

**ISSUES IN LAW, RACE AND GENDER**

**6**

**Lay assessors in  
South Africa's  
Magistrates' Courts**

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**with**

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A typical sceptic's view of lay assessors  
(From *The Star*, reprinted in the *Cape Times*, 23 January 1998)

## Introduction

No judicial system can stand apart from the establishment of democracy in a country.<sup>1</sup> The process of building democracy does not end with the election of representative legislatures and councils at national and sub-national levels, on the basis of a universal and unqualified adult franchise. At the very least, the consolidation of representative democracy generally requires the reform – or even transformation – of a range of state institutions, including the judiciary as much as the bureaucratic structures of state administration and the coercive structures (i. e. the defence forces, police and prison services). Proponents of a more substantive conception of democracy argue for extending citizen participation in a wide range of state and civil institutions, including the judicial system.

This is true whether 'democratisation' entails decolonisation (as in Britain's colonies in Africa between the late 1950s and the mid-1960s), armed liberation (as in Mozambique in 1975 or Uganda ten years later), the dismantling of a one-party state or the replacement of a military dictatorship (as in much of Latin America in the 1980s). The relationships between the courts and the state and civil society all change, albeit to varying extents.

The South African judiciary has undergone several important reforms as part of the process of democratisation. Most obviously, the rewriting of the Constitution and the adoption of a Bill of Rights was accompanied by the appointment of a Constitutional Court. The country's existing higher courts have been reformed through the appointment of many new judges, many of whom would have been excluded in the past on grounds of race (and even, in practice, gender). Several types of dispute – including many industrial disputes, under the new Labour Relations Act – have been removed from the courts to new, less adversarial institutions. The courts of the former 'independent' bantustans have been reintegrated into a unified court system. The Truth and Reconciliation Commission has provided a mechanism for confronting some of the injustices of the past.

But perhaps the most far-reaching change in terms of its potential, direct effect on the lives of ordinary members of the public is the appointment of lay assessors to lower courts across the country. In mid-1994 the Department of

Justice initiated a programme of appointing lay assessors to sit with magistrates in magistrates' courts. The programme was apparently motivated by a perception that the judiciary lacked public legitimacy because of the overwhelming predominance of white men among the magistrates and judges appointed in the apartheid era. The appointment of lay assessors who were more representative of the population of South Africa would, it was reasoned, go some way to restoring the legitimacy of the judiciary.

This lay assessor programme was conducted under enabling legislation passed under the previous, National Party government in 1991, but which had been used sparingly hitherto. The Minister of Justice in the African National Congress-led government, Dullah Omar, promoted the appointment of lay assessors as a central element in the reforms required to bring the courts into line with the 'new', democratic South Africa. South Africa's new Constitution does not stipulate how citizens would be involved in the courts, but section 180 accommodates the nascent lay assessor system:

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including . . .  
(c) the participation of people other than judicial officers in court decisions.

Between 1994 and 1996, the lay assessor system was introduced nominally throughout the country, although the actual use of lay assessors has been very uneven.

The introduction of lay assessors represents a fundamental reform of the country's lower courts – and it is these lower courts which handle the overwhelming majority of criminal trials in the country. Not only has the introduction of lay assessors been a mechanism for changing the racial composition of the bench (with, put bluntly, the use of mostly black assessors alongside mostly white magistrates). The use of lay assessors also serves to deprofessionalise the courts, removing the monopoly over judicial authority which professional magistrates (and judges) have enjoyed since the abolition of juries in 1969. Magistrates can be outvoted on the determination of guilt (on the basis of the facts of the case) by two assessors – although, in practice, very few magistrates have chosen to sit with two assessors. Over a very short period of time the power of judgment in district courts has shifted – at least potentially – from predominantly white professional magistrates to predominantly black lay assessors. Furthermore, the reintroduction of lay participation in the courts can be seen in terms of democratising this corner of the South African state. It is no exaggeration to suggest that this reform opens the way for potentially the most

profound institutional change to the country's lower courts since Union in 1910.

In practice, the potential effects of this reform have been very limited because of resistance from magistrates and concern over the costs of using lay assessors. Lay assessors have been introduced under legislation which gives magistrates the discretionary power to use assessors or not (except in very specific categories of case, where their use is compulsory). Although they can choose to sit with two assessors, most magistrates prefer to sit with one or none. Magistrates have also been able to influence the selection of assessors and their allocation to cases, and to control the contributions that assessors may make in court. Little effort has been made to empower assessors relative to magistrates. The result is that assessors have assisted the courts, rather than transformed them. The Department of Justice, for its part, has held back from introducing legislation that would make the use of assessors compulsory (in part out of its concern with the cost thereof).

In 1995 the Law, Race and Gender Research Unit at the University of Cape Town began to monitor and analyse the introduction and operation of lay assessors in South Africa's magistrates courts. Our initial research focused on the establishment of the lay assessor system in magisterial districts in greater Cape Town and parts of the Northern Cape. In 1996 the Research Unit was awarded a research grant by the Human Sciences Research Council (HSRC) as part of the HSRC's programme on the Consolidation of Democracy (itself part of the HSRC priority theme of 'Democratising State and Society'). The award was to fund a nationwide survey on lay assessors under the project title 'Attitudes to the Reform of the Judiciary'. We envisaged using structured questionnaires with purposive samples of 200 lay assessors, 200 members of the public and 40 magistrates, prosecutors and lawyers, in four provinces.

In September 1996, we piloted structured questionnaires among magistrates (in Mpumalanga) and lay assessors (in Pretoria (Gauteng) and Wynberg (Western Cape)). It soon became clear that the use of a structured questionnaire alone would not be the most effective way of collecting much of the information we sought. Magistrates and assessors often wanted to give long answers to our questions, and led the discussion in unanticipated directions. These detailed and frequently unpredictable answers provided us with much more and richer information than the terse responses to a more structured questionnaire (although, of course, it made the processes of collating and interpreting responses immeasurably more difficult). In light of this experience, we decided to reduce the use of a structured questionnaire. For magistrates and assessors we would use instead a combination of a shorter structured

questionnaire and a longer free interview. Members of the public would be surveyed using a short structured questionnaire only. The experience of piloting led us also to rephrase some of our questions.

Between November 1996 and February 1997 we conducted the survey, mostly in four provinces (the Western Cape, Northern Cape, Gauteng, and Mpumalanga). The revised questionnaires were administered to over 700 members of the public, over 200 assessors and about 50 magistrates. Most of the assessors and magistrates were also interviewed freely. Additional information was collected from other magistrates and assessors.

Our research was focused on district courts. In South Africa, magistrates' courts are divided between regional courts and district courts. The former have jurisdiction over more serious offences, but there are many more of the latter, and they deal with a much higher proportion of the total criminal caseload (as we shall see in Chapter 2). Lay assessors have been used in both types of court since 1991-92. In the regional courts, magistrates are required to sit with two assessors in murder cases; these assessors may be either expert or lay. In other cases in the regional courts, and in all cases in the district courts, magistrates have had the discretion as to whether to sit with an assessor, two assessors or none at all. Our research has focused on district courts because it is in these courts that assessors have been used most, and since 1994 the policy of the Department of Justice has focused on them. In many instances, our commentary on the use of lay assessors in district courts is appropriate to their use in the regional courts also.

This report provides an analysis of the findings of this survey which was funded by the HSRC. We also provide considerable background information. This report thus represents an interim report on our overall research project. The report opens with two chapters setting out the background to the use of lay assessors today. In Chapter 2 we set out the historical background to the lay assessor programme. We trace the decline of lay participation in South Africa's courts up to 1969, when the jury system was finally abolished and the higher and lower courts entirely professionalised.<sup>2</sup> The issue of lay participation was only revived in 1990-91, at a time when the judicial system was perceived as suffering a 'legitimacy crisis' in the sense of being regarded as illegitimate by black South Africans. This perceived legitimacy crisis was attributed to the predominance of white South Africans among magistrates. The use of lay assessors was seen primarily as a way of bringing black South Africans onto the bench, and thereby enhancing the courts' legitimacy. But, we proceed to report, recent analyses of data on public opinions suggest that public perceptions of the courts are altogether more complex than the crude no-

tion of a 'legitimacy crisis' suggests. The notion of a legitimacy crisis misconstrued the complexity of the challenges facing South Africa's courts. Chapter 2 concludes with an analysis of lay participation in courts elsewhere in the world, and a review of the arguments made in favour of lay participation in which we emphasise the democratic arguments that can be made for citizen participation.

Chapter 3 provides a chronology of the introduction and operation of lay assessors - initially, and in very few courts, under the National Party government between 1992 and 1994, and from 1994 as part of a co-ordinated and more coherent programme under the new African National Congress government. We examine the pilot project implemented in the Cape Town magistrates' court between in late 1994 and early 1995, and the rapid extension into other parts of the country during 1995. This chapter provides a summary of the patchy data available on the current, uneven usage of lay assessors across South Africa (which will be documented more fully in further research). It concludes with a discussion of public knowledge of lay assessors (as found in our survey), of reported cases concerning lay assessors, and of the Magistrates' Courts Amendment Bill introduced in 1998 to revise the regulation of the lay assessor system.

Chapters 4 to 6 present the bulk of our findings from the HSRC-funded survey. Chapter 4 provides an analysis of magistrates' views on lay assessors. We examine magistrates' use of assessors, the practical problems they report, and their assessment of the value of having lay assessors in court. Magistrates are, in general, opposed to the use of lay assessors, and are strongly opposed to ceding to assessors the power to outvote magistrates. Magistrates identify a range of practical problems they have experienced. Some magistrates, however, evaluate assessors positively, and have identified solutions to many of the practical problems they and others have experienced. Such positive assessments are especially common among magistrates who have used assessors extensively.

In Chapter 5 we turn to the experiences and views of lay assessors themselves. We examine the profile of assessors countrywide, detail the methods of recruitment, training and preparation, and set out the key aspects of their experiences in court. The chapter concludes with a discussion of assessors' grievances. Unsurprisingly, assessors value highly their contributions to court. Many are very critical of magistrates, especially with regard to magistrates' understanding of the 'community'. But, at the same time, we found a remarkably high level of deference to and respect for magistrates among lay assessors.

In Chapter 6 we provide a detailed comparison of the attitudes of magistrates, assessors and members of the public on a range of issues concerning the courts, the law, justice, magistrates, police and assessors. Our findings underscore the complexity of public perceptions of the courts. The pattern of responses varies depending on the question. We suggest that lay assessors and magistrates do bring different views to the bench on some issues, in part because they are lay people and in part because South Africans' attitudes vary by race (and, no doubt, by class and gender also). The participation of lay people in the courts is also likely to improve public confidence in the courts.

Chapter 7 sets out some conclusions and recommendations. These cover the purposes of having lay assessors in the courts, the regulation and administration of the lay assessor system, education and training, questions of law that arise from the introduction of lay assessors, the relationships between magistrates and assessors, and the need for continuing research and monitoring.

Our research on the introduction and operation of lay assessors has been complicated by the absence of any baseline study of South Africa's lower courts. Besides occasional newspaper reports, very little has been written about the actual operation of magistrates' courts. The higher courts have been subjected to a series of scholarly studies (including Corder, 1984; Forsyth, 1985; Ellman, 1992; and Lobban, 1996 – as well as numerous articles in journals), but the lower courts have been neglected. It is revealing that even the debate on reintroducing lay participation in the judicial system in 1990-92 (discussed in Chapter 2 below) was focused almost exclusively on the higher courts. We believe that our research shows that it is imperative that research be conducted on the administration of justice in the lower courts. Most criminal cases are dealt with in the magistrates' courts, yet few are ever reviewed by higher courts or publicised in any other way. By and large, magistrates function outside of any public scrutiny. In addition, for a system of lay assessors to succeed in deprofessionalising and democratising the courts, magistrates must not be allowed to dominate assessors. The introduction of lay assessors also raises new issues which were previously either not relevant or were hidden from view. We discuss further the implications of this for research and monitoring in Chapter 7. We hope that, in the period until new and broader research is done, our study will contribute to an understanding not only of the lay assessor programme in particular, but also of the operation of magistrates' courts more broadly.

One reason why so little research is done in the lower courts is that such research is difficult. The available documentation is limited: unlike the higher

courts, evidence is transcribed in only a small proportion of cases. Magistrates are often reticent about discussing their cases publicly. Furthermore, as we found, magistrates (and lay assessors) take many things for granted – yet these are often the things that researchers find most interesting or consider most important. In our interviews with magistrates and assessors we have many quotable accounts of exceptional incidents, or the things that magistrates and assessors feel deserve comment. But we have relatively few quotable accounts on issues that seem banal to the interviewees. These issues often became clearest not in the recorded interviews, but in the general conversation that we had with magistrates and assessors over long periods of time. One consequence of this was that we found that we had formulated strong impressions of the roles of and relationships between assessors and magistrates, but lacked clear evidence that we could cite in support of our understandings. To take just one example, we are confident that magistrates who have worked extensively with assessors generally have a much more positive evaluation of assessors than magistrates with limited experience. We are also confident of the explanation for this: that these magistrates work with assessors who accumulate experience, and it is experienced assessors who (for a variety of reasons) magistrates value most highly. But we cannot provide many quotations from our recorded interviews which support unambivalently these conclusions.

In the course of our research our overall impression of the value and importance of lay assessors has varied. In general, when we have interviewed experienced assessors or weaker magistrates, we have become much more enthusiastic about the system. When we interviewed inexperienced or poor assessors, or very able magistrates, our enthusiasm for assessors waned. Looking back on our research we judge that there are good and bad assessors, just as there are good and bad magistrates. Some critics of lay participation point to bad assessors and use them to justify the rejection of lay participation in general. This is, in our view, very problematic. Criticisms of individual assessors need to be distinguished from criticisms of systems of lay participation in general. Problems that can be solved through administrative or regulatory reform need to be distinguished from those that cannot. The rejection of lay participation because there are some bad assessors is no more persuasive than the rejection of the system of professional magistrates in general simply because there are some bad magistrates.

Ultimately, however, much of the value of lay assessors depends on normative judgments that cannot be resolved easily through argument. Should South Africa's lower courts be presided over by professional magistrates exercising discretion on the basis of legal training? Or should lay people partici-

pate in decision-making, interpreting the evidence put before the court through the prism of lay beliefs about justice? In the legal profession, and perhaps among South African elites in general, lay participation is viewed with great scepticism. The cartoon reproduced at the front of this report captures this view, with the scales of justice being tipped off balance by a suspicious-looking 'lay assessor'. We dissent from this conservative view. We suspect that the legal system comprises some institutions in which legal professionalism is most appropriate, and others where lay participation is more appropriate. We are sure that there are many cases in the lower courts for which a mixed bench, comprising a professional magistrate and lay assessors, is appropriate.

## Chapter 2

### **The historical background to the introduction of lay assessors in the lower courts**

The history of the criminal court system in South Africa is an extraordinarily complex one. Along with many other colonies in Africa, South Africa had (and retains) a dualistic legal system, comprising common and customary law: the former intended primarily for white and urban black people, the latter for rural African people. For a long time, lay participation was provided through juries, in courts applying the common law, and through chiefs and headmen who played the primary role in applying customary law. During the twentieth century, however, the state whittled away the jury system, abolishing it altogether in 1969. At the same time, social change meant that customary law declined in importance. South Africa's criminal court system was not only entirely professionalised (i. e. lacked any significant lay participation), but was also heavily racialised and gendered, in that the judiciary and magistracy were dominated by white men. From 1990, the government and legal profession began to worry about the legitimacy of the criminal court system, concerned that the unrepresentative racial composition of the judiciary and magistracy undermined popular confidence in the courts. In order to deal with this, in 1991 the National Party government provided for the appointment of lay assessors to the lower courts.

#### **South Africa's dualistic judicial system**

Throughout the twentieth century South Africa has had two kinds of legal system: one for those South Africans categorised as 'native', 'Bantu' or 'Black', and the other applicable to everyone. This dualism – typical of colonial Africa (Mamdani, 1996) – had its origins in the ways in which the colonial and Boer authorities established legal systems in the territories they colonised or occupied in the nineteenth century. One option was to impose the colonial or Boer legal systems they brought with them. In the British Cape Colony, this approach was motivated in part by a concern to 'civilise' conquered peoples,

with the prospect of assimilation of newly-civilised 'natives' into full colonial citizenship. In the Boer republic of the Orange Free State, there was no such prospect of assimilation: the 'native' population was entirely and unambiguously subordinate. The motivation here seems to have been, simply, to ensure unfettered Boer authority. The alternative option – developed in Zululand and Natal (by Theophilus Shepstone) and in the Transkei, and later adopted in the Transvaal – was to sanction a system of 'customary' law and/or courts separate from the colonial legal system. This second option was chosen in areas where the colonisers were administratively weak, and unable to impose a single legal system. But, over time, it came to be seen as having political benefits; as the administrative capacity of the colonisers grew, the customary law or court system was maintained. Thus, when the new Union of South Africa was formed in 1910, African people in some areas were subject to the same law as white citizens, but in other areas were subject to a separate legal system.

Uniformity was established across the Union in 1927, under the Native Administration Act (Act 38 of 1927). The Act adopted from the Transkei a formula for the recognition of customary law, and from Natal a formula for the organisation of customary courts in relation to the colonial legal system (Bennett, 1991: 61-2, 115). 'Native' chiefs and headmen would be authorised to run courts. Appeals in civil cases – and more serious cases – would be heard by courts presided over by 'native commissioners' appointed by the Union government's Department of Native Affairs. Appeals from the commissioner's courts would be heard by a specialist court of appeal. From 1957, the commissioners' courts were also empowered to hear prosecutions for criminal offences committed by African people, and came to assume sole responsibility for the prosecution of minor cases (especially infringements of the pass laws).

This system, under the authority of the Department of Native Affairs, existed alongside the primary legal system under the authority of the Department of Justice. The latter system comprised higher and lower courts. The higher courts consisted of the Supreme Court system, broadly inherited from the pre-Union colonies and republics, which was divided between an overarching Appellate Division and various Provincial Divisions. The lower courts comprised the Magistrates' Courts, organised by magisterial district, and regulated in terms of the 1917 and 1944 Magistrates' Court Acts. In 1952, regional magistrates' courts were created with broader powers of criminal punishment than the existing district courts, and with jurisdiction over a number of districts (Hahlo and Kahn, 1960: 270).

The jurisdiction of chiefs' and headmen's courts was limited to civil cases including African plaintiffs and defendants and involving matters governed by

customary law, and very minor criminal cases involving African accused. Serious criminal cases were excluded from their jurisdiction. In criminal cases, these courts were not allowed to impose punishments of imprisonment, fines of more than R40 (or two cattle or ten sheep or goats), or corporal punishment (except to unmarried men below the age of thirty). The jurisdiction of chiefs' courts was defined so vaguely that there was chronic dispute over whether a case should be heard there or in the magistrates' courts (Bennett, 1991: 64-5).

The criminal jurisdiction of district courts extends to all charges except murder, rape and treason, but sentencing in the district courts is limited. In 1998, the limits are twelve months imprisonment and fines up to R20 000. Regional courts were initially permitted to deal with all cases except murder and treason, but since 1990 they have been permitted to hear murder cases. Sentences in the regional courts are limited in 1998 to ten years' imprisonment or a fine of up to R200 000 (Magistrates' Courts Act, section 92 (1)). District and regional courts could formerly also impose a sentence of whipping up to a limit of seven strokes (Hoexter, 1983: 264), until whipping was declared unconstitutional in 1995 (*S v Williams* 1995 (3) SA 632 (CC)), and the relevant legislation was amended in 1997.

In addition, there has also been a long history of courts in African townships and rural areas that were either unrecognised by the state, or tolerated without official sanction (Bennett, 1991; Seekings, forthcoming).

This dualistic legal system involved, in practice, many points of interaction. Appeals in the minor criminal cases heard in chiefs' and headmen's courts would be heard in the magistrates' courts, not the commissioners' courts. Commissioners' courts could use their discretion in whether to apply customary or common law. Many magistrates doubled up as commissioners (and visa-versa, it seems). But, crucially, customary law was always subordinate to common law if there was any conflict between them; customary law might be recognised as the sole source of law on some matters – such as *lobola* – but this recognition was made under the common law, and could be retracted.

As if this legal system was not already complex enough, the devolution of legal powers to the bantustans under grand apartheid added further complexity. The Self-Governing Territories Constitution Act (Act 21 of 1971) provided for the (qualified) autonomy of judicial systems in the self-governing territories (i. e. homelands or bantustans). A schedule set out the matters on which South African legislation would be inapplicable (unless the relevant legislation made specific provision for it). These matters included control and administration of the courts (Mitchley, 1992: 4-5). Transkei became

'independent' in 1975, followed by Bophuthatswana, Venda and Ciskei (known collectively by their respective initials, i. e. as the 'TBVC' states). By about 1990 there were twenty regional magistrates in the supposedly independent TBVC states (compared to 144 in the rest of South Africa) and 53 district magistrates (compared to 821 elsewhere) (Dugard, 1992: 98, citing *Hansard, Questions and Replies*, 27 Mar 1990, col. 723-4, and fn 9).

The separation out of the bantustan legal systems makes it very difficult to present data on the overall distribution of courts and their caseloads. The Hoexter Commission, for example, provided the following data on the distribution of criminal cases in 1980:

**Table 2. 1: Criminal caseload, by type of court, 1980**

	Cases	%
Supreme Court	1 549	0.1
Regional Courts	46 294	2.8
Commissioners' Courts	199 487	11.9
District Courts	1 434 884	85.3

Source: Hoexter, 1983.

These figures almost certainly exclude criminal cases heard in the separate, bantustan courts – for which data is apparently unavailable. Nor is there any data on the number of petty criminal cases heard in chiefs' and headmen's courts (and there is certainly none on cases heard in unrecognised courts).

What Table 2.1 does indicate, however, is the importance of district courts in the criminal court system. In this, more formal, part of the judicial system, 85 per cent of criminal cases were dealt with in the district courts, compared to just 12 per cent in commissioners' courts, less than three per cent in the regional courts and a mere 0.1 per cent in the higher courts. Not all cases in the District Courts involved trials, it should be noted: about half were disposed of without evidence being led, mostly in terms of section 112 (1) (a) or (b) of the Criminal Procedure Act (Act 51 of 1977) – i. e. with a sentence imposed without trial following a guilty plea (Hoexter, 1983: 279).

Since the early 1980s there have been further major institutional changes in the South African court system. The first arose from the recommendations of the Hoexter Commission (i. e. the Commission of Inquiry into the Structure and Functioning of the Courts chaired by Mr Justice G. G. Hoexter). This Commission recommended in 1983, *inter alia*, that the commissioners' courts (and other, related 'special' courts for African people – but excluding the chiefs' and headmen's courts) should be abolished. This was effected under the 1986

Special Courts for Blacks Abolition Act (Act 34 of 1986). The powers and responsibilities of the commissioners' courts were transferred to the magistrates' courts, and the legal system (outside of the bantustans) was brought under the sole administrative control of the Department of Justice. Chiefs' and headmen's courts continue to operate.

Secondly, and following another of the Hoexter Commission's recommendations, provision was made to expedite the settlement of minor civil cases. Small Claims Courts were established under the Small Claims Court Act (Act 61 of 1984). In 1991, provision was made for low-cost and accessible facilities for voluntary arbitration and mediation in civil cases, under the Short Process Courts and Mediation in Certain Civil Cases Act (Act 103 of 1991). Introducing this Bill into Parliament, the Minister of Justice (Kobie Coetzee) explicitly noted that the abolition of commissioners' courts had left a vacuum, and claimed that the new Bill provided for mediation according to, for example, Xhosa 'custom' (*Hansard, House of Assembly*, col. 11 403-5, 3 June 1991).

Thirdly, the dismantling of the bantustans during South Africa's democratisation meant the reintegration of the bantustan courts into the South African legal system. The former bantustan justice departments were formally merged with the 'South African' Department of Justice in October 1994, but the reintegration of judicial institutions, as with other administrative institutions, has proved a slow process. The Justice Laws Rationalisation Act (Act 18 of 1996) provided for legislative uniformity regarding judicial matters throughout South Africa. Even now, in 1998, the jurisdiction of the various courts does not correspond to the new South African provincial boundaries. In 1995 Hoexter was appointed to chair another commission of inquiry into the courts – the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court (appointed through the *Government Gazette* 16 336, 31 March 1995). The Commission reported in 1997, although its reports were only published in 1998.

This second Hoexter Commission also examined the structure of the court system. An official vision of future institutional structure was previewed by Minister of Justice Omar in June 1996. Following the provisions of the newly-passed Constitution, Omar envisaged a fully-integrated hierarchy of courts, extending from the Constitutional Court and an appeal court at the national level, through provincially-based High Courts, to Regional Courts, District Courts and, below them, Community Courts (*Hansard*, 13 June 1996). The second Hoexter Commission also reaffirmed the recommendation of the first

Hoexter Commission that family courts be established in the magistrates' courts to take over divorce settlements from the High Courts.

The status of the more than 1 500 traditional courts, presided over by chiefs and headmen, remains unclear. Customary (or indigenous) law is protected by the new Constitution (section 211) and continues to be practiced. The South African Law Commission, charged with investigating and proposing legal reforms, appointed a committee to look at 'the harmonisation of indigenous and common law'.

South Africa's judicial institutions remain complex and in a state of flux. For the first time in decades, however, the Department of Justice has been able to provide data on the distribution of cases heard at the various levels across the whole of South Africa. This is presented in Table 2.2.

**Table 2. 2: Caseload in the judicial system, 1995/96**

<i>High courts: Appellate, provincial and local divisions</i>	
1 919	criminal cases entered
863	civil appeals heard
1 279	appeals heard in criminal cases from regional courts
1 391	appeals heard in criminal cases from district courts
34 488	cases examined on review
<i>Regional courts</i>	
59 145	cases entered
52 507	cases heard
<i>District courts</i>	
2 680 150	criminal cases entered, of which:
2 208 809	entered with an admission of guilt
1 408 288	civil cases entered
<i>Small claims courts</i>	
27 690	trials

Source: Department of Justice, *Annual Report 1995-96* (RP 58/1997).

Table 2.2 indicates that the district courts continue to deal with the lion's share of criminal and civil cases. The proportion of cases heard in the regional courts and High Courts, including even cases taken to the High Courts on appeal or review, deal with a tiny proportion of the total caseload. Again, there is no official data on the caseload of courts presided over by chiefs and headmen.

The distribution of cases is reflected in the distribution of judicial officers. Of a total of 1 738 judicial officers in the higher courts and magistrates' courts, 157 serve in the Supreme Court of Appeal and High Courts, these 157 com-

prising the Chief Justice, nine judge-presidents, four deputy-judge-presidents, and 143 judges), 194 serve as magistrates in the regional courts, and 1 387 as magistrates in the district courts (data from Department of Justice, *Annual Report 1995-96*, pp. 12, 152-6).

As is no doubt clear from the above account, it is difficult to piece together into a unified picture the diverse fragments of South Africa's legal system. There is a vast scholarship on the law, but relatively little on the administration of justice, especially in the lower courts. The early history of the courts is well described in a volume by Sachs (based on his doctoral thesis), and Chanock and Bennett have written about the development of the customary law system. Informal justice in unrecognised courts is the subject of a growing literature. But the lower courts have been largely neglected in research. This has made the task of examining contemporary reforms of the magistrates' courts all the more difficult.

### Lay participation in the judicial system

Most judicial systems around the world are characterised by lay participation, albeit to greatly varying degrees. In Britain, for example, most cases in the lower courts are presided over by lay magistrates (justices of the peace), whilst juries are used in many higher court trials. In the United States of America, juries are used in higher court trials – as we are well aware from the televised reports of real-life trials such as of O. J. Simpson as well as from drama series such as *L. A. Law* – whilst there remain systems of lay judges presiding over lower courts in some parts of the country. In most of continental Europe, lay assessors sit alongside professional magistrates in a wide range of cases.

Juries were introduced into some British colonies, including in West Africa and India. Kahn reports that the problems experienced with the jury system in West Africa dissuaded the British from introducing it elsewhere in Africa (except in settler colonies, where juries became an established part of the judicial system). In India, juries were abolished after 1958, reportedly because bribery was rife. Kahn reports that there is no lay participation in courts in most of Southern Africa (Kahn 1991: 675-6). Kahn – himself a strident critic of the jury system, and it seems of lay participation in courts in general – overlooks two facts. First, that colonial rule was, almost by definition, never democratic; the reservation of key judicial decision-making to appointed colonial officials is hardly surprising. Secondly, provision was in fact made for lay participation – in the subordinate institutions of 'customary' law. Kahn is also mistaken on some points. For example, he asserts that post-colonial governments have not

increased, and some have in fact reduced, the scope for lay participation in the judicial system. In fact, as we shall see below, some post-colonial governments have increased lay participation in the lower courts (examples include Tanzania and Mozambique).

South Africa thus resembled colonial contexts rather than the democratic industrialised societies in that there was no lay participation at all in the formal judicial system during the 1970s and 1980s. But this had not always been the case. In the nineteenth century justices of the peace (and sometimes elected *veldcornetten*) administered the law in many frontier areas. More importantly, juries were used in the higher courts up until 1969. Although South Africa's courts were always much more professionalised than their European or North American counterparts, complete professionalisation was limited to the 1970s and 1980s. The involvement of chiefs, headmen and elders in sanctioned chiefs' courts might be considered a form of lay participation, but their significance was greatly reduced by both their subordination to district and commissioner's courts and their restriction to parts of the reserves or bantustans.

The use of justices of the peace in South Africa originated in rural areas beyond the reach of resident magistrates, as the colonial frontier was being pushed further inland. J.P.s exercised judicial and police functions. As the system of magistrates was extended, so the roles played by justices of the peace declined. By the time of Union (in 1910), they had very limited powers: to arrest without warrants and to issue search and arrest warrants, and to serve as commissioners of oaths (Sachs, 1973: 51; Hahlo and Kahn, 1960: 281). 'Special' justices of the peace had somewhat greater powers, but the number of these special justices declined as the Department of Justice sought to convert them into magistrates; by 1956, only two full-time and ten part-time special justices of the peace remained (Hahlo and Kahn, 1960: 275). In the 1990s legislation still exists governing justices of the peace,<sup>3</sup> but their powers are meagre and essentially administrative; they play no role in the judicial system.

The jury system provided a far more important avenue for lay participation. The South African jury system had its origins in the jury systems used in the four provinces prior to Union in 1910. Juries were first introduced in criminal and some civil cases in the Supreme Court of the Cape Colony in the 1820s. In mid-century, juries were adopted in Natal, the Orange Free State and Transvaal. In each of these four cases, jurors had to be male and satisfy a property qualification, but there was initially no formal racial restriction (although it would be surprising if any black person was ever selected to a jury in either Boer republic). Later jurors were required to be able to read and write.

By 1910 jurors in the Orange Free State and Transvaal were restricted formally to white people, and in Natal there was a *de facto* colour bar. But racially-mixed juries had sat in court in the Cape (see Sachs 1973: 60). In 1917 the provincial qualifications were standardised under the Criminal Procedures and Evidence Act. Jurors in the new Union of South Africa had to be registered parliamentary voters, which extended the existing provincial differences (since the black elite in the Cape Province did satisfy the requirements both to vote and to serve on juries). Jurors had to be able to read and write in one or other of the official languages (English and Afrikaans), and there remained a property or income qualification (Kahn, 1991: 679-687; 1992a: 87-96). In 1930, white women were enfranchised, but were not permitted to serve on juries with men; although an all-female jury was possible, none was ever appointed. In 1954 a strict colour bar was established countrywide for the first time; henceforth no black South Africans could serve on juries. Wealth and income qualifications were abolished in 1955. By the 1960s it was estimated that only 2 per cent of the population was eligible for jury service (Kahn, 1992a: 101-2).

Throughout the period since Union there was a steady decline in the use of juries. In 1914, fearful that trial by jury in labour disputes would result in judgments that were disadvantageous to it, the government established a special criminal court to try particular 'political' offences without a jury. In 1926 trial by jury was abolished in civil cases. From 1935, the accused or the Minister of Justice could object to the use of a jury; in such a situation, the judge would have to appoint assessors to sit alongside the judge for certain categories of offence (including murder and rape). The powers of the Minister were steadily expanded, especially after 1948. From 1954, trials would be heard by a jury only if the accused opted for this (and if the Minister of Justice chose not to order otherwise). In the 1940s, juries were used in about one in six criminal trials in the Supreme Court; by the early 1960s they were used in fewer than three per cent of such trials, and by the late 1960s in less than one per cent (Kahn, 1992a: 104). Pressure for the abolition of the jury grew during the 1960s. The jury was eventually abolished under the 1969 Abolition of Juries Act (Act 34 of 1969).

As the jury was used less and less, so assessors were used more – although the proportion of cases where judges sat alone seems to have risen steadily. The assessors were not ordinary lay people, however, but 'experts', most of whom were drawn from the ranks of former magistrates and judges. The small number of non-lawyers appointed as assessors were mostly accountants, doctors and engineers. Smit and Isakow, in their study of Cape Town in 1984, found that every single one of the expert assessors used had legal qualifica-

tions (Smit and Isakow, 1985: 222). Three years after the jury was abolished, in 1972, the prominent liberal academic John Dugard called for the use of lay assessors in the higher courts (Dugard, 1972: 57), but this did not lead to any public debate.

In whittling away the jury system, government ministers invoked images of jury injustice, including especially racially prejudiced injustice by white juries against black accused. Is there any evidence that such injustice was widespread, or that it was the reason for reducing the use of juries? No systematic research has been conducted on the performance of juries in South Africa, and so 'one must rely on the views of judges, ministers of state and practicing lawyers, and on anecdotal material' (Kahn, 1992a: 105). Praise is rare in such accounts, and criticism rife. Unsurprisingly, the criticism is generally phrased in terms of arguments about the injustice of jury verdicts. Jurors were alleged to acquit far too readily, especially in inter-racial cases where the accused was white. As Kahn discusses at length, allegations of the injustice of juries abounded both before and after Union (Kahn, 1991: 685; 1992a: 88, 97-8, 105-110; see also Sachs, 1973: 60-62). Dugard accepted that the jury system was flawed by the racial prejudices of white South Africans, but felt that an insistence of strict educational qualifications would ensure that the right kind of 'objective' and unprejudiced citizens served as lay assessors (1972: 58).

No doubt white juries were often racially prejudiced – just as some white magistrates and judges were, of course. But one can only wonder how far the discourse of jury injustice was used to legitimate actions taken for other reasons. Sachs suggests that the main reason for the eventual abolition of juries appears to have been the inconvenience rather than the injustice that they caused (1973: 233), and Dugard wrote that he was 'not convinced that lawyers are less subject to typical South African racial prejudices than other educated members of our society' (1972: 56). There is, indeed, much anecdotal evidence that judges have long been sensitive to the dominant attitudes among white South Africans, and that magistrates have been even 'less likely to fly in the face of white public opinion' (see Sachs, 1973: chapter 5). The Minister of Justice, Dullah Omar, said shortly after his appointment that 'it is at the Magistrates' Court level that the greatest abuses occurred', and it was at this level where '90 per cent of South Africa's people made contact with the system of justice' (*Hansard*, 26 Aug 1994, col. 2 057).

We might speculate that legal professionals simply sought fuller professional control over the administration of justice. As Dugard noted in 1972:

Many lawyers in our society will contend that there is nothing undesirable about leaving the administration of justice entirely to judges, mag-

istrates and legally skilled [i. e. *not* lay] assessors. They contend that this is a field which should be left to legal experts as the average White South African is so racially prejudiced and susceptible to external influences that lay participation would destroy our high standard of justice. (1972: 56)

Some arguments made against juries were clearly spurious. For example, some Members of Parliament pointed out that trial by jury was hardly 'trial by one's peers' given that (by this time) only white men could qualify; none of these critics, however, proposed removing the gender or racial restrictions on eligibility (Kahn, 1992a: 102). The bottom line of the argument against juries was that lay people, being untrained and prone to prejudice, could not be relied on to administer justice according to the law. In addition, one cannot but wonder how far the government was motivated by a desire to extend and protect its powers (this interpretation is lent credence by the government's arguments against juries in political and civil cases early in the century).

Even in the early twentieth century the jury system was used only in the higher courts. After the system of residential magistrates was put in place across the whole country, there was no lay participation in the lower courts. Nor, for many years, was there any apparent debate about the merits and possible forms of lay participation in the lower courts. It was only in the mid-1980s, amidst widespread protest against the apartheid state, that the issue arose. In 1991, the participation in the lower courts of lay people as assessors was made possible under an amendment to the Magistrates' Courts Act.<sup>4</sup>

The 1991 amendment allows magistrates to appoint lay people as assessors. Regional court magistrates are required to appoint two assessors in cases involving murder charges, with the discretion as to whether to appoint expert or lay assessors. The power to appoint lay people does not extend to the civil courts, where magistrates remain restricted to expert assessors. Nor is any provision made for lay participation in the higher courts.

The motivation for re-introducing lay participation into the courts in the early 1990s lay not in any value being attached to such participation in itself, but rather in the perceived need to transform the racial composition of the bench to promote the legitimacy of the courts – with the use of lay black people being the only way of changing to racial composition of the bench fast. Introducing the Magistrates' Courts Amendment Bill in 1991, the then Deputy-Minister of Justice (Danie Schutte of the National Party) explained the purpose of the Bill as affording 'communities greater involvement in the administration of justice as far as conviction as well as sentencing is concerned'. Assessors would 'assist' the magistrate (on matters of fact, but not law). The

appointment of assessors on a 'representative' basis would foster identification with the judicial system among all South Africans. Identification, it was understood, would bring legitimacy.

### The 'legitimacy crisis'

The motivation for allowing lay assessors arose from the perception that the courts were in a 'legitimacy crisis', i. e. that they did not enjoy popular legitimacy and that this was so important as to describe the court system as being in crisis.

The perception that the courts suffered from a legitimacy crisis was certainly widespread at the end of the 1980s and especially in 1990-91. This view was expressed in Parliament, at legal conferences and in law journals. As Kahn testily writes:

Again and again we are told by spokesmen and spokeswomen of the African National Congress and certain other organisations with a large following of blacks, and also by white and black academics and journalists, that in the eyes of blacks the legal system enjoys no legitimacy; indeed, it is feared, as it was imposed by whites in their own interests on the rest – the vast majority – of the peoples of the country. (Kahn, 1991: 672)

Kahn provides a list of many references – a list which would be much longer if its ambit was extended to include 1991 (see also Ellman, 1995: fn. 1). With every repetition, the assertion could be made yet more boldly. A study written in 1992 proclaimed that: 'The major hurdle to overcome on the road to a legal system for a whole South Africa is the lack of *legitimacy* that the system is confronted with' (Rossouw, 1992: 2, emphasis in original).

The 'legitimacy crisis' of the courts was something which was treated as so self-evident that evidence was barely needed. As Rossouw wrote in 1992: 'That the South African legal system lacks legitimacy can hardly be doubted and one need not undertake an empirical study as a jurist to ascertain this, mere common sense should prove sufficient' (p. 3). Insofar as 'evidence' was provided, it came from three sources. First, reference was widely made to an assertion made by the HSRC in 1985:

The South African legal system is suspect among large parts of the population because, on the one hand, the administration of justice is controlled by whites and, on the other, because, as a result of various economic, language and other factors, legal processes and administra-

tion as well as penal and litigation procedures have become inaccessible and incomprehensible to many. This legitimacy crisis in the legal system will have to be resolved systematically through training, legal aid, guidance and reform, since mistrust of a legal system is one of the strongest incentives for revolution. (HSRC, 1985: 166-7)

The research on which this conclusion was based is not, however, provided. Secondly, commentators pointed to the proliferation of 'people's courts' in the 1980s; the existence of such alternative courts was interpreted as an indication of the lack of legitimacy of the formal justice system.<sup>5</sup> Thirdly, great importance was attached to assertions that there was a legitimacy crisis made by black leaders or people who might otherwise be assumed to serve as authentic voices for black opinions. Most important of all, here, was the voice of Nelson Mandela. A speech made by Mandela in August 1990, to a meeting of the National Association of Democratic Lawyers (NADEL), was widely cited. In this speech Mandela reportedly said that the court system could not enjoy legitimacy because its officers were drawn from the ranks of the privileged white minority (although it must be recorded that on other occasions Mandela expressed respect for South Africa's legal institutions – see Ellman, 1995: 418). Some black lawyers and journalists expressed similar criticisms of the legal system, claiming that ordinary black people shared their scepticism (*ibid.*: 417-8).

After April 1994, the new Minister of Justice added his voice to the chorus proclaiming a 'legitimacy crisis'. Dullah Omar opened his first budget speech with some comments on the illegitimacy of the 'apartheid system of justice' and 'apartheid judiciary':

Throughout the apartheid years . . . the system of justice was perceived differently by different sections of the people. Those who enjoyed the franchise in South Africa and had access to the institutions of justice, had no problem with the system at all. By and large, they have been surprised at the criticism levelled at the system. In their perception, the system of justice was fair, impartial and just. For the unfranchised majority in our country, the perception as well as the reality was very different. The system of justice for them was an instrument in the hands of successive White governments to enforce the laws made by Whites, in the making of which Blacks had no say, laws which were often unjust, which helped to dispossess Blacks of land, removed them from areas occupied by them and forced them to carry passes. These laws were regarded as laws which enforced repressive labour conditions, as well as

residenti and sport apartheid, and generally compelled victims to obey the law. This is the historical perception of the majority of Blacks of the justice system in South Africa. In their eyes our justice system did not dispense justice. (*Hansard*, 26 Aug 1994, col. 2 055-8)

Omar continued to quote from a speech made by Mandela in 1962, in which he denounced the courts for being bastions of white power: no African was tried by kith and kin, but was instead subjected to an oppressive 'atmosphere of white domination'. His words were echoed in the speeches by other prominent Members of Parliament from the African National Congress (including Johnny de Lange, the chairperson of the Parliamentary Select Committee on Justice, and Brigitte Mabandla, who later became a deputy-minister in the government) (*ibid.*: col. 2 081-92).

Not only was the 'legitimacy crisis' taken as axiomatic, but so too was the solution treated as self-evident. To restore or promote legitimacy, the courts would have to be made more representative of the whole population. As Omar said, in his first 1994 speech: 'All the institutions and structures of justice need to become representative both in terms of race and gender' (*ibid.*: col. 2 059). And, again: 'Perceptions will only change if, in reality, we do embark on a process of transformation to make our courts representative, both in terms of race and gender' (*ibid.*: col. 2 062). De Lange concurred; Mabandla called for affirmative action, and even quotas (*ibid.*: col. 2 082-3, 2 091-2).

This solution was based on two claims. The first, undeniably true in general terms, was that the judiciary and magistracy were dominated by white men. The second, and more questionable claim was that the racial composition of the bench was the key factor in determining public perceptions of the courts.

White men certainly predominated in the judiciary and magistracy. This was not the result of statutory restrictions: there was never a statutory prohibition on the appointment of black (or female) South Africans as judges in the higher courts, and the monopoly of judicial office by white (male) South Africans was thus *de facto* rather than *de jure* (Kahn, 1991: 673). Similarly, the near monopoly of white men to appointment as magistrates was *de facto* rather than *de jure*.

The first black judge to be appointed to the South African Supreme Court was Ismail Mahomed SC, in August 1991 (although Hassan Mall had been appointed an acting judge in 1987). By February 1993 there was still only one black judge, and only one woman, out of a total of 146 (*Hansard*, Questions and Replies, 24 March 1993, col. 815-8). In 1982, of 635 magistrates, only fourteen were women and only two were not white (both were Indian) (Hoex-

ter, 1983: 270). By 1990, there were still only three coloured, ten Indian and one African district magistrates, compared to 808 white district magistrates. All 144 regional magistrates were white (Dugard, 1992: 98, citing *Hansard*, Questions and Responses, 27 March 1990, col. 723-4, and fn. 9).

Table 2. 3 below shows the racial and gender composition of the magistracy over the period since 1982. It shows a striking change in the racial profile of the magistracy between 1992 and 1996, with the proportion of district court magistrates who were black appearing to rise tenfold from three per cent (28 out of 843) to 38 per cent (529 out of 1 387).

**Table 2. 3: Racial and gender breakdown of the magistracy under the jurisdiction of the Department of Justice in the Republic of South Africa**

	1982 d/ct	1990	1992 d/ct	1992 r/ct	1992 total	1994	1996 d/ct	1996 r/ct	1996 total
White	633	952	815	171	986		858	171	1029
African	0	1	3	0	3		472	17	489
Coloured	0	3	9	0	9		30	1	31
Indian	2	10	16	0	16		27	5	32
Men	621					795	1122	183	1305
Women	14					229	265	11	276
Total	635	966	843	171	1014	1024	1387	194	1581

Sources: (1) 1982: Hoexter, 1983; (2) 1990: Dugard, 1992; (3) 1992: *Hansard*, Questions and Replies, 21 Apr 1992, col. 799; (4) 1994: Department of Justice, *Annual Report, 1994/95*; (5) 1996: Department of Justice, *Annual Report 1995/96*.

There has indeed been a marked, and long overdue change in the composition of the magistracy, but Table 2.3 exaggerates the change through omitting data for magistrates in the bantustans before 1996. Overlooking bantustan-appointed magistrates is a common error. Kahn, for example, writes 'not long ago there was not one black magistrate' (Kahn 1991: 673). In fact, the first two black magistrates are said to have been appointed in the 1960s – in the Transkei (Sachs, 1973: 118). The figures in two paragraphs above for the racial composition of the magistracy in 1982 and 1990 exclude the TBVC states. By about 1990, nine of the 20 regional magistrates and almost all 48 out of 53) district magistrates in the TBVC states were African. Including the TBVC states would give the following aggregate data for magistrates in 1990: nine out of 164 regional magistrates (or five per cent) and 52 out of 874 district magistrates (or six per cent) were black. (It is even unclear whether this data includes the non-independent bantustans such as

KwaZulu.) The apparently changing composition of the magistracy is thus in part the result of the reintegration of the former bantustan courts, and in part the result of new appointments. Without data on the racial breakdown of the magistracy in the bantustans in 1992, it is impossible to gauge the precise importance of each.

Since 1994 black people have certainly been promoted to senior positions in the magistracy and judiciary. By the beginning of 1997, 22 black people had been appointed as permanent judges. Black chief magistrates had been appointed in Johannesburg, Port Elizabeth, Bloemfontein, Durban, Odi and Bafokeng. A black regional court president had been appointed in Cape Town (Department of Justice, *Annual Report 1995/96*, pp. 12-13).<sup>6</sup>

The composition of the judiciary and magistracy is deemed important not in itself, however, but because of its supposed effects on public perceptions of the courts. Curiously, two articles that report on empirical research into public opinion sound warnings about the whole illegitimacy thesis. Using a series of opinion polls conducted in 1981, 1990 and 1993, Ellman argues that 'South Africans – and, in particular, black South Africans, the victims of apartheid – did accord the legal system under apartheid a measure of legitimacy' (1995: 412). Ellman's analysis of the polls suggests deep ambiguity and complexity in black people's attitudes to the legal institutions.

**Table 2. 4: Confidence in the legal system, 1990**

	Urban African %	Rural African %	Coloured %	Indian %	White %
A great deal	27	33	13	32	28
Quite a lot	35	46	43	30	47
Not very much	21	13	29	21	18
None at all	11	4	2	7	3
Don't know	5	5	13	10	4
Total	99	101	100	100	100

Question: 'Please indicate . . . how much confidence you have in . . . the legal system?'

Source: Ellman 1995: 426, using a 1990 poll conducted by Markinor. Figures have been rounded off to the nearest integer; some columns do not add to 100 per cent because of rounding off.

Ellman reports that the polls suggest an increase in public confidence in the legal system between 1981 and 1990, followed by a decline thereafter. Confidence levels at the 1990 peak are set out in Table 2. 4. As Ellman notes, even if the very high levels of confidence found in this poll (conducted in late 1990) reflect optimism following the release of Mandela and return of the

ANC, they nonetheless indicate that views were not immutable. Confidence in the legal system was consistently higher than confidence in either the police or parliament, indicating that respondents were able to distinguish between more and less legitimate institutions. The polls found much lower levels of confidence in the legal system among coloured people than among African people. Coloured people expressed higher levels of confidence in the police than in the legal system, in direct contrast to African respondents (Ellman, 1995: 430-3). Of course, none of this suggests that the courts would not have been held in higher esteem if they were staffed by officers more representative of the entire South African population, or if they had a better record for procedural and substantive justice.

These polls did not distinguish between attitudes to the lower and higher courts, or between specific courts and the 'legal system' as a whole. Some disaggregation is possible in a subsequent poll of public opinion conducted by Gibson and Gouws. Gibson and Gouws use an almost identically worded question to probe confidence in a range of institutions, including 'local courts', 'the legal system' and 'the constitutional court'. Some of their results are presented in Tables 2.5 and 2.6 below. The African respondents in the survey express much less confidence in local courts than in the legal system – unlike white, coloured and Indian respondents. Confidence in the legal system as a whole among African respondents was about the same in 1996 as Ellman reports for 1990 (and higher than Ellman reports for 1993). Among coloured, Indian and white respondents, however, there was much less confidence in 1996 than there had been in 1990.

**Table 2. 5: Confidence in local courts, 1996**

	African %	Coloured %	Indian %	White %
A great deal	18	5	6	6
Quite a lot	35	33	26	37
Not very much	31	38	50	41
None at all	11	12	10	12
No opinion	5	13	7	4
Total	100	101	99	100

Source: Gibson and Gouws, 1997: 183. Figures have been rounded off to the nearest integer; some columns do not add to 100 per cent because of rounding off.

**Table 2. 6. Confidence in the legal system, 1996**

	African %	Coloured %	Indian %	White %
A great deal	27	9	8	7
Quite a lot	41	26	31	28
Not very much	23	40	48	44
None at all	3	11	6	19
No opinion	6	14	6	2
<b>Total</b>	<b>100</b>	<b>100</b>	<b>99</b>	<b>100</b>

Source: Gibson and Gouws, 1997: 183. Figures have been rounded off to the nearest integer; some columns do not add to 100 per cent because of rounding off.

