

INDEPENDENCE OF THE MAGISTRACY: CROSSING OVER TO JUDICIALISM

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INDEPENDENCE OF THE MAGISTRACY: CROSSING OVER TO JUDICIALISM

**Speech to be delivered at the Judicial Conference of Australia in
Adelaide on Saturday 2 October 2004**

INTRODUCTION

Judicial independence is at the heart of the western democratic legal system. It is ‘integral to upholding the rule of law, engendering public confidence and dispensing justice.’¹ It is the surest protection against the abuse of power. We are fortunate to live and operate in a country with such a strong record of judicial independence in the law. But as I stand here today, what more can be said on the subject? Has it not been exhausted?

Chief Justice McLachlin of the Supreme Court of Canada recently considered whether ‘everything which can be said (on the topic of judicial independence) has been said and repeated on so many occasions in so many learned articles that any further observations are inevitably redundant’.² Some may say this is so. But could it not be that, in our innumerable discourses on the subject of judicial independence, we have overlooked – deliberately or not – the magistracy?

Historically seen as separate from the higher courts, the magistracy has only recently, and some might say cautiously, been welcomed into the judicial family. This has been inevitable in light of the Court’s increasing independence from the executive, its growing complexity and expanding jurisdiction and the ever-improving legal qualifications of its magistrates. As a sign of the times, only last month magistrates in Victoria were elevated in title, being addressed no longer as ‘Your Worship’, but as ‘Your Honour’.

¹ ‘Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government’, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003.

² ‘Remarks of the Right Honourable Beverley McLachlin, P.C. on Judicial Independence’, at the 300th Anniversary of the Act of Settlement Conference, Vancouver, British Columbia, on 11 May 2001, quoting Mr Justice Sydney L Robins.

Yet, while more like courts than the quasi-judicial administrative bodies they once were, Magistrates' Courts nevertheless retain a uniqueness in the practice and nature of their work – as well as, I would suggest, a persisting connection to the executive – which sets them apart from the higher courts.

And this distinction brings with it new questions and problems relating to judicial independence for the magistracy. As Chief Justice Gleeson said recently, 'it is easy for modern judges to forget how recent are the developments in the independence of the ... magistracy. Some of these developments are continuing to work themselves out.'³ How they are 'worked out' will be integral to establishing true judicial independence for the magistracy but also to retaining the unique work patterns and nature of the Magistrates' Courts. So let us consider the role of the magistracy today, in the context of the wider State and Federal judicial system.

THE MAGISTRACY: A KINGSWOOD AMONG ROLLS ROYCES?

If indeed the magistracy stands apart from the judiciary as a whole – and if its independence is as a result more compromised than its senior counterparts, then the reason for this lies in three basic grounds. They are

1. Its historical connection with the Executive;
2. The volume and flexibility of its work; and
3. Its proximity to the public at large.

I will speak briefly about each in turn.

Historical Connection with the Executive

Historically, Australian magistrates formed part of government bureaucracy.⁴ A large part of their function was administrative, and their judicial role, in terms of recruitment, conditions of service and promotion, was tied up very closely with the

³ Chief Justice Gleeson, 'The State of the Judicature', delivered in a speech on 14 October 2001.

executive.⁵ It was staffed by public servants, usually not legally qualified, who dealt with minor civil and criminal matters.

Whatever the truth of this historical picture, the present depicts a different reality. More about this later. For the present, it is enough to illustrate how the historical ties of the Magistrates' Court to the executive have set it apart from the judiciary as a whole.

Volume/Flexibility of Work

The second major reason for the unique status of the Magistracy lies in the nature of its work. Magistrates' Courts handle many more cases and make many more determinations than all the other courts together.⁶ This often calls for a more flexible, 'rough and ready', 'quick-fix justice', approach that does not ascribe to the rigidity and formality necessitated in higher courts by pleadings, precedent and tradition. On this basis, certain commentators have been led to liken the justice meted out by magistrates as 'Kingswood rather than Rolls Royce'.⁷

This, I would respectfully suggest, is far from the truth.

But the attitude, as far as it prevails, has probably worked to the advantage of the Magistrates' Court: I would suggest that a failure to acknowledge its contribution and status was one of the major reasons for its efficiency and vitality. By being less bound by tradition in the way of more superior courts, the Magistrates' Courts have been more receptive to change, more innovative and more capable of responding to new demands as they arise.⁸

⁴ Chief Justice Gleeson, 'A Changing Judiciary', in a speech delivered at the Judicial Conference of Australia, Uluru, on 7 April 2001.

