

THE AUSTRALIAN MAGISTRACY: FROM JUSTICES OF THE PEACE TO JUDGES AND BEYOND

“ In just under 200 years the lay justice, creature of Edward 111, in New South Wales became a judge in all but name, possessing professional qualifications, judicial independence and tenure.”¹

“ We pursue the same ideal, the dispensing of justice according to law. We have the same basic duties and procedures”²

Introduction

This paper has six purposes: the first is to trace the evolution and development of the Australian magistracy, over the last two centuries, from a thematic perspective; the second is to show how the emergence of the modern coroner has enhanced the status of magistrates; the third is to outline the extensive and complex jurisdiction exercised by the modern Australian magistrate; the fourth is to describe the qualifications for appointment of magistrates, their mode of appointment and the different mechanisms for removal of magistrates from office; the fifth is to evaluate the present role and status of magistrates within the Australian judicial system; and the sixth and final aim of this paper is to contemplate the future directions of the Australian magistracy. That final purpose will embrace a discussion of the elevation of magistrates to the status of judges, and the consolidation of the newly recognised judicial independence of the magistracy and its relationship with judicial accountability.

A Thematic History of the Australian Magistracy

The modern Australian magistracy has its origins in the ancient English office of the Justice of the Peace which was transported to Australia during the early years of settlement. However, the office of Justice of the Peace was quickly adapted to meet the peculiar demands of the Australian colonies and very soon acquired a distinctive character that set it aside from its English counterpart. That very early adaptation of the office of Justice of the Peace also initiated a train of processes which were to extend over the nineteenth and twentieth centuries and are continuing to this very day. The history of the Australian magistracy is punctuated by a number of overlapping, and frequently concurrent, processes

¹ **Epilogue** (written by I H Pike , Chief Magistrate and A M Reidel, Magistrate) to Hilary Golder’s book **“High and Responsible Office, A History of the New South Wales Magistracy”** at p 215.

² **“ The Ethics of Magistrates”**, The Honourable Justice Thomas, **The Australian Law Journal Vol 65 July 1991 387 at 401.**

shaping, defining and redefining the office of magistrate : (1) the transition of magistrates from honorary justices of the peace to paid magistrates; (2) the transformation of a paid magistracy from “police magistrates” to “stipendiary magistrates” (3) the transformation of a lay, untrained and unqualified magistracy into a professional, legally trained and competent body of judicial officers; (4) the transmutation of the magistracy as a powerful and autonomous governmental agency into a subordinate arm of the civil or public service; (5) the expansion of the jurisdiction of courts presided over by magistrates and the increasing complexity of that jurisdiction; (6) the separation of the magistracy from the public service; and (7) the extension of the requirement or protection of “judicial independence” to the inferior courts presided over by magistrates.

All of these processes have contributed to the emergence of a modern judicially independent magistracy whose members are true judicial officers, deserving of the title of “judges”.

(1) The English Office of the Justice of the Peace

The origin of the Australian magistracy extends back into pre-Norman England, being deeply rooted in the ancient office of the Justice of the Peace.³ However, it was not until the passage of the Justices of the Peace Act 1361 that formal recognition was given to the office of Justice of the Peace. The following commentary taken from **Halsbury Vol 25 3rd ed p103, para 183** makes reference to the historical and functional link between justices of the peace and magistrates:

“The name justice of the peace was first given to the office of the magistrate by the Justices of the Peace Act 1361. The description “magistrate” is the common denomination under which are included are all those who are entrusted, whether by commission or appointment, or by virtue of their office, with the conservation of the peace and the hearing and determination of charges in respect of offences against it.”⁴

The justices of the peace and magistrates of today are the descendants of the incumbents of the ancient office of the Justice. Therefore, an understanding of the nature and function of the English office of the Justice of the Peace is in fact necessary for a full comprehension of the subsequent development of the magistracy, both in England and in Australia.

A logical relationship existed between the function performed by Justices of the Peace in Pre-Norman times and their mode of appointment: as the function of

³ “ **Summary Justice South Australia**”, Ward Kelly at para 1.290, p 601. See also “ **The Origins of the Victorian Magistracy**”, Thomas A Weber ANZ **Journal of Criminology (1980) 13 at 142** and the “**Early Development of the Queensland Magistracy**” a paper by the Honourable Mr Justice B.H. McPherson C.B.E. presented to Conference of Magistrates held at Brisbane June 1990 (at p 2).

⁴ This extract from **Halsbury** is to be found in Ward Kelly “ **Summary Justice South Australia**” para 1.70 at p 522.

justices was to keep the King's peace it was only natural that they were appointed by royal commission.⁵ However, the tenure of justices of the peace was not secure: they were removable by will.⁶

The Statute of Edward 111 in the year 1344 provided that "two or three persons of the best reputation in the Counties should be assigned by the King's commission as Keepers of the Peace and they, with others learned in the law, should hear and determine charges of felonies and trespasses against the Peace."⁷ The Statute also empowered "the keepers of the peace to inflict "punishment reasonably according to (law and reason) the manner of the law ".⁸

The 1344 Statute marked the transformation of "keepers of the peace" from conservators of the peace with executive functions into justices with judicial powers. This process was continued through a series of statutes in the 14th century. In particular, it was provided in a Statute of 1363 that the justices were required to hold sessions four times in each year,⁹ and had power to hear and determine all offences, except treason, without a jury.¹⁰

Without doubt the most distinctive feature of the office of Justice of the Peace was its dual function: justices exercised both executive (or administrative) duties and judicial duties.¹¹ Included in their non-judicial duties were responsibility for keeping the peace, and apprehending offenders as well as performing constabulary duties.¹² The judicial functions of justices involved the hearing and

⁵ This very early arrangement has an analogue several centuries later in the appointment of justices of the peace by the Governor, the Queen's representative, during the early years of the Colony of New South Wales. In most Australian jurisdictions this ancient mode of appointment continues.

⁶ It was not only justices who were removable at will. From Norman times until the reign of the Stuarts, English judges "held office at the pleasure of the executive government" (the King). (See "**Judicial Accountability**" a paper by the Hon Justice Murray Gleeson (at 165) forming part of a collection of papers from a National Conference , "**Courts in a Representative Democracy**" presented by the AIJA, the Law Council of Australia and the Constitutional Centenary Foundation in Canberra 11-13 November 1994. Tenure of office (usually associated with the concept of judicial independence) and accountability is a recurrent theme that runs through the history and development of the Australian judiciary (which includes the magistracy).

⁷ See "**An Outline of the Powers and Duties of Justices of the Peace in Queensland**" 5th ed by Brennan and Hartigan at p 1. The 1344 Statute is the first statute to formally deal with the qualifications for appointment of justices of the peace. The main criteria appears to have been "good reputation". The question of qualification for appointment to the high and responsible office of magistrate has loomed large in the history of the Australian magistracy, and continues to be a live issue.

⁸ **Halsbury's Laws of England 4th ed Vol 29 para 203 p 111.**

⁹ Brennan and Hartigan **op cit** at p2. From these sessions originated the Courts of Quarter Sessions.

¹⁰ Ward Kelly **op cit** at para 1.310 at p 601.

¹¹ This hybrid role, involving a combination of executive and judicial functions, meant that justices of the peace were not "judicially independent". However, it was not until the Act of Settlement of 1701 that express provision was made for the separation and independence of the judicial arm of government. It was also provided that judges were no longer to hold office only during the King's pleasure and were guaranteed security of tenure conditional upon good behaviour.

¹² Ward Kelly **op cit** para 1.330 at p 601. The following commentary appears in that work at para 1.390 at pp 602 –603:

determination of cases brought before the courts. There was no clear boundary between the executive and judicial functions performed by justices of the peace.

Various statutes from the 16th century on gave justices of the peace power to hear and determine numerous matters outside Quarter Sessions.

Alongside their judicial functions, Justices of the Peace exercised considerable administrative powers which increased between the 14th and 19th centuries.¹³

In 1691 justices were given the power of review of decisions of “overseers of the poor” who were vested with responsibility for the administration of the Poor Laws. Justices of the Peace also administered a proliferation of legislation which was initiated by the administration of the Poor Laws. These included laws against vagrancy, begging, the possession of house-breaking implements and offensive weapons and consorting.

As part of their accretion of administrative power, justices of the peace assumed responsibility for the administration of licensing laws. Justices of the Peace were given the power to license ale houses and to de-license the keepers of such houses for a breach of the peace on such premises.

Ward Kelly lists the following miscellaneous duties performed by justices of the peace:

“Other duties that fell to the lot of the justices of the peace were administration of the game laws, giving testimonials to dismissed servants, licensing of deceased persons to go to Bath or Brixton, making regulations in time of plague, the supervision of accounts at hospitals, the inspection of decayed bridges, the supervision of the manufacture of malt, supervision of the cloth trade, weights and measures, searching for popish books and the reading of gas meters.”¹⁴

The power of justices of the peace appears to have peaked in the 18th and 19th centuries.¹⁵ Such was their power that “they were often able to control the entire administration of a county”.¹⁶

“ As there was no organised system of constabulary in the Middle ages, justices fulfilled many of those functions personally. The justices of the peace for a particular district at least assumed administrative responsibility for control of constables, and there was no clear boundary between the duties of constables and those of justices of the peace.

.....Local justices either exercised constabulary powers themselves, or were in charge of local constables. This continued until comparatively modern times. When the first stipendiary magistrates were appointed they took over the powers of heads of police. However, stipendiaries were not appointed in many districts, and local justices retained their control until the police forces were set up in the 19th century.”

¹³ For a comprehensive treatment of the administrative powers exercised by justices see Ward Kelly **op cit** paras 1.350 – 1.410 at pp 602 –603.

¹⁴ “Summary Justice South Australia” para 1.410 at p 603.

¹⁵ This observation is made by Ward Kelly **ibid**. Modern magistrates do not exercise the same powers as their predecessors exercised. For a comprehensive treatment of the decline of the enormous power exercised by justices see Ward Kelly **op cit** paras 1.430 – 1.510 at pp 603- 606. The reasons for the

It is important to note that the office of the justice of the peace was “entirely honorary and largely confined to members of the country landowning class.”¹⁷ Justices of the peace were also laymen, possessing no more than “a smattering of legal knowledge”.¹⁸

As a result of the rising level of corruption amongst justices of the peace during the course of the eighteenth century, the justices were partly replaced by “a body of professional magistrates”.¹⁹ In 1792 a law was passed according to which twenty four magistrates were to be remunerated at the rate of 400 pounds per year to deal exclusively with criminal cases.²⁰ By 1825 “only four of the stipendiary magistrates were not barristers”.²¹

decline included: (1) the impossibility of justices performing both constabulary and judicial functions due to the expanding population; (2) the demise of the Poor Laws and vagrancy laws; (3) the complexity of modern law and (4) inadequacies in some justices.

As to the inadequacies of some justices of the peace, Windeyer (“**Legal History**”) makes the following comment on the record of Justices of the Peace during the formative centuries of their office:

“ In general, the Justices of the Peace, who in the seventeenth and eighteenth centuries were all powerful in the country districts, discharged their varied duties satisfactorily; and England owes them much. No doubt in their administration of the law, particularly the game laws, they were often tyrannical and blinded by the prejudices of their class. No doubt, too, there were many ignorant and pompous Silences and Shallows.. But there were also Sir Roger de Coverleys and others who, like Thomas Fuller’s Gentlemen, ‘compounded many petty differences betwixt their neighbours which were earlier ended in their own Parish than in Westminster Hall.’ But in the towns and cities, particularly in London, the Justices of the Peace had, until the nineteenth century, a less satisfactory record. For various reasons they were during the eighteenth century inefficient and corrupt. Although not paid a salary, they were entitled to receive certain fees, and many of them used their office merely as a means to make corrupt profits and became known as “Trading Justices”. It is, however, only fair to mention, that many of the Bow Street Magistrates were exceptions. The most illustrious of them was the novelist Henry Fielding, who obtained the Office in 1748. But their determined efforts to preserve order and put down crime were not successful. The City Watchmen were unable to control the mobs of London and Westminster and there was no effective Police system in the metropolis until Peel’s force was formed in 1829.” (See Brennan and Hartigan, **op cit at p 5**) Henry Fielding was one of the first of the full-time paid magistrates to be appointed during the course of the eighteenth century.

¹⁶Ward Kelly **op cit at para 1.410 p 603** citing the Encyclopaedia Britannica. The following commentary appears in “**Osborne Justices of the Peace 1361-1848**” The Sedgehill Press, Shaftesbury 1960 **at p 209**: “ In the complete freedom from any kind of direction or control which they enjoyed during the eighteenth century the justices came to exert an authority and influence far and away beyond anything attained in any earlier period. The expansion was not confined to what may be called their official responsibilities, indeed, the outstanding feature was the way in which they asserted themselves in spheres completely outside the widest conception of the duties of either magistrates or administrators”

¹⁷ The Honourable Mr Justice B.H. McPherson C.B.E **op cit at p 2**.

¹⁸ The Honourable Mr Justice B.H. McPherson C.B.E. **ibid.**

¹⁹ Milton Frank, “ **The English Magistracy**” 1967 Oxford University Press London **pp 1-38**, referred to in a paper by R. Michelides entitled “**Report on the Change in Terminology From Magistrate to Judge**”, 8th March 1995 **at p 3 fn 3**.

²⁰ R. Michelides, **op cit at p 3**.

