



THE JUDICIAL CONFERENCE OF AUSTRALIA

**Chair:** Justice Ronald Sackville

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The Hon J McGinty MLA,  
Attorney-General and Minister for Health &  
Electoral Affairs,  
30<sup>th</sup> Floor, Allendale Square,  
77 St George's Tce,  
PERTH WA 6000.

Dear Attorney,

As you know, the Judicial Conference of Australia ('JCA') has made representations about the terms of the *Magistrates Court Bill 2003* (WA). The JCA has been particularly concerned about those aspects of the Bill that it considers are inconsistent with the fundamental principle of the independence of the Judiciary, particularly independence from the executive government of the day.

The former Chairman of the JCA, Justice C S C Sheller has now received a copy of the *Report of the Standing Committee on Legislation in Relation to the Magistrates Court Bill 2003* ('Report') from the Senior Committee Clerk of the Legislative Council of Western Australia. The Report was considered by the Governing Council of the JCA at its meeting in Adelaide on 1 October 2004 and by the Annual General Meeting of the JCA, which was held the following day.

The JCA welcomes the fact that the Standing Committee on Legislation has clearly carefully considered representations made by the JCA, together with those made by the Chief Justice of Western Australia and on behalf of the Magistrates. The JCA notes that while the Report does not adopt its proposal that Western Australian Magistrates should enjoy the same security of tenure as Judges, the Report does address some of the JCA's concerns about the legislation. Although the JCA would

have preferred its proposal to be adopted, it appreciates the steps that have been taken to meet the concerns expressed by it and others.

Without canvassing the issues raised in previous communications, the JCA wishes to draw attention to certain amendments that could readily be made to the Bill. These amendments would ameliorate the JCA's concerns about the proposed legislation, yet leave the structure of the legislation intact. The suggested amendments are as follows:

1. Amend cl 14(3) to remove the automatic effect of a notice, namely that the Magistrate the subject of the notice be 'relieved from carrying out the duties of his or her office'. Instead, the legislation should be amended to provide that the Inquirer nominated by the Chief Justice should have power to determine, in the interests of the administration of justice, whether the Magistrate should be relieved from his or her duties pending the completion of the inquiry and the making of recommendations.

#### **Comment**

If the automatic consequence of a notice is that the Magistrate is relieved from duties (a euphemism for suspension on full pay) it is the actions of the Attorney General that are sufficient of themselves to prevent the Magistrate continuing to perform his or her duties. It is true that the Attorney General must consult with the Chief Magistrate (cl 14(2)(b)), but the Attorney General need not obtain the approval of the Chief Magistrate to cause a notice to be issued. Moreover, there may be circumstances in which it is inappropriate for the Chief Magistrate to express a view. One such situation is where the problem originates with difficulties in the relationship between the Chief Magistrate and the Magistrate the subject of the notice. (Experience in other States suggests that this is not a fanciful prospect). Giving responsibility for the decision to the Inquirer interposes an independent decision maker and affords the Magistrate concerned a measure of natural justice.

2. Delete cl 14(1)(a) of the Bill.

#### **Comment**

It is not clear whether cl 14(1)(a) is intended to add anything to cl 14(1)(b). On the face of it, serious incompetence or neglect in performing a Magistrate's duties would render that Magistrate unfit to hold office for the purposes of cl 14(1)(b). If it is intended that cl 14(1)(a) is to be confined to serious incompetence or wilful neglect in performing the Magistrate's functions, it probably adds nothing to cl 14(1)(b).

If, on the other hand, cl 14(1)(a) is intended to widen the scope for suspending a Magistrate from office, it increases the power of the Attorney General over particular Magistrates very considerably and renders Magistrates vulnerable to action under the legislation, particularly when they have participated in unpopular decisions. Is a Magistrate whose unpopular sentencing decision is overturned on appeal to be the subject of a notice on the ground that the

Attorney General of the day considers that he or she has been ‘incompetent’ in a particular case?

In any event, I suggest that the ambiguity as to the scope of cl 14(1)(a) is a reason for itself for reconsidering whether it will form part of the legislation.

3. Cl 14(5)(a) should be amended to empower the Inquirer to report not only as to the truth of the allegation, but as to whether the allegation, if true, merits consideration of the Magistrate’s removal.

**Comment**

An allegation may be true yet it may provide no reasonable basis for considering the removal of the Magistrate. The role of the Inquirer should not be as limited as the Bill currently provides. At present, it appears that the Inquirer is bound to consider the truth of allegations, regardless of whether the allegations are sufficiently serious to warrant consideration of the Magistrate’s removal.

The JCA would be grateful if these additional comments could be taken into account in determining the final form of the Bill.

If you thought it appropriate, I would be very happy to discuss these matters with you or your representative.

Yours sincerely,

**JUSTICE RONALD SACKVILLE,  
Chair  
Judicial Commission of Australia.**