⁵ Chief Justice Gleeson, 'The State of the Judicature' *op.cit.*

⁶ Over 90% of all civil and criminal cases are initiated in a Magistrates Court. See G Hiskey, 'The Dynamic Magistracy', (2000) 22(2) *LSB* 32 at 33.

⁷ John Willis, 'The Magistracy: The Undervalued work-horse of the court system', (2001) 18(1) *Law in Context* 129 at 133-134, where he considers the attitudes of various authors writing on the 'ideology of triviality' in Magistrates' Courts.

⁸ See Willis, *ibid.* at 129.

Direct Contact with the People

The third distinguishing feature of the Magistracy is its rather unusual proximity to the wider public. As Chief Justice Gleeson has said, '[t]he judicial officers with whom members of the public are most likely to come into contact are magistrates, sitting in Local Courts.'⁹ For this reason Magistrates' Courts are sometimes described as 'the people's court'.

This status distinguishes the Magistrates' Court from the higher courts in a number of ways. Primarily, through geographical proximity and symbolic proximity. As to the first, many Magistrates' Courts are situated in the suburbs and country districts, and magistrates will often live in these areas. This closeness to the community can be both a strength and a weakness. Its strength is in the accessibility of the court to the general community and the magistrate's subsequent heightened awareness of, and responsiveness to, the concerns and needs of the community. Its weakness lies in the danger of being too close to local prejudices and biases.¹⁰

The second factor, which I have called 'symbolic proximity', is more subtle. Unlike the higher courts, where judges are able to set themselves apart from lay people with wigs and robes, a lofty Bench, and significant pomp and ceremony, many magistrates deal far more directly, and on more equal terms, with those seeking their day in court. For example, they will often not have the assistance of legal advocates for the parties. They may play the role of mediator between the parties, who do not have a good understanding of the relevant law, who cannot present their case effectively and who are often very emotionally involved in the matter.¹¹

Such situations will arise particularly in the context of 'problem oriented courts'. This is a relatively new initiative within the Magistracy which has seen the establishment, among other things, of a Drug Court for drug dependent offenders¹² and a Koori

⁹ Chief Justice Gleeson, 'The State of the Judicature' *op. cit.*

¹⁰ See Willis, *op. cit.* at 134.

¹¹ Hiskey *op. cit.* at 32

¹² A Drug Court is being trialled in Dandenong (Victoria) over the next three years. It has been established in response to the failure of the current custodial sanctions to adequately address drug use and related offending. The Victorian model claims to have incorporated the best features of existing drug courts and represents a fundamental shift in the way in which courts will deal with drug offenders,

Court to address special needs for indigenous offenders.¹³ The Magistrates' Court also runs diversion programmes in various forms.¹⁴ Their approach is different in that they all involve direct consultation, diversion, reappraisal and supervision of offenders.¹⁵ Again, the role of the magistrate is unique in terms of his or her direct involvement with offenders.

THE MAGISTRACY AS THE THIRD SECTOR OF THE JUDICIARY

The Growing Role of the Magistracy

So what we have, then, if my brief examination has merit, is a court that, by virtue of its historical and practical purpose, can be seen as quite separate from its counterparts. On the other hand, significant changes have brought the magistracy closer to the superior courts. The past 30 years have seen it gradually removed from public service control in the various Australian jurisdictions. At the same time, legal qualifications have been made a precondition for the office of magistrate in virtually all cases and they are subsequently performing increasingly complex, qualitative, judicial work.¹⁶ Magistrates have also been granted much greater security of tenure

with a focus on rehabilitation and reintegration of offenders. See the Victorian *Courts Strategic Directions Project*, 2 September 2004, at 44.

¹³ The Koori Court, a Division of the Magistrates' Court, was officially opened in Shepparton (Victoria) in September 2002. The Court is part of the Victorian Aboriginal Justice Agreement and is designed to help produce more culturally appropriate sentencing outcomes for Kooris in the justice system, through a more informal sentencing approach with participation by Aboriginal elders and justice workers. See *ibid.* at 44.