²¹ **Ibid.**

The Metropolitan Courts Act of 1839 marked not only the creation of “police courts” but also the establishment of a professional stipendiary magistracy: all appointees to the magistracy had to be a barrister.²²

The next landmark piece of legislation were the Jervis’ Acts of 1848 which for the first time codified the powers and duties of Justices. A series of three Acts²³ dealt with the preliminary hearing of indictable offences (ie committal proceedings), the hearing of summary cases and the responsibilities of justices for acts done by them in purported execution of their judicial functions.²⁴ The Summary Jurisdiction Act of 1848 was devoted to the procedural aspects of the jurisdiction of justices in respect of offences punishable summarily – a jurisdiction which became known as “Petty Sessions”.²⁵

Under the Stipendiary Magistrates Act 1858 (UK) 21 and 22 Vic 73 Stipendiary Magistrates were empowered to do all acts authorised to be done by two justices of the peace.²⁶

Therefore, by the middle of the nineteenth century not only were justices of the peace stripped of much of their power but stipendiary magistrates were invested with powers that could only be exercised by two justices of the peace. However justices of the peace (ie lay magistrates) continued to be in the majority, a trend which continues to the present day.

In the immediately following part of this paper attention is given to the transportation of the office of Justice of the Peace to the Australian Colonies and the subsequent evolution and development of the Australian magistracy. The main focus is on the history of the New South Wales magistracy, with occasional historical and legislative references to magistrates in other States and Territories. There are three reasons for that emphasis. The first is that this country had its origins in New South Wales. Secondly, the history of the New South Wales magistracy brings into sharp relief contemporary issues affecting the magistracy as an institution – those of judicial independence and accountability. The third reason for the emphasis is that there has been comparatively little in depth historical research into the magistracy of the other States and Territories. However, having said that, it would appear that the magistracy in those other jurisdictions has evolved and developed along similar lines to those in New South Wales and given rise to the same important issues.

The historical account that follows is based upon a particular methodological approach. Rather than focus upon a purely descriptive, factual account of the evolution and development of the Australian magistracy, the emphasis is on a

²² **Ibid.**

²³ Namely, the Indictable Offences Act 1848, the Summary Jurisdiction Act 1848 and the Justices Protection Act 1848.

²⁴ Ward Kelly **op cit para 1.510 at p 606.**

²⁵ Brennan and Hartigan, **op cit at p3.**

²⁶ **Whartons Law Lexicon 10 ed p 727** cited by R Michelides **op cit p 5 fn 7.**

thematic approach designed to highlight contemporary issues affecting and confronting the magistracy. Many of those issues will continue to assume significance during the new millenium.

(2) The Transplantation of the Office of Justice of the Peace and the Development of the Australian Magistracy

The existing legal institutions of England were transported to the Colony of New South Wales. The system of justices of the peace was part of that inheritance. Consequently, during the early years of settlement justices exercised the same powers as those exercised by their English counterparts. The transplantation of those powers was confirmed in 9 Geo 1V C83.²⁷

In 1788 Governor Phillip had been given a commission as a justice of the peace with power to appoint other justices by commission. Governor Phillip appointed a small number of civil and military officers as magistrates, whose primary function was to manage the convict labour force.²⁸ Accordingly, during the years 1788 – 1822 the nascent magistracy in New South Wales has been referred to as the “Convict Magistracy”.²⁹

David Neal has described the nascent Australian magistracy in the following terms:

“The office of justice of the peace (or magistrate) offered prized symbolic, practical and strategic advantages to those who could secure it. Moreover, it was an office which conferred state power on prestigious, wealthy, private individuals who acted in an honorary capacity. Prestige, financial independence and the traditional associations of the office offered secure footholds for the contest over power in the colony. But these footholds provided no guaranteed outcome. Although traditionally justices of the peace stood at the pinnacle of local authority in England, the economic, political and class patterns of England found no counterparts in New South Wales. The new order had to be negotiated – admittedly with familiar tools – over unknown terrain. As an office which straddled Montesquieu’s division of powers, the magistracy was a crucial element in the governance of New South Wales.”³⁰

²⁷ Ward Kelly **op cit** para 1.530 at p 606.

²⁸ The first Sydney Bench of Magistrates was convened on 19th February 1788. By 1800 justices were sitting regularly at Parramatta and in the Hawkesbury District. By 1822 magisterial proceedings were widespread in New South Wales. (See the Preface by the Honourable Mr Justice AM Gleeson, the then Chief Justice of New South Wales (now the Chief Justice of the High Court) to Hilary Golder’s book “**High and Responsible Office A History of the Australian Magistracy**)

²⁹ Golder “**High and Responsible Office**” at pp 27-50.

³⁰ “**Law and Authority: The Magistracy in New South Wales 1788 – 1840**” **Law in Context Vol 3 1985 at pp 45-46.** The political, economic and social conditions that prevailed during the early years of the Colony of New South Wales was not at all conducive to the creation of a judicially independent magistracy. Indeed, there is little evidence of assertion of claims to judicial independence on part of justices during the early colonial years.

Magistrates, sitting as a bench, exercised jurisdiction over summary criminal offences (ie minor offences decided without a jury) and convict discipline cases from the first days of the Colony of New South Wales.³¹

Magistrates also exercised a civil jurisdiction during the early days of the New South Wales Colony. The Judge-Advocate presided over the Colony's first civil court accompanied by two assessors appointed by the Governor. Magistrates were appointed as assessors.³²

1814 saw a restructuring of the Colony's civil courts. Two new civil courts were established: the Supreme Court presided over by an additional judge for the colony and two assessors appointed by the Governor and a Small Claims Court (the Governor's Court) presided over by the Judge-Advocate.

New South Wales justices came to exercise a civil jurisdiction by presiding over courts of request which were established in 1823³³ and subsequently over small debts courts under the Small Debts Recovery Act 1846.³⁴

It is important to remember that magistrates performed a variety of onerous extra-judicial functions: they were involved in the administration of the convict system, including assignment, convict discipline, the granting of tickets of leave (a precursor of the parole system) and the administration of local ordinances. Therefore, magistrates "were heavily involved in the administration of districts over which they had control."³⁵ Neal goes on to say : " Central policy in NSW was entrusted at a local level to a landed magistracy which had policies of its own to promote".³⁶

The plurastic role performed by magistrates – the judicial cum administrative (in which they often acted as delegates of the Governor) – obviously compromised the judicial independence of the magistracy.

However, "it would appear from the extant records that a somewhat stricter control was exercised by the Governor over the magistrates" than as was the

³¹ In Van Diemen's land, at least by 1816, a local Bench of magistrates were sitting in much the same manner as in Sydney Town. It was not until 1838 that the first regular Court of Petty Sessions began sitting in Melbourne. (See "**An Australian Legal History**" by Alex Castles **at p 234**)

³² David Neal **op cit at 49**.

³³ It was not until 1839 that a Court of Requests was established in Melbourne. Courts of Request began operating in Van Diemen's Land in 1825. They were to "become the long-term foundation for the exercise of lower civil jurisdiction in the colony for the remainder of the century". (Castles **op cit at p 281**) In 1836, provision was made for Western Australian justices of the peace to deal summarily with small civil claims with a jurisdictional limit of 10 pounds. This was followed by the establishment of Courts of Request in 1842.

³⁴ The Honourable Mr Justice McPherson **op cit at p 4**. By the time of Separation there were at least three kinds of small debts courts operating in Queensland. (**ibid**).

³⁵ Neal **op cit at p 52**.

³⁶ **Ibid**.

case in England.³⁷ The Governor exercised control over the magistracy in that he virtually held the sole power of appointment and dismissal. The Colonial Office could override the Governor, but such occurrences were rare.³⁸

The power of dismissal was as controversial as it is today. Governor Bligh had dismissed a magistrate for refusing to commit a member of the police force. Governors Brisbane and Bourke had exercised the power of dismissal against magistrates who were of alternate political persuasion.

The preamble to 6 Geo 4 No 18, passed in 1826,³⁹ gives some insight into the character of justice meted out by magistrates prior to that date:

“Whereas, since the establishment of a Colony of New South Wales, Justices of the Peace have from time to time been appointed by the Governors of the said Colony in a manner differing from the ordinary Commission of the Peace as by law and ancient usage established and Justices so appointed have exercised a summary jurisdiction in certain cases not sanctioned by the laws and practice in England And whereas the said Justices or some of them have in years past made done and caused to be executed divers judgments, sentences, orders acts and things which although not imputable to any evil intention but to an error in judgment are nevertheless not justified by law.”⁴⁰

In a letter from Judge Advocate Brent to Under Secretary Cooke dated 7th May 1810, the following passage appears:

“.....The cases brought before them (sic bench of magistrates) consist of breaches of the peace, larcenies of a petty nature, prisoners brought up for neglect of work, and complaints of a trivial nature. In these cases the Magistrates act in a very summary manner, and proceed without the form of indictment or information. The minutes of these proceedings are, however, always taken down in writing, and the sentences taken down in a book for that purpose which is usually transmitted at the adjournment of the Court to the Governor for inspection.”⁴¹

During the years 1823⁴² and the passing of the New South Wales Justices Act 1850 (which adopted the Jervis' Acts with modifications), there was piecemeal

³⁷ J W Smail “**Justices Act Annotated and Rules and Regulations NSW**” at p 114. The NSW Act 1823 and Governor Bourke’s Summary Offences Act 1832 attempted to place legislative controls over the exercise of magistrate’s curial powers. (See Neal **op cit** at p 50).

³⁸ Neal **op cit** at p 52.

³⁹ This was an Act indemnifying justices for illegal and excessive exercise of jurisdiction. This Act represents an early step towards the establishment of judicial independence in that it is difficult to conceive of an independent judiciary without some judicial immunity.

⁴⁰ Smail, **op cit** at p 114.

⁴¹ Smail **ibid**. This correspondence is quite illuminating because not only does it describe the summary justice administered by justices in the early years of the Colony but also a degree of executive scrutiny of judicial decisions with which modern governments continue to be preoccupied.

⁴² See 4 Geo 4 c96 which was passed 19th July 1823.

legislation “directed to expanding and regularising the exercise of the powers of justices, in the main inspired by English examples.”⁴³ The most significant developments in New South Wales during this period were the establishment of Quarter Sessions in 1830⁴⁴ and the appointment of police magistrates in 1832.⁴⁵ Act 4 Will 4 No 7 Act provided for the appointment of police magistrates by “gubernatorial (ie of the Governor) warrant with ordinary duties of justices, coupled with additional ones of suppressing riots and other breaches of the peace, and nominating and regulating the police force of Sydney Town.”⁴⁶ Police magistrates were also vested with supervisory functions over wharves. The appointment of police magistrates “created potential for more control over the magisterial office by the central government.”⁴⁷ Act 4 Will 4 No7 was significant for the further reason that it indemnified New South Wales justices for acts done in the execution of their office.⁴⁸

⁴³ Smail **op cit at p 115.**

⁴⁴ See **10 Geo 4 No 7**. This Act conferred powers upon justices assembled in general sessions or quarter sessions. Quarter Sessions heard crimes of a more serious nature. As the name implies, quarter sessions were held every quarter in major areas of settlement throughout New South Wales.

In 1839 Quarter Sessions with extensive criminal jurisdiction was established in Victoria.

In South Australia, in 1837, the Courts of General and Petty Sessions Act established Courts of General or Quarter Sessions. Section 4 of that Act provided that “all magistrates or Justices of the Peace for the said Province shall be and are hereby constituted and appointed members of and Judges in the said Courts of General or Quarter Sessions. The same Act established Courts of Petty Sessions.

Courts of Quarter Sessions were established in Van Diemen’s Land in 1825.

In Western Australia, justices of the peace were appointed by the Commission of the Peace and given more authority over criminal offences compared to their English counterparts and their counterparts in other parts of Australia. (Castles **op cit at p 297**) During the 1930’s Quarter Sessions were established to try offences.

⁴⁵ Difficulties in getting honorary magistrates to attend to their duties and complaints about the performance of justices who attended to their duties prompted the creation of the first stipendiaries in the Colony who were known as “police magistrates”. Police magistrates were salaried magistrates.

Hilary Golder (“**The Making of the Modern Magistracy**” at p30) gives the following account of the rise of police magistrates:

“ The geography, demography and economy of the colony obliged governors to develop and rely upon a network of paid police magistrates from 1825. As the name suggests, they directed the local constabulary and heard the bulk of the area’s cases. The name “police magistrate” was retained until 1947, although paid magistrates lost executive control of their local police forces as early as 1862.” (See the Police Regulation Act (1925 Vic No 16) . See also R. Walker “ **The New South Wales Police Force, 1862-1900**”, **Journal Of Australian Studies 15, November 1984, pp 25-38**)

⁴⁶ Smail **op cit at p 115.**

⁴⁷ Neal **op cit at p 57**. Neal goes on to say: “ The appointment of police magistrates constituted an item of government patronage and gave the governor a lever over the police magistrates that he did not have over the honoraries. Some suggested, echoing traditional rhetoric about paid police magistrates, that the police magistrates were spies for the central government.” (at p 58)

The following extract is taken from Castles book “**Australian Legal History**”:

“ Away from Melbourne, as in other parts of New South Wales, paid police magistrates and honorary justices of the peace were the chief links with the central administration”. (at p 250).

⁴⁸ This represented another important step down the path towards the establishment of an independent magistracy.

