The Queensland Magistracy: The Road Ahead

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On 16 October 2003 the *Magistrates Amendment Bill* 2003 was read for a second time. It makes significant changes to:

- the Chief Magistrate's powers to discipline magistrates by reprimand;
- the process for making decisions about the transfer of magistrates;
- the review of those decisions; and
- the process for suspension and removal of magistrates from office where a magistrate is charged with an indictable offence.

Power of reprimand

The *Magistrates Act* 1991 gives the Chief Magistrate power to discipline by reprimand a magistrate who, to the Chief Magistrate's satisfaction:

- is seriously incompetent or inefficient in the discharge of the administrative duties of office; or
- is seriously negligent, careless or indolent in the discharge of the administrative duties of office; or
- is guilty of misconduct; or
- is absent from duty without leave or reasonable excuse: or
- wilfully fails to comply with a reasonable direction given by the Chief Magistrate or a magistrate authorised to give the direction; or
- is guilty of conduct unbecoming a magistrate [2].

It was the power of reprimand for failure to comply with a reasonable direction which was central to *Cornack -v- Fingleton* [3]. In that case McKenzie J decided that neither this power nor the power of the Chief Magistrate to do all things necessary or convenient for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Court[4] were sufficiently clear and

[1] Chief Magistrate and Judge of the District Court of Queensland
[2] Subsection 10(8)
[3] [2003] 1 Qd R 667
[4] Subsection 10(2)

unambiguous to abrogate the fundamental aspect of judicial independence that judicial officers are independent of one another.

Accordingly the Chief Magistrate was not authorised to give a magistrate a compulsory direction to report with regard to aspects of her demeanour in court, or to indicate how she intended to modify the way in which she conducted cases, which direction, if not complied with would be the subject of disciple by way of reprimand.

McKenzie J observed that:

> "the principal that judges are independent of one another, or internal judicial independence…. is incompatible with the power to require a judicial officer to discuss issues concerning the way in which the judicial officer conducts hearings in court. It would require very clear words to abrogate the principle since it is a fundamental aspect of judicial independence. The notion that a head of jurisdiction could compel a judicial officer to modify how he or she conducts the hearing of cases by threat of sanction is not reconcilable with principle"[5]

A letter dated 26 October 2001 from the Magistrates Association requesting the Attorney-General to consider repealing this power of reprimand and related provisions[6] provided a context in which McKenzie J considered the events in *Gribbin -v- Fingleton.*[7] The thrust of the letter was this was necessary to recognise the position of magistrates as independent judicial officers and to reflect the position of other judicial officers in Queensland and the magistracy throughout Australia. It stated that no other Chief Magistrate or the head of any other Australian jurisdiction had this power and argued that:

> "The threat of reprimand should not be able to be held over the head of any Magistrate in any circumstance. The power of the Chief Magistrate to

[5] [2003] 1 Qd R667 at 679[34]
[6] Subsection 10(9)-(11)
[7] [2003] Qd R 698

discipline by way of reprimand sets up a hierarchy more consistent with the management of public servants than the organisation of judicial officers."[8]

The letter also submitted that the power of the Chief Magistrate to do all things necessary or convenient to be done to ensure the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts and the powers to suspend or remove magistrates were sufficient.[9]

This position has now been properly recognised in the Bill which removes the Chief Magistrate's powers to discipline magistrates by way of reprimand. Importantly the Attorney-General said:

"Such powers are inconsistent with judicial independence and the principle that the head of a jurisdiction is to be regarded as the 'first among equals'."[10]

This is appropriate given that the long title of the *Magistrates Act* 1991 is "An Act relating to the office of magistrates, the judicial independence of the magistracy, and for related purposes" and the intention of the legislation was to change the Magistrates Court from an arm of the public service to a fully independent part of the judicial system.

The Attorney-General also stated that this was in keeping with a more collegiate approach to court administration which is also intended to be reflected in the process for making decisions about the transfer of magistrates.

Transfer decisions

There can be no doubt that the past 12 months has been a difficult time for the magistracy. It must have been a particularly difficult time for magistrates working alone or in small numbers in relatively small communities where they are not able to fade into anonymity away from their work to the same extent as magistrates in larger centres. It is the transfer system that has been at the centre of many of these difficulties.

[8] Ibid at 701[11]
[9] Ibid at 701-2[12]
[10] 2003 Hansard at 4251

The establishment of a just and equitable transfer system is important when 77 men and women are spread throughout a State as extensive in area and as decentralised as Queensland and where, as a result there is a need to post some to remote areas. Magistrates have in the past and will continue in the future to serve the community in such areas at some personal and financial inconvenience.