¹⁴ The Diversion program in Victoria provides mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that will benefit the offender, victim and the community as a whole. It is aimed at improving the efficient use of court resources by facilitating the development of an alternative and/or complementary procedure to normal case processes. See Victorian Magistrates' Court website, at www.magistratescourt.vic.gov.au. A similar programme has been established in NSW called MERIT ('Magistrates Early Referral Into Treatment'). It has been designed as a diversionary treatment program for alleged offenders with illicit drug problems. It is a program in the Local Courts, operates pre-plea, and is a voluntary program with no sanctions for opting out. A magistrate may refer a willing person to the MERIT team which consists of persons from probation service, psychologists, community counsellors, drug and alcohol treatment agencies, and other health agencies. See 'Current Issues', (2004) 78 *ALJ* 555 at 557 per Young J.

¹⁵ Chief Justice Gleeson, 'The State of the Judicature' *op. cit.*

¹⁶ The requirements for appointment as a magistrate are set out in the following States legislation: *Magistrates Court Act* 1930 ss 8, 10A (ACT); *Stipendiary Magistrates Act* 1991 s 4 (Qld); *Magistrates Court Act* 1991 s 5 (SA); *Magistrates Court Act* 1987 s 8 (Tas); *Magistrates Court Act* 1989 s 7 (Vic); *Stipendiary Magistrates Act* 1957 s 4 (WA). See Willis *op. cit.* at fn2.

with the provisions dealing with the removal of a magistrate from office generally requiring a process involving a judicial commission or a judicial determination.¹⁷

As Justice Thomas of the Supreme Court of Queensland stated, in an address to magistrates in 1991, all these changes have had a significant impact on the standing of magistrates:

The Magistrates' Court are for most citizens the only place where direct contact is made with a judicial officer. It is inescapable that the point has been reached where the magistrates must be regarded as a group of judicial officers forming the ground level of a three-tier judicial structure. It is no longer valid to view the magistracy as a hybrid creature, part public servant, part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role. There were times not long distant when such a view was accurate. The times have changed, and in this instance for the better. I take it to be clearly established that the magistracy is here to stay as a primary and clearly identifiable sector of the Australian judiciary.¹⁸

Qualifications

Let us consider these changes in more detail. There is, as a whole, increased recognition of magistrates as independent judicial officers. Not least important in this process has been the professionalisation of the magistracy. Where magistrates were once almost all public service trained, with no legal training and only ad hoc legal knowledge, judicial officers in Magistrates' Courts today must with very few exceptions be legally qualified.

Growth in Jurisdiction and Complexity

This has enabled them to take on work of greater substance and complexity which in turn has resulted in the growth of the jurisdiction.

¹⁷ The requirements for removal of a magistrate are set out in the following legislation: *Judicial Commissions Act* 1994 s 5 (ACT); *Judicial Officers Act* 1986 s 44 (NSW); *Magistrates Act* 1991 s 10 (NT) *Stipendiary Magistrates Act* 1991 s 15 (Qld); *Magistrates Court Act* 1991 s 11 (SA); *Magistrates Court Act* 1987 s 9 (Tas); *Magistrates Court Act* 1989 s 11 (Vic); *Stipendiary Magistrates Act* 1957 s 5 (WA). See Willis *ibid.* at fn3.

¹⁸ Justice Thomas, 'The Ethics of Magistrates' (1991) 65 *Australian Law Journal* 387 at 389, 390, quoting Briese, 'Judge or Magistrate' (1988) 7 *Commonwealth Judicial Journal* 19 at 20.

An examination of the criminal jurisdiction of Magistrates' Court illustrates this. It has grown significantly, largely through the increase in the number of indictable offences that can be heard summarily. The various State and Territory statutory provisions show us not only the wide range of offences over which magistrates may exercise jurisdiction¹⁹ but also the very serious nature of those offences.²⁰ Australian magistrates also exercise summary jurisdiction over Commonwealth criminal matters.²¹

The civil jurisdiction, as with the criminal, has increased its jurisdictional limit markedly in most jurisdictions over the years.²² Not only has the civil jurisdiction of magistrates increased in terms of its monetary limits²³ but also in terms of its complexity. The modern Australian magistrate exercises both a common law and equitable jurisdiction which affords litigants a vast array of remedies and relief.

