

Queensland Magistracy – Past Present and Future

Bar Practice Course

Judge MP Irwin, Chief Magistrate

23 July 2004

Thank you Mr Lennon, His Honour the Chief Justice, Your Honours, members of the legal profession, fellow magistrates – they're the people who will be asking me the difficult questions later I think, and it is nice to see some familiar faces amongst the audience here tonight because I believe I recognise some of you from the mooting exercises that were done in the Magistrates Court earlier this year.

I would like to thank the Bar Practice course for giving me the opportunity to speak here tonight and also for the Magistrates Court being able to participate in a practical sense in this course.

When I chose the title for tonight's talk I went back to last years Annual Report which had a similar title. In fact I could have chosen the working title for this years annual report, which is 'The Magistrates Court, the Peoples Court' because the Magistrates Court of Queensland does represent the coal face of the Queensland judicial system. It is the court that the greatest majority of people who come before the courts in Queensland will have contact with. In fact approximately 96% of persons who are charged with criminal offences come before the Magistrates Court. Those people are often self represented. Many of the people who come before the courts are stressed and suffering from the trauma of having to appear before the court, sometimes for the first time. In short the Magistrates Court is the place where most members of the community form their first impressions of, and their perceptions of the Queensland criminal justice system.

It is a court that deals with a great volume of matters every day. Frequently magistrates are dealing with hundreds of matters during the course of busy list. They deal with a great variety of legal issues from the most basic to the most complex. In the short time I have been on the court I have had the experience of having complex litigation with senior Counsel appearing on one end of the scale and on the other presiding over cases where people have been assaulted by watermelons, a police officer who was assaulted by having a dog thrown at him and somebody else whose choice of weapon was not a mallet but a mullet. So it really is justice at the cutting edge of humanity.

But I want to go back to the past for a moment to spend a little bit of time talking about the history of the magistracy and if you are interested in reading more about this there is an excellent article in 74 Australian Law Journal, by a Northern Territory Magistrate called John Lowndes.

The modern Australian magistracy has its origins in the ancient pre-Norman office of Justice of the Peace. In those days the Justices of the Peace were keepers of the King's Peace. They played a more of a law enforcement function than a judicial role. But over the centuries through the 13th to 19th century Justices of the Peace not only were formally recognised in statute but they took on more judicial function. At the same time there was not a clear boundary between the executive functions of Justices of the Peace and their judicial function. So Justices of the Peace found themselves doing tasks like licensing and de-licensing ale houses, supervising the manufacture of malt, inspecting decayed bridges and even reading gas meters. I'm glad that power has been removed.

Those people who were appointed as Justices of the Peace were often the landed gentry, people who were not paid but had an honorary position, people who had a smattering of legal knowledge. But as a consequence of corruption eventually in England, Stipendiary Magistrates – Professional Stipendiary Magistrates - were appointed from the ranks of barristers and they took on the appearance of today's magistrates dealing with committal proceedings and hearing summary matters in petty sessions. Those English legal institutions

where introduced into Australia at the time of settlement. Initially as in England the earliest value Justices of the Peace held honorary positions and again they were land owners and they were appointed and dismissed often for political reasons by the governors of the day. Again there was not a clear boundary between executive functions and judicial functions so that issues such as judicial independence were already starting to rear their heads. After 1810 in the Moreton Bay District there was a development of Police Magistrates whose role was to largely supervise the police service.

In most jurisdictions after 1850 the magistrates were paid and became Stipendiary Magistrates, exercised more judicial functions and exercised greater independence. The Stipendiary Magistrates at that stage were largely members of the Public Service. They were promoted as clerks through the Public Service until they were appointed as magistrates and in Queensland there were grades of magistrates up until 1991, and traditional careers for magistrates would be to start as a clerk in a country area, work their way through provincial towns to metropolitan areas and then start all over again when they became magistrates working themselves through the same progression. Often those early magistrates did not have legal qualifications and their training was by passing Public Service examinations.

