jottings on the bar

Removal for being "unsuited" to performance of duties - a truly independent magistracy?

By Peter Barr*

It's a hard act to follow Lex Silvester's Fijian fishing, golfing and legal travelogue, his very own version of "Adventures in Paradise" which featured in the July edition of *Balance*, but I want to raise an important issue for all practitioners, particularly those who practise in the magistrates' court system here in the Northern Territory.

In *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2001] FCA 1728, the primary ground relied on by NAALAS in its case that the Chief Magistrate's appointment was invalid was that the Northern Territory had negotiated a two-year Special Determination for Mr Bradley's remuneration and allowances, and had thereby improperly secured what was in effect a fixed term appointment, thus subverting the requirement in the *Magistrates Act* 1977 that magistrates be appointed to the age of 65 years. NAALAS contended that these circumstances of the appointment put Mr Bradley in the position of being beholden to the government for his future remuneration and defeated an implicit requirement of that Act that judicial independence be protected.

It was all about the judicial independence of magistrates.

In our Territory legal system, magistrates are judicial officers of lower rank than the judges of the Supreme Court. Curiously, however, the Northern Territory legislature places greater faith in the ability of magistrates to properly and fairly determine and decide factual issues than it places in Supreme Court judges.

If you don't believe me, have a look at the appeal provisions in the *Local Court Act*, s.19, and the *Work Health Act*, s.116. Both restrict appeals to questions of law. It is worthwhile remembering what this means. In *Haines v Leves* (1987) 8 NSWLR 442 at 469-470, Kirby P. stressed that similar legislation did not permit a court to correct errors of fact or even review findings of fact which were said to be "perverse or contrary to the overwhelming weight of evidence or even against the evidence and the weight of the evidence". He went on to say: "Nor may the Court review findings on the facts which are alleged to ignore the probative force of the evidence which is all one way, even if no reasonable person could have reached the decision made, and even if the reasoning ... was demonstrably unsound".

The view of Kirby P. was adopted by Mildren J. in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 37, and then by the Court of Appeal in *Wilson v Lowery* (1993) 110 FLR 142 at 146. It represents the law in the Northern Territory currently. As the present Chief Justice said in the recent case of *Young v Northern Territory of Australia & Anor* [2004] NTSC 16:

> *"In these circumstances, notwithstanding my opinion that the Magistrate's process of reasoning was flawed in the manner I have described, those flaws cannot be elevated to an error in law for the purposes of s 19 of the Local Court Act. ... The errors lie in the understanding and assessment of the evidence. However, as the law presently stands, those errors cannot be properly categorised as an error of law."*

Or Mildren J. in *Starr v Northern Territory* NTSC unrep. 23/10/98:

> *"I have some sympathy for the appellant. The case he presented at trial was a strong one, and one I would have expected to succeed on the facts. However, there were weaknesses in the evidence which the respondent was able to exploit successfully, and the learned Magistrate's factual findings favoured the respondent. As an appeal to this Court rests upon errors of law, I can only allow the appeal if such an error is shown, and in my opinion none has been shown which was determinative of the decision to dismiss the claim."*

Perversity and lack of logic in a first instance decision are irrelevant where appeals are restricted by statute to questions of law. It is as though the trial magistrate in the Work Health Court or the Local Court wears a mantle of infallibility in his or her treatment of the facts in the case.

In contradistinction, an appeal from a single justice of the Supreme Court to the Court of Appeal under s.51 *Supreme Court Act* is a re-hearing on the evidence below, with power (albeit exercised sparingly) to receive further evidence, and the Court of Appeal can draw its own inferences of fact under s.54 *Supreme Court Act*. There is no presumption as to fact-finding infallibility.

Given the extra degree of responsibility and confidence reposed in magistrates to 'get it right' factually, free from extraneous factors or influences, you would expect that the provisions intended to achieve judicial independence for a

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darwin community legal service

Attention DCLS volunteers

The Darwin Community Legal Service (DCLS) is holding its Annual General Meeting on Monday 20 September 2004 at 5.30pm. Formal notices will be distributed shortly.

A new Management Committee will be elected by the membership at this meeting.

If you have enjoyed volunteering for DCLS you may want to think about nominating for the Management Committee or one of the Advisory Committees. You would be involved in setting the direction of the organisation and determining priorities. You could be involved in big picture issues or the fine details of administration and management. Your views will be appreciated and we will find a use for whatever skills you have!

What, you didn't know DCLS had a management committee? And what about these advisory committees?

DCLS is an incorporated association managed by a Management Committee elected from our membership. DCLS also has advisory committees that provide advice and assistance to our specialist services. Current advisory committees are: Disability Rights Advisory Committee and the Aged Care Rights Advisory Committee.

From time to time projects conducted by DCLS are informed by advisory committees made up of DCLS members and other invited experts such as the Human Rights Advisory Committee.

If you are not already a member please think about joining DCLS (membership forms are available from the office). And if you are already a member – or are planning to become one – please consider nominating for the Management Committee.

If you have any questions please contact DCLS Co-ordinator Caitlin Perry on 8982 1111.

Deadline for young lawyer awards fast-approaching

The Australian Young Lawyers Committee of the Law Council of Australia (LCA) is seeking nominations for the 2004 Australian Young Lawyer Awards.

The awards are designed to encourage young lawyers' associations and individual young lawyers across Australia to establish programs to benefit the profession and the wider community.

The awards are judged in three categories: professional issues; community issues; and individual contribution to the profession and/or the community.

Nominations close at 5pm on Friday, 17 September 2004.

To obtain an application form, visit www.lawcouncil.asn.au or contact Gwen Fryer at the Law Council of Australia on (02) 6246 3721, or email gwen.fryer@lawcouncil.asn.au

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magistrate would be the same as, and certainly no less than for a Supreme Court judge.

But here you would be surprised. The provisions for removal from office before retiring age, a long-accepted means of guaranteeing judicial independence, are materially different for the two classes of judicial officeholders. Under s.40(1) *Supreme Court Act*, for a judge to be removed by the Administrator, the statutory requirement is "an address from the Legislative Assembly praying for his removal on the ground of proven misbehaviour or incapacity" (and not otherwise); under s.10 *Magistrates Act*, a magistrate may be removed from office for failing to comply with (in effect) an administrative direction given by the Chief Magistrate under s.13A(1)(b) of the Act, or in circumstances where the Administrator is satisfied that the magistrate is incapable of or incompetent to carry out his or her duties, or is "for any other reason unsuited to the performance of his or her duties."

I suggest that "for any other reason unsuited to the performance of his or her duties" is not specific enough to protect a magistrate from attack by the executive if the executive is dissatisfied with the decisions or judicial philosophy or even the politics of that magistrate.

What really does "unsuited" mean? It *could* mean very little in terms of defect. As a term, it can be easily moulded and re-formed. A magistrate's tenure of office is made vulnerable, but in an imprecise way. A magistrate's judicial independence is badly safeguarded by such an imprecise term.

The Bar Association raised this issue with the Attorney-General a year or so before the present enquiry into a sitting Northern Territory magistrate was announced, but still no response has been received. It is a serious issue for the whole of the legal profession and a worthy topic for discussion. I would hope that those who spoke so loudly on the sidelines in the NAALAS and Bradley case would see the same point of principle here.