Other jurisdictions exercised by Australian State magistrates include

- A coronial jurisdiction;
- Jurisdiction under the *Family Law Act*;
- A Children's Court or Juvenile jurisdiction;
- Jurisdiction over child welfare and child protection matters;
- Jurisdiction over adoptions;
- A preventative jurisdiction (domestic violence);

¹⁹ In Victoria, the Magistrates Court has jurisdiction (a) to hear and determine summary offences; (b) to hear and determine all indictable offences that may be heard and determined summarily and (c) to preside over committal proceedings in relation to indictable offences – ss 25(1) (see also ss 53, 54 and Schedule 4) of the *Magistrates Court Act* (Vic) 1989. Other jurisdictions reflect a similar scope. See the *Justices Act* (NSW) 1902 ss 52-100AQ, 32-48I, 51A; the *Magistrates Court Act* (Qld) 1921 ss 25(1), 51, 52, 54, 56; the *Magistrates Court Act* (ACT) 1930 ss 19, 22.

²⁰ In many cases indictable offences attract a maximum term of imprisonment of 7 and 10 years. Magistrates may impose maximum sentences of 2 to 5 years in relation to indictable matters dealt with summarily (for example, Northern Territory magistrates can impose a sentence of 5 years, *Justices Act* (NT) 1928). See Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74(9) *ALJ* 592 at fn 141.

²¹ See s 26 of the *Acts Interpretation Act* 1901 (Cth), and ss 4G, 4H and 4J of the *Crimes Act* (Cth) 1914 – cited in Lowndes, *ibid.* at fn 142 and 143. The maximum penalties that can be imposed in relation to indictable offences dealt with summarily are laid down in s 4J of the *Crimes Act* 1914.

²² Willis *op. cit.* at 143.

²³ The *Magistrates' Court (Increased Civil Jurisdiction) Bill* was introduced in August this year, an received royal assent on 19 October. These provisions will commence on 1 January 2005 and will result in an increase in the civil jurisdictional limit of the Court from \$40,000 to \$100,000 and an

- Jurisdiction over Workers Compensation or Work Health matters;
- A licensing and industrial jurisdiction;
- A mining wardens jurisdiction;
- Jurisdiction in tenancy matters;
- A mental health jurisdiction;
- Jurisdiction over criminal injuries compensation claims;
- A marine jurisdiction; and others.²⁴

While not all States and Territories exercise all of these jurisdictions, this list is indicative of the vast potential of the magistracy.

The Federal Magistrates Court

Moreover, the creation of the Federal Magistrates Court in 1999 has precipitated rapid growth and marked a change in direction in the administration of justice at the federal level in Australia. Its jurisdiction is shared with the Family Court of Australia and the Federal Court of Australia,²⁵ its objective being to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts. The Court has jurisdiction in family law (heard from the Family Court) and immigration and trade practice matters (heard from the Federal Court).

Although only established since 2000, the increasing range and volume of cases heard by the court has confirmed its role in Australia's judicial system. Over half of all migration matters and more than 40 per cent of family law children's and property applications are now completed in the Federal Magistrates Court. Approximately 80 per cent of the court's workload is in the area of family law. It is rapidly moving towards becoming one of Australia's largest courts.²⁶

increase in monetary limit of proceedings which must be referred to arbitration from \$5,000 to \$10,000. See the Victorian Magistrates Court website, at www.magistratescourt.vic.gov.au.

²⁴ See Lowndes, *op. cit.*

²⁵ Includes family law and child support, administrative law, bankruptcy, unlawful discrimination, consumer protection law, privacy law, migration and copyright.

²⁶ See <http://www.fmc.gov.au/html/introduction.html>.

INDEPENDENCE OF THE MAGISTRACY: FACT OR FURPHY?

Fact

'Judicialisation' of the Magistracy

The logical result of these changes has been a move away from the executive, and towards the judiciary, as its third sector. The magistracy has been 'judicialised', so to speak: It is now largely independent of the public service; it is legally qualified and has security of tenure. Its jurisdiction is large and continues to grow. In all these ways it is increasingly associated with the mainstream court system.

As we have seen, a number of interrelated factors have contributed to this change:

- The gradual severance of the magistracy from the executive arm of government/public service;
- The increased demand for, and appointment of, more highly qualified magistrates; and
- The expanding jurisdiction of magistrates which by necessity shed them of their administrative functions and diverted them into the performance of judicial functions.²⁷

Public Expectation

With these changes have come a new demand, that is, corresponding heightened need for judicial independence within the magistracy. As Magistrates' Courts increasingly resemble higher courts, there is a concomitant expectation on the part of the community that those who preside over Magistrates' Courts will act judicially, ie, act as 'judges'. The Judicial Commission of NSW addressed the matter squarely:²⁸

The litigants and public expect impartial and independent adjudication from magistrates just as they expect it from judges. The common law principles relating to bias and ostensible bias apply to magistrates as well as judges. Magistrates' Courts

²⁷ Lowndes *op. cit.* at 54

undertake important work extending over a wider range of issues. They exercise an important jurisdiction in relation to summary offences. They are the principal point of contact that the community has with the court system. Today there are strong reasons for applying the concept of judicial independence to magistrates.