“Police magistrates” were not unique to New South Wales. In his **“Origins of the Victorian Magistracy”**,⁴⁹ Thomas A Weber speaks of the links between police history and the history of the magistracy in Victoria:

“When viewing the early history of the office of magistrate in the State of Victoria, the links with police history must not be understressed. Our early stipendiary magistrates were called “police magistrates” and they lived up to their name. They were both policemen and magistrates (as were the early justices of the peace), their job combining the functions of preservation of the peace, detection of crime, the apprehension of offenders, as well as the duties of sentencing and punishing.”⁵⁰

Police magistrates were also a feature of the Queensland magistracy. In his paper entitled **“Early Development of the Queensland Magistracy”**, The Honourable Mr Justice B.H.McPherson C.B.E gives the following account:

“Transported to Australia the institution of courts of petty sessions and quarter sessions quickly became established, as did the practice of appointing stipendiary magistrates or, as they came to be known after 1810, “police magistrates” because of their function of supervising police. In the Moreton Bay District before Separation there were police magistrates at Brisbane, Ipswich, and Maryborough, as well as water police magistrates for the Brisbane and Wide Bay areas, and clerks of petty sessions at some nine other places.”⁵¹

⁴⁹ **ANZJ Crim (1980) 13 at 142.**

⁵⁰ The first Court of Petty Sessions to deal with misdemeanours was established in Victoria in July 1838. The numbers of police (or stipendiary) magistrates increased substantially with the advent of the gold rush and separation in 1851. (See Weber **op cit at 144**).

During the early years of the State of Victoria paid magistrates were referred to as “police magistrates” or “stipendiary magistrates”. The terminology was interchangeable. However, from 1857 onwards “police magistrate” became “a recognised category in the statistical records, the word ‘stipendiary’ fading into obscurity.” (See Weber **op cit at p 145**). The 1859 Commission reporting on the Civil Service stated: “ There are throughout the Colony 93 courts of petty sessions, 46 of these courts are presided over by police magistrates, paid as such, 26 by police magistrates receiving salary in respect of other appointments; and 21 by honorary magistrates.” (See Weber **op cit at 145**).

The 1859 Commission Report made some interesting observations as to the power exercised by magistrates and their qualifications which remain, as Weber notes, largely pertinent today:

“ There are few persons perhaps, who fully understand the extent of power possessed by the magistrate in this Colony. A reference to our statute book will show a long list of offences over which they have absolute jurisdiction and that they are entrusted with absolute power in the administration of very severe punishments. In such circumstances a serious responsibility attaches to the performance of magisterial duty. We think that, in addition to the honorary magistrates, it is of great importance that a sufficient number of stipendiary magistrates should be appointed, directly responsible to the Government for the efficient discharge of their duties; and that the salary attached to the office should be sufficient to secure the services of men thoroughly qualified for the work assigned to them.” (See Weber **at 146**).

⁵¹ **At p 3**. It should be noted that Quarter Sessions were never established in Queensland, their place being filled in 1866 by the Districts Courts (**op cit at p 4**).

Two landmark pieces of legislation affected the police magistracy in Queensland. The first was the Justices Act Amendment Act of 1909 which conferred on police magistrates in specified districts the exclusive power of adjudicating at petty sessions, to the exclusion of honorary justices, when a police magistrate was

Police magistrates also formed an integral part of the early South Australian magistracy.⁵²

There were also very strong links between the magistracy and police in Van Diemen's Land :

"The development of a paid magistracy, operating within defined regions, probably helped to maintain a system of police organisation in Tasmania which persisted into the second half of the nineteenth century. It was not until 1899 that policing was amalgamated fully under the command of a Commissioner of Police. As before 1824, day-to day policing remained in the charges of local magistrates, and particularly the police magistrates."⁵³

Between 1824 and 1850 the police magistracy fostered by Governor Arthur became "the foundation for professional magistrates remaining a focal point for the lower level administration of criminal justice."⁵⁴

In Western Australia, there was also a link between magistrates and the police. Until the middle of the nineteenth century, resident and honorary magistrates in Western Australia were largely responsible for the administration of local law enforcement. They appointed constables and supervised their day- to -day activities. However, by 1853, local police forces had been brought under the control of a police superintendent.

After 1856 the number of paid police magistrates increased. Their appointments were generally the result of "lateral recruitment" (a euphemism for political patronage).⁵⁵ According to Golder " the recruitment and treatment of police magistrates ensured that they remained unusually autonomous government employees".⁵⁶ Almost invariably governments "stonewalled constituency criticism of resident police magistrates".⁵⁷ Golder captures the essence of "lateral recruitment" thus:

present to constitute a court. The second piece legislation was the Justices Acts Amendment Act 1941 which changed the designation "police magistrate" to "stipendiary magistrate".

As to the early Queensland magistracy see the article entitled "**The Growth of the Lower Courts**" by W.R. Johnston **Queensland Heritage pp15- 17.**

⁵² For the origins of the police magistracy see "**Lawmakers and Wayward Whigs**" by A Castles and M Harris Wakefield Press 1987 **at p 89.** An example of the extent to which the office of police magistrate undercut the doctrine of the separation of powers is given in Ward Kelly (**op cit at para 1.770 at p 702:** " The doctrine of separation of powers had not yet illuminated South Australia: Mr Finnis was appointed both police magistrate and Commissioner of Police in 1843".

⁵³ Castles **op cit at pp 286-287.**

⁵⁴ Castles **at 293.**

⁵⁵ See Golder "**The Making of the Modern Magistracy**" **at p 31.**

⁵⁶ **Ibid.**

⁵⁷ **Ibid.**

“Ministers were free to appoint relatives, friends, political supporters and even political enemies, many of whom made perfectly competent magistrates.”⁵⁸

Golder goes on to say:

“Because governments had no systematic approach to promotion or rotation of magistrates, many of them became entrenched as the leading citizens in their communities. As such they were barely distinguishable from the ‘traditional justice’. The wicked workings of patronage actually served to perpetuate a semi-independence for the police magistrate.”⁵⁹

The distinctive feature of the Australian magistracy is the early and relatively widespread use of paid magistrates.⁶⁰ In most jurisdictions, after 1850, the paid

⁵⁸ **Ibid at 32.**

⁵⁹ **Ibid.**

⁶⁰ See Golder “**High and Responsible Office A History of the NSW Magistracy**”.

The first paid or stipendiary magistrate in the Colony of New South Wales was D’Arcy Wentworth, having been appointed in 1810. He was designated as a Police Magistrate and occupied that position until 1820. Castles says that by the mid-1830’s the use of paid magistrates had grown extensively in New South Wales and Van Diemen’s Land. (**at p 373**).

There was a particularly strong reliance upon a paid magistracy in Van Diemen’s Land. (See Castles **op cit at p 211**). It is, however, interesting to note that Tasmanian magistrates were not always paid money for their services. For example, in Van Diemen’s Land, in the second half of the nineteenth century, magistrates received rations from the government and a special assignment of convicts. (See Castles **op cit at p 71**)

Under Governor Arthur the working of the Van Diemen’s Land magistracy was “structured on a more tightly organised system of administration: stipendiary magistrates became a focal point for regulating the administrative and judicial business of the magistracy in separate districts proclaimed around the island.” (Castles **op cit at p 281**).

Governor Arthur paid less reliance on unpaid magistrates “as the chief instruments for maintaining localised order and for carrying out the many administrative and judicial functions of the magistracy” (Castles **at p 284**). Castle goes on to say:

“ The effect, as in New South Wales, was to build up the strength of a paid magistracy which ultimately owed its position, its deferment and its allegiance to the government, helping to develop in Van Diemen’s Land, a much stronger reliance on paid magistrates, for the carrying on of magisterial work, compared to England.” (**ibid**).

Castles gives the following commentary in relation to the emergence of a paid magistracy in Western Australia:

“ In 1845 it became possible for separately constituted courts to deal with non-capital offences away from Perth. This was achieved with legislation aimed primarily at ensuring that a degree of local autonomy could be maintained in and around Albany in the administration of criminal justice. The Ordinance provided that local courts presided over by two or more justices could be constituted to sit with juries to hear and determine all criminal charges not punishable by death. By this time, in Albany as well as some other places, there were paid officials appointed by the government who could be expected to preside over these proceedings under the terms of the 1845 legislation. These officers had originally been described as government residents. (The first three were appointed in 1830. Their salaries were 100 pounds per annum.) At first, Stirling had not made these officers justices of the peace. But this situation soon changed and these officers were normally given commissions of the peace. With this, they came in time to be described as resident magistrates.(**at p 306**)

Castles goes on to say:

“ the resident magistrates were, for most intents and purposes, the ‘government’ in their designated areas. Like the paid magistrates in the eastern colonies in remoter areas their commissions of the peace

magistracy “began to be regarded as officials who were basically judicial-style functionaries.”⁶¹ Castles adds: “They acted more independently. They were expected to be more like judges, compared to earlier years.”⁶²

Castles goes on to make these important observations:

“The growing acknowledgment that paid magistrates were being regarded increasingly as judicial officers is illustrated by an editorial in the *Australian Jurist* in 1871. As the journal argued, care needed to be taken to ensure ‘the judicial competency and personal status’ of paid magistrates which it described as ‘judges’. The adoption of the Jervis’ reforms required them to act with more professional skill in carrying out committal proceedings and related functions. The establishment of centralised police forces meant that they were no longer in charge of the day-to-day supervision of the constabulary. So, too, the growth of local government authorities and the development of colonial administrative authorities meant that paid and honorary magistrates were no longer required to carry out the range of administrative and quasi-legislative functions which has often been important elements of their work in earlier years.”⁶³

gave them official backing for carrying on a variety of functions, not least the administration of criminal justice.” (**at p 307**)

As to the position in South Australia, Castles writes:

“(Courts of Resident Magistrates Act 1837) helped to lay a foundation for the lower –level judicial administration in the colony which remained in force until 1850..... The Courts of Resident Magistrates Act demonstrated that in a relatively small and sometimes struggling colony there was really no place for some of the more complex forms of court organisation which operated in the mother country. Essentially, the Act provided that both criminal and civil jurisdiction could be exercised by single tribunals. The courts were to be constituted by paid resident magistrates or, failing this, two or more justices of the peace. In civil matters, these bodies could hear small debts and other cases, involving sums up to twenty pounds.....” (**at pp 315-316**).

Later on, Castles says:

“ In practice, the courts of resident magistrates, supplemented by justices exercising statutory and common law powers, became the basic means of exercising lower-level criminal and civil jurisdictions. The system seems to have worked reasonably well in Adelaide. A paid resident magistrate was appointed in 1837.” (**at p 322**)

Castles further says:

“ It was not until the 1840’s, however, that the system of justice centered on paid resident magistrates began to be extended more effectively to country areas.” (**at p 323**)

The Local Court Ordinance 1850 brought about substantial changes to the South Australian magistracy.

The following extract is taken from Castles’ book:

“ Under the Local Courts Ordinance, 1850, it was provided that paid or unpaid magistrates designated as special magistrates were to be chief officers of (local courts).” (**at p 324**).

As to the position in the Northern Territory of Australia, the Northern Territory had been allocated to South Australia in 1863. In 1911 the Northern Territory was transferred from South Australia to the Commonwealth. During the intervening decades the appointment of magistrates in the Northern Territory was governed by South Australia legislation. The 1850 Local Courts Ordinance (SA) which applied to the Northern Territory provided for the appointment of “Special Magistrates” – a generic name for both paid and unpaid magistrates.

⁶¹ Castles **op cit** at p 327.

⁶² **Ibid.**

⁶³ **Ibid** at 374.

In New South Wales “Stipendiary magistrates” were first appointed by the Stipendiary Magistrates Act 1881.⁶⁴ Their appointment was subsequently regulated by Part 111 of the Justices Act 1902. By Section 13 of the Justices Act (NSW) lay justices were prohibited from sitting in certain courts of summary jurisdiction. The Act provided that only stipendiary magistrates could sit in these courts.

With the advent of stipendiary magistrates the workload of magistrates moved more into the judicial sphere, though magistrates retained a variety of administrative functions. This had two consequences: first it marked the decline of the honorary magistracy; and secondly, it brought to the surface the question of “judicial independence” which had hitherto been a latent issue.

The period 1895- 1920 saw the emergence of a “recognisably modern magistracy” in New South Wales: “the future shape of the magistracy was discernible by 1920”.⁶⁵

It was also during this period that New South Wales magistrates were incorporated into a reformed public service.⁶⁶ From that point on magistrates

⁶⁴ See also the Stipendiary Magistrates Act 1884 (47 Vic No 14) and the Newcastle Act 1896 No 18.

⁶⁵ See Golder “ **The Making of the Modern Magistracy**” at p 30.

⁶⁶ **Ibid.** There were similar developments in the State of Victoria. Weber says that the 1862 Civil Service Act was perhaps the most important single piece of legislation affecting the magistracy in Victoria. (at p 145) The following extract is taken from Weber’s article(at p 147):

“ The aim of thelandmark Civil Service Act (an Act to regulate the civil service) was to classify the civil service: ‘ According to the duties performed by the officers thereof and to regulate the salaries therein accordingly and to establish a just and uniform system of appointment promotion and dismissal.’

The Act commenced the separation of the service into various Divisions which was finally completed by the Public Service Act 1883 which instituted the four division system now in operation (ie as at 1980). The 1862 Act also set appointment qualifications for the public service which were finalised by the Public Service Amendment Act 1889 into prerequisites very similar to those applied to our present magistracy (ie again as at 1980).

During the latter part of the last century there were many problems with political interference with the Public Service as a whole and presumably the magistracy was not immune. An early pamphleteer, AE Moore, described the Civil Service Act by saying that “ A larger fraud of an Act of Parliament never was placed in the statute book.” It appears that originally there was at least some slight attempt to comply with the provisions of the Act, however Judge Hamilton noted that:

‘ In 1862 an Act was passed for the regulation, appointment, and classification of the civil servants. Its provisions were, however, evaded on an enormous scale, and the offices were filled by the friends and relatives of politicians. Those who had no political influence, if they were in the service, could obtain no promotion, and if they were not in the service, could obtain no appointment.’

To overcome this situation Moore believed that the appointment of outsiders should be kept to a minimum and he recommended that all appointments be made by a Board rather than as political rewards. This is the crux of the reason why few, if any, lawyers have been recruited to the ranks of our Public Service magistracy.”