But in 1991 in Queensland the *Magistrates Act* was passed and Magistrates emerged from the public sector to be independent judicial officers. Now they were magistrates who were all equal. They were no longer graded and the Chief Magistrate was the first amongst equals, which is the case today. I don't want to quote from a lot of literature during the course of this talk tonight, but I do want to summarize what I have just said by adopting the words of Justice Thomas formerly of the Supreme Court of Queensland writing about the ethics of the Australian magistracy in 65 *Australian Law Journal* and His Honour there said:

“Clearly the Magistrates’ Courts are simply the courts of first instance in the judicial structure throughout Australia.

The professionalisation of the magistracy has been one of the most notable changes in legal professional life over the past two decades. This is the period over which the magistracy has been transformed in substance from a body of persons largely public service trained to a body of professional trained and legally qualified practitioners.

From 1985 all new appointments to Magistrates' courts throughout the Commonwealth have been qualified legal practitioners.

In Queensland now [and His Honour was only writing in 1991] there are only four magistrates who do not have the legal qualification of a barrister and solicitor."

Of course in 2004 all magistrates and people who act as magistrates have that qualification.

Therefore in two centuries since the settlement of Australia the magistracy has evolved from being honorary Justices of the Peace to judicially independent magistrates whose members are judicial officers in the full sense of the word.

In mid 2000 the title 'stipendiary' was dropped and we all became simply magistrates.

There are currently 81 magistrates in Queensland, to come back to the present and give you a thumbnail sketch of today's magistracy. Of those (and my mathematics is not always the best when I try to count up lists) 39 of those magistrates have been appointed externally, 20 are females and 4 of our magistrates are indigenous. Twenty three (23) of our magistrates are in Brisbane and with advent of some new legislation late last year we now have our first two part-time magistrates.

Queensland is a large and decentralised state as you know so our magistrates sit in 30 different centres throughout the state and they circuit to

about 74 other centres. So there are over 100 courts in this state that magistrates attend on a regular basis and they include courts in indigenous communities in Cape York and the Gulf. In many areas there is a single magistrate only who constitutes the court, including in places like Mt Isa and Charleville and Emerald.

Many of the magistrates travel long distances, sometimes in light planes, sometimes by road. The magistrate in Emerald just to give you example would spend about 50% of his time on the road. His itinerary reads something like that old song "I've been everywhere man" because he goes to (and I won't try to sing it) Alpha, Barcaldine, Blackall, Blackwater, Clermont, Longreach, Moranbah, Springsure and Winton. It is a big call for a magistrate who has to be continually covering large areas to go to those places.

It also demonstrates that there is no 'one size fits all' solution to the administration of the Magistrates Court. Magistrates Courts operate differently of necessity in different areas and magistrates have to be adaptable.

If you want to appreciate the extent and the diversity of the jurisdiction of the Magistrates Court it is only necessary to go to last year's Annual Report and one of the Appendices of that report sets out some but not all of the legislation that magistrates work under and if you count up those Acts you will find there are about 160 there. It is a growing list and it's a growing pressure on magistrates to keep up to date. The jurisdiction is continually increasing; the work that comes before the courts is continually increasing. A good example of that is in the domestic violence area. As many of you will know there was new legislation introduced in March of last year which resulted in an extension of the class of people who could bring applications for domestic violence orders. In the 12 months since that time there has been an increase of 51.1% in applications over the previous 12 month period. Despite this the Magistrates Court as indeed do all the other courts in Queensland operate very efficiently. We all have to consider performance indicators these days and all of our courts perform very well on a national basis. The Magistrates Court is the second best in finalising matters in six months - according to this

year's budget papers 91% of matters were finished in six months. That compares with the national average of 76%. The Magistrates Court is the third best in finalising matters within 12 months, that's about 98% of matters. Despite the fact that according to a Commonwealth Report that was issued this year on Government service provision, Queensland has the lowest number of judicial officers per capita and largest number of matters going before courts at all levels. In fact, the filings before the Queensland Magistrates Court are second only after the Magistrates Court in New South Wales.