R v Magistrates' Court at Lilydale

This notion was explored by the Full Court of the Victorian Supreme Court in *R v Magistrates' Court at Lilydale; Ex parte Ciccone*.²⁹ In this case a magistrate, in making his way out to a view, travelled in the same vehicle as counsel for the respondent. The car was also being driven by a man who was to be a principle witness for the respondent in the matter, although at the time the magistrate was not aware of the driver's status as a witness. The respondent argued that the magistrate, in accepting the lift to and from the view, had displayed merely a lack of 'nicety'.

The Full Court, however, found that, despite there being no evidence to indicate the magistrate's decision was actually biased, nonetheless found that a reasonable person might suspect or conclude that the applicant was not likely to receive a fair and unbiased hearing. Citing Lord Denning it was said that 'justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking the judge was biased'.³⁰

In this case, not only was a magistrate subjected to the same standards as a judge, but the importance of judicial independence and ethics was treated as paramount.

R v Farquhar

A decade on, in the mid-eighties, the question of independence arose again in a number of cases relating to the magistracy. In *R v Farquhar*,³¹ the Chief Stipendary Magistrate, allegedly 'leaned' on a presiding magistrate to discharge a defendant. The Chief Magistrate was convicted and sentenced to four and a half years' imprisonment,

²⁸ 'Fragile Bastion of Judicial Independence in the Nineties and Beyond' The Judicial Commission of NSW 2000 at 31, cited in J Lowndes at 50.

²⁹ P[1973] VR 122.

³⁰ at 131.

³¹ NSWCCA (Unreported, CCA 63 of 1985) 29 May 1985 per Hope JA, Lee and Finlay JJ.

with a non-parole period of 18 months. An appeal against conviction was dismissed. As part of his decision, Hope JA said

[w]here, as here, the offence is committed by a person holding judicial office in the judicial hierarchy of the State the attempt to commit the offence strikes at the very core of the integrity of the administration of justice. Such a person is in a commanding position to attempt to pervert the course of justice and when he seeks to abuse his position to achieve that end, public confidence in the judicial system will be lost unless it is made clear that such conduct will bring a prison sentence.³²

R v Murphy

A related and infamous case of a judicial officer attempting to pervert the course of justice was the *Murphy Case*.³³ Here, charges were brought against the High Court Judge Lionel Murphy for his alleged attempts to have a committal proceeding involving a solicitor charged with forgery and conspiracy dismissed. The defendant was said to be a friend of Justice Murphy.

Famously, in a subsequent telephone conversation with Chief Stipendiary Magistrate Mr Briese, Murphy J was alleged to have said: ‘and now what about my little mate?’ Apparently, these words conveyed a request or demand that some reciprocal favour ought now be done for Mr Ryan.³⁴ Unsurprisingly, considerable significance was placed on this remark. While found guilty on one charge in the Supreme Court of NSW, and sentenced to 18 months imprisonment, Murphy was acquitted on retrial at that State’s Court of Criminal Appeal.³⁵

Ironically (though coincidentally), the original subject of the phone conversation between Murphy and Briese related to securing legislative independence of the NSW magistracy.³⁶

³² *Ibid.* at 30.

³³ *R v Murphy* (1985) 63 ALR 53.

³⁴ (1985) 4 NSWLR 42 at 68 per Street CJ, Hope, Glass, Samuels and Priestley JJA.

³⁵ E Campbell and HP Lee, *The Australian Judiciary*, Cambridge University Press, 2001, at 187.

³⁶ *R v Murphy, op. cit.* at 57.

