 503. Defamation - grounds for new trial. Appeal dismissed.

Samson v Aitchison (1912) NZPCC 441. Negligence - employer's liability. Appeal dismissed.

Manu Kapua v Para Haimona (1913) NZPCC 413. Native lands - title of "loyal inhabitants". Appeal dismissed.

Kauri Timber Co Ltd v Commissioner of Taxes (1913) NZPCC 636. Income tax - deduction of capital. Appeal dismissed.

Equitable Life Assurance Society of the United States v Reed (1914) NZPCC 190. Life insurance policy - surrender value. Appeal dismissed.

Union Steam Ship Co of New Zealand Ltd v Wellington Harbour Board (1915) NZPCCC 176. Exemption from Harbour Board dues. Appeal dismissed.

Rutherford v Acton-Adams (1915) NZPCC 688. Vendor and purchaser - compensation for deficiency. Appeal dismissed.

R v Broad (1915) NZPCC 658. Railways - negligence - effect of statutory restriction on public right of way. Appeal dismissed.

Mangaone Oilfields Ltd v Herman & Weger Manufacturing & Contracting Co Ltd (1916) NZPCC 21. Building contract - construction. Appeal dismissed.

Ridd Milking Machine Co Ltd v Simplex Milking Machine Co Ltd (1916) NZPCC 478. Patent - infringement. Appeal dismissed.

Gillies v Gane Milking Machine Co Ltd (1916) NZPCC 490. Patent - infringement. Appeal dismissed.

McCaul v Fraser (1917) NZPCC 152. Family arrangement - trust to divide estate. Appeal dismissed.

Attorney-General for New Zealand v Brown, In Re Knowles (deceased) (1917) NZPCC 698. Construction of will. Appeal dismissed.

Marsh v T Leger (1918) NZPCC 232. Lands Act 1892 - construction of provisions regarding renewal and rental. Appeal dismissed.

Hineiti Rirerire Arani v Public Trustee of New Zealand (1919) NZPCC 1. Maori adoption. Appeal dismissed.

Tarbutt v Nicholson and Long (1920) NZPCC 703. Construction of will. Appeal allowed.

Union Stem Ship Co of New Zealand v Robin (1920) NZPCC 131. Death by accident - amount recoverable by dependent. Appeal dismissed.

Gerrard v Crowe (1920) NZPCC 691. Riparian owners - right to erect embankment against flood. Appeal dismissed.

Thornes v Brown (1922) NZPCC 534. Exchange of land - negligence of agent acting for both parties. Appeal dismissed.

Ward and Co Ltd v Commissioner of Taxes (1922) NZPCC 625. Income tax - deductibility of money expended on propoganda for licensing poll. Appeal dismissed.

A Hatrick & Co Ltd v R (1922) NZPCC 159. government railways - Minister's power to exact sorting-charges. Appeal allowed.

Snushall v Kaikoura County (1923) NZPCC 670. Control by County Council of "paper roads". Appeal dismissed.

Smallfield v National Mutual Life Association of Australasia Ltd (1923) NZPCC 197. Life insurance - truth of statements forming basis. Appeal allowed.

Auckland Harbour Board v R (193) NZPCC 68. Constitutional law - authority for payment out of Consolidated Fund. Appeal dismissed.

Waimiha Sawmilling Co Ltd (in liquidation) v Waione Timber Co Ltd (1925) NZPCC 267. Land Transfer Act 1915 - unregistered interest. Appeal dismissed.

Peddle v McDonald (1925) NZPCC 138. Assignment of right to use tram line. Appeal dismissed.

Wright v Morgan (1926) NZPCC 678. Trusts - assignment of option given under will to co-trustee. Judgment varied.

Biset v Wilkinson (1926) NZPCC 93. Contract for sale of land - misrepresentation. Appeal allowed.

Gardiner v Hirawanu (1926) NZPCC 365. Native land - covenant by lessee to cultivate. Appeal allowed.

Doughty v Commissioner of Taxes (1926-27) NZPCC 616. Income tax - value of partner's share on conversion of partnership into a company. Appeal allowed.

Crown Milling Co Ltd v R (1926-27) NZPCC 37. Commercial Trusts Act 1910. Appeal allowed.