Gibson and Gouws' findings suggest that local courts should be separated out from the legal system as a whole. Among African respondents, local courts were viewed with barely more confidence than the police. But it remains unclear how to interpret this. Is public confidence related to the racial composition of the magistracy and judiciary? The predominance of white people among judges and magistrates did not stop white respondents expressing a marked lack of confidence in the legal system, nor black people expressing a high level of confidence in it. Further research is required into the sources of judicial legitimacy.

In the early 1990s, however, there was little dissent from the notion that the courts suffered a legitimacy crisis, and that the solution was to make them more representative of the population as a whole. The question was, how should this be done? Legal professionals anxiously argued against the reintroduction of a jury system. The most sustained such argument was written by the eminent legal scholar Ellison Kahn, in a five-part essay in the *South African Law Journal* in 1991-93. In his first two instalments, Kahn surveyed the use of juries in South Africa up until their abolition in 1969. The following two instalments examined some of the arguments made for and against the jury in Britain and America. The final instalment summed up his case. In Kahn's view, the courtroom is not the place for participatory democracy, but for legal rationalism (as Weber put it). The judge has expertise, in part through his experience and in part his legal training (see Kahn, 1993: 325). He concludes with an emphatic statement of opposition to juries, invoking the support of a long list of legal professionals (eminent judges, advocates, attorneys and legal academics) (*ibid.*: 337). But Kahn's argument is less than convincing. He deals with counter-arguments with counter-assertions, and ignores some of the lessons he himself draws. For example, he refers to the controversial 1991 Pottle/Randle case in London, where the jury refused to convict accused who confessed

to their 'crime', but uses this as an argument against juries rather than an argument for an appeal procedure in instances of jury nullification.

Kahn acknowledges (but belittles) the provisions introduced in South Africa for the use of lay assessors in the lower courts (whereby lay assessors participate on matters of fact):

The legislature has made only a small concession to participatory democracy. Those who believe that it takes a trained and experienced lawyer to be a competent factfinder – and they have a strong case – will not accept even this concession unless assessors are lawyers of that stature. (*ibid.*: 325)

It is clear that Kahn belongs to a long tradition of legal professionals in South Africa – as elsewhere – who have been opposed to lay participation in the judicial system.

Kahn's approach is typical of many opponents of lay participation: list the shortcomings of one or other system of lay participation, and conclude that lay participation must be rejected. The same approach applied to judges and magistrates would, of course, find good reason to reject them as well. Writers in this vein rarely distinguish between perceived shortcomings which can be addressed, and those which cannot. Lay participation has a long history, and one which cannot be so easily dismissed by its opponents.

## **Democracy and the judicial system**

The suspicion if not outright hostility with which legal professionals and the state have viewed lay participation in the judicial system is not confined to South Africa. States have long been jealous of popular intrusion into the state's domain, whilst legal professionals have typically promoted an understanding of the law as something to be applied in an 'independent' and 'objective' manner. This is not the only way of viewing the law – as is evident in those many judicial systems that provide for significant lay participation.

In classical Athens, which provided the foundations of western democratic thought and practice, democracy entailed citizens' participation in both law-making and in the application of the law. Aristotle defined citizenship in a democracy as 'the right to take part in deliberative and judicial office' (Aristotle, *The Politics*, 1275b13-22). Besides serving in the Council of Five Hundred and the nomothetai (that drafted and ratified laws) and the Assembly (which decided whether existing laws needed to be changed), Athenian citi-

zens served as jurors in the People's Courts (and as magistrates in a wide range of primarily administrative functions) (Hansen, 1991).

Support for the extension of democracy into the judicial system is, however, not confined to advocates of participatory democracy two and a half thousand years ago. The demand for trial by a jury of one's peers – rather than by the King's appointees – was central to social and political struggles over democracy in England, culminating in the victory of Parliament over the monarchy and the establishment of civil rights in the late seventeenth and eighteenth centuries. When democracy was revived in the late eighteenth century in the form of representative democracy in revolutionary America, the participation of citizens in the courts was again regarded as integral to democracy. The jury system, inherited from England, was the centrepiece of citizen participation. In America, in contrast to England, juries decided law as well as fact, and could sit in civil as well as criminal cases. Lay participation was not limited to the jury: lay judges presided in many parts of America, both in the higher and lower courts.

Representative democracy was born as an alternative to tyranny, and citizen participation in the courts was seen as an important way of limiting absolutism and protecting democracy. Thomas Jefferson went so far as to proclaim:

Were I called upon to decide, whether the people had best be omitted in the legislative or judicial department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them. (Quoted in Hans and Vidmar, 1986: 36).

More remarkably, direct citizen participation in the courts was supported also by those Founding Fathers who were suspicious of direct popular participation in law-making – for example, Madison and Hamilton (*ibid.*: 36-7). It was this breadth of support among the Founding Fathers that led to the guarantee of the right to a jury trial being enshrined in the constitution through the sixth and seventh amendments.

De Tocqueville, the great French political writer who studied American democracy in the 1830s, was especially impressed by the jury system:

The jury system as it is understood in America appears to me to be as direct an extreme a consequence of the sovereignty of the people as universal suffrage. (Quoted in Richert, 1983: 3).

The jury is pre-eminently a political institution; it must be regarded as one form of the sovereignty of the people. . . . The jury is that portion of

the nation to which the execution of the laws is intrusted [sic], as the houses of parliament constitute that part of the nation which makes the law. (Quoted in Hans and Vidmar, 1986: 248).

In England, the jury was defended on democratic grounds by the great eighteenth century jurist, Sir William Blackstone – and has continued to be so defended by late twentieth century jurists such as Lords Devlin and Denning. In Blackstone's view, 'trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.' Devlin saw the jury as a defence against tyranny, and Denning described it as 'the bulwark of our liberties' (see Kahn, 1992b: 307-9).

The jury continues to exist in America and Britain. In 1976, Richert reports, 592 000 petit jurors were selected to serve in the federal courts, and a further 176 000 served as grand jurors in the U. S. district courts (Richert, 1983: 8). Juries decide only about 8 per cent of criminal cases; the rest are resolved by a judge or through plea-bargaining – but plea-bargaining is affected by the prospect of trial by jury, and juries decide a much higher proportion of contested cases (i. e. in which the accused maintain their innocence) (Hans and Vidmar, 1986: 19, 43). Use of the jury has declined in England; nonetheless, an estimated 110 000 people actually served on juries in 1964 (Richert, 1983: 8).

In America, the lay judge has declined in importance. Even before the Revolution, lawyers fought for the professionalisation of the judiciary, insisting that the professional qualification of a legal education should be a prerequisite for judicial appointment. The Founding Fathers, many of whom were themselves lawyers, were sceptical of lay judges whilst supporting strongly juries (Provine, 1986: 9-15). As the legal profession in America grew in power, the lay judges in the higher courts were concentrated on the frontier only; then, in the twentieth century, the role of lay judges in the limited-jurisdiction lower courts came under attack. By the 1970s, about 13 000 lay judges served in about 43 states, mostly in rural areas; in New York state alone they hear a total of about three million cases per annum; in most states, their jurisdiction is limited to traffic cases, small civil claims and minor criminal cases (*ibid.*: xi-xii).

The criticisms made of lay judges in America are typical of the criticisms of lay participation in the courts in general. 'Nonlawyer judges', it is said, 'are bound to make technical mistakes, and they lack the professional detachment to stay wide of prejudice, bias, and corruption'; common sense is no substi-

tute for professional knowledge (*ibid.*: 58). In America, this view was put forward primarily by 'successful urban lawyers and, increasingly, law professors, law students, and professionals in court administration' (*ibid.*: 42-3). It was based not on social scientific evidence of the performance of lay judges, but rather flowed 'deductively from professional presuppositions about credentials and court organisation' (*ibid.*: 43). Professional lawyers found support in sections of the population: 'Americans with wealth and status to protect came to prefer the professional's approach to justice, with its promise of procedural regularity and predictable decisions, much as they do today' (*ibid.*: 2). These criticisms have been made of jury trials, too, but with less success in America.

Lay judges remain important in England and Wales (and, to a lesser extent, Scotland – see Bankowski *et al*, 1987). Ninety-eight per cent of criminal cases are decided by lay justices of the peace, sitting in panels of between three and five, and assisted by a trained clerk of the court. In Scotland, there were about five thousand justices of the peace in the early 1980s (*ibid.*: 61). In England and Wales, there were about nineteen thousand justices of the peace (Richert, 1983: 16).

A different model exists for lay participation in most of continental Europe. There, lay people participate in court primarily as lay assessors on mixed benches of professional and lay judges. In the former West Germany, twenty-seven thousand lay judges served in district and county level criminal courts in 1976 (*ibid.*: 70). They sat in about 20 per cent of cases – excluding petty crimes and very serious offences (such as treason) which are dealt with by a professional judge or judges. The size and composition of the mixed bench varies according to the severity of the offence (*ibid.*; Casper and Zeisel, 1972). In Denmark, most criminal cases are dealt with by a mixed bench comprising one professional and two lay judges (Anderson, 1990). Nor is lay participation limited to representative democracies. In the Soviet Union, over half a million people were estimated to serve as lay judges per annum; in Hungary, about 17 000 lay assessors; in Poland, almost 50 000 (Richert, 1983: 164, fn 46). In such political systems, citizen participation was an important element in support of the claim that the system was democratic.

Given the wide extent of lay participation in courts in the industrialised societies, it is curious that scholars of democracy in the twentieth century almost invariably overlook citizen participation in the courts. This is true of studies of both democracy itself and of political participation. Richert suggests that the jury ceased to be seen as a *political* institution, and came to be seen as a *judicial* structure (*ibid.*: 6).

Whilst lay participation in the courts has not been regarded as central to democratisation by mainstream scholars, in practice provision has been made for lay participation in a variety of countries wrestling with democratisation. In post-independence Tanzania, for example, lay assessors serve in the lower or primary courts in the three-tier court system. Prior to independence, lay participation comprised the involvement of recognised chiefs and headmen in customary law courts, and of assessors who advised colonial magistrates on matters of customary law (Dubow, 1973: 227). After independence, the government stripped chiefs of the administrative and judicial authority vested in them under colonial rule, and abolished customary criminal law (although elements of customary civil law retained). An integrated, three-tier court system was established, comprising the High Court, District and Resident Magistrate's Courts, and more than 800 primary courts. In the primary courts, magistrates are required to sit with two lay assessors, who have an equal vote with the magistrate in judgment and sentencing, and may ask questions of witnesses (*ibid.*: 5) although it is the magistrate alone who can dismiss cases, for example ruling that there is no case to answer (*ibid.*: 228). They are known officially as *wazee wa Mahakama*, 'elders of the court' (although some are quite young, in their thirties) (*ibid.*: 86). According to Dubow:

The primary courts are characterised by a general informality. The primary court is a court *for* and *of* laymen. There are no legal professionals among the courts' personnel and legal professionals are not permitted to appear as representatives. (*ibid.*: 83)

The primary court magistrates are themselves civil servants without law degrees; most are former court clerks.

The magistrates occupy a middle ground between the legal professionals and the general public. They are men with experience with bureaucracies and their rules, but who have not acquired the special outlook and language for dealing with rules found in the legal profession. (*ibid.*: 84)

Dubow reports that 'the absence of legal professionals as advocates and as adjudicators fosters a language and mode of proceeding in which litigants can and do act on their own behalf with assurance and competence' (*ibid.*: 110).

In Tanzania, as in America and many other countries (including Mozambique), the legal profession was weak at independence. The legal profession was unable to mount a strong attack on lay participation. Once a country has a strong and entrenched legal profession, however, lay participation is vulner-

able to attack (on America, see Provine, 1986: chapters 2 to 4). South Africa had a strong and entrenched legal profession in the early 1990s, which helps to explain the fragmentary and faltering development of lay participation in South Africa's courts.

In South Africa, following the elections of 1994, the ANC Minister of Justice and his advisors articulated a vision in which lay participation would be expanded, in the first place through the appointment of lay assessors in the lower courts. But lay participation would not be limited to lay assessors. In August 1994 Omar told Parliament:

It is my contention that it is imperative to involve ordinary people in the legal system, especially in regard to the adjudicating process. Consequently I have also started to examine the possible establishment of a system of lay magistrates, similar to those in Britain. (*Hansard*, Fri 26 Aug 1994, col. 2 065)

Late in 1995 Omar's advisors produced a 'discussion document' on 'community courts'. The document proposed that 'community courts' would be presided over by a lay assessor, together with two respected members of the local community, and assisted by a clerk of the court (along the lines of lower courts in England). Its criminal jurisdiction would encompass offences covered by section 57 of the Criminal Procedure Act (Act 51 of 1977). It could impose fines of up to R500 and impose community service, among other possible sentences.<sup>7</sup>

These proposals have come to naught, for better or worse. As we shall see in the next chapter, even the introduction of lay assessors has been beset by opposition, resulting in a system that operates in only a small proportion of cases in the lower courts. Nor has there been much of a debate in South Africa over the fundamental issues involved in lay as compared to professional participation in the courts.

The possible dimensions of such a debate can be sketched on the basis of long debates over lay participation elsewhere in the world. Three broad arguments can be made in favour of lay participation in a democracy.

First, *justice must be done*. In this view, justice is more likely to ensue through the deliberations of and adjudication by lay people rather than professional, legally-qualified judges or magistrates. This may be for one or more of a number of reasons:

- (a) Lay people will bring to bear a better understanding of the social context relevant to the case.

- (b) Specific lay people may have specialist knowledge not shared by judges or magistrates, that is germane to a particular case or category of cases.
- (c) Magistrates and judges may bring to court prejudices and biases that can be offset through some countervailing lay perspective.
- (d) Lay participation 'reduces the isolation of the law from prevailing moral standards and at the same time helps prevent the routinization and cynicism which sometimes infects decision-making by full-time, law-trained judges' (Richert, quoted in Provine, 1986: 182).

The last of these is the most controversial. In Britain and America, popular conceptions of justice that are at odds with the law sometimes give rise to jury decisions that 'nullify' the law (Hans and Vidmar, 1986: 149-163). One famous case, widely cited by opponents of lay participation in South Africa, concerned the trial of two men (Pottle and Randle) who had admitted that they had broken the law many years before when they had helped 'spring' a Soviet spy from a British prison. The jury acquitted the accused, despite their admission of guilt. This decision, whilst nullifying the law, received widespread public approval, but strong criticism from the legal profession.

Secondly, *justice must be seen to be done*. If decision-makers in courts are representative of the community, in some sense, then the decisions of the court are more likely to be regarded as legitimate by the public. This is the argument made in the early 1990s with respect to the supposed legitimacy crisis facing South Africa's courts.

Thirdly, *justice must be done in a democratic manner*. In the Anglo-American tradition, popular participation in the courts serves as a guarantee of democracy, to limit absolutism (Richert, 1983: 9-11). This is in part due to the educational function of participation, emphasised by de Tocqueville:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all citizens; and this spirit with the habits which attend it is the soundest preparation for free institutions. It imbues all classes with respect for the thing judged, and with the notion of right. . . . It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged.

The jury contributes most powerfully to form the judgment, and to increase the natural intelligence of a people; and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights . . . and becomes practically acquainted with the laws of this country, which are brought within the reach of his capacity by the efforts of the bar, the ad-

vice of the judge, and even by the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil cases. (Quoted in Hans and Vidmar, 1986: 249).

Other scholars attribute the strength of democratic institutions in England, relative to France (for example), to the English experience of juries (Richert, 1983: 11-13). The democratic aspect of lay participation in the courts also arises from a concern that state officials – i. e. professional judges and magistrates – may be subject to pressure from the state (with regard to promotion, for example) to the detriment of justice. Lay people may bring to the courts perspectives that differ from those brought by professional magistrates, and which may affect not only whether justice is done (i. e. fall within the ambit of the first argument made above) but also the health of democracy more broadly.<sup>8</sup>

The introduction of lay assessors in South Africa has been justified primarily in terms of the need to ensure that justice is seen to be done, i. e. the second of the arguments above. As we have seen, however, the nature of the 'legitimacy crisis' facing the courts in South Africa may well have been misconstrued. We believe that the more robust arguments for lay participation are the first and third ones above: lay people bring to the courts different perspectives to professional magistrates, and these can enhance the quality of justice, whilst the involvement of lay people in the courts also serves to strengthen democracy.

### Chapter 3

## The introduction of lay assessors, 1991-1998

The initial framework for the use of lay assessors in the lower courts was devised in 1992-93, following amendments in 1991 to the 1944 Magistrates' Courts Act. Whatever the intentions of the legislators, in practice the emerging framework for the use of assessors was aimed at providing for assistance to district court magistrates, not for the transformation of the district courts. Except in a handful of courts, mostly in Mpumalanga, lay assessors were hardly used in district courts before 1994. (The use of assessors was compulsory in murder cases in regional courts, but magistrates were under no obligation to use lay rather than expert assessors.) Following the 1994 elections, the new Minister of Justice – Dullah Omar – added fresh impetus and direction to the use of lay assessors. A Co-ordinating Committee was established outside the existing Department of Justice bureaucracy, and a pilot scheme initiated in the Cape Town Magistrates' Court. In late 1994 and early 1995 the new lay assessor programme was extended elsewhere in the Western Cape, then to the Northern Cape and Northern Province, and then to the other provinces.

Whilst the system was nominally in place in all provinces by the end of 1996, in practice the use of assessors remains very uneven. In a few magisterial districts assessors are used routinely in a high proportion of criminal cases. In others, assessors are not used at all, or are used very seldom. In some of these latter districts the system never got off the ground, but in others the system broke down between 1995 and 1997, primarily through the opposition of magistrates. The use of assessors in the district courts was (and remains) at the discretion of the presiding magistrate, and most magistrates choose to use assessors rarely if at all. Since 1995 the Department of Justice seems to have had more pressing priorities than increasing the use of assessors through either departmental pressure or legislative reform. Further amendments to the Magistrates' Courts Act, tabled in 1998, make the use of assessors compulsory in district courts in particular categories of case only, preserving magisterial discretion over the use of assessors in the majority of cases. If this legislation is passed, it is likely that the use of lay assessors will continue to be uneven in future.

## The initial framework, 1991-94

Lay assessors were introduced into the lower courts in terms of the amendments to the 1944 Magistrates' Courts Act (Act 32 of 1944) made in 1991 under the Magistrates' Courts Amendment Act (Act 118 of 1991), and extended to the former bantustans when their courts were reintegrated in 1996. Section 93ter of the Magistrates' Courts Act had formerly provided for the appointment of expert assessors where the magistrate deemed 'it expedient for the administration of justice'. These assessors had to have 'experience in the administration of justice or skill in any matter which may have to be considered at the trial'. In practice, expert assessors were rarely if ever appointed to cases in the magistrates' courts. The 1991 amendments did two things. First, the requirement that assessors have relevant expertise was removed, thus allowing lay people to be appointed. Secondly, regional court magistrates were required to use assessors in cases of murder (unless the accused objects, in which case the use of assessors is at the discretion of the magistrate). Magistrates were not required to appoint lay assessors in any other cases, and even regional court magistrates could choose to appoint expert assessors in murder cases. When the 1991 amendments were debated in Parliament in June 1991, they seem to have been supported by all parties there, reflecting the prevalence of the perception that the lower courts suffered from lack of legitimacy.

Magistrates probably heard about the new provisions for the first time in late 1991 and early 1992. Some may have noticed when the Act was published in the *Government Gazette*.<sup>9</sup> The new provisions were due to come into effect on 1 March 1992,<sup>10</sup> and the Department of Justice issued a series of circulars.<sup>11</sup> These circulars apparently included advice on how to select assessors, what to pay them and so on, and instructions to magistrates to submit statistics on their use of assessors. The emphasis was on using assessors in the regional courts, as required under the amended Act in murder cases, and not in the district courts. The system was explained in terms of the prevailing political situation. Remarkably, there does not seem to have been much discussion of lay assessors in the magistrates' journal, *The Magistrate*, or the journals of attorneys or advocates (*De Rebus* and *Consultus* respectively) until much later.

In February 1992, Justice College – the national training centre for magistrates – produced a document for magistrates on 'Assessors in the Lower Courts' (Mitchley, 1992). This set out implications of the new legislation in terms of the amended legal and administrative procedures for appointing assessors. This document makes it clear that members of the public are to be involved in court so as to improve the court's understanding of particular cases.

Magisterial control is upheld through the invocation of the superior status of legal expertise (in South African law). The document says nothing about public perceptions of the courts. In short, the use of lay assessors is presented as a technocratic reform, not a transformation of the court system.

The document reports baldly that 'the aim of the amendment is to involve the community in the legal process' (*ibid.*: 4). There is no mention of legitimacy! This view is, perhaps, based in the legislation. Subsection (2) (a) of the amended section 93ter says that magistrates should decide whether to appoint assessors taking into account the following five factors:

- (i) the culture and social environment from which the accused originates;
- (ii) the educational background of the accused;
- (iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;
- (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
- (v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors.

No mention is made here of the relevance of public perceptions of the court or of the overall legal system. The point of having assessors is to improve the work of the court by drawing on the knowledge etc of relevant members of the public, not to make it responsive to the public in general. This interpretation is developed in the Justice College guide. It points out that the amended legislation does not prohibit the appointment of expert assessors, but rather permits the appointment of 'so-called lay assessors':

These may be persons without experience in the administration of justice and without any particular proficiency in another field. An ordinary member of the public may be appointed but only if such an appointment will be expedient for the administration of justice. The cultural and social background of the accused will be of utmost importance. If a person who is considered for appointment as assessor has no knowledge of the cultural or social background of the accused and [sic – does Mitchley mean 'or?'] has a totally different cultural or social background, it can hardly be said that he [sic] will be able to assist the presiding officer in any way. A person whose objectivity may be suspect by reason of his political or other viewpoints should not be appointed. An illiterate

should for obvious reasons also not be appointed. (Mitchley, 1992: 11-12)

Lay assessors are portrayed as having knowledge and hence value in ways which are comparable to those of expert assessors.

The Justice College guide informed its audience – presumably magistrates – that prosecutors are supposed to notify magistrates in advance of cases where assessors may be appropriate so that magistrates can make the necessary arrangements (*ibid.*: 12). The document seems to suggest that magistrates' courts had already been instructed to draw up lists of assessors:

In all magistrates' offices there are lists of persons suitable for appointment as assessors. In compiling these lists community leaders such as headmasters, priests, lawyers, etc. are consulted. These lists may be of assistance to presiding officers [i. e. magistrates], but they are under no obligation to appoint only people whose names appear on these lists. (*ibid.*: 12)

The document not only emphasises magistrates' discretion in appointing assessors (excepting murder cases in the regional courts), but also emphasises that magistrates should appoint assessors only if they need specialist assistance and that they could choose who to appoint.

During 1992-93 it is reported that the Department of Justice made 'several attempts' to promote lay assessors. A Deputy Director-General is said to have travelled countrywide helping magistrates to compile lists of assessors. In practice, the use of assessors generally fell between a rock and a hard place. On the one side was widespread suspicion on the part of the 'community' in the period before democratic elections. In Cape Town, for example, Chief Magistrate Jooste tried to compile a list of possible assessors, but recalls that there was 'community resistance' to it. His list ended up comprising mostly white supporters of the National Party. He describes it as a 'statutory list' in the sense of drawn from the 'statutory' side of local politics (i. e. , in the language of local government negotiations at the time, from the mostly white people who were already represented fully in statutory municipal institutions).<sup>12</sup> Similarly, in George, the then senior magistrate, H. A. F. Swart, recalls receiving a circular from the Department of Justice, encouraging magistrates to increase community involvement. He issued a pamphlet, but says that local black people did not trust the initiative and did not want to be associated with the courts.<sup>13</sup> Lists of assessors were, therefore, generally inadequate to the need to get specialised knowledge of black accused. On the other side was

general disinterest among magistrates, who chose not to make use of assessors even when it was possible.<sup>14</sup>

The one part of the country where lay assessors were appointed in significant numbers was Mpumalanga (then the Eastern part of the Transvaal). This seems to have been due, above all, to the efforts of the newly-appointed head-of-office in Nelspruit, Senior Magistrate H. Moldenhauer. Nelspruit was a smallish office, with two regional and two district criminal courts (the regional court magistrates also service a court in Barberton); many of the surrounding areas fell under the separate jurisdiction of the KaNgwane bantustan. According to Moldenhauer, he saw the use of lay assessors as part of a more general attempt to make the courts more accessible to people. By the early 1990s, he recalls, it had 'occurred to me that, in the magistrates' court, we don't treat people as people'. Assessors would also improve public perceptions:

People on the outside don't know what we are doing and that creates a problem. We see this [i. e. LAs] as a way of getting information back to the people. But when we started with this scheme we found that they really could help us.<sup>15</sup>

In late 1991, Moldenhauer approached a prominent African attorney in Nelspruit with strong connections to the ANC and asked him to suggest possible assessors. Moldenhauer says that he had already spoken to a former senior court interpreter, in part because it would be easier to persuade magistrates if they saw a familiar name at the top of the list. Early the following year the attorney submitted a list of about sixteen names, including the former interpreter as well as several white people. At some point during 1992 the former interpreter began work as a lay assessor. He was later joined by several others, including a teacher, a pastor, and a former mayor and KaNgwane cabinet minister. The first month for which we have statistics is December 1992, when assessors were involved in two murder cases in the regional courts, and twenty-nine other cases (most of which were probably in the district courts). The Department of Justice was encouraging, and paid for the assessors – a sum of R77 000 in the first year, says Moldenhauer. Given that the daily rate was then R250, this sum would have paid for, on average, between one and two assessors on every working day.

During 1993 and 1994 assessors were used in many but certainly not all cases in the Nelspruit district courts. The magistrates exercised their discretion as to which cases were appropriate for lay assessors. Because there were few assessors (and not a large number on a list), they served in court on a more-or-less full-time basis despite the fact that they were not involved in

every case. They were used one at a time, so that the magistrate retained the power to outvote, as well as overrule, the assessor. Notwithstanding this, the assessors saw their work as a job, or even part of a career, rather than some kind of public service. Indeed, one assessor went on to become a prosecutor; another returned to his former job as chief court interpreter.

Assessors were also used elsewhere in Mpumalanga – including in Barberton, Graskop, White River and Middelberg. The magistrates from these districts met regularly, and seem to have been persuaded by Moldenhauer that it was a good idea to appoint assessors. The head-of-office in Barberton introduced assessors because, he says, he realised that ‘it was this or the jury system’. As in Nelspruit, a black court interpreter played an important role in setting up the system.

Elsewhere, we have only unsubstantiated and often second-hand information on the occasional use of lay assessors. For example, one magistrate informed us that lay assessors had been used routinely in the regional courts in Welkom since 1992 (and not just in murder cases), and in at least one district court there too – but we have not been able to verify this.<sup>16</sup>

In the questionnaire we administered to magistrates in 1996-97 we asked if assessors had ever been used in district courts in their district prior to 1994. Only nine of forty-eight said yes. All but one of these were from the Mpumalanga districts (the exception being one magistrate in Bellville, in the Western Cape). We also asked if any of them had heard about or received any documentation concerning lay assessors prior to 1994. Approximately 40 per cent had. The information came from various sources. We conclude that many magistrates outside of Mpumalanga knew that assessors could be appointed before 1994, but had no direct experience or knowledge of lay assessors ever being used in practice.

We also asked lay assessors when they were appointed. Of our 200-odd respondents, fourteen said that they had been appointed prior to July 1994. These assessors served in the following districts: Wynberg (Western Cape – five assessors), Johannesburg (five assessors), and Pretoria, Springs, Victoria West and Mitchell’s Plain (one assessor each). These assessors may have served in regional courts prior to 1994 – sitting with magistrates on murder cases, when magistrates were required to use assessors. We know that the Pretoria assessor appointed in 1992 served only in the regional court (until the system was expanded in 1995), and we believe that the list of assessors drawn up in Johannesburg in 1992 was primarily for regional court use.<sup>17</sup>

The picture that emerges of assessors being used significantly in a handful of Mpumalanga districts only is also corroborated by the only aggregate statis-

tics that seem to be available. In response to a parliamentary question, Dullah Omar reported that assessors had been used in a total of 1 286 cases in district courts and 650 cases in regional courts between 1 July 1993 and 30 June 1994.<sup>18</sup> These would have included cases where expert assessors were used, especially in the regional courts. These totals correspond to a mere one per cent of criminal cases heard in the regional courts, and two per cent of the criminal cases heard in the district courts (i. e. excluding cases where there was an admission of guilt).<sup>19</sup> Apart from the murder cases, Nelspruit alone probably accounted for most of these. Nelspruit’s monthly reports indicate that assessors were used, on average in this period, in at least eighty cases per month – which would account for almost one thousand cases across twelve months. If we take into account the cases in other Mpumalanga courts that involved assessors, it is unlikely that any other district courts in the country were using assessors to any significant extent. The absence of critical commentary in the *Magistrate* provides further circumstantial corroboration: had lay assessors been used widely, we would have expected criticisms to be published.

### **Preparing for change, 1993-94**

The ANC and progressive lawyers had put some thought into the issue of judicial reform prior to the 1994 elections. In September/October 1993, the National Association of Democratic Lawyers (NADEL) organised a conference on ‘Reshaping the Structures of Justice for a Democratic South Africa’. The key assumption underlying the conference was that judges and magistrates enjoyed no respect or legitimacy whatsoever among black South Africans. The predominant response among participants – including the future president of the Constitutional Court (Arthur Chaskalson), the future Minister of Justice (Dullah Omar) and senior ANC legal strategist (Kader Asmal) – was that the profile of the judiciary needed to be changed through the appointment of black (and perhaps also female) judges, through an overhauled system for judicial selection (Norton, 1994). The issue of lay participation arose, but was very clearly regarded as of secondary importance.

Lay or citizen participation in the courts did not feature in the various prospectuses for a post-apartheid South Africa, nor was it a topic addressed in the constitutional negotiations between the ANC, NP and other players. Debate – and controversy – was focused on the establishment of a separate Constitutional Court, and the appointment of high court judges; little attention was paid to the lower courts or to the question of lay participation. One report

from the Technical Committee on Constitutional Issues in the multi-party negotiations dealt with the court system in the following way:

6. 2. . . . it would be undesirable in a Constitution for the transitional period to make more changes in the organisation and functioning of the courts than are absolutely necessary. It should be possible for the Court system to be kept largely intact during the transition, and we consider it desirable that this be done. . . .
6. 4. Magistrates' Courts and courts of Chiefs and Headmen should not be affected to any significant degree. (12th report of Technical Committee on Constitutional Issues, 2 Sep 1993, para 6. 2 and 6. 4)

The Report discussed the appointment of judges – but did not mention magistrates. The emphasis was clearly on continuity in the lower courts. Even the ANC's Reconstruction and Development Programme, which initially served as the ANC's election manifesto for the 1994 elections, was silent on the issue of citizen involvement in the courts, notwithstanding fulsome support for popular participation in other decision-making institutions or processes.

A part of the reason for this relegation of lay participation to the margins of institutional reform may have been the hegemony of legal professionalism, even within the ANC (as we began to examine in Chapter 2). The defence of the legal status quo was, however, widely justified in terms of the need for stability. For example, at the NADEL conference Kader Asmal referred with explicit approval to paragraph 6.2 of the Technical Committee report quoted above (Norton, 1994: 57). Legal professionals tended to attribute any problems in the legal system to the social composition of its personnel, not to the character of the system.

Lay participation arose in three papers at the NADEL conference, all of which recommended the use of lay assessors in lower courts. Papers on the (West) German and Swedish systems referred to the roles played by lay assessors (Werle 1994: 44-5; Olding, 1994: 84-5), whilst a paper by a future Constitutional Court judge, Yvonne Mokgoro (1994), assessed some of the different ways in which lay participation could be introduced. None of these speakers referred to the existing usage of lay assessors in Nelspruit or elsewhere.

Following the conference, NADEL prepared a short memorandum on 'community participation' in the courts. Unusually in this debate, NADEL prefaced this memorandum with a commitment to popular participation on democratic grounds rather than simply as a means of changing the racial profile of the bench so as to secure the legitimacy of the courts. NADEL argued against the jury system on both practical and social-cultural grounds, recom-

mending instead the compulsory use of lay assessors in all courts (higher and lower, civil and criminal). The existing legislation was said to be wholly inadequate. NADEL called on the Minister of Justice 'to establish a commission, without delay, to explore and make recommendations for the development of such a system'. As the memorandum noted, the introduction of lay assessors who were representative of the population 'would have as an important by-product' the correction of the racial profile of the bench.<sup>20</sup>

These recommendations seem to have influenced Dullah Omar, who was appointed as Minister of Justice in May 1994 after the ANC won the lion's share of the vote in the April 1994 elections. In a speech soon after his appointment, Omar proposed greater involvement of members of the 'community' in the judicial system. He later set out the purpose of lay assessors as follows:

The object of lay assessors is to involve communities in the administration of justice. This would enable more and more people to identify themselves with the judicial system. In turn this would help to establish legitimacy and the credibility of our courts, particularly in a situation where courts are not yet properly representative of the population in terms of race and gender. (*Hansard*, Questions and Replies, Thur 11 May 1995, col. 319-321)

Omar appointed a Co-ordinating Committee to oversee the introduction of lay assessors in the lower courts. This committee comprised the Chief Magistrate of Cape Town (Mr Abraham Jooste, who acted as chairperson) and two attorneys (Mr Essa Moosa and Mrs Ghadija Khan, who was then director of the Legal Aid Clinic at the University of the Western Cape), both of whom were old associates of the new Minister.<sup>21</sup> The work of the Committee was administered by Mr Jooste's office, with the assistance of Mr H. A. B. Swart, the Senior Magistrate in Cape Town (formerly Senior Magistrate in George and East London).

This Committee was established outside the existing bureaucracy of the Department of Justice. The Director-General was reportedly consulted, but not involved. Moosa and Khan were employed as part-time consultants. One consequence of this was that the Committee lacked formal authority. The resultant lay assessor system was semi-voluntary, and magistrates had to be persuaded to cooperate.

## The 'pilot project', 1994-95

A pilot project was launched in Cape Town in August 1994, extended to other parts of the Western and Northern Cape in late 1994 and early 1995, and then evaluated (and publicised) at a conference held in Cape Town in April 1995.

### *The pilot project in the Cape Town Magistrates' Court*

The pilot project was initiated in the Cape Town Magistrates' Court in August 1994 with the appointment of nine lay assessors on an experimental basis. Six of the assessors were nominated by an old friend of the Minister; most of these, like the Minister, were members of Cape Town's coloured and Indian middle-classes. One of the others, from the African township of Guguletu, was suggested by the South African National Civic Organisation (SANCO). It is not known who proposed the remaining two assessors. Six of the assessors were men, and three were women.

The assessors served on a more-or-less full-time basis. They sat, mostly one at a time but occasionally two of them together, with magistrates, presiding over a wide range of cases: theft, housebreaking, assault, fraud, traffic offences and drug-related offences. They participated fully in trials and sentencing, and less regularly in bail applications. They were permitted to ask questions directly of witnesses. According to one assessor:

I took up my position on the bench with the magistrate. I was allowed to participate fully in litigation. Where clarity on certain aspects was required I would pose questions to the accused. Any matter of law arising for decisions was always left to the magistrate. I was fully involved in judgment and sentencing of the accused.

The extent and form of assessors' participation in court proceedings in this pilot project ran contrary to the advice given by Justice College in 1992 (Mitchley, 1992).

The assessors later told us that there had been a few occasions when they had disagreed with magistrates. Two of them said that they had each disagreed twice with the magistrate (over the course of nine or ten months), but that the magistrate had asserted that there was a legal issue involved and therefore the assessors' views would be disregarded. Three assessors said that they had been outvoted by the magistrate on occasion; their dissent was recorded in the judgment – sometimes at their insistence. But, according to one assessor, some magistrates ignored the assessors. Disagreements were more common with regard to sentencing than to determining guilt. According to one:

I have never disagreed with a presiding magistrate on the judgment of a case but have done so on numerous occasions where sentence was involved. These disagreements were always amicably resolved. I always maintained that an accused person from a less fortunate community, considering his cultural and social environment and his educational standards *cannot* be sentenced in a same way for a *similar* offence as an accused coming from a community of a more fortunate background. Some magistrates differed in their thinking, especially those from up-country. Their reasoning [is]: 'Theft is theft'. (emphasis in original)

But another assessor complained that drug-related offences were treated too leniently:

I feel the law is sometimes too lenient on drug crimes. In my opinion the perpetrator is getting off too lightly. For the hardcore criminals the punishment should be much harsher.

Magistrates, he added, were too sensitive to 'extenuating circumstances'. In general, however, assessors and magistrates reached agreement through a process of 'discussion and compromise', as another assessor put it.

The assessors may not have disagreed with magistrates often in court, but they repeatedly voiced criticisms of the criminal justice system and of the lay assessor pilot project.<sup>22</sup> Their criticisms covered four main areas. First, they complained of the lack of preparation or training. Although they had been given weekly lectures, they said they should have had a manual, guidelines and some basic training at the outset. They were even unsure as to the purpose of the assessors system: 'we were put on a playing field not knowing what game we were playing or what was hoped to achieve'. Secondly, they rebuked magistrates for not using them more. Thirdly, they voiced criticisms of the criminal justice system: magistrates were too lenient on drug-related offences, the police investigating officers were incompetent and prosecutors were ill-prepared. Finally, they voiced their concern at public misperceptions of their role: 'there is the idea that we are there to side with the accused and plead with the magistrate on their behalf and also that we represent a particular political party.'<sup>23</sup> Partly in response to these criticisms, the assessors together with Senior Magistrate Swart drew up a draft 'Code of Conduct' for assessors.

### *The introduction of lay assessors elsewhere*

Whilst the pilot project was still incomplete the lay assessor system was extended to other parts of the Western Cape. In late 1994 meetings were held in the almost 40 magisterial districts under Chief Magistrate Jooste's jurisdiction (mostly north of the N1, in the Western Cape). In each district, the magistrate convened a meeting of 'community leaders' to form a selection committee or select assessors directly. At the start of 1995, similar meetings were held in the magisterial districts in the Western Cape that fell under the jurisdiction of J. van Reenen, Chief Magistrate in Wynberg. The whole of the Western Cape was said to have been covered by April 1995.<sup>24</sup>

The introduction of lay assessors was concentrated in the Western Cape, but was not confined to the province. The use of lay assessors was also invigorated in Pretoria and Pretoria North at the end of 1994. The Pretoria Magistrates' Court was prompted to appoint lay assessors through their physical proximity to the head-office of the Department of Justice. In November, the Chief Magistrate and one other magistrate met with political leaders in Pretoria, and in December several meetings were held to compile a list of assessors. This list was made available to magistrates, but the use of assessors remained entirely discretionary. The goal, according to one of the magistrates, was to ensure that assessors from an area – for example, one of the townships – were available if needed in a case concerning that area. When one of the Pretoria magistrates was transferred to Pretoria North, she initiated the use of assessors there (also around November). She hand-picked the first assessors. It is not clear how much assessors were used in either Pretoria or Pretoria North, but it is unlikely that they were used to any great extent.<sup>25</sup>

In both Pretoria and Pretoria North, the purpose of assessors was, at best, ambiguous. For sure, some of the magistrates involved saw assessors as improving links to the 'community'. But, by and large, assisting the magistrates seems to have been more important than changing public perceptions and legitimating the courts. The system was also discretionary, and little pressure was exerted on magistrates to choose to use assessors.

Jooste and Moosa visited some other parts of the country outside of the Cape. Moldenhauer recalls that they visited Nelspruit in 1994, shortly after the elections. They were apparently very pleased with the level of use of assessors there, but argued that Nelspruit was doing it wrongly: a different assessor should be used in each case. Moldenhauer recalls that he told them that the system was working fine, and the continuity helped to allay magistrates' suspicions and objections.<sup>26</sup>

### *Responses to the pilot project*

In November 1994 the Department of Justice held the first of a series of consultative 'legal forums' on the administration of justice. Discussion ranged across many issues, including (briefly) lay participation. Jooste reported on the Cape Town pilot project. Some concern was raised over the cost of a 'fully comprehensive compulsory system in all Courts', but the rapporteur on this session reported nonetheless that 'the principle of popular participation in the administration of justice was fully supported' (Ministry of Justice, 1994: 39). This was echoed by the Minister of Justice himself in the final wrap-up session: 'I think there is general acceptance that we should, as far as possible endeavour to make use of assessors throughout our country' (*ibid.*: 122). Only later did it become clear that there was considerably less than total support for lay participation in the courts.

The motivation for lay assessors was very much the improvement of legitimacy, and perhaps of a weak form of accountability, with no attention paid to the democratic argument made by NADEL earlier in the year (and repeated in a submission to the legal forum). Furthermore, the Minister of Justice gave notice at the very start of the legal forum of his commitment not to dictate to the judiciary – an attitude that was to cause considerable difficulties for the lay assessor programme in the following years given the growing hostility of magistrates and judges. According to the Minister:

One of the things that I do not want to do, is to succumb to some of the demands that we must tell the Courts what they must do and that we should prescribe to the Courts. I do not believe that [it] is going to help us in the long run. It is absolutely imperative – no matter how illegitimate we may consider our Court system to be, no matter the fact that it is not representative and that changes need to take place – it is nonetheless absolutely imperative that we build an independent judiciary in our country and that we interfere with the work of the Courts as little as possible. Therefore it is not for us as a Department of Justice to begin to prescribe to Courts and tell the Courts what they must do, but it is very important that we should assist the Courts, so that the Courts can take the kind of decisions which they are empowered to take. (*ibid.*: 7)<sup>27</sup>

Already, therefore, at the end of 1994, there were faint indications of the tension that was to emerge between reform on the one hand and the professional autonomy of judges and magistrates on the other.

As the new year dawned, however, optimism reigned. The Co-ordinating Committee told the Minister of Justice that it hoped 'to complete its task by the

end of June 1995<sup>28</sup> and wrote to the Premiers of the other eight provinces, requesting their assistance in extending the lay assessor system nationwide. The letter explained that the judiciary was being reformed through increasing community involvement, and that the proposed system of lay assessors was 'functioning on a sound basis in the Cape Town Magistrates Court'. The Co-ordinating Committee would visit each province to help set up the system.<sup>29</sup>

There was further discussion of the nascent lay assessor system at a conference held in February, in Somerset West. The conference was on the theme of Crime, Security and Human Rights. A range of logistical issues were discussed. As a result of the discussions, the Co-ordinating Committee began to draft a 'Concept Act', Regulations and a Code of Conduct.<sup>30</sup>

More important was a one day conference held in Cape Town, in April 1995, to assess specifically the experiences of using assessors in the pilot project, and to promote the lay assessor system. The conference was attended by about 140 people, including magistrates from the Western Cape and beyond, judges, the Attorney-General of the Western Cape, academics and Cape Town assessors.<sup>31</sup>

The conference provided an opportunity for officials to set out the objectives of the lay assessor system. Moosa (from the Co-ordinating Committee) identified the following objectives:

- 1) to involve our community in the administration of justice and to bring our courts closer to the community.
- 2) to make our courts more representative and to make their judgments [uitsprake] acceptable to the wider community.
- 3) to make the administration of justice more transparent and our courts more accountable to the community that they serve.

He then elaborated:

In other words, we want to make our courts more legitimate in the eyes of the broader community. In the past, because of the way that the courts were constituted, the majority of people in this country did not accept the courts as part of their institution. They adopted alternative structures such as the people's courts. This often led to very serious abuse and lack of proper control. We want our courts to be accepted by all the people and one way of doing so is to introduce the lay community assessors systems [sic] in our courts, not only in the lower courts, but also in the superior court, and not only in the criminal courts, but the objective is that eventually we want to introduce them in the small claims court and in the civil court.<sup>33</sup>

A second speaker placed his emphasis rather differently. Enver Daniels, advisor to the Minister, spoke of the legitimacy crisis of the courts, and then went on to discuss their role as 'watchdogs' over the courts (i. e. magistrates). He said that most magistrates were white men with 'ideological perspectives [that] were often biased in favour of the State' (a remarkable comment from an official of the now ANC-controlled state); these biases 'usually meant protecting white privilege and severe and excessive sentences imposed on blacks in criminal cases and on people in political matters'.

Assessors must ensure that accused persons received [sic] fair trials and that justice is dispensed in an impartial manner. . . . Assessors will have to monitor the actions, statements and general behaviour of judicial officials, to ensure that they behave in accordance with democratic principles and act in accordance with human rights values and norms. Assessors will have to monitor bias, rudeness and prejudice to ensure that at all times, justice is seen to be fair and impartial.<sup>34</sup>

Like Moosa, Daniels envisaged the extension of lay assessors to civil courts and the higher courts, and even the possibility of lay magistrates in future.<sup>35</sup>

Moosa also raised some of the outstanding questions about lay assessors that needed to be resolved. Should assessors be compulsory? In all cases, or certain categories of cases? Should magistrates be able to use just one or should they be required to sit with two? Should assessors be paid, and if so how much? How should assessors' safety be assured in the face of threats? These issues were discussed in small group sessions.

As at previous conferences where lay participation was discussed, there was no outright dissent. One of the groups reported back to a plenary session: 'It was common ground that nobody is opposed to the system of lay assessors and that there should be such a system'.<sup>36</sup> But there was a range of dissent over the details. Daniels' view of assessors as watchdogs went down badly with magistrates, unsurprisingly. The judge-president of the Western Cape recorded his strong opposition to the extension of lay assessors to the higher courts. There was widespread feeling that assessors should not be compulsory. The conference thus provided forewarning of opposition from legal professionals.

Notwithstanding these portents of future problems, Minister Omar reported to Parliament in May that:

Despite some teething problems, the project has been extremely successful, and the programme is running well. . . . At present, sixty-three

magistrates' offices are making use of this system. [*Hansard*, Tu 16 May 1995, col. 1 179]

These 63 offices comprised 55 in the Western Cape, three in the Eastern Cape and five in the Northern Cape (*Hansard*, Questions and Replies, Th 11 May 1995, col 321). No aggregate data appears to exist on the number or proportion of cases in which assessors were used. But Omar told Parliament that assessors had been used in 1 557 criminal cases in Cape Town since the initiation of the pilot project in September 1994 (*ibid.*: col 320). This averaged out to about 200 cases per month – i. e. over twice as many as in the much smaller Nelspruit courts prior to mid-1994.

Omar and his officials seem to have envisaged the rapid extension of the lay assessor system across the country, with the intention of making the use of assessors compulsory at some point. The prospective rise in the use of assessors raised the thorny question of resources: who would foot the bill? Presumably in anticipation of increased usage of assessors, the Department of Justice reduced the remuneration paid to assessors from R250 per day to R20 per hour or a maximum of R100 per day, with effect from 27 June.

### **The expansion of the lay assessor system, 1995-97**

Even before the Cape Town conference, the Co-ordinating Committee had taken its first steps in extending the lay assessor system outside of the Western Cape. This expansion was given greater impetus after the conference. Progress was most rapid in the Northern Cape and Northern Province. By the end of 1996 the system was in place, at least nominally, in all nine provinces.

The expansion of the system country-wide involved three stages. First, in early and mid-1995, the Co-ordinating Committee invited chief and senior magistrates from other regions to accompany them on their visits to magisterial districts in the Western and Northern Cape to set up the lay assessor system. Secondly, from mid-1995, provincial co-ordinating committees were formed to oversee the process in other provinces. Each committee comprised a representative of the Department of Justice (generally a Chief Magistrate), together with a representative of the provincial government and a community leader. Members of the original, overall Co-ordinating Committee provided initial assistance to the provincial committees. Thirdly, in provinces where the process was slow to get underway – notably the Eastern Cape and KwaZulu-Natal, further national intervention was needed to get the system off the

ground. In practice, the process was driven by the Chief Magistrate involved.<sup>37</sup>

By August 1995, the Co-ordinating Committee reported that the lay assessor system was 'functioning on a sound basis' in the Western Cape, Northern Cape, Northern Province and Mpumalanga, and in some districts in the Free State. Progress was said to have been especially rapid in the Northern Province, perhaps because Pretoria Chief Magistrate Bester was enthusiastic and had time available. In practice, even in these provinces progress was less certain than the Co-ordinating Committee claimed. Our research in the Northern Cape suggests that in most districts around Kimberly the lay assessor system never really got off the ground in the crucial sense that lay assessors were hardly used. The Co-ordinating Committee's reports seem to have been optimistic in their assessment of the growth of the lay assessor system.

Even optimists acknowledged that progress was delayed in the North-West, Eastern Cape and KwaZulu-Natal. In North-West, the premier's office apparently would not appoint anyone to liaise with the Coordinating Committee, and there was therefore no provincial co-ordinating committee. In much of the Eastern Cape the courts were in shambles, and there were serious conflicts between chiefs and civic organisations in some areas. In KwaZulu-Natal, the conflict between Inkatha and the ANC was deemed too serious to allow any impartial system of assessors.<sup>38</sup> Nonetheless, in 1996 the process began to be completed with the establishment of local committees to select assessors in the last province, KwaZulu-Natal. The Chief Magistrate of Pietermaritzburg, Mr Dicks, reported in June that committees had been set up in all 71 districts in the province to select assessors (although most were not yet in operation). IDASA assisted in the process of selecting assessors in this province. The districts where assessors were used least or last were generally those in the former bantustans. Not only did the 1991 Act not apply there until the Justice Laws Rationalisation Act (Act 18 of 1996) was passed, but many of the courts were in chaos.