Weber refers to a series of dismissals of public servants that occurred on 8th January 1878. One section of the list of dismissals which was directly applicable to magistrates stated:

“ The Governor, with the advice of the Executive Council, has, in pursuance of the power conferred by the 16th and 17th sections of the Civil Service Act (no 160), dispensed with the services of each and every person now holding the office of police magistrate or police magistrate and warden etc.” (at p 147)

enjoyed the status of government employees. The 1895 Public Service Act (59 Vic No 25) was a watershed in the development of the Australian magistracy. Golder deals with this aspect at some length:

“Lateral recruitment was.... one of the casualties of the 1895 Public Service Act which ended the politician’s control of government employment. A new agency, the Public Service Board, became responsible for the classification, discipline, promotion and above all recruitment of public servants. Magistrates were explicitly included in this new bureaucratic career service; internal and external candidates for the magistracy now had to pass a qualifying examination. But there were some early doubts about their incorporation into a public service which institutionalised ‘insider preference’. Under the new legislation no outsider could be appointed to a promotion position in the service unless there was no suitable internal candidate. This was designed to prevent the revival of political patronage, but it subverted the Public Service Board’s own efforts to recruit practising lawyers into the magistracy. In the years immediately following 1895 a handful of lawyers were appointed and the Justices (Amendment) Act 1909, seemed to dilute insider preference; from 1909 an external appointment to the bench could only be blocked if the Board certified that an internal candidate was not just suitable but ‘as capable’ as the outsider. Public servants argued that this change upset the tacit bargain –between the Board and its junior staff- which underlay the reforms of 1895. The Petty Sessions branch of the Department of Justice drew in able and ambitious recruits, who tolerated a long and not particularly well paid apprenticeship because they anticipated promotion to the bench. Too many external appointments could disrupt a chain of promotions and ultimately threaten the staffing of the branch. Such political–industrial arguments eventually locked the Board and the Department into a system of internal recruitment and at the same time locked the magistracy into a highly –regulated public service. From 1900 to 1975 no magistrate was appointed from outside that service. The overwhelming majority of them came from the Petty Sessions branch, which consequently developed some of the characteristics of a closed order, a brotherhood.”⁶⁷

By the late 1920’s the Petty Sessions Officers Association was advising its members not to rely on public service examinations alone, but to strengthen their claims with legal qualifications.⁶⁸

However, some two weeks later the dismissals were rescinded, the Minister for Justice issuing the following order:

“ The Governor, with the advice of the Executive Council, has directed that the Order in Council..... dispensing with the services of each and every person holding the office of public magistrate or police magistrate and warden etc be cancelled.” (**ibid**)

Such capricious conduct was partially cured by the Public Service Act 1890 which prevented the dismissal of officers except for contraventions of the Act. (**ibid**).

⁶⁷ “**The Making of the Modern Magistracy**” at p 33.

⁶⁸ **Ibid.**

With the incorporation of the magistracy into the public service and the growing professionalism of the public service magistrate came the decline in the use of honorary justices of the peace. To use the words of Golder the honorary justices of the peace were “crowded out”.⁶⁹ By 1914 justices of the peace were complaining that they had been reduced to “mere witnessing machines”.⁷⁰ By 1920 the majority of the population of New South Wales was under the jurisdiction of stipendiary magistrates.⁷¹

The reforms of the late nineteenth century had other consequences: they brought into sharp focus issues of independence and accountability⁷² which were to continue to assume importance throughout the twentieth century and are certain to do so into the next century. Golder says:

“Magistrates in the years 1895 –1920 were the first generation to confront the paradoxes of a public service magistracy. Their judicial independence was guaranteed, according to a 1958 judgment, by a ‘Departmental rule of long standing’. At the same time they were subject to ‘certain directions on administrative matters.’”⁷³

Compared with other judicial officers the tenure of magistrates was insecure. Furthermore, in the years immediately following 1895 magistrates were confronted with demands that “their sentencing practices should be adjusted to fit the demands of other departments.”⁷⁴ Interference of this type constituted a direct assault on the independence of the magistracy.

Golder refers to the ambiguous legacy of the years 1895-1920: “bureaucratic control of magistrates’ appointment, deployment and remuneration could seem incompatible with their autonomy in the courtroom.”⁷⁵ Golder goes on to make the following observations about this crucial period in the development of the New South Wales magistracy:

“...union success in blocking lateral recruitment meant that magistrates graduated from a long public service apprenticeship in the Petty Sessions branch. According to later critics, they could not expose the ambiguities of their position, being imbued with the ‘Public Service order – and- obey mentality.’ Certainly internal recruitment narrowed the distance between magistrates and officers of the Petty Sessions branch. This was symbolised by the fact that, for a short period in the 1920’s, magistrates could belong to the Petty Sessions Officers’ Association. They soon seceded to form their own Magistrates Institute.

⁶⁹ **Ibid.**

⁷⁰ **Ibid at 34.**

⁷¹ **Ibid.**

⁷² **Ibid at p 35.**

⁷³ **Ibid.** See **Ex Parte Blume (1958) 75 Weekly Notes (NSW) 411 at 415.**

⁷⁴ Golder “**The Making of the Modern Magistracy**” at p 36. It was suggested that magistrates should tailor their sentences to solve the problem of overcrowding prisons.

⁷⁵ **Ibid at p38.**

But it was the Association that represented a number of police magistrates in 1925, when they complained about inadequate salaries to the Public Service Appeals Tribunal. During this case the Under Secretary of Justice argued that magistrates who 'want to hear argument and string out their cases' were responsible for their own long working hours'. This was a rather contemptuous public demonstration of the fact that magistrates were not immune from the current push for public service 'productivity'.⁷⁶ But the issues raised by such comments were not really explored until after the Second World War. The increasingly complexity of cases coming before the lower courts, together with the appointment of younger, legally qualified men to the bench, placed the issue of structural independence on the magisterial agenda."⁷⁷

With the decline in lateral recruitment and the ceding of control of government employment to a central and independent agency, being the new Public Service Board, it was arguable that magistrates were politically neutral and professional public servants⁷⁸ being paid by the community to treat everyone impartially⁷⁹, thus giving the impression of a judicially independent and accountable magistracy. However, in reality, the contradictory implications of a public service magistracy undermined any perceptions as to the judicial independence of the New South Wales magistracy.

Issues of accountability had arisen during the period 1895-1920. The following extract is taken from Golder's book **"High and Responsible Office A History of the New South Wales Magistracy"**:

"Governments throughout this period chose to rely on their own magistrates, who were represented as efficient and accountable. There was debate, however, about the definition and even the desirability of efficiency. Government statisticians, for example, argued that the employment of stipendiary magistrates had been vindicated by a rise in the proportion of summary convictions from the early 1880's. Efficiency was equated with speed and predictability, but some critics questioned the rapid dispatch of cases and argued that a dangerous congruence between police and magistrates was turning the lower courts into mere 'manufactories of criminals'. Magistrates themselves struggled with the question of accountability. What exactly did it mean to be a public service magistrate and what were the limits of magisterial independence under the new regime?"⁸⁰

Golder goes on to make these further observations:

⁷⁶ In a later part of this paper the concept of judicial accountability (which applies to both judges and magistrates) will be discussed. Judicial accountability entails, inter alia, the efficient disposition of cases coming before the courts.

⁷⁷ **"The Making of the Modern Magistracy" at p 38.**

⁷⁸ Sections 31 and 32 of the Public Service Act stipulated a minimum age of 35 years for police magistrates and provided for a qualifying 'examination in law'.

⁷⁹ See Golder **"High and Responsible Office" at p 96.**

⁸⁰ **At p 110.**

“Public service reform gave magistrates a new layer of insulation against direct pressure from aggrieved litigants and voters, but their incorporation into a regulated service, and the new standards of professional competence demanded of them, left magistrates struggling to define the limit of their judicial independence and their administrative accountability. In fact governments and magistrates were to skirmish and negotiate over this terrain for much of the twentieth century.”⁸¹

During the 1920’s magistrates in New South Wales continued to explore the contradictory implications of their position within the Public Service hierarchy. The interrelated issues of tenure and independence and the issue of accountability came very much to the forefront.⁸²

The Justices Amendment Act 1947 did away with the very anachronistic designation of “ Police Magistrate” which “allowed for the development of an integrated and coherent magisterial structure”⁸³ during the years 1950 – 1986. However, during this period the increased responsibilities of the office of magistrate encouraged legally qualified magistrates⁸⁴ to further examine and question their status as “public service magistrates.”⁸⁵ In terms of accountability, there was the continuing tension between the conflicting demands of productivity and fairness, the latter being a fundamental element in the administration of justice⁸⁶. The period was also characterised by various attempts to secure the structural independence of the New South Wales magistracy.⁸⁷

As to the rising importance of the issue of magisterial independence during the period 1950- 86 Golder makes the following comments and observations:

“Could the magistracy be contained within the public service? From the 1950’s changes in personnel and in the jurisdiction of the summary courts began to expose the long-standing contradictions of the modern magistracy. They

⁸¹ **Ibid at pp 114 –115.**

⁸² **Ibid at p 145.** Golder makes the following observation (at p 145):

“ During the 1920’s there were ...well publicised cases of forced resignation and retirement, which encouraged magistrates to argue for greater – more ‘judicial’ – security of tenure. After all, new legislation was loading them with responsibilities which had once belonged only to judges.”

Magistrates were also complaining about their salaries. Such complaints were made, within the Public Service framework, to the Public Service Appeals Tribunal. Those complaints were countered with allegations that magistrates were not productive. There was at the time a great deal of pressure for greater productivity in the Public Service (See Golder “ **High and Responsible Office**” at 146) There was a general perception that “the best magistrate was a quick magistrate” (**ibid**) . Against this backdrop questions of magisterial accountability came to the forefront.

⁸³ Golder **Ibid at p 168.**

⁸⁴ In 1948 it was announced that as from 1 July 1955 only those persons who had completed an undergraduate law degree or passed the examinations required for admission as a barrister or solicitor were eligible for appointment as a magistrate.

⁸⁵ Golder **ibid at p 169.**

⁸⁶ Golder **ibid at p 173.**

⁸⁷ Golder **ibid at pp 171-198.**

demanded and often received recognition as judicial officers, but were always liable to be reminded that they were, strictly speaking, 'public servants performing judicial duties'. For the first time there was open debate about the nature and extent of executive control over magistrates. In these preliminary skirmishes, however, the crucial issue of judicial independence was often wrapped in the more mundane – and quintessentially public service – questions of salary, grading and increments."⁸⁸

In 1958, an important case was heard by the Full Bench of the Supreme Court of New South Wales.⁸⁹ In that case the Court drew a distinction between the judicial independence of magistrates, which was guaranteed by a 'Departmental rule of long standing', and the subjection of magistrates to 'certain directions on administrative matters'. Strict departmental control over magistrates tended to create a public perception that magistrates were "subject to control inside the court room."⁹⁰

Golder refers to the increasing dilemma that confronted magistrates during the 1970's:

"The magistrates' dilemma – the fact that they were simultaneously members of the executive and the judiciary- was not new, but public perceptions and reactions were changing as the magistrates' responsibilities increased. The contradictions of their position were evident when magistrates came to deal with complex prosecutions launched by government agencies such as the Corporate Affairs Commission."⁹¹

During this period issues of accountability also came to the forefront as is evident from the following commentary from Golder:

"Public service reforms created tensions between serving and aspiring magistrates. Those reforms were designed to democratize the service, to open up the recruitment and promotion while reinforcing the accountability of the public service workforce to an elected government. This new emphasis on accountability made magistrates nervous, however. The downgrading of the Public Service forced them finally to confront the question was membership of the public service compatible with judicial office? It is debatable whether the Public Service Board did effectively insulate the magistracy from the government before 1979."⁹²

It is arguable that during the 1970's the magistracy had attained a measure of self-autonomy, but as C. R. Briese, Chairman of the Bench, observed in 1979

⁸⁸ **Ibid at p 175.**

⁸⁹ **Ex Parte Blume (1958) 75 WN (NSW) 411.**

⁹⁰ Golder "High and Responsible Office" at p 182.

⁹¹ **Ibid at pp 184-185.**

⁹² **Ibid at p 190.**

“self-autonomy was a poor substitute for independence and actually left the magistracy subtly permeable to outside intervention.”⁹³

By the early 1980’s New South Wales magistrates were “united behind the demand that they should no longer be appointed under or regulated by public service legislation.”⁹⁴ They also had “hoped to build into the new system an independent selection process which would balance the need for outside appointments with the claims of public service candidates.”⁹⁵

Structural independence was finally achieved with the passage of the Local Court’s Act 1982. This Act expressly exempted the magistracy from the provisions of the Public Service Act⁹⁶ and created the position of Chief Magistrate who “was to report directly to his Minister and have specific statutory responsibility for the administration of the bench.”⁹⁷ The Local Court Act was a watershed in the history of the New South Wales magistracy: as Golder puts it “Magistrates emerged from the public service to encounter a debate about the composition and accountability of the judiciary in a democratic society.”⁹⁸

The Judicial Officers act 1986 was also a turning point in the history of the New South Wales magistracy. Magistrates were included in this legislation which, inter alia, provided that no judicial officer could be removed except on an address of both Houses of Parliament. The Judicial Officers Act recognised not only the status of magistrates as judicial officers but also their judicial independence.

The Emergence of the Modern Australian Coroner and the Enhancement of the Status of Magistrates

English laws relating to coronial matters were incorporated into the laws of New South Wales following the First Settlement in 1788. At common law there was power to conduct inquests into deaths. During the eighteenth century legislation was passed in England investing coroners with the power to conduct inquiries into fires. This power was gradually incorporated into the laws of the Australian colonies by statute.