Watson v Haggitt (1927) NZPCC 474. Construction of deed of partnership. Appeal dismissed.

Finch v Commissioner of Stamp Duties (1929) NZPCC 600. Tax - death duties (gift duty). Appeal allowed.

Wanganui Sash and Door Factory & Timber Co Ltd v Maunder (1929) NZPCC 484. Patent - infringement. Appeal allowed.

Burnard v Lysnar (1929) NZPCC 538. Principal and surety - validity of arrangement with creditor. Appeal allowed.

Scales v Young (1931) NZPCC 313. Licensing districts. Appeal dismissed.

Benson v Kwong Chong (1932) NZPCC 456. Negligence - function of jury. Appeal allowed.

Aspro Ltd v Commissioner of Taxes (1932) NZPCC 630. Income tax - deduction for sums voted as director's fees. Appeal dismissed.

New Plymouth Borough v Taranaki Electric Power Board [1933] NZLR 1128. Municipal Corporations Act 1920. Appeal dismissed.

Brooker v Thomas Borthwick & Sons (Aust) Ltd [1933] NZLR 1118. Workers compensation. Appeal allowed.

Gould v Commissioner of Stamp Duties [1934] NZLR 32. Tax - death duties. Appeal dismissed.

Lysnar v National Bank of New Zealand Ltd [1935] NZLR 129. Contract - formation. Appeal allowed.

Barton v Moorhouse [1935] NZLR 152. Construction of a private Act. Appeal allowed.

Trickett v Queensland Insurance Co Ltd [1936] NZLR 116. Motor vehicle insurance policy - construction. Appeal dismissed.

Public Trustee v Lyon [1936] NZLR 180. Life insurance Appeal dismissed.

Attorney-General of New Zealand v New Zealand Insurance Co Ltd [1937] NZLR 33. Validity of will. Appeal dismissed.

Vincent v Tauranga Electric Power Board [1936] NZLR 1016. Breach of implied contract and statutory duty - limitation of action. Appeal dismissed.

Auckland City Corporation & Auckland Transport Board v Alliance Assurance Co Ltd [1937] NZLR 142. Local authority debentures - currency of payment. Appeal dismissed.

Macleay v Treadwell, In re Macleay (deceased) [1937] NZLR 230. Construction of will. Appeal allowed.

Mt Albert Borough v Australasian Temperance & General Mutual Life Assurance Society Ltd [1937] NZLR 1124. Local body loan - application of Victoria statute. Appeal dismissed.

De Bueger v J Ballantyne and Co Ltd [1938] NZLR 142. Contract - currency of payment - construction. Appeal allowed.

Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd [1939] NZLR 388. Mortgage - mortgagee's obligations on sale. Appeal dismissed.

Stewart v Handcock [1940] NZLR 424. Negligence - evidence. Appeal allowed.

Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590. Legal effect of Treaty of Waitangi. Appeal dismissed.

Dillon v Public Trustee, In re Dillon [1941] NZLR 557. Family Protection Act 1908 - effect on distribution under a contract to make a will. Appeal allowed.

Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee [1942] NZLR 294. Will - withdrawal to probate - liability of executor for payments made. Appeal dismissed.

Sidey v Perpetual Trustees, Estate, & Agency Co of New Zealand Ltd [1944] NZLR 891. Construction of will. Appeal allowed.

Auckland Electric Power Board v Public Trustee [1947] NZLR 279. Electric Supply Regulations 1935 - Electric Wiring Regulations 1935 - ultra vires. Appeal allowed.

Australian Provincial Assurance Association Ltd v E T Taylor & Co Ltd [1947] NZLR 793. Contract - formation. Appeal allowed.

National Mutual Life Association of Australia Ltd v Attorney-General [1956] NZLR 422. Government debentures - currency of payment. Appeal dismissed.

Ward v Commissioner of Inland Revenue [1956] NZLR 367. Death duties (estate duty). Appeal dismissed.

Commissioner of Stamp Duties v New Zealand Insurance Co Ltd [1956] NZLR 335. Death duties (estate duty). Appeal dismissed.

McKenna v Porter Motors Ltd [1956] NZLR 845. Tenancy - landlord's possession. Appeal dismissed.