I should say something about the jurisdiction of the Magistrates Court, although for many of you this is probably like telling you how to suck eggs. In the criminal jurisdiction the Magistrates Court hears and determines complaints for summary offences and also hears indictable offences which can be dealt with summarily. The maximum penalty which can be imposed by the Court is three years. There are also committal proceedings conducted by the Magistrates Court. In a civil jurisdiction the maximum awarded is \$50,000.00. I anticipate that within a relatively short period of time, maybe a year or two that that jurisdiction will increase. Certainly the quality of the people who make up the court is such that there is no reason why that jurisdiction can increase and I am sure that some of higher courts would be happy to throw off some of their areas of jurisdiction to the Magistrates Court.

The Magistrates Court has very few specialist jurisdictions - there is one that I will talk about in a moment. But we do a variety of work, in some areas of which, we do have magistrates who do that work almost exclusively. The Magistrates Court has Small Claims and Minor Debts jurisdiction up to \$7,500.00. Although every magistrate in Queensland is a Small Claims Referee, there is one magistrate who has that as his exclusive function. As you probably know there is no legal representation in the Small Claims Tribunal and probably it's a matter that would be of less interest to you than some of the other work that we do.

Our main specialist court is the Queensland Drug Court Pilot Program which has now been operating for 4 years in Beenleigh, Southport, Ipswich, Cairns and Townsville. The purpose of that court is to help drug dependant offenders deal with their drug addiction and it involves a team approach by the court working closely with Legal Aid lawyers, people from Community Corrections, people who are engaged in treatment services, sentencing people by using intensive drug rehabilitation orders which have conditions attached to them to ensure that the person gets an opportunity for intensive treatment under close court supervision. Many of these people have to report back to the court about their progress every week.

In the 4 years since the court has been established there have been 100 graduates. It has to be born in mind that these are people who otherwise would be sentenced to terms of imprisonment and to graduate through the program can take as long as 18 months, if not 2 years. The program has been evaluated last year by the Australian Institute of Criminology and it found that recidivism had been significantly reduced by those who completed the program with consequential benefits in the reduction of offences and the cost to the community, which is brought about through the commission of criminal offences.

Recently the Pilot Program has been extended and funded till the end of next year. I would be confident that the Drug Court in some form will be a permanent part, eventually of the Queensland judicial landscape.

The Magistrates Court also has Childrens Court jurisdiction. And again while all magistrates are Childrens Court magistrates there is one specific magistrate who performs that function as a result of the Governor-in-Counsel appointment in Brisbane. As well as dealing with criminal offences the court hears child protection applications and it may be in light of developments in the Child Safety area that there will be more applications coming before the court in the near future.

Another significant part of the Magistrates Court work is dealing with indigenous offenders and some of you may have heard that the court has established what we call Murri Courts which are adapted from courts which have been developed in Victoria and South Australia. There has been a Murri Court that has sat in Brisbane each Wednesday afternoon for the last 2 years, and for the last 12 months there has been a similar court in Rockhampton sitting once a month and recently there has been a court established in Mount Isa. Likewise there has been a Youth Murri Court established in the Childrens Court in Brisbane and that is an Australia first.

The purpose of the Murri Court is to sentence adult Aboriginal and Torres Strait Islander offenders who are likely to go to prison. It is conducted in such a way to try to address the disproportionate incarceration rate of indigenous people in our prisons in Queensland. Also to conduct a court in a less intimidating manner for these people so that they are less likely to fail to come to court so there will be less warrants issued for people for failing to appear before the courts. The courts also seek to use provision in the *Penalties and Sentences Act* to ensure they obtain advice from Aboriginal elders, respected members of the Aboriginal community and community justice groups, as to culturally appropriate sentencing options.

