SUPREME COURT
OF QUEENSLAND

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My topic is magistrates and judicial independence: the evolution of the role of magistrate and its increasing independence, and I will make some observations about challenges to that independence.

You will probably know that the foundations of modern judicial independence were laid with the Act of Settlement in 1701. Under the Stuart kings, judges could be dismissed at royal pleasure, which would not have encouraged confidence had you been a subject in litigation against the Crown. For example, James I removed Sir Edward Coke from his position as Chief Justice of the King's Bench; he had been tactless enough to declare that the King was subject to the laws of the land. In the last 11 years of his reign Charles II sacked 11 of his judges. His brother James II, sacked 12 in just three years. Clearly an accelerating tendency. After James II's abdication, Parliament passed the Act of Settlement, which gave judges tenure and established salaries for them, to be paid out of public revenue; both widely recognised to this day as essential conditions for the maintenance of judicial independence.

The evolution of the position of magistrate and the development of conditions for independence were somewhat slower. The forerunners of magistrates were justices of the peace who were generally members of the land-owning class. They held an honorary position and exercised considerable power,

often exercised arbitrarily and inconsistently, and sometimes corruptly. They could, though, be sued for their decisions.

What were called the *Jervis Acts,* named after the then Attorney-General, were passed in England in 1848. They were designed to improve the situation by introducing consistency of practice and importantly for independence, introducing some protection for magistrates.

Justices' powers and duties were codified in three Acts. The *Indictable Offences Act* and the *Summary Jurisdiction Act* dealt respectively with the preliminary hearing of indictable offences and summary hearings. The *Justices Protection Act* protected magistrates from suit for acts done other than maliciously in the exercise of their judicial functions. The contents of those Acts would look very familiar to anyone who knew our *Justices Act 1886,* particularly as it stood in the last quarter of the twentieth century.

Meanwhile, the position of stipendiary magistrate which, as the name implies, was a paid position, developed through English legislation mid-nineteenth century. Stipendiary magistrates in England had to be solicitors or barristers.

In Australia the first stipendiary magistrate in New South Wales, who was titled police magistrate, was D'Arcy Wentworth, appointed in 1810. He had relevant experience, having been twice tried and acquitted of highway robbery. Captain John Wickham became the first police magistrate at Brisbane in 1842. He was a former naval officer who had been second-in-command of the Beagle on Charles Darwin's voyage; apparently although he liked Darwin, his collections of specimens were a source of profound irritation on board. The conditions of Wickham's employment as police magistrate

were clearly not set with independence as a primary consideration: he was also the representative of the Governor which meant many administrative and governmental tasks, including conducting a survey of Moreton Bay.

Once separation occurred in 1859, and a Governor was appointed, Wickham left Queensland. Because of interstate buck-passing, he was never able to get a pension despite his 17 years of service. The New South Wales Government said he should talk to the Queensland Government since he had retired from service in Queensland; the Queensland Government said New South Wales had appointed him. During his tenure, other police magistrates were appointed in the Moreton Bay District at Brisbane, Ipswich and Maryborough.

Meanwhile New South Wales, by the *Justices Act 1850*, adopted the Jervis Acts with modifications. After separation from New South Wales, Queensland in turn adopted the NSW legislation. My predecessor as Chief Justice, Sir James Cockle, later undertook the consolidating of the Jervis Acts, the end result being the *Justices Act 1886,* passed with some revision by the then Premier, Sir Samuel Griffith. Who could claim the most credit for the end product was the subject of some debate, but at any rate, it provided for the appointment of both justices of the peace and police magistrates, and can reasonably be regarded as the foundation of the current role of the Queensland magistrate.

The independence of the role of the stipendiary magistrate was improved by amendments to the Justices Act in 1909. Prior to that police magistrates, as stipendiary magistrates were still called, did not sit alone unless no justice of the peace was available. That meant that justices of the peace sitting with a

stipendiary magistrate in sufficient number could overrule the stipendiary magistrate's decision. The 1909 amendment, which is still reflected in section 30 of the *Justices Act* gave a magistrate power to do alone any act which could be done by two or more justices. In that same year the administration of the roles of magistrates and clerks of petty sessions passed from the Premier's Department to the Department of Justice.

From 1889, the Civil Service Board, later the Public Service Board, was responsible for the appointment of magistrates, although the Government had a power to make an appointment if the Board advised there was no suitable appointee within the public service. That did not in fact happen. In 1920, the Police Magistrates and Wardens Association was registered as an industrial union of employees, its primary role being described as seeking award determinations for the magistracy on the basis that the office and duties were distinct from the work of the public service. The Association sought to have the role of magistrates as judicial officers recognised without success until 1977, when the Industrial Conciliation and Arbitration Commission accepted for the first time that the functions of the magistrate being predominantly judicial, the salary should not be tied to public service award relativities.