Maori Trustee v Ministry of Works, In re Whareroa 2E Bock [1959] NZLR 7. Public works - compensation for land taken. Appeal dismissed.

Perkowski v Wellington City Corporation [1959] NZLR 1. Negligence - liability of local authority. Appeal dismissed.

Mouat v Betts Motors Ltd [1959] NZLR 15. Customs and price control restrictions on sale of imported car. Appeal dismissed.

Truth (New Zealand) Ltd v Holloway [1961] NZLR 22. Defamation - jury verdict. Appeal dismissed.

Lee v Lee's Air Farming Ltd [1961] NZLR 325. Company law - separate corporate personality - governing director's ability to become employee of company. Appeal allowed.

Australian Mutual Provident Society v Commissioner of Inland Revenue [1962] NZLR 449. Income tax - assessment. Appeal dismissed.

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Boots the Chemists (New Zealand) Ltd v Chemists' Service Guild of New Zealand (Inc) [1969] NZLR 78. Statutory limitations on persons owning or controlling pharmacy business. Appeal allowed and cross appeal dismissed.

Loan Investment Corporation of Australasia v Bonner [1970] NZLR 724. Contract - specific performance. Appeal dismissed.

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Ross v Henderson [1977] 2 NZLR 458. Sale of land - Land Settlement Promotion and Land Acquisition Act 1952. Appeal dismissed.

Thomas v R [1978] 2 NZLR 1. Criminal law - petition for special leave to appeal - jurisdiction. Leave refused.

Dickens v Neylon [1978] 2 NZLR 35. Sale of land - waiver of contract deadline. Appeal dismissed.

Lilley v Public Trustee [1981] 1 NZLR 41. Will - testamentary promises. Appeal dismissed.

Reid v Reid [1982] 1 NZLR 147. Matrimonial property. Appeal and cross appeal dismissed.

Lesa v Attorney-General [1982] 1 NZLR 165. New Zealand citizenship. Appeal allowed.

Wiseman v Canterbury Bye-Products Co Ltd [1983] NZLR 184. Bylaw and rule-making power - Meat Act 1939. Appeal dismissed.

McDonald v R [1983] NZLR 252. Criminal law - murder - offer of immunity. Appeal dismissed.

Mahon v Air New Zealand Ltd, Re Erebus Royal Commission [1983] NZLR 662. Administrative law - powers of Royal Commissions of inquiry - judicial review. Appeal dismissed.

Lowe v Commissioner of Inland Revenue [1983] NZLR 416. Income tax - profit derived from land. Appeal dismissed.

Kaitamaki v R [1984] 1 NZLR 385. Criminal law - rape. Appeal dismissed.

Chiu v Richardson [1984] 1 NZLR 757. Criminal law - petition for special leave to appeal. Leave refused.

Hart v O'Connor [1985] 1 NZLR 159. Contract for sale of land - capacity and fairness. Appeal allowed.

Scancarriers A/S v Aotearoa International Ltd [1985] 1 NZLR 513. Contract - formation. Appeal allowed and cross appeal dismissed.

New Zealand Rugby Football Union Inc v Finnigan [1986] 1 NZLR 13. Powers of incorporated society - standing - petition for special leave to appeal. Leave refused.

Commissioner of Inland Revenue v Challenge Corporation Ltd [1986] 2 NZLR 513. Income tax - tax avoidance. Appeal allowed.

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Rowling v Takaro Properties Ltd (in receivership) [1987] 2 NZLR 700, Ministerial negligence. Appeal allowed.

NZ Meat Industry Association v Accident Compensation Corporation [1988] 1 NZLR 1. Accident compensation - employer levy - interpretation. Appeal dismissed.

Hovell v R (July 1988, not yet reported). Criminal law - petition for special leave to appeal. Leave refused.

Chase Securities Ltd v G S H Finance Pty Ltd (October 1988, not yet reported). Contract - share values. Appeal allowed.

The following figures - drawn from the above list - may be of interest. Where several appeals are dealt with in the same judgment, these are treated as one appeal for statistical purposes.