As I said the whole idea is to create a less intimidating atmosphere for the people who appear in these courts and to create a better communication between the bench and the defendant. So in our Murri Courts, certainly in Brisbane, the magistrate sits on the same level as the defendant. He or she has sitting next to them an elder who will advise the magistrate through the proceedings, the police prosecutors don't wear uniforms, the defendant is not only represented by a lawyer but can bring a support person to court and that support person can talk on behalf of the defendant. Indeed the defendant can speak on his own behalf and the magistrate can talk to the defendant and to the support person, as can the elder. In that way there is a communication developed between all the parties so that the magistrate and certainly this has been my experience; and Brian Hine, who is the Deputy Chief Magistrate, and is here tonight and sits in that court significantly I am sure finds the same

thing. There is a more of a feeling than normal in court that you actually understand the problems the person before you has. There is also a feeling that when you are sentencing the person that your words are just not empty words that are floating out through the windows and the open doors never to be thought of or heard again, but they are actually being taken in by the person that you are addressing. That's not to say that in appropriate cases people won't be sentenced to terms of imprisonment and it's important to bear in mind that the magistrate is not abrogating his or her sentencing discretion. The magistrate is simply seeking advice from people who understand the cultural background of the people who are appearing before them and are imposing sentences which are consistent with the sentencing principles under the *Penalties and Sentences Act*. But it is an innovative approach which is proving very effective in terms of reoffending by aboriginal people.

The Magistrates Court also has an Industrial jurisdiction and we appoint one person in Brisbane as a full-time Industrial magistrate who also handles Commonwealth matters and a major part of the workload there is dealing with appeals under the work cover legislation about decision on workers compensation matters as well as prosecutions for fraudulent claims under that legislation and workplace health and safety breaches where death or grievous bodily harm is caused. Again throughout Queensland every magistrate is an industrial magistrate but in Brisbane we do have one magistrate who handles those matters full-time.

Well that's a snapshot of what the Magistrates Court does, but an issue which has been of some importance in Queensland so far as the magistracy is concerned and one that I have touched on in passing in tracing the history of the magistracy is the issue of judicial independence. This of course is an issue that very much concerns all members of the judiciary.

The *Magistrates Act* 1991 that I mentioned, in fact in its long title assures judicial independence because the long title includes these words "an act relating to the judicial independence of the magistracy".

The principle of judicial independence includes not only independence of the judiciary from the executive but also the principle that judges and magistrates are independent of one another. Something which is often referred to as internal independence. However it has been this issue of internal independence which has been of particular concern to the Queensland magistracy. In 2003 in the Supreme Court, Mr Justice McKenzie said this about judicial independence:

“that is one of the cornerstones of the free society and legislative incursion upon it could only be achieved by the clearest words”.

In a high court decision *Re:Colina; ex parte Torney* (1999) it was said:

“The Chief Justice of the court has no capacity to direct or even influence judges of the court in the discharge of their adjudicate powers and responsibilities.”

And those words apply equally to magistrates, so that a Chief Magistrates function for ensuring the orderly and expeditious discharge of the business of the court does not extend to directing or influencing or even seeking to direct or influence magistrates as to how they will decide cases. I frequently have to deal with correspondence from people who are disappointed in decisions made by the court, just as they are disappointed by decisions that they loose in any court. It is sometimes difficult to explain to them that I can't overturn a decision based on their complaint; also I can't revue a decision of a magistrate. Their right is a right of appeal.

In that decision in 2003, Mr Justice McKenzie found that it was incompatible with the principle of judicial independence to require a judicial officer to discuss issues concerning the way in which the officer conducted court hearings, or to compel a judicial officer to modify how that officer conducted the hearings by threat of sanction.

That case was decided in the context that the Chief Magistrate had a power of reprimand. Such a power is much more consistent with managing the public

sector department than the organisation of the court and thankfully last year it was removed as being inconsistent with the principle of judicial independence, and I can't say that I am disappointed about that.