In 1941, an amendment was made to the Justices Act to remove the term "police magistrate" and substitute "stipendiary magistrate", the Attorney-General observing that the former term was misleading because it conveyed the impression that magistrates were associated with the police force. Notwithstanding, there was often a practical association between magistrates and police prosecutors, particularly when it came to circuit travel. And the stipendiary magistrates continued to have administrative functions which were not necessarily compatible with independence. For example, an appeal

board constituted for the purposes of police appeals against promotion was constituted by a stipendiary magistrate as chairman, with the other members being police officers representing the Commissioner and the police union.

When I was a young barrister in the 1980s, magistrates were still a curious hybrid of public servant and judicial officer. Appointment to the magistracy was confined to people who had come up through the system as clerks of the Court, and there were no outside appointments at all. That made for an insular culture, one in which police prosecutors and police witnesses had far too much influence. To give you an example of what the mindset could be like: I was appearing for a student arrested at a demonstration. At the outset of the hearing I asked for particulars of the direction my client was said to have disobeyed. The magistrate responded, “You don’t need particulars. Your client would have heard the police officer’s direction.” That response contained some findings of fact all of its own, and before we had even started evidence. It did not really suggest an independent approach to the case, which, not too surprisingly, ended with a conviction.

What significantly advanced the cause of formal recognition of the independence of magistrates as judicial officers was the Fitzgerald report, which emphasised the importance of the independence of the judiciary generally. The result was statutory recognition of magistrates’ independence in the *Stipendiary Magistrates Bill* assented to on 21 November 1991. The then Attorney-General Dean Wells noted that the doctrine of separation of powers required that the control of magistrates, as part of the judicial arm of government, be removed as far as possible from the executive arm.

The *Stipendiary Magistrates Act*, in 2000 re-titled the *Magistrates Act*, described itself as relating to "the judicial independence of the magistracy". The Act required the same legal qualifications for appointment as for judges and gave magistrates tenure until age 70. It separated the magistracy from the public service. Remuneration was brought under the *Judges' Salaries and Pensions Act 1967* and the Act expressly said that magistrates were not public servants, and industrial awards and the legislation governing the public service did not apply to them. Still there was one feature more consistent with public service employment than an independent judiciary: the Chief Magistrate had a power of reprimand, for example of a magistrate careless in the discharge of his or her administrative duties.

That power is now gone from the Act. The grounds for removal of magistrates, though, are broader than for judges: as well as proved misbehaviour or physical incapacity, there are incompetence, serious neglect of duties, unbecoming conduct and a failure to comply with a transfer decision, always a thorny issue. Proper cause for removal from office also includes conviction of an indictable offence. There is always a delicate balance between judicial independence and judicial accountability. There is some protection of independence in the fact that the question of whether proper cause exists is decided by a Supreme Court judge. That ensures that a dissatisfied government cannot move to sanction a magistrate whose decisions it dislikes.

Former Chief Justice Gleeson has said:

> "What is called the law and order debate sometimes involves opportunistic demands, not merely for the reduction of judicial discretion, but also for sanctions for unpopular decision making. If

> judges could be penalised, or publicly censured, because their decisions displease the Government, or some powerful person or interest group, or, for that matter, most of the community, then the right of citizens to an independent judiciary would be worthless."[1]

Let me give you an example of why you should not get relaxed and comfortable on the topic of governmental interference. In 1977 the Northern Territory passed a *Magistrates Act* with similar effect to ours. It separated magistrates from the public service and provided security of tenure. Nonetheless in 1998 the Northern Territory Government proposed legislation which would limit the appointment of magistrates to fixed terms of ten years while making them eligible for reappointment after that period. The Judicial Conference of Australia pointed out that legislation of that kind had the potential to permit the executive direct influence in the judicial process. Even if the power to remove or reappoint was not exercised improperly its mere existence tended to affect the way in which judicial functions were discharged. This observation was made:

> "The lesson of history is that only strong minded judges or magistrates are able to remain completely indifferent to the potential impact of giving a decision likely to be unacceptable to a government having power to dismiss them in that way."

Just as importantly, even if that kind of pressure could be resisted there would always be dissatisfied litigants who would attribute the decision to those concerns.

[1] Chief Justice Murray Gleeson, 'The Right to an Independent Judiciary' (Speech delivered at the 14th Commonwealth Law Conference, London, September 2005).

Common sense or possibly the results of electoral polling prevailed, and the NT legislation was abandoned. It seems probable that it would not have survived a *Kable* challenge.

North Australian Aboriginal Legal Aid Service v Bradley,[2] another case from the Territory, made it clear that the *Kable* principle applies to the Magistrates Court as a court exercising Federal judicial power and provides an important common law protection for independence. A government cannot constitutionally enact legislation which compromises the integrity of the magistracy or is apt to lead reasonable members of the public to conclude that magistrates in exercising their judicial function are susceptible to influence from other branches of government.