The nominal extension of the lay assessor system into all nine provinces was a remarkable exercise, completed on a shoestring budget. A mere R23 000 was budgeted per province, totalling R207 000, to cover the accommodation and transport costs of the teams setting up the lay assessor system. In addition, Moosa and Khan were employed as consultants, at an apparently reasonable cost. Although these figures do not include the implicit cost of the various chief magistrates' time, it is clear that the costs of setting up the lay assessor system were low – especially compared to equivalent initiatives in other government departments where vast sums were spent on teams of

highly-paid consultants. The Department of Justice, members of the Co-ordinating Committee, chief magistrates and others involved deserve congratulations on a remarkable initiative.

But the nominal establishment of the system did not mean that lay assessors were actually used in practice. As the lay assessor system grew, so did opposition among magistrates. As the use of assessors was at the discretion of the magistrates, assessors were often not used even where they had been selected. Magistrates' opposition was expressed publicly in a series of critical articles in the magistrates' journal, *The Magistrate (Die Landdrost)*. In November 1995, opposition was voiced openly at the second legal forum, held in Durban on the theme of 'Access to Justice'. The Magistrates' Commission and the Association of Regional Magistrates expressed criticisms. Many of the criticisms were practical (as we shall see in Chapter 4); many were based on initial bad experiences with assessors; whatever their cause, they strengthened the view among magistrates that the use of assessor must remain at the discretion of magistrates themselves.

Growing criticism of assessors prompted the Co-ordinating Committee to draft a new Act, Regulations and a Code of Conduct to govern assessors in the lower courts. Copies of these were distributed in November 1995 to magistrates across the country, with the request that comments be returned by February 1996. The comments received were collated into a summary document in mid-1996. In June 1996 Omar told Parliament that the Department was 'promoting legislation' to extend the system throughout the whole country (*Hansard*, 13 June 1996, col 2851). Early in 1997 the Department of Justice indicated that it expected to introduce an Assessors Bill during 1997.<sup>39</sup> It was rumoured that Minister Omar would refer to the draft bill in his budget speech in May 1997, but he did not. Only in 1998 was legislation tabled, and (as we shall see below) it proved to be very different from the vision set out three years before.

### **Models of usage of lay assessors**

The Co-ordinating Committee measured its success in terms of the number of magisterial districts where the lay assessor system had been established nominally in that processes were underway for the selection of assessors. But this did not guarantee that assessors would actually be used in court. Unfortunately we have not been able to obtain any statistics on the use of assessors nationwide – although magistrates are supposed to submit statistics on each district to the Department of Justice every month (and the Department should

have data on its disbursements to assessors). In the absence of any national statistics, we have tried to piece together a total picture. But because our evidence is patchy, we cannot say with any precision what the overall use of assessors is across the country – either in terms of what proportion of cases involve assessors or what proportion of courts use assessors.

In further research we shall collate the available evidence from our survey and in-depth interviews, together with our observations, for each magisterial district for which we have data. Our preliminary collation of our data suggests that there are four broad models of use of lay assessors in South Africa. These four models are:

#### **Model 1:**

Assessors sit in court for all or most of the time, and are used routinely. This was the model developed in Nelspruit prior to 1994, and in Cape Town after 1994, although the system for allocating assessors differs greatly between these two districts. The assessor (or assessors) sit alongside the magistrate. In some stages of the legal proceedings they do not participate – and they may be excused from sessions (especially the first session of the morning, before the tea-break) which are mostly taken up with remands, pleas and bail applications. Because of the different ways of allocating assessors we need to distinguish between two variants of this model:

##### *Model 1A:*

Assessors sit with the same magistrate in the same court for an extended period of time. This is the system used in Nelspruit.

##### *Model 1B:*

Assessors rotate among courts according to a roster. This was the system used in Pretoria in 1996.

#### **Model 2:**

Assessors are always available in the court buildings, but do not sit in court all of the time. This is the system used in, for example, Wynberg (WCp). Assessors will wait in a waiting-room until a magistrate calls for them to come to his (or her) court because they are required for a particular case. In this mode, assessors are sometimes used often, at least in all major trials; sometimes, however, they are used rarely, even if they are always available. They are likely to be used in trials only. Assessors are very unlikely to be used in minor cases (including traffic offences or cases in which there are no difficult or controversial facts – for example, a housebreaking cases where the accused left finger-

prints). This model requires magistrates to have some idea about a case before any evidence is led. One magistrate suggested that magistrates should be given a 'summary of the facts' before the case comes up (as, he says, happens in the Supreme Court) in order to identify which cases do and do not require an assessor. In districts which use this model there are generally some individual magistrates who use assessors pretty much routinely, as in Model 1, but most of the courts are using Model 2 (this seems to be the case in Pretoria during 1997).

### **Model 3:**

Assessors are not called to court routinely, but have to be called in especially if their presence is considered necessary in a case. In White River, for example, the prosecutor informs the magistrate in advance as to what kinds of cases are to be heard, and the magistrate decides whether or not to call in an assessor on that day. Unlike in Model 2, the magistrate requires a summary of the facts of a case days in advance so that an assessor can be summonsed to court, rather than at the start of the trial. In Kimberly, if the senior prosecutor thinks a case warrants an assessor, he informs the magistrate and arranges for an assessor to attend. In practice, therefore, magistrates have delegated to the prosecutor the discretion as to when to call an assessor – but assessors are used very rarely. In these Model 3 scenarios, assessors will only be used in particular trials, and not in any other stages of legal proceedings. In this model, magistrates may select assessors by rotation from a roster, but many simply invite assessors whom they know.

### **Model 4:**

Some magistrates object to lay assessors, and refuse to use them at all.

Which model is in use in which districts or courts depends on magistrates, who have discretionary power over whether or not to use assessors (except in specific categories of case in which their use is compulsory), the chief magistrate in the area, and also heads of office, who wield significant if informal power over the magistrates under their jurisdiction.

It is important to note that in some districts, different magistrates use different models. Moreover, the model in use may vary over time. Our research suggests that there are many magisterial districts where the lay assessor system was set up, functioned for a while, but then faltered, usually as a result of greater self-confidence among hostile magistrates.

## **Setting up the lay assessor system**

There is no standardised procedure for setting up the lay assessor system, although the Co-ordinating Committee energetically promoted one procedure which became the most common one. Nonetheless, magistrates' concern to maintain control pulls them toward alternative procedures.

In Nelspruit, where assessors were first used in a significant proportion of cases, assessors were (and still are) selected by the senior magistrate, in consultation with local leaders. Initially, the first assessor waited to be called to sit with a magistrate, depending on the case, but from early on some of the magistrates began to sit with an assessor on a more-or-less permanent basis. Variants of this system are used in many other courts in Mpumalanga. In Witbank, for example, one of the court interpreters arranged for people from the township – including people who share her surname and may well be relatives of hers – to be put on a list of assessors, although the magistrates choose to sit with assessors relatively infrequently. Procedures such as these in Nelspruit and Witbank mean that there is no democratic control over the selection of lay assessors whatsoever. In the Nelspruit case, the assessor system seems to operate well in other respects; in Witbank, however, it appears to be close to disastrous.

The procedure promoted by the Co-ordinating Committee was very different. The Co-ordinating Committee wrote to the head-of-office in each magisterial district, requesting that they invite leaders of all local community organisations to a meeting to set up the lay assessor system. The heads-of-office typically wrote to local civic and residents' organisations, churches, farmer and other professional associations, and in some cases political parties and welfare organisations also. In all of the cases we have studied the invited organisations seem to be broadly representative of the 'community' in racial, gender and party political terms.

Each 'launch meeting' would be attended by members of the national or provincial co-ordinating committees, usually together with guest magistrates from other parts of the country. The meetings usually followed the following format:

1. An introduction by the head-of-office.
2. A presentation by a member of the Co-ordinating Committee on the background to and motivation for the introduction of lay assessors.
3. A presentation by a second member of the Co-ordinating Committee (or another visiting Chief Magistrate) on the roles and functions of lay assessors, their required qualifications, training and remuneration.

4. Comments by any other visiting magistrates.
5. Questions from the floor, and responses by the speakers.
6. Discussion of the establishment of a District Assessors Committee which would be responsible for selecting assessors.
7. The election or nomination of members of the District Assessors Committee.

Thereafter, the selection of assessors was in the hands of the District Assessors Committee, generally working closely with the head-of-office.

In many cases, the members of the District Assessors Committee were elected on a racial basis. Members of the Co-ordinating Committee often described the objective of the lay assessor system as correcting the inadequate representation of different racial groups in the courtroom. It was not surprising, therefore, that many District Assessors Committees were constituted along racial lines, with (for example, in the Northern Cape) three coloured members, three African members and three white members. The effect of this was generally to contribute to a middle-class bias in the committees. Because these committees were generally formed prior to the holding of democratic local government elections, no provision was made for local councillors to be included on them. Gender was sometimes a criterion used in constituting a District Assessors Committee. To the best of our knowledge, class was never taken into account.

In metropolitan areas the composition of the district committees sometimes became a problem, because the boundaries of the magisterial district did not correspond to the 'communities' from which either accused or victims came. In greater Cape Town, for example, many of the accused appearing in the Cape Town or Wynberg magistrates' courts do not live in the Cape Town or Wynberg magisterial districts. This raises questions about what constitutes the 'community'. The District Committee may represent the 'community' living within the magisterial district, but have no representatives from the accused's 'community', or even from the same racial group as the accused. There are no major African residential areas in the Wynberg magisterial district, for example, although many of the accused appearing in the magistrates' courts are African. In such cases, community leaders from outside the magisterial district had to be co-opted onto the district committee. This problem is far less important outside the metropolitan areas (but not entirely unknown, as farmworkers and other rural people are unlikely to be represented fully on committees).

The District Assessors Committee would then go about selecting assessors. In many small towns, the members of the committee selected themselves, and may indeed have understood this as the purpose of the initial launch meeting. In most areas, however, they advertised by word-of-mouth or by writing to organisations, and then interviewed applicants, putting together a roll of assessors. In one district in Mpumalanga, radio advertising was used.

How these assessors were allocated to court depended on which of the models outlined above was in use. In model 1B, assessors are allocated to each court according to a roster, generally drawn up by the District Assessors Committee. In Pretoria, assessors are allocated to each district court for one week at a time, and to the regional courts for three months at a time. It remains up to the individual magistrate to choose whether or not to use the assessor, but the choice of assessor is outside the magistrate's control. Assessors rotate between courts, sometimes with time off. In model 2, assessors are called into court, generally so as to ensure that there are always sufficient assessors available in court. The assessors are generally chosen by rotation, according to a roster, in principle. In practice, however, some assessors prove harder to get hold of, or less reliable in turning up, and over time they are called to court less and less often. The roster in this model may be kept by the Committee (perhaps delegated to the secretary or another committee member) or by an official at the court (such as the chief magistrate's secretary). In model 2 it is easier for magistrates to disregard the formal rotation system and invite specific assessors from the roster to sit in cases – in other words, they subvert model 2 by resorting individually to model 3. How much control magistrates enjoy depends on the relationships between the head-of-office, magistrates, the assessors committee and individual assessors. In model 3, magistrates have most power. They can easily pick and choose which assessor they want to invite into court. There are courts where magistrates defer to the District Assessors Committee to arrange an assessor. But the choice remains the magistrate's. A magistrate may choose even to select an assessor who is not on the list.

In practice, whether the selection of an assessor for a case is made by the individual magistrate concerned or whether it is outside his control depends on the informal as much as formal power of the magistrate. Magistrates are only likely to cede the power of selection to anyone else if three conditions exist: first, if the head-of-office exerts pressure on magistrates to use lay assessors; secondly, if assessors stand behind the Assessors Committee and insist that they are used according to a pre-arranged roster; and thirdly, if the con-

duct of assessors on the roster is such that magistrates are for the most part indifferent as to which assessor or assessors sit with them in court.

One might expect that there would be struggles within the 'community', or within the District Assessors Committee, over the allocation of assessors. We are aware of districts where certain assessors were alleged to have been favoured by the Committee's secretary in drawing up the roster. But, in general, District Committees have accepted that the assessors on their list be allocated by rotation according to a roster. Nor does there appear to have been much division within Committees over who should be appointed: Committee members seem to have almost all agreed on the basic qualifications required of assessors, and do not seem to have divided along racial or other lines.

This is not to say that Committees have been free from turmoil. In several districts in greater Cape Town which we have studied in some detail, the Assessors Committees have been plagued by bitter political divisions. Insofar as District Committees are representative of the 'community', so they may be beset by 'community politics'. In parts of metropolitan Cape Town, National Party-aligned 'community organisations' have lined up against African National Congress-aligned 'community organisations' in District Committees. The political divisions have not been along racial lines – black against white, or whatever – but largely confined to organisations based in coloured residential areas. Where implicitly partisan 'community organisations' are competing to represent the residents of an area, their conflict carries over into structures such as District Assessors Committees. Ironically, there is little evidence that these conflicts affect the operation of the lay assessor system in any way; they do not appear to affect even the selection or allocation of assessors. District Assessors Committees are a site of struggle not so much because of the powers that they have over lay assessors or the courts, but rather because of the symbolic value they have as institutions representing the 'community'. It is this that makes them a prize for partisan activists.

### Public knowledge of lay assessors

In the survey we conducted among members of the public – which we report on more fully in Chapter 6 – we asked whether people had seen lay assessors in court or otherwise knew of lay assessors prior to the survey. Our sample of members of the public was drawn from people who were present in and around court – in other words, people who we might expect to be much more likely than other members of the public to know about lay assessors (see fur-

ther Appendix A). Nonetheless, only a minority of the members of the public who we interviewed previously knew about lay assessors.

Knowledge of assessors varied little by race (see Table 3.1), but did vary by province (see Table 3.2): it was highest in the Western Cape and Mpumalanga, and lowest in Gauteng. (The Western Cape data is complicated by the high 'no answer' rate; it is possible that knowledge of assessors is higher than the 32 per cent recorded in Table 1.) Given that assessors are more widely used in the Western Cape and Mpumalanga than in Gauteng and the Northern Cape, it is not surprising that public knowledge is much higher.

**Table 3.1: Did you know about lay assessors before answering these questions? Responses by race.**

	White %	African %	Coloured %
Yes	27	20	29
No	59	74	54
No answer	14	6	17
Total	100	100	100

Source: Our survey, Q27. Note: Coloured includes Indian.

**Table 3.2: Did you know about lay assessors before answering these questions? Responses by province.**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %	4 Provinces %
Yes	32	18	10	35	24
No	45	75	89	58	63
No answer	23	7	1	6	13
Total	100	100	100	99	100

Source: Our survey, Q27. Note: some columns do not add to 100 per cent because of rounding off. The final column is the unweighted total for the four provinces included in our survey.

Earlier in the questionnaire we asked respondents if they had ever seen an assessor in court. Their responses are set out in Table 3.3 below.

**Table 3.3: Have you ever seen a lay assessor in court? Responses by province.**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %	4 Provinces %
Yes	52	14	21	30	37
No	43	82	50	59	51
Don't know	5	4	30	11	12
Total	100	100	101	100	100

Source: Our survey. Note: some columns do not add to 100 per cent because of rounding off. The final column is the unweighted total for the four provinces included in our survey.

Again, members of the public are much more likely to have seen assessors in court in the Western Cape and Mpumalanga.

Combining answers to the two questions considered above allows us to get a more complete picture of public knowledge and assessors. Table 3.4 shows that 17 per cent of our sample claimed to have *both* known about *and* seen lay assessors. Six per cent claimed to have known about, but not seen, assessors. Ten per cent were in the unlikely position of having seen but not known about assessors (this is not an impossible position, as respondents might not have realised that they were assessors until questioned about it by us – but this seems somewhat implausible). Forty per cent said they had neither known about nor seen assessors, and the remaining 27 per cent did not answer both questions, so we have no adequate data.

**Table 3.4: Prior knowledge of / having seen assessors**

		Seen lay assessors in court?		
		Yes %	No %	DK/No answer %
Knew about assessors beforehand?	Yes	17	6	1
	No	10	40	12
	DK/No answer	0	0	15

Note: these are percentages of our total sample. DK= Don't know

The most interesting groups in this table are the 17 per cent who replied yes/yes, the 6 per cent who said yes/no, and the 40 per cent who said no/no. The breakdown of respondents in each province and the courts for which we have large samples (i. e. a minimum of 30 people) are given in Table 3.5 below.

**Table 3.5: Knowledge/sight of assessors, by province**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %	4 Provinces %
Knew about and seen	26	7	8	17	17
Knew about, not seen	5	10	2	14	6
Not known, not seen	27	61	47	40	40
Other combinations	42	22	43	29	37
Total	100	100	100	100	100

In the Western Cape, almost everyone who knew about assessors had seen them in court. In Mpumalanga, most had. In the Northern Cape, however, most people who knew about assessors had never seen them in court.

Questions of the sort 'do you know about...?' may elicit exaggerated numbers of affirmative responses, because people often do not like to appear ignorant. We must therefore be cautious in interpreting the data above. But it does appear that there are many members of the public – even those who go to court for one or other reason – who do not know about assessors. To our knowledge the Department of Justice has never issued any publicity or educational material (posters, pamphlets, etc).

### Reported cases

Since the Co-ordinating Committee embarked on its programme to introduce lay assessors into all magistrates' courts, about a dozen cases dealing with the use of assessors have been reported. Virtually all of the decisions arose as a result of cases being sent to the High Courts on review, with just a few involving appeal proceedings. By and large the cases seem to be part of a perhaps inevitable process of clarifying the meaning of the provisions of the Magistrates' Courts Act which govern the use of lay assessors.

Many of the cases involved situations in which lay assessors failed to return to complete a partly-heard matter. In this series of decisions it was consistently held that, unless the assessor became unfit to continue and could be dismissed under section 147 of the Criminal Procedure Act (Act 51 of 1977), the assessor's presence was necessary for the proper conclusion of the trial. His or her absence would constitute a fatal irregularity resulting in any conviction and sentence being set aside (for example *S v Daniels* 1997 (2) SACR 531 (C); *S v Williams* 1997 (2) SACR 299 (EC); *S v Van der Merwe* 1997 (2) SACR 230 (T)). *Daniels* is the most interesting of these cases because, in responding to the review judge's questions, the magistrate asserted that the accused were

not prejudiced by the absence of the assessor: 'because there was only one assessor . . . the magistrate's finding on the facts would in any event have been the finding of the court' (*Daniels* 532i). Judge Farlam was unimpressed: 'This overlooks the fact that the assessor, if she had disagreed with the magistrate on the facts, might have been able to persuade the magistrate that her view was correct' (532j). Perhaps the magistrate's assertion was an attempt to justify an action after the event but it encapsulates the attitude of many magistrates to lay assessors: the magistrate can make decisions adequately on his or her own, assessors should play an advisory role at most, but anyway it is (almost) inconceivable that an assessor could ever raise something that would improve the magistrate's own decision. On this view, one assessor sitting with a magistrate could only be window-dressing.

Lay assessors fail to return to complete partly-heard trials relatively infrequently, but the issue is nonetheless serious because it means that the proceedings must be aborted. It is now to be dealt with directly in the Magistrates' Courts Act. The amendments to that Act proposed in Bill 33 of 1998 give the presiding magistrate a discretion to continue proceedings before the remaining members of the court.

In *S v Gumbushe* 1997 (1) SACR 638 (N) the Natal Provincial Division was confronted with a case which, to the judges concerned, was evidence of the lack of value of lay assessors. In this case Hurt J comments: 'Hopefully I am being unduly pessimistic in this regard, but I am compelled to say that the particular case with which this appeal is concerned gives me no encouragement [concerning the real assistance lay assessors might give courts] whatsoever' (643i)). The case involved an appeal from a regional court trial in which the accused had been convicted on two counts of murder. Following the requirement of section 93*ter* of the Magistrates' Courts Act, the magistrate had sat with two assessors. In convicting the accused, the assessors overruled the magistrate. The magistrate believed that the evidence before the court fell short of establishing the accused's guilt beyond reasonable doubt. The High Court agreed and set aside the conviction and sentence.

The judgment in *Gumbushe* is interesting not so much as an example of an appeal judge overturning a decision in which two assessors had overruled a magistrate but for the court's comments on the use of lay assessors under the Magistrates' Courts Act. Hurt J is at pains to distinguish between assessors used under section 145 of the Criminal Procedure Act and those used under section 93*ter* of the Magistrates' Courts Act. The former (expert assessors) he reminds us, who sit in the Supreme (and now High) Court, 'are invariably people who have previous substantial experience in criminal procedure and in

the science of the evaluation of evidence'. The presence of assessors used in terms of section 93*ter*, on the other hand, is to:

make the trial of the accused more of a 'trial by peers' and constitute some protection against the conduct and reactions of the witnesses and accused being judged by incorrect yardsticks not applicable to those of the environment and community to which those witnesses and the accused belong. In a limited sense then, the assessors were intended to give the magistrate the benefit of their expertise and experience of the community from which the accused comes and of its communal values and standards, which might often explain conduct or reactions which a stranger to that community might regard as doubtful or suspicious. (642j-3a)

But Hurt J is far from convinced that these assessors can assist the magistrate:

There is no selection criterion based on legal or procedural knowledge or experience or expertise. Although the experience of the community may be of considerable assistance in the enquiry pertaining to sentence of an accused person, it is by no means clear that, in the average situation, they will be able to give the presiding officer any real assistance in reaching a decision as to the guilt or innocence of an accused person. (643h)

The lack of legal expertise of lay assessors means, according to Judge Hurt, that the record of cases in which assessors participate in making the decision (as opposed to advising on sentence) will have to include a number of things that are not necessary in proceedings without lay assessors (and are not necessary when expert assessors are used under section 145 of the Criminal Procedure Act). It must include a record of the magistrate's 'tuition' (*sic* at 644c) of the assessors concerning particular rules of evidence (such as, in this case, rules relating to single witnesses). It will not be sufficient to state the rule: 'the presiding officer will have to inform his assessors of the reason why the rule is in place' (644c). The judgment must reflect clearly whether or not views on each part of the evidence are those of the full court; reasons for any dissent will have to be recorded; and, finally:

where an assessor has special knowledge of some custom of habit peculiar to the community from which the witness or the accused comes, which may affect his conclusion as to the facts, he should inform the court of this knowledge and the existence or otherwise of the custom

(and, of course, its effect on the assessment of evidence) can then be properly aired in evidence and form part of the record of the trial. (644i)

Hurt J acknowledges that this places a 'substantial additional burden' (645a) on magistrates but believes it to be unavoidable.

Overall, *Gumbushe* reflects the ambivalence (or even hostility) that the legal establishment feels towards assessors. The ability of lay people to distinguish fact from falsehood or to sift what is relevant from what is irrelevant without tuition in law is denied by the judgment. Its response is to require assessors to be taught to behave like lawyers. The likely effect of the judgment is to discourage magistrates from using lay assessors. But in one sense the judgment treats lay assessors very seriously. The reason that Hurt J demands that lay assessors be given 'tuition' and that the record contain a full explanation of the reasoning of the assessors can only be so that their views are properly considered when a case goes on review and so that the magistrate does not automatically have the upper hand. The question is whether this is an appropriate way to treat lay assessors. Our research shows that in most cases there is no disagreement among the members of the court (as we shall see further below). This is not unexpected. Although in some cases it may be a result of too-ready deference by assessors to the 'wisdom' of magistrates, in a well-working system one might expect discussion amongst assessors and the magistrate to lead to agreement. In those rare cases where assessors do not persuade the presiding magistrate and he or she does not persuade them, the overruled magistrate will send the case on review. Perhaps the views of the assessors will not be done full justice in the reasoning of the magistrate supplied to the reviewing judge but it is not clear that this will matter a great deal. Although the review judge may be deprived of a full sense of the assessors' reactions to witnesses, he or she will have the full record of the case. A review judge's decision to set aside the decision of the court and acquit the accused cannot lead to serious injustice.

Cameron J's treatment of the use of evidence by lay assessors in *S v Maslela* 1996 (2) SACR 453 (T) while still firmly in the cautious South African tradition, is much more robust. The magistrate had set the proceedings aside because inadmissible evidence had been introduced before an assessor. The 'inadmissible evidence' in question was an answer prompted by a leading question put by the prosecutor. In fact, although it may have been improperly put before the court the evidence was not prejudicial to the accused. Cameron J noted that there is well-established law suggesting that 'a trial which takes place before a Judge and assessors is not a fair trial when there is divulged to the assessors inadmissible evidence which is damaging to the accused' (*R v*

*Matsego* 1956 (3) SA 411 (A) at 417 quoted in *Maslela* at 499j). In directing the magistrate to resume the trial, Cameron J invoked the constitutional guarantee of a fair trial. The question, he said, is whether the accused has been tried in accordance with notions of basic fairness and justice. Here the evidence improperly elicited was in fact favourable to the accused – the magistrate's reaction had been 'exaggerated and inappropriate' (502d). It may seem surprising that this is the only case of its sort over the past few years. Although this case was not complex, it is clear that drawing the line between evidence legitimately heard by an assessor and other evidence will often be difficult. But as a general rule, cases like this will reach the High Court only when a decision is challenged on appeal. An appeal in a matter like this would depend on the presence of a lawyer at the trial and it is still a minority of district court cases that are defended.

A number of things are interesting about these reported cases concerning lay assessors over the past seven or so years. One is that there are so few of them. This may be interpreted as a sign that the system is relatively unproblematic, or, at least, that there are not many problems that cannot be sorted out in the trial court. Another is that they cover a limited number of issues. A few deal with the always-vexed issue of recusal (*S v K* 1997 (1) SACR 106 (C); *S v Kroon* 1997 (1) SA 525 (A)), and, as already mentioned, a number concern lay assessors who do not return to complete a trial, but very few consider the issues that might be the most complex in trials with lay assessors – rules of evidence and the distinction between law and fact. One possible reason for this as we suggest in commenting on *Maslela* is that such cases will reach the High Courts only if they were defended and are taken on appeal. Another possible reason is that problems are relatively rare.

Taken together – and despite Hurt J's pessimism in *Gumbushe* – these cases hardly suggest that the use of lay assessors gives rise to widespread injustices. What they do seem to reflect are not unexpected teething problems, moments of professional resistance, and the viability of a lay assessor programme.

### **The Magistrates' Courts Amendment Bill, 1998**

The Department of Justice held out the prospect of new legislation to govern the use of assessors from the end of 1995, through 1996 and into 1997. The 1996 Constitution specifically envisaged the extension of lay participation in the courts. Eventually, in January 1998, the Cabinet finally approved a Magistrates' Courts Amendment Bill.<sup>40</sup> Two months later the Bill was published as Bill 33 of 1998 (see Appendix D).

After a long wait, the Bill turned out to propose minimal changes only. On the crucial issue of magisterial discretion over the use of assessors, the Bill does propose that two assessors be compulsory in certain types of case. But, because these types of case are narrowly defined and magistrates are allowed to retain control over who they appoint as assessors, the Bill promises to protect magisterial power.

The Portfolio Committee on Justice in the National Assembly invited written and oral submissions on the Bill. It is appropriate in this chapter to draw attention to the opposition expressed in submissions to the very principle of lay participation in judicial decision-making. One version of this was contained in the submissions by members of the Law Society. The Law Society of the Cape of Good Hope expressed its opposition to any provision for lay assessors to outvote a magistrate. It proposed that assessors be required to have legal, paralegal or 'social science' qualifications, otherwise there is the danger of 'community views riding roughshod over well established legal principles'. Assessors' views might be 'frighteningly subjective' rather than 'objective'. Attorney E. M. Makgoba, of the Northern Region of the Law Society of the Transvaal, put it as bluntly. He submitted that:

Our standpoint is that it is dangerous to allow lay assessors who had [sic] absolutely no knowledge of the law to outvote magistrates trained in law. There is a danger that such lay assessors would ignore basic principles of punishment, such as the fact that punishment should fit the criminal. In a country such as ours where elements of tribalism, ethnicity and racism are still prevalent there is no doubt that the use of lay assessors would promote bias, prejudice and unfairness. Nepotism and corruption will not be ruled out.

Without passing law examinations, he contended, assessors were not competent to decide even on matters of fact.

A similar view was put forward by the South African Institute of Race Relations. The Institute was as emphatically negative about the value of lay participation:

Lay assessors are at best superfluous, and at worst a threat to the independence of magistrates. Magistrates have the theoretical knowledge, training and practical experience which places them in the best position to reach a decision on the basis of all the evidence which is presented in a trial. There is nothing a lay person can contribute in such a situation.<sup>41</sup>

The Institute pointed to a range of practical problems in the use of lay assessors, asserted that their use would lead to injustices, and argued that legislation making them compulsory in any cases and allowing magistrates to be outvoted entailed an infringement of the independence of the judiciary.

These submissions show that the hostility to lay participation recorded in Chapter 2 remains a powerful force, within and outside the legal profession. The *principled* positions taken by these critics of lay participation are hard to reconcile with the main currents of democratic theory (whether liberal or otherwise). The following chapters examine whether the experience of the lay assessor system *in practice* justifies this hostility.

## Conclusion

Lay assessors were introduced in 1992-93 with little fanfare and reintroduced after 1994 with much fanfare. By the time that new legislation was tabled, in 1998, the lay assessor system had faltered in the face of magisterial opposition. Indeed, the contents of the 1998 legislation suggest that there was also a marked loss of enthusiasm on the part of the Minister and Department of Justice. Having formerly trumpeted the prospect of compulsory assessors in all courts, as well as lay magistrates and 'community courts', the Minister and Department seem by 1998 to have retreated to a vision of discretionary lay assessors not dissimilar to the vision of the Department under the National Party government prior to 1994.

The shift in official thinking seems to have taken place in 1996. Lay assessors were barely mentioned in the Department of Justice's report on *The First 1000 Days (May 1994 - January 1997)*, barely figure in the Department's vision statement, *Justice 2000*, and are rarely mentioned in speeches by the Minister. Three major reasons stand out as possible explanations for this shift. First, opposition to the use of lay assessors rose dramatically among magistrates and judges. This opposition was clear in November 1995, at the Department's Legal Forum held in Durban; it continued through 1996 and 1997. Secondly, the Department of Justice was apparently alarmed at the fiscal implications of a compulsory, countrywide system of lay assessors - and the legal profession played on this fear astutely. It is possible even that pressure was exerted on the Department of Justice by the Department of State Expenditure. Thirdly, the Minister and Department of Justice defined new priorities. Initially, the introduction of lay assessors was driven by the perception that the courts lacked legitimacy and the assessment that this problem could be solved through the appointment of black people to the bench, albeit as lay assessors.

By 1996, however, it was becoming clear that the public was more concerned with the efficacy of action against crime than with the representativeness of the bench, and was more concerned with justice for the victims of crime than justice for the accused. One indication of this shift was that the Department of Justice introduced legislation which gave magistrates greater powers to lock people up without bail, without reforming in any way the decision-making structure of the bench.

Amidst its changing priorities, the Department of Justice never clarified what roles or objectives were attached to lay assessors. At different times the objective seemed to be: to change the racial composition of the bench so as to legitimate the courts; to monitor and check up on magistrates; to ensure that at least one member of the bench matched, in cultural terms, the accused; to harness 'community' knowledge; and so on. The lack of clarity as to what the system was supposed to achieve undermined its implementation.

Nor did the Department of Justice set in place any procedures for monitoring the use of lay assessors. Whilst data are supposedly sent from every magistrates' court to Pretoria, once a month, detailing the use of assessors, in practice nobody at the Department of Justice seems to collate this data. The Department of Justice perforce relies on impressionistic or anecdotal information to know how the system is proceeding – and much of this information is misleading. The use of lay assessors is much less widespread than senior officials seem to believe.

In the following two chapters we begin to document the experiences of and with lay assessors, as well as the attitudes towards the system on the part of both magistrates and assessors themselves.

## Chapter 4

### The views of magistrates on lay assessors

The appointment of assessors affects, most directly of all, the professional (i. e. legally trained) magistrates who hitherto have enjoyed a monopoly of judicial decision-making power in the lower courts. It is not surprising that most magistrates have been less than enthusiastic about the introduction of lay assessors. Few have used the discretionary provisions of the 1991 legislation to appoint assessors to sit with them in court. But the widespread ambivalence or even opposition of magistrates to the use of lay assessors does not stem solely from a reluctance to cede any power. Even those magistrates who believe that the system of lay assessors is a good idea express reservations about the way in which the system works in practice. These reservations cover both logistical issues – i. e. the practicalities of running a court, especially given the heavy caseload in many areas – and the way in which lay assessors reach decisions in court – i. e. the justice of the outcome. As we shall discuss further in Chapter 7, many of the criticisms raised by magistrates require attention if the lay assessor system is to operate in a just and effective manner. But these problems are not insoluble; many of the solutions have been identified already by magistrates who, faced with these problems, have not thrown up their hands in horror but have instead sought ways of addressing them so as to make the system of lay assessors work.

The dearth of material on South Africa's lower courts makes it very difficult to assess how those lower courts operated *prior* to 1991, or even 1994-95. The present research project has therefore been unable to build on existing research so as to provide a detailed assessment of how the introduction of lay assessors has *changed* the administration of justice. What we have been able to do is provide a critical account of the claimed perceptions – and claimed experiences – of participants in these changes, i. e. magistrates and lay assessors. In this chapter, we focus on the perceptions and experiences of magistrates.

## Profile of magistrates interviewed

Our research among magistrates was conducted through the use of structured questionnaires, semi-structured in-depth interviews and wide-ranging, more informal discussions. Questionnaires were completed by about 50 magistrates, three-quarters of whom were white and one-fifth African, with the remainder coloured or Indian. About 60 per cent were men, and 40 per cent women. Although the racial composition of this sample is not dissimilar to that of magistrates in South Africa as a whole (see chapter 2) and our sample is drawn from many parts of the country, it cannot be considered a representative sample. Given both the non-random selection and the small size of our sample, our findings from our questionnaire-based survey should not be interpreted as representative of magistrates as a whole. Our methodology is discussed further in Appendix A.

In-depth interviews were conducted with about 60 magistrates. In Mpumalanga and Northern Province we interviewed about thirty magistrates (including twenty-two white and eight black magistrates, all of the latter from former bantustan districts). In each of the Northern Cape, Western Cape and Gauteng we interviewed about ten magistrates. In total, we collected some information from about three per cent of the country's lower court magistrates. Almost all were criminal court magistrates; a small minority were at the time of the interview civil court magistrates. Two of our interviewees had only worked in the regional courts, a handful had worked in both regional and district courts, and the overwhelming majority had only worked in the district courts. In general, the following description and analysis refers to district criminal courts (and not civil or regional courts).

It is perhaps necessary for us to point out who we have *not* spoken to or interviewed. For the most part, magistrates opposed to the lay assessor system have been reluctant to speak to us. In addition, when approaching the head-of-office in a district to arrange interviews we were usually directed to magistrates who have used lay assessors. The resulting focus on magistrates who are not totally unsympathetic to the system has had benefits as it allowed us to explore problems of implementation in a constructive way. However, it also means that, although we have interviewed some magistrates who are opposed to the system, the number of these interviews is not in proportion to the large number of magistrates with these views in the country as a whole. Secondly, we have not interviewed any magistrates from two areas where the administration of justice has particular problems – KwaZulu-Natal, where political conflict has continued past 1994, and the former Transkei, where the administration of justice is reported to be in a parlous condition.

## Familiarity with and use of assessors

Given the limitations of our sample, we cannot use our survey to quantify meaningfully the extent of familiarity with and use of assessors in district courts. The 'results' indicate how unrepresentative our sample was: a full 40 per cent of the criminal court magistrates interviewed claim to use assessors always, with a further 26 per cent using them often, 16 per cent sometimes or rarely, and only 19 per cent never. As we saw in Chapter 3, the actual use of lay assessors is nowhere near this high. Our sample of magistrates comprises, disproportionately, assessors who have some experience of the lay assessor system. This is, of course, useful in considering what these experiences have been (as we shall see below), but not for quantifying how widespread such experiences have been among district court magistrates at large.

### *Knowledge about assessors*

Magistrates' knowledge of assessors comes primarily from their own experiences. Magistrates have not had access to much documentation on assessors. Many – perhaps most – magistrates seem to be aware that Justice College produced a document on the use of assessors. One magistrate told us that Justice College had also provided lectures on assessors in their courses for criminal court magistrates. Some magistrates had read the Act. Magistrates have therefore relied primarily on verbal briefings from chief magistrates or their head-of-office. Magistrates were not aware of any written communication from the Department of Justice (at least, not since 1992). Magistrates in some areas had been given very short documents written by the chief magistrate, setting out guidelines for assessors. Some magistrates had received the draft Act circulated in late 1995 by the Co-ordinating Committee. At least one magistrate referred to a document issued by the Magistrates' Commission concerning the use of lay assessors. Even if magistrates had received all of the above written and verbal communications, however, they would have only a hazy idea of how the assessor system is supposed to work in practice, and none of how it actually does work anywhere else.

It is our impression that most magistrates know little about the use of assessors by other magistrates, even in the same district. They do not attend each other's courts, of course, and their discussions in the tea-room are likely to be limited to horror anecdotes. Nor, it seems, do magistrates have access to the collated statistics on the use of assessors in their district, yet alone other districts.

### Use of assessors

The Magistrates' Courts Act makes it quite clear that the use of assessors is entirely at the discretion of the magistrate (except in murder cases in the regional courts, for which the Criminal Procedure Act requires that assessors are used). This is also emphasised strongly in the Justice College document on lay assessors. At the same time, however, magistrates are under a certain amount of pressure to use assessors. When the pressure comes from the Department of Justice alone, it has little force. But when the chief magistrate or head-of-office applies pressure, it is harder to resist. The result, as we saw in Chapter 3, is that the use of lay assessors is very uneven across the country.

There is also little clarity on what kinds of cases are appropriate for the appointment of assessors. In general, assessors are not used in a range of minor offences – including, especially, traffic offences (which means that assessors are not used at all in those courts in the larger magisterial districts which specialise as traffic courts). Assessors are used in most other cases – including theft, shoplifting and housebreaking, assault, and so on.

Magistrates say that they ask the accused if he or she has any objection to the participation of lay assessors on the bench. It seems rare for the accused themselves to object (although we were told by one magistrate that he had heard that the chairman of his assessors' committee had appeared in a neighbouring court and objected to being tried by assessors!). It seems to be relatively common for attorneys to object – but as large numbers of accused people still appear in court undefended, objections are not common. (We have been told that objections are more common in the regional courts.) Magistrates say that they often over-rule objections. According to one magistrate in Cape Town, 'they have got to give me a good reason'; if the reason given is simply that they feel 'uncomfortable' with lay assessors, then he overrules the objection. Only if the attorney provides a 'good reason' – such as that the assessor is the neighbour of the accused – will the magistrate heed the objection, and even then he says he gets a different assessor from another court. Magistrates often tell us that attorneys see the presence of assessors as raising the likelihood of conviction. Some magistrates say that now they only ask the accused if they object if the accused has an attorney, because they are the only ones who object. Defended white accused are considered to be the most likely people to object. It is unclear how many magistrates distinguish between objections to specific lay assessors and objections to lay assessors generally.

There is great variation in which stages of the proceedings in court the assessors are used. In the questionnaire we asked magistrates in which stages

they used assessors. Table 4.1 presents the answers we collected, as a percentage of the magistrates who said they used assessors at all.

Table 4.1: Use of assessors in different stages of court proceedings

Stage in which used:	by magistrates who use lay assessors			
	Always %	Often %	Rarely %	Total %
Remands and pleas	29	18	0	20
Bail hearings	18	9	0	11
Trials	100	100	100	100
Trials-within-trials	12	18	0	11
Sentencing	65	73	43	63
Section 174 applications	29	55	29	37
Other	12	9	0	9

Note: The total column comprises all magistrates who said they used assessors always, often or rarely, i. e. it excludes magistrates who never used assessors.

Some of these responses surprise us. The use of assessors in bail hearings is surprisingly low. The Justice College document on lay assessors argues against their use in bail hearings – the document refers to the provision which states that assessors may assist the magistrate in any *trial*. Since a bail application is not part of the trial, assessors should not be used (Mitchley, 1992: 17). Bail hearings are, however, a matter of great concern to the public – as became very clear during 1996. Indeed, the Criminal Procedure Act was amended in 1997 so as to empower magistrates to take into account views in the community (section 60 (8A) (c) and (d)) – clearly in response to the public outcry over offences committed by people out on bail. Yet very few magistrates – even magistrates who are clearly sympathetic to the assessor system – use assessors in bail hearings. Taking the views of the 'community' into account does not extend as far as sharing decision-making with lay assessors from the 'community'.

There may be a practical reason for the low use of assessors in bail hearings. Bail hearings are usually short. Unless magistrates have assessors sitting on the bench permanently (i. e. in model 1, as set out in Chapter 3), they may not consider it worth the delay to call an assessor (except in unusual cases, perhaps). In courts where assessors are called in to attend only previously earmarked cases (i. e. model 3), assessors would clearly not be used for bail hearings. (Notwithstanding these practical difficulties, the 1998 Magistrates' Courts Amendment Bill makes it easier for magistrates to use assessors in bail hearings by substituting the word 'proceedings' for the word 'trial'.)

Surprisingly, a number of magistrates claim to use assessors in trials-within-trials as in bail hearings. Trials-within-trials concern matters of law. The Magistrates' Courts Act clearly stipulates that 'any matter of law . . . shall be decided by the presiding judicial officer [i. e. magistrate] and no assessor shall have a voice in any such decision'. Justice College pronounced that magistrates should sit alone on matters of law in order to avoid 'irregularities' (Mitchley, 1992: 17). It may be that magistrates who allow the assessor(s) to remain on the bench during a trial-within-trial considered themselves to be 'using' the assessor. We did not explore this issue in interviews.

Our questionnaire revealed a high use of assessors in sentencing. The legislation is somewhat unclear on the involvement of assessors in sentencing. The Magistrates' Courts Act (as amended in 1991) stipulates that magistrates may appoint assessors 'in considering a community-based punishment', which is defined as correctional supervision or community service. The Act also states that assessors should have no role when a community-based sentence is not contemplated (section 93*ter* (3) (f)). According to the Act, the determination of sentence is a matter of law and is thus the preserve of the magistrate. The 1991 legislation, by providing for the appointment of assessors in consideration of community-based sentences, creates what Justice College describes as 'an exception to the general rule that the question of sentence is to be determined by the presiding officer [i. e. magistrate] alone' (Mitchley, 1992: 18). This does not preclude assessors' involvement in situations where community-based sentences are not chosen, as long as such sentences were 'considered'. This clearly leaves some ambiguity as to the role of assessors in these situations. In the opinion of Justice College, if the court (comprising magistrate and assessors) decides not to impose a community-based sentence then the assessors should have 'no say in the consideration of ... an alternative sentence'. But – and this is a very big 'but' – the magistrate 'may nevertheless consult' the assessors, 'as long as it is realised that the final decision is that of the presiding officer' (*ibid.*: 19).

Many magistrates were wary of discussing with us the involvement of assessors in sentencing, apparently out of concern that they were acting beyond the scope of existing legislation. Some magistrates say that they were told by more senior magistrates not to use assessors at all except in imposing community-based sentences. Nonetheless, many magistrates say that they 'consult' assessors regularly. In Cape Town, for example, one magistrate told us that although sentencing is not 'strictly' part of an assessor's role, in practice magistrates tend to consult with the assessors. Another magistrate told us that he would ask the assessors what they thought even if it was clear that a

community-based sentence was inappropriate; the decision on sentencing would be the magistrate's alone, but he would be influenced by the assessors' views. A magistrate in Mpumalanga told us that he consulted the assessors over whether to impose a community service sentence – but that the assessors were rarely enthusiastic, saying that 'we don't need them [the convicted criminals] in the community'. Otherwise, this magistrate said, sentencing was his responsibility, for which he alone had to answer to judges if necessary. As Table 4.1 shows, almost two-thirds of the magistrates who use assessors at all say that they use them in sentencing. We did not ask magistrates to distinguish whether this meant only community-based sentencing or sentencing in general, but our impression is that many magistrates use assessors routinely in sentencing. The 1998 Magistrates' Courts Amendment Bill would clarify the position of assessors with regard to sentencing. The proposed amendments specify that, in determining sentence, assessors assist the magistrate 'in an advisory capacity only' (Magistrates' Courts Amendment Bill, clause 2(c)).

Table 4.1 also indicates that assessors are used in 'Section 174 applications'. Section 174 of the Criminal Procedure Act provides for applications to be made for the discharge of the accused at the end of the state's case, on the grounds that 'the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge'. Justice College confidently pronounces that this is a matter of law, and so 'the decision is that of the presiding officer' alone (Mitchley, 1992: 16). A series of South African cases have confirmed that this is a matter of law (see, for example, *S v Magxwalisa* 1984 (2) SA 314 (N)), and so it would be a matter in which, according to the Magistrates' Courts Act, 'no assessor shall have a voice' (section 93*ter* (3) (a)). Nevertheless, there is case law to the effect that the credibility of a witness may have some (albeit limited) relevance in making a decision under section 174 (*S v Mpetsha* 1983 (4) 9 262 (C)) – and this is a matter on which assessors may have something to contribute. Our impression is that assessors are generally used in an advisory role in consideration of section 174 applications. We witnessed a case where a magistrate consulted with the assessors before discharging the accused. The case concerned shoplifting; the prosecution's only witness was the store security officer, whose testimony seemed flawed when cross-examined. The magistrate's consultation with the assessors was really to ensure that they understood and did not dissent from the decision to discharge the accused.

In short, assessors are most widely used in trials, and seem to be used on an advisory basis in sentencing and, to a lesser extent, section 174 applications. Assessors are used but rarely in bail applications, remands or pleas.

The range of proceedings in which assessors are used – or, at least, are present – depends very much on the general use of assessors in that court. In Chapter 3 we identified four distinct models of use of assessors in the lower courts. In model 1, assessors sit in court for all or most of the time, are used routinely regardless of the nature of the case, and attend or participate in a wide range of proceedings. In many courts using this model, the magistrate does not bring the assessor(s) into court at the start of the day until after most of the more routine matters – including, often, bail hearings – have been dealt with. But once they have joined the bench, the assessors are involved in most proceedings. In models 2 and 3 it is likely that assessors will only be used in trials and, sometimes, for sentencing.

Some magistrates object to lay assessors, and refuse to use them at all; this we identified as model 4. As we shall see further below, the reasons for not using assessors at all are varied. They include a range of practical objections, the assertion that legal expertise is both necessary and sufficient for judicial officers ('I have a degree, why should I sit with an untrained assessor?') and – it is said – elements of racism (as one black magistrate told us: 'remember, we still have people [i. e. magistrates] here who would find it difficult to sit next to a black person').

Some magistrates who employ model 1 and have assessors in court all or most of the time have been criticised by other magistrates. In Wynberg (WCP), for example, one magistrate told us that she had been criticised strongly even though the assessors sitting with her had not actually been participating in all stages of proceedings. She reasoned that assessors gained experience and learnt about court proceedings even if their participation was not really necessary. In cases where she did use assessors, she used them from the beginning of the trial to its conclusion, including sentencing – for which some of her colleagues also criticised her.

#### ***Criteria for deciding whether assessors are required in a case***

Many magistrates exercise discretion as to the kinds of case where an assessor is appropriate (i. e. using either model 2 or model 3 as set out in Chapter 3). The Magistrates' Courts Act provides little guidance on the exercise of this discretion. Magistrates are told to take into account:

- (i) the cultural and social environment from which the accused originates;
- (ii) the educational background of the accused;

- (iii) the nature and seriousness of the offence of which the accused stands accused or has been convicted;
- (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
- (v) any other matter or circumstance which he [sic] may deem to be indicative of the desirability of summoning an assessor or assessors. (Section 93ter (2) (a))

Justice College provides some supplementary guidance. Its briefing paper discusses, first, the background of the accused (i. e. (i) and (ii) above). Where the background of the accused is 'relevant to the adjudication of a fact in dispute', 'a subjective test must be applied in judging' this fact in dispute, and the background of the accused is 'foreign to the presiding officer', then 'it will probably be appropriate to appoint an assessor who is conversant with such background'. The briefing paper provides one example of this: In a case where the accused's belief in witchcraft is so relevant, then the appointment of an assessor with an understanding of witchcraft is (probably) appropriate (in fact, Justice College use the term 'expedient').<sup>42</sup> The paper immediately adds:

This does not mean that it will be appropriate to appoint assessors in all cases where the presiding officer's cultural and social background differs from that of the accused. Each case will have to be judged on merit. (Mitchley, 1992: 10)

If this leaves considerable ambiguity in how to exercise discretion with respect to the cultural and social background of the accused, it is even more unclear as to how the educational background of the accused might be relevant.

With regard to the seriousness of the offence and likely severity of the punishment (i. e. section 93ter (2) (a) (iii) and (iv)), Justice College advises simply that the appointment of assessors 'may be viewed as more expedient' if the crime is relatively serious or the probable punishment relatively severe. Finally, Justice College suggests that, in terms of paragraph (v), magistrates may bear in mind: 'the public interest in the case; the possible consequences the judgment may have on another member or members of the public; [and] the technical nature of the evidence to be adduced' (Mitchley, 1992: 10-11).

Section 93ter (2) (a) seems to accommodate and reflect two very different reasons for using assessors: one, to enhance the quality of justice through a more informed adjudication of the facts of particular cases, and the other, to

enhance the legitimacy of the courts and its decisions. The Justice College paper implies that the former is the most important. In considering the choice of an assessor, the paper assumes that the selection is up to the magistrate. It then suggests:

An ordinary member of the public may be appointed but only if such an appointment will be expedient for the administration of justice. The cultural and social background of such a person or his knowledge of the cultural and social background of the accused will be of utmost importance. If a person who is considered for appointment as assessor has no knowledge of the cultural or social background of the accused and has a totally different cultural or social background, it can hardly be said that he will be able to assist the presiding officer in any way. (Mitchley, 1992: 11-12, emphasis added)

The paper provides no guidance whatsoever as to what criteria should be used if the concern is the legitimacy of the courts, as may fall under section 93ter(2) (a) (v) especially. The perception that assessors are there to 'assist' the magistrate is also revealing.