	Appeals Allowed	Appeals Dismissed	Other*	Total
1840-1899	8	15	2	25
1900-1909	12	14	3	29
1910-1919	2	16	0	18
1920-1929	10	9	1	20
1930-1939	6	11	0	17
1940-1949	5	2	0	7
1950-1959	0	7	0	7
1960-1969	5	7	0	12
1970-1979	7	13	5	25
1980-	6	9	3	18
	61	103	14	178

*Appeal withdrawn by consent, judgment varied, petition for special leave to appeal refused.

APPENDIX I

COURT, TRIBUNAL, GOVERNMENT: CRITERIA FOR CHOICE*

*Extract from the Report of the Legislative Advisory Committee on Administrative Tribunals (Report No. 3, 1988). See para 136 above.

THE CHOICES

37 The basic choice is of course that already indicated - between court, tribunal and the executive government. The material indicates as well that the choice can be more complex, taking account of differences within each body, of overlaps of both people and jurisdiction between them, and of relationships of direction, advice and appeal between the bodies:

- (a) within court, tribunal or government, different decision-makers are or may be available - one person or several, a special judge, a judge with additional members, an independent statutory officer ...; e.g. the Administrative Division Judge, that Judge with expert members in commerce matters, the Planning Judge sitting alone or with other matters, or the Commissioner of Patents.
- (b) by contrast to the division involved in (a), a member of a court or tribunal might be a member of the other, especially the tribunal member who is required by law to be a Judge or is in fact one; e.g. the Planning Judge and the Taxation Review Authorities respectively.
- (c) as with (b) there might be an overlap, but of jurisdiction rather than people; the litigants might be able to have the matter dealt with in one of a number of bodies; those bodies may also be able to control where the matter is considered; e.g. a small claim relating to a motor vehicle might come within the jurisdiction of a Small Claims or Disputes Tribunal, a Motor Vehicle Disputes Tribunal, or the courts.
- (d) one body may be able to give directions to another affecting the way in which that other exercises the power of decision: e.g. the Minister of Commerce can give directions to the Commerce Commission.
- (e) one body may give advice or make recommendations to another which decides; eg. the Commerce Commission to the government on price control.
- (f) there might be a right of appeal from one body to another. The nature and the extent of the right can vary greatly; the statutory forms include
 - full consideration as if the matter were being dealt with originally (e.g. the Planning Tribunal on appeal from a local body); this involves all the evidence being heard by the appeal body;

- a general appeal on the merit (e.g. air services licensing appeals to the High Court)
- an appeal as if from the exercise of a discretion (e.g. indecent publication appeals to the High Court)
- an appeal on the ground that the decision was unreasonable or in breach of the Act
- an appeal on law alone
- an appeal on the ground that the proceedings were conducted in an unfair manner which prejudiced the proceedings (small claims).

THE CRITERIA FOR CHOICE

38 The reasons or criteria for choice of a particular method of decision-making can be organised under three headings -

- (1) the characteristics of the function or power, together with the issues to be resolved and the interests affected; prominent among these interests are the liberty of individuals and their other important rights;
- (2) the qualities and responsibilities of the decision-maker; and
- (3) the qualities to be followed. They can be put more shortly: what is to be done, who is to do it, and how? (See also paras 44-46 and 59-64 of the report of the Committee on Legislative Change (1987). That Report has since been endorsed by Cabinet.)

(1) The power: the issues and interests

39 How confined is the power? Does it mainly involve the finding of past facts and the application of precise rules to those facts? Or does it require the making of broader judgments or the exercise of wide discretions looking to the future and to elements of public interest? Does it have a high policy making content?

40 This Report is principally about administrative tribunals but we must not forget that elected representatives and responsible governments are fundamental to our governmental and constitutional system. The main principle of our constitution is that it is democratic. Those who for the time being have public power have it within the confines of a democratic system. An issue which we must squarely face is how to draw the line from area to area and time to time between those matters which are to be handled by those with political responsibility to the electorate and those which are best settled by an independent tribunal or court. The broader the policy element the more appropriate it may be for the matter to be settled by Ministers who are responsible to Parliament, and ultimately to the electorate (or, at a local level, by the relevant local authority whose members are also responsible to the people).