The Deegan Controversy

More recent events show a continued approach of subjecting magistrates to judicial standards. Only this year Adelaide magistrate Mr Brian Deegan took up a political campaign against the federal government as an independent candidate. The magistrate's activities became the subject of controversy which ultimately, so the Melbourne *Age* reported, led to the intervention of Chief Justice Doyle. It was reported that the Chief Justice told the magistrate:

... assuming you intend to continue to criticise publicly the commonwealth government, to continue to press for an inquiry into the role of the commonwealth government in relation to the events in Bali, and to stand as a candidate at the election, you should resign your office as magistrate without delay ... If you do not, you will be involved in matters of public controversy and in the political process in an unacceptable manner for a member of the judiciary.³⁷

These examples point to two obvious trends: the universal acceptance that a magistrate behave as, and be subject to, the same standards as a member of the judiciary, and the attendant expectation that, in this capacity, the magistrate retains judicial independence from the executive. But an awareness of these facts, in the context I have described, must also inevitably give rise to a recognition that the struggle to attain judicial independence is ongoing and, perhaps, never fully attainable.

Furphy

Indeed, there are significant aspects of the state of the magistracy which indicate that it has a long way to go in untangling itself from its life-giver, the executive. As one commentator, J Lowndes, has noted, while structural independence may in many ways be assured for the magistracy, 'institutional independence' is still significantly under threat:

³⁷ *The Age* 30 July 2004.

It is logical to argue that so long as the judiciary (which includes the magistracy) continues to be substantially dependent upon the administrative and financial resources provided by the Executive arm of government then the judiciary does not enjoy 'institutional independence'.³⁸

Financial Dependence on the Executive

It is true that threats to judicial independence are usually contemplated in the context of direct political interference.³⁹ But a less direct, though potentially more insidious threat to judicial independence may be the provision of financial and material resources to courts by government. In 1983 Chief Justice King (as he then was) of the Supreme Court of South Australia observed:

The effective functioning of the judiciary depends in large measure upon the financial and material resources made available to it ... the dependence of the judiciary on outside sources for the wherewithal to perform its function must always pose some threat to the independent and impartial administration of justice. Those who control the purse strings will always have some capacity to influence the actions of those who are dependent upon the contents of the purse.⁴⁰

Similarly, Sir Ninian Stephen at a forum earlier this year stated that

A court's lack of adequate equipment and adequate staff to assist the judges in their tasks might well be seen as jeopardising the proper functioning of the court as one arm of government and as prejudicing the collective independence of the judiciary as a whole.⁴¹

This problem, while doubtlessly applicable across the board in all jurisdictions, is felt acutely in Magistrates' Courts which, being at the bottom of the judicial hierarchy, are often under-resourced and reliant on crumbs from the table or 'fiscal bread basket'.⁴²

³⁸ Lowndes *op. cit* at 55.

³⁹ King, L, 'Minimum Standards of Judicial Independence', [1984] 58 *ALJ* 340.

⁴⁰ *Ibid.* at 341-2.

⁴¹ Sir Ninian Stephen, 'Why Judicial Independence?' Speech delivered at the Asia-Pacific Judicial Educators Forum, January 2004.

⁴² Lowndes *op. cit.* at 55. For current arrangements in the various States and Territories ('traditional model', the 'separate department model' and the 'autonomous model') see Lowndes at 59-61

Judicial Remuneration

Similarly, the relationship between judicial independence and judicial remuneration is well defined. Although Remuneration Tribunals for magistrates are in place in most Australian jurisdictions, there are some continuing concerns surrounding the relationship between salary arrangements and the independence of magistrates. For example, a number of the Tribunals' recommendations are subject to legislative ratification. And most States provide no statutory guarantee that a magistrate's salary cannot be reduced during the time in which office is held.⁴³

Judicial Pensions

By extension, the question of judicial pensions for magistrates is relevant. To achieve full judicial independence, magistrates should be entitled to a non-contributory pension along similar lines to the higher courts.⁴⁴ Significant discussions are taking place in relation to judges' retirement benefits. It might be said that magistrates have been sidelined in this debate. As Chief Justice Gleeson said in 2001, their remuneration and superannuation arrangements still reflect the public service background.⁴⁵ It is timely for the development of a protocol or minimum standard for retirement benefits of magistrates.

Security of Tenure

The final, and perhaps most important threat to the judicial independence of the magistracy is that relating to security of tenure. I am aware that Professor Sharyn Roach Anleu will be speaking on this subject in significant detail today. I will simply raise some key issues that to my mind warrant further discussion.

Security of tenure is central to the independence of judicial officers for the simple reason that, in order to administer justice without fear, favour or affection – and be seen to do so – the appointee must not be subject to political influence. This may not

⁴³ See ASMA paper 'Future Directions of the Australian Magistracy' (1994), cited in Lowndes at 62.