In practice those magistrates who use assessors selectively apply fairly crude racial and sometimes gender criteria. Firstly, some white magistrates say that the use of assessors is only 'necessary' if a case has a 'racial dimension'. This does not appear to mean only those cases where the accused, on the one hand, and the victim of the crime and the magistrate, on the other, differed in racial terms – most obviously, in cases where the accused was black, the victim of the crime white, and the magistrate white. Rather, it seems to mean an undefined range of cases where the accused and the magistrate differed in racial terms. Given a white magistrate, therefore, it refers to cases with black accused, and justifies the need for a black assessor. In cases involving 'white-on-white crime' (as one magistrate put it), a (white) magistrate does not need a (black) assessor.

Within such a logic, the choice of assessor clearly has to be appropriate to the case. Magistrates say, for example, that you should not use a middle-class white assessor if the accused is a homeless coloured person. A similar argument was made in the parliamentary debate on the proposed legislation in 1991 by a Conservative Party member of parliament. He asked that the new legislation

not be used to promote and market the new South Africa. I think that the race of the accused will and must play a great role in the appointment of an assessor and that, where the accused is a White, a White should also

be appointed as an assessor as he must surely be able to decide better. (J. R. de Ville, CPM. P. for Standerton, *Hansard*, 10 June 1991, col 12 380)

A coloured M. P. agreed:

While it may sound racial, it is a practical issue in South Africa and under those circumstances I would strongly advocate that if the accused is White, White assessors be asked to preside at the trial. (P. A. S. Mopp, independent M. P. for Border in the House of Representatives, *Hansard*, 10 June 1991, col 12 389)

Most magistrates see the role of the assessor as helping the magistrate to understand the culture or background of the accused, and to legitimate court decisions in the eyes of the 'community' (which is often a euphemism for black people). Given that most white magistrates, like most white lay people in South Africa, understand culture and background in primarily racial terms, it is not surprising that race is the primary criterion for deciding who is an appropriate assessor as well as whether an assessor is needed at all.

Black magistrates are unlikely to exercise their discretion as to when to involve an assessor in quite the same way. As one black magistrate told us, his understanding of the 'community' was adequate; indeed, he considered himself to be part of the 'community'. He used assessors not to help understand the background of people appearing in court but to help to close the gap he perceived between the 'community' and the court. As we shall see below, some white magistrates also say that they have sufficient understanding of the 'community' – i. e. black people – and do not need the assistance of an assessor. They too are likely to view assessors in terms more of public perceptions that court decision-making.

Some magistrates select assessors on grounds of gender as well. One male magistrate told us that a woman assessor should be used in cases involving a woman – for example, indecent assault against a girl, or a vehicle accident with a woman driver. A Chief Magistrate told us that he tried to dissuade his magistrates – almost all of whom are men – from sitting with two male assessors, as this would not give confidence to any women appearing in court. Such gender sensitivity is, however, relatively rare.

The choice whether to select an assessor and then who to use is generally made in the light of the 'culture' and 'background' of the accused. Sometimes the complainant is taken into account, but the 'community' as a whole is rarely considered – whether as collective victims of crime, or simply in terms of society at large. The Justice College advice to bear in mind 'public interest in the case' or 'possible consequences' is rarely heeded. Such advice pre-

sumes a very different conception of the role of the assessor – one which is entirely in keeping with the apparent intentions of the legislators in 1991 (see chapters 2 and 3), but which is not widespread among magistrates. Curiously, the Magistrates' Commission resolved in 1996 to recommend that magistrates give 'serious consideration' to the use of lay assessors only in 'cases of great community involvement or community interest'.<sup>43</sup> This seems to point to a concern with the legitimacy of the courts rather than the quality of justice in specific cases. Not many magistrates exercise their discretion as to which cases warrant the appointment of assessors according to such public interest and legitimacy arguments. Most magistrates do not seem to think in terms of 'representing' society – i. e. the terms used by the deputy-minister who introduced the Magistrates' Courts Amendment Bill into Parliament in 1991 (see Chapter 2). But insofar as it is important to 'represent' society as a whole, magistrates seem to believe that they do so adequately already.

It must be emphasised that these comments by magistrates on what kind of assessor is (or assessors are) selected are not necessarily applicable in Model 1, i. e. when assessors are used more-or-less routinely, and not in all instances of Model 2. In most instances of Model 1 and some of Model 2 the role of assessors is seen by magistrates as representing the 'community' in a broader sense. Thus, when two assessors are used they are often selected to ensure racial and gender variation – for example, a white woman and an African man. This reflects a different, and (among magistrates) minority, conception of the role of assessors.

As long as the law allows magistrates to exercise their discretion as to when to use assessors but does not provide clear guidelines as to the criteria to apply, the selection of assessors will reflect the beliefs, assumptions and prejudices of individual magistrates. In South Africa, magistrates see society in racial terms primarily, and gendered terms much more rarely. The need to ensure that the court understands the facts of a particular case is almost always interpreted in narrowly racial terms, as is the need to ensure the legitimacy of the courts (when magistrates take this into account). But 'society' should not be seen nor 'represented' in racial and gendered terms alone. 'Society' is constituted in terms of many other factors, including class, age, religion, location, and education. These intersect and overlap such that it is very questionable that society can be 'represented' according to any specific categories, whether racial, gendered, or other. Given the explicitly racial emphasis of the legislators and government officials before and after 1994, it is unsurprising that more subtle conceptions of society have not been reflected in the patterns of magisterial discretion. In a post-apartheid South Africa, if magisterial dis-

cretion is to be retained, then at the very least the criteria by which such discretion should be exercised need to be thought through and spelt out altogether more thoroughly.

### *Procedures in court*

The first formal procedure followed in court is that the magistrate has to administer the assessor (or assessors) taking an oath. The Magistrates' Courts Act (as amended) stipulates that assessors must take an oath to the effect that they will give a true verdict or considered opinion according to the evidence or regarding punishment (section 93*ter* (3)). Whether this is required for every case, for every session, everyday, or just once, is unclear. The wording of the Act suggests that the oath should be readministered for each case but this interpretation is absurd. Oaths appear to be administered in different ways. In some courts, the senior magistrate may administer them in his or her office; in others, the presiding magistrate administers the oath in court. The fact that magistrates do not raise this issue in interviews suggests that it is not a controversial activity.

The most widely discussed procedures concerning assessors in court relate to the ways in which assessors can ask questions in trials (or, sometimes, in other stages of legal proceedings). Most magistrates insist that assessors ask questions through the magistrate, invoking legal expertise as their reason. In this they are following the advice given by Justice College:

In the interest of good order the practice in the Superior Courts is that the presiding judge alone communicate with the parties and questions witnesses if necessary. This practice should also be followed in the lower courts. Should an assessor wishes [sic] to question a party or a witness, or wants to clarify an uncertainty he should request the presiding officer [i. e. the magistrate] to do so. Apart from the fact that this procedure will ensure the orderly conduct of the proceedings it will also enable the presiding officer to effectively prevent [sic] inadmissible questions and inadmissible evidence. (Mitchley 1992: 15)

For example, one Western Cape magistrate described to us how she asks the assessor if he or she has any questions. The assessor tells her any questions, or passes them to her on a piece of paper. If the magistrate feels that the questions are inappropriate she points this out, and they discuss the questions. Most of the questions are relevant. She then puts the questions to the witness – without saying that the question came from the assessor, but in practice it is generally clear from the preceding consultation. Other magistrates tell the accused that

the question comes from the assessor. Another Western Cape magistrate, who generally uses two assessors, tells the witness that the question came from an assessor but does not indicate which assessor (although it is presumably often evident, since the question will be written on a piece of paper passed from the assessor to the magistrate). One Western Cape magistrate told us that assessors usually asked two or three questions in a trial, and that it was normal for one of these to be inadmissible; only rarely are the assessors' questions important.

Many magistrates, on the other hand, allow assessors to ask questions directly (even if, as one puts it, 'we are not supposed to'). Some point to problems that have arisen (but presumably without thinking these sufficiently serious to change their practice in court). Some of the questions are described as merely 'ignorant', but others are seen as unprocedural. One Mpumalanga magistrate claimed that one assessor had gone so far as to berate the accused, before any evidence had been led, saying that 'you know you are guilty, don't you?'. Whilst strongly disapproving, this magistrate suggested that prior 'training' about conduct and procedures in court would probably have helped. Other magistrates let assessors ask questions directly, and do not mention any problems arising from this. Assessors are sometimes said to tend to ask too many questions, to the point of virtually cross-examining witnesses. One magistrate told us that an attorney had complained.

The procedural problems that can, and surely do, arise can be viewed in two ways. The first is to see these as the consequences of a lack of experience and understanding of procedures on the part of the assessors – in which case the problems can be solved through better preparation. The second way is to see these as inherent in the lay assessor system. In this view, lay assessors are, by definition, untrained in comparison with magistrates, and full compliance with the correct procedures can only follow from the kind of training which magistrates have – and assessors do not. As one magistrate put it to us, it is not 'a natural human quality' to be 'objective'. In other words, the inherent expertise of magistrates is being invoked again. The Justice College document clearly reflects the second of these views.

Whatever the motivation, the effect of full and complete magisterial control over assessors' participation in court is to assert, emphatically, the privileged position of the magistrates over the assessors. It is unsurprising that lay assessors are said to complain of being 'throttled' by magistrates. And it is equally unsurprising that many members of the public interviewed in the precincts of courts where assessors are used nevertheless had not noticed them (as we saw in Chapter 3).

Magistrates follow broadly standardised procedures for consultation with assessors over the verdict. Sometimes they will consult whilst remaining in court – just switching off or covering the tape recorder. In major trials, they will generally adjourn the court, and discuss their verdict in the magistrate's chambers. When it comes to sentencing, the magistrate is much less likely to adjourn the court, or even to consult the assessor, as most magistrates see assessors' role in sentencing as advisory at most. One advantage of consulting with the assessors in court is that the public can see this, and will not regard the assessor as a mere puppet. When magistrates do consult with assessors, on either judgment or sentencing, they employ a variety of strategies (as we shall see further below) – sometimes asking the assessor's view first, sometimes giving their own view, and sometimes setting out the options before the assessor.

### **Practical problems with assessors**

Many of the reasons given by magistrates for their opposition or ambivalence about assessors concern practical problems with the system. At least five kinds of practical problem have been pointed out to us. Each of these problems deserves to be taken seriously and addressed.

#### ***Assessors are unreliable in terms of attendance***

Poor attendance by assessors is a serious problem in cases which are part-heard and postponed. If an assessor serves with a magistrate at the start of a trial, then he or she must be present throughout the case. Whilst we do not have statistics, our observations suggest that a significant proportion of trials are not completed in one day, sometimes because not all of the witnesses are available, sometimes because of inadequate management of the court's time. Whatever the reason for such postponements, magistrate after magistrate emphasised to us that assessors do not understand the importance of being there throughout a case. Assessors allegedly forget the dates when part-heard cases continue, they do not keep diaries, and so on.

One magistrate told us of a case in which, he said, an assessor had refused to attend a part-heard case. The magistrate proceeded without the assessor, but the judgment and sentence were set aside in the Supreme Court because of the procedural irregularity. This prompted another magistrate to ask whether assessors could be required to sign an undertaking not to absent themselves from part-heard cases; perhaps there could even be some system of sanctions, involving warnings followed by suspensions; 'we cannot have the court proceedings disrupted'. Magistrates agree that the problem of part-

heards underscores the need for a code of conduct and for clear disciplinary procedures.

We do not have any statistics on the extent of this problem – although there are a handful of reported cases dealing with it (including *S v Williams* 1997 (2) SACR 299 (EC), *S v Van der Merwe* 1997 (2) SACR 230 (T)). But it is also likely that magistrates exaggerate it and that in some districts the same instance was described by several different magistrates who we interviewed. Assessors themselves do concede that some assessors have proved unreliable – and in some cases the assessors themselves have taken action against the individuals concerned. Such problems are least common in courts where assessors are used often and regularly, and most common where assessors are used according to models 2 or 3 (as described in Chapter 3).

Attendance at part-heard cases is a problem at present because there is no provision for cases to continue in the absence of an assessor (as the reported cases make clear). The Magistrates' Courts Amendment Bill tabled in 1998 makes provision for cases to continue, thus solving the practical aspects of this problem. As importantly, the whole issue underscores the need also for training, a clear code of conduct, and effective disciplinary procedures for assessors. Some District Assessors Committees have already drafted such codes of conduct and taken disciplinary action against transgressors, but the Department of Justice should provide guidance on this. The Magistrates' Courts Amendment Bill provides for the Department of Justice to issue regulations regarding 'a code of conduct . . . , and mechanisms for the enforcement of such code of conduct' (clause 3, to be inserted as section 93 *quat* in the Magistrates' Courts Act).

### **Lack of physical space**

Some district courts do not have a bench that is physically large enough to accommodate anyone besides the magistrate. In many districts the volume of work has far outgrown the original court buildings, and magistrates operate out of very cramped buildings. In some districts, 'temporary' accommodation has been in use for years. In Barberton, for example, one of the district courts occupies a supposedly 'mobile' court designed to be transported on the back of a truck!

In such small court buildings, the assessor has to sit at floor level in front of the magistrate's elevated bench. This makes it difficult for the magistrate to consult with the assessor, and reduces the likelihood of the accused and public understanding the assessor's position and role. A further likely consequence of the magistrate's superior physical location is that the power

relationship between magistrate and assessor becomes more unequal, and is seen as being more unequal.

### **Trials take too long**

Magistrates complain that trials take too long when assessors are sitting. They say that they have to consult with the assessor, and explain what is going on. Every time that assessors bring in hearsay evidence or want to ask an inappropriate question then the magistrate must patiently interrupt proceedings – and even adjourn the court – so as to explain to the assessor. In all but the simplest cases, magistrates will generally adjourn the court to consult with the assessors on both verdict and sentence. Without an assessor, the magistrate might not do this. If assessors are not present in court routinely, then the court has to be adjourned to summonse an assessor and again at the end to recuse the assessor. Having assessors therefore results, magistrates say, in many more adjournments. Given the large number of cases to be heard, assessors are seen as an impractical luxury.

In courts which use assessors according to model 3, the use of assessors can slow courts down in a rather different way. In smaller magistrates' courts in the Northern Cape there are generally only a small number of cases on the roll and some are presumably heard immediately. One magistrate said that cases might be postponed 'unnecessarily' whilst an assessor is arranged, as it is difficult to predict when an assessor will be required.

Proceedings will generally take longer with lay assessors, particularly if they participate fully in decision-making. But the argument that trials become *too* long would be more compelling were it not for the apparent inefficiency that characterises many magistrates' courts. There is all too often inadequate coordination between prosecutors, police and prisons staff, and magistrates, such that courts spend too little time in operation and too much time merely postponing cases to a later date. There is a clear need for drastic improvements in the efficiency of the management of the criminal courts.

Recent figures produced by the Department of Justice on magistrates in the Western Cape support this concern about inefficiency. The Western Cape is almost certainly one of the more efficient provinces, yet it is reported that 'more than 18 000 courts hours a year were lost through mismanagement until recently'. Magistrates are supposed to spend 1 134 hours a year on judicial work – i. e. an average of about four hours per day. Some did more than this, but others were found to spend fewer than 400 hours yearly – i. e. much less than two hours per day (*Saturday Argus*, 6 Sep 1997, p. 7). The most recent figures produced by the Department of Justice record 1 387 district court magis-

trates spending a total of just over one million hours on 'judicial and quasi-judicial' work', i. e. an average of 743 hours each, whilst 194 regional court magistrates spent a total of just over 52 000 hours on the bench, i. e. an average of 270 hours each (Department of Justice, *Annual Report 1995/96*, pp. 12 and 159).

### **The cost**

Some magistrates argue against the general use of assessors on grounds of cost. Others say that the cost already precludes them using assessors as often as they would like. In one district we were told that magistrates could only use assessors from Monday to Thursday because of the budget constraint. The Association of Regional Magistrates of South Africa, in a memorandum (dated February 1996) on the proposed legislation for lay assessors, emphasised the cost of lay assessors. Besides the direct costs of remunerating assessors, there would be indirect costs as cases were postponed due to non-attendance at part-heard cases (p. 14). The Association suggests that any extra funding should be used to remunerate magistrates better, and to make the position of magistrate more attractive to good black candidates.

With the exception of the two cases mentioned above, the magistrates that we spoke to and who raised cost as a concern seem simply to have assumed that using lay assessors was expensive. We did not get the impression that they had made any attempt to find out what had been budgeted for lay assessors in their courts nor to use fully lay assessors within these constraints. More often costs were raised in the context of the general underfunding of courts; magistrates could not understand why money was being spent on assessors while facilities were poor for both staff and public. Often arguments about costs seemed to be a smokescreen for other objections. Expenditure on assessors was a waste because assessors were seen as, at best, a luxury, and at worst, detrimental to the administration of justice. When magistrates pointed explicitly to costs, implicitly they were often expressing a judgment on the value of assessors.

Assessors are not highly-paid. At first assessors were paid R250 per day. (This may have been the sum paid to expert assessors, which was simply duplicated for lay assessors.) In June 1995 the sum was reduced to R20 per hour, with a maximum of R100 per day. Assessors are paid only for the time they spend in court, and not for time spent waiting to be used. Even if two assessors sit with a magistrate, full-time every day of the year, then the cost of those two assessors together will still be a fraction of the salary paid to the magistrate. If an assessor was to spend 1 134 hours in court a year – i. e. the time that a mag-

istrate is supposed to spend on judicial activity – then the assessor would be paid a maximum of R23 000 (and most probably much less, since he or she would only be paid R100 even when they worked for more than five hours in a day). For 743 hours, which is what district court magistrates work on average a year (according to official figures), then the assessor would be paid a maximum of about R15 000 annually. These sums are very low compared to the magistrate's annual salary package of about R200 000.

The South African Institute of Race Relations, in its submission to the parliamentary Portfolio Committee on Justice on the Magistrates' Courts Amendment Bill in 1998, calculated what it would cost to have assessors in the cases for which the Bill proposed that assessors be compulsory. On the basis of an estimated total of 53 000 trials in these categories, and one and a half days per trial, the total costs would be about R16 million annually. (This total includes the cost of assessor in cases where they are already compulsory, i. e. murder cases in the regional courts.)

This seems to us to be a high estimate. Given that district and regional court magistrates worked a total of less than 1.1 million hours on judicial and 'quasi-judicial' business in 1995/96, if two assessors were to sit with each magistrate in *all* judicial and quasi-judicial business then the total cost would be a maximum of about R40 million a year (and most probably less, since assessors would only be paid R100 even if they worked more than five hours in any one day). Assessors are clearly not going to be used in remands and a range of other judicial or quasi-judicial business, so the actual cost of using assessors in every bail hearing, trial and sentencing would presumably be much lower than R40 million a year. Given that the 1998 Bill proposes the compulsory use of assessors in certain narrowly-defined categories of case only, it seems implausible the total cost would amount to R16 million annually.

In one court in Mpumalanga we were told that the system has high administrative costs. When assessors only worked for one or two days each month, but were paid each month, there was a high administrative cost in terms of the issuing of cheques. In order to reduce administrative costs, or so we were told, the magistrates told the assessors that they would have to serve for one month at a time. The magistrates liked this, but the assessors not (as we shall see in later chapters). It seems to us implausible that the administrative costs are significant, and that arguments about them are probably a disguise for other arguments.

### ***The dangers of intimidation***

Some magistrates suggest that assessors are vulnerable to intimidation, but not one magistrate provided an example from his or her own experience. The evidence of lay assessors reveals that intimidation (or fear thereof) can be a problem – but is one which magistrates are often insensitive to, and indeed contribute to unwittingly.

The dangers of intimidation are noted in the memorandum by the Association of Regional Magistrates (ARMSA). The Association reports that its members' 'main objection' to the compulsory use of lay people as assessors is that

the desired objectivity of community-based persons can, in given circumstances, become a pipedream because of the influences which they are sometimes subjected to by gangs, political enemies and even friends or relatives. Because they lack the training that judicial officers undergo, they are more susceptible, and more easily succumb, to outside influences. The result in given circumstances can reflect adversely on the interests of justice. ARMSA does not suggest that the danger of improper influences must operate to negate the concept of lay participation in the judicial process. What we do submit is that due heed should be given to the problem in an effort to minimise the risks involved.

It is curious that magistrates could not provide us with actual examples of injustice resulting from pressure.

Whilst we do not want to trivialise the dangers of intimidation, it seems to us that the citation of intimidation by many magistrates is part of a broader ideology of legal professionalism, which justifies professional magistrates' monopoly of decision-making authority in the courts on the basis of the claimed benefits of legal training and qualifications. As the ARMSA memorandum asserts explicitly, a lack of legal training renders lay people more susceptible and more likely to succumb to 'outside influences'. The idea that qualified magistrates are somehow immune to external influence, that they bring nothing to court with them but an ability to apply the law in a value-free, 'scientific' manner, is absurd. Indeed, it is questionable if one would want lay assessors to leave their values and perspectives at the door of the courtroom.

### ***Responses***

Magistrates respond to these supposed logistical problems in a variety of ways. One widespread response is to oppose the whole lay assessor system (although it is unclear whether such opposition is a response to or the prior cause of the practical objections). A second response is to exercise discretion

and to use assessors very rarely, whilst accepting the value of assessors in principle. In this second response, magisterial discretion is probably not being exercised with respect to the merits of each case.

A third response is for magistrates to take over the administration of the lay assessor system so as to minimise logistical problems such as irregular attendance. In many courts, magistrates have become centrally involved in the administration of assessors, deciding which people from the list of assessors to invite to court, and when. Assessors who are deemed unreliable can be sidelined. This may help to improve administrative efficiency, but at the cost of giving magistrates too much power over lay assessors. It seems to us to be imperative that magistrates are not directly involved in the administration of the assessor system. What is needed is an administration which is both efficient and independent of the magistrates.

The invocation by magistrates of logistical objections to the lay assessor system may give the impression of general hostility to lay participation. In the case of many magistrates, this is surely the case. But in the case of many of the magistrates we interviewed, the concern is indeed practical, and magistrates themselves have been at the forefront of attempts to come up with solutions to the problems.

### ***Evaluation of lay assessors***

Magistrates say that the primary value of assessors is to enhance the legitimacy of the courts through changing public perceptions of the courts. Inside of the court itself, magistrates see the role of assessors as assisting them to come to a correct verdict and sentence through adding a better understanding of the social and cultural background of the case. Magistrates therefore evaluate the conduct and contributions of assessors in court primarily in terms of whether the assessors are of assistance to them. Given that having assessors certainly means that trials (and other proceedings) take longer, and that any disagreement between an assessor and a magistrate is likely to be regarded by the latter as a hassle rather than an assistance, it is not surprising that most magistrates are unenthusiastic about assessors. It is only in small ways that most magistrates find assessors of assistance to them. These include correcting the translations done by court interpreters and occasionally providing clarificatory background information of which the magistrate was unaware hitherto.

### ***The quality of assessors***

Those magistrates who often use assessors generally have a good opinion of them. They describe the assessors as eager to learn and 'down-to-earth'. But many magistrates who use assessors express a low opinion of particular individuals, whilst approving of the quality of assessors in general. 'Some of them don't have a clue as to what is going on', said one magistrate. They complain of individuals falling asleep on the bench, not keeping proper notes, forgetting the 'facts' of the case, repeatedly failing to attend for part-heard cases, and so on. Some, they say, seem unable to understand basic legal procedures. Such individuals rarely pose an ongoing problem to magistrates, however, as magistrates readily find ways of not using them. In courts where assessors have to be called in (model 3), such assessors are simply never called. Where assessors wait in a waiting-room until needed (model 2), they wait endlessly, and generally lose interest and stop attending. Where assessors are used routinely (model 1), the magistrate may refuse to sit with that particular assessor, or will speak to the assessors' committee. One way or the other, the problem comes to the attention of the assessors' committee, which will either not allocate the assessor concerned, or will take formal action.

When lay assessors are indeed incompetent or unfit to act as lay assessors they should be recused but few magistrates seem to realise that this is possible. What is likely is that many of the individual lay assessors about whom magistrates complain are merely weak assessors but there would not be sufficient reason to call for their recusal. In any event, inadequate individual assessors pose little more than an irritation to magistrates. The exception is in model 3, especially where there is a large roster of assessors and each assessor is used rarely. It is then difficult for magistrates to form an impression of individual assessors. Faced with some – or many – inadequate assessors, magistrates may choose to do without assessors altogether rather than weed out the inadequate individuals.

Most magistrates have strong views on who should be selected as assessors, but their preferences are similar to the actual profile of assessors. Occasionally this is not true. Magistrates are in general very critical of the appointment of young, unemployed people (as in, for example, Witbank). They say that the use of people who are not respected in the 'community' could undermine rather than bolster confidence in the legal system. (This view is shared, however, by many assessors – as we shall see in Chapter 5.)

Occasionally, magistrates who have used assessors voice a general hostility to lay assessors. One asserted that 'lay assessors sometimes don't understand what the case is about, even when they are educated'. Lay people

should therefore not be involved in court, whether as assessors or as a jury. This argument often took on a racist hue, since 'lay' is used as synonymous with 'black'. This kind of argument is perhaps the visible tip of the iceberg of legal 'expertise', which we shall examine further below. But almost all magistrates who have used assessors extensively have little problem with the quality of the individuals selected.

### ***The value of assessors***

A typical assessment of the overall value of assessors is given in the following response, by a Wynberg magistrate, when we asked him why he thought assessors had been introduced:

Community participation was probably the overriding reason. Assessors don't improve the actual administration of justice. Their function is valuable for the community to see that it has got an input, so it's more of a perception thing. Their main role is to get the community involved, and to get the community to feel that they are involved. I'm trained with a hell of a lot of experience. They're not teaching me anything. But the accused might accept the court's decision better, . . . [and] maybe the complainant [will also] accept the fact. . . . [The system could mean] that people are more readily accepting the administration of justice, although [it] has not changed; magistrates are not acquitting or convicting more than previously. Assessors assist in [understanding the community better], to some extent – but if you've sat in a court for six years (like I have here) then you get to know the community. . . . I know the community in my area very well, even though I have not actually slept there, . . . you hear from the evidence in court what the community is like. . . . I haven't got a case in which I have not been able to understand the community from the evidence.

As this magistrate makes clear, the primary motivation for – and benefit of – the assessor system is to change public perceptions of the courts, i. e. to enhance their legitimacy. Justice is therefore better *seen to be done*. Few magistrates believe that the presence of assessors helps improve the quality of justice – i. e. that justice *is done*. None mention any broader democratic arguments for lay participation in the judicial system.

Magistrates say that the presence of assessors serves to reassure the community, to educate them about the law and the courts, and to protect magistrates against accusations of racism. According to one Western Cape magistrate, the purpose of assessors was:

to make the justice system more legitimate in the eyes of the public. And where we now have mainly a white judiciary, in this way other races are also represented in the decision-making process, which cannot be achieved quickly on another basis.

An Mpumalanga magistrate says that having (black) assessors means that 'there is another black face in court; . . . I think they feel there is someone up there from their community'.

Some magistrates see lay assessors promoting legitimacy not so much through changing the perceptions of those members of the public who are in court (i. e. the accused, witnesses, etc), but by helping the broader 'community' to understand the problems which courts face. In other words, lay assessors serve as a mechanism for communication, through which magistrates can communicate to the public the problems they face, the reasons for verdicts and sentencing, and so on.

On this view, the overall importance of assessors would depend on the extent and importance of the legitimacy crisis of the courts. In our questionnaire we asked magistrates whether they agreed or disagreed with the following statement: 'The community thinks that the courts are just'. Only 23 per cent of magistrates agreed (or agreed strongly) with this statement. More than twice as many – 50 per cent – disagreed (or disagreed strongly), with the remaining 27 per cent unsure. This certainly suggests that most magistrates agree that the courts do face a legitimacy crisis. But there are certainly many magistrates who believe that there are far more pressing problems facing the courts. Black magistrates, for example, are less likely to regard their courts as illegitimate on racial grounds, and are more likely to see the courts as suffering from a myriad of greater problems. Most African magistrates serve in formerly bantustan districts, where the court system is on the verge of breakdown.

Insofar as assessors are seen as being of any assistance in court, it is primarily through providing some understanding of 'cultures' with which the magistrate is not sufficiently familiar. Many white magistrates say, however, that they are familiar with the culture of black people in the area. White magistrates are reluctant to admit that they may not be familiar with the people they have jurisdiction over.

One exception to this concerns cases involving witchcraft (as Justice College noted). In rural areas it is not uncommon for evidence to be led about witchcraft, including in murder cases (heard in regional courts). Magistrates say that it is useful to have an assessor or assessors who are conversant with the culture of witchcraft in such areas. Similarly, some magistrates say that it is useful to have an assessor who understands popular attitudes towards assault.

Several white magistrates told us that in 'African culture' there is a different attitude towards assault than in 'white culture'. Provocation is said to count for more in cases of assault in 'African culture'. A white magistrate says he'll take provocation into account when sentencing, but African assessors will do so in terms of conviction.

But magistrates raise counter-arguments against the use of assessors even in these cases. One white magistrate argued that he had a better understanding of witchcraft cases than many of the assessors on the local roll – because he 'understood the people of the area' whilst the assessors were African, they lived in the local township and had no understanding of rural African culture. One of the cases that had come before him as a magistrate had been widely talked about. He says that he believed that the accused should be acquitted, but that the two black assessors wanted to convict. Another magistrate from the same district recalled, however, that the disagreement had been between the assessors who 'understood the culture' and the magistrate who was arguing on 'the merits of the case'. Whatever the disagreement was, these varied recollections of the case underscore the problematic nature of 'culture', with no clear way of determining who is and who is not the appropriate authority.

Even where there is a benefit in having an assessor who understands the culture or background of the accused, this can be outweighed by the problems of reconciling such cultural understanding with the law. In assault cases, for example, magistrates may argue that the law requires provocation to be taken into account in sentencing only, and not in the decision to convict or acquit.

The strongest assertion of the importance of assessors in understanding 'culture' was made, curiously, by a black magistrate. In a written submission, he wrote that there was a need for assessors from the same 'culture' as the accused (and perhaps of the witnesses also), with 'culture' being understood as specific to each of the 'ethnic groups' whose languages have some kind of official status. (It should be noted that this magistrate was a former court interpreter.) This magistrate provided an example:

For instance in the Northern Sotho culture a working adult male can start paying marriage goods for a girl of ten to twelve years old with the knowledge of the parents by providing clothes and paying for her schooling with a view to marrying the girl at a later stage. It is possible that such a man can have intercourse with the girl when she is fourteen years old. This is mostly done by people working in the Reef. This is statutory rape in law while in custom that is with consent of the parents.

In this view, a Northern Sotho assessor would be required in this case. Precisely what view would be put forward by an assessor who was conversant with these customs remains unclear. (A case of this sort also raises questions about the gendered nature of 'culture'. Would Northern Sotho women have the same perspective as Northern Sotho men?) As we mention above, however, another black magistrate argued that his understanding of the 'community' and its culture was adequate, and he did not need assessors to help him; he used assessors to close the gap that he perceived between the 'community' and the court.

South Africans' views about 'culture' all too easily lapse into racial or ethnic stereotyping. Stereotyping has been encouraged by the wording of section 93ter(2) (a) together with the comments of government ministers and officials both before and after 1994. Magistrates who use lay assessors according to model 3 are serving as arbiters of what constitutes the appropriate 'cultural and social background'; when lay assessors are used according to model 1, the District Assessors Committee assumes the role of arbiter over culture; magistrates and District Assessors Committees share this role under model 2. There are obvious pitfalls in allocating this role to any one person or institution.

It is perhaps unsurprising, therefore, that the magistrates who argued most strongly for using assessors did not do so on the basis of cultural arguments at all. Avoiding the treacherous waters of culture, these unusually positive magistrates said that assessors were useful because they served 'as a sounding board' or, as a black magistrate in Gauteng put it, to keep him on his toes:

I've been to [law] school and know law. But the lay assessor can keep you on your toes. At least you've got somebody who will remind you that a question should have been asked!

(This magistrate describes the role of the assessor as that of an 'assistant' to the magistrate.) Positive experiences such as this with good individual assessors led many magistrates to change their views on assessors as time passed.

I was hostile at the beginning. It was forced on us – and it was this that caused the hostility. But now I think that, if you have the right person, it's good. It's working well, with some of them. Some are excellent.

Another magistrate said that she had initially thought of the lay assessor system as mere 'political window-dressing', but had come to see that there were real advantages in having assessors.

### **Problems with assessors in court**

Regardless of their assessment of the overall value of lay assessors, most magistrates agreed that there are problems involved in using them in court. Typically, magistrates say that problems arise in court because of the assessors' lack of legal training and expertise. Many magistrates say that these problems can be easily resolved, through patient explanation. Others, however, point to these problems as evidence of the absurdity of lay participation in court.

Many magistrates see assessors as too emotional, basing their decisions on emotions not facts. According to one sceptic:

A lay assessor gets so emotional, especially if the lay assessor is a woman. As soon as a child or a woman is a victim, they believe them even without good reason to do so. For them, it is a very emotional thing. It is as if they have the view that the police will not arrest an innocent man as far as rape or child abuse is concerned.

According to another, white magistrate, black assessors often assume that an accused person is guilty simply because that person is standing trial; assessors, the magistrate says, do not understand that findings have to be based on facts introduced during the trial, and have little grasp about 'reasonable doubt'.

Magistrates portray themselves as the calm, collected administrators of justice, drawing on their legal expertise to ensure that justice is done. In their view, they are the defenders of the rights of the accused against a vindictive public concerned little with rights or justice. The overwhelming importance of legal expertise in the courtroom is a view shared by black magistrates also.

The legal expertise of magistrates and the lack of expertise among assessors is of particular relevance in four areas: general rules of evidence, identification, hearsay evidence, and the influence of knowledge not introduced into court as evidence.

Assessors' lack of legal expertise is said to lead them to attach too much importance to evidence that is either inadmissible or falls foul of legal rules of evidence. A common problem is for assessors to be overly-swayed by the evidence of a single witness, or a child (especially if a child is the only witness in a case of child abuse).

You cannot educate any lay assessor as far as cautionary rules are concerned. You cannot do so. They go on the face-value of the evidence, and they don't take cautionary rules into consideration. I've seen it many times. I've had to argue over this many times. Just because of the

mere fact that they don't know what the cautionary rules are about. . . . You have to be very careful with it, with these cautionary rules the lay assessor is very dangerous.

Assessors also are too cavalier in their attitude towards proof of identification. Assessors may say they believe that the accused is the perpetrator, but cannot give sufficient grounds for this identification – but magistrates, as they themselves emphasise, have to be able to justify their judgments, and so must comply with the requirements of the law. Consider the following example from a regional court in Mpumalanga:

In one case there were two counts of attempted murder. The accused, who was defended by an attorney, had allegedly shot two people point-blank in the face on a dark night. There was no proper identification. After cross-examination of the two complainants (one with brain damage), the state's case was, in my opinion, in tatters. The attorney applied for discharge in terms of section 174. I decided to test the two assessors. We adjourned and I put it to them, do you agreed that there is no way that the accused could be identified by the two complainants on this dark night. They said no, there is a strong case against the accused. I was shocked but went back to court and said I've discussed it with my lay assessors and I do not grant application for discharge. The man was eventually found guilty. I recorded the assessors' view, and then my view, concluding that the majority decision on the facts was that the accused was guilty. He was sentenced to ten years. The case has now gone on appeal.

Assessors are also said to be too willing to rely on hearsay evidence, regardless of its inadmissibility. According to magistrates, even if they rule that hearsay evidence is inadmissible, the assessor has already heard it and may not disregard it entirely; the magistrate then has to tell the assessor to disregard such evidence when reaching a finding, and cannot be sure that the assessor does so.

Assessors sometimes even introduce new 'evidence' when they and the magistrate are at the point of evaluating the evidence led in the trial so as to arrive at a judgment. Assessors are supposed to come 'from the community', but (in magistrates' eyes) only to advise the magistrate on issues of culture and background. Unsurprisingly, assessors often have some prior knowledge of the accused, witnesses or even the crime itself. One magistrate told us that assessors would whisper to her that that person is the one who did such-and-such.

Magistrates have the right to call additional witnesses if they deem it necessary, but use this right cautiously. The South African legal system is supposed to be an accusatorial one, not an inquisitorial one. If an assessor has specific knowledge that is relevant to a case but not so intimate as to warrant recusal, then the appropriate course of action would presumably be for the bench (whether magistrate or assessor) to call other witnesses to give evidence on these points.

'The biggest problem', says one Gauteng magistrate, is that assessors don't understand how the facts of a case relate to the crime. If there is a complicated charge sheet you must know what facts the state has to prove to prove the crime, i. e. you need to know what facts to look for. This is not a problem with cases such as shoplifting, but it is a problem with statutory offences, especially commercial branch cases in the regional court. Nor, magistrates say, do assessors understand the principles of sentencing. In one magistrate's words, assessors' suggested fines are a 'thumb-suck'.

Many of these problems, magistrates emphasise, are a matter of preparation or experience. As one magistrate says, assessors may bring in hearsay, but once the status of hearsay is explained, the problem is solved. But, magistrates also complain, there are no clear procedures or guidelines providing for the recusal of an assessor. One magistrate complained to us that assessors did not realise that they should recuse themselves if they knew the accused, or if they were somehow involved in political conflicts which were connected to the case. When questioned, however, he said he did not know of any cases where this had affected the outcome. (It could clearly affect perceptions of the justice of an outcome.)

Several of these problems point to the blurred boundaries between 'fact' and 'law' in the courtroom. According to one Western Cape magistrate, 'it is easy to distinguish matters of fact from others' for people who have 'got a university degree'! But if this ease of distinction cannot be communicated, there are likely to be many disagreements in court. The boundaries are often blurred – and magistrates themselves may struggle with the concepts. One magistrate gave us the following example. A person accused of shoplifting presents the defence that they 'forgot' to pay. This, the magistrate asserted (wrongly), is technically a question of law – whether her state of mind was reasonable or not. Whether the security officer saw the accused take the goods and leave without paying for them is a clear question of fact (although here one must beware relying on a single witness).

Several magistrates complained that assessors do not maintain their independence. For example, they talk to witnesses in the corridor during recess, or

they overhear or even solicit information whilst the court is adjourned. (It must be noted that many assessors do not have access to an office to use when court is in recess.) Independence is also, it seems, something that magistrates acquire only through professional legal training.

### **Disagreements**

Disagreements between magistrate and assessor(s) are remarkably rare. Some magistrates who use assessors regularly say they have never disagreed; others can give one or two examples. Most accounts of disagreements are second-hand: some other magistrate was overruled by assessors on, it is said, spurious grounds.

It seems that it is more common for magistrate and assessor(s) to disagree initially, but that most such initial disagreements are resolved through discussion. Such discussion can involve clarification, or intimidation by the magistrate. One Wynberg magistrate describes his experiences with assessors:

Yes, we do have differences of opinion. We discuss it, and I will ask why he feels like that. I may come round to their point of view or vice versa. Normally I let them give their views first, discuss it, then give my views, then decide which facts we are going to accept, and decide if the accused is guilty or not guilty. I have had an instance where I sat with two lay assessors and one disagreed. I won't push him. The other lay assessor and I will state our views. I'll put the other's views on record. I can recall one instance in which they overruled me and I gave their judgment. . . . I respected that. At least they did not succumb to my view which is a good thing. Disagreements are mostly over whether to believe or not believe certain facts, or impressions of witnesses. . . . [If I ask assessors] why they disagree, some have a problem in really justifying their criticism. But it is very seldom that lay assessors really disagree after discussion.

Some magistrates approve of the occasional disagreement, as it shows that the assessors are not unthinking puppets, but others see it as a discredit to one or other party. Disagreements can certainly be regarded as reflecting badly on the magistrate involved. According to one Chief Magistrate:

If it did happen [that there was a disagreement in the verdict], I'd think there was something wrong with that magistrate. He should be able to convince the lay assessor, and if he could not convince the lay assessor, he would not be able to convince the public! If a magistrate came and

told me that this was happening, I'd say remand the case for a week and think about it.

Although disagreements seem to be rare, magistrates suggest that there is a persistent pattern of assessors favouring conviction more often than magistrates. According to one white magistrate in Mpumalanga: 'Sometimes I feel they are out to get the accused, not to pursue justice'. He says that assessors assume the guilt of the accused. They 'represent the community more than the accused', and are willing to convict on inadequate evidence (in contrast to the magistrate: 'if I don't have enough proof, I'm not going to find him guilty'). Magistrates emphasise how they are constrained by the evidence led, and are often unable to support a conviction because the evidence led was circumstantial or inadmissible. Assessors are said to be less inhibited. As one magistrate puts it: 'Assessors are more likely to convict. Often assessors have the facts correct, but we have to point out that the case is not proved.'

In general – but not universally – assessors are also seen as harsher when it comes to sentencing convicted criminals. In Mpumalanga, magistrates stressed that assessors are harsher on assault:

Black people are fed up with assault. They really want strong sentences – go to jail for assault. They always say, send him to jail.

A Western Cape magistrate felt that assessors are easier on first offenders and with regard to statutory offences, but that there are no differences when it comes to repeated offenders. He expands:

I don't think that lay assessors have the skills to weigh up everything, i. e. personal circumstances, the community's interests and the seriousness of the offence. Sentencing is the tricky part of the job. One ought to be very careful and I would not like to see personal perceptions intrude. I do not want to be guided by personal perceptions, I deal with facts, the circumstances of the case. . . . Assessors' responses are more emotive, especially when it comes to sentencing. . . . Sometimes the assessor stays in the area where the problem happens, and therefore feels that the sentence should be more harsh.

Magistrates often say that assessors tend to favour harsher sentences, e. g. imprisonment rather than correctional supervision. Such differences may decline as assessors gain more experience. According to one magistrate in Nelspruit, assessors were at first very punitive in their sentencing for even petty offences such as shoplifting:

They see these cases going on and on, and say why don't we give them stiffer sentences, like twelve months for a first offender. . . . But after a while they become trained; you can't say that they thought like magistrates, but they began to think the same way.

One black magistrate in Gauteng dissented from the views that assessors were prone to be harsher in conviction and sentencing. Some assessors, he said, especially women, are softer on the accused: they have pity on them. Women assessors also generally opted for lighter sentences, except when the case was something like severe assault and the complainant was a woman – in which case the assessor prefers harsher sentences than the magistrate!

If a disagreement between magistrate and assessor cannot be resolved through discussion, magistrates can always invoke their legal expertise. As one sympathetic magistrate candidly remarked, she could always say something is a 'legal issue' to get out of a disagreement. Several magistrates told us that disagreements had been settled when they explained the law to the assessors.

Where a magistrate sits with one assessor, any formal disagreement results in the magistrate having the final say. Where a magistrate sits with two assessors, it is possible for the magistrate to be in the majority, outvoting one of the assessors, or in the minority, outvoted by both assessors. Each of these scenarios occurs, but rarely. When, in the latter scenario, the outcome is a conviction, the magistrate will almost certainly send the case for review to the High Court. We do not have any data on the number of such cases that go on review, nor on the outcome of the review. But anecdotal evidence suggests that the majority decision taken by two assessors against a dissenting magistrate has been upheld sometimes, and overturned on other occasions. The fact that such cases go on review goes a long way to ensure that there are fewer miscarriages of justice.

## Conclusion

Magistrates are, on the whole, opposed to the lay assessor system. Most magistrates believe that the only value of assessors is in enhancing the legitimacy of the courts through changing public perceptions. The quality of justice is not improved very much, although assessors can 'assist' magistrates by providing advice on the culture and background of the accused. As far as most magistrates are concerned, there is nothing wrong with the quality of justice which magistrates administer; it is just that the public does not recognise the high

quality of this justice. Almost all magistrates believe that magisterial authority must be upheld in order to maintain this high quality of justice, as only legally trained and qualified professionals are in a position to apply the law in a just and equitable manner. The role of assessors is thus to inform and, to a lesser extent, reassure the public of the high quality of magistrates' justice. This view characterises both the many magistrates who do not use lay assessors, and many of the much smaller number of magistrates who do choose to use them.

Magistrates' views on the lay assessor system are clearly reflected in their responses to the proposed 'legislation' on lay assessors, first distributed at the end of 1995, and to the Magistrates' Courts Amendment Bill which was finally tabled in 1998. Typically, magistrates belittled the 1995 proposals because they were not drafted professionally: 'The person who drafted the draft legislation cannot have ever sat in court', said one magistrate. The most important theme in magistrates' responses was strong and uniform opposition to the compulsory use of two lay assessors, i. e. the removal of the discretionary powers of appointment provided in the Magistrates' Courts Act, and the institutionalisation of potential outvoting of magistrates by assessors.

Magistrates' opposition has been based on at least three grounds. First, magistrates invoke their legal expertise. Assessors, it is said, are not 'qualified' to overrule magistrates, and injustices will result. Further, if the expert is outvoted, it will make a mockery of the court; popular confidence in the judiciary will be undermined. Some magistrates express their disquiet by referring to the likely responses of *other* magistrates; 'they' would resent compulsion; 'they' would say they had been magistrates for twenty years, and now they're being told they cannot do their jobs without assessors. Brain surgeons are not forced to work with lay people, so why should magistrates?

The second basis for opposing the compulsory use of two assessors is cost (as we have already seen). 'It's a waste of time to have a lay assessor in every case', we were told; 'in petty cases it is not necessary.' Thirdly, some magistrates claim that the newly-gained magisterial independence precludes interference.

Some magistrates concede that assessors play a useful role now, but that their participation should be seen as an interim arrangement. When sufficient trained black magistrates have been appointed, then the need for lay assessors will fall away.

Only a small proportion of magistrates enthuse about the lay assessor system, although this number includes many – perhaps most – of the magistrates who have used assessors extensively. These magistrates often describe the benefits of sharing the bench with experienced assessors in contrast to the

loneliness of making decisions on one's own; an assessor, or even assessors, bring fresh points of view to the bench, provide a sounding board for ideas, and can contribute knowledge of social conditions outside of most magistrates' own experience.

Even these magistrates, however, point to a range of practical problems that arise from the use of lay assessors in court: Assessors may be unreliable in attending court, especially in returning to court for part-heard cases; the bench is sometimes too small to accommodate assessors as well as the magistrate; trials may take too long, and the system is expensive; and, finally, assessors are vulnerable to intimidation, which is said to be prevalent in the 'community' (i. e. black areas). These problems are serious. But they are not insuperable. Those magistrates who use assessors extensively have often found ways of overcoming these practical problems. For example, the system for allocating assessors can be reorganised, and poorly performing assessors eased out of the system, so as to ensure reliable attendance. Poor attendance is all too often a symptom of the generally slack management that characterises many magistrates' courts. Above all, sharing the bench with experienced assessors serves to allay many of the fears that magistrates have.

One issue that magistrates cannot deal with easily is education and training. Most magistrates believe that assessors should have some form of 'training' (with most lay assessors themselves concurring with this). Some magistrates have provided some basic guidance themselves. Many, however, have left assessors to themselves, to learn about law and the courts 'on the job'. Overall, there is no clarity among magistrates as to what kind of training or education is appropriate. If training is to be provided, it should not be provided by magistrates themselves. Assessors should be trained independently of the magistrates they work with. Moreover, magistrates cannot be expected to be good trainers, and are almost all far too busy to dedicate time to it on a sufficiently regular basis.

The amendments to the Magistrates' Courts Act that are currently before Parliament are unlikely to allay magistrates' concerns and counter their opposition. The amendments propose to extend slightly the range of cases in which the use of two assessors is compulsory, but magistrates retain the discretion as to whether or not to use assessors in most cases. The amendments propose procedures to deal with the problem of assessors failing to return to complete part-heard cases. But the amendments do nothing in themselves to persuade magistrates that lay perspectives are integral or even beneficial to justice. Few magistrates who use assessors do so without some form of pressure from their

superiors. Without such pressure from above, magistrates are unlikely to use assessors extensively.

The strength and breadth of magisterial hostility to assessors puzzles us somewhat. This hostility seems to be based, in part, on a sense of being threatened, i. e. institutional insecurity. Yet magistrates' power in the courtroom is not merely the result of formal legal provisions. Our research suggests that magistrates can maintain their power in practice, even whilst sharing formal decision-making authority with assessors. As we shall see in the next chapter, which focuses on assessors, magistrates are collectively and individually the objects of deference and respect among assessors.

## The experiences and views of lay assessors

Lay assessors cannot be expected to have a clear sense of how their introduction has changed the courts – since they are unlikely to have had sufficient contact with courts prior to service as lay assessors. But they can be expected to have views on their own value in court, and a sense of how they differ from magistrates. This chapter examines these and related issues.

### A profile of lay assessors

What kind of people serve as lay assessors? The architects of the system intended that lay assessors be 'representative' of the general population in such a way as to promote the legitimacy of the judicial institutions as a whole. This is one reason why it is important to analyse the composition of the body of people serving as lay assessors.

We are unaware of any available data on the overall profile or composition of the current body of lay assessors. It is highly unlikely that any such data exists given the difficulties in even ascertaining the total number of lay assessors in South Africa. As we have already mentioned in Chapter 3, the Department of Justice has been unable to provide us with aggregate data on the numbers of lay assessors, although the required data from each magisterial district is supposedly submitted to the Department on a monthly basis. As far as we can tell, neither magistrates' court officers nor district assessor committees have been requested to furnish the Department of Justice with data on the profile of lay assessors in their district. One of our recommendations, therefore, is that the submission, collation and analysis of data on lay assessors be improved greatly (see Chapter 7 below).

As part of our survey, data was collected on a sample of 203 lay assessors. It must be emphasised that our sample cannot be assumed to be representative of the entire universe of existing lay assessors: without both a composite list of existing lay assessors and substantially greater resources, we were compelled to collect data on a fairly *ad hoc* basis (as described in Appendix A). But at the same time we are not aware of any major systematic biases in the selection of our sample. Our findings should thus be read as suggestive rather than con-

clusive. It is also important to recognise that our sample was drawn from towns in just four provinces. When we aggregate our data and present findings for our sample as a whole, we make no allowance for the other provinces, not do we reweight the data we have – not least because we are unsure as to how we would do so in the absence of a composite list of assessors.