Transfer decisions will need to be made because the period of appointment to a particular area has expired and the magistrate requests a transfer. In some circumstances a magistrate may seek a transfer before the appointment period has expired because of personal circumstances or may retire or die. However the present transfer system results in decisions which are unnecessarily contentious because, under the legislation, a transfer decision is made by the Chief Magistrate with no requirement for consultation beyond the magistrate who is likely to be affected by the decision. There is no requirement that the Chief magistrate take advice from any other magistrate no matter how experienced.

This is changed by the Bill which establishes a Court Governance Advisory Committee to assist in the administration of the court, particularly in relation to transfer decisions. While the Chief Magistrate will continue to be the decision maker for transfer decisions he or she will do so with regard to recommendations made by the Committee.

The Committee will consist of the Deputy Chief Magistrate and the State Coroner who will be permanent members as well as three magistrates who will hold appointment for two (2) years. The temporary members will be selected by the Chief Magistrate in consultation with the permanent members. At least one of the temporary members must be serving in a regional centre outside the south-east corner of the state. In the second reading speech the Attorney-General said:

> "The three magistrates are included on the committee to ensure that there is representation by rank and file magistrates and also to reduce the Brisbane focus of the advisory committee"[11]

It is clear that the aim of the Bill is to ensure that the process for making decisions regarding the transfer of magistrates is transparent and more inclusive.[12]

This collegiate approach is intended to be enhanced by requiring the Advisory Committee to develop a transfer policy in conjunction with the Chief Magistrate. To assist the committee to develop this policy, the Bill outlines the core principles that must be included in the policy. Underpinning the amendments is the principle that:

- magistrates are expected to serve in regional areas.

It is important to understand that this is a principle that has been accepted by the magistracy. At the annual conference of magistrates earlier this year there was a policy that was agreed on which specifically reflected the need to ensure that all regional and remote centres were properly served.

The other core principles to be reflected in the transfer policy will be:

- generally, a magistrate is to constitute a Magistrates Court for between two and five years; and
- generally before making a decision about which magistrate is to constitute a Magistrates Court at a particular place, expressions of interest are to be called.

The principle of calling for expressions of interest is also consistent with the position that magistrates have previously agreed on.

Importantly, it is only if no expressions of interest are received for a vacancy that magistrates who have not constituted a Magistrates Court at a place or

[11] 2003 Hansard at 4250
[12] Ibid

places in regional Queensland for at least 2 years within the previous 10 years are to be considered for filling the vacancy before magistrates who have that experience. Even then, the magistrate's transfer history must be considered.

Regional Queensland will be areas outside the Beenleigh, Brisbane, Caboolture, Cleveland, Gold Coast, Gympie, Ipswich, Maroochydore, Redcliffe and Toowoomba Magistrates Courts districts.

The transfer history of a magistrate who has not served outside these districts in the past 10 years will also be considered if there has been a requirement to move on a number of occasions, for example a magistrate may have served in Toowoomba, Maroochydore and Beenleigh with the associated changes of residence involved during the period. The history will also be considered if the magistrate has previously had significant regional service prior to the commencement of the 10 year period.

In addition there are core principles that:

- a magistrate is to be consulted before a decision is made about where the magistrate is to constitute a Magistrates Court; and
- a magistrate's personal circumstances are to be taken into account before a decision is made about this.

Consequently, if the Advisory Committee is proposing to make a transfer recommendation, it must give the magistrate involved written notice about it and allow the magistrate at least 14 days to make representations about it. The Advisory Committee must consider any representations having regard to the transfer policy. When making a transfer recommendation, the Advisory Committee must have regard to the transfer policy and give concise reasons for the recommendation to the Chief Magistrate.

Another significant change from the current legislation is that the Bill replaces the current merits review by the judicial committee with limited judicial review of transfer decisions. According to the second reading speech:

> "This collegiate approach to transfer decisions will circumvent the need for outside review of transfer decisions[13] …… It is also undesirable to have matters of internal court management subject to protracted judicial proceedings[14]."

There is no right of review if the Chief Magistrate accepts the Advisory Committee's recommendation. If a magistrate refuses, without reasonable cause, to constitute a Magistrates Court at a particular place in accordance with a transfer decision as required by the Chief Magistrate, this is a proper cause to remove the magistrate from office.

If the Chief Magistrate proposes to make a transfer which differs from the Advisory Committee's recommendation, the magistrate who is the subject of the decision must be given an opportunity to be heard about the proposal. This is similar to the notice which must be given by the Advisory Committee.

The Chief Magistrate must give the Advisory Committee and the magistrate who is the subject of the final decision written notice of it together with concise reasons.

It is only when the Chief Magistrate rejects a recommendation of the Advisory Committee that the decision may be reviewed by the Supreme Court. However, the grounds for review are limited to denial of procedural fairness or that the decision is manifestly unreasonable. Each party to the review must bear their own costs unless the judge determines that there are exceptional circumstances that justify a costs order in favour of the magistrate.

