

Comments on Transfer Policy
for Queensland Magistracy 2003 Conference
Commentary by Judge Michael Forde
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Introduction

1. May I say at the outset that the Transfer Policy Discussion Papers raise issue of principle and practicalities. In my view, it should allow the Magistrates and the government to be aware of the issues and perhaps move towards a mutual solution.

2. There are two areas which I wish to comment upon and they are:
 - a. The present legislation – Magistrates Act 1991

- b. an alternative to the decision being made solely by the Chief Magistrate as to where and when a magistrate is to be located.

Present Legislation

- 3. Section 5 provides that after the minister consults with the Chief Magistrate about an appointment (s.5(2)), that the appointment must state:
 - a. the place where the magistrate is first to constitute a Magistrates Court appointed under the Justices Act 1886, section 22B(1)(c) which refers to the appointment of places for holding Magistrates Courts
AND
 - b. The period not longer than 5 years, the magistrate is to constitute the magistrates court at the place.

4. The functions of the Chief Magistrate under s.10(2)(a) include the determination under s.5(2)(a) above. That determination could be made by the Minister in the first instance particularly where there is some difficulty getting a person to fill in a vacancy in a more remote area. At least then the person appointed would be faced with an option at that stage. That procedure is adopted in the District court. Judges are appointed to Brisbane, Southport, Maroochydore, Rockhampton, Townsville or Cairns. The appointment to a particular place has not impinged upon the independence of judges appointed to particular centres. Of course, there are always complaints from disgruntled litigants or members of the legal profession about judges. That has not affected the standing of the Supreme or District Court. The ability to deal with such criticism is important.

5. As one magistrate commented in his discussion paper:

“My first thoughts in regard to transfers come from being in the Magistrates Courts Service from an early age....Since then I have been from the top to the bottom end and from the east coast to the western borders of the State chasing promotion through the ranks”

In the past, this was how the Magistrates Court service operated. It is not how the Magisterial Bench should operate. Once appointed, promotion should not be chased. It is an appointment of a judicial character. If a person is appointed on merit then there is no reason to doubt that person's ability to carry out his or her duties wherever they are appointed. It may be that an appointment is refused if it is to an area not acceptable to the candidate : so be it. However, I agree with the same magistrate who states that the appointment to a particular position by the minister should only be made after expressions of interest are called for from within the magisterial bench.

6. The Chief Magistrate may for good reason move a Magistrate to another place. Examples of good reasons include the need to discipline the magistrate or incompatibility of the magistrate with the local community or another magistrate.(s.5(5)). I suggest that the panel or committee system to be discussed later be used for that procedure as well.

7 Section 10A to 10I now refines the process of reviewing a determination by the Chief Magistrate. The judicial

committee was established. It reviewed the decision of the Chief Magistrate in the Thacker case. The Committee left it open for her to apply to the Department of Justice and Attorney General for costs. A magistrate aggrieved by a decision of the Chief Magistrate takes a risk of having to face a bill for the costs. Some hearings may be complex. The idea of a review or judicial committee is desirable. However, I would suggest that there be an intermediary process apart from the decision of the Chief Magistrate.

The Alternative - A Panel or committee to make determinations in relation to transfers or disciplinary matters.

8. The process which is suggested is that if there is a transfer to be decided that a panel of say three(3) persons decide the issue. The panel should be a standing panel with reserves in the event that a panel member is unavailable. The panel should be appointed by the magistrates at their annual meeting. The panel should include the Chief Magistrate at least as an ex officio member. The Chief Magistrate is not bound by the decision of the panel. However, if the majority of the panel make a determination which is not accepted by

the Chief Magistrate, then that majority decision should be a factor considered by the judicial committee if and when it reviews the determination by the Chief Magistrate.

9. The advantages of that system over the present system are as follows:

- i. It gives the rank and file a role to play in the decision making process. It may make such a decision more authoritative.
- ii. If the Chief Magistrate acts capriciously and arbitrarily then it will be obvious to the other panel members and presumably the judicial committee
- iii. It is one further safeguard to protect magistrates from having to review the Chief Magistrate's determination. That may not be helpful in one's career path.
- iv. It may avoid an expensive review process
- v. It may also avoid public scrutiny of internal management matters which can often reflect

adversely on the public confidence in the court system.

Conclusions

The proposal made is consistent with the principle that the head of court is first amongst equals. A collegiate approach to the transfer policy of magistrates will resolve what was sometimes seen in the past as an arbitrary exercise of power by the Chief Magistrate. The policy reasons for such an approach have now passed into history as the magistracy is now part of the judiciary of the Australian legal system. The independent thinking of magistrates has challenged the past system which was heavily reliant on philosophies of the public service transfer policy system.

This independent thinking is consistent with the judicial independence inherent in an effective judiciary. However, in order to maintain public confidence in the

legal system it is important that an acceptable system of court governance be implemented forthwith. The concept of a council of magistrates within the Magistrates Court would go a long way towards achieving the goal of judicial independence. Under that system which exists in Victoria, a committee system is set up with representatives of the court being elected as part of the council. The District Court judges in the past have supported such a system of court governance. The various committees report to the council. A panel or committee for transfers would fit comfortably within that system of court governance. The Magistracy is not on its own in seeking a change to internal court governance procedures. The Report of the Australian Institute of Judicial Administration on court governance, soon to be published, should assist both the courts and the government to review the present structures in a fair and objective manner.