The following tables refer to the four provinces where we conducted most of our research – i. e. the Western Cape, Northern Cape, Gauteng and Mpumalanga. '4 Provinces' gives the unweighted total of the four provinces.

### Demographic profile

Table 5.1 summarises our data on the profile of lay assessors, broken down by province, and an unweighted total of these four provinces.

Table 5.1: Profile of lay assessors

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %	4 Provinces %
Race:					
African	13	30	59	58	38
Col./ Indian	84	45	31	16	49
White	3	25	10	26	14
Sex:					
Female	33	33	43	56	40
Male	67	68	57	44	60
Age:					
Under 20	0	0	0	2	1
20-29	9	8	6	26	11
30-39	19	18	14	26	19
40-49	10	33	10	19	16
50-59	25	13	16	12	17
60-69	28	18	49	14	28
70 or over	9	13	6	2	7
Schooling:					
None	1	0	0	0	1
Std 5 or less	1	15	0	2	4
Std 6 - 9	23	30	24	27	25
Matric	29	23	29	42	30
Post-school dip	32	23	26	15	25
Post-school degree	13	10	22	15	15

n = 203. Note: some percentages do not add to 100 per cent due to rounding off.

Taking our data at face-value gives us the following picture of lay assessors in these four provinces. There are more coloured and Indian than African assessors, together with a significant minority of white assessors. There are more men than women, although the proportions are perhaps not as uneven as we might have expected. Most assessors are middle-aged or elderly: except in

Mpumalanga, three-quarters are 40 or more years in age; one-third are older than 60 years. A high proportion – varying between about one-third and about one-half, have post-matric qualifications (either a diploma or a degree).

There are striking differences between the profile of lay assessors in each province and the adult population as a whole, according to the most recent data available from the Central Statistical Services. Table 5.2 below provides the racial and gender breakdown of the entire population for each province, the age breakdown of the adult population for each province, and the schooling level breakdown of the adult population of the country as a whole (excluding the TBVC states).

Except in the Northern Cape, the proportion of coloured and Indian lay assessors is disproportionate to their share of the general population. Except in Mpumalanga, the proportion of male lay assessors is disproportionate to their share of the general population. The comparison by age is complicated by the different age cohorts used, but it is clear that lay assessors are, in general, considerably older than average among the adult population. In terms of schooling, lay assessors are much better educated than the population as a whole.

**Table 5.2: Composition of total population in four provinces**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %
<b>Race:</b> African	16	31	61	88
Coloured/Indian	59	53	6	1
White	25	17	32	11
<b>Sex:</b> Female	50	49	46	50
Male	50	51	53	51
<b>Age:</b> 20-34	47	44	46	50
35-44	21	22	24	21
45-59	19	21	20	18
60 or over	13	13	10	10
	SA total (excl TBVC states) %			
Schooling: none	17			
Std 5 or less	26			
Std 6 – 9	32			
Matric	13			
Post-school diploma	4			
Post-school degree	6			

Age and schooling data are for adults aged 20 years or more. Schooling data is for total South Africa excluding the TBVC states (Transkei, Bophuthatswana, Venda and Ciskei). Source: Central Statistical Services, Provincial Statistics 1994 parts 1, 3, 7, 8 and 10; 1991 Census vol 03-01-22 (1991).

### Occupational profile

The occupations of assessors correspond to their educational qualifications. It has not been easy to categorise all of the occupations given to us in the survey, but the general pattern is evident in Table 5.3 below. Assessors are certainly not representative of the general population. In occupational terms, half are unambiguously middle-class: in the professions (a total of 43 per cent, including teachers especially), business or senior management. A further third can be considered as skilled working-class or lower middle-class (craftsmen or artisans, supervisory staff, and office workers). Only eight per cent can be considered as blue-collar workers, and none of these were in manual or unskilled jobs. Another very under-represented group are 'housewives'.

**Table 5.3: Occupation of lay assessors**

	%
Teachers (incl school principals)	22
Police	5
Priests	3
Other professions (e. g. nurses, accountants)	13
Businessmen	2
Senior management	3
Craftsmen	4
Supervisors/junior management	9
Office-workers (clerks, sales staff)	21
Workers	8
Students	3
Other/unclassifiable	7
<b>Total</b>	<b>100</b>

Note: Unemployed and retired people were asked to indicate their previous occupation. n = 172 (15 per cent of the assessors interviewed did not indicate their present or former occupation).

### Organisational involvement

We asked assessors if they were active members of each of the following kinds of organisation: religious, sport, political party, community or civic, and 'other'. As we can see from Table 5.4, we found a high level of activity. Most assessors were active members of religious and community organisations. Only one-quarter said they were active members of political parties. Two out of every three assessors said they were office-bearers in one or more of these organisations.

**Table 5.4: Active membership of organisations**

	Category of organisation				
	Religious %	Sport %	Party %	Community %	Other %
Active members	68	16	26	57	12
Not active members	28	81	71	39	82
No answer	3	3	3	4	6
Total	101	100	100	100	100

Note: Some columns do not add to 100 per cent because of rounding off. n=203.

Only three per cent of the assessors in our sample said that they were not active members of any organisation. Thirty-four per cent said that they were active in just one of the categories of organisations listed above. Forty per cent said that they were active members of organisations in two of the above categories. Twenty per cent said that they were active in organisations in three or more of the above categories, with one assessor claiming to be active in organisations in all five categories. (The remaining three per cent did not answer these questions). This evidence suggests, in summary, that most assessors are involved actively in a variety of organisations in the 'community'. There were some differences between provinces. In the Northern Cape and Mpumalanga, under half of the assessors were active members of civic or community organisations. In the Western Cape and Gauteng, by contrast, most assessors were active in civic or community organisation. A higher proportion of assessors in the Western Cape were active members of political parties than was the case in the other provinces, although even the proportion was low even in the Western Cape (at just one in three assessors). These differences presumably reflect the contrasting recruitment systems in the different parts of the country. In the Western and Northern Cape, most assessors were nominated by or recruited through community-based organisations (including advice offices, civic or residents' associations, political parties, and so on). In Gauteng and Mpumalanga, many assessors were recruited through advertising or personal networks (see Chapter 3). This was reflected in inter-provincial variations in whether assessors say that, in serving as assessors, they are representative of an organisation. The proportion of assessors in our sample who say they do represent an organisation ranges from over one half (in the Western Cape), to almost one half (Northern Cape), just one third (in Gauteng) and one tenth (in Mpumalanga).

### *What kinds of people should serve as lay assessors?*

Unsurprisingly, active involvement in the 'community' is one of the criteria which assessors agree is necessary for their selection. The other two criteria over which there is broad agreement among assessors are 'maturity' and the ability to read and write. The latter is important, for one thing, because assessors must be able to take notes and follow proceedings. Whilst assessors tend to suggest that merit and maturity are more important than age and educational qualifications – 'you must have a fine ear and a clear mind', said one – in practice most assessors seem to believe that assessors should be older people and that a matric qualification is about the minimum education acceptable. One assessor insisted that not everyone can be an assessor:

Some people cannot read, spell or write. This means that the magistrate would have to lower himself or come down to that level so that the person can understand him and he in turn can understand that person. Assessors must have at least matric and then a diploma or something. But not a plain, normal person from the street.

Many assessors suggest that assessors should generally be professional people. 'A lay assessor must be a role model in all respects', said one – and educated professionals who are also community leaders seem to be held up as the ideal role model. Surprisingly, perhaps, few assessors mentioned that assessors should be religious.

In Nelspruit, where assessors are quasi-professional, they suggested that assessors should have some knowledge of criminal law and procedure, be able to communicate, and be 'independent' (whatever that means). Age is not important, but an assessor must be someone who the community accepts and respects outside of the court. Indeed, younger assessors may understand juvenile offenders better than older assessors. This description of the required qualifications for assessors conjures up an image of a respected quasi-magistrate – which seems to be very much how the Nelspruit assessors see themselves.

By and large, therefore, assessors believe that the right kind of people are currently serving as assessors. Certainly, many indicate that some of their colleagues are inappropriate: they are too young, or they are unable (or unwilling) to take notes. But, in general, these older, better educated, predominantly middle-class people seem satisfied that older, better educated, predominantly middle-class people are serving as assessors. Looked at another way, assessors seem to identify appropriate characteristics of assessors in very self-referential ways.

Some dissent is expressed at the predominance of teachers. In Cape Town especially, some assessors are emphatic that there are too many former teachers or school principals. 'Certain assessors regard themselves as semi-gods' on account of 'their training as principals, and degrees', accused one. Some ex-teachers claimed special expertise in juvenile courts; but, protested another angry assessor, ex-teachers' understanding of children was often inferior to ordinary parents, since 'parents deal with children in an uncontrolled environment whereas teachers and preachers deal with children in a controlled environment'. Such critics rarely advocated that non-professionals be employed, but rather that a wider range of professionals besides teachers should be appointed.

In some districts, the profile of the body of lay assessors differs markedly from the profile nationally. In Witbank, the assessors were distinctive in terms of their youth and the high incidence of unemployment. Not only were most of the assessors we surveyed currently unemployed, but most of these had never had a job. Furthermore, some of the assessors had difficulties in completing our questionnaires, even though these were available in the language of their choice. Whilst there might be some value in having some young assessors, having only or even mostly young assessors seems to lead to a series of problems: The public are not respectful of them, whilst most magistrates are reluctant to sit with them.

#### **When were assessors appointed?**

Finally, it is important to ascertain how long the assessors in our sample had been serving as assessors. Table 5.5 shows when they started working as assessors, broken down by province as an unweighted total for the four provinces.

**Table 5.5: When did assessors start work as assessors?**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %	4 Provinces %
Before 30 June 1994	12	3	20	0	8
July 1994 – Dec 1995	64	55	33	40	51
After 1 Jan 1996	19	18	37	51	30
Did not say	6	25	10	9	11
Total	101	101	100	100	100

Note: some columns do not add to 100 per cent because of rounding off.

A small minority began work prior to mid-1994 (almost all in regional courts). In the Western and Northern Cape, over half began work between mid-1994 and the end of 1995 – i. e. in the period when the lay assessor system was being set up in these areas (as we saw in Chapter 3). In Mpumalanga, most assessors had been appointed in 1996, which is what we would also have expected given our periodisation in Chapter 3. Our sample thus includes assessors with varied lengths of experience of this work.

#### **Preparation and training**

Lay people have been introduced into the lower courts as assessors without any formal preparation or training. In some districts, magistrates or other, outside institutions have provided limited guidance. For the most part, however, lay assessors have learnt on the job, through their own experience. Assessors broadly agree that this is unsatisfactory, but there is little agreement as to exactly what kind of training or guidance is appropriate.

In our survey, fewer than one in five assessors said they had received some training *at any time*, with an overwhelming three-quarters saying they had not. Of the small minority who said they had received training, most said that it had been the magistrates who provided it, with some indicating other sources (including universities and non-government organisations). In the Western Cape, one-third of the assessors said they had received some training; elsewhere, the proportions were much lower. There was no relationship between when assessors started work and whether they had received any training.

This picture was corroborated in our interviews with assessors. Many assessors told us of their initial confusion on being arriving in court. In Wynberg (WCp), for example, some assessors were so confused that they went to sit in the public gallery in order to familiarise themselves with what was going on. One described herself as very 'lost' at the beginning; 'you would introduce yourself (but) nobody would tell you what you are in for, what is expected'; eventually, it was arranged that she would sit in a court where another, experienced lay assessor was serving, and learn that way. Another remarked that 'assessors are presently being appointed and then left to fathom the workings of the system for themselves'. Such uncertainty undermines public perceptions of the courts: the fact that 'some assessors are not too sure about their role . . . filters down to the public', said a former assessor in Nelspruit. In Barberton:

I had no training. The first day I appeared in court I did not know that I needed a pen and paper. They just sort of told me when you come in you must bow. . . . Nobody explained the difference between fact and law, only at the end [did] they explain that this is 'beyond a reasonable doubt'.

Similarly, in Athlone:

We did not know in the beginning what was expected of us. . . . Because the courts were foreign to most of us as well as the rules and ethical behaviour in courts, most of us were very nervous the first time we were used as assessors. . . . We as assessors were thrown into the deep end without any formal training or prior briefing. . . . We had to organise our own workshops and had to get speakers at our own cost to lecture and inform us as to our function and duties at courts. Here I must add that one or two black magistrates did go out of their way to inform us as to what is really expected from us in court and how to assess matters.

Another assessor adds that only one of the magistrates was helpful and enthusiastic:

He took us through the whole process. It was totally nerve-wracking the first time because we did not know what we were doing. But he said all we had to do was to sit and listen very carefully. We would then adjourn and debate the issues very carefully, and he would explain to us what we could do within the parameters of the law. And he allowed us to participate right up until sentencing.

Most assessors have learnt through their own experiences ('self-training', as it was often described), combined with occasional advice from other sources (such as relatives who are lawyers). Two assessors in Mpumalanga – one African, one white – told us that most of their knowledge of the law came from watching the American television series, *L. A. Law*.

In only a handful of districts had magistrates organised formal assistance. Assessors in Cape Town praised the efforts of the Senior Magistrate, who (they say) spent an hour every Wednesday morning discussing with assessors issues concerning evidence, sentencing and so on. Another magistrate organised a much appreciated one-day workshop for assessors, explaining court procedures, the law, assessors' roles, and so on. Assessors who started in Cape Town and then moved to other courts (such as Wynberg) regretted that there was no such training elsewhere. In Nelspruit, one of the magistrates organised some informal guidance at the outset, and later more formal training on gender and

race consciousness. Few assessors mentioned the documents produced by Justice College, although those who did praised them.

Assessors concur that some kind of formal 'training' or assistance is needed – if only to promote self-confidence, without which assessors cannot participate fully in court. The most common suggestion is that there should be regular workshops or lectures, perhaps on one morning each month, on topics such as procedures in court, assessors' conduct, and sentencing options. Another appropriate topic for workshops is the Bill of Rights: 'As lay assessors we struggle to reconcile the notion that an accused has rights as well, with that gut feeling that the person is guilty.' There also needs to be better communication between magistrates and assessors in general, assessors said. In addition, visits to prison (for example) would be useful so that assessors can gain a better understanding of the entire justice system. (Some assessors had arranged a visit to Pollsmoor in Cape Town, which was said to be very instructive.) Some assessors say that the best training is getting experience through often sitting in court as assessors; if the use of assessors was not discretionary, they say, then they would gain much more experience. In this view, the solution to the 'training' problem is to make sure that assessors are used routinely.

Some assessors want to be 'trained' so that they can become 'professional' assessors. They should have the 'same legal training as that given to the magistrates and judges, so that lay assessors can also be able to sit in the regional and supreme courts'. In the extreme version of this view, being a lay assessor is the first stage in a professional career in the judiciary; it is not an end in itself, but rather a stepping stone on to becoming a professional prosecutor or magistrate. Assessors in several districts in Mpumalanga (including Nelspruit and Witbank) saw their work in these terms, and saw no conflict between their aspirations and the concept of a *lay assessor system*.

Many assessors, however, insist that any training should be limited. This view was based on a variety of reasons. Firstly, extensive training would offset their value as *lay assessors*. Assessors, it is said, should be more 'spontaneous', relying on their instincts. One assessor, from an African shack settlement, said that he did 'not favour training because assessors come from the community, and if legal training is provided, then they have to stick to the law, which defeats the purpose of the lay assessor scheme'. Legal training would mean that assessors were not lay people anymore. Training should be on procedures, therefore, rather than in the details of the law: 'We are not lawyers, we leave the determination of law to the magistrate.' Secondly, professional legal training might generate conflict. It might lead to assessors quarreling with magistrates on their application or interpretation of the law; assessors

need to know enough to serve as a check on magistrates, but not so much that it generates conflict. Or, 'if people go through training they might want better remuneration'. Thirdly, the extra training of the magistrate is appropriate given the desired division of responsibility: 'Because it is nice to know that after the case is decided the magistrate can take the blame should any problem arise.'

Sometimes, respect for education (i. e. 'training') combines with a respect for magisterial power: training will enable assessors to help magistrates more effectively. One African woman assessor in Mpumalanga told us:

I do feel that we should get training because it will help us to assess better the evidence of the accused and also to be able to judge the character of the accused. I also think that the training should include legal courses such as criminology that will help us to see when a person is lying. I don't think that the legal training will make lay assessors into magistrates, because a magistrate will remain thus and the function of the lay assessors will remain that of a person who is there to help the magistrate. I think that there is so much criminal activity happening at the moment [that] often a magistrate, because of his workload, becomes confused and he finds an innocent person guilty as a result. At least with lay assessors there they are able to keep him focused on the facts presented. . . . So I think that such legal courses are necessary for assessors not so that they can get diplomas or degrees but so that they are able to perform their job properly and professionally.

Assessors in Mpumalanga are more likely to be used according to Model 1, and as such are more likely to see their work in 'professional' terms rather than as some kind of community service.

## Experiences as lay assessors

### When used in court

In Chapters 3 and 4 we saw that there is a wide range in the use of lay assessors in district courts. In some courts they are used routinely; in others selectively, and in others hardly or even not at all. There are also different systems for organising assessors. In some districts there are a large number of assessors on a roster, and each is used rarely. In other districts, assessors are used intensively over short periods, but then not use again for some time. In others, there is a very short list of assessors, and each assessor serves often or even all of the time. This variety is reflected in the number of days in the last month that the

assessors in our sample actually served as assessors in court, as we can see in Table 5.6.

**Table 5.6: Number of days in last month when served as an assessor**

Number of days	Assessors %	Days for 1-5 category	
0	25		
1-5	40	1	10
		2	11
		3	9
		4	7
		5	3
6-10	18		
11-15	8		
16+	8		
Total	99		

*n* = 153 (respondents who did not answer this question have been excluded)  
The column total does not add to 100 per cent because of rounding off.

It needs to be remembered that our sample is a sample of assessors who are active in one or other way. Most of the assessors we surveyed were interviewed in court, i. e. a large part of our sample comprised assessors who were actually in the court buildings. Some of our sample comprised assessors who were asked to come in to be surveyed; it is likely that organisers who assisted us in this invited the more active assessors. It is therefore very likely that the above table massively overstates the use of assessors in the country as a whole: a very high proportion of assessors probably are being used very, very rarely, and we know there are many who have never been used since the date of their 'appointment'.

Even in our sample, one quarter had not served at all in the previous month, and a further 40 per cent had served for five or fewer days. Just over one quarter worked for between six and 15 days, with the remaining 8 per cent working full-time. The mean was about five days, and the median about two and a half days.

It is widely recognised that a major reason for the limited use of assessors in court is that some magistrates use their discretion not to sit with assessors. One reason for this that assessors volunteer is that magistrates are racially prejudiced and stuck in an apartheid mentality. According to one outspoken activist from Athlone:

A person that has seen how the court structures were used to enforce apartheid policies in the past can only find one reason why magistrates up until today refuse to make use of community assessors, and that is because of their apartheid mentality and nothing less.

Assessors in Wynberg agreed that some of the magistrates there refused to use assessors because they still had an apartheid mentality.

Magistrates' objections were not seen as only racial. As one assessor incisively noted, magistrates objected to the 'community perspective' which assessors brought: it was this perspective that magistrates 'regarded as the mark of the lay assessor's incapability [sic] to do the job'. This alleged objection, unless merely a disguised expression of racial hostility, reflects a defence of legal professionalism – i. e. the defence of the necessity for the administration of justice of legal training and professional qualifications.

A third, and common, reason given by assessors was that magistrates did not want to lose control. Magistrates are said to resent assessors for 'treading on their turf'.

In the old South Africa, they were pulling the strings and whatever decision they made, that was it. Now they have to consult with lay assessors, and sometimes lay assessors can overrule them.

And similarly:

These people here [i. e. the magistrates] are so used to having control over everything here and they cannot get used to the feeling that they are losing it now. I believe one of the magistrates told a lay assessor that 'you people are going to take over now'. That is uncalled for.

This alleged objection represents a defence of institutional power, i. e. the powers that individual magistrates have in the court system through their institutional position as magistrates.

In many districts, assessors report that magistrates' attitudes have changed over time (which some magistrates themselves told us, as we saw in Chapter 4). In Athlone, hostility gave way to suspicion and then even a degree of trust: even the more conservative white magistrates began to use assessors, and a 'partnership' (however uneasy) was said to have developed. Magistrates were initially hostile because:

they did not know what to expect and some might even have felt that lay assessors were going to undermine the justice system; but this all

changed when they started working with the assessors and began to realise that it can work if they are willing to make it work.

Sceptics might retort that magistrates have learnt that they can defend legal professionalism and their own institutional power at the same time as conceding assessors a role in court.

Magistrates are seen to vary greatly in their treatment of assessors in general. Some magistrates are said to be consistently rude to assessors: not greeting them, making them feel unwelcome, not even acknowledging them sometimes. Male magistrates are said to be worse than female magistrates.

### *Hearing evidence*

The trial is almost always the first stage in court proceedings in which assessors are used. Very rarely are assessors used in pleas or bail hearings. Only where assessors are used according to Model 1 are they used prior to trial, and not always then. None of the assessors interviewed in the Western Cape said that they had been involved prior to trial, even in those courts where Model 1B was used – generally because the bulk of pre-trial proceedings are heard at particular times of the day, especially first thing in the morning, and assessors are only brought into court later. Assessors are most likely to be involved prior to trial in courts using Model 1A, such as Nelspruit. The information given by assessors as to their use is consistent with the information given by magistrates (summarised in Chapter 4).

At the beginning of the trial, some – but certainly not all – magistrates tell the accused that the lay assessor is there to assist with the case, and ascertains that the accused do not object. In the Western Cape, nobody reported that the accused had ever objected.

One Cape Town assessor gave us the following account of what happens in court thereafter:

*Assessor:* What I normally do is I request the charge sheet, if the magistrate has it before him. I then jot down the case number in my diary. You might later have a part-heard [case] . . . , so I usually jot down the case number, then what the charge is for. . . . Then, once the trial begins, the prosecutor leading evidence and so on, you jot down things as it goes along.

*Q:* During the trial, do you find it is essential to take notes?

*Assessor:* It is essential, because what I normally do is make notes and then when I have spare time I review my notes, just to keep the case fresh in my mind. Especially when it comes to part-heards. If you hear a

case today and the part-heard in a month's time, you can refer and come back to more or less what was the gist of the case.

Q: During the case itself, how do you go about asking questions?

Assessor: If I'm not clear on an answer, and the magistrate requests if I need clarity on an issue, I will make a note, forward it to him, and the question will be asked via him to whoever it is directed to.

Q: [You cannot ask questions yourself?]

Assessor: I prefer to work via the magistrate, because he/she is the person in authority. He/she would then say to the accused or whoever it was directed to that 'the assessor needs some clarity on a point; this is his question....' I feel this keeps the decorum in place. I feel the magistrate is still the person who demands more respect....

Q: So you never interrupt proceedings?

Assessor: Not while it is in progress. I will only ask a question once they have done their questioning. The magistrate always asks the assessors if they have any questions so that they don't feel left out.

Many assessors share this emphasis on note-taking. Taking notes is required if you are to argue strongly with the magistrate in his or her chambers:

Maybe if the magistrate finds the person guilty, and I find him not guilty, then I must give him my view of the case; that's why it is important to write down whatever it is people are saying in court.

But some magistrates seem to discourage assessors taking extensive notes. One assessor was told by a magistrate that she must be his eyes in court whilst *he* was taking notes. In one case, of alleged robbery on a train, the assessor believed that this proved useful:

The witness testified that she could identify the accused because his hands which the accused could not keep still as they had been shaking continuously. I noticed . . . that the accused could not keep his hands still during the entire proceedings while the magistrate was writing. Therefore, when the court adjourned and during discussions with the magistrate, I pointed this factor out to him.

The accused was convicted; when his criminal record was produced, it showed that he had a long record for robbery on trains.

Assessors can and do ask questions of the accused and witnesses. In most courts, questions are asked through the magistrate; in some, assessors can ask questions directly. Most assessors seemed comfortable with the former system, or at least said that they 'do not have a problem with the procedure'.

Many assessors actually expressed support for indirect questioning in terms that reflected a degree of *deference* to the magistrates. Magistrates are said to have more expertise than assessors; they could ensure that questions were 'relevant', better phrased and procedural ('appropriate'); 'it is important to be guided by a person who has a legal background'. If assessors were to ask questions directly, 'you may make a fool of the bench', or perhaps ask a leading question. Magistrates have a 'court language' which assessors are not good at. Also, said one assessor who had learnt from her mistakes, 'sometimes you ask questions that have already been asked, then you feel embarrassed'. Some assessors emphasised the need to be *respectful* to magistrates, accepting their control of the courtroom: 'We respect the magistrate as our elder there [i. e. in the courtroom]; we can [overrule] him if his decision is incorrect, but this is done in chambers'. Others said that it was easier for them: 'It would most probably be nerve-wracking to have to ask [a question] directly'. One assessor in Goodwood sounded an ominous note: 'if a lay assessor asks questions directly to the accused, at the end of the day the assessor's life may be in jeopardy on the outside, because the assessor comes from the community'; asking questions via the magistrate gives assessors some protection.

Most magistrates are said to ask questions faithfully, or will explain why they did not do so. But there are said to be exceptions. One assessor emphasised that, if questions are relayed via the magistrate, the magistrate should not alter the meaning of the question – implying that this assessor had experienced such an alteration. More often, but still rarely, assessors said that some magistrates did not ask their questions, and did not explain why.

Asking questions via the magistrate does have one unfortunate effect:

I participate in trial with a piece of paper and a pen, and am not allowed to speak, but am allowed to discuss the case with the magistrate in his chambers. During the trial the accused does not hear the sound of his community's representative. The victim/accused does not know why you are sitting there with your mouth shut and why you are not helping them during the trial.

Another assessor worried that the sight of magistrates and assessors 'whispering' to each other gave the impression that they were 'in cahoots', creating a bad atmosphere.

Besides asking questions, the other major contribution that assessors make in trials is in checking the translation of evidence made by the court interpreter. This is something done most often by African assessors, who say they have to correct the translation of evidence from languages other than English

and Afrikaans into these two courtroom languages. According to one assessor, he had an obligation to correct translations because he was not going to watch some 'poor guy being sentenced because of [an] interpreter's wrong translation'. Court interpreters, he said, needed training. Another assessor told the magistrate when the interpreter was failing to translate evidence fully; the magistrate apparently advised him not to let on that he understood Xhosa, so that he could monitor the court interpreters and help to 'sift out the rotten apples'.

Often, 'correcting' a translation entails clarifying what was meant. For example, an interpreter might translate evidence as 'I got into the house and the people were fighting', leading the magistrate to believe that there was a physical fight in the house. But the evidence might have referred to a verbal fight, or argument. 'Correcting' translation may also entail clarifying what the accused or witness said; court interpreters are said to translate too mechanically, sometimes at least, thereby missing important nuances.

Racial differences in how often assessors corrected translations are evident in Table 5.7 below. Among African assessors, about the same proportion said they had never corrected translations as said they had sometimes or more often; among coloured and Indian assessors, the proportion was about three to one; among white assessors it was more than five to one.

**Table 5.7: How often have you corrected the court interpreter's translation of evidence? Responses by race**

	African %	Coloured %	White %	All %
Never	39	65	61	55
Sometimes	33	16	11	22
Often	4	5	0	4
Very often	3	3	0	2
No answer	21	10	29	17
Total	100	99	101	100

Note: The sample of white assessors is very small (n = 28 answers). Some columns do not add to 100 per cent because of rounding.

Corrections are less common, but certainly not unknown, in cases where the accused or witnesses spoke Afrikaans. According to one coloured assessor in the Western Cape:

There are times when the magistrate does not understand the accused and the accused does not understand the magistrate. This is because the

accused comes out of kitchen language, not the pure Afrikaans or English, the magistrate comes out of a college, where he is not exposed to kitchen language. This is where the lay assessor comes in. The lay assessor asks the magistrate to put the case aside for a few minutes and they go to chambers to discuss about whatever this man said.

Assessors' ability to monitor and correct translation in court clearly depends on the range of languages they speak. The languages spoken by assessors in our sample are tabulated in Table 5.8 below.

**Table 5.8: Languages spoken by assessors**

Language spoken	Assessors %
English	94
Afrikaans	87
Zulu	25
South Sotho	15
Xhosa	14
North Sotho	11
Setswana	11
Siswati	4
Tsonga	3

(Languages spoken by three or fewer assessors in our sample included Shangaan, Ndebele, Urdu, Gujarati, German, French, Arabic, Venda and 'Fanagolo').

Some assessors did not say that they spoke English or Afrikaans, the two official languages of the courts (although court officers in some areas do use other languages in court). This can be interpreted in two ways. First, it is possible that assessors gave us incomplete information: Some assessors may have assumed that they did not need to specify English (or Afrikaans) because they were being interviewed in it. Secondly, it is possible that there are assessors who do not speak English or Afrikaans fluently. Magistrates claim that this is the case. In our interviews with magistrates, we asked 'How many lay assessors are competent in both English and Afrikaans?' Only 11 per cent of magistrates replied 'all', with over 40 per cent saying 'most' and almost 17 per cent saying 'none' (the remainder saying they did not know). Also, some assessors struggled to complete our questionnaires.

The distribution of languages spoken in our sample of assessors clearly reflects where we conducted our survey. The fact that we did not interview as-

sessors in the Free State or North-West, for example, is reflected in the low proportions of South Sotho and Setswana speakers.

Nonetheless, our survey did show some revealing patterns. Only about three per cent of the coloured assessors interviewed spoke an 'African' language (such as Xhosa). It is not surprising therefore that court translations are corrected by African assessors far more often than by white or coloured assessors.

Assessors are insistent that they should not point out publicly any errors in the translation, but should rather report them privately to the magistrate.

Assessors voice many of the frustrations that magistrates themselves express with regard to other court officials. Prosecutors are said to be poorly prepared all too often. They are often young, and inexperienced, unable to cope with an overload of cases. The police are widely regarded as less than competent. One assessor told us: 'Today, I'm very angry because the case I was part of was chucked out because the police were negligent and did not do their job properly.' Prisoners and dockets often do not arrive on time. Serving in court has made many assessors more sympathetic to magistrates, but much more critical of the police.

### **Judgment**

Passing judgment on the accused is the primary contribution of lay assessors to proceedings in court. As we have noted, two assessors can override a magistrate. If there is a disagreement between magistrate and lay assessor when only one assessor is sitting (which is the situation in the vast majority of cases in which lay assessors are used at present), the magistrate's decision is the decision of the court. Judgment is determined by the magistrates and lay assessors together. The key question with regard to judgment is, therefore, whether (or how often) lay assessors and magistrates disagree.

Assessors are far from uniform in answering this question. One might have expected that assessors would emphasise how often they disagreed with magistrates, in order to assert their value. Many assessors do emphasise this, saying that they differ with magistrates 'often', or even 'almost always'. But a high proportion of assessors say that differences are rare.

Differences are generally discussed in the magistrate's office, privately. For the most part differences are resolved. Sometimes, assessors say, the magistrates are persuaded by the assessor and change their view. More often, magistrates persuade assessors that the latter should change their views. In this, many assessors express a deferential attitude to the magistrates. Magistrates are said to show assessors that they 'are more clever than us'. Even if an asses-

sor is less than entirely convinced, lingering doubts may be 'cancelled out by the magistrate's experience and training'. Some magistrates ignore assessors' views, or at least fail to explain why they are disregarding them.

It is said to be rare that differences remain unresolved. Many assessors said it had happened to them once only; none indicated that it was more common than this. Very rarely, two assessors outvoted a magistrate. Sometimes, one magistrate and one assessor outvoted the second assessor. Most often, the magistrate over-ruled the single assessor – and it is even reported that magistrates sometimes overrule two assessors (and that in at least one case, the magistrates' judgment was set aside on review and the assessors' judgment upheld).

In such cases the different views of assessors and magistrate are sometimes, but not always, recorded. According to one assessor:

I felt that the accused was guilty and my partner and the magistrate thought otherwise. But through debate between the three of us, I have accepted their viewpoint, and the magistrate did make it clear in judgment that the decision was split 2:1. I think that was fair, and I felt comfortable with that.

Assessors said that magistrates rarely, if ever, recorded what the actual differences were. This was a bone of contention for some assessors. If the magistrate chooses to overrule the assessor, many said, he/she must set out the reasons for this; if these were recorded, then it would also be easier for the presiding officer if the case went on review.

In our survey, we did not ask how often assessors and magistrates disagree. We did ask, however, how they compared in terms of convicting or acquitting the accused, i. e. whether there were systematic differences between them. The answers are tabulated in Table 5.9 below. Most assessors thought that magistrates and assessors were 'about the same' in whether or how often they wanted to convict the accused. But there was a minority of assessors, especially African assessors, who said that magistrates want to convict more often than lay assessors.

**Table 5.9: Do magistrates and lay assessors usually agree on whether a person is guilty or not guilty?**

	African %	Coloured %	White %	All %
Magistrates want to convict more often than lay assessors	25	10	9	15
They are about the same	62	79	77	73
Lay assessors want to convict more often than magistrates	0	3	0	1
Don't know	13	9	14	11
Total	100	100	100	100

Note: the sample of white assessors is very small (n=22). Coloured includes Indian.

The incidence of disagreement may be reduced by the practice of magistrates in some courts to ask assessors what they think before voicing their own views. Magistrates can then choose whether or not to disagree with the assessor. Many assessors are impressed by such attention from magistrates – but others recognise that ‘magistrates are very cunning; they know the assessors and they position themselves’. Nevertheless, in eliciting an opinion from the assessors first, magistrates avoid putting words in their mouths and this may be a way of attempting to counteract the hierarchy of magistrate over lay assessor which is so evident in our interviews.

One way in which a magistrate can override easily the views of the assessor(s) is by not adjourning to his or her chambers to discuss the verdict (or sentence). Consider the following example:

It does happen that he [the magistrate] hands down the verdict without ever consulting us. There was this one case when I was very hurt. . . . This case was a gang rape case which involve eight men. . . . My heart was very sore because the magistrate gave. . . [one of the accused] eight years imprisonment and discharged the other seven co-accused without consulting us at all. We never even adjourned to his chambers to discuss the case. The magistrate merely gave the verdict and the sentence immediately. After this case I went home and couldn't sleep and I almost quit. I wanted to make an appeal on the grounds that the magistrate made his decision without consulting us. The next day I found out that my co-assessor also felt the same way about the case.

In such cases, the assessor would have to object in court, confronting the magistrate directly; furthermore, as the above example indicates, an individual assessor would not know what the other assessor thought.

Most assessors do not see the relationship between them and magistrates as a relationship between equals. They see their roles as primarily *advisory*, and are generally deferential towards magistrates. This seems to be largely because they accept the distinction between ‘law’ and ‘fact’, and accept that the former is the preserve of legally-trained, professional magistrates. As one assessor put it, assessors are not ‘*wetgeleerdes*’ but just ordinary people. A minority of assessors see the relationship more as one of *partnership*. According to an assessor in Athlone:

Lay assessors have no legal backgrounds. We are basically using our life skills and experiences that we have seen in our communities etc. And that for me is an advantage over a magistrate who has studied law and knows all the Acts etc. I'm lucky from Athlone side that we have built and worked towards that kind of relationship with the magistrates and that the hostility has broken down. This allows both lay assessors and magistrates to ask questions and to discuss issues freely with each other.

This view is confined to people with backgrounds in political activism.

### **Sentencing**

Most assessors report that they are usually not involved in sentencing. If they are, it is generally in an advisory role only. Many assessors say that they agree that sentencing should be a magisterial prerogative. According to one, involvement in sentencing ‘would be tantamount to being a magistrate because you need legal knowledge to be able to sentence’. Another says that magistrates make it clear to everyone that sentencing lies in his hands alone, which is good for assessors because no convicted person will blame them for sending them to jail. ‘At this stage sentencing should be the sole prerogative of the magistrate, but in time it should be extended to the lay assessor, but then there must be training’. ‘The magistrate knows the technical details with regard to sentencing, assessors do not’; magistrates are more competent when it comes to sentencing; ‘this is where assessors need a lot of training’.

But many other assessors resent their exclusion from equal participation in sentencing (even if they accept that the magistrates have primary responsibility for the sentence). One assessor told us how he and another assessor had been involved fully in the trial; the evidence was discussed in the magistrate's chambers, and they agreed that the accused was guilty. The magistrate, how-

ever, postponed sentencing, and told the assessors that they should not come back for the sentencing. This, the assessor said, was very unfair. Other assessors complained that 'magistrates like to think for us'. We found that resentment of this sort was expressed even by assessors who were generally deferential to magistrates. Magistrates' legal knowledge does not justify excluding assessors from a role in sentencing because assessors do not seem to recognise sentencing as a solely or even primarily legal issue. One assessor expressed this through making a distinction between fairness or justice, on the one hand, and law and order, on the other:

Law and order determines the guilt or innocence of a person based on the evidence which is limited by the lawbooks; fairness/justice is determined by the circumstances that control the action of the person.

In this view, sentencing should rather depend on the specific circumstances and needs of the 'community'. This has potentially important implications – but which can only be clarified with further, in-depth qualitative research.

For those assessors who are involved in sentencing, their involvement can take one of two forms. The first entails the magistrate *canvassing* the assessor's response to the magistrate's preferred sentence. Magistrates tell assessors what sentence they propose, and merely invite the assessor to agree or disagree. According to one assessor in the Western Cape, the magistrate tells the assessor what sentence he intends to impose, leaving the assessor to come in as a 'sort of opposition' if he/she differs. Alternatively, magistrates may *consult* with the assessor(s), asking them what they think in a more open and inviting manner. In this case, it is up to the magistrate whether to agree or disagree. Assessors seem to support this approach: Magistrates should set out the options and consult with the assessor(s) as to what is appropriate. This enables the magistrate to ensure that sentences are legally correct as well as involve the assessor(s) in the choice of an appropriate sentence given the circumstances.

Either way, the magistrate may simply ignore what assessors have to say. In the first approach, magistrates can and often do ignore any dissent:

At present the magistrate would say 'ek gaan hom maar 6 maande gee, wat dink jy?' [I'm going to give him only 6 months, what do you think?] and at the end he still gives his 6 months. . . . What is the point of 'giving input' if the magistrate has already made up his mind?

Some magistrates will ask you whether you are happy with the sentencing, but if you are not happy then 'so what?'

The magistrate turned to me and asked me how long did I think that the accused should get and I responded 'three months' to which the magistrate said 'no ways, a year'.

Assessors can empower themselves. According to one:

I used to make notes of magistrates' sentencing options on certain crimes and offences, and I used to jot down the magistrate's name and the type of offence. If, then, for argument's sake, someone was caught with possession of four grams of dagga and one mandrax, I used to use other magistrates' sentencing options on that crime. When asked for a recommendation, I would forward that sentence to the magistrate and, more often than not, it was agreed upon. . . .

Table 5.10 tabulates assessors' perceptions as to the relative severity in sentencing of magistrates and assessors. The table suggests that magistrates in general are seen as neither more nor less lenient than assessors. The majority of assessors say that magistrates and assessors are 'about the same'. A small number of assessors say that magistrates are harsher, with a similarly small number saying that assessors are harsher.

**Table 5.10: How do magistrates and lay assessors compare in terms of sentencing?**

	African %	Coloured %	White %	All %
Magistrates prefer heavier sentences than lay assessors	17	15	11	15
They are about the same	57	62	44	58
Lay assessors prefer heavier sentences than magistrates	6	15	11	12
Don't know	19	8	13	15
Total	99	100	99	100

Note: the sample of white assessors is very small (n=18). Coloured includes Indian. Some column totals do not add to 100 per cent because of rounding off.

In interviews, many assessors suggest that their superior understanding of the community leads them to propose lighter punishments for certain offences. For example, a magistrate might assess that a tsotsi stabbed someone 'without reason', because he or she did not understand tsotsi culture. Or, again:

Take, for argument's sake, the case of a person from Khayelitsha, and he's involved in a shoplifting case – it might be food or something to that effect. I might see the case in a different light from the magistrate. I will then come in and say 'Look, I look at it from this point of view: he's underprivileged, he might have hardships; look at the amount of members of his family which he has to feed; I don't think we should be so hard on him'. As economic matters stand, there are a majority of underprivileged people who are battling to survive; and if someone goes into a supermarket and manages to take polony or cheese, he should be more lenient, and more forgiving in that sense. Give him the chance; it may be a one-off thing. The point is here that he's trying to feed his family and if we are visibly hard on him, if we send him to prison, how is his family going to be taken care of? So when it comes to food issues, the magistrates have, I have realised, become more lenient.

If a person steals a loaf of bread because he was hungry and has no income, yes, it is a crime. But the circumstances forced the man to do that. You have to be lenient somewhere.

Another assessor said that he often found himself objecting to the long prison sentences imposed by the magistrate, when he himself would prefer more community service sentences. One assessor claimed that magistrates had become less harsh after sitting with assessors.

It would be interesting to see whether lay assessors also favoured (or say they favoured) lighter sentences in cases where the convicted person came from a relatively privileged background. Only one black assessor mentioned serving on a case where a white person was convicted (it was a fraud case, and the accused was convicted). Some assessors pointed out that they were not aware of any such cases.

Sometimes assessors argue in favour of a certain sentence because they know of the individual accused. For example, a white assessor in Mpumalanga argued for a lighter sentence to be imposed on someone convicted of drunken-driving:

I said to the magistrate, 'I know this chap, I've known him all my life, he's not a drinker, it just so happened that he went to a friend's farewell party and he had a couple of drinks, he normally does not drink'. . . . I said to the magistrate, 'if you give this man a very long sentence or a heavy fine that will do him a lot of harm because he has a very high-up position in one of the big companies in the area . . . , give him as lenient a sentence as you can'.

The reasoning here is that the crime was a one-off action, and would not recur. (As we saw in Chapter 4, magistrates point to similar actions by assessors, contributing information beyond the evidence presented in court. The use of lay assessors will inevitably lead to situations of this sort, where assessors know of, and perhaps even know, the accused. The line between situations where an assessor should recuse him or herself and those where his or her understanding of the situation is valuable, will often be indistinct. What is clear, as we suggested in Chapter 4, is that assessors – and magistrates – should follow the correct procedures in terms of ensuring that the appropriate evidence is presented in court.)

Assessors do sometimes relate stories illustrating that they can be harsher. For example:

Someone held up people in Hanover Park [Cape Town] with a plastic gun, and the police arrested him. A woman came out shouting and wanted to know who the police had arrested. The police told her to stand back as it was none of her business. Her brother in the meantime tried to open up the police van in order to release the prisoner. The police then tried to pull him away while at the same time trying to hold the woman back. She then hit the policeman holding her back, in his face. The police then put the brother into the van and at that moment another guy jumps in to rescue the brother and both of them start beating up the police. . . . The woman was the troublemaker, the instigator, and she should have been found guilty and been given a harsher sentence than the suspended sentence the magistrate handed down on the basis that she was a first offender and she received maintenance from the state.

Another assessor concurred:

Lay assessors will give harsher sentences than the magistrate because they know what is going on in the community and also because assessors often know some of the accused and are aware of what those people are capable of doing – most have no respect for older people and no respect for life at all.

This view seems to be especially prevalent in coloured areas of the Western Cape, perhaps because of the endemic problem of gangsterism. This assessor continued to say that gangsters feel threatened by the lay assessor system because they now realise that the community is fighting back. Such assessors see their role as fighting crime rather than ensuring justice. (This is another situa-

tion where it is difficult to specify how much and what kind of knowledge an assessor can bring into the courtroom, rather than recuse him or herself.)

In several districts, women assessors said that they were disappointed by the light sentences imposed on convicted rapists by male magistrates.

Several assessors bemoaned the abolition of corporal and capital punishment.

If a person is guilty, according to the Bible, of killing . . . innocent people, . . . then they should get the death sentence. You see it in the court, that in just ordinary problems, arguments occur, people take out knives and stab another, . . . knowing that they will not be punished with the death sentence and that after a few years they will be released.

Assessors are almost indistinguishable from magistrates in this respect. In our survey we asked magistrates and lay assessors whether they agreed or disagreed that there should be a death penalty to help to prevent crime. Among assessors, 34 per cent agreed strongly and 25 per cent agreed, against 24 per cent who disagreed and 12 per cent who disagreed strongly. Seven per cent said they did not know. The equivalent figures for magistrates were 36 per cent, 32 per cent, 21 per cent and six per cent (with four per cent 'don't know').

Assessors need not be uniformly harsher or more 'lenient'; rather, they may be harsher on some issues and more 'lenient' on others. This complexity is not captured in straightforward questions such as the one we asked and reported on in Table 5.10 above. The ambiguity in assessors' positions made clear in an interview with an influential assessor in Athlone. First, she emphasised the importance of assessors in pushing the court to take some kinds of crime seriously. She emphasised how the involvement of lay assessors made magistrates 'understand how communities are subjected to violence, to trauma, and also that the justice system needs to take stronger positions on issues of drug abuse and drug related violence, rape, gangsterism'. Then, however, she emphasised the importance of courts considering a broader range of punishments than hitherto, through considering alternatives to incarceration:

For too long we were saying that it is okay to merely put people in prisons. But we do have rehabilitation programmes; do we offer them alternatives? Research has proven that 90 per cent of prisoners go right back to prison within a month of two of release.

Further research – and public debate – is needed into public attitudes on sentencing.

### ***What do lay assessors achieve?***

Assessors argue in general that their involvement in court is a good thing because 'better decisions are made as legal knowledge is now paired with community knowledge'. Many assessors are dismissive of (white) magistrates' understanding or knowledge of life in poor (black) areas.

Ninety per cent of them has not even set a foot in a township, 90 per cent of them does not even know the areas they are presiding over but they are talking about the 'interest of the community'. Here is where I believe as an assessor we can play an important role, to ensure that the interest of the community is really being taken care of.

Ask yourself how many magistrates have ever been in a shebeen already and how many lay assessors have been in one. Maybe that will give you the answer. Lay assessors are there where the action takes place.

Most of our magistrates are white and they don't come into black and coloured townships and they don't really grasp, have no knowledge really of how life is conducted in these places; since many of the assessors come from these areas they are able to inform the magistrate about conditions in the townships.

Magistrates do not understand the communities. How can a magistrate who lives in Claremont understand what is going on in the Cape Flats? He may be informed through the media, but that is not the point; he must have first hand experience.

It is necessary to emphasise that most assessors portray magistrates as ignorant, not as racist.

A few assessors suggest that the situation is changing slowly, with magistrates becoming more responsive to the broader 'community'. But the examples given by these assessors do not inspire confidence. Magistrates are said to read newspapers and are deemed to be 'reasonably intelligent'; one chief magistrate now had pictures in his office showing him visiting schools in underprivileged areas; magistrates can also ask for reports from social workers.

Understanding the community is widely seen as especially important when it comes to sentencing (as we have already seen above). An African assessor in Cape Town said that:

A magistrate who would have sent a first [time] offender to jail is now more likely through his/her understanding of the accused's background to send him/her to do community service.

In general, assessors believe that they are more likely to take the accused's socio-economic conditions into account before sentencing. Knowledge of the community can also lead assessors to favour harsher sentences. Assessors can identify people who are 'trouble for the community, thereby curbing their activities and protecting the community'.

Assessors also represent themselves as more understanding of people. In one case, according to the assessor, a man accidentally broke a window, while drunk, at the home of his common law wife; she reported it to the police, and the man was charged with malicious damage to property. The magistrate proposed to jail the man for nine months, but the assessor suggested that he be set free because the couple would be reconciled by the time they reached the courtroom door. The magistrate concurred and, as the assessor forecast, the couple left hugging each other.

Assessors claim that their participation in court contributes to a higher quality of justice in other, more routine ways. A single magistrate, it is said, may miss points in evidence. Having someone to consult is a benefit in itself. Assessors can also help to make the machinery of justice more 'people-friendly'. According to one assessor in Wynberg (W. Cape):

A woman was suspected of theft. She lives with her parents in Hout Bay, she earns R30 per month working on a farm. The woman and her parents used to come to court on the appointed days, and sometimes the case does not even come before the court on that day, even though it is on the court roll. I got fed up with this. I went to the magistrate and told him I've got a problem with the people coming from Hout Bay, they don't have money, and they don't enquire about what's happening. I told him that the court must pay these people for coming to court, and they must be fetched from Hout Bay.

More seriously, assessors in several parts of the country say that they help to ensure that justice is done by serving as a watchdog over other parts of the criminal justice system. In the Western Cape, assessors are determined

to see that the communities become involved in the justice system as we were all fed up with crime and gangsterism; we were also fed up to see criminals committing crimes today before our eyes and that of the police yet tomorrow they are walking on the streets again – being granted bail; we were also fed up as community leaders to see and hear how gangsters openly brag about how they will pay policemen and interpreters to let police dockets disappear.

A similar watchdog role was claimed by an assessor in the Northern Transvaal. Assessors also make sure that magistrates are not biased, that the verdict is not 'one-sided'.

Assessors, unsurprisingly, believe that their participation has resulted in changing attitudes to the courts among the public (and among accused people in particular). Assessors say that the courts were viewed with suspicion in the past:

When people were found guilty, they would say it was because the magistrate and prosecutor were white. Even if the accused knows he was guilty? There was a feeling that justice was not done when the accused was black, and the court officers white.

Some assessors say they expected to be viewed with suspicion when they first started to sit in court:

When I first came here, I thought that people would be very angry with me; they'd say that I was the person to advise the court to convict me.

Such fears have occasionally been proved correct. According to one assessor, the public still see the courts as being there simply to punish people and send them to jail; many people still see assessors as 'opportunists hitching a ride on the gravy train'. But, overwhelmingly, assessors say that public attitudes have changed. The appointment of assessors has 'strengthened the confidence of the people'.