With the principle of judicial independence now well and truly recognised and entrenched in our legislation we journey into the future. I thought it might assist you as new practitioners if I made some observations about the expectations of the court when practitioners appear before it. When those of you who appeared before me to do moots presented to your cases to me it was clear that you had prepared very carefully and diligently. I emphasise the need for all practitioners appearing before the Magistrates Court or indeed any court to prepare carefully and to provide assistance to the court. Be familiar with the legislation, be ready to answer questions about the maximum penalty which can be imposed, bring your legislation to court, if you are intending to seek a costs order make sure you have a schedule of costs with you to present to the magistrate at the conclusion of the proceedings. Make sure that your submissions are succinct and to the point. Also while in many cases magistrates would be readily aware of what sentencing ranges are there can be cases before which are novel and raise unusual fact situations. In that case Magistrates Courts, like any other courts, will be assisted by comparative sentences; well magistrates would at least like to hear a question as to whether or not your worship could be assisted by any comparative sentences. There has recently been some publicity about a case involving the RSPCA, some kittens and some soldiers. Now the magistrate in that case was not only told the wrong maximum penalty but neither side put any comparative sentences before the magistrate, so here was a person who found himself in a busy list having to deal with a case of that nature without any real assistance. I would hope that as new practitioners having prepared and presented your cases so diligently before us during the moots that have been conducted that when you appear before the Magistrates Court you will bring that degree of preparation and diligence with you and treat the Magistrates Court with the same degree of seriousness and respect that you would give to any other court.

That extends also to the issue of punctuality. I have had an experience of recent time in presiding in various courts that some people seem to think that a 9:30 starting time (and we tend to start much earlier on the whole than other courts) - is really a 9:45 starting time. As I have said to practitioners in those situations you would not turn up in the District or the Supreme Court 15 minutes late, you would get to court early, make sure your clients are at court early or at least if you can't appear you would come before the court and explain why you can't appear and present your case at 9:30. So, again I hope that you would bear that in mind when you're appearing before the Magistrates Court because that is the sort of culture that we would like to see when you appear in our court. Also some people sometimes think that you can agree amongst yourselves that the matter should be adjourned because it is inconvenient to your diary or your Counsel's diary if you're instructing Counsel, and the magistrate will just rubber stamp the adjournment. While magistrates who have been in practice themselves or have been on the bench for many years will bend over backwards to the extent they can to meet the convenience of counsel, its not always possible and solicitors might hear from time-to-time a magistrate saying 'well that's not the only counsel who is competent to do that work you simply have to brief somebody else". I just make those observations to you because you are setting out in many cases on a legal career and I would hope with that advice that you can, as new members of the legal profession as I have said, bring those sought of attitudes and culture into our court.

Queensland is currently experiencing a population growth. According to the budget papers, far in advance of anywhere else in Australia to the extent of 2.3% or 86,000 people during 2003. About 80% of that growth was in the south-east corner. That growth will bring both benefits and challenges and one of those challenges will be for the Magistrates Court in maintaining its effectiveness in finalising matter expeditiously, which is after all what the litigants and I am sure what you as practitioners want. With the expansion of population some of our courts are already experiencing significant pressures on their lists. That is the case in growing areas like the Gold Coast where our court is at Southport. It is also the case at places like Inala and Beenleigh, the

Sunshine Coast; Hervey Bay which are growing areas. Cairns is another example. Over the years there are no doubt that the number of magistrates in this state will increase. Indeed the courts which are now being built including the one just across the road are being built with an eye to the future and future expansion. The recognition that over a period of time the Magistrates Court will become busier and inevitably there will be more magistrates is highlighted by the fact that there will be one floor of the new building that will simply be kept vacant so that courts can be built in there in the future. On Tuesday there will be the official opening of the Western Districts Courthouse which replaces the old Inala Courthouse. Inala had one court and a little half court which could be used by a second magistrate. The new Western District courthouse at Richland has two courts plus a slightly bigger third court and there is room for expansion in the future. All the courts which are on the drawing boards for the future in places like Caloundra, Petrie and Thursday Island are being built with the opportunity for expansion. These changes of course will be incremental - they won't occur over night.

The future will also see the greater use of technology. Some of our courts including the Central Courts in Brisbane already include video conferencing facilities and closed circuit television facilities. They are particularly useful for victims in sexual cases, particularly affected child witnesses and they also allow in some area remands of prisoners to occur without the additional expense and the safety issues of having to transport the prisoners to court. In at least one place in Queensland we are actually trialling the concept of sentencing prisoners who are not actually in the court by using video technology and this will only increase.