⁴⁴ See the Marks-O'Connor Review in Victoria, cited in 'Future Directions of the Australian Magistracy' *op. cit.* in Lowndes at 63.

⁴⁵ Gleeson CJ, 'The State of the Judicature', *op. cit.*

be possible where the magistrate's re-appointment is, or is seen to be, subject to how favourably his or her decisions affect the administration of the day.

- Acting Magistrates

This problem arises particularly in the context of acting magistrates, who are appointed for limited periods of time, and whose tenure may be directly influenced by government. In the past, acting magistrates had to have previously served in judicial office to be eligible for appointment. In Victoria, since the enactment of the *Courts Legislation (Judicial Appointments) Act 2004*, the eligibility criteria for their appointment has been extended.

Moreover, a recent Discussion Paper on Acting Judges and Magistrates presented by the Victorian Department of Justice dealt with a range of policy and legislative issues surrounding the offices of acting judge and acting magistrate, and ultimately endorsed the prospect of increasing the number of acting judicial officers, including lawyers who have not held or do not hold a permanent commission, in the various State jurisdictions.⁴⁶

There are obvious difficulties with such changes. They offend against the principle of judicial independence and the proper administration of justice.⁴⁷ The requirement that judges and magistrates serve the community until retiring age as long as good behaviour is maintained is a stringent and well-tried test which would be undermined by the risk or reality of removal by the Executive. The situation would be made all the more problematic by the prospect of the acting magistrate returning to professional practice amongst those he or she has submitted judgment.

- Suspension from office

The issue of suspension from office is a further important, though less central, aspect of security of tenure. The current situation is that magistrates in all jurisdictions

⁴⁶ 'Acting Judges' Discussion Paper, Department of Justice (Court Services), July 2004.

⁴⁷ See correspondence between the Chief Justice of the SCV and Rob Hulls AG dated 31 August 2004
*** *Should this be footnoted at all? if so, how?* ***

(except the Northern Territory and Tasmania) can be suspended where grounds may exist to justify removal from office.⁴⁸ An earlier version of the *Magistrates' Court Bill* 2003 (WA) allowed suspension for 'substandard performance'. That has changed,⁴⁹ largely on the basis of the following criticism -

The grounds for suspension are stated in broad and undefined terms. They include, for example, 'neglect' in the performance of duties or failure to comply with the direction of the Chief Magistrate to perform administrative duties. The decision as to whether 'a proper reason for suspending a Magistrate from office exists' is to be made by the Minister, since the Governor is bound by convention to act on the Minister's recommendation. ... Moreover, the Bill, on its face, does not appear to require the Magistrate to be given notice of an intention to suspend him or her. Nor is provision made for the Magistrate to make representations as to why he or she should not be suspended. ... As a matter of principle, Magistrates should enjoy the same independence and security of tenure as Judges. This is the position that obtains with the Federal magistracy, by virtue of s 72 of the *Constitution*. ... The JCA respectfully submits that to enact cl 14 of Sch 1 to the Magistrates Bill in its present form would be a retrograde step, inimical to maintenance of the rule of law.⁵⁰

It goes without saying that a regime that allows the executive government, without proper safeguards, to suspend or dismiss superior court judges would be unacceptable. There is no sound reason why it should apply to magistrates. In fact, it is imperative, for the sake of judicial independence and the rule of law, that it does not.

- Transfer Power

⁴⁸ Clause 14 of the Bill permits the Minister to recommend to the Governor that a magistrate be suspended. While this power could be exercised after consultation with the Chief Magistrate, approval of that Chief Magistrate would not have been required. This clause provides an example of the way in which weakened security of tenure rights for Magistrates can undermine their judicial independence. See Mack and Roach Anleu, 'The Judicial Independence of Australian Magistrates: Security of Tenure', Paper prepared for the Judicial Conference of Australia 2004 at 25.

⁴⁹ Standing Committee on Legislation, 22nd Report, Chapter 3: Magistrate Court Bill 2003.

⁵⁰ Draft letter from Justice Sackville on behalf of the Judicial College of Australia to The Hon J McGinty, Attorney-General and Minister for Justice and Legal Affairs, WA, 16 April 2004, at www.jca.asn.au/docs/WAAG_160404.doc.