41 Such political processes and governmental power of decision might be complemented by a tribunal. For instance, (1) Ministers might determine the general policy by direction and the tribunal might then apply the policy to particular cases, or (2) a tribunal or a commission of inquiry might have a power to investigate a matter and make recommendations to Ministers who retain the power of decision. The latter power of recommendation is to be found for instance in the environmental area. (While there are cases in which a recommendatory power is conferred on a court that is most unusual and is contrary to the constitutional function of a court of deciding - especially in

disputes between the Crown and individuals. We might add that the basic understanding of the function of a tribunal is that it decides - subject of course to any appeal or review. In its original meaning a tribunal was a place of judgment, a place of decision.)

42 A more common procedure than such a hybrid executive - tribunal method will be for Parliament to settle the broad policy and decide that a specialist body, independent of the executive and with power of decision, is best able to develop and apply the policy consistently, on a country wide basis and, where appropriate, develop it by reference to a changing perception of the public interest. Such a function might be thought better suited to a specialist tribunal with a multidisciplinary and changing membership than to the judges of a court of general jurisdiction. (That is not to deny a role for the courts in respect of questions of law and related matters arising from the exercise of such functions, see paras 56-70 below and also paras 114 of the report of the Committee on Legislative Change (1987), but that point too emphasises one difference between court and tribunal.)

43 The preceding paragraphs look at the matter from the point of view of the state, of those in authority seeing to it that policy is properly elaborated and applied. It is critical as well to consider it from other end, from the point of view of the individuals affected by the exercise of the power. How important are the individual rights and interests which may be affected by this exercise of the power? Is personal liberty involved? do the rights justify or require elaborate and careful protections by a formal process supervised and applied by a body which is clearly independent of the government? Against that may be important public interests such suggest that the state should have a substantial or final power of decision. In general however the more serious the consequence of the decision for individual rights and interests (for example the possibility of imprisonment or detention) the greater the need for the protection of the person affected - in terms of

- the independence of the decision-maker (court or tribunal rather than executive) or if it is to be the executive the seniority of the person with power of decision (Minister or Governor-General rather than officials),
- the procedure to be followed (a right to be heard and to call witnesses rather than no express procedural protections at all),
- the specificity of standards, criteria and rules for decision, and
- rights of appeal and review.

44 Constitutional principles, legislative practice, natural justice as developed and revived by the Courts, and relevant international standards all give very strong support to that proposition. Early English translations of the central promise of Magna Carta require "due process" from the state. As the public powers to interfere with rights and interests grow, many statutes have required greater procedural protections (sometimes using the phrase "principles of natural justice"). The courts have long shown themselves willing to "supply the omission of the legislature" if a statute which confers public power to affect rights and interests is silent about procedural protections. And the relevant international standards, including the right to a fair trial by an independent and impartial tribunal in the determination of rights and obligations in a suit at law, are being given a liberal reading by some, see e.g. Report of the Committee of the Justice - *All Souls Review of Administrative Law in the United Kingdom, Administrative Justice - Some Necessary Reforms* (1988) 256-258; see also 376-380.

45 The right to personal liberty and especially to freedom from arbitrary imprisonment and detention of course fall within such principles. But the range of rights and interests to be protected by institutional and procedural safeguards may vary from one context and time to another as the assessment of the value of these rights and interests varies over time.

46 A large volume of relatively routine matters might provide a quite different reason or using a special tribunal especially at first instance rather than a general court. In some cases, this tribunal might be a public servant acting as an independent officer and usually subject to a full right of appeal to the Courts. (Consider many registration and intellectual and industrial property functions.) This relates also to the third of the general matters noted in para. 38 above - the procedure to be followed.

(2) This qualities and responsibilities of the decision-maker

47 This matter ties back into the characteristics of the issues and the function and, indeed, forward into the procedure. thus the nature of the issues might require special expertise (which the tribunal members might have on appointment or might acquire by concentrating in that field), possibly across several areas (thereby justifying multimember panels); consider for example the statutory provisions about members of the Indecent Publications Tribunal and the Commerce Commission, and the nature of the decisions to be made about medicines, poisons and pesticides.