Coming back to the *Magistrates Act* here, it is critical to judicial independence that Government has no control of which judicial officers determine which matters. That is resolved in the *Magistrates Act* by conferring on the Chief Magistrate responsibility for ensuring the orderly and expeditious exercise of the court's jurisdiction and powers which includes deciding who is to sit where and do what. Every magistrate must comply with reasonable directions or requirements by the Chief Magistrate; one infers that if a direction were inimical to independence it would not be reasonable. Magistrates have the same protection and immunity as judges for anything done in judicial proceedings.

Interestingly, among the recommendations of the Fitzgerald Inquiry was consideration of the administrative independence of the judiciary. Its report recognised the threat to judicial independence constituted by dependence on

[2] (2004) 218 CLR 146 at 152.

administrative and financial resources from government departments. That is something which has never been resolved in Queensland. However, I think it is fair to say that although our resources may not be all we would like, government in this state currently has an appropriate and respectful relationship with the judiciary.

Notwithstanding the safeguards in the Magistrates Act, the magistracy, unlike the Supreme and District Courts, has yet to receive any constitutional recognition. As Gleeson CJ pointed out in *Bradley*, there are differences in arrangements concerning the appointment and tenure of judges and magistrates, their conditions of service and procedures for dealing with complaints against them and Court administration, all of which bear on independence. That is, he says, because "there is no single ideal model of judicial independence".

Plainly, the independence of magistrates is less entrenched than for the other levels of the judiciary. And yet I think there are more pressures on magistrates' independence than for anyone else. You often work and live in smaller centres with the pressures of being part of the community in which you are also judging, bearing in an immediate way the effects of unpopular although correct decisions. You have to work more closely with the police which means the risk of familiarity and unconscious influence. I can imagine that police expectations may be difficult to resist if you know the officer well: for example when they turn up asking you to issue a warrant. It is human nature to be obliging to those with whom we are on good terms, but of course you have instead to be objective analytical and rigorous and to say no, where the evidence is not there.

Another area of pressure, as you all know, is from the media, particularly when it comes to sentencing and bail decisions. There is a popular narrative, not just in this country, that judges and magistrates impose lenient sentences without regard for the effect of the crime on the victim. I was intrigued to read this description by an English judge of the changing landscape there:
"Any judge who started life in the law, as I did, as a barrister in the early 1960s, was appointed in the late 1980s, and has only recently retired, will have seen the stereotype of the … judge transformed in certain organs of the press from that of a port-soaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind, to that of an unashamedly progressive member of the chattering classes, … out of touch with 'ordinary people' …"

I think it is a bit the same here: we have gone from the image of grumpy old male fogies to being now portrayed as bleeding-heart lefties, although puzzlingly we also live in ivory towers.

Criticism of judicial decisions is something which is entirely appropriate in a democracy, and courts are used to it. But while criticism of decisions is fine, sustained and personal attacks on individual decision makers, accompanied by invasions of privacy, are not. I think it is beyond doubt that magistrates have suffered more acutely from those attacks than any other level of the judiciary.

And disappointingly sometimes that kind of media treatment is aided and abetted, not by government but by individual politicians. You may remember a politician who said last September on talk back radio that it was no wonder there were lenient sentences being handed down here when you looked at

the background, friendships and affiliations of magistrates and judges; going on to specify appointments of magistrates by Attorneys-General Welford, Lavarch and D'Ath. He has recently repeated similar observations in connection with a bail decision in a domestic violence case.

Now that sort of remark has a double significance. It obviously is liable to diminish public confidence in the independence of the judiciary. It can also have the tendency, whether intended or not, to actually affect independence, as judicial officers have reason for concern as to how they may be attacked in this way because of their decision making. Indeed it can cut both ways; sometimes you have to examine your decision-making to ensure that you do not go to the other extreme in order to demonstrate your independence. Either way it is completely undesirable.

There is also an increasing tendency for social media to be engaged as victims' families react to sentencing which will never be and cannot be adequate personal redress for their loss. There is also a perception of bail as some form of preliminary sentencing, so that if someone charged with a serious offence who does not pose an unacceptable risk to the public is released, there is outrage that he has "walked free" despite a serious charge. The resulting online agitation is often exploited by mainstream media or picked up by politicians who see electoral advantage. It all adds pressure.

I think our jobs are only going to get harder because of these effects. But magistrates and judges take an oath or affirmation in the same terms, containing the pledge which epitomises independence; to do equal justice without fear, favour or affection. We all have to stay focussed on that and on the need to resist influence from government, individual politicians, the media

and occasionally public campaigns. We are here to administer justice, not to be popular.

I will leave you with a quote from former US Supreme Court justice Sandra Day O'Connor who said this:

> "The reason why judicial independence is so important is because there has to be a place where being right is more important than being popular, and where fairness trumps strength."

That place, she says, is the courtroom.