In the next financial year \$1,000,000.00 has been committed to expand the number of courts equipped with video conferencing and closed circuit television. It will be installed in 12 courts over that period of time and as courts are upgraded or new courts are built these new and modern state of the art facilities are built into them.

We also now have a capacity to accept electronic lodgement of documents in 19 different locations across the state in civil matters and indeed in Beenleigh 33% of the total number of claims lodged are lodged electronically in the civil jurisdiction. This will create efficiencies but it also demonstrates that over time the Magistrates Court and indeed all the other courts in Queensland will continually become more technologically orientated, more work will be done by the expanded use of video and close circuit televisions facilities so that just as we use the telephone in these days to save people from having to come to court that we will essentially be moving more and more towards to video courts.

One of my aims, and a number of people here this evening have heard me say this before, is to reach a situation where every one of the magistrates in Queensland has a laptop computer and every one of our Magistrates Court's in Queensland has a computer on the bench so that we are essentially carry an electronic bench book with us. That is starting - more and more magistrates are using that sort of technology, more and more ports are being installed in courts to be able to use that technology. Just recently we have been able to use some funding we have for computers to establish computers on the bench in our Arrest Courts, courts 1 and 3 at Roma Street and that is a development that will continue in the future. It will certainly beat having to carry three volumes of Carters Criminal Code and balance them precariously walking up and down steps of buildings and perhaps some other statues and bench books and note books as well. We will be able to carry all that material with us essentially in a brief case and have it on the bench with us so we can readily look it up.

Again, although this will be new to some of you, a number of you have heard - talking about the future - that one of the major aims that the I have in this court is to enhance the professional development opportunity for magistrates so that magistrates are able to keep up-to-date and I'm confident that the funding that will be necessary to achieve that will be incrementally made available because of the importance of this in a growing complex legal environment.

I also intend to in so far as is possible to improve the conditions of magistrates so that magistrates are to all intents and purposes in the same position as other judicial officers and the last vestiges of the public sector terms and conditions - there are still some of those about – are removed. In particular there are some magistrates who it is recognised serve in some very difficult postings because of their remoteness or the amount of travel involved or the size of the town - places like Mount Isa, Charleville and Emerald. My aim is to provide additional incentives to make it easier to go to those areas. Some of those incentives are starting to emerge at the present time.

It also has to be acknowledged that transfer issues have been a major issue concerning the magistracy over the past few years and as the magistrates and some of the audience have heard me say before with the assistance of the new legislation we have had since last year the aim for the future is to establish a more just and equitable transfer system that has existed in the past. One which is approached strategically and one which allows magistrates to be transferred, because they want to be transferred rather than to be forced to transfer to places in Queensland they don't want to be. What I am looking towards is a system where the number of transfers that occur are reduced to those that are absolutely necessary and that the results for the Magistrates Court as far as possible, whether it be the transfer area or elsewhere, or achieved by persuasion and discussion and consensus rather than by direction. This will not always be possible but it should be possible in the greatest majority of cases.

Ultimately much can be achieved by us all as members of the court conducting ourselves in a collegiate way - thinking about how our actions affect our colleagues on the courts so that we work as a team.

So what I have tried to do this evening is look back to the past to say where the Magistrates Court has come from, tell you something about the court as it currently operates and some of our expectations of you as new practitioners and also look into the future to some of the changes and the developments

that you might see in the Magistrates Court in Queensland during the next few years while you are practicing.

Ultimately the aim at all times is to maintain the standards and to ensure that the court acts effectively and efficiently and therefore creates the perception in those many people whose only contact with the courts is the magistracy that the Queensland justice system is fair and equitable and considers the human beings who are part of the criminal justice and indeed the whole of the justice system.

I hope that what I have said has been of some value to you at this stage of your careers. I thank you for attendance this evening and I look forward as indeed do my fellow magistrates who are here this evening, the other members of the judiciary who are here this evening, to seeing you appear before us in the future. Thank you.