⁹³ Golder **Ibid at p 192.**

⁹⁴ Golder **Ibid.**

⁹⁵ **Ibid.**

⁹⁶ In other jurisdictions, the severance of the magistracy from the Public Service had occurred earlier. The magistracy was severed from the Public Service in Tasmania in 1969. A magistracy independent of the Public Service was established in the Northern Territory in 1976; likewise in the Australian Capital Territory in 1977. The Stipendiary Magistrates Act Amendment Act 1979(WA) removed the Western Australian magistracy from the Public Service in that State.

The structural independence of the South Australia magistracy was achieved in 1983 with the passage of the Magistrates Act in 1983.

Magistrates in Queensland were severed from the Public Service with the passage of the Stipendiary Magistrates Act 1991.

⁹⁷ Golder “**High and Responsible Office**” at p 199.

⁹⁸ **Ibid at p 207.**

In due course, the various States and Territories of Australia came to have their own Coroners Act governing the conduct of inquests and inquiries into fires. The coronial jurisdiction was generally exercised by magistrates.

Throughout the eighteenth, nineteenth and twentieth centuries the coronial systems of the States and Territories underwent reorganisation to improve the efficiency of the coronial process.⁹⁹ The emergence of the modern coroner in Australia has been the product of a slow evolutionary process which during the last quarter of the twentieth century culminated in the creation of State and Territory Coroner Systems.

In 1975 South Australia broke new ground by providing for and appointing a State Coroner who was to hear every inquest or to delegate the Deputy State Coroner or another coroner to hear an inquest.

Ten years later, Victoria established its State Coroner System which was designed to provide “an integrated coronial structure.”¹⁰⁰ The State Coroner was charged with the administrative responsibility for “the proper operation of the coronial service as a whole.”¹⁰¹

In 1988 the State of New South Wales established its own State Coroner System, imposing duties and responsibilities on the State Coroner similar to those imposed upon the State Coroner of Victoria.

In 1994 the Northern Territory set up its Territory Coroner System which was modelled along the Victorian lines, though on a much smaller scale.

Waller has stressed the importance of the modern Australian Coroner:

“The coroner has the primary function of establishing the identity of a deceased person, time and place of death and manner and cause of death – or the circumstances surrounding a fire – but his procedures are mainly for the benefit of the public. The coroner’s powers reflect directly his or her obligation to inquire publicly and to announce the findings publicly. The coroner’s public duty is emphasised by his or her ability to make recommendations designed to reduce the likelihood of similar fatalities.

The modern State or City Coroner has a relatively high profile. He or she will take charge of important or controversial cases as early as possible, and the public

⁹⁹ See Golder “**High and Responsible Office**” generally and in particular pp 117-120. See also Castles “**Australian Legal History**” at 374-375.

¹⁰⁰ See Kevin Waller “**The Modern Approach to Coronial Hearings in Australasia**” in “**The Aftermath of Death**” (editor Hugh Selby) at p 4.

¹⁰¹ **Ibid.**

element in the investigation will entail the use of the media in disseminating information.

With disasters likely to increase in number and dimension, future coroners will have a greater role and greater resources to enable them to attend to their responsibilities.

Coroner using the new approach know that they are keeping the public much better informed of the circumstances surrounding important and controversial deaths and fires, and that they are able to make useful suggestions as to how such events may be curtailed.”¹⁰²

The modern coroner is part of the Australian magistracy, performing a highly specialised function which is of great benefit to the community in general. The fact that the incumbents of the office of State or Territory are magistrates has contributed enormously to the status of the magistracy. The standing of State and Territory Coroners has been equated with that of a District or County Court Judge:

“The value of the Coroner’s role must now be recognised, the responsibilities of that office require the recognition of the Coroner’s true status, the provision of adequate and coordinated facilities. In my view the coroner should be the person basically in charge of investigation of deaths within his or her jurisdiction and those responsibilities should be recognised. The terms and conditions attaching to Senior Coroner or State Coroner’s Office should certainly be not less than that of a Judge of a District or County Court.”¹⁰³

By very reason of its nature and function, the Office of Coroner has also made a substantial contribution to the judicial independence of magistrates. Not only are today’s coronial investigations carried out thoroughly, but they are truly independent. The coronial system is the perfect embodiment of the priceless tradition of judicial independence. Its hallmarks are independence, impartiality, and fairness.

However, with the judicial independence that adheres to the Office of Coroner comes public accountability which requires that the coronial system operate in the public interest. A number of mechanisms exist to assure members of the deceased’s family, friends of the deceased and the community in general that coroners operate in that broad interest. Those mechanisms include the following: (1) procedures allowing members of a deceased ‘s family to request an inquest (2) the provision of reasons for declining to hold an inquest (3) the public nature of coroner’s findings and (4) appellate procedures. All of these mechanisms enhance the accountability of the coronial system.

¹⁰² **Ibid at p9.**

¹⁰³ See Muirhead J “**Interim Report of the Royal Commission into Aboriginal Deaths in Custody**”.

The Expanding Jurisdiction of Magistrates: A Cross-Jurisdictional Survey

Over the last two centuries the jurisdiction of magistrates, both criminal and civil, has increased considerably and continues to increase. Over that time, Australian magistrates have also gradually shed their administrative functions, which by necessity were imposed on them last century, and assumed true judicial functions, taking on “work of true judicial quality”.¹⁰⁴ Furthermore, in those jurisdictions in which there are only two tiers to the judiciary, and no intermediate court (ie a District or County Court), magistrates have come to exercise the jurisdiction exercised by intermediate courts in other jurisdictions. But even in those jurisdictions consisting of a three-tiered judiciary, the jurisdictional distinctions between magistrates’ courts and intermediate courts are becoming increasingly blurred, thereby calling into question the need for intermediate courts.¹⁰⁵

(1) The Criminal Jurisdiction

In Australia virtually all criminal cases are commenced in magistrates’ courts¹⁰⁶, being the Local Court in New South Wales, the Magistrates’ Court in Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory, the Court of Petty Sessions in Western Australia and the Court of Summary Jurisdiction in the Northern Territory.

Magistrates in each of the States and Territories have a very broad criminal jurisdiction.

- **New South Wales**

Magistrates in New South Wales have jurisdiction¹⁰⁷:

- (1) to hear and determine summary offences¹⁰⁸
- (2) to hear and determine certain indictable offences summarily¹⁰⁹
- (3) to conduct committal proceedings in respect of indictable offences.¹¹⁰

¹⁰⁴ This observation is made by I.H. Pike Chief Magistrate and A Reidel Magistrate in the **Epilogue** to Hilary Golder’s book “**High and Responsible Office A History of the New South Wales Magistracy**” (at p 215).

¹⁰⁵ This observation is also made by I.H. Pike Chief Magistrate and A Reidel Magistrate in the **Epilogue** referred to in **fn 104**.

¹⁰⁶ The exceptions are (1) the filing of ex officio indictments in higher courts (2) the original jurisdiction in criminal matters exercised by the Federal Court of Australia and (3) the original jurisdiction in trials of Commonwealth indictable offences vested in the High Court of Australia.

¹⁰⁷ **Halsbury’s Laws of Australia Vol 8 para 125-2615 p 237,207.**

¹⁰⁸ Sections 52-100AQ of the Justices Act 1902.

¹⁰⁹ Sections 548 and 549 of the Crimes Act 1900 and Section 51B of the Justices Act.

¹¹⁰ Sections 32-48I and 51A of the Justices Act.

- **Victoria**

The Magistrates Court in Victoria has jurisdiction¹¹¹:

- (1) to hear and determine summary offences;¹¹²
- (2) to hear and determine all indictable offences that may be heard and determined summarily;¹¹³
- (3) to preside over committal proceedings in relation to indictable offences.¹¹⁴

- **Queensland**

Magistrates in Queensland have jurisdiction:¹¹⁵

- (1) to hear and determine complaints for summary offences¹¹⁶ and indictable offences dealt with summarily;¹¹⁷
- (2) to hear committal proceedings.¹¹⁸

- **Western Australia**

The Court of Petty Sessions in Western Australia has jurisdiction:¹¹⁹

- (1) to hear and determine complaints for simple offences;¹²⁰
- (2) to hear and determine certain complaints for indictable offences;¹²¹
- (3) to conduct an examination into a complaint of an indictable offence and commit for trial.¹²²

- **South Australia**

The Magistrates Court in South Australia has jurisdiction:¹²³

¹¹¹ **Halsbury's Laws of Australia Vol 8 para 125-4195 at p 237,559.**

¹¹² Sections 25(1) (a), 51 and 52 of the Magistrates Courts Act.

¹¹³ Sections 25(1) (b) and 54 of the Magistrates Courts Act.

¹¹⁴ Sections 25(1) (c) and 56 of the Magistrates Courts Act.

¹¹⁵ **Halsbury's Laws of Australia Vol 8 para 125-3015 at p 237,293.**

¹¹⁶ Sections 139-178 of the Justices Act 1886.

¹¹⁷ Sections 552A –552J of the Criminal Code.

¹¹⁸ Sections 99-134 of the Justices Act.

¹¹⁹ **Halsbury's Laws of Australia Vol 8 para 125-4750 at p 237,664.**

¹²⁰ Sections 20(1), 134-159 of the Justices Act and Sections 428-437 of the Criminal Code.

¹²¹ Sections 1, 369, 409, 426A, 465,473, 488, 512-514, 527 549 555, 555A, 559 563 599(2) 602A and 606 of the Criminal Code.

¹²² Sections 4, 98-130 of the Justices Act.

¹²³ **Halsbury's Laws of Australia Vol 8 para125-3535 at p 237,394.**

- (1) to hear and determine a charge of a summary offence;¹²⁴
- (2) to hear and determine a charge of a minor indictable offence;¹²⁵
- (3) to conduct a preliminary examination of a charge of an indictable offence.¹²⁶

- **Tasmania**

Tasmanian magistrates have jurisdiction to hear and determine:¹²⁷

- (1) complaints for simple offences;¹²⁸ and
- (2) certain complaints for indictable offences;¹²⁹

In addition a magistrate has power to conduct an examination into a complaint of an indictable offence and commit for trial.¹³⁰

- **Australian Capital Territory**

In the Australian Capital Territory, the Magistrates Court has jurisdiction to hear and determine:¹³¹

- (1) any matter punishable on summary conviction;¹³²
- (2) any matter by which a person is made liable to a penalty or punishment or to pay a sum of money for any offence, act or omission and no other provision is made for the trial of the offender;¹³³
- (3) any matter in respect of which jurisdiction is conferred upon
 - (a) a Court of Petty Sessions,
 - (b) a Court of summary jurisdiction,
 - (c) a Court constituted by a police or stipendiary magistrate or justices,
 - (d) a magistrate,
 - (e) a justice or justices or
 - (f) a Childrens Court

by a Territory law pursuant to the Seat of Government Acceptance Act (Cth) 1909 or the Imperial Acts Application Act (ACT) 1986.¹³⁴

¹²⁴ Section 9 (c) of the Magistrates Courts Act 1991 and Sections 49-76B of the Summary Procedure Act 1921.

¹²⁵ Section 9(b) of the Magistrates Courts Act 1991 and Section 114 of the Summary Procedure Act 1921.

¹²⁶ Section 9(a) of the Magistrates Courts Act 1991 and Sections 101-113 of the Summary Procedure Act 1921.

¹²⁷ **Halsbury's Laws of Australia Vol 8 para 125-3840 at p 237,473.**

¹²⁸ Sections 26-50D, 72D –87 of the Justices Act.

¹²⁹ Sections 71-72C of the Justices Act.

¹³⁰ Section 23 (e) of the Justices Act.

¹³¹ **Halsbury's Laws of Australia Vol 8 para 125-1730 at p 237,025.**

¹³² Section 19(1) of the Magistrates Courts Act 1930.

¹³³ Ibid.

¹³⁴ Section 19(2) of the Magistrates Courts Act 1930.

In addition, the Magistrates Court is empowered, in prescribed circumstances, to conduct committal proceedings.¹³⁵

- **Northern Territory**

The Court of Summary Jurisdiction has power to hear and determine:¹³⁶

- (1) complaints for summary offences;¹³⁷
- (2) complaints for certain minor indictable offences;¹³⁸
- (3) complaints for other minor indictable offences.¹³⁹

The Court also has jurisdiction in relation to committal proceedings.¹⁴⁰

- **General Commentary**

An examination of the various statutory provisions governing the summary disposal of indictable offences in each of the jurisdictions not only discloses the wide range of offences over which magistrates exercise jurisdiction but also the serious nature of many those offences. In some instances the offences carry a maximum sentence of 14 years and in many cases the indictable offences over which magistrates exercise summary jurisdiction attract a maximum term of imprisonment of 7 and 10 years.

The maximum sentence of imprisonment that Australian magistrates may impose in relation to indictable matters dealt with summarily ranges from 2 years to 5 years.¹⁴¹

In addition to their State or Territory criminal jurisdiction, Australian magistrates exercise summary jurisdiction over Commonwealth criminal matters.¹⁴² The maximum penalties that can be imposed by magistrates in relation to indictable offences dealt with summarily are laid down in Section 4J of the Crimes Act.¹⁴³

¹³⁵ Section 22 of the Magistrates Courts Act 1930.

¹³⁶ **Halsbury's Laws of Australia Vol 8 para 125-1965 at p 237,074.**

¹³⁷ Section 43 of the Justices Act

¹³⁸ Section 120 of the Justices Act

¹³⁹ Section 121A of the Justices Act

¹⁴⁰ Sections 134-142 of the Justices Act.

¹⁴¹ Upon summary conviction Northern Territory magistrates may impose a sentence of imprisonment of up to 5 years.