I can readily appreciate that magistrates facing another change in their transfer arrangements, with more limited rights of review may view all this with some trepidation. However, the establishment of the Advisory Committee of which the Chief Magistrate is not a member should serve as an important check and

[13] Ibid
[14] Ibid at 4251

balance on the individual approaches which might otherwise be adopted by different Chief Magistrates with different styles and philosophies.

For my part, I am committed to adopting a consultative approach to the decisions that I will have to make as Chief Magistrate about transfers and other matters. In this way I will seek to ensure that the more collegiate, fair and transparent approach which is contemplated by the Bill is taken to transfer decisions.

I do not seek to pre-empt what the transfer policy will be after the Bill becomes law. This is because the policy is to be established in consultation with the Advisory Committee. However, I can confirm that I have previously told a number of magistrates that I have come to the view that there should be no policy that a magistrate should be transferred after being at any centre after any arbitrarily selected period of time, whether it be two, five or seven years.

The Bill contemplates that a magistrate may continue to constitute a Magistrates Court at a particular place although the appointment period has expired if the magistrate does not ask for a transfer. There is no reason why, all other things being equal, a magistrate who is happy in a place can not remain there. This may not always be possible. For example it may be difficult for a magistrate to remain for more than two years in a centre with a small population such as Charleville because of limitations this could place on social activities. There may also be undue pressure on magistrates at one person centres who find themselves subject to criticism because the local media or community does not agree with their sentencing policy.

However, I consider that much can be achieved by adopting a flexible approach as opposed to the application of arbitrary principles without regard to the circumstances of each case. I am optimistic that this flexibility will be enhanced by an amendment which will allow the Governor in Council to nominate two locations where a newly appointed magistrate is to constitute a Magistrates Court. This will enable an initial appointment to a multi magistrate centre such as Brisbane, Southport, Ipswich, Maroochydore, Cairns or Townsville for up to

12 months for an induction period, before the Magistrate is then transferred to another centre which could be a regional centre for up to 5 years. However, the second appointment can also be made to the same place as the first appointment.

The current Act only allows for an initial appointment to one area. The implementation of this new provision will require some forward planning and foresight as to when vacancies may occur. In addition to assisting to develop a long term strategy to address anticipated vacancies, this will also be fairer to new appointees who will know at the time of appointment where they will live for as long as the first six years of their judicial service. It will also enable persons who are offered a magisterial appointment to make an informed decision as to whether to accept the appointment to the places offered. Further flexibility will also be achieved by allowing for the appointment of part time magistrates for the first time.

Suspension and removal

The Bill also clarifies the process for suspension and removal of magistrates from office in circumstances where a magistrate is charged with an indictable offence. A magistrate who is charged with an indictable offence is automatically suspended on full pay. If the magistrate is convicted, he or she is automatically suspended without pay. However, a magistrate is entitled to be reimbursed for lost income if the conviction is quashed on appeal and proceedings for the offence are at an end or a new trial is ordered. A suspension will lapse if the magistrate is not convicted, the charge is not proceeded with, or if the Governor in Council lifts the suspension.

If a magistrate is suspended from office and the suspension has not lapsed (because the magistrate is convicted) and the appeal period has elapsed without an appeal being commenced or an appeal has been finally decided or abandoned, the Attorney-General must apply to the Supreme Court for a decision about whether proper cause exists to remove the magistrate.

A magistrate cannot be removed from office unless the Supreme Court decides that proper cause exists to do so. Proper cause to remove a magistrate may

include conviction of an indictable offence. The Supreme Court would need to look at all the circumstances, including the gravity of the offence and whether or not a conviction has been recorded. If the court decides that proper cause is not established, then suspension would lapse, and the magistrate would be reimbursed for income lost after conviction.

Conclusion

In the two centuries since the settlement of Australia, the magistracy has evolved from honorary justices of the peace through many stages to the emergence of a modern judicially independent magistracy whose members are true judicial officers.[15]

In Queensland it was the aim of the *Magistrates Act* 1991 to change the magistracy from an arm of the public service to a fully independent arm of the judiciary.

The *Magistrates Amendment Bill* 2003 has continued this evolution by removing the Chief Magistrate's powers to discipline magistrates in recognition that such powers are inconsistent with judicial independence and the principle that the head of a jurisdiction is to be regarded as the first among equals.

The Bill has also made significant changes to the process of making transfer decisions by establishing an Advisory Committee to make transfer recommendations to the Chief Magistrate. This has been done with the expressed intention of the adoption of a more collegiate approach to such decisions and to the administration of the Magistrates Court in general.

It is another step along the long and winding road of the evolution of the Magistrates Court. I am optimistic that this step will result in a fair, equitable and more transparent transfer system, and ultimately to a position in which the legislature will have the confidence to remove the regime of external review of

[15] J. Lowndes, "The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part 1" (2000) ALJ 509 at 509-510

the administration of the Magistrates Court so as to allow the court to fully emulate the administrative structure of the higher courts.