48 The nature of the issues and of the judgements to be made may affect not only the criteria for the appointment of tribunal members, but also the method and the terms of appointment. To stress the independent character of the tribunal, the Minister of Justice or Attorney-General should usually have the major role or at least be involved in the appointment (for instance by way of consultation) and there should be some security of tenure; but the relevant departmental Minister will often also - and rightly - have a role, given the greater policy component in the function. That matter also explains why party caucuses usually have a role in respect of tribunal appointments, but have none at all with judicial appointments. Tribunal appointments are also usually for a fixed term. That in our view is desirable. Among other things it acknowledges that the assessment of the relevant public interests can evolve, and change (see also para 146).

49 On the other hand the issues in some situations - for instance of law and fair procedure - might be such that judges in courts of general jurisdiction, with the traditional independence and other attributes of that office, are the appropriate people to determine them. There might be a case for specialisation within the general court as with the Family Court. Another possibility, again seen in the Commerce Act, is to add expert members to the general court. A further variation in an appeal context is to limit the issues which a general court can consider as mentioned at the end of para 37.

50 By contrast with the foregoing, the character of the issues and of the function might be such that Ministers should take responsibility. This could be so, for instance, if the policy and public interest components of the decision predominate. They might be such that elected Ministers accountable to the electorate should have the power of decision. Our law and administration has a democratic base.

(3) The procedure to be followed

51 The three categories of decision-makers - courts, tribunals, and the executive - have their standard procedures. Those different procedures, it can quickly be seen, are more apt for dealing with some issues than with others. A court process is designed, for example, to resolve, through adversary presentation and testing of evidence and argument, disputes about facts and law. Sometimes that will require very formal, structured presentation of evidence and arguments. Tribunal procedure by contrast is usually less formal, with the rules of evidence being relaxed in almost all cases. Tribunals are sometimes expected to take an active inquisitorial role in contrast to a more passive court which is dependent on the parties to bring the relevant material before it. They are still however bound by the principles of natural justice. The less structured processes of Ministerial decision-making may extend out of the relevant sources of information and opinion (expert and political) in the community, without rules about notice, disclosure and opportunities for rebuttal and do not require the kind of organised and complete record of a court and many tribunals. Those who decide will often not have "heard" all the material relevant to decision. Such procedures are better able to determine, say, the nature and characteristics of a new taxation regime.

52 Procedures within courts and within tribunals can of course vary greatly (as we noticed for instance with the Commerce Commission, paras 32 and 33 above), and that is even more true within the executive. The procedures can be more or less formal, more or less speedy and more or less costly. Those considerations may also themselves justify the use or establishment of a tribunal instead of a court. Thus the Small Claims Tribunal (soon to be renamed the Disputes Tribunal) was established to deal in an expeditious, informal, private and less costly way with small claims which otherwise come within the regular court jurisdiction. The issues might by contrast be so significant or difficult that a more elaborate and formal process is required.

53 Tribunals often are more accessible and less costly and allow a greater range of individual and public participation. In the courts a party who wishes to be represented usually is required to engage a lawyer. Tribunals frequently operate without the assistance of lawyers and indeed the use of lawyers is prohibited or limited in some tribunals concerned with private law matters in the interests of informality and lower costs.

54 However, in some tribunal cases the interests involved will be very large, the issues complex and many, and parties will wish to be represented by counsel and to engage in a relatively formal process - which in part in consequence may well be as costly and time consuming as major litigation in the High Court. But in the usual case the procedural advantages will be available. Legal aid can be important in either event and is provided for in the Legal Aid Act 1969 s 15(1)(h) and (j). (that legal services area is also under review.)

55 The criteria set out above are based on much relevant practice in New Zealand and other similar jurisdictions and in the writing of official bodies and others about tribunals. They have been strongly supported by those who have mentioned them in their submissions to us. *Accordingly we make the following recommendations.*

The Government should endorse the criteria for the allocation of decision-making powers between the executive, the courts and tribunals set out above. These criteria relate to

- (1) the characteristics of the powers, the issues to be resolved and the interests affected,
- (2) the qualities and responsibilities of the decision-makers, and
- (3) the procedures they follow.

The Government and Parliament should apply these criteria when proposing or reviewing statutes conferring public powers.

A related recommendation concerns a matter raised earlier in this Report (paras 5, 6, 23, 25 and 29; see also para 135):

In many situations the above criteria may be met by (1) officials (often acting in a summary administrative way) making the first decision and (2) an independent tribunal, following the principles of natural justice, determining appeals from the first decision. (para 55).

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