The lay assessors make people feel more at ease. Beforehand, when they come into court there used to be that tension. There used to be the bench and the accused and you can feel that something is amiss. But with lay assessors being there the accuseds and the general public at large feel they have freer access to justice.

[The public are] aware that assessors are there as representatives of the community and are therefore fortunate to have them present in court to ensure that they have a fair trial.

I would say my being here helps a lot because people feel freer when they see us here. People feel that their hope of a fair trial is real and they also feel that even if they are found guilty as long as there is a person from the community they feel that the sentence is fitting. Even when they meet you in the street they are happy to see you because they think that had it not been for you they probably would have got a harsher sentence.

[T]his enables the accused to speak freely and state his/her case. In the past the accused was intimidated and alienated by the presence of only white faces. But now that there are black faces this allows the accused to tell everything and this facilitates the emergence of the truth.

Assessors say that the public are deemed to be reassured by the presence of lay assessors, because the assessor 'is not a magistrate, it's someone there for your interest'! Similarly:

because now you have lay assessors from the same communities as the accused the public is of the opinion that the lay assessors help the magistrate to give lighter sentences.

Sometimes assessors are wrongly held responsible for leniency: one assessor was approached by an acquitted man, who told him 'it was because of you that I got off' – which was not true. Against this, some assessors say that their presence in court serves as a deterrent to criminals.

The accused have more respect for the verdict and sentence if they see that there is someone from the 'community' involved. The accused then knows that the person from his community is now aware of his standing and attitude, ... He will then have to reconsider whether he will continue his life of crime. In a sense it could act as a deterrent.

I remember one person in my community having seen me for the first time serving as a lay assessor asked me whether I was a magistrate. I told him that this was not so but that I was a helper, I am giving the magistrate a hand ['ke le tsogo']. He told me that he knows that there will be changes now that we are serving as lay assessors and also that this [will] deter them from committing crimes, because of the fear that 'you might see me and that there is a chance that you will be serving on my case and you won't sympathise with me'. Since I was appointed to be a lay assessor I have realised that members of my community hold me in high esteem and the presence of a lay assessor in the community deters many from committing crimes. I think to most of them I am a magistrate.

Many assessors say that they feel accountable to the community: 'To my people out there', said one; 'First and foremost, I am accountable to my area and the organisation I come from', said another, adding 'I think being accountable is very important because without it then people tend to do what they want.'

## Recommendations

Almost every assessor we interviewed said they he or she enjoyed being an assessor. But many had specific grievances and proposals for change.

### *Should the use of assessors be compulsory?*

A large majority of assessors say that the use of lay assessors should be compulsory in all cases except (perhaps) for very minor cases such as traffic offences. Table 5.11 shows that 75 per cent of the assessors in our sample said this, compare to just 16 per cent who disagreed. Only among white assessors was there a high level of disagreement, and even among white assessors there was majority support for the compulsory use of assessors.

**Table 5.11: Should magistrates be compelled to use lay assessors in all cases except for very minor cases (such as traffic offences)?**

	African %	Coloured %	White %	All %
Yes	72	82	57	75
No	13	13	39	16
Don't know	15	5	4	9
Total	100	100	100	100

Note: the sample of white assessors is very small (n=23). Coloured includes Indian.

Some assessors said that it was not necessary to have assessors in all cases. It would be a waste of taxpayers' money in minor or undisputed cases, said one. One woman assessor emphasised that assessors should sit on maintenance cases (even though a (male) magistrate had told her that they were too 'boring'). Furthermore, why shouldn't lay assessors be used in the higher courts too?, asked several assessors. An why cannot lay assessors serve as lay magistrates, especially in the so-called minor cases such as traffic offences?

Assessors should also be involved in every stage of proceeding. Magistrates may have legal training but assessors have common sense, and can do everything that the magistrate can.

One reason for assessors' strong support for their compulsory use was the inconvenience caused by a discretionary system. At present, assessors are often called to court in the morning, only to find that magistrates choose not to use them; they do not get remunerated for time not actually spent in court.

Most assessors expressed a strong preference for two assessors to be used in court: 'Two should be used in all cases, full stop', said one. Among the rea-

sons given for this were to bring a wider perspective into the courtroom, and to offset assessors' nervousness:

The first time when I came to court I was alone and I was very nervous and I felt very intimidated; but if it is two people and one of which is experienced then it makes much more easier to adjust and builds confidence.

Having two assessors would also enable them to overrule the magistrate. But many assessors – especially outside of Cape Town – do not agree that assessors should be able to overrule magistrates. The magistrate should be able to overrule even two assessors, one assessor told us, since the magistrate is the professional, and it is 'his' court. Assessors should not be able to outvote a magistrate even on matters of fact because the 'magistrate knows the law better and can point out the assessor's inadequacies'.

In Nelspruit, however, where a single assessor sits alongside the magistrate throughout proceedings, assessors were not insistent that two assessors serve together. 'Normally one is enough', we were told. Only in 'complicated' cases would two assessors be needed. These assessors' confidence may reflect the high level of their participation already; perhaps it is only where assessors feel that they are not taken seriously that they demand that two assessors must sit alongside each magistrate.

### **Training**

Most lay assessors are concerned about the absence of any training or preparation for them. This has been discussed above, pp. 111-15.

### **Remuneration and conditions of service**

Very many assessors complained about the remuneration. One assessor felt that the remuneration should be a 'living wage'; his 'only problem is a financial one: R20 per hour is not enough for a professional person. Even a char does not get that amount'. (This, incidentally, is not true; most domestic workers get much less than R20/hour.) 'They must pay me what I'm worth', said another.

The remuneration grievance was compounded by the fact that the daily and hourly rate had been reduced by the Department of Justice. This reduction seems to be blamed on local magistrates not on the Department of Justice.

In districts such as Nelspruit, where assessors serve more-or-less full-time, assessors' grievances relate to the conditions of service. For these assessors,

their work in court is a job, part of a projected career in the courts (with assessors moving on to become prosecutors or magistrates perhaps). Assessors thus complain that the Department of Justice does not contribute to a pension fund for them, nor is there any provision for medical aid – both of which are provided for the police and court interpreters.

### **The administrative system**

Assessors complain strongly about a system in which they spend so much time sitting around waiting to be used, unpaid. The magistrates' discretion in whether or not to use assessors is thus a source of great irritation. Tensions between assessors and magistrates are exacerbated by the payment regulations: magistrates have to authorise payment by signing forms declaring how many hours an assessor spent in court. Because the assessor is only paid for time actually spent serving as an assessor in court, and not for any waiting time, the system encourages discord.

Assessors also complained about the attitude and behaviour of court administrative staff in general. One assessor complained that 'the district court's administration tried to make our lives a misery'. Assessors are paid with the money received by the court for bail. If no bail money is received, then assessors sometimes cannot get paid; assessors are sometimes given money with fresh blood on it. Assessors accuse the payment clerks in many districts of incompetence and rudeness or even racism.

In many districts the assessors do not have a common room or office. They are forced to share public facilities, which means they inevitably have some contact with accused and witnesses outside of the court.

### **Conclusion**

In our research we were repeatedly struck by the high level of deference expressed by assessors with respect to magistrates. 'Lay assessors are not on a par with the magistrate; he is the one who is qualified', said one. 'We have a feeling about things sometimes, but the magistrate is the one with the real knowledge', and 'we haven't got the knowledge, we have to use common sense', said two others. Most assessors see their role as primarily advisory (especially with regard to sentencing); many cannot envisage over-riding a magistrate. Such deference is subdued in some areas – especially Cape Town – where many assessors are former political or civic activists, steeped in a more assertive tradition of activism.

Assessors are nonetheless insistent on their value, especially because of their knowledge of the community. Assessors' own justifications of their value in court are, however, often banal, and they struggle to give concrete examples of their contribution to judicial decision-making. This is understandable. If a significant part of their contribution is their participation in discussion about a case with the magistrate it would be hard to identify specific contributions – the contribution would (and should) be engaged involvement in a process rather than point-scoring. As researchers, we can see that it is difficult to measure or even just document the contributions that assessors are making, and the same must be true for assessors themselves. But short of comparing through sustained observation exactly what happens in courts with and without assessors, we have to rely on participants' own perceptions.

Nevertheless, lay assessors did give some examples of specific contributions, many of which raise difficult legal and ethical questions. For instance, under 'Sentencing' earlier in this chapter, we quote an assessor explaining how he put in a plea for a light sentence for a person convicted of drunken driving who he had 'known all his life' and knew did not drink usually. Similar examples were given a number of times. How well can an assessor know an accused without recusing him or herself? How much prior knowledge of the events or players can an assessor draw on in court?

Choosing assessors from the 'community' which the court serves means that they will frequently have some knowledge of the events before the court – in small towns this will probably be the rule rather than the exception. This is a matter that needs to be addressed directly and lay assessors – just like magistrates – need to be properly informed about when they should recuse themselves and when it is legitimate to draw on their knowledge of matters before the court in decision-making. If an assessor knows an accused well, this can too easily lead to the kind of special pleading mentioned above. One obvious response is to say that assessors should not sit on cases involving people that they know, personally and directly. But this is not entirely adequate, at least in small towns. Firstly, there may be an asymmetry between magistrates and assessors. We suspect that magistrates in small towns sometime know, directly and personally, the accused who appear before them, but this is unlikely to arise in discussions in court because magistrates feel less need to justify their views to assessors (if they choose to use them) than the other way round. Secondly, in small towns some people might be very widely known (this does raise the question of whether such a person should not be tried in a different court).

The question is often more difficult. An assessor (like many magistrates) may know the accused by sight only, or know of an accused, by repute. At what point may the assessor remain on the bench and when should he or she be recused? If the purpose of using assessors is to bring the 'community' and court closer together, it is inevitable that they will bring to the bench knowledge beyond that of magistrates'; indeed, this is what magistrates often value in assessors. Surely it is impossible to bring knowledge of the 'community' without bringing knowledge of a great many members of the 'community'?

The challenge is surely to ensure that assessors and magistrates follow adequate procedures. The accused should feel free to object to particular assessors if they believe they will not get a fair trial. Assessors should understand that they must recuse themselves if their prior knowledge of or relationship with the accused might influence their judgment. Assessors should not raise or use evidence in coming to a judgment or sentence that has not been presented in court.

Whether or not assessors make a difference in court in terms of what they bring to the bench, their very presence helps to keep 'the magistrate on his toes', as one put it. In small towns, especially, magistrates come to wield a lot of power; the lay assessor system opens them to potential challenge, and thereby makes them more accountable. Assessors also say that they have helped transform public attitudes to the courts. In summary, in the words of a lay assessor from Lydenburg, lay assessors 'bring the court to the people and the people to the court'.

In the following chapter we explore further evidence from our survey which contributes to an analysis of the differences that assessors probably make in court. Through comparing the attitudes on a range of issues of magistrates and assessors, we suggest ways in which having lay and mostly black people on the bench, alongside professional and mostly white magistrates, might change the courts' attitudes. And, by examining the attitudes of members of the public, we try to shed some light on whether the presence of assessors will bring the courts closer to the people.

## Comparing the attitudes of assessors, magistrates and members of the public

A major part of this research project was the administration of a standard set of structured questions to magistrates, assessors and members of the public. Our structured questionnaires included a set of twenty-six questions probing respondents' attitudes to the courts; justice and the rule of law; magistrates; rights and the severity or leniency of the judicial system; the police; and lay assessors. The full list of questions is included in the questionnaires in Appendix B.

We had several objectives in this part of our research. *First*, we sought to compare the attitudes towards law and the judicial system of magistrates, assessors and members of the public. This has a potential bearing on the possible *effects* of introducing lay assessors into the courts, and hence on an evaluation of the *merits* of lay participation in the courts. One of the factors that will determine whether the introduction of lay assessors makes any difference to the administration of justice in the lower courts is the attitude towards law and crime of the lay assessors themselves, and especially how far assessors' attitudes differ from those of magistrates. If assessors have very different views to magistrates, then we would hypothesize that changing the composition of the 'bench' would have an effect on judgments and sentencing.

Furthermore, the existence of differences of attitude among magistrates, assessors and members of the public could be construed as evidence in support or opposition to arguments over the principle of lay participation in the judicial system. If magistrates have different views to members of the public, then perhaps their power should be curtailed. But what if assessors do not share the views of the public? If the views of the public are deemed hostile to democracy or justice, is it perhaps important to have judicial officers who hold different views?

*Secondly*, the comparison of attitudes among magistrates, assessors and members of the public allows us to explore the significance of *race* in particular. The initial, official motivation for the lay assessor system emphasised the

racial composition of the bench, which allegedly underpinned the 'legitimacy crisis' of the judicial system. We sought to ascertain how far attitudes and perceptions were related to race. Did white magistrates, assessors and members of the public share a set of attitudes that differed from those of African magistrates, assessors and members of the public, for example?

*Thirdly*, we sought to identify any other sources of variation in the attitudes of assessors. Perhaps assessors who have served for some time have different views from those who are newly-appointed? Perhaps assessors in different parts of the country have different views, reflecting the different ways in which the lay assessor system has been organised?

Our findings need to be understood in light of the samples used of magistrates, assessors and members of the public. Our sample of magistrates was not random, and should not be assumed to be representative of magistrates as a whole. Our results need to be treated with some caution, and should be read as indicative rather than conclusive. Similarly, our sample of members of the public was restricted to that section of the public which is present in court – for whatever reason. We should not assume that their attitudes are representative of the public as a whole. Nor is our sample of lay assessors 'random', because we had no way of determining the dimensions of the total universe of lay assessors from which to draw a sample.

Most of the findings reported in this chapter are based on the second half of our questionnaire, where respondents were invited to 'agree strongly', 'agree', 'disagree' or 'disagree strongly' with each of a series of statements (respondents could also indicate that they 'don't know'). The last few questions had slightly different response options, as appropriate to the question. There were also a few questions that we asked only of one or other of our three groups of respondents (i. e. magistrates, assessors and members of the public).

On some issues we found very considerable differences between the responses of magistrates, lay assessors and members of the public. On almost all issues we found some differences. The attitudes of lay assessors generally fell in-between those of magistrates and members of the public. Magistrates, for example, had much more positive assessments of the court system than assessors or (especially) members of the public. Assessors and members of the public were also critical of magistrates and the police. Magistrates, assessors and members of the public concur that crime has reached very serious levels, but magistrates are slightly less likely to endorse responses that impinge on the rights of accused people. Magistrates, assessors and members of the public differ in their evaluation of the prospective benefits of lay participation in court decision-making. From this we conclude that the appointment of lay as-

sessors should be expected to have some effect on decision-making in the lower courts, but perhaps not in the expected directions. This effect may well be muted by the fact that assessors are not representative of the members of the public, at least in our sample; this might be due to their position in court, which shapes their attitudes; or it might be due to other factors (such as their social position).

### Perceptions of the courts, justice and the rule of law

Most magistrates, assessors and members of the public were broadly positive in their overall assessment of the courts, and there was a near-total commitment to the rule of law. On these issues there were minor differences between magistrates and the public, with assessors in between. But striking differences emerged in assessments of how fair the courts are.

Almost all (88 per cent) of the interviewed magistrates agreed that 'overall, the courts are doing a good job'. The proportion of assessors and members of the public agreeing was lower – at 72 per cent and 62 per cent respectively – but agreement was still much more common than disagreement (see Table 6.1 below). Nonetheless, the fact that about one in four assessors and members of the public believe that the courts are not doing a good job is cause for concern.

**Table 6.1: Are the courts doing a good job?**

	Magistrates %	Assessors %	Public %
Agree or agree strongly	88	72	62
Disagree or disagree strongly	8	24	25
Don't know	4	4	13
Total	100	100	100

Source: Q1: 'Overall the courts are doing a good job'.

There was also more agreement than disagreement with the statement 'On the whole the judicial system caters for the needs of the public' (see Table 6.2). Magistrates were markedly less positive about the judicial system in general than courts in particular. There were smaller differences in assessors' views, and none in those of the public. It would seem that the courts and the judicial system are not regarded as synonymous by magistrates, but are by the public.

(This may reflect the wording of our translation of the questionnaires into languages other than English for members of the public.)

**Table 6.2: Do the courts cater for the public?**

	Magistrates %	Assessors %	Public %
Agree or agree strongly	58	61	63
Disagree or disagree strongly	35	31	25
Don't know	6	7	12
Total	99	99	100

Some columns do not add to 100 per cent because of rounding off.

Source: Q19: 'On the whole, the judicial system caters for the needs of the public'.

Attitudes varied much more on the subject of the *justice* of court decisions. As Table 6.3 shows, a large majority of magistrates believe that the courts treat people fairly always or most of the time. By contrast, assessors were fairly evenly divided on this issue, whilst a large majority of the public thought that the courts treated people fairly only sometimes or never.

**Table 6.3: Do the courts treat people fairly?**

	Magistrates %	Assessors %	Public %
Always/most of the time	78	52	21
Sometimes/never	21	45	70
Don't know	0	3	9
Total	99	100	100

Note: About one quarter of the surveyed members of the public did not answer this question (n=509). Some columns do not add to 100 per cent because of rounding off.

Source: Q31: 'Do the courts treat people fairly?'

Responses to the question 'Are court verdicts just?' (Q33) showed a similar pattern: agreement among magistrates, disagreement among members of the public, with assessors evenly divided.

In the light of the above findings, responses to the statement 'the community believes that the courts are just' were intriguing. Magistrates were more inclined to disagree with this statement than either assessors or members of the public (see Table 6.4). Among magistrates, about one-quarter agreed, but one-half disagreed. If legitimacy is linked to perceived justice, then it seems fair to conclude that many magistrates see the courts as suffering from a legitimacy crisis – but notwithstanding the perceived fairness of court decisions

and quality of court performance. In other words, magistrates seem to believe that there is a legitimacy crisis, but that the courts' legitimacy problems are not because there is actually anything wrong with what the courts do. The obvious interpretations, although we cannot demonstrate them to be true, are related: magistrates may attribute the legitimacy crisis to either the fact that the courts are not staffed by black people or the history of the courts under apartheid.

Compared to magistrates, higher proportions of assessors both agreed and disagreed with the statement that 'the community believes that the courts are just' (this being possible because a far smaller proportion said that they did not know – indicating that they felt themselves to be more in touch with what the 'community' believes). Among the members of the public, however, the proportion agreeing was larger and the proportion disagreeing was smaller – with more people agreeing than disagreeing. According to the public – who should know, after all – there is actually *less* need to worry about the perceived injustice of the courts than magistrates think.

**Table 6.4: Community perceptions of the courts**

	Magistrates %	Assessors %	Public %
Positive	23	46	45
Negative	50	55	35
Don't know	27	6	20
Total	100	102	100

Some columns do not add to 100 per cent due to rounding off.

Source: Q13: 'The community thinks that the courts are just'. 'Agree' or 'agree strongly' are taken as positive responses; 'disagree' or 'disagree strongly' as negative ones.

These findings on popular perceptions of the courts seem to suggest a more complex set of perceptions than is implied in a crude 'legitimacy crisis' view of the courts. For sure, magistrates and the public have strikingly different views on the fairness of the courts, with assessors falling in between. But views on the general performance of the courts are not so different, and among the public there is less support than expected for the view that the 'community' sees the courts as unjust. Taken together, these findings perhaps point to the conclusion that the public views the courts as seriously flawed but at the same time important and valuable. This might also help to explain the contrasting attitudes towards different parts of the legal system found by Gibson and Gouws (see Tables 2.5 and 2.6 in Chapter 2): the perceived strengths and

weaknesses of the courts may not be spread uniformly across different types of court.

Our survey lends further support for the argument that there is a very strong commitment to the rule of law in South Africa – as reported by Ellman and found by Gibson and Gouws (see Chapter 2). No magistrates, only five per cent of assessors and only 12 per cent of the public agreed that 'it is alright to break the law as long as you don't get caught' (Q3). The percentages disagreeing with this statement were 98, 95 and 86 respectively (with a tiny proportion of respondents saying that they did not know).

We asked all of our respondents whether they felt that the courts had improved since 1994 (Q4). Magistrates were evenly divided on whether there had been improvements or not. Among both the public and assessors, slightly more felt that there had not than that there had. This should be of concern to the Department of Justice.

On all of these questions there was some variation by race. Table 6.5 shows the proportions agreeing or disagreeing with the statement: 'overall, the courts are doing a good job'. Coloured assessors, and coloured and white members of the public, were markedly less impressed with the performance of the courts than the other sections of the sample. Similarly, African assessors and members of the public gave the most positive responses to Q19 (although, in this case, it was white assessors who were the most negative).

**Table 6.5: Are the courts doing a good job?**

	Agree %	Disagree %	Don't know %	Total %
White magistrates	92	3	6	101
White assessors	81	15	4	100
African assessors	84	12	4	100
Coloured assessors	59	37	4	100
White public	52	36	11	100
African public	73	16	10	99
Coloured public	50	33	17	100

Some rows do not add to 100 per cent because of rounding off. Coloured includes Indian.

Source: Q1: 'Overall, the courts are doing a good job'.

Among assessors, there were also differences by race in perceptions of whether the courts treated people fairly. As Table 6.6 shows, white assessors were much more positive than either African or coloured assessors. Among the public, however, views seem to be negative pretty much regardless of race.

**Table 6.6: Do the courts treat people fairly?**

	<i>Always/mostly %</i>	<i>Sometimes/never %</i>	<i>Don't know %</i>	<i>Total %</i>
White magistrates	91	9	0	100
White assessors	80	12	8	100
African assessors	52	45	3	100
Coloured assessors	44	55	1	100
White public	28	60	13	101
African public	22	71	7	100
Coloured public	18	71	12	100

Some rows do not add to 100 per cent because of rounding off. Coloured includes Indian.

Source: Q31.

Responses to this question (and to the related Q33) show a huge gulf between white magistrates and assessors, on the one hand, and the public (regardless of race) on the other, with coloured and African assessors in between. (On Q13, probing perceived community perceptions, white assessors were also particularly positive or optimistic; on this question, however, white magistrates were particularly negative or pessimistic; the public were divided, with little variation by race.)

### Attitudes to magistrates

Our questionnaires included three questions on magistrates: Do they understand the problems of ordinary people? Do they understand the 'community'? And, are they kind-hearted? The first two questions are similar, but we hoped to distinguish between magistrates' reputed understanding of individuals in court – including individuals accused of crimes – and their reputed understanding of the overall 'community' or public.

On all three questions, assessors and members of the public were strongly critical of magistrates. The ratio of negative to positive responses among assessors varied between 2:1 and 3:1. Among the public, the ratio was almost 5:1. Magistrates themselves were more positive – but with some variation between the three questions. Almost two-thirds of the magistrates surveyed said that all or most magistrates understood the problems of ordinary people, and half said that all or most understood the community – indicating, perhaps, the perception that magistrates understand the situations of individuals in the

courtroom more than they do the 'community' at large. Just under half of the magistrates surveyed said that all or most magistrates were kind-hearted.

The only major difference by race occurs, as with some of the attitudes already discussed, with respect to white assessors, as we can see from Tables 6.7 and 6.8 below.

**Table 6.7: Do magistrates understand the problems of ordinary people?**

	<i>All/ most %</i>	<i>Some/ none</i>	<i>Don't know %</i>	<i>Total %</i>
White magistrates	71	29	0	100
White assessors	84	16	0	100
African assessors	23	68	10	101
Coloured assessors	18	75	7	100
White public	15	75	10	100
African public	13	72	15	100
Coloured public	21	67	12	100

Coloured includes Indian. Source: Q28.

**Table 6.8: Do magistrates understand the community?**

	<i>All/most %</i>	<i>Some/none %</i>	<i>Don't know %</i>	<i>Total %</i>
White magistrates	60	40	0	100
White assessors	71	29	0	100
African assessors	21	71	8	100
Coloured assessors	9	83	8	100
White public	18	63	20	101
African public	14	71	15	100
Coloured public	15	73	12	100

Coloured includes Indian. Source: Q30.

Differences by race between members of the public were very minor, and the differences between coloured and African assessors were small (with coloured assessors slightly more critical of magistrates than their African counterparts). But there was a huge gulf between the negative perceptions of all of these and the glowing perceptions of white assessors. Eighty-four per cent of white assessors said that all or most magistrates understood the problems of ordinary people – compared to just 23 per cent of African assessors and 18 per cent of coloured assessors. Seventy-one per cent of white assessors said that all or most magistrates understood the 'community' – compared to 21 per cent of African assessors and a mere 9 per cent of coloured assessors. White asses-

sors were more positive about magistrates than were magistrates themselves! Only when asked whether magistrates were kind-hearted did white assessors voice negative views, with only 29 per cent saying that all or most magistrates were kind-hearted (only a slightly higher proportion than among African and coloured assessors, and lower than among magistrates).

A comparison of Tables 6.7 and 6.8 shows that assessors in every racial category were even more critical of magistrates' understanding of the community than they were of magistrates' understanding of the problems of ordinary people – a difference shared by magistrates themselves.

### Rights, leniency and crime

So far we have found that a majority of magistrates, assessors and members of the public alike view the courts positively in terms of doing a good job and catering for the needs of the public, although it is a bare majority in the case of African and coloured members of the public. At the same time, there is widespread public scepticism over whether the courts treat people fairly, and whether magistrates understand either the problems of ordinary people or the 'community' in general. This scepticism is shared by coloured and African assessors. When we turn to attitudes towards crime, however, we find that there is widespread support for tougher responses. In other words, the criticisms of the existing judicial system are not so much that it treats people (especially black people) too harshly, but rather that it does not do enough to protect the 'community'. Crime is regarded as more of a problem than discrimination.

We found a high level of agreement that the courts lean too far toward protecting the accused. Almost half of the magistrates, just over half of the assessors and half of the public agreed or agreed strongly that the courts pay too much attention to the rights of the accused, as we can see from Table 6.9.

**Table 6.9: The courts pay too much attention to the rights of the accused**

	Magistrates %	Assessors %	Public %
Agree or agree strongly	43	55	50
Disagree or disagree strongly	53	38	34
Don't know	4	7	16
Total	100	100	100

Source: Q6.

On this question the differences between magistrates and assessors or public were not large. Asked whether the protection of the community is more important than the protection of the rights of accused individuals, however, a large gap emerged between the responses of magistrates and assessors/public – as we can see in Table 6.10. About half of the magistrates agreed that the protection of the community was more important, compared to three quarters of the assessors and almost as many of the members of the public.

**Table 6.10: It is more important to ensure the protection of the community than to protect the rights of the individual accused person**

	Magistrates %	Assessors %	Public %
Agree or agree strongly	52	76	71
Disagree or disagree strongly	45	18	22
Don't know	2	3	7
Total	99	97	100

Source: Q9.

Similar differences occurred in response to the statement: 'There would be less crime if our laws were stricter' (Q12). Magistrates agreed with this statement by a ratio of about 2:1. Assessors and the public agreed with it by a ratio of about 6:1. The differences were less marked in response to the statement: 'The justice system is generally too easy on criminals' (Q10). Two-thirds of magistrates agreed, about the same proportion as the public and slightly less than assessors. The ratios of agreement to disagreement were 2:1 among magistrates, but only slightly higher (and under 3:1) among assessors and the public. Curiously, magistrates, assessors and the public tended to agree that the courts' sentences were too light 'sometimes', rather than 'always', 'most of the time' or 'never' (Q29).

Magistrates, assessors and the public were in near-total agreement that 'the rate of crime has reached a level which requires drastic counter measures' (Q18). As many as 96 per cent of magistrates, 97 per cent of assessors and 85 per cent of the public agreed with this statement (with most respondents in each category agreeing strongly). For many, but far from all, 'drastic counter measures' seem to include the reintroduction of the death penalty (Q14). Two-thirds of magistrates agreed with this, with slightly fewer assessors and members of the public.

Overall, there is clearly widespread agreement that 'drastic counter measures' are required to deal with crime, that the laws should be stricter, and (al-

beit less emphatically) that the judicial system is too easy on criminals. There is considerable, but far from total, support for the reintroduction of the death penalty. Criticism of the severity of sentences is surprisingly muted. Most assessors and members of the public think that the protection of the community is more important than the protection of the rights of accused individuals, although there is less agreement that courts pay too much attention to the rights of the accused. Magistrates are slightly more cautious about prioritising the protection of the 'community', but even they tend strongly towards a tough stance on crime.

Insofar as there are differences between magistrates, on the one hand, and assessors and members of the public, on the other, they are the opposite of what we might expect if the courts were seen as being unfairly tough on the accused, most of whom are black. Assessors – and, less clearly, the public – favour a tougher stance on crime than the magistrates themselves!

Differences by race seem to be less important than differences between by position (i. e. between magistrates, assessors and public). Table 6.11 disaggregates responses by race and position to the statement: 'It is more important to ensure the protection of the community than to protect the rights of the individual accused person' (Q9). Agreement is strongest among assessors, more-or-less regardless of race, strong among members of the public, again more-or-less regardless of race, and weakest among magistrates.

**Table 6.11: It is more important to ensure the protection of the community than to protect the rights of the individual accused person**

	Agree %	Disagree %	Don't know %	Total %
White magistrates	49	49	3	101
White assessors	85	15	0	100
African assessors	85	10	6	101
Coloured assessors	75	24	1	100
White public	64	32	4	100
African public	73	19	8	100
Coloured public	69	23	8	100

Source: Q9. Some rows do not add to 100 per cent because of rounding off. Coloured includes Indian.

Table 6.11 indicates that assessors are especially insistent that it is more important to protect the 'community' than to protect the rights of individual accused. This may be because assessors understand their role as representing or

defending the interests of the 'community' in some way; it is not their role in court to protect the rights of individual accused.

White lay assessors do not seem to have distinctive attitudes on these issues. Whereas they were particularly positive about the courts and magistrates, either sharing the views of magistrates or even being more positive than them, white assessors broadly share the views of coloured and African assessors (and the public) on the need for tougher treatment of criminals.

Amidst this evidence of a tough view on crime on the part of assessors and members of the public, one of our findings seems discordant. As we saw in Table 6.6, there was a perception among members of the public, as well as coloured and African assessors, that the courts did not treat people fairly. We assume that 'people' here refers to, or at least includes, accused people. We also assume that the responses in Table 6.6 reflect a belief that people should be treated fairly. How then can this finding be squared with the evidence in Tables 6.9 to 6.11? Consistency would require that members of the public and assessors believe that accused people can be treated more 'fairly' even if courts do not protect their rights as much as at present. This is certainly possible: the perceived injustice in the courts may be due to a lack of even-handedness, whether intentional or not, along racial or other lines. Formal procedures for protecting the 'rights' of accused people do not prevent such injustices. The courts could therefore be more even-handed in their dissemination of justice at the same time as taking bolder steps to protect the 'community' even at the cost of whittling away the formal procedures of the accused.

The implication of these findings is surely that, if lay assessors are to play more important roles in a wider range of cases, then the courts are likely to tend towards higher conviction rates and harsher sentences.

### Attitudes to the police

In order to assess attitudes to the police we included in our questionnaire three statements about the police, and asked our respondents whether they agreed or disagreed with them. The three statements were: Most police officers are dishonest; on the whole the police are hostile and aggressive; and overall the police are doing a good job. On the first two of these questions we found very large differences between magistrates and the public, with assessors in between but closer to the latter. On the third question we received very mixed responses, with no clear, systematic variation between magistrates, assessors and public.

The public do not seem to have a high regard for the police. 68 per cent agreed that most police officers are dishonest, and 61 per cent agreed that the police are hostile and aggressive. Assessors were divided in their responses. 50 per cent agreed that most police were dishonest, but only 42 per cent agreed that they were hostile and aggressive (with a slightly higher percentage disagreeing). Magistrates had a much more positive view. Only 17 per cent agreed that most police were dishonest (compared to 64 per cent who disagreed), and only eight per cent agreed that they were hostile and aggressive (compared to 70 per cent who disagreed). Assessors share some of the scepticism of the public, which could have an important bearing on the importance they attach to evidence from and about the police in court cases. For example, we might speculate that assessors would be more willing to regard with scepticism 'confessions' obtained by the police from suspects during interrogation, or indeed of other 'evidence' found by the police. Research has shown that physical violence – i. e. torture – was common in police interrogations of ordinary criminals as well as political offenders before 1994. Whilst this is unlikely to occur as often now, the police clearly still continue to face a credibility problem in court.

Perceptions of the overall performance of the police were more mixed. Members of the public were more positive on the overall performance of the police than they were with respect to their honesty and hostility. Fifty-six per cent agreed that the police do a good job (against 39 per cent disagreeing). Assessors were, again, fairly evenly divided, with 52 per cent agreeing and 43 per cent disagreeing. Magistrates' views were very similar to those of the public – and much less positive than their views on the honesty and hostility of the police. Fifty-four per cent of magistrates agreed that the police are doing a good job, with 37 per cent disagreeing. Whilst it is unlikely that magistrates and the public evaluate police performance by exactly the same criteria (magistrates probably attaching more importance to the roles played by the police in the criminal justice system rather than in crime prevention on the streets), it is striking that the pattern found in the first two statements about the police is not replicated in the third.

The responses to our statements about the police are perhaps reminiscent of the responses to our statements about the courts. Magistrates and the public had very different views on whether the courts treat people fairly, and whether verdicts are just, but had more similar views on the overall performance of the courts. There seems to be a pattern among the public of a relatively positive overall evaluation of the courts and police, combined with a strongly negative assessment of particular aspects of them.

There were some variations in perceptions of the police according to race, as we can see from Tables 6.12 and 6.13. White magistrates and assessors are especially critical of the suggestions that most police officers are dishonest, and that they are hostile and aggressive; white members of the public were more critical of these suggestions than African and coloured members of the public.

**Table 6.12: Most police officers are dishonest**

	Agree %	Disagree %	Don't know %	Total %
White magistrates	6	74	20	100
White assessors	19	67	15	101
African assessors	71	17	12	100
Coloured assessors	42	41	18	101
White public	43	43	15	101
African public	76	17	7	100
Coloured public	70	17	13	100

Some rows do not add to 100 per cent due to rounding off. Coloured includes Indian.  
Source: Q11.

**Table 6.13: On the whole the police are hostile and aggressive**

	Agree %	Disagree %	Don't know %	Total %
White magistrates	6	69	25	100
White assessors	4	78	19	101
African assessors	43	45	12	100
Coloured assessors	51	39	10	100
White public	30	54	17	101
African public	72	20	8	100
Coloured public	64	27	10	101

Some rows do not add to 100 per cent due to rounding off. Coloured includes Indian.  
Source: Q17.

Race makes little difference to respondents' overall assessment of the performance of the police, however – just as position made little difference, as we saw above. Even among African members of the public, who were most critical of the dishonesty, hostility and aggression of the police, the mean overall assessment of the police was positive. Among all sections of our sample, a majority of people thought that the police were doing a good job, despite their honesty, hostility and aggression.

## Race, institutional position and attitudes

To what extent are the attitudes reported on in this chapter related to the race of the people concerned, and to what extent are they related to their institutional position, i. e. whether they are magistrates, assessors or members of the public?

Tables 6.5 to 6.8 and 6.11 to 6.13 suggest that, in general, both race and institutional position are important in determining attitudes. Tables 6.5 and 6.6 point to the importance of institutional position: magistrates' views differed from assessors' (for the most part), which in turn differed from those of members of the public. There were some variations by race within each institutional group, but these were relatively minor. Table 6.7 suggests that race combined with institutional position is important with respect to magistrates' reputed understanding of ordinary people: the only groups who felt that magistrates did understand the problems of ordinary people were white magistrates and assessors; coloured and African assessors and members of the public disputed this; but white members of the public agreed with our coloured and African respondents. The same pattern is evident in Table 6.8. Tables 6.12 and 6.13 show a similar combination of race and institutional position. White respondents were the most favourably disposed towards the police, but within each racial category there were systematic differences between magistrates, assessors and members of the public (with perceptions of the police deteriorating in that order).

Table 6.11 is anomalous in that the views of members of the public lie in between those of magistrates and those of assessors. In other words, assessors' views are in no way a compromise between the views of members of the public and magistrates. On this question there are no clear racial differences. One explanation of this, as we saw above, is that assessors understand their role as representing or defending the interests of the 'community' in some way; assessors would then be expected to be especially committed to the protection of the community, even at the possible expense of the rights of individual accused.

The implication of this is that the involvement of lay people in courts is likely to have an effect on judicial practice both because they are lay people and because many of them are African and coloured (whereas most magistrates are white).

Insofar as assessors' attitudes are, at least in part, related to their institutional position, then we might expect that attitudes will vary according to the length or depth of each assessor's experience as an assessor in court. Assessors who have a lot of experience might be expected to have attitudes far

closer to those of the magistrates, whereas novice assessors might be expected to have attitudes closer to those of members of the public. We sought to examine this proposition. Unfortunately, the only available proxy for 'experience' in our survey was the date of appointment. This is a poor proxy, as it makes no allowance for the frequency with which assessors have actually served. As we have seen, there is great variation in the frequency of service. It is possible that an assessor appointed in 1996 might have served full-time and accumulated much more experience in court than an assessor appointed in 1995 who only served irregularly and infrequently. It is important to keep this caveat in mind when we examine Tables 6.14 and 6.15, which contrast the attitudes of assessors appointed at different times.

**Table 6.14: It is more important to ensure the protection of the community than to protect the rights of the individual accused person**

	Appointed		
	before end 1994 %	in 1995 %	in 1996 or 1997 %
Agree or agree strongly	91	80	77
Disagree or disagree strongly	9	16	23
Don't know	0	5	0
Total	100	101	100

Note: The sample of assessors appointed before the end of 1994 is small. Some columns do not add to 100 per cent because of rounding off.

Source: Q9.

Table 6.14 shows that there is some correlation between the length of service as an assessor and responses to this question: the longer the assessor's service, the higher the probability that they will prioritise the protection of the community over the protection of the rights of the accused. If we compare this with Table 6.10, we see that the longer the service as an assessor, the *more* likely it is that an assessor's views will differ with those of magistrates. This undermines the hypothesis that service will bring assessors' views closer to those of magistrates, at least with regard to this question. It is consistent with the alternative hypothesis, raised above, that assessors see their roles as protecting the community: the longer they serve as assessors, the more likely they are to see themselves playing this role.

Table 6.15 provides a similar breakdown of responses to our Q12, 'There would be less crime if our laws were stricter'. The responses for assessors ap-

pointed before the end of 1994 and those appointed in 1995 are very similar, so these are combined into one category. The 'agree' and 'agree strongly' responses are separated out.

**Table 6.15: There would be less crime if our laws were stricter.**

	Appointed before end 1995 %	Appointed in 1996 or 1997 %
Agree strongly	42	62
Agree	41	26
Disagree or disagree strongly	13	10
Don't know	3	2
Total	99	100

Some columns do not add to 100 per cent because of rounding off.  
Source: Q12.

This is one question on which there are some differences between recently-appointed assessors and those appointed longer ago. The recent appointees are much more emphatic that there would be less crime if the laws were stricter. Their views are very close to those of members of the public. Assessors with longer service are less emphatic – and their views are closer to those of magistrates. It seems that this is one topic on which service in court may moderate people's views, or at least lead them to believe that the solution to crime lies elsewhere.

On most questions, however, we found only no significant correlation between length of service and attitude. Assessors did not seem to differ much in their assessment of the performance of the courts or of the police according to their length of service. Serving as a lay assessor did not seem to result in any visible convergence of views between them and magistrates.

One exception to this is shown in Table 6.16, which presents assessors' responses to our Q30, 'Do magistrates understand the community well?' There is a strong correlation between length of service as an assessor and views on whether magistrates understand the community well. The longer an assessor had served, the more likely that he or she considers that only some or no magistrates understand the community well. It is newly-appointed assessors who are the most generous to magistrates in this regard! This seems to underscore the point made above with reference to Table 6.14: the longer an assessor serves, the more likely it is that the assessor emphasises the difference between him or her and the magistrate in understanding the community.

**Table 6.16: Do magistrates understand the community well?**

	Appointed		
	before end 1994 %	in 1995 %	in 1996 or 1997 %
All/most	10	20	30
Some/none	90	74	63
Don't know	0	6	8
Total	100	100	101

Note: The sample of assessors appointed before the end of 1994 is small. Some columns do not add to 100 per cent because of rounding off. Source: Q30.

Can we make sense of these findings? The data is consistent with the following overall interpretation, which seems plausible: assessors' views on their importance in representing and defending the community are solidified the longer they serve in court; their views on the the police change little, as these are determined primarily by the performance of the police on the streets; their views on the efficacy of reducing crime through stricter laws are moderated, as they begin to recognise the real dilemmas facing judicial officers in the courtroom. Our findings, however, are very tentative. Further research is clearly needed, using both a better indicator of assessors' experience and a wider range of questions on attitudes to the courts, law and crime.

### Attitudes to lay assessors

In previous chapters we have examined the attitudes towards lay assessors of magistrates and assessors themselves, using qualitative and quantitative data. Our questionnaire survey also provides us with crude data on public perceptions of assessors, and enables us to examine any correlations between attitudes to assessors and attitudes on other aspects of the courts.

The responses of members of the public to our questions and statements about assessors were generally positive, as we can see in Tables 6.17, 6.18 and 6.19. Sixty-three per cent of the public say that it is good to have members of the public hearing cases with magistrates. Only eight per cent say that it is bad, with 29 per cent saying they don't know or not answering the question. Thus eight times as many of our public respondents thought that it was good than thought it was bad. There is clear public support for the principle of public participation in the courts. Approval of public participation was more emphatic among African and white people than among our coloured

respondents. The ratio of respondents who thought public participation was good to those who said it was bad was almost 14:1 among African respondents, almost 10:1 among white respondents, but less than 5:1 among coloureds.

**Table 6.17: Views of the public on: 'Is it good or bad to have members of the public hearing cases with magistrates?'**

	%
Good	63
Bad	8
Don't know/other/no answer	29
Total	100

The perceived benefits of lay participation are examined in Table 6.18, where the views of members of the public are contrasted with those of magistrates and assessors.

**Table 6.18: Views on possible benefits of having lay assessors in court**

	Magistrates %	Assessors %	Public %
<i>Improved public perceptions of the court</i>			
- Agree strongly/agree	51	88	53
- Disagree strongly/disagree	23	2	9
- Don't know	26	6	33
- No answer	0	4	4
Total	100	100	99
<i>More likely to come to the correct decision</i>			
- Agree strongly/agree	23	88	55
- Disagree strongly/disagree	64	5	10
- Don't know	13	5	31
- No answer	0	2	4
Total	100	100	100
<i>Understand the community better</i>			
- Agree strongly/agree	60	91	57
- Disagree strongly/disagree	28	4	9
- Don't know	13	5	30
- No answer	0	1	4
Total	101	101	100

Some columns do not add to 100 per cent due to rounding off.

Sources: Q23-25.

As we saw in Chapter 4, magistrates are weakly positive about assessors. About one half thought that having assessors would improve public perceptions of the courts, and that they would help the court (i. e. magistrates) understand better the community. But about one quarter disagreed with these propositions. Most magistrates disagreed that having assessors would make it more likely that the court would come to the correct decision. In short, magistrates saw the value of assessors more in terms of improving legitimacy than justice itself. Assessors, unsurprisingly, were much more positive about themselves, agreeing overwhelmingly that having assessors would improve public perceptions, the courts' understanding of the community and the quality of justice. The public were also very supportive, with little disagreement – but a high proportion were unsure, replying that they did not know to each of the questions. Among assessors and the public the differences between the three questions were negligible.

We also asked all of our respondents to evaluate the performance of assessors. Assessors were overwhelmingly positive, magistrates divided (with twice as many positive as negative), and the public mostly positive or uncertain (see Table 6.19).

**Table 6.19: 'On the whole, lay assessors do a good job'**

	Magistrates %	Assessors %	Public %
Agree strongly/agree	49	82	45
Disagree strongly/disagree	26	2	9
Don't know	26	14	42
No answer	0	2	4
Total	101	100	100

Some column totals do not add to 100 per cent due to rounding.

Source: Q26.

Chapter 4 shows that magistrates express strong criticisms of the lay assessor system in general, but are often positive (albeit grudgingly, sometimes) in their evaluation of the individual assessors with whom they have worked. Table 6.19 provides some support for this pattern: almost twice as many magistrates agreed that assessors were doing a good job as disagreed with this statement.

The data presented in the previous three tables is for all of our respondents – regardless of whether they had any prior knowledge or personal experience of assessors. We assume that all of the magistrates and assessors interviewed

had prior knowledge of the assessor system, and (as we have seen in previous chapters) most of them had some personal experience (i. e. working as or with assessors in court). Among the public respondents, however, only a minority had prior knowledge or experience with lay assessors (as we saw in Chapter 3). Knowledge of assessors varied little by race, but did vary by province: it was highest in the Western Cape and Mpumalanga, and lowest in Gauteng.

Do public attitudes vary according to prior knowledge or experience of assessors? On the question, 'Is it good or bad to have members of the public hearing cases with magistrates?', there were no differences at all between the responses of people with prior knowledge or experience of assessors and those without. As Tables 6.20 and 6.21 show, however, prior knowledge or experience of assessors does seem to correlate with an even more positive assessment of the benefits of having assessors. Members of the public who have no prior knowledge or experience of assessors are hardly competent to assess the performance of assessors, and their answers to questions about the possible benefits of having assessors should be seen as speculation (or anticipation) rather than observation.

**Table 6.20: Views on possible benefits of having lay assessors in court**

	Prior knowledge of lay assessors?		
	Yes %	No %	All %
Improved public perceptions of the court			
- Agree strongly/agree	65	47	53
- Disagree strongly/disagree	15	7	9
- Don't know / no answer	20	46	37
Total	100	100	99
More likely to come to the correct decision			
- Agree strongly/agree	67	48	55
- Disagree strongly/disagree	12	9	10
- Don't know / no answer	21	43	35
Total	100	100	100
Understand the community better			
- Agree strongly/agree	69	49	57
- Disagree strongly/disagree	14	7	9
- Don't know / No answer	17	43	34
Total	100	101	100

Some columns do not add to 100 per cent due to rounding off.

Source: Q23-25 ('prior knowledge' includes respondents who had seen and/or heard of lay assessors prior to the interview; the 'all' column includes also respondents who did not answer the prior knowledge questions).

**Table 6.21: 'On the whole, lay assessors do a good job'**

	Prior knowledge of lay assessors?		
	Yes %	No %	All %
Agree strongly/agree	57	37	45
Disagree strongly/disagree	14	6	9
Don't know / no answer	30	57	46
Total	101	100	100

Some columns do not add to 100 per cent due to rounding off.

Source: Q26 (see note to Table 6.20).

The views of the public vary between provinces on some questions about assessors, but not on others. Table 6.22 shows that Gauteng recorded a much higher proportion of positive responses to the question 'Is it good or bad to have members of the public hearing cases with magistrates?', with the Western Cape recording a slightly higher proportion than the remaining two provinces. When we analyse the responses of just those members of the public who claimed prior knowledge of lay assessors (claiming to having either seen them in court or hearing about them), all four provinces recorded higher positive response rates, but Gauteng again recorded the highest positive response rate (at 97 per cent) (this is not shown in Table 6.22). With respect to the other questions we asked about lay participation, however, the positive response rates did not differ much between the provinces (see Tables 6.23 and 6.24). Looking at these three tables together, it is just the one result from Gauteng that differs markedly from the general pattern. We have no explanation for why in Gauteng the positive response rate to the first question was so much higher than the positive response rates to the other two questions.

**Table 6.22: Is it good or bad to have members of the public hearing cases with magistrates?**

	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %
Good	60	41	87	51
Bad	13	5	3	10
Don't know / no answer	26	55	10	39
Total	99	100	100	100

Note: Some columns do not add to 100 per cent due to rounding off.

**Table 6.23: Lay assessors make it more likely that the court will come to the correct decision**

	W. Cape %	N. Cape %	Gauteng%	Mpumalanga %
Agree strongly / agree	63	49	56	51
Disagree strongly / disagree	11	12	6	10
Don't know / no answer	26	40	37	39
Total	100	101	99	100

Note: This table excludes respondents who did not answer this question at all. Some columns do not add to 100 per cent due to rounding off.

Source: Q24.

**Table 6.24: With lay assessors the court understands the community better**

	W. Cape %	N. Cape %	Gauteng%	Mpumalanga %
Agree strongly/agree	64	54	56	55
Disagree strongly / disagree	12	7	5	15
Don't know / no answer	24	39	38	31
Total	100	100	99	101

Note: This table excludes respondents who did not answer this question at all. Some columns do not add to 100 per cent due to rounding off.

Source: Q25.

We also found that there were no significant differences by race to Q24 and Q25. White, coloured and African members of the public all responded in the same proportions: about 60 per cent agreed that the presence of lay assessors would make it more likely that the court would come to the right decision, and that the court would understand the community better; about 10 per cent disagreed, and about 30 per cent did not know. This finding sits uneasily with the finding we reported above, that much higher proportions of African and white members of the public believed that it is good to have members of the public hearing cases with magistrates than was the case with coloured members of the public.

Notwithstanding these odd results, a reasonably coherent picture is emerging: members of the public are not as positive about lay participation as lay assessors themselves, which is hardly surprising, but most are positive, and most of those who are not positive say they don't know. Only a small minority of members of the public are opposed to lay participation, or do not agree that it would improve the understanding and justice of court decisions.

Magistrates' opposition to lay participation is not shared by the public. Support is much higher among those members of the public who had prior knowledge of the lay assessor system.

Our data allows us to test some more hypotheses concerning attitudes. Do evaluations of the prospective benefits of lay assessors vary according to perceptions of the courts and magistrates? We might expect any of the following to be true:

1. People are more likely to think that assessors will improve public perceptions of the courts if they think that the community has a poor view of the courts at present.
2. People are more likely to think that assessors will improve the quality of justice if they think that the courts and magistrates at present do not dispense justice.
3. People are more likely to think that assessors will improve the courts' understanding of the community if they think that magistrates understand the community poorly.
4. People are more likely to regard public participation in the courts as a good thing if they are critical of magistrates and the courts at present.