¹⁴² See Section 26 of the Acts Interpretation Act 1901 (Cth), and Sections 4G, 4H and 4J of the Crimes Act (Cth).

¹⁴³ According to Section 4J (3) of the Crimes Act where an offence is dealt with summarily the court may impose:

- (a) where the offence is punishable by imprisonment for a period not exceeding 5 years – a sentence of imprisonment not exceeding 12 months;
- (b) where the offence is punishable by imprisonment for a period exceeding 5 years but not exceeding 10 years – a sentence of imprisonment not exceeding 2 years.

(2) The Civil Jurisdiction

Magistrates in all States and Territories exercise a civil jurisdiction which has substantially increased since the early days of Courts of Requests and Small Debts Courts which sprung up during the course of the last century. Not only has the civil jurisdiction of magistrates increased in terms of its monetary limits but also in terms of its complexity. The modern Australian magistrate exercises both a common law and equitable jurisdiction with affords litigants a vast array of remedies and relief.

As in the criminal sphere, the jurisdictional boundaries between Magistrates Courts and District/County Courts in the civil area are becoming increasingly blurred, one again calling into question the need for intermediate courts.

In those jurisdictions where there are only two tiers to the judiciary Magistrates Courts exercise the civil jurisdiction of a District/County Court.

- **New South Wales**

The New South Local Court, in its civil jurisdiction, sits in two divisions: its General Division presided over by a magistrate sitting alone and its Small Claims Division presided over by either an assessor or a magistrate sitting alone.

A Local Court in its General Division has jurisdiction:

- (1) to hear and determine actions in relation to the recovery of any debt, demand or damage (whether liquidated or unliquidated) where the amount claimed does not exceed \$40,000, whether on balance of account or after an admitted set-off or otherwise;
- (2) to hear and determine actions for the recovery of detained goods or the value thereof, if the value of the goods together with the amount of any consequential damages claimed for the detention of the goods does not exceed \$40,000; and
- (3) to grant relief under section 7(1) (a) of the Contracts Review Act (NSW) 1980 in relation to proceedings concerning a contract in the course of being heard.¹⁴⁴

Furthermore, subject to the Court's general jurisdictional limits, the Local Court has jurisdiction in relation to civil matters arising under the Corporations Law which are not within the exclusive jurisdiction of a superior court. Again subject to the Court's general jurisdictional limits, the Local Court has jurisdiction under the Commonwealth Trade Practices Act 1974.

¹⁴⁴ See **Halsbury's Laws of Australia Vol 8 para 125-2585 at p 237,195**

In its Small Claims Division, the Local Court exercises the same civil jurisdiction in relation to actions for the recovery of debts, demands, damages or detained goods as it does in its General Division subject to a jurisdictional limit of \$3000. The Local Court, in its Small Claims Division, also has the same power to grant relief under the Contracts Review Act.

- **Victoria**

The Magistrates' Court in Victoria, in the exercise of its civil jurisdiction, is able to hear and determine:

- (1) any cause of action for damages or for a debt or liquidated demand or any claim for equitable relief where the amount claimed or the value of the relief sought does not exceed \$40,000;
- (2) with the parties' consent, any cause of action for damages or for a debt or liquidated demand or any claim for equitable relief irrespective of the amount claimed or the value of the relief sought;
- (3) to inquire into, hear and determine any question or matter concerning accident compensation or under the Workers Compensation Act (Vic) 1958 in respect of a decision, recommendation or direction for or in respect of a sum or matter the amount or value of which does not exceed \$40,000.¹⁴⁵

In addition the Magistrates' Court has jurisdiction to inquire into, hear and determine any question or matter relating to accident compensation or under the Workers Compensation Act 1958 (Vic) concerning a decision, recommendation or direction for or in respect of a sum or matter the amount or value of which is not more than \$40,000.

Furthermore, magistrates have jurisdiction in civil matters arising under the Corporations Law subject to the general jurisdictional limits of the Magistrates' Court, except for those matters which are within the exclusive jurisdiction of a superior court. As in New South Wales, magistrates also have jurisdiction under the Trade Practices Act 1974 (Cth), again subject to the general jurisdictional limits of the Magistrates' Court.

- **Queensland**

The Queensland Magistrates' Court has jurisdiction to hear and determine:

- (1) personal actions where the amount claimed does not exceed \$50,000,
- (2) actions to recover an amount not exceeding \$50,000 which is the whole or part of the liquidated balance of a partnership account or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;

¹⁴⁵ See **Halsbury's Laws of Australia Vol 8 para 125-4195 at p 237,561.**

- (3) actions where a person has an equitable claim or demand against another person in respect of which the only relief claimed is the recovery of a sum of money or damages that does not exceed \$50,000,

but not any case in which the title of land (other than incidentally) or the validity of a devise, bequest or limitation under a will or settlement is in question.¹⁴⁶

As in the case of New South Wales and Victoria, the Magistrates' Court in Queensland has jurisdiction in civil matters arising under the Corporations Law, subject to the general jurisdictional limits of the Court, except for those matters within the exclusive province of a superior court, and jurisdiction under the Trade Practices Act 1974 (Cth), again subject to the Court's general jurisdictional limits.

- **Western Australia**

Subject to certain exceptions¹⁴⁷ the Local Court has jurisdiction in respect of:

- (1) actions to recover a demand not exceeding \$25,000 which is the whole or part of the unliquidated balance of a partnership account or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;
- (2) actions to recover a sum which does not exceed \$25,000 on an equitable claim or demand, whether liquidated or unliquidated;
- (3) actions by landlords for the recovery of land where the annual rent is not more than \$25,000 and no fine or premium has been paid; and
- (4) actions for the recovery of land having an annual value of not more than \$25,000 by the owner or person entitled to immediate possession from a person in possession without right, title or licence.¹⁴⁸

In common with the jurisdictions mentioned earlier, the Local Court of Western Australia exercises civil jurisdiction over matters arising under the Corporations Law subject to the Courts' general jurisdictional limits, except for those matters which fall within the province of a superior court. The Local Court also exercises jurisdiction under the Trade Practices Act 1874, subject to its jurisdictional limit.

¹⁴⁶ See **Halsbury's Laws of Australia Vol 8 para 125-3015 at p 237,290.**

¹⁴⁷ Section 30(2) of the Local Courts Act provides:

“Except as provided in subsection (3) a Local Court shall not have jurisdiction to hear and determine any action –

- (a) in ejectment;
- (b) in which title to land is in question;
- (c) in which a devise, bequest or limitation under a will or settlement is in question;
- (d) for libel or slander;
- (e) for personal injury caused by or arising out of the use of a motor vehicle;
- (f) for seduction.”

Section 30(3) reads:

“If the title to land incidentally comes into question in an action, the court shall have power to decide the claim which is the immediate object of the action to enforce.....”

¹⁴⁸ See **Halsbury's Laws of Australia Vol 8 para 125-4705 at p 237,658.**

The Local Court also has a Small Claims Division which, as its name implies, hears and determines small claims. Such claims are defined as actions in which the cause of action is for a debt or liquidated amount which does not exceed \$3,000.

- **South Australia**

The Magistrates Court is vested with jurisdiction to hear and determine:

- (1) an action at law or in equity for a sum of money where the amount claimed does not exceed \$60,000, if the claim is for damages or compensation for injury, damage or loss caused by, or arising out of, the use of a motor vehicle, or where the amount does not exceed \$30,000 in any other case;
- (2) an action at law or in equity to obtain or recover title to, or possession of, real or personal property where the value of the property is not more than \$60,000;
- (3) an interpleader action where the value of the subject property does not exceed \$60,000 and
- (4) with the consent of the parties, any action beyond the monetary jurisdictional limit of the Court.¹⁴⁹

In its Civil (Minor Claims) Division, the Court has jurisdiction to hear and determine any minor civil action, other than one which is statutorily assigned to the Civil (Consumer and Business) Division of the Court. The Court, in this Division, also has jurisdiction to grant any form of relief necessary to resolve the action.¹⁵⁰

The Magistrates Court, in its Civil (Consumer and Business) Division, is vested with jurisdiction to hear and determine any minor civil action assigned to it by statute; it also has jurisdiction to grant any form of relief necessary to resolve the action. Furthermore, this Division of the Court has jurisdiction to hear and determine applications under the Second - Hand Vehicle Dealers Act 1995 (SA), the Retail Shop Leases Act 1995 (SA) and the Building Work Contractors Act 1995 (SA).¹⁵¹

As in the case of New South Wales, Victoria, Queensland and Western Australia, the Local Court in South Australia has civil jurisdiction with respect to matters arising under the Corporations Law, subject to the general jurisdictional limits of the Court, except for those matters over which a superior court has jurisdiction.

¹⁴⁹ See **Halsbury's Laws of Australia Vol 8 para 125-3535 at p 237,392.**

¹⁵⁰ **Ibid.**

¹⁵¹ **Ibid.**

The Local Court also exercises jurisdiction under the Trade Practice Act 1974 (Cth), again subject to the Court's general jurisdictional limits.

- **Tasmania**

In Tasmania, magistrates exercise civil jurisdiction through two divisions: the Civil Division and the Small Claims Division.

The Magistrates Court, in its Civil Division, has jurisdiction to hear and determine:

- (1) all actions for the recovery of an amount or goods where the amount or the value of the goods claimed, together with the amount of any claim for consequential damages for detention of those goods does not exceed \$20,000;
- (2) certain matters which are within the equitable jurisdiction of the Supreme Court of Tasmania involving an amount that does not exceed \$20,000;
- (3) any matter under Sections 41 and 45 of the Residential Tenancy Act 1997 and
- (4) any action, irrespective of the amount involved, with the consent of the parties.¹⁵²

In common with the other Australian jurisdictions, the Civil Division of the Magistrates Court is invested with jurisdiction to hear and determine, subject to the general jurisdictional limits of the Court, civil matters arising under the Corporations Law, except for those matters which are within the province of a superior court. It also has jurisdiction under the Commonwealth Trade Practices Act, again subject to the general jurisdictional limits of the Court.

In its Small Claims Division, the Magistrates Court has power to hear and determine:

- (1) a small claim¹⁵³ referred to it by a claimant or transferred to it from the Civil Division of the Court;
- (2) a claim for a set-off or a counterclaim, not exceeding the prescribed sum in respect of a cause of action which a respondent claims to have against a claimant, or exceeding that sum if the parties consent to it being heard and determined by the division or a magistrate determines that it should be so heard and determined; or
- (3) a claim for an order authorising access to land under Section 5 of the Access to Neighbouring Land Act (Tas) 1992.¹⁵⁴

- **Australian Capital Territory**

¹⁵² See **Halsbury's Laws of Australia Vol 8 para 125-3813 at p 237,467.**

¹⁵³ A "small claim" is a contractual or quasi-contractual claim, a tortious action or a claim in detinue or conversion where the total amount of the claim does not exceed \$2,000.

¹⁵⁴ See **Halsbury's Laws of Australia Vol 8 para 125-3815 at p 237,469.**

In the Australian Capital Territory, the Magistrates Court has jurisdiction to hear and determine:

(1) personal actions where the amount claimed does not exceed \$50,000, including an action where the amount claimed is the balance due on a balance of account, whether on an admitted set-off or not;

(2) actions in detinue where the value of the goods and the damages, if any, claimed for their detention does not exceed \$50,000;

(1) actions based on nuisance where the damages claimed do not exceed \$50,000.¹⁵⁵

In addition, the Magistrates Court has jurisdiction to make declarations that a person does not owe a specified debt or of the amount of a specified debt alleged to be owed by a person. Furthermore, the Court has such jurisdiction as conferred by any law in force in the Australian Capital Territory.

The Magistrates Court does not have jurisdiction to hear and determine proceedings involving disputes over title to land unless the issue of title to land incidentally comes into question in the proceedings.

In common with the other Australian jurisdictions, the Magistrates Court of the Australian Capital Territory has jurisdiction to hear and determine (subject to the jurisdictional limits of the court) civil matters arising under the Corporations Law except for those matters which fall within the purview of a superior court. The Court also has jurisdiction under the Trade Practices Act 1974 (Cth).

Magistrates also exercise jurisdiction under the Small Claims Act 1974. That jurisdiction extends to:

(1) a cause of action in relation to which the Magistrates Court has jurisdiction where the amount involved does not exceed \$5000;

(2) a claim for a declaration that the applicant is not indebted to the defendant or not indebted for a specified amount not exceeding \$5000 and

(3) a claim for nuisance.¹⁵⁶

- **Northern Territory**

In the civil sphere, magistrates in the Northern Territory exercise both a local court and small claims jurisdiction.

¹⁵⁵ See **Halbury's Laws of Australia Vol 8 para 125-1715 at p 237,996.**

¹⁵⁶ See **Halsbury's Laws of Australia Vol 8 para 125-1770 at p 237,005.**

The Local Court jurisdictional limit is \$100,000. Within that jurisdictional limit the Local Court has jurisdiction to hear and determine:

- (1) a cause of action for damages or a debt, or a liquidated demand;
- (2) a claim for equitable relief;
- (3) a claim concerning the ownership or possession of property;

In addition, the Court has jurisdiction to hear and determine with the written consent of the parties:

- (i) a cause of action for damages or a debt, or a liquidated demand, irrespective of the amount claimed;
- (ii) a claim for equitable relief, irrespective of the value of the relief sought; and
- (iii) a claim concerning the ownership or possession of property, irrespective of the value of the property

The Court also has jurisdiction to hear and determine any other matter or cause of action if it is given jurisdiction to do so by or under an Act other than the Local Court Act.

The Local Court does not have jurisdiction in civil matters arising under the Corporations Law which are not within the jurisdiction of any State Court other than the Supreme Court of the Northern Territory. The Local Court has jurisdiction under the Commonwealth Trade Practices Act 1974 subject to the general jurisdictional limits of the Court.