Finally, judicial independence may be undermined internally through the purported authority to transfer magistrates by Chief Magistrates.⁵¹ This has arisen on three recent occasions in Queensland, where disciplinary action was taken against a magistrate by the Chief Magistrate for failing to comply with a direction of that Chief Magistrate. Challenges against the disciplinary action (threatened or carried out) were upheld in *Payne v Deer*,⁵² *Cornack v Fingleton*⁵³ and *Gribbin and Thacker v Fingleton*.⁵⁴ These cases demonstrate a strong commitment to and recognition of judicial independence. However, the threat remains.

CONCLUSION

Few principles are more important than judicial independence. A brief examination today of the changing role of the magistracy has shown that ‘crossing over to judicialism’ is not only a positive development but in many ways a necessary one. But the process is changing the face of our State and Federal jurisdictions, and we must respond to this.

Drawing on the Victorian experience for a moment, the decisions of the Magistrates’ Court feature in the daily business of the Supreme Court, by way of appeals on the issue of law. We should refer to the appeal provisions of the *Magistrates Court Act* 1989 (civil and criminal).⁵⁵ Generally, judges of the court find these appeals quite difficult. They are heard quickly but are often tricky to decide. And they are not getting any easier to decide on review. The complexity is aggravated by the increasing imposition by the courts of a judicial standard upon Magistrates’ Courts’ decisions, the hearing of cases and the delivery of decisions.

It is not unusual to hear magistrates these days refer to their ‘reserved judgments’. They are expected to be knowledgeable in the law, including in evidence and

⁵¹ ‘Internal independence’ is discussed extensively by Professor Roach Anleu and Mack in their essay ‘The Administrative Authority of Chief Judicial Officers in Australia’, Paper prepared for the Judicial Conference of Australia 2004.

⁵² [2000] 1 Qd R 535. Chief Magistrate Deer reprimanded Magistrate Payne for refusing to go to Townsville on three weeks’ notice. Ms Payne was then a mother of 5 school age and infant children and had resided in Brisbane for all of her professional career as a lawyer prior to her appointment as indigenous judicial officer.

⁵³ [2002] QSC 391.

⁵⁴ [2002] QSC 390.

procedure, and to be capable of deciding cases based upon sound and articulated reasons.

I have put a case today that the magistracy has some way to go in achieving real independence. That said, I hope I have also made clear that it has come a very long way, in a relatively short time. And this should not be forgotten. Nor, in our pursuit of improved independence for the magistracy, should we compromise its unique and defining characteristics, that is, its proximity to the community and its capacity to deal sensibly and innovatively with new and difficult challenges. As Chief Justice Gleeson has said,

It is upon the magistrates' courts that we depend principally for our ability to make justice accessible to ordinary people. The legal profession, and the community generally, have a large stake in the capacity of Local Courts to deal promptly, fairly and inexpensively, with the bulk of litigation. That stake is not sufficiently recognised. The profession ought to take a strong and active interest in the magistracy.⁵⁶

His Honour goes on to highlight the importance of flexibility and creativity within the framework of judicial independence:

There is a danger that the judiciary itself may become bureaucratised. In our enthusiasm to respond to various pressures, including those that come from increasing numbers, and the complexity of the court structures, we may risk losing some of the vitality that comes from our individual independence of one another. Leaders of the judiciary ... need to take care not to stifle this individual independence. Judges can be led, but they are not amendable to command and direction in the same manner as employees or subordinates. Courts, and their members, are awkward to manage. I prefer it that way. The day the judiciary becomes easy to manage is the day it will have changed beyond my recognition.⁵⁷

⁵⁵ Division 4.

⁵⁶ Gleeson CJ, *op.cit.*

⁵⁷ *Ibid.*

As the role of magistrate has developed its judicial aspect, so too has the judicial standard of independence been attracted and attached to the office. One of the major challenges confronting the magistracy is the search for a model of court governance that guarantees and protects the judicial independence of all Magistrates' Courts without compromising their inherent character.⁵⁸ Thus, there is an important debate that is required. The magistracy provides grassroots justice. As it becomes more judicial it may be that the grassroots connection of the magistracy will be sacrificed. It is that potential loss that ought to be analysed and discussed.

Achieving this independence is a fine balance between freedom to administer the law without external or internal pressure, and the onerous responsibility to the community in general to deliver, and be seen to be delivering, impartial justice. This is an undertaking which, even in the best of democratic societies, may never be entirely achieved. Nevertheless, we continue to set our standards high.

⁵⁸ Lowndes *op. cit.* at 73.