Our survey fails to support any of these hypotheses: there are no significant correlations among either assessors or members of the public between evaluations of the courts and magistrates now and expectations of the benefits to stem from having assessors.

### Further research

Our research has only begun to scrape the surface of the relationship between the attitudes of members of the court (whether magistrates or assessors), those of the public, and the administration of justice. As the lay assessor system is introduced further, we recommend that research continue. It is important to understand, for example, whether and how attitudes towards the severity of different crimes vary, and how attitudes towards sentencing vary.

## Conclusions and recommendations

We suggested at the beginning of this report that the introduction of lay assessors in the magistrates' courts is one of a small number of truly significant changes to the South African court system in this century. Our research suggests that it is a change that may enhance the administration of justice. Obviously, however, this kind of change is unlikely to occur entirely smoothly. Our research has identified a range of problems that need to be addressed if the system is to work efficiently and to succeed in its goals. This chapter draws some conclusions from the research, summarises the problems that we identified, and recommends ways in which they might be resolved.

### Why have lay assessors?

The introduction of lay assessors has not been accompanied by any clarity as to precisely what is the purpose of their introduction. Since 1991 an extraordinary range of reasons have been given for introducing assessors, with still more reasons why assessors might be a good thing. This lack of clarity bedevils the whole lay assessor system. Different players – including the Department of Justice itself, magistrates, assessors, District Assessor Committees and so on – have different understanding of the objectives in introducing assessors. This all too easily leads to them acting at cross-purposes. Acting on their varied understandings, the different players make key decisions regarding the overall regulation and the actual administration of the system, the recruitment of assessors, the exercise of magisterial discretion over when to use assessors (in terms of both cases and stages of court proceedings), the allocation of assessors to cases, and the use and conduct of assessors in court.

The diversity of reasons for having lay assessors is indicated in previous chapters. In Chapter 2 (pp. 18-20) we saw that, when introducing the Magistrates' Courts Amendment Bill to Parliament in 1991, the then National Party government located the introduction of assessors in the context of the courts' supposed legitimacy crisis. Justice must be seen to be done, it was argued, and this required that the racial composition of the bench be transformed, which could most easily be done through the appointment of assessors who were

representative of the 'community' (by which was generally meant the black part of the population). This vision was shared by the ANC government that took over in 1994. But the Bill itself implied that the reason for introducing lay assessors was to enhance the quality of justice, i. e. to ensure that justice was done. This reading of the Bill was emphasised in the briefing paper prepared at Justice College (see Chapter 3, pp. 37-8 and Chapter 4 pp.76-81), which does not even mention legitimacy. In this view, the value of lay assessors was not the legitimacy they brought to the court, but rather the knowledge they brought, especially pertaining to the cultural and social background of the accused (as indicated in section 93ter (2) (a) (v) of the amended Magistrates' Courts Act).

The different visions of politicians and judicial officers might be seen as an appropriate division of responsibility: the former more concerned about the legitimacy of the courts, the latter more concerned with the quality of justice. Even if this were to be true, the cost of the resulting uncertainty was very high indeed – because the two visions had very different implications for how the lay assessor system would operate in practice. In the second vision, lay assessors would provide assistance to magistrates; the relationship would inevitably be an unequal one, with magistrates exercising a high degree of discretion over when and who to use as assessors, according to their own interpretation of the merits of each individual case and their assessment of the particular qualifications of prospective assessors. In the first vision, by contrast, public perceptions of the courts would presumably be improved most if the relationship between magistrates and assessors was one of partnership and if assessors were representative of the hitherto excluded parts of the citizenry. This would surely entail limiting or even removing magistrates' discretionary powers.

To further complicate this picture, other understandings of the value of lay assessors were put forward in the early 1990s. In Nelspruit, where the general use of lay assessors was pioneered, assessors were seen as enhancing both legitimacy and the administration of justice. In other courts around Nelspruit, assessors were introduced in part because of a fear that the alternative – juries – would be even worse. Meanwhile the National Association of Democratic Lawyers (NADEL) advocated lay participation on democratic grounds, with the changed racial profile of the bench and resulting legitimacy being by-products of democratisation.

When the ANC took control of the Department of Justice in 1994, the lay assessor system was renewed. The ANC Minister generally emphasised the same arguments about legitimacy as had his NP predecessor, but the meaning

of these changed slightly. Prior to 1994, the official view seems to have been that the courts faced a legitimacy crisis, but one that was due merely to the racial composition of the bench and not to the quality of justice itself. In this view, the racial composition of the bench did not have real, detrimental effects on the quality of justice. From 1994, however, the legitimacy crisis was understood in a different way. The racial composition of the bench was understood as having direct consequences for the quality of justice: white magistrates were prone to implement what might be called 'white man's justice'. The strongest statement of this view was put forward by the then advisor to Dullah Omar (the ANC Minister of Justice): Assessors, he said, should serve as watchdogs over prejudiced magistrates. 'Assessors must ensure that accused persons receive fair trials and that justice is dispensed in an impartial manner. . . . Assessors will have to monitor bias, rudeness and prejudice.' (see Chapter 3 pp.48-9). Unsurprisingly, this argument did not go down well with magistrates. Nor did the consequent policy implication that the use of assessors should be compulsory.

Since 1995 the Department of Justice has retreated from its initial radicalism. Contributing factors in this probably included magisterial opposition, cost, and the shift in official concern from supposed discrimination (whether intended or unwitting) in the courts to the efficiency of the courts in the 'fight' against crime – this shift probably a response to public concern. The draft legislation distributed by the Co-ordinating Committee of the lay assessor system in late 1995 proposed the compulsory use of two lay assessors in a very wide range of cases in the lower and higher courts. The actual Magistrates' Courts Amendment Bill tabled in Parliament in 1998 proposed that the compulsory use of assessors be limited to a very narrow range of cases in the lower courts, and not at all in the higher courts.

Magistrates (correctly) tend to attribute the introduction of lay assessors to political factors, i. e. to the political need for increased community participation in the courts. Few magistrates believe that assessors do in fact contribute to the quality of justice. As one said: 'Assessors don't improve the actual administration of justice. . . . It's more of a perception thing'. Insofar as assessors do have any value in court, according to most magistrates, it is in assisting magistrates to understand cultures with which they are unfamiliar. This is very much in accordance with the pre-1994 interpretation of the 1991 amendments to the Magistrates' Courts Act. Most magistrates believe that these benefits are of minor importance, and are outweighed by the costs of having assessors in court, in terms of both practical problems and legal difficulties.

Magistrates profess support for lay participation in principle, but are opposed to any diminution of magisterial power in practice. For magistrates – and many other members of the legal profession – lay participation must not entail partnership. This view is generally based on a blanket privileging of legal expertise. But it seems sometimes to go hand-in-hand with very dismissive beliefs about South African citizens. Juries and assessor-dominated mixed benches may have a role to play in the administration of justice in the supposedly sophisticated and unprejudiced societies of Europe and North America, but not in South Africa – presumably because South African citizens are not sufficiently sophisticated and are too prejudiced. South African citizens may be permitted to vote, but should not be allowed to exercise decision-making powers in the courts.<sup>44</sup>

Assessors themselves, unsurprisingly, say that their presence enhances the quality of justice. Table 6. 18 (p. 146) shows the gulf between magistrates' and assessors' views on this. Whereas 64 per cent of magistrates disagreed or disagreed strongly with the statement that the presence of assessors makes it more likely that the court will come to the correct decision, 88 per cent of assessors agreed or agreed strongly with this statement. Table 6. 18 points to a further important contrast between magistrates and assessors. Assessors say that their presence enables the court to understand better the 'community' and to come to better decisions. It seems that assessors believe that a better understanding of the community contributes to a high quality of justice. A clear majority of magistrates agree that the presence of assessors helps the court to understand better the community, but imply that this is largely irrelevant to the quality of justice. Magistrates and assessors operate with different conceptions of justice, with assessors attaching more value than magistrates to the importance of understanding the community. As one assessor put it, 'better decisions are made as legal knowledge is now paired with community knowledge' (see p. 131).

Whilst assessors value their participation in court because they have knowledge the magistrate lacks, most are also deferential to magistrates' knowledge of the law and respectful of magistrates as individuals and as office-holders. A few of the assessors we interviewed described their role as that of a watchdog – but meant that they would ensure that the interests of the community were looked after through convicting criminals, not that they would ensure that the accused got a fair trial despite the prejudices of magistrates as Omar's advisor had meant in 1995. Most assessors said that their role was to assist the magistrates. Only a small minority said that the relationship between magistrates and assessors should be a partnership. The relationship

is certainly not seen as adversarial. Thus, whilst almost all assessors say that magistrates should be compelled to use lay assessors in all cases (except very minor cases) (see Chapter 5, p. 135), few say that they have been unable ever to reach agreement with magistrates over judgments or sentencing. The ideology of professionalism that characterises South Africa's legal profession rubs off on lay people too.

None of the assessors we interviewed articulated a clear motivation for lay assessors on democratic grounds. In South Africa there is no discourse of democracy with respect to the courts that assessors can draw on; struggles for democracy in South Africa did not include struggles for control of state courts. None of the assessors we spoke to seemed to have much knowledge of lay participation in courts elsewhere in the world, where lay participation in the courts has often been an integral part of the democratic tradition. In the absence of any such democratic discourse, it is perhaps inevitable that the lay assessor system would be seen in instrumental terms, and in terms of reform rather than transformation.

Members of the public express strong support for the participation on the bench of members of the public. As we saw in Chapter 6, members of the public say that the presence of lay assessors would lead to a better understanding of the community, better decisions, and improved public perceptions of the courts (see Tables 6.17 and 6.18). Support is much higher among members of the public who knew about assessors or had seen them in court prior to our survey.

Our research is unable to reveal whether assessors *do* improve public perceptions of the courts or the quality of justice or the courts' understanding of the 'community'. We do not have any objective measures to test these. (If assessors were to be used more widely it would be possible to do a more systematic study of how courts with and without assessors vary in their treatment of similar cases.) What our research does allow us to do is to delineate the different *interpretations* of the purposes (or potential) of using of lay assessors. The interpretations discussed above can be divided into the following categories, which we introduced in Chapter 2:

1. The use of lay assessors ensures that justice is done, i. e. lay assessor enhance the quality of decision-making. This may be because:
  - (a) Lay assessors may have knowledge that the magistrate does not have on the social context of the problem that is before them, including the social and cultural background of the accused.

- (b) Lay assessors have specialist experience or experience not shared by the magistrate, and can assist the magistrate to come to a correct decision. This is the motivation given traditionally for the use of assessors in South African courts. Thus a judge might select someone with particular experience in a certain area (such as prison violence) to assist in a case in that area.
- (c) Black assessors may prevent racial or other discrimination by white magistrates against black accused and other witnesses.
- (d) Lay assessors may implement 'justice' in cases where the formal application of the law may be deemed unjust. This could happen in what might be described as weaker and stronger ways. A weak version would occur when law is open to different interpretations and lay assessors persuade the court to apply law in a way that is perceived to be more just. A stronger version occurs when decisions fly in the face of law. In the United States, in the context of juries, this is referred to as jury nullification of the law. A famous British example was the Potter and Randle case in 1991 (see p. 30). In South Africa, magistrates' monopoly over matters of law and the fact that assessors are members of the court and not part of an independent jury might forestall such nullification of the law by lay people.

2. The use of black assessors may ensure that justice is seen to be done; this is because the legitimacy of the courts depends on the bench being representative, in racial terms, of the population.
3. The participation of citizens as lay assessors may help to democratise the courts and society more generally.

The 1998 Magistrates' Courts Amendment Bill does little to clarify the relative importance of these. The 'Memorandum on the Objects of the . . . Bill' includes the following:

It is important to ensure that the administration of justice remains in touch with actual community experiences, and to reduce the risk of formal justice losing touch with reality.

This is ambiguous, perhaps falling into category (2) above, or perhaps into category (1) (d).

The importance of this lies in the implications of the different interpretations for how and when assessors are used in court. The appropriateness of many aspects of the lay assessor system depend on the objective. Moreover, if any player is to exercise discretion in important aspects of the use of assessors

– most obviously, if magistrates are empowered to exercise discretion over when to use assessors, and who to use – then it is imperative that clear criteria exist to guide decision-making. Such criteria require clarity as to the objective of the system.

The different interpretations of the purposes of having lay assessors lead to very different kinds of lay assessor system. If the purpose is to bring specialist knowledge into court so as to assist magistrates – as magistrates themselves understand – then the use of assessors may be limited, with magistrates themselves controlling the allocation of assessors to cases and the administration of the system in general. In this view, assessors should not be empowered to override a magistrate; their presence or absence in court should not affect the continuation of proceedings; and in court they should be required to ask questions through the magistrate. The Magistrates' Courts Act as it exists at present accommodates this kind of system. If, on the other hand, the purpose is to transform the courts, either because the courts need to be legitimated through changing their racial profile (for which the evidence is far from conclusive) or because magistrates cannot be relied upon to administer justice (as in either motivations 1 (d) or 3 above), then a very different kind of system is warranted. In this view: the selection, administration and allocation of assessors would be kept outside of magistrates' control; assessors would be selected from the population as a whole (or at least respected members thereof), and allocated according to a roster or random process and not according to the particular details of individual cases; the use of assessors would be compulsory (at least for many categories of case); assessors would be empowered to overrule magistrates, and they would not be subordinate to magistrates in terms of their participation in court.

Given magistrates' opposition to the second kind of system, unless legislation provides clearly for this kind of system it will not be implemented. If there is any ambiguity in the legislation or regulations, the use of lay assessors in practice will lapse into the former system. The Department of Justice at present seems to be undecided as to which kind of system it envisages. But, the 1998 Bill allows magistrates considerable discretionary powers without clear directions as to how to exercise this, and thus will almost inevitably lead to the first kind of system in practice.

The choice between competing interpretations of the purpose of lay assessors is, ultimately, a political one. It is up to the legislature, in response to the electorate, to determine what kind of legal system should exist. Determining the overall structure of the system in no way impinges upon the independence

of the judiciary from the executive. But some of the findings of our research are relevant to the choice to be made by the legislature.

Firstly, arguments that black assessors should be used so as to legitimate the courts are not robust. As we saw in Chapters 2 and 6, the evidence on the legitimacy of the courts is far more complex than captured in crude renditions of the 'legitimacy crisis'. Furthermore, the public seem to be more concerned with the efficacy of the criminal justice system than with any residual racial discrimination or prejudice. Indeed, there is some irony in that these allegedly prejudiced magistrates now represent themselves as protecting the accused against the more vindictive inclinations of lay people.

Secondly, arguments about the importance of *lay* participation are far more robust. In courts that are otherwise dominated by legal professionals, arguments 1 (d) and 3 above are important. These arguments support the use of lay assessors as part of a transformation of the courts. In so doing, as we shall see further below, a series of difficult questions are raised about the law and its application. Argument 1 (b) above also falls into this category, although its implications are less far-reaching, as they could be accommodated within a court system that continues to be controlled by professional magistrates.

## **Administration**

How should the system of lay assessors be administered? What kind of a regulatory framework is required? Who should select assessors and allocate them to cases? What criteria should be used to select assessors? What should be covered in a code of conduct for assessors? Is the cost of using assessors prohibitive? In this section we examine the implications of our research for these and related questions.

### ***Providing a framework***

At present the lay assessor system in district magistrates' courts operates within a minimalist framework provided by the Magistrates' Courts Act. As we point out in Chapter 3, the Act permits the use of assessors and specifies aspects of proceedings in which they may participate. Matters such as the selection of assessors and their allocation to cases are left entirely to the discretion of magistrates.

Legislative authority is obviously necessary for lay assessors but legislation need not be restricted to the sparse approach of the Magistrates' Courts Act. Various other options are possible: the Act could give the Magistrates' Commission the responsibility for developing and managing the system; it could it-

self contain greater detail about the operation of the system (for example by prescribing the way in which lay assessors should be selected and allocated to cases); or it could give the executive (in practice the Minister of Justice) the power to regulate the system.

If the goal of the lay assessor system is to offset magisterial power (or to enhance the legitimacy of the courts), then the regulation of a lay assessor system and particularly the selection of lay assessors and their allocation to cases, cannot be left to magistrates, whether individually or through the Magistrates' Commission. This means that it should be treated in a more detailed way in the Act or the Minister should be given the power to regulate it. Because the lay assessor system is 'work in progress' and is being refined through experience, regulating it fully in an Act seems unwise. Instead, Parliament should set out the goals of a programme and its parameters and leave its administration to the executive.<sup>45</sup> But the Minister should not be given a free hand in regulating the system. For example, the Act should make it clear that lay assessors should not be hand-picked by magistrates; and the Minister should not be allowed to hand the management of the system to the Magistrates' Commission. Instead, the Act should seek to ensure that the system is regulated in such a way that the goals of involving lay people in the administration of justice are achieved and that lay assessors are independent and have credibility.

The following sections deal with the most important aspects of the system and, using the information we gathered in the course of the research, makes a number of recommendations.

### ***Who selects lay assessors?***

The existing legislation permits magistrates to select their own lay assessors, and some magistrates do so. In the extreme case of White River, magistrates used primarily two hand-picked assessors, both with professional legal qualifications, and one of whom was white. The Co-ordinating Committee promoted a system of selecting assessors that was independent, at least formally, of the magistrates. As we saw in Chapter 3, the selection would be undertaken by a District Assessors Committees, formed by representatives of community organisations. In practice, methods of selecting assessors vary widely from court to court even when there is agreement that such a committee of local people should select lay assessors. When the Co-ordinating Committee drafted in 1995 legislation and regulations to govern the use of lay assessors, it specified that assessors should be selected by a District Assessors Committee. There is no such provision in the 1998 Bill.

In our interviews we did not raise directly the question of how or by whom lay assessors should be selected. A number of magistrates acknowledged that the District Assessors Committee system worked well enough and magistrates did not assert a strong desire to appoint their own assessors. Magistrates did not object to lay assessors primarily on the grounds that the wrong kind of people were selected consistently (although there were exceptions, such as Witbank, where it seems that the wrong kind of people were selected). Lay assessors sometimes had complaints about how committees were actually working or, if a list was being managed by staff in the magistrates' court, they sometimes were sceptical about whether it was being done fairly – but not about who was being selected, or the process itself. In general, lay assessors seemed to support a system based on lay assessor committees. Overall, then, the District Assessor Committee model received support. This makes it especially puzzling that the selection of assessors is left to the discretion of magistrates in the 1998 Bill.

A lay assessor committee is also consistent with the idea of using assessors to add an element of democracy to the courts and it provides the basis for the use of lay assessors in a way that may increase the legitimacy of the courts. Permitting magistrates to select their own lay assessors clearly conflicts with these goals.

Whilst there might be general approval of the model of District Assessors Committees, there is little clarity as to who should serve on these committees. In practice, senior magistrates simply invited a range of community organisations to send representatives at a meeting, where a committee was constituted. In some areas, these groups were dominated by particular social or political groups. For example, it sometimes happened that white people dominated, and the few black committee members soon stopped attending. A variety of reasons could be given for what some white assessor committee members referred to as a 'lack of interest' on the part of black members of the committee. In some instances it seemed that the time and location of meetings was almost designed to exclude those who came from the 'other side of town'. This seems to have been the case in some committees on the East Rand. In other areas, especially in Cape Town, committees became a battleground for party political conflict. In Wynberg and Mitchell's Plain, for example, NP-aligned and ANC-aligned community leaders competed for control of the committees.

The Co-ordinating Committee referred to the composition of District Assessors Committees in the draft regulations it distributed in 1995. The draft regulations specified that the magistrate would invite 'representatives from

the community' to a meeting where a committee would be formed, subject only to the proviso that it should be 'representative of the community with regard to race and gender'.

This model seems to us to be seriously flawed. It should not be up to the magistrate to convene such a founding meeting, nor to decide who should be invited. Perhaps the only realistic way of organising a committee independently of the magistrates and at the same time counteracting charges that lay assessor committees (and, by implication, lay assessors themselves) are unrepresentative is to give the responsibility to municipal councils. Local government councillors could appoint a District Assessors Committee in each of the magisterial districts that fall within the council's boundaries (this might involve liaison with other councils if a district spans several municipal jurisdictions). The committee would not be made up of members of the council – their political affiliations would be too strong – but the council might be represented on it. The committee would then draw up a list of lay assessors and manage the system. This process would avoid the arbitrary choice of representatives of local interest groups and strengthen the democratic elements of the programme.

In metropolitan areas where the population in each magisterial district is not representative of the metropolitan area as a whole, it is probably appropriate to have on the committee people from outside the magisterial district to make the committee more representative of the broader population.

#### ***Who may serve as a lay assessor?***

Can criteria be laid down for deciding who should be selected as lay assessors? This question raises two issues: (1) should lay assessors as a group conform to any particular profile? For instance, should they reflect the profile of local or South African society in terms of age, education, race, sex and so on? And (2) are there any necessary qualifications for being a lay assessor?

There seemed to be a general consensus among assessors and magistrates that certain kinds of people should be assessors, and others not. Even though they may have disagreed over the reasons for having assessors, magistrates and assessors seem to have agreed that assessors should be respected members of the 'community', with knowledge of and understanding of the 'community', and active in the 'community'; they should not be young. Whilst there should be a range of assessors in terms of race and gender, there was no need to be representative strictly of the community in every respect. In practice, assessors are not fully representative, but neither magistrates nor assessors themselves see this as a problem. According to our research: the proportion of

Indian and coloured lay assessors is disproportionate to their share of the general population: most lay assessors are middle-aged or elderly (in three of the four provinces we studied three-quarters are over 40 years); over half were middle-class (drawn from professions, especially teaching, business or senior management), with only eight per cent being blue-collar workers.

Age is clearly considered to be an important factor. We were told on a number of occasions that lay assessors 'were not permitted to be over 70', but nonetheless found that seven per cent of the lay assessors included in our survey were over 70. A number of lay assessors commented on the absence of young lay assessors. Although many were unconcerned about this or even thought it a good thing, those concerned about the gap between the courts and the community defended the use of young people as assessors.

The ready agreement between lay assessors and magistrates does hide a problem. Like magistrates, assessors tend to be middle-class professionals. Often the only significant differences between them and the magistrates with whom they sit are their lack of legal training and their race. If the purpose of using assessors is to bring different views to the bench, a more diverse group might be desirable. Lay assessors touch on this when they object to the number of teachers amongst them but, by and large, they would be happy to have teachers replaced by other middle-class, professional people. It is a small handful of assessors who argue, for instance, that more young people should be chosen.

The question of age shows the importance of clarifying the purpose of having lay assessors. One assessor in Johannesburg, with a long history of political activism, complained that putting her on the bench as an assessor had no effect on young people. Most accused people are under 25, she asserted; when they saw her on the bench, she said, they just saw another person like the magistrate: middle-aged and conservative. She argued that young people need to see that their peers are participating in the justice system. This argument need not rely on legitimacy concerns solely. If a purpose of having lay assessors is to understand the social and cultural background of the accused (as magistrates suggest, and according to a common reading of the 1991 amendments to the Magistrates' Courts Act), then magistrates who want to go beyond racial stereotypes about culture and society should indeed use informed, young assessors to assist them in understanding the background of young accused.

Magistrates and assessors often agree that certain individual assessors were unsuitable, and District Assessors Committees often recognise that not all their choices have been ideal. There clearly need to be procedures for the

suspension or removal of assessors from service, as well as more clarity on the recusal of assessors in individual cases. Sometimes, when magistrates complain about assessors, they are not referring to the weaknesses of these individuals but rather to the alleged weaknesses of assessors in general. Such objections need to be distinguished from complaints about individuals' capacity or performance. Better communication between District Assessors Committees, magistrates and assessors themselves should enable the appropriate action to be taken expeditiously and smoothly against unsuitable assessors. We are not aware of magistrates objecting to assessors because they differ in court, i. e. they cannot agree on judgments or sentencing. It is clearly unacceptable for magistrates to object to assessors on such grounds (even if the magistrate feels that the assessor is not applying the law).

There was a high level of agreement about the minimal qualifications that assessors should have. Most assessors concurred that assessors should be sufficiently literate that they could take notes during trials, which would be needed either if a case was adjourned and resumed some time later or if the lay assessor and magistrate differed in their decision on a case and the assessor needed to provide reasons (this is especially necessary if two lay assessors sit together, as they could outvote the magistrate). Assessors did emphasise that educational qualifications should not prevent otherwise suitable and generally capable candidates from serving as lay assessors. Stipulating a literacy requirement would exclude a significant portion of the population in some areas – including many respected and active people. It is unlikely that magistrates will disagree strongly to this. Some magistrates insisted that assessors should have minimal legal qualifications – but this is an objection to the whole concept of lay participation, not a suggested qualification for lay assessors.

The lay assessors whom we interviewed agreed that 'involvement in the community' is necessary for lay assessors. In practice, assessors in some districts do not have this qualification, and these assessors are often ones who impressed neither magistrates nor us, the researchers. Community involvement is one criterion that perhaps should be stipulated in regulations made by the Minister. This is not a criterion that could be defined with precision but properly-elected District Assessor Committees should be able to apply it in a satisfactory way.

In general, the criteria governing the selection of lay assessors cannot be determined in the abstract. They need to be matched to the reasons for using lay assessors. If enhancing the legitimacy of the system and adding an element of democracy to it are the central purposes of the programme, one might de-

mand that the profile of lay assessors matched the profile of the population as a whole. If the purpose is to enhance decision-making by increasing the courts' sensitivity to the social context of cases, then assessors should be selected more purposively so as to ensure that the assessors' roll includes people with knowledge and understanding of all sectors of society (and society should not be understood in terms of race and gender only). Besides stipulating community involvement, it might be wise to leave the selection of lay assessors to District Assessors Committees, whilst providing these committees with clear guidelines as to the purpose of the system. It would then be up to these committees themselves to decide whether there should be young as well as old assessors, for instance, or whether there should be so many teachers among them.

There is one further important factor: District Assessor Committees should in general not be allowed to select themselves as assessors, or, to put it another way, any Committee member who puts him or herself forward as a candidate for selection as an assessor must first resign from the Committee. The one exception that might be made to this is if serving assessors are allowed to nominate one or more of themselves as members of the District Assessor Committee, so as to ensure that their experience is made use of.

#### ***In what cases should magistrates use lay assessors?***

The Magistrates' Courts Act at present (1) *requires* the use of lay assessors in certain cases (charges of murder in the regional court unless the accused requests that the trial proceed without an assessor), and (2) *permits* the use of lay assessors in other cases. It also specifies that lay assessors should not participate in deciding matters of law and that their role in sentencing is limited to considering 'community-based punishment' (section 93ter (3) read with section 93ter (1)).

Our research indicated a variety of problems with the present system. First, there is uncertainty as to which cases lay assessors should be used in. Different magistrates have different approaches. Many magistrates are also uncertain about whether or not lay assessors may be used in bail hearings. Secondly, there is uncertainty about the use of lay assessors in different parts of cases. For instance, many magistrates seem not know whether lay assessors should be used in sentencing or whether they should participate in section 174 applications.

There are wide variations in the reasons for deciding to use lay assessors in a case or not and in the frequency with which lay assessors are used. In Chapter 3 we described four 'models' of the use of assessors. It is only in model 1, in

which assessors sit alongside magistrates all day that assessors are used for a wide range of matters. In model 2, where assessors are available in the court buildings all day but need to be called into court for particular cases, and model 3, where assessors are called to court only if their presence is considered necessary in advance for a particular case, assessors are used in a limited number and range of cases and few stages of proceedings. In models 2 and 3, however, there does not appear to be any consistency in decisions about whether or not an assessor should be used. Magistrates claim to use a variety of criteria in deciding whether or not to use assessors (the 'culture' and background of the accused, race, the controversial nature of the case, etc). Some had a vague idea that they 'ought' to use assessors in certain situations and 'need not' in others, but there was very little certainty on the matter and the Act provides no guidance.

Although this is something one cannot quantify, our interviews suggested that those magistrates most committed to the transformation of the court system and developing the legitimacy of magistrates' courts in all sectors of the population are more likely to use lay assessors. Those more resistant to change or who believe that public opinion of the court system is not particularly relevant tend not to use lay assessors. In addition, many magistrates are concerned about the cost of using lay assessors. Sometimes this is merely a pretext for very limited use of assessors but, nevertheless, a real issue underlies the concern. Courts should have a budget for lay assessors and some related guidelines on their use. Decisions about the budgetary allocation to lay participation should be made by the Department – or even Parliament – and not by magistrates.

There is also widespread uncertainty and disagreement over when assessors should be used in terms of the stages of proceedings in court. Lay assessors do not object to their exclusion from matters of law. On the contrary, they seem ready to accept that points are matters of law on the say-so of a magistrate. They do object to being excluded from playing a full role in sentencing. The most forthright protest in this regard came from the lay assessor who complained that it was 'not fair' that they were not required to return for sentencing in a case on which they had sat. Magistrates, in turn, admit that the distinction between law and fact is sometimes difficult but are also happy to fall into the centuries-old tradition of using their power to determine whether an issue is or is not a matter of law to silence troublesome assessors.<sup>47</sup> On sentencing, magistrates are less confident. Overall, although some take the advice of assessors on all sentencing, most are uncertain as to what is the legal position.

The Magistrates' Courts Amendment Bill addresses some of these issues. It would extend the range of cases in which lay assessors are required to be used to include some cases heard in the district courts. It also stipulates that lay assessors may be used in any part of a matter, although they may not decide matters of law. Assessors may participate in all forms of sentencing, but act in an advisory capacity only. What this amendment will do is clarify the confusion surrounding sentencing and probably lead to the use of lay assessors in some bail matters. But it will not lead to greater consistency in magistrates' discretionary use of assessors.

#### ***How should lay assessors be chosen for particular cases?***

Once a magistrate decides to use an assessor in a case, or even for all the cases appearing before him or her in a particular time-period, how is an assessor identified? There are several possible answers to this question. As we noted above, the Magistrates' Courts Act read with its proposed amendments gives magistrates a free hand (indeed, they are not even obliged to use assessors from a pre-selected roll). In many districts at present, assessors are allocated, or available to be used, according to a previously prepared roster. Other methods are also possible: selection could be random, along the lines of juror selection in jury systems; or, specific individuals could be chosen for specific cases by magistrates or the District Assessors Committee. Sometimes magistrates ask for a particular 'type' of assessor. For example, a magistrate in Uppington might say 'I have a case involving Pabellelo [the African township], please give me an assessor who knows the community', or magistrates may request women assessors for cases involving women. In the range of procedures used in practice, the 'community' as a whole is seldom considered.

Is it acceptable for magistrates to specify the type of assessor required for a particular case? There are costs and benefits to allowing or not allowing such actions. For instance, if the purpose of using lay assessors is to ensure that the bench is better informed of the social context of a particular case, one might be able to specify the 'type' of lay assessors required. Lay assessors might be chosen from the locality concerned and may also be selected because they are from the same racial, language or cultural background as the accused or complainant. But this form of selection places enormous discretion in the hands of the person who selects and opens up real opportunities for the misuse of the system. If magistrates have a free hand, or specify the particular kind of assessor they need, the allocation of assessors will reflect magistrates' assumptions about the 'culture' and identity of the accused. Taking lay assessors from the very locality in which a crime is committed may also increase the

possibility of undue influence being placed on assessors. On the other hand, a totally random use of lay assessors could mean that lay assessors in particular cases are no more informed of the context of a particular case than the magistrate and, in these circumstances, lay assessors may simply reinforce the pre-conceived ideas of the magistrate. Obviously a system would have to be devised which goes as far as possible to achieving stipulated goals of a lay assessor programme without infringing on any other important principles in the administration of justice.

Assessors comment that they have a role to play in correcting interpreters. If this role is considered a valid one – and until the standard of interpreting is greatly improved there is no reason why it should not be – consideration might be given to choosing assessors who can bridge the language (as distinct from 'culture') gap between accused, complainant and court.

### ***Magistrates and lay assessors – negotiating a relationship***

The relationship between magistrates and lay assessors, both in relation to the operation of the system as a whole and in relation to individual magistrates and lay assessors who work together, is often difficult. It is therefore important for the relationship to be well-defined, with clear and appropriate mechanisms for raising concerns and ironing out difficulties.

If a District Assessors Committee is to fulfil some or all of the functions that we suggest (including, most importantly, selecting lay assessors and placing them in courts), it is essential that a good relationship exists between the committee and the court. Many difficulties can arise – some mundane, others more serious. In our research, magistrates complained about unsuitable or unreliable lay assessors; lay assessors complained about being misused (for instance by being required to wait at court for hours only to be used for a short time or not at all (see p. 137)). As with many of the difficulties raised in the course of the research, magistrates and assessors often found their own solutions but this could be done only with good channels of communication between them.

It may be appropriate for regulations to require each court and lay assessor committee to establish a forum in which lay assessors, magistrates and the District Assessors Committee come together regularly to discuss common problems and grievances.

### ***Code of Conduct for lay assessors***

A draft code of conduct was prepared soon after the pilot project of the lay assessor system was introduced in Cape Town, and was revised and then distributed countrywide along with draft legislation and regulations in late 1995. The purpose of the code of conduct was to provide guidelines on how assessors should behave, and especially how they should approach issues which raise ethical problems. The draft code of conduct, for example, included provisions prohibiting lay assessors from sitting as an assessor in any situation in which a conflict of interest might arise. The need for a code is clear. The system is still evolving and many assessors are unsure of what it involves or what is expected of them as assessors. In addition, a code will give lay assessor committees a standard against which to assess assessors when problems arise. The draft code of conduct distributed in 1995 did not go far enough, however; a much fuller code, or set of guidelines, needs to be prepared. This would specify in more detail the kinds of circumstances in which an assessor should recuse him or herself from a case. It should also specify in more detail what is expected of assessors in court (and in magistrates' chambers, when discussing the court's decisions) in terms of how assessors should participate and what is expected of them. A fuller code of conduct needs to be drafted in liaison with preparation of appropriate education and training (see below).

### ***Costs***

The cost of the lay assessor programme is a question frequently raised by magistrates and lawyers. It is rumoured that the expense could fund as many as 700 prosecutors. Lawyers tend to raise the question: would the money not be better spent on funding the public defence system?

We have been unable to determine what the lay assessor system costs at present, nor have we seen any reasoned calculations from the Department of Justice as to the likely costs of extending the system (whether merely along the limited lines proposed in the 1998 Bill, or more fully, as was previously proposed). Individual magistrates appear not to know how the budget works for the use of lay assessors in their court. Some take it that they can use lay assessors as often as they wish. These magistrates tend to be based in larger courts. Because only a minority of magistrates use lay assessors under the new programme this means that there is probably a largish budget being drawn on by a limited number of magistrates. In a couple of cases we heard that magistrates were restricted in their use of assessors because of its cost. In a northern Cape

court we were told that the budget had run out. In another court we heard that assessors were only available on certain days because of the budget.

The South African Institute of Race Relations estimates that the total cost of assessors in the system as proposed in the 1998 Bill would amount to about R16 million annually – which certainly does not cover the cost of seven hundred prosecutors! In commenting on this (Chapter 4, p. 87) we estimate that the total cost of using two assessors in every single ‘judicial and quasi-judicial matter’ to be dealt with by district and regional court magistrates would be about R40 million annually. The total Department of Justice budget for 1998-99 is R2 118m, of which R1 067m is spent on the administration of justice in the lower courts.<sup>47</sup> Almost all of this latter figure is spent on personnel (magistrates and administrative staff). Expenditure of R40m would amount to a 4 per cent increase in the lower courts’ budget, whilst the amount of R16m would amount to a 1.5 per cent increase.

Whilst the costs of using lay assessors on a large scale are small in comparison to the overall cost of the administration of justice in the lower courts, it is necessary to consider the relative importance of this expenditure in terms of overall priorities in the administration of justice. Greater clarity about the goals of the lay assessor programme would facilitate public debate and official decision-making over priorities.

If, however, cost does drive policy-making in the Department of Justice, then there is a strong argument for the transfer of decision-making powers and responsibilities in a range of matters from professional magistrates (who are expensive) to lay assessors (who are not), sitting alone. Traffic offences, for example, are one category of case in which jurisdiction might be transferred to lay magistrates. Without detailed figures as to the numbers of cases and the time spent on them we cannot be certain, but we suspect that the transfer of a small range of cases from professional to lay magistrates would result in savings that could finance the general use of lay assessors in a very wide range of more serious cases.

### **Education and training**

Lay assessors have been introduced into the lower courts with minimal education or training for anyone involved. None of the players involved – i. e. magistrates, assessors, prosecutors or members of the public – have been prepared for the participation of lay assessors. This may have been appropriate in the initial, experimental stages of the system. But after several years of practice

it is necessary to consider seriously whether, and what kind of, education and training is needed.

### ***Training for lay assessors***

Most magistrates and lay assessors agree that some kind of training is required if assessors are to perform their roles adequately. Many magistrates told us that basic training should be provided for lay assessors. Some magistrates attempted to do this themselves, giving lay assessors an informal and brief introduction to criminal court procedure before they start on the bench. Other magistrates, in a handful of courts, organised a more formal, albeit still limited, programme of lectures for lay assessors. One or two magistrates required lay assessors to sit in court for a few days to learn the ropes before they acted as assessors. More recently, Justice College and the Department of Justice have provided training to some lay assessors. But most lay assessors have to learn on the job. Magistrates are uncertain of the appropriate extent of training; many recognise that too much training would defeat the purpose of introducing a lay element to the bench. Lay assessors, for their part, agreed that some form of training is necessary but disagreed about what that training should be. As we show in Chapter 5, some assessors wanted a full legal education, whilst others were wary lest it undermine their function as lay participants in the courts. What assessors have in common is a concern that they should be prepared sufficiently so as to participate fully in court (whether as assistants to the magistrate, as many believe, or as partners, as some say).

Our survey suggests three reasons why education and training is required. Firstly, basic instruction on court proceedings and the role of a lay assessor is required. Without this lay assessors may have no idea of what is happening in court. Indeed, it might not be clear at first to non-lawyers who are the key players in court (i. e. prosecutor, defence counsel, accused and witnesses) or what their respective roles are. In addition, the process of a trial – and deviations from the usual procedure – are difficult to follow. Basic training is necessary for the lay assessor to be able to participate in an informed way.

Secondly, section 93ter (3)(e) of the Magistrates’ Courts Act requires the court to give reasons for its decision in all cases. This means that if two lay assessors overrule a magistrate they must provide the reasons for decision. To do this may require some further training. For instance, in convicting an accused the lay assessors would have to indicate that all the elements of the crime were proved.

Thirdly, basic preparation and training is required if assessors are to be able to counter domination by magistrates. Assessors need to be aware of the re-

spective roles and powers of magistrates and assessors. They must be able to understand when the magistrate has the final word, and when he or she does not, and to be able to resist attempts by magistrates to undermine the system by silencing them. Assessors should be able to recognise the subtle as well as the crude ways in which magistrates assert and entrench their power in court.

Fourthly, assessors require some of the same training that magistrates themselves need. At present, a small part of magistrates' training at Justice College – the national training centre for magistrates in Pretoria – covers matters of 'social context'. The purpose of this training is to give judicial officers the knowledge and understanding needed to be sensitive to the perspectives and circumstances of other people, so that magistrates' decisions are just and appropriate to the society in which we live. One example of the kind of issue covered in 'social context' training is violence against women, particularly domestic violence. Magistrates are alerted to the battered woman syndrome, which leads many battered women to bow to authority and reconcile with their violent partners or to withdraw charges in spite of the fact that a pattern of violence may have developed over many years. Many lay assessors probably need similar training, as they bring with them to court similar, entrenched preconceptions. In Chapter 5 we quoted the following statement by one assessor, who was explaining the value of assessors in court:

A man accidentally broke a widow while drunk at the home of his common law wife; she reported it to the police, and the man was charged with malicious damage to property. The magistrate proposed a prison sentence of nine months, but the assessor suggested that he be set free because the couple would be reconciled by the time they reached the courtroom door. . . as the assessor forecast, the couple left hugging each other.

This anecdote may be perceived either as an example of the degree of level-headedness that a lay assessor may bring to proceedings or a warning of the dangers of the system.

Overall, lay assessors require some preparation because they cannot simply reflect 'community opinion' in the courts. The very purpose of individualised hearings for all accused people is to enable their cases to be considered in a way that is as free from bias and preconceptions as possible. Juries – which are larger and chosen randomly – may be claimed to achieve this but the elaborate procedures developed for excluding individual members of a jury reflect the limitations of the system. This means that some form of social context training is essential for lay assessors.

The most serious concern about training for lay assessors is that of capacity. A properly operating system of lay assessors would mean that there would be many more assessors than magistrates. A day or even a morning of training might be sufficient on most matters although social context training typically requires more time. But even a day would be costly and given the limited training facilities in South Africa, not easy to provide. One possibility would be to use magistrates as trainers. The limitation of this approach is that, by setting up magistrates as trainers and lay assessors as learners, the hierarchy of professional over lay person is reasserted. Nevertheless, the importance of training for lay assessors, limited funds and the absence of alternatives may mean that this is an acceptable option.

As we understand it, the new cluster system for magistrates' court management anticipates a significant degree of decentralisation in on-going training of magistrates. International experience shows that peer training is perhaps the most effective form of judicial training. If this insight were to be put into practice, magistrate trainers would be located in every cluster. With guidance these magistrates could also train lay assessors on all matters except social context. For social context training a partnership between community-based trainers and magistrates is important because the essence of such training is to break entrenched ways of thinking.

This research project did not focus on training needs. Ideally, further research should be done when training programmes for lay assessors are devised. Nevertheless, our research does suggest that training in the areas described below should be considered. To some this may seem an overdose of 'law' for lay people. We agree that every effort needs to be taken to ensure that lay assessors do not see themselves as lawyers. But lay assessors are not jury members – on matters of fact they are full members of the court and need to be able to participate in the proceedings with confidence. Our overwhelming impression is that this cannot be achieved if lay assessors do not have more knowledge of procedures in court and the law on which they are based. They cannot be left to acquire this knowledge from the presiding magistrate – this leaves great discretion in the magistrate's hands and, as most magistrates do not welcome lay assessors on the bench, this discretion is easily exercised in a way that minimises the role played by lay assessors.

In conclusion, we would suggest training covering the following areas:

1. The role of lay assessors: lay assessors must have a clear idea of what they are to do and what their relationship to the magistrate is.

2. Basic criminal procedure: geared to enabling lay assessors to understand the process of trial in context; this means that the training cannot be abstract, it must familiarise lay assessors with practice including details about who sits where in a court and what various instructions given to witnesses mean.
3. Basic criminal law: many of the important issues relating to specific offences can be conveyed to lay assessors on a case-by-case basis by magistrates but the process would be made much easier if lay assessors had a basic grasp of the fact that proof of certain matters (the so-called elements of the crime) is necessary to establish that a crime has been committed and that, particularly in statutory offences, these may seem artificial or technical.
4. Basic matters of evidence: one of the concerns raised most frequently by magistrates is that lay assessors ask inadmissible questions; part of this problem will be resolved by a clear description of the role of the lay assessor which, as a member of the court is not to bring about a conviction or acquittal but to judge the case (see Chapter 4 p. 90 and the description of a lay assessor challenging an accused by saying 'you know you are guilty, don't you?'); a brief description of rules such as the hearsay rule, and the reasons for such rules, should eliminate many of the remaining problems.
5. Social context training, which is discussed above, is perhaps the most important training for lay assessors as it does not involve matters which can be picked up through experience on the bench.

### **Training of magistrates**

Our survey makes it clear that magistrates need to be better informed about the lay assessor programme. Whether training takes place at Justice College or in a decentralised way through the cluster system of magistrates' courts, it should include both details of the implementation of the lay assessor programme and an analysis of the goals of the programme. We understand that personnel from Justice College have recently toured the country running workshops for magistrates on the Magistrates' Courts Amendment Bill.

### **Informing the public**

Our survey revealed that only one in three members of the public in our survey were aware of the presence of lay assessors (i. e. that they had either heard

of the system or had seen assessors in court prior to being surveyed – see Table 3. 4). Given that our survey was conducted in and around court buildings, and therefore the surveyed people can be assumed to be more familiar than most with what happens in court, it seems fair to comment that public knowledge of the lay assessor system was alarmingly low. Insofar as one of the purposes of the system is to enhance the legitimacy of the courts, it is essential that the public be aware of assessors and recognise their contribution to the justice system. Insofar as another purpose is to contribute to the general democratisation of society, members of the public should also be aware of assessors so that they can participate where possible in their selection. A public information programme perhaps similar to those run for the Constitutional Assembly is necessary for this to occur. The Department of Justice could provide information on lay assessors in courts and other public places. In addition, consideration should be given to other ways of introducing people to lay assessors. For instance, the Street Law programme which reaches hundreds of thousands of school children annually could incorporate information about lay assessors in its programmes.

### **Lay assessors and the law**

A number of legal issues are important for a lay assessor system. The first is the distinction between law and fact because assessors are involved in findings of fact and not law. Another is the question of when lay assessors should be re-used either for their prior knowledge of matters relevant to the case at hand or because they have heard some inadmissible evidence. In addition, the consequences of non-attendance of lay assessors needs an acceptable legal solution.

### **Law and fact**

The distinction between law and fact is not always an easy one. This is, in part, because it developed in a casuistic way often as a result of the determined efforts of judges to limit the influence of juries. While some magistrates claim the distinction is 'easy' to make, others recognise its difficulties. In the course of our interviews, the distinction caused most concern in relation to section 174 applications. On the face of it, the inquiry clearly involves factual matters – is there enough evidence before the court to convict the accused? In law this is considered a matter of law, a state of affairs which appears to have developed from a view that a case against an accused should not even be put to a jury if there is insufficient evidence to convict. Many magistrates were uncer-

tain whether section 174 applications are matters of law or fact and, if section 174 applications are to retain their characterisation as matters of law, magistrates and lay assessors should be better informed on the matter.

Difficult section 174 applications are rare in practice, and the distinction between law and fact is much more important in relation to substantive matters arising in trials. At present there is little guidance in our case law on the matter and, because lay assessors are used mostly in undefended district court trials, there is little chance of the law developing – magistrates will have no need to send such matters on review and lay assessors are unlikely to be able to identify with confidence the problematic issues. As we suggest below, this is an area that needs monitoring.

### **Recusals**

The law relating to recusal and the questions of fairness that the subject raises, are very difficult. The problems are raised starkly in the context of assessors. We have already noted that lay assessors give very few concrete examples of their influence in court proceedings. When they do give examples these often involve suggestions that an assessor could assist the court because he or she 'knew' the accused or complainant or was familiar with some other issue relating to the case. As we note in Chapter 5, sometimes this knowledge is direct personal knowledge, in other cases it seems to be a form of acquaintance acquired through living in the same community, in others it is a deduction drawn from the features of the case and the 'type' of accused or witness. In law, some of these situations seem relatively clear cut. An adjudicator should not be able to say that someone deserves a lighter sentence than the average 'because I know him and know that he is really not bad'. First, this amounts to adducing evidence which the state has no opportunity to test. Secondly, it makes sentencing depend on the arbitrary fact that a friendly judicial officer heard a case. But the other examples are more difficult and there is little in South Africa's jurisprudence on recusal to guide decisions on those matters. Again, such issues will rarely reach the higher courts, and it is an area that must be monitored.

### **Unreliability**

As we note in Chapter 3, an assessor must be present for the entire trial after plea (or if the assessor is appointed only on sentencing, for the entire sentencing procedure). If an assessor fails to return to court to complete a partly-heard matter the proceedings must be set aside and it rests with the Attorney-

General to decide whether or not to prosecute again. It is only in the case of the death or incapacity of an assessor that, in terms of section 147 of the Criminal Procedure Act (Act 51 of 1977), the magistrate may decide to continue with the case without the assessor.

In Chapters 4 and 5 we note that magistrates have complained of the unreliability of assessors and that members of lay assessor committees recognise that there have been problems. We also say that our interviews suggest that this is a problem that occurs relatively infrequently. Nevertheless, with the law as it stands, when it does occur, it creates a very serious problem.

The proposed amendments to the Magistrates' Courts Act would solve the problem as they would allow a magistrate to continue a trial without the assessor after a consideration of the 'interests of justice' and any arguments put forward by the prosecutor and the accused (Magistrates' Courts Amendment Bill 33 of 1998 section 2(e) amending subsection 93*ter* (5) of the Magistrates' Courts Act).

### **Research and monitoring**

A change to the court system as significant as the introduction of lay assessors must be monitored. At present it is impossible to acquire even the most basic facts about the system such as in how many cases lay assessors are used annually and how much the system costs. The effectiveness of the programme cannot be assessed without such information. Our research also shows that great variation is possible in the implementation of the system and, at the initial stages of the programme at least, this should be monitored and assessed. The actual role lay assessors play in court should be studied. Do they make a difference? And, if so, in what ways or to whom? Is it by influencing decisions or by giving the public more confidence in the courts? If lay assessors make no perceptible difference, the system would need to be reconsidered.

We suggest that data needs to be collected routinely on: (1) the number of cases in which lay assessors are used; (2) the types of cases in which they are used; (3) the number of assessors used in each case; (4) the frequency of disagreement between a magistrate and assessor; and (5) the number of cases in which defence lawyers have asked that assessors not sit. In addition, courts need to be monitored to assess the way in which the distinction between law and fact is made and the way in which lay assessors participate in hearings (are they required to ask questions through the magistrate or do they address witnesses directly? Do magistrates adjourn to discuss their decision or does some other form of consultation take place – or none at all?). Research should

be done on the actual contribution made by assessors in cases. Case studies in which magistrates and assessors are interviewed about specific cases would give one a sense of the way in which proceedings are influenced by assessors.