In its small claims division, the jurisdictional limit of the Local Court is \$10,000. Small Claim proceedings may be instituted with respect to a claim for:

- (1) the recovery of an amount not exceeding \$10,000;
- (2) the performance of work of a value not exceeding \$10,000;
- (3) relief from payment of money of an amount not exceeding \$10,000 and
- (4) the return or replacement of goods to a value not exceeding \$10,000.

(2) Other Jurisdictions Exercised by Magistrates

Other jurisdictions exercised by Australian magistrates include:

- A coronial jurisdiction
- Jurisdiction under the Family Law Act
- A Childrens Court or Juvenile jurisdiction
- Jurisdiction over child welfare and child protection matters
- Jurisdiction over adoptions
- A preventative jurisdiction (domestic violence)
- Jurisdiction over Workers Compensation or Work Health matters

- An licensing and industrial jurisdiction
- A mining wardens jurisdiction
- Jurisdiction in tenancy matters
- A mental health jurisdiction
- Jurisdiction over criminal injuries compensation claims
- A marine jurisdiction and
- Appellate and tribunal jurisdictions.¹⁵⁷

It is not the case that magistrates in every State and Territory of Australia exercise all of these jurisdictions. The breadth of jurisdiction varies from State to State.¹⁵⁸ However, magistrates in the Northern Territory, ACT and Western Australia have the broadest jurisdiction embracing most of the jurisdictions listed above. Moreover, in some jurisdictions, like the Northern Territory, the trend has been away from creating specialist magistrates and all magistrates exercise jurisdiction in multiple areas of the law.

Current Qualification for Appointment of Magistrates, Mode of Appointment and Removal from Office.

- **New South Wales**

According to Section 12(2) of the Local Courts Act 1982 a person is not eligible for appointment as a magistrate unless that person is, or is eligible to be, admitted as:

- (1) a barrister or solicitor of the Supreme Court of New South Wales;
- (2) a barrister, solicitor or barrister and solicitor of the High Court of Australia; or
- (3) a barrister, solicitor or barrister and solicitor of any Court of another State or a Territory.

Pursuant to Section 12(1) of the Local Courts Act magistrates are appointed by the Governor by commission under the public seal of the State. Subsection (4) of Section 12 provides that magistrates are not subject to the provisions of the NSW Public Service Act 1979 (repealed).

New South Wales magistrates hold office until attaining the age of 65 years unless either suspended or removed from office for misbehaviour or incapacity pursuant to the provisions of Section 44 (3) of the Judicial Officers Act 1986 (NSW).

¹⁵⁷ As an example of the increasing intrusion of appellate and tribunal jurisdictions into magistrates courts see Schedule 1 which tables the numerous appellate and tribunal jurisdictions exercised by Northern Territory magistrates.

¹⁵⁸ "State" is be regarded as including the ACT and NT.

The Governor may remove a judicial officer from office upon the preparation of a report from the Conduct Division of the Judicial Commission stating that there are sufficient grounds for Parliamentary consideration of the removal for proved misbehaviour or incapacity.¹⁵⁹

- **Victoria**

The prerequisites for appointment as a magistrate in Victoria are different to those imposed in New South Wales. According to Section 7 (3) and (4) of the Magistrates' Court Act a person will not be appointed as a magistrate unless that person:

- (1) has not attained the age of 70 years;
- (2) is enrolled as a barrister and solicitor of the Supreme Court of Victoria or of the High Court of Australia; and
- (3) either
 - (a) has been enrolled for not less than five years, or
 - (b) for an aggregate period of not less than 10 years has been an officer of the Supreme Court of Victoria, the County Court or the Magistrates' Court or the Magistrates' Court or a clerk of a Childrens' Court or a coroner's clerk.

As in New South Wales, magistrates are appointed by the Governor.¹⁶⁰ Unlike the situation in New South Wales, magistrates in Victoria may be removed from office following a determination by the Supreme Court of Victoria that proper cause exists for removal.¹⁶¹

- **Queensland**

Pursuant to Section 4 of the Stipendiary Magistrates Act 1991, a person is not eligible to be appointed a magistrate unless he or she has not attained the age of 65 years and is:

- (1) a barrister or solicitor of the Supreme Court of Queensland of at least five years standing;
- (2) a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of Australia of at least five years standing; or

¹⁵⁹ If after investigating a complaint against a judicial officer, the Conduct Division of the Commission concludes that a serious complaint has been wholly or partially established:

1. the Commission may form the opinion that the complaint could justify parliamentary consideration of the removal from office of the judicial officer in question;
2. the Commission must forward a report to the Governor
3. if the Commission's report is to the effect that the matter could justify parliamentary consideration of the removal of the judicial officer from office, the report must be put before both Houses of Parliament.

¹⁶⁰ See Section 7(1) of the Magistrates Court Act.

¹⁶¹ See Sections 9(10), 9 (11) (b), 11(3) 11(4) and 12 (b).

(3) a barrister, solicitor, barrister and solicitor or legal practitioner of the Supreme Court of another State or of a Territory of at least five years standing.

Section 5 (1) of the Act provides for the appointment of magistrates by the Governor.

As in Victoria, a magistrate can be removed from office on a determination by the Supreme Court that proper cause for removal exists.¹⁶²

- **South Australia**

In South Australia a person is not eligible for appointment as a magistrate unless that person is a legal practitioner of at least five years standing.¹⁶³

Pursuant to Section 5 (1) of the Magistrates Act 1983, the Governor may, upon the recommendation of the Attorney-General, appoint magistrates.

In accordance with Section 11(1) of the Magistrates Act 1983 the Attorney-General may, and at the request of the Chief Magistrate made after consultation with the Chief Magistrate must, conduct an investigation in order to determine whether proper cause exists for the removal of a magistrate from office.

Pursuant to Section 11(3) of the Act, where it appears to the Attorney-General or the Chief Justice of the Supreme Court of South Australia that a judicial inquiry should be conducted to determine whether proper cause exists for the removal of a magistrate from office, the Attorney-General must apply to the Supreme Court of South Australia (constituted by a single judge) for such an inquiry.

Section 11(6) of the Magistrates Act provides that where the Full Court determines that a magistrate should be removed from office the Governor may remove the magistrate from office.

- **Western Australia**

Section 4(1) of the Stipendiary Magistrates Act 1957 provides for the appointment of stipendiary magistrates by the Governor.¹⁶⁴

According to Section 4(2) of the Act a person will not be appointed as a stipendiary magistrate unless that person:

¹⁶² See Section 15(4), 15(5) and 15(6) of the Stipendiary Magistrates Act.

¹⁶³ See Section 5(5) of the Magistrates Court Act 1991.

¹⁶⁴ The Governor may also appoint Magistrates of Local Courts (see Section 8 of the Local Courts Act 1904). A stipendiary magistrate has all the jurisdiction and powers of a Local Court Magistrate (see Section 9(b) of the Stipendiary Magistrates Act 1957 and Section 106Q (2) of the Local Courts Act 1904).

- (1) is or has been a barrister or solicitor of the Supreme Court of Western Australia, of a State or Territory, of the High Court of Australia or of England Northern Ireland; or
- (2) has passed the prescribed examinations, and satisfies other prescribed requirements.”

Pursuant to Section 5B of the Act a magistrate may continue in office beyond the age of 65 years, but not beyond 70 years, in prescribed circumstances.

Section 5(2) of the Act provides that a magistrate may be removed from office by the Governor on an address of both Houses of Parliament made at any time.

- **Tasmania**

Section 8 of the Magistrates Act 1987 provides that a person is not eligible for appointment as a magistrate unless that person has not attained the age of 65 years and is a practitioner or a barrister of at least five years standing.

Section 4 (1) of the Act empowers the Governor to appoint magistrates.

According to Section 9 (1) of the Magistrates Court Act a magistrate may only be removed from office by the Governor on an address of both Houses of Parliament moving for removal on the ground of proved incapacity or misbehaviour.

- **Australian Capital Territory**

In the Australian Capital Territory, magistrates are appointed by the Executive.¹⁶⁵

A person is not eligible for appointment as a magistrate unless that person is, and has been for not less than five years, enrolled as a legal practitioner of the High Court of Australia or of the Supreme Court of a State or Territory and has not attained the age of 65 years.¹⁶⁶

The removal from office of magistrates is governed by the general provisions of the Judicial Commission Act relating to the removal from office of judicial officers of the Australian Capital Territory.¹⁶⁷

¹⁶⁵ See Section 7(2) of the Magistrates Court Act 1930.

¹⁶⁶ See Sections 8 and 10A(2) of the Magistrates Act.

¹⁶⁷ Where a written complaint as to the behaviour or physical or mental incapacity of a judge is made to the Attorney-General, the Attorney-General may refer that complaint to a Judicial Commission. (see Sections 14 and 16 of the Judicial Commissions Act 1994) In accordance with Section 22 of that Act the Judicial Commission must provide a report to the Attorney-General which must be placed before the Legislative Assembly. (see Section 23 of the same Act)

Following the lodgment of a report the judicial officer complained of has at least 14 days in which to provide a written statement to the Attorney-General in relation to the report and must be given a reasonable

- **Northern Territory**

In the Northern Territory, stipendiary magistrates are appointed by the Administrator.

A person is not eligible for appointment as a stipendiary magistrate unless that person:

- (1) has not attained the age of 65 years;
- (2) is a legal practitioner of at least five years standing of the High Court of Australia, or the Supreme Court of a State or Territory, New Zealand, Papua New Guinea, England, Scotland or Northern Ireland.

A stipendiary magistrate may not be removed from office unless:

- (1) the magistrate has failed to comply with a direction of the Chief Magistrate as to sittings;¹⁶⁸
- (2) the Administrator is satisfied that the magistrate is incapable of carrying out his or her duties; or
- (3) the Administrator is satisfied that the magistrate is incompetent to carry out those duties; or
- (4) the Administrator is satisfied that the magistrate is for any other reason unsuited to the performance of his or her duties.

The previous mechanism for removal of magistrates in the Northern Territory invested the Administrator with power to remove a magistrate from office on a resolution, requesting his or her removal on the ground of proved misbehaviour or incapacity, being presented to the Administrator by the Legislative Assembly.

- **Cross- Jurisdictional Commentary**

As between the various States and Territories there are differences in the prerequisites for appointment as magistrates, though there is a uniform emphasis on legal qualifications.

opportunity to address the Legislative Assembly. (see Sections 24 and 5 (3) (c) of the Judicial Commissions Act).

Section 5 (3) (c) and (2) of the Act provide that within 15 days after the tabling of the report the Legislative Assembly may determine that the Commission's findings amount to misbehaviour or physical or mental incapacity. According to Section 5(1) of the Act, the Executive must remove the judge from office if the Legislative Assembly makes such a determination.

¹⁶⁸ Note that there is a statutory prohibition on the Chief Magistrate giving a direction for the purpose of affecting the exercise by a magistrate or Justice of his or her judicial discretion. (Section 13A of the Magistrates Act (NT). This provision is designed to prevent interference with the judicial independence of magistrates.

The mode of appointment is the same in all jurisdictions except the ACT. However, it is submitted that there is, in practical terms, very little difference between an appointment by a Governor and an appointment by the Executive. Invariably, magistrates are appointed by the Governor on the advice of the Executive following Cabinet approval of a recommendation by the Attorney-General. In the Northern Territory, where the power to appoint magistrates is vested in the Administrator, the process is similar: the Attorney-General makes a recommendation to Cabinet and on the advice of the Executive the Administrator makes the appointment.

Judicial appointments have traditionally been regarded as an executive function. Should that be so? Does the appointment of magistrates by the Executive arm of government infringe the principle of separation of powers and impinge upon magisterial independence?¹⁶⁹ What are the alternate modes of appointment?¹⁷⁰ How does one guard against political appointments to courts in a representative democracy?

This paper is not intended to provide any answers: it merely reiterates the range of issues that have emerged during the last decade of this century which need open and vigorous debate as much in the context of the magistracy as in the corridors of the higher levels of the judiciary.

The major disparity between the various States and Territories occurs in relation to the mechanisms for removal of magistrates from office. That disparity raises a number of questions, the resolution of which will inevitably occupy the mind of all levels of the judiciary well into the next century.

Should the same mode of removal apply to all judicial officers? If magistrates are to be elevated to the status of judges then it is only logical that there be a common mechanism for the removal from office of all judicial officers.

Should that common machinery be in the form of a parliamentary process? It has been said that process is “inevitably political and controversial” and “cumbersome”.¹⁷¹ A further argument against the parliamentary process is that parliamentarians are too busy and, in any event, ill-equipped to pass judgment upon the conduct of a judicial officer.

¹⁶⁹ For a view that the present executive function in relation to the appointment of judicial officers does not cut across the separation of powers doctrine see “**The Keynote Address –The Separation of Powers**” by The Honourable Justice King AC (at pp 13-15) which forms part of a collection of papers from a National Conference, “**Courts in a Representative Democracy**”, presented by the AIJA, the Law Council and the Constitutional Centenary Foundation in Canberra on 11-13 November 1994.

¹⁷⁰ As to those alternate mechanisms see the Keynote Address (at pp 13-14) mentioned in the preceding footnote. See also “**The Appointment of Judges**” by The Honourable Michael Lavarch MP and Commentary by The Honourable Justice David Malcolm AC (“**Courts in a Representative Democracy**” at pp 153-158 and 159-164 respectively)

¹⁷¹ The Honourable Justice Thomas “**The Ethics of Magistrates**” **The Australian Law Journal Vol 65, 387 at p 399**

It may well be that the best person or persons to adjudicate upon judicial misconduct are members of the higher levels of the judiciary. Such a model amounts to judgment by one's peers. Magistrates, whether or not elevated to the status of judges¹⁷², may feel comfortable with being judged by an upper level of the judiciary. However, it would be clearly inappropriate for a Judge of a Supreme Court of a State or Territory to sit upon the fitness of another member of the same court to remain in office.¹⁷³ For that reason, this mode of removal from office could not have universal application.