### **Conclusion: Lay participation in South Africa's courts**

South Africa's judiciary is highly professionalized: through the 1970s and 1980s there was almost no lay participation in the formal court system, and even since 1991 lay participation has been limited, as few magistrates have either been compelled (in the regional courts) or have chosen to use lay assessors. This has several implications for the South African legal system. First, legal proceedings in South Africa are expensive. Secondly, there is a significant divide between courts and community (although this need not warrant invocation of a legitimacy crisis). Thirdly, the ideology of legal professionalism is hegemonic: people seem largely unaware that there are other ways of administering justice, and that in many countries around the world these work very well.

The lay assessor system has reintroduced lay people into decision-making in court, but has certainly not put lay participants on equal terms with professional magistrates. Outside of murder cases in the regional courts, lower court magistrates retain the discretion as to whether to use assessors or not, and few have made extensive use of their discretionary powers. Magistrates often play a role in selecting assessors, and a major role in allocating assessors to particular cases. In court, magistrates expect assessors to assist them, and can invoke their legal training to restrict assessors to a marginal role. Their legal powerlessness, the lack of training for assessors, and the hegemony of legal professionalism combine together to lead many assessors to accept the hierarchy of magistrates over assessors. Most assessors are deferential towards magistrates.

Magistrates have a powerful position in the politics of the bench. Some choose to exert their power in a brutal way, instructing or ignoring assessors, telling them what the court's decisions are, leaving them the options of acquiescing or challenging the magistrate from a position of weakness. Other magistrates choose to exercise power in a more patronising manner, treating assessors like children, as if they might 'grow up' into proper magistrates later; assessors' contributions are listened to, but not necessarily acted on. Only a few magistrates treat assessors as partners, asking them what they think on a range of matters, reasoning and arguing with them if necessary. Such magistrates often command respect not simply by virtue of their office, but by virtue

of their individual abilities. It is possible that most magistrates do not adopt this approach because they are unsure of their individual abilities: using their institutional power is an easy way out. But we should not assume that it is good for justice.

Professional magistrates and lay assessors bring different things to the bench. They do not just bring specialist knowledge and expertise, as a technical approach to the issue might believe. They bring a variety of perspectives, rooted in sometimes different conceptions of justice. It is this mix of perspectives which seems to us to be the strength of the mixed bench that is provided for under existing legislation in South Africa. The minimal reforms encompassed in the 1998 Magistrates' Courts Amendment Bill disappoint us. By allowing magistrates to exercise discretion over lay participation in most criminal cases in the lower courts, and by not specifying mechanisms which would weaken the hierarchy of magistrate over assessor, the Bill limits the benefits that lay participation brings.

Lay participation in the legal system need not be limited to the lower, criminal courts. In 1994-95, Minister Omar's advisors in the Department of Justice and the Assessors Co-ordinating Committee clearly envisaged the extension of lay participation to the higher courts, and even that lay magistrates preside over some cases, perhaps in recognised 'community courts'. Judges in the higher courts seem to have quashed successfully the idea of extending lay participation to 'their' courts. The idea of lay magistrates may, however, still be on the agenda – not least perhaps because it can be seen to promise cheaper and more accessible forms of justice.

Opposition can certainly be expected to the idea of using lay people as magistrates. When, in the mid-1980s, the Small Claims Courts were introduced, with lawyers serving as judges but using streamlined procedures, critics asked why cases involving smaller sums of money could be dealt with in proceedings that took short cuts on procedures which had been developed over centuries to protect litigants. The fact that matters involve smaller sums of money does not mean, it was argued, that they deserve inferior treatment. Similar arguments are bound to be raised if lay people are used to judge minor criminal matters.

Magistrates' opposition to lay people revolves around the invocation of the superiority or even necessity of legal training. Lay assessors, it is said, 'do not understand law', and do not have the objectivity and freedom from prejudice that supposedly come with such an understanding. In this view, legal matters – and particularly those that are part of the system in order to protect people against arbitrary decision-making – should not be left solely in the

hands of lay people, whether the case is considered minor or not. Even if this argument is correct, which is not obvious to us, it does not justify the conclusion that lay people should *not* participate in court or even should *not* decide cases. The insights provided by legal training can be built into the system in a variety of ways besides reserving decision-making powers for professional magistrates. In England, for example, lay magistrates (or justices of the peace) serve on a bench, advised by a legally trained and qualified clerk of the court. Moreover, professional magistrates preside over appeals made against convictions in the (lay) magistrates' courts. Legal expertise is thus accommodated, without the problems of professionalism and the hierarchy of magistrate over lay assessor that almost automatically asserts itself in South African courts.

It is clearly outside the ambit of a report on our research on the use of lay assessors in South African courts over the past four years to make proposals on the more extensive use of lay people in criminal proceedings. Nevertheless, our research suggests that this option should not be ignored. Our research findings give us no reason to think that lay assessors do not enrich the administration of justice. This is reason enough to consider the use of appropriately experienced lay people as lay magistrates as one way, alongside court diversion projects and other initiatives, of alleviating the impossible situation facing South Africa's lower courts at present.

## APPENDIX A

### Methodology

This research project has involved four forms of research:

1. the analysis of documentary sources;
2. a series of semi-structured and unstructured interviews with magistrates and lay assessors;
3. a survey in four provinces of magistrates, lay assessors and members of the public, using a structured questionnaire; and
4. observation.

Each of these had its strengths and weaknesses.

#### Documentary sources

First, documentary sources have been examined thoroughly. The principal documentary sources used are the parliamentary speeches of the Minister of Justice and parliamentary debates around relevant legislation, as recorded in Hansard. A smaller number of documents written by assessors, magistrates and the Magistrates' Commission have also been used. Draft or proposed legislation prompted a series of submissions (including from the Association of Regional Magistrates of South Africa, the South African Institute of Race Relations, and provincial law societies). Chief Magistrate A. Jooste (Cape Town) kindly allowed us access to the records of the Co-ordinating Committee.

We were unsuccessful, however, in obtaining from the Department of Justice any collated countrywide statistics on the use of assessors in cases in the district and regional courts, or on expenditure on assessors. Courts are required to submit the former data monthly, and we understand that the latter must be submitted for accounting purposes. We suspect that this data has not been collated by the Department of Justice. This presumably explains the absence of any such statistics from Department of Justice reports. We are puzzled, however, as to why these statistics are not collated, since it would be an easy enough task on a computer. We were able to collect some such data from individual courts.

We also conducted a careful scrutiny of every case recorded in the Wynberg Magistrates' Court (WCp) in particular months in order to explore what range of cases assessors were being used in, and whether there were any identifiable differences between the judgments and sentences in cases with and without assessors. It turned out, however, that the use of assessors was so limited as to render the more ambitious goal unviable.

Magistrates in the Western and Northern Cape were kind enough to send us documentation relating to the establishment of the lay assessor system in their courts in 1994-95. This documentation covered the process of setting up district assessors committees and selecting the first assessors.

### **Semi-structured interviews**

Secondly, we conducted a series of semi-structured interviews with magistrates and lay assessors around the country. Interviews were conducted with about sixty magistrates and well over two hundred assessors. The purpose of these interviews was to collect data on the selection, use and experiences of assessors in courts. This is data which is not easily collected through a structured questionnaire. In addition, we sought to get an understanding of the nuances of magistrates and assessors' experiences, as well as accounts of actual cases and situations.

### **Survey using structured questionnaires**

Thirdly, a structured questionnaire was administered to about fifty magistrates, two hundred assessors and seven hundred members of the public around the country. The purpose of the questionnaire was to collect quantifiable data on (1) knowledge and experiences of lay assessors among members of the public and (2) the attitudes towards the court system of magistrates, assessors and the public.

We had originally envisaged relying on a structured questionnaire, administered to samples of 200 lay assessors, 200 members of the public and 40 magistrates, prosecutors and lawyers. Our experience during the piloting of our questionnaire led us to change our plans. It became clear that the use of a structured questionnaire alone would not be the most effective way of collecting much of the information we sought. Magistrates and assessors often wanted to give long and detailed – and fascinating – answers to our questions. We therefore decided to use semi-structured and unstructured interviews with magistrates and assessors in addition to a short, structured questionnaire. The

short questionnaire was administered to samples of 200 lay assessors and about 50 magistrates, as well as 700 members of the public.

### **Observation**

Members of the research team also conducted very limited observation in court. Two researchers spent several weeks in the Wynberg Magistrates' Court, observing in courts where assessors were in use. Another researcher was, on one occasion, able to practice fully participant observation as a temporary lay assessor in Pretoria. Our experiences led us to desist from this method of research. Sitting in court proved to be a very time-consuming activity, with little benefit because the researchers could not hear what was said between magistrates and assessors (whether they were in court or when they retired to the magistrate's office to deliberate in private). In our single experience of fully participant observation, it was not possible to identify what effects arose from the researcher's presence.

### **Research sites**

Budgetary considerations ruled out the use of a representative, countrywide sample. We simply did not have the funds available to conduct research in more than a small number of sites around the country. We therefore selected a purposive sample of research sites so as to provide (1) examples of different types of location and (2) areas where assessors have been in use for a while, and areas where they have been used rarely.

Our sample of sites eventually included four of the country's nine provinces: the Western Cape, Northern Cape, Gauteng and Mpumalanga. More accurately, our research covered metropolitan Cape Town and Gauteng, and urban areas of the Northern Cape and Mpumalanga.

Our survey of assessors covered 29 magisterial districts, and our survey of the public 13 magisterial districts (as set out in the following table). In addition, we conducted qualitative interviews only (i.e. without the structured questionnaire) with other assessors in these and other districts. Our research with magistrates was more widely spread, for reasons discussed further below.

		Lay assessors	Public	
			P1	P2
Western Cape:	Cape Town	8	102	3
	Wynberg (inc. Athlone)	46	182	2
	Mitchell's Plain	13		
	Goodwood	2		
	Total	69	284	5
Northern Cape:	Kimberley	9	81	3
	Warrenton	3	29	
	Britstown	1		
	Douglas	5		
	Jankempdor	8		
	Hartswater	3	1	
	Beaufort West	4		
	Victoria West	3		
	Vryburg	4		
	Total	40	110	4
Gauteng:	Pretoria (inc. Mamelodi)	19	52	3
	Johannesburg (inc. Protea & Orlando)	13	102	14
	Randburg (inc. Wynberg)	5	34	7
	Benoni	1		
	Boksburg	3		
	Brakpan	1		
	Germiston	2		
	Kempton Park	3		
	Springs	4		
	Total	51	188	24
Mpumalanga:	Nelspruit	3	30	1
	Barberton	4	5	7
	Graskop	8	9	1
	Lydenburg	8	5	
	White River	1	8	
	Witbank	15	36	
	Middelburg	4		
	Total	43	93	9
Total		203	675	42

Initially, we had a total of 722 structured interviews with members of the public. On examination we realised that 42 of our 'members of the public' were in fact policemen and women, employed by the South African Police Service (SAPS), whilst another 5 were attorneys. The 42 police officers are

listed under the P2 column above. Only the 675 'genuine' members of the public are included in P1. In this report, only the P1 category is used in discussion of the attitudes of the public.

### The sample: magistrates

Our sample of magistrates is far from random. In principle, we could have obtained a list of magistrates in the country, selected a random sample, and then conducted interviews with the selected individuals. In practice, this was not possible. Besides the logistical difficulties of traversing the country, we were in any case unable to obtain a composite list of magistrates at the outset.

Our sample of magistrates was compiled in two ways. First, and most importantly, we interviewed a sample of magistrates in each of the courts where we based our research. These courts were selected on a purposive basis, to cover metropolitan and urban areas. Secondly, we interviewed magistrates at two workshops organised by the Law, Race and Gender Research Unit as part of its judicial education programme. The magistrates attending these workshops were drawn from all over the old Transvaal province, including 'self-governing' and nominally 'independent' territories (or bantustans or homelands). The two methods together gave us a total of about 60 magistrates, including 47 who completed the structured questionnaire also. The demographic profile of these 47 magistrates was as follows:

		%
Race	White	75
	Coloured	2
	Indian	2
	African	21
Gender	Male	60
	Female	40
Age	Under 20	0
	20-29	2
	30-39	44
	40-49	31
	50-59	23
	60 or over	0

The magistrates were from the following magisterial districts:

		Magistrates
Western Cape:	Cape Town	1
	Wynberg (including Athlone)	4
	Total	5
Northern Cape:	Kimberley	5
	Douglas	1
	Jankempdorpe	1
	Hartswater	1
	Total	8
Gauteng:	Pretoria (including Mamelodi)	3
	Johannesburg (including Protea and Orlando)	2
	Randburg (including Wynberg)	1
	Germiston	1
	Roodepoort	1
	Total	8
Mpumalanga:	Nelspruit	2
	Barberton	3
	Graskop	1
	Lydenburg	3
	White River	2
	Witbank	4
	Middelburg	1
	Total	16
Elsewhere:	Bolobedu	1
	GaRankuwa	1
	Giyani	1
	Hlanganani	1
	Itoseng	1
	Klerksdorp	1
	Lebowakgomo	1
	Pietersburg	2
	Thohoyandou	1
	Total	10
<b>Total</b>		<b>47</b>

In South Africa as a whole, in 1996, 65 per cent of magistrates were white, 31 per cent were African, two per cent were coloured, and two per cent were Indian (see Table 2.3). Our sample thus over-represents white magistrates somewhat. Most African magistrates, however, serve in districts in the former bantustans, and have not used assessors extensively or at all. In the country as a whole, 83 per cent of magistrates were men, with women comprising just 13

per cent of the total. Our sample therefore over-represents women and under-represents men.

We have no information on magistrates country-wide in terms of age. Compared to assessors, however, there are very few young magistrates (aged under 30) and no old magistrates (aged 60 or over) – presumably because of retirement policies (the age of assessors in our sample is given in Table 5.1).

Magistrates in our sample were appointed as criminal court magistrates across a wide range of years, as we can see below:

When appointed	%
1970-79	20
1980-89	35
1990-93	33
1994-96	13
Total	101

#### *The sample: assessors*

The problems of drawing up a sample of magistrates were minor in comparison with the difficulties in getting a 'representative' sample of assessors. There is no composite list of assessors to use as a universe from which to draw up a sample. In any case, if you could draw up a stratified sample of assessors, one of the most important criteria for stratifying the sample would be the form and extent of the use of assessors (see Chapters 3, 4 and 5). In some courts, there are many assessors, each used rarely; in others, there are few, each used often. Our interest in the experience of assessors leads us to an interest in the few who are used often that is disproportionate to their numbers. In short, we had insufficient information prior to the research to define a universe or stratify a sample.

In practice, our preliminary research led us to identify courts in which assessors were selected and organised in a range of different ways. We selected courts in each category. Then we identified a number of courts on a more random basis, although the selection was limited by logistical considerations – courts that could be reached in one week of fieldwork by a team of researchers in each of the Northern Cape, Mpumalanga, and Gauteng. (Additional research was conducted in each region by individual researchers.)

We cannot be sure whether our final sample of over 200 assessors is 'representative' of all of the assessors in the country as a whole. But our information

leads us to believe that we have a reasonably typical range of experiences. The profile of assessors in our sample was examined in Chapter 5.

Our sample is far from representative in one obvious respect. We have interviewed assessors in four provinces only – interviewing none in the Eastern Cape, Free State, North West, KwaZulu-Natal and Northern Province. Two of these are provinces where the assessor system was introduced very late, and the others are provinces where, we suspect, the assessor system is far from fully operational. Although our sample may be considered skewed, it captures the uneven usage of lay assessors nationally.

### **The sample: public**

We were faced with a dilemma as to how to devise a sample of members of the public. On the one hand, we wanted a representative sample so as to be able to compare their views with those of magistrates and lay assessors. On the other hand, we thought that a representative sample would give us very little information about assessors in particular, as very few members of the public have regular or even irregular contact with the courts. We therefore decided to use a sample of members of the public in the vicinity of the courts, so as to ensure that the people we interviewed had a reasonable chance of knowing something about assessors. Members of the public were interviewed at random in and immediately outside of court buildings. The distribution of interviews by province and district was set out above. The racial and gender profile of the interviewees is set out below:

**Profile of interviewed members of the public: Race/gender**

Racial category	Men	Women	Not given	Total
African	194	139	2	335
Coloured	145	108	1	254
Indian	14	3	0	17
White	33	23	0	56
Other/not given	9	4	0	13
<b>Total</b>	<b>395</b>	<b>277</b>	<b>3</b>	<b>675</b>

**Profile of interviewed members of the public: Age**

Age	%
under 20	11
20-29	38
30-39	36
40-49	11
50-59	4
60 or over	1
<b>Total</b>	<b>101</b>

Because of the small number of Indian respondents in the survey we have combined them with the coloured respondents into one category. In this report 'coloured' should be read as including 'coloured' and 'Indian'.

Compared to South Africa's population as a whole, our sample over-represents coloured people (especially) and men, and under-represents African people (especially), white people and women.

The provincial distribution of our sample, the venue and manner of collecting data, and the racial, gender and (no doubt) class skewedness of our sample, means that our findings should in no way be viewed as representative of the South African population as a whole.

**Profile of public sample, by province**

Racial category	W. Cape %	N. Cape %	Gauteng %	Mpumalanga %
African	18	42	85	87
Coloured	70	50	7	2
White	28	6	6	11

**Profile of interviewed members of the public: Education**

Highest formal education standard passed	%
No formal schooling	2
Grade 1 to std 5	13
Std 6 - 9	48
Matric	29
Post-school diploma	6
Post-school degree	2
<b>Total</b>	<b>100</b>

### The questionnaire

Different questionnaires were administered to magistrates, assessors and members of the public, although all had many questions in common to allow comparison. The questionnaires were piloted and revised prior to the survey. Questionnaires for magistrates and assessors were available in English and Afrikaans. Magistrates and assessors completed the questionnaires themselves, although some assessors required assistance from the researchers. Members of the public were interviewed and the questionnaires completed by researchers. We tried to use researchers in each area with appropriate language proficiencies. The questionnaire for the public was translated into Zulu, Xhosa, Siswati, North Sotho and Tswana, as well as English and Afrikaans. Copies of the questionnaires are included in Appendix B.

## APPENDIX B

### Questionnaires used in research

Please note that the following questionnaires, originally on A4-sized paper, have been slightly reformatted in order to fit into this book while remaining legible; their contents are unchanged.

#### I. Questionnaire for magistrates

##### ATTITUDES TO LAW AND JUSTICE

DATE: ..... COURT: ..... QUESTIONNAIRE NO:

*This research is being conducted by the University of Cape Town. We are collecting the views of many different participants in the legal system. We would be very grateful if you would help us by filling in this form. Your identity will not be revealed when we use the information that you give us.*

Name (optional): .....

Sex: Female  Male

Race: Coloured  African  Indian  White  Other

Name of suburb/township/area in which you live: .....

Age: Under 20  20 - 29  30 - 39  40 - 49  50 - 59  60 - 69  70 or more

Qualifications (please also name institution): .....

When did you first become a criminal court magistrate? Month ..... Year .....

What was your previous job/work/occupation? .....

Court in which you work as a magistrate? District  Regional

What languages can you speak? .....

Are you an active member of any of the following organisations?  
religious  sport  political party  community or civic  other

If yes, please name the organisations (optional): .....

Are you an office-bearer (eg chair, secretary, etc) in any of these organisations? Yes  No

If yes, please name the organisations (optional): .....

Do you use lay assessors in your own court:

All the time  Never   cases a month (enter number)  days a month (enter number)

If you do use lay assessors, in which of the following stages of legal proceedings do you use them?

- remands and pleas Yes  No
- bail hearings Yes  No
- trials Yes  No
- trials-within-trials Yes  No
- sentencing Yes  No
- section 174 application Yes  No
- other Yes  No

Did you ever hear anything or receive any documentation concerning lay assessors before the change of government in 1994? Yes  No

If yes: What? .....

From whom? .....

Were lay assessors ever used in district courts at your magistrates court in 1992 - 1993?

- Yes (please name court) .....
- No
- I was not working in a court in 1992 - 3

Do officers of the court ever use languages other than English or Afrikaans in court?

Yes  No  If yes, which languages? .....

How many lay assessors are competent in both English and Afrikaans?

all  most  some  none  don't know

**PLEASE INDICATE YOUR AGREEMENT OR DISAGREEMENT WITH EACH OF THE FOLLOWING STATEMENTS**

1. Overall the courts are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
3. It is alright to break the law as long as you don't get caught.  
agree strongly  agree  disagree  disagree strongly  don't know
4. The courts have not improved since 1994.  
agree strongly  agree  disagree  disagree strongly  don't know

6. The courts pay too much attention to the rights of the accused.  
agree strongly  agree  disagree  disagree strongly  don't know
7. The police and prosecutors prepare cases for the court well.  
agree strongly  agree  disagree  disagree strongly  don't know
9. It is more important to ensure the protection of the community than to protect the rights of the individual accused person.  
agree strongly  agree  disagree  disagree strongly  don't know
10. The justice system is generally too easy on criminals.  
agree strongly  agree  disagree  disagree strongly  don't know
11. Most police officers are dishonest.  
agree strongly  agree  disagree  disagree strongly  don't know
12. There would be less crime if our laws were stricter.  
agree strongly  agree  disagree  disagree strongly  don't know
13. The community thinks that the courts are just.  
agree strongly  agree  disagree  disagree strongly  don't know
14. There should be a death penalty to help prevent crime.  
agree strongly  agree  disagree  disagree strongly  don't know
15. Living conditions in prisons are more harsh than they should be.  
agree strongly  agree  disagree  disagree strongly  don't know
17. On the whole the police are hostile and aggressive.  
agree strongly  agree  disagree  disagree strongly  don't know
18. The rate of crime has reached a level which requires drastic counter measures.  
agree strongly  agree  disagree  disagree strongly  don't know
19. On the whole the judicial system caters for the needs of the public.  
agree strongly  agree  disagree  disagree strongly  don't know
20. Overall the police are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
23. Lay assessors improve public perceptions of the courts.  
agree strongly  agree  disagree  disagree strongly  don't know
24. Lay assessors make it more likely that the court will come to the correct decision.  
agree strongly  agree  disagree  disagree strongly  don't know
25. With lay assessors the court understands the community better.  
agree strongly  agree  disagree  disagree strongly  don't know

26. On the whole, lay assessors do a good job.  
 agree strongly  agree  disagree  disagree strongly  don't know

*I have just a few more questions.*

28. Do magistrates understand the problems of ordinary people?  
 all  most  some  none  don't know
29. Do the courts give sentences which are too light?  
 always  most of the time  sometimes  Never  don't know
30. Do magistrates understand the community well?  
 all  most  some  none  don't know
31. Do the courts treat people fairly?  
 always  most of the time  sometimes  Never  don't know
32. Are magistrates kind-hearted?  
 all  most  some  none  don't know
33. Are court verdicts just?  
 all  most  some  none  don't know

## 2. Questionnaire for lay assessors

### ATTITUDES TO LAW AND JUSTICE

DATE: ..... COURT: ..... QUESTIONNAIRE NO: LA

*This research is being conducted by the University of Cape Town. We are collecting the views of many different participants in the legal system. We would be very grateful if you would help us by filling in this form. Your identity will not be revealed when we use the information that you give us.*

Name: .....  
 (We need your name to control the collection of information; it will be kept confidential.)

Sex: Female  Male

Race: Coloured  African  Indian  White  Other

Name of suburb/township/area in which you live: .....

Age: Under 20 years  20-29  30-39  40-49  50-59  60-69  70 plus years

Highest formal educational standard passed:

No formal schooling  Grade 1-Std 5  Std 6-9  Matric  Post-school diploma

Post-school degree  Other (please describe): .....

Other training or qualifications: .....

What is your current job/work/occupation? (Please include self-employment if applicable): .....

What was your previous job/work/occupation? .....

When did you stop doing that job/work? Month ..... Year .....

What languages can you speak? .....

Court in which you work as a lay assessor: Regional  District  Both

When did you start work as a lay assessor? Month ..... Year .....

Are you an active member of any of the following organisations?

religious  sport  political party  community or civic  other

If yes, please name the organisations (optional): .....

Are you an office-bearer (eg chair, secretary, etc) in any of these organisations? Yes  No

If yes, please name the organisations (optional): .....

In your work as an assessor, are you a representative of any organisation/s? Yes  No

If yes, please name the organisations: .....

Approximately how many days did you work as an assessor in the last month? .....

Have you received any training for your work as an assessor? Yes  No

If yes, please describe briefly (a) the length of training .....

(b) the nature of training .....

(c) who provided it: .....

Do magistrates and lay assessors usually agree on whether a person is guilty or not guilty?

magistrates want to convict more often than lay assessors  they are about the same

lay assessors want to convict more often than magistrates  don't know

How do magistrates and lay assessors compare in terms of sentencing?

magistrates prefer heavier sentences than lay assessors.  they are about the same

lay assessors prefer heavier sentences than magistrates  don't know

How often have you corrected the court interpreter's translation of evidence?

never  sometimes  often  very often

Should magistrates be compelled to use lay assessors in all cases except for very minor cases (such as minor traffic offences)?

Yes  No  Don't know

**PLEASE INDICATE YOUR AGREEMENT OR DISAGREEMENT WITH EACH OF THE FOLLOWING STATEMENTS**

1. Overall the courts are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
3. It is alright to break the law as long as you don't get caught.  
agree strongly  agree  disagree  disagree strongly  don't know
4. The courts have not improved since 1994.  
agree strongly  agree  disagree  disagree strongly  don't know
6. The courts pay too much attention to the rights of the accused.  
agree strongly  agree  disagree  disagree strongly  don't know
7. The police and prosecutors prepare cases for the court well.  
agree strongly  agree  disagree  disagree strongly  don't know

9. It is more important to ensure the protection of the community than to protect the rights of the individual accused person.  
agree strongly  agree  disagree  disagree strongly  don't know
10. The justice system is generally too easy on criminals.  
agree strongly  agree  disagree  disagree strongly  don't know
11. Most police officers are dishonest.  
agree strongly  agree  disagree  disagree strongly  don't know
12. There would be less crime if our laws were stricter.  
agree strongly  agree  disagree  disagree strongly  don't know
13. The community thinks that the courts are just.  
agree strongly  agree  disagree  disagree strongly  don't know
14. There should be a death penalty to help prevent crime.  
agree strongly  agree  disagree  disagree strongly  don't know
15. Living conditions in prisons are more harsh than they should be.  
agree strongly  agree  disagree  disagree strongly  don't know
17. On the whole the police are hostile and aggressive.  
agree strongly  agree  disagree  disagree strongly  don't know
18. The rate of crime has reached a level which requires drastic counter measures.  
agree strongly  agree  disagree  disagree strongly  don't know
19. On the whole the judicial system caters for the needs of the public.  
agree strongly  agree  disagree  disagree strongly  don't know
20. Overall the police are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
23. Lay assessors improve public perceptions of the courts.  
agree strongly  agree  disagree  disagree strongly  don't know
24. Lay assessors make it more likely that the court will come to the correct decision.  
agree strongly  agree  disagree  disagree strongly  don't know
25. With lay assessors the court understands the community better.  
agree strongly  agree  disagree  disagree strongly  don't know
26. On the whole, lay assessors do a good job.  
agree strongly  agree  disagree  disagree strongly  don't know

*I have just a few more questions.*

28. Do magistrates understand the problems of ordinary people?  
 all  most  some  none  don't know
29. Do the courts give sentences which are too light?  
 always  most of the time  sometimes  Never  don't know
30. Do magistrates understand the community well?  
 all  most  some  none  don't know
31. Do the courts treat people fairly?  
 always  most of the time  sometimes  Never  don't know
32. Are magistrates kind-hearted?  
 all  most  some  none  don't know
33. Are court verdicts just?  
 all  most  some  none  don't know

### 3. Questionnaire for members of the public

#### ATTITUDES TO LAW AND JUSTICE

DATE: ..... COURT: ..... QUESTIONNAIRE NO:

*Many people think that the courts should be changed. Others think that courts work well at the moment. This research is being conducted by the University of Cape Town. We are collecting the views of as many people as possible. We would be very grateful if you would help us by answering our questions. Your identity will not be revealed when we use the information that you give us.*

Sex: Female  Male

Race: Coloured  African  Indian  White  Other

Name of suburb/township/area in which you live: .....

Age: Under 20  20 - 29  30 - 39  40 - 49  50 - 59  60 - 69  70 or more

Highest formal educational standard passed: No formal schooling  Grade 1 to std 5

Std 6 - 9  Matric  Post-school diploma  Post-school degree

Other (please describe):  .....

What is your current job/work/occupation? .....  
 (Please include self-employment if applicable)

What languages can you speak? .....

About how often have you been to court in the last 6 months? Only today  Fewer than 5 days   
 5 - 10 days  10 - 20 days  More than 20 days

One of the recent changes in criminal courts is that members of the public who are not lawyers have been appointed to hear cases with magistrates. They are called lay assessors. Nowadays magistrates sometimes have one or two lay assessors sitting next to them in court.

Have you ever seen a lay assessor in court? Yes  No  Don't know   
 If yes, how often? Every time you attend court  Sometimes  Seldom  Only once

Has anyone outside the court ever told you about lay assessors? Yes  No

If yes, who? .....

Why do you think there are lay assessors in the court? .....

Is it good or bad to have members of the public hearing cases with magistrates? .....

Why? .....

PLEASE INDICATE YOUR AGREEMENT OR DISAGREEMENT WITH EACH OF THE FOLLOWING STATEMENTS

1. Overall the courts are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
3. It is alright to break the law as long as you don't get caught.  
agree strongly  agree  disagree  disagree strongly  don't know
4. The courts have not improved since 1994.  
agree strongly  agree  disagree  disagree strongly  don't know
6. The courts pay too much attention to the rights of the accused.  
agree strongly  agree  disagree  disagree strongly  don't know
7. The police and prosecutors prepare cases for the court well.  
agree strongly  agree  disagree  disagree strongly  don't know
9. It is more important to ensure the protection of the community than to protect the rights of the individual accused person.  
agree strongly  agree  disagree  disagree strongly  don't know
10. The justice system is generally too easy on criminals.  
agree strongly  agree  disagree  disagree strongly  don't know
11. Most police officers are dishonest.  
agree strongly  agree  disagree  disagree strongly  don't know
12. There would be less crime if our laws were stricter.  
agree strongly  agree  disagree  disagree strongly  don't know
13. The community thinks that the courts are just.  
agree strongly  agree  disagree  disagree strongly  don't know
14. There should be a death penalty to help prevent crime.  
agree strongly  agree  disagree  disagree strongly  don't know
15. Living conditions in prisons are more harsh than they should be.  
agree strongly  agree  disagree  disagree strongly  don't know
17. On the whole the police are hostile and aggressive.  
agree strongly  agree  disagree  disagree strongly  don't know
18. The rate of crime has reached a level which requires drastic counter measures.  
agree strongly  agree  disagree  disagree strongly  don't know
19. On the whole the judicial system caters for the needs of the public.  
agree strongly  agree  disagree  disagree strongly  don't know

20. Overall the police are doing a good job.  
agree strongly  agree  disagree  disagree strongly  don't know
23. Lay assessors improve public perceptions of the courts.  
agree strongly  agree  disagree  disagree strongly  don't know
24. Lay assessors make it more likely that the court will come to the correct decision.  
agree strongly  agree  disagree  disagree strongly  don't know
25. With lay assessors the court understands the community better.  
agree strongly  agree  disagree  disagree strongly  don't know
26. On the whole, lay assessors do a good job.  
agree strongly  agree  disagree  disagree strongly  don't know

*I have just a few more questions.*

27. Did you know about lay assessors before answering these questions?  
yes  no
28. Do magistrates understand the problems of ordinary people?  
all  most  some  none  don't know
29. Do the courts give sentences which are too light?  
always  most of the time  sometimes  Never  don't know
30. Do magistrates understand the community well?  
all  most  some  none  don't know
31. Do the courts treat people fairly?  
always  most of the time  sometimes  Never  don't know
32. Are magistrates kind-hearted?  
all  most  some  none  don't know
33. Are court verdicts just?  
all  most  some  none  don't know

## APPENDIX C

# Provisions relating to assessors in the Magistrates' Court Act and the Criminal Procedure Act

Please note that the amended sections of these Acts are used here with the permission of Jutas.

## I. MAGISTRATES' COURTS ACT 32 OF 1944

### I.1 Provision relating to assessors in civil matters

#### *Section 34 Assessors*

In any action the court may, upon the application of either party, summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity.

### I.2 Provisions relating to assessors in criminal matters

#### *Section 93ter Magistrate may be assisted by assessors*

(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice—

- (a) before any evidence has been led; or
- (b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the

judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.

[Sub-s. (1) substituted by s. 10 (a) of Act 91 of 1977 and by s. 1 (a) of Act 118 of 1991.]

[NB: Sub-s. (1) has been amended by s. 62 of the Magistrates' Courts Amendment Act 120 of 1993, a provision which will be put into operation by proclamation.]

- (2) (a) In considering whether summoning assessors under subsection (1) would be expedient for the administration of justice, the judicial officer shall take into account—
  - (i) the cultural and social environment from which the accused originates;
  - (ii) the educational background of the accused;
  - (iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;
  - (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
  - (v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors,

and he may question the accused in relation to the matters referred to in this paragraph.

- (b) For the purposes of subsection (1) (b) a community-based punishment means—
  - (i) correctional supervision as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);
  - (ii) a punishment contemplated in section 297 (1) (a) (i) (cc) of the Criminal Procedure Act, 1977; or
  - (iii) a punishment contemplated in section 297 (1) (b) or (4) of the Criminal Procedure Act, 1977, and where the performance of community service as referred to in the said section 297 (1) (a) (i) (cc), is a condition for the suspension.

[Sub-s. (2) amended by s. 2 (a) of Act 16 of 1959, deleted by s. 10 (b) of Act 91 of 1977 and inserted by s. 1 (b) of Act 118 of 1991.]

(3) Before the trial or the imposition of punishment, as the case may be, the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict or a considered opinion, as the case may be, according to the evidence upon the issues to be tried or regarding the punishment, as the case may be, and thereupon he or they shall be a member or members of the court subject to the following provisions:

- (a) any matter of law arising for decision at such trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a voice in any such decision;
- (b) the presiding judicial officer may adjourn the argument upon any such matter or question as is mentioned in paragraph (a) and may sit alone for the hearing of such argument and the decision of such matter or question;
- (c) whenever the said judicial officer shall give a decision in terms of paragraph (a) he shall give his reasons for that decision;
- (d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion;
- (e) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph (d);
- (f) in the event of a conviction the question of the punishment to be inflicted shall, except in a case contemplated in subsection (1) (b), be deemed, for the purposes of paragraph (a), to be a question of law.

[Para. (f) substituted by s. 1 (d) of Act 118 of 1991.]

[Sub-s. (3) amended by s. 1 (c) of Act 118 of 1991.]

(4) If any such assessor is not a person employed in a full-time capacity in the service of the State he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of ex-

penses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

[Sub-s. (4) substituted by s. 10 (c) of Act 91 of 1977.]

(5) The provisions of section 147 of the Criminal Procedure Act, 1977, shall *mutatis mutandis* apply where an assessor referred to in this section dies or becomes in the opinion of the presiding judicial officer incapable of continuing to act as an assessor.

[Sub-s. (5) added by s. 2 (b) of Act 16 of 1959 and substituted by s. 10 (d) of Act 91 of 1977.]

[S. 93ter inserted by s. 3 of Act 14 of 1954.]

## 2. CRIMINAL PROCEDURE ACT

### Provisions relating to the use of assessors in criminal trials in the High Courts

#### Section 145 Trial in superior court by judge sitting with or without assessors

- (1) (a) Except as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.  
(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.
- (2) Where an attorney-general arraigns an accused before a superior court—
  - (a) for trial and the accused pleads not guilty; or
  - (b) for sentence; or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge,the presiding judge may summon not more than two assessors to assist him at the trial: Provided that where the offence in respect of which the accused is on trial is an offence for which the sentence of death is a competent sentence, the presiding judge shall, if he is of the opinion that, in the event of a conviction

and having regard to the circumstances of the case, the sentence of death may be imposed, summon two assessors to his assistance.

[Sub-s. (2) amended by s. 2 of Act 107 of 1990.]

[NB: Sub-s. (2) has been amended by s. 31 of the Criminal Law Amendment Act 105 of 1997, a provision which will be put into operation by proclamation.]

(3) No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.

(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that—

- (a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court.
- (b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone;
- (c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he may for this purpose sit alone.

[Sub-s. (4) substituted by s. 4 of Act 64 of 1982.]

(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

### **Section 146 Reasons for decision by superior court in criminal trial**

A judge presiding at a criminal trial in a superior court shall—

- (a) where he decides any question of law, including any question under paragraph (c) of the proviso to section 145 (4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision;
- (b) whether he sits with or without assessors, give the reasons for the decision or finding of the court upon any question of fact;
- (c) where he sits with assessors, give the reasons for the decision or finding of the court upon the question referred to in paragraph (b) of the proviso to section 145 (4);
- (d) where he sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in paragraph (b) of the proviso to section 145 (4), give the reasons for the decision or finding of the member of the court who is in the minority or, where the presiding judge sits with only one assessor, of such an assessor.

[S. 146 substituted by s. 5 of Act 64 of 1982.]

### **Section 147 Death or incapacity of assessor**

- (1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct—
  - (a) that the trial proceed before the remaining member or members of the court; or
  - (b) that the trial start *de novo*, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.
- (2) Where the presiding judge acts under subsection (1) (b), the plea already recorded shall stand.

APPENDIX D

**Magistrates' Courts Amendment Bill  
(B33-98)**

**General explanatory note:**

Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

**BILL**

To amend the Magistrates' Courts Act, 1944, so as to further regulate the summoning of assessors in civil and criminal proceedings; to further regulate the procedure in the event of death, incapacity or absence of an assessor; to empower the Minister of Justice to make regulations in connection with matters pertaining to assessors; and to provide for matters connected therewith.

Be it enacted by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 34 of Act 32 of 1944**

1. The following section is hereby substituted for section 34 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act):

**“Assessors**

34. In any action the court may, upon the application of either party, summon to its assistance one or two persons **[of skill and experience in the matter to which the action relates]** who may be willing to sit and act as assessors in an advisory capacity.”

**Amendment of section 93ter of Act 32 of 1944, as substituted by section 10 (a) of Act 91 of 1977 and amended by section 1 (a) of Act 118 of 1991**

2. Section 93ter of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) (a) The judicial officer presiding at any proceedings may, subject to paragraph (b), if he or she considers it expedient for the administration of justice, summon to his or her assistance one or two persons who, in his or her opinion, may be of assistance at a hearing of a matter or determination of a sentence, to sit with him or her as assessor or assessors;

(b) The presiding judicial officer shall be assisted by two assessors at a hearing of a person who is charged with an offence in respect of which—

(i) the infliction of bodily harm on another person constitutes an element, unless the prosecutor informs the court that, in his or her opinion, the offence is not of such a nature that the accused person would, upon conviction, be liable to imprisonment without the option of a fine; or

(ii) the prosecutor informs the court that, in his or her opinion, the offence concerned is of such prevalence in the jurisdiction of the court or of such a serious nature that the accused person would, upon conviction, be liable to imprisonment without the option of a fine.”;

(b) by the deletion of paragraph (b) of subsection (2);

(c) by the substitution for subsection (3) of the following subsection:

“(3) Before the [trial] hearing of a matter or the imposition of punishment, [as the case may be], the [said] presiding judicial officer shall administer an oath or affirmation to the [person or persons whom he has called to his assistance] assessor or assessors to the effect that the assessor or assessors [that he or she or they] will give a true verdict, or a considered opinion [as the case may be] according to the evidence tendered in the proceedings [upon the issues to be tried] or regarding the punishment, [as the case may be] and thereupon [he or they] such an assessor or assessors [shall be] becomes or become a member or members of the court subject to the following provisions:

(a) any matter of law arising for decision at such [trial] proceedings, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a [voice] say in any such decision;

- (b) the presiding judicial officer may adjourn the [argument upon] proceedings regarding any [such] matter or question [as is mentioned] referred to in subparagraph (a) and may sit alone for the hearing of such [argument] proceedings and the decision of such matter or question;
- (c) whenever the [said] presiding judicial officer [shall give] delivers a decision in terms of paragraph (a) he or she shall give his or her reasons for that decision;
- (d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such presiding judicial officer shall be the decision or finding of the court if there is a difference of opinion;
- (e) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph (d);
- (f) [in the event of a conviction the question of the punishment to be inflicted shall, except in a case contemplated in subsection (1)(b) be deemed, for the purposes of paragraph (a), to be a question of law] an assessor shall, in determining an appropriate sentence, assist the presiding judicial officer in an advisory capacity only.”;

(d) by the repeal of subsection (4); and

(e) by the substitution for subsection (5) of the following subsection:

“(5) If an assessor dies or in the opinion of the presiding judicial officer becomes unable to act as an assessor or is absent at any stage before the completion of the proceedings concerned, the presiding judicial officer may, after due consideration of the arguments put forward by the accused person and the prosecutor and the interest of justice direct that—

- (a) the proceedings continue before the remaining member or members of the court; or
- (b) the proceedings start afresh.”.

#### Insertion of section 93quat in Act 32 of 1944

3. The following section is hereby inserted into the principal Act:

#### “Regulations pertaining to assessors

93quat. The Minister may, in respect of assessors referred to in section 93ter make regulations regarding—

- (a) a code of conduct for such assessors, and mechanisms for the enforcement of such code of conduct;
- (b) the payment of allowances to such assessors in consultation with the Minister of Finance;
- (c) any other matter which the Minister deems expedient to prescribe in order to regulate the service of assessors in courts.”

#### Short title

4. This Act is called the Magistrates' Courts Amendment Act, 1998, and shall take effect on a date fixed by the President by proclamation in the *Gazette*.

## NOTES

1. This is not to say that judicial systems can stand apart from the destruction of democracy. As the experience of Germany in the 1930s shows very clearly, the courts can adjust to and even abet the downfall of democracy.
2. As juries were phased out in the course of the twentieth century, so more use was made of 'expert' assessors. The use of expert assessors was compulsory in murder cases where there was some prospect of capital punishment; in other cases it was at the discretion of the judge. Although an assessor need not have legal 'expertise', in practice very few assessors were used who did not have legal qualifications. Smit and Isakow found, in their study of the Cape Provincial Division of the Supreme Court in 1984, that all of the assessors used had legal backgrounds (Smit and Isakow, 1985: 222).
3. The Justices of the Peace and Commissioners of Oaths Act (Act 16 of 1963), as amended.
4. The Magistrates' Courts Act was amended by the Magistrates' Courts Amendment Act (Act 118 of 1991).
5. See, for example, the comments of Essa Moosa at the conference on assessors held in Seapoint, Cape Town in April 1995, and discussed in Chapter 3.
6. In addition, black people were appointed to the Constitutional Court – including Ismail Mahomed as the court's Deputy-President. In 1996, Mahomed was appointed as Chief Justice. On being appointed, Mahomed remarked that restoring the legitimacy of the law was the most important challenge facing lawyers (*Cape Times*, 24 Oct 1996).
7. 'Discussion Document for Community Courts Prepared By Assessors Co-ordinating Committee'.
8. It should be noted that we are *not* suggesting that lay participation always ensures that the decisions made by courts are just or even good for democracy. The examples of the Parisian revolutionary tribunals in the 1790s and the Nazi *volksgerichtshof* in Germany provide evidence that popular participation can go hand in hand with appalling decisions. The experiences of 'people's courts' in South Africa are, however, decidedly more ambiguous (see Seekings, 1991).
9. This was the case in at least one magistrates' court in the Eastern Transvaal (Mpumalanga).
10. Proclamation R14, *Government Gazette* 13 802, 28 Feb 1992, cited in Kahn, 1993: 325.
11. Assessors were apparently the subject of Justice Circular (or *omsendbrief*) 50 of 1991 (dated 8 Nov 1991), 3 of 1992, 6 of 1992 and 19 of 1992. Magistrates in the Eastern Transvaal received an 'official minute' from the Chief Magistrate in Preto-

ria, reportedly dated 21 Nov 1991. (Information from Magistrates Liebenberg (Barberton, interview, February 1997) and Swart (Cape Town, interviews, 1 July 1996 and 21 October 1997).

12. Interview with A Jooste, Cape Town, June 1996.
13. Interview with H A F Swart, Cape Town, June 1996.
14. See, for example, the comments of Pretoria magistrate Venter at the conference on lay assessors, Cape Town, 1 April 1995, as recorded in the unpublished transcript of conference proceedings.
15. Interview with H Moldenhauer, Nelspruit, June 1996.
16. Interview with Chief Magistrate Pruis, Pretoria North, Sept 1996.
17. The Johannesburg list was reported on in the *Sunday Times*, 20 Feb 1992.
18. *Hansard*, Questions & Replies, Thursday 11 May 1995, col. 319-321.
19. Total number of cases from Department of Justice, *Annual Report 1993/94* (RP 118/1995). The data excludes all bantustan courts; we assume that Minister Omar's data does likewise.
20. National Association of Democratic Lawyers, 'Memorandum to the Minister of Justice on Community Participation in Judicial Services', dated 27 July 1994, signed Pius Langa (National Director, NADEL – and later a Constitutional Court judge). The main ideas in this were aired previously in the latter part of a discussion document for a NADEL workshop on the transformation of judicial services.
21. In addition, a former court interpreter, Temba Moshe, initially assisted the Committee; but he left to continue his career as a prosecutor (Jooste, interview; Moosa, 'Lay assessors', p. 16).
22. 'Report from Assessors: Cape Town Magistrates Court', typed, undated (but early November 1994?), unsigned; hand-written memo by S. Conrad, dated 24 Oct; 'Report from Assessors', dated 2 Dec 1994, signed K. Desai; 'Interim report from assessor K. Desai', hand-written and undated; letter, Z. Shaboudien to Co-ordinating Committee, 6 March 1995.
23. Letter, Z. Shaboudien to Co-ordinating Committee, 6 March 1995.
24. Interview, Swart.
25. Venter, at April 1995 CT conference; interview, Ms van der Walt, Pretoria North, September 1996.
26. Moldenhauer interview, June 1996.
27. Capitals in original; punctuation amended.
28. Letter, Moosa to Minister Omar, 19 Jan 1995.
29. Letter, Co-ordinating Committee to provincial premiers, undated (Jan/Feb?).
30. 'Memo: Lay Assessors', unsigned, undated.
31. The plenary sessions of the conference, held at Arthur's Seat Hotel, Seapoint (1 April 1995), were transcribed. There does not appear to be any record of discussions in the small-group session.
32. Transcript of proceedings, p. 3, translated from Afrikaans.

33. *Ibid.* (original in English).
34. *Ibid.*, pp. 4-7. Daniels' comments echoed the view of a German legal scholar at the first legal forum, two months before. In the course of describing the use of lay assessors in Germany, he had suggested that lay assessors were especially appropriate in South Africa given its 'divided society' and the need to exercise 'effective control over the professional judges and magistrates' (Norton, 1994: 45).
35. *Ibid.*, p. 7.
36. *Ibid.*, p. 37.
37. The key individuals included Chief Magistrates Pruis (Pretoria North, responsible for Mpumalanga), Ecksteen (Johannesburg, responsible for Gauteng), Steyn (Bloemfontein, responsible for the Free State), Bester (Pretoria, responsible for Northern Province) and Dicks (Pietermaritzburg, responsible for KwaZulu-Natal) – besides Jooste (Cape Town) and Van Reenen (Wynberg), as we have already seen.
38. Interview, Jooste; letter, Co-ordinating Committee to Free State Premier's office, 22 Aug 1995.
39. Department of Justice, *The First 1000 Days*, p. 29.
40. 'Cabinet backs assessors bill', *Cape Times*, 22 Jan 1998.
41. Submission by South African Institute of Race Relations, p. 7.
42. The paper refers to two cases: *Mokonto* 1971 (2) SA 319 (A) and *Mojapelo* 1991 (1) SACR 257 (T).
43. Circular from Magistrates' Commission (27 Dec 1996), reporting on a meeting held on 9 Dec 1996, p. 2.
44. This view gives rise to curious positions among some supposed champions of liberalism. The South African Institute of Race Relations, for example, expresses strong opposition to lay participation in its submission to the Parliamentary Portfolio Committee on Justice on the 1998 Magistrates' Courts Amendment Bill. Yet citizen participation in the courts was a central feature of the liberal tradition in Britain.
45. Regulation by the Minister of Justice through making regulations need not infringe the principle of separation of powers or interfere with the independence of the courts. First, it is uncontroversial in South Africa at least that both Parliament and the executive should have a role in the administration of the judiciary and that its independence and institutional separateness is mainly concerned with the conditions in which decisions are made. Second, the notions of separation of powers and accountable government do not demand that judicial officers are in control of who may become a judicial officer. Instead, the Judicial Service Commission is a mechanism for the selection of judges which incorporates legal professionals and political appointees. The Magistrates' Commission does the same for the selection of magistrates. What is required if the new commitment to an independent magistracy is to be retained is that the executive should not hand-pick assessors.
46. See Lord Devlin, *Trial by Jury*, p. 61.

47. *Estimate of Expenditure to be Defrayed from the National Revenue Fund during the Financial Year ending 31 March 1999* (RP 2/1998).

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### **Legislation**

- Abolition of Juries Act (Act 34 of 1969)
- Criminal Procedure Act (Act 51 of 1977)
- Justice Laws Rationalisation Act (Act 18 of 1996)
- Justices of the Peace and Commissioners of Oaths Act (Act 16 of 1963)
- Magistrates' Courts Act (Act 32 of 1944)
- Magistrates' Courts Amendment Act (Act 118 of 1991)
- Native Administration Act (Act 38 of 1927)
- Self-Governing Territories Constitution Act (Act 21 of 1971)
- Short Process Courts and Mediation in Certain Civil Cases Act (Act 103 of 1991)
- Small Claims Courts Act (Act 61 of 1984)
- Special Courts for Blacks Abolition Act (Act 34 of 1986)