The attraction of the New South Wales model is that it attempts to depoliticise the process and avoid the problem of a Judge of a Supreme Court of a State or Territory sitting upon the fitness of another member of the same court to remain in office. The real advantage of this model is that it is capable of governing and regulating the removal from office of the full spectrum of judicial officers.

The Northern Territory model is unique. It would appear to provide the least protection for magistrates in that the removal of a magistrate from office is not regulated by a regimented parliamentary process, nor by judicial determination or an independent judicial body.

As the Honourable Justice Thomas has said:

"Just what form of protection will be the best for magistrates needs debate".¹⁷⁴

The magistracy must vigorously carry this debate over into the new millenium.

The Present Status of Magistrates within the Judicial Hierarchy

Magistrates preside over courts which lie at the bottom of the judicial hierarchy. That is the case in New South Wales, Victoria, South Australia, Western Australia and Queensland where there are three tiers to the judiciary and also in those jurisdictions such as Tasmania, ACT and the Northern Territory where the judiciary only consists of two tiers.

However, the status of magistrates should not be viewed solely in terms of the position which they occupy within the judicial hierarchy. There is a normative dimension to their status which takes into account the character and the breadth of the multiple and often complex functions performed by magistrates: the modern Australian magistrate is "a judge in all but name".¹⁷⁵ Magistrates perform identical functions to those performed by Judges: "they are responsible as an

¹⁷² Either way magistrates would function at the lowest level of the judiciary.

¹⁷³ The Honourable Justice Thomas **op cit at p 400**.

¹⁷⁴ **Ibid.**

¹⁷⁵ See the **Epilogue** (by I.H.Pike Chief Magistrate and A. Reidel Magistrate) to Golder's book "**High and Responsible Office A History of the Australian Magistracy**" (at p 215).

integral tier of the Australian Judiciary for performing identical tasks to those persons identified as Judges.”¹⁷⁶

As early as last century, there was some recognition of the status of magistrates as judges. The following extract is taken from Castles’ book “**An Australian Legal History**”:

“The growing acknowledgment that paid magistrates in particular were being regarded increasingly as judicial officers is illustrated by an editorial in the Australian Jurist in 1871. As the journal argued, care needed to be taken to ensure ‘the judicial competency and personal status’ of paid magistrates which it described as ‘judges’”.¹⁷⁷

In more recent times, on 17 July 1986 His Honour, the Chief Justice of Western Australia, Sir Francis Burt, acknowledged the importance of magistrates within the judicial system and their judicial status:

“I would agree that Magistrates should be regarded - as they are – as but one branch and an important branch of the State judiciary and that they should, as to terms, pensions and other commissions be dealt with in the same way as other judges.”¹⁷⁸

Similar sentiments were expressed by the Board of Inquiry into Judicial Remuneration in Victoria¹⁷⁹:

“The Government concedes that the Magistrates must now be seen and treated as the third arm of the Victorian Judiciary. Although barely within our terms of reference, we think that some consideration might be given in due course to change the name of the Magistrates’ Court to, say, Local Court or some other suitable name. Magistrates could then be designated Local Court Judges which would be more in keeping with the reality of the position that they now hold. The Parliament and the Government have done a great deal for the Magistrates’ Court to the extent that it is no exaggeration to say that over the last decade or so the Court has been transformed from a public service orientated Court of Petty Sessions to a Court of much higher calibre.”¹⁸⁰

This transformation has not only resulted in an improvement of the quality of magistrates as judicial officers: the transformation of the Australian magistracy from a public service institution to an office which is structurally independent of

¹⁷⁶ This pertinent comment is made by R.B. Lawrence SM, Freemantle in his foundational paper entitled “**Magistrates – Change of Name**” at p 1.

¹⁷⁷ At p 374. This extract from Castles’ book also appears on page 14 of this paper.

¹⁷⁸ Cited by RB Lawrence **op cit** at p 1.

¹⁷⁹ The Board was constituted by Their Honours, Connor QC (the Chairman of the Board) and Marks QC (Board Member).

¹⁸⁰ See the Board’s Report 1991 at p 175. This extract from the Report is also cited by RB Lawrence in his paper at p 2.

the Public Service has fostered the judicial independence of the magistracy. This has resulted in the alignment of magistrates with Judges as judicially independent officers.

In **Attorney –General for New South Wales**¹⁸¹ Sir Anthony Mason, former Chief Justice of the High Court, implicitly included magistrates within the definition of “judicial officer”, thereby equating magistrates with Judges:

“Underlying the respondent’s argument and the majority judgment in the Court of Appeal are the importance of the doctrine of judicial independence and the need to protect the security of tenure of judicial officers. The importance of these matters requires no emphasis. These considerations are relevant to removal from judicial office rather than to appointment to judicial office, except in so far as they bear upon the terms of appointment. For my part I am unable to equate the failure to appoint magistrates to the Local Courts with removal from their previous office.”¹⁸²

It is not without significance that a magistrate is a “judicial officer” for the purposes of the New South Wales Judicial Officers Act 1986. This represents not only a statutory affirmation of the judicial independence of magistrates but a tacit acknowledgment that magistrates are judges.

It is worth noting earlier comments by Sir Ninian Stephens concerning the equivalence between magistrates and Judges in the context of the preservation of their judicial independence:

“There are a number of good reasons, questions of recruitment of suitable candidates to Judicial Office, of their retention once appointed, of public respect for Judicial Office in a community that tends to measure most things in money terms, and perhaps placing Judges (Magistrates) in a financial position beyond the reach of temptation, all good reasons for ensuring proper and, in real terms, secure salaries and for that matter, pensions.”¹⁸³

Back in 1991, The Honourable Justice Thomas described the Australian magistracy in the following factual and qualitative terms:

“Clearly the Magistrates’ Courts are simply the courts of first instance in the judicial structure throughout Australia.¹⁸⁴ The professionalisation of the magistracy has been one of the most notable changes in legal professional life over the past two decades. That is the period over which the magistracy has been transformed in substance from a body of persons largely public service

¹⁸¹ (1990) 170 CLR 1 at p 19.

¹⁸² Cited by R.B. Lawrence **op cit** at p 4.

¹⁸³ Referred to by R B Lawrence **ibid**.

¹⁸⁴ “**Eligibility for Appointment to the Bench – A Magistrate’s Viewpoint**”, Commentary by R.J. Cahill CSM, Bicentennial Australian Legal Convention, Canberra 30 August 1988, **ASMA Vol 10 NO 2 p 10**.

trained to a body of professionally trained and legally qualified practitioners. From 1985, all new appointments to Magistrates' Court throughout the Commonwealth have been qualified legal practitioners.¹⁸⁵ The change has occurred quickly. In Queensland now there are only four magistrates who do not have the legal qualification of a barrister or solicitor. Two years ago Mr Briese made an eloquent plea for recognition of the importance of the work being performed by the magistrates.¹⁸⁶ He noted a trend in all jurisdictions to increase the jurisdiction of magistrates, observing that the vast majority of property offences are now tried by magistrates in his State, and that the defendant no longer has a right to trial by judge and jury in matters involving property up to \$5000. In Queensland magistrates have jurisdiction in civil matters up to claims of \$20,000, and have criminal jurisdiction entailing \$6,000 or imprisonment of up to two years. In the Australia Capital Territory civil claims jurisdiction has reached \$50,000 and in Victoria \$25,000.

As Mr Briese observed:

'as judges of both fact and law, magistrates make decisions which are responsible for determining the overwhelming majority of disputes and allegations referred to Australian courts for resolution.'¹⁸⁷

Their role in this respect is not going to decrease.

The Magistrates' Courts are for most citizens the only place where direct contact is made with a judicial officer. It is inescapable that the point has been reached where the magistrates must be regarded as a group of judicial officers forming the ground level of a three-tiered judicial structure. It is no longer valid to view the magistracy as a hybrid creature, part public servant, part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role. There were times not long distant when such a view was accurate and valid. The times have changed, and in this instance for the better.

I take it to be established that the magistracy is here to stay as a primary and clearly identifiable sector of the Australian judiciary."¹⁸⁸

In perhaps more restrained terms, Mr Justice P W Young has recently commented upon the newly acquired judicial independence of the magistracy and the increasing stature of the office:

"In most States and Territories the office of Stipendiary Magistrate by whatever name called is a respected judicial office. However, the magistracy still has to live with the fact that it is only relatively recently in some places that magistrates were

¹⁸⁵ **Ibid.**

¹⁸⁶ " **Judge or Magistrate**" (1988) 7 **Commonwealth Judicial Journal** 19 at p20.

¹⁸⁷ **Ibid, p 21.**

¹⁸⁸ " **The Ethics of Magistrates**" **The Australian Law Journal** Vol 65 July 1991 387 at pp 389-390.

divorced from the public service and made into independent judicial officers. Indeed in New South Wales, public service promotion appeals were still being heard from potential magistrates who had been passed over and it was only as recently as 1955 that candidates for appointment had to show that they were qualified as barristers or solicitors. The history is well related in Golder **“High and Responsible Office”** (Sydney University Press 1991), pp 175 et seq.

The office of a magistrate has been increasing in stature. In some States, promotion to the office of judge is only available to those who have served as a magistrate. At least three States have seen persons promoted from the office of magistrate to judge.

Yet there are still differences between magistrates and judges. These vary from State to State. In New South Wales, magistrates do not robe, they deal predominantly with crime, they are primarily addressed by solicitors rather than barristers and they tend to function until rotated in a limited geographical area. They also deal with a far greater bulk of cases than other judicial officers, many of them travel greater distances and few of their decisions are used as precedents for other cases. However, as the differences diminish, as they probably will, the case for treating magistrates in the same way as District or County Court judges will strengthen.”¹⁸⁹

All of the above observations on the magistracy show, in varying degrees, a recognition of the stature of magistrates as judicial officers, and hence judges. What is significant is that this recognition comes from the judges themselves, and indeed from judges at the higher levels of the judicial hierarchy.¹⁹⁰

There are persuasive arguments in favour of elevating magistrates to the status of Judges.

Magistrates and Judges perform a common function. As The Honourable Justice Thomas has said:

¹⁸⁹ “ **The Magistracy**” appearing under “**Current Issues**”, **The Australian Law Journal –Vol 72 June 1998 at 402.**

¹⁹⁰ This observation is made by R.B. Lawrence **op cit at p 4.** .

It is interesting to contrast the view of the various judges with the view expressed in the **Northern Territory Law Reform Committee Report on Local Courts Act 1983 at p 2:**

“ Consideration should be given to whether magistrates, exercising the jurisdiction which they currently exercise both in civil and criminal work, ought to have County or District Court status conferred on them by changing their title from “SM” to “Judge”. This suggestion does not envisage any alterations to their salary or conditions but simply their status. They are in fact exercising the jurisdiction exercised by intermediate Court Judges elsewhere and there is a recent precedent for this course, viz in New Zealand, where SM’s were elevated to that status. The principal benefit of such a course would be to attract the best possible applicants for vacancies in these courts. Interested parties have been asked for their views upon the suggested title change. The Law Society was unable to come to any consensus. The Supreme Court Judges are against the suggestion. The magistrates are in favour of it, with one exception. The Committee does not support the suggestion.”

“(they) pursue the same ideal, the dispensing of justice according to law.... (they) have the same basic duties and procedures. There can be no doubt that (they) must all respond to a common ethical perception and regulate (their) activities accordingly.”¹⁹¹

Magistrates not only perform the same basic function as judges, and subject to the same ethical standards applicable to judges, but are now recognised as truly independent judicial officers. Such recognition carries with it the same judicial accountability that is imposed upon judges.¹⁹²

The jurisdiction exercised by magistrates in all States and Territories is extremely broad.¹⁹³ The criminal and civil jurisdictions exercised by magistrates are constantly being reviewed and enlarged.¹⁹⁴ The jurisdiction of magistrates extends beyond the criminal and civil spheres and in recent years there has been an extension of tribunal jurisdictions into the Magistrates’ Courts.¹⁹⁵

Magistrates are performing increasingly complex, qualitative, judicial work. In their constantly expanding criminal jurisdiction, magistrates are assuming greater responsibility in the sentencing process. Generally speaking, Magistrates are also required to apply the same sentencing legislation as that applied by Judges. Sentencing legislation, in recent times, has become quite complex, often requiring statutory construction. Consequently, the sentencing process in Magistrates Courts has tended to become more time-consuming and more onerous. In the civil sphere, the jurisdictional limits in magistrates courts continue to expand; likewise the relief, redress and remedies that may be granted by magistrates. The conferral of equitable jurisdiction upon magistrates courts has also resulted in magistrates taking on qualitative judicial work. In some States and Territories magistrates preside over Workers Compensation or Work Health Courts which are presided over by judges in other States. Some Australian magistrates exercise mining jurisdiction, and in the case of the Northern Territory and the Australian Capital Territory, a Mining Warden has all the powers of a Supreme Court Judge. Finally, the proliferation of tribunals in recent times, and their intrusion into the domain of magistrates’ courts, has added to the breadth and complexity of the jurisdiction exercised by magistrates.

¹⁹¹ “**The Ethics of Magistrates**” **The Australian Law Journal Vol 65 July 1991 at p 401.**

¹⁹² The issues of judicial independence and judicial accountability are dealt with in the next section of the paper.

¹⁹³ **Supra at pp 24-35.**

¹⁹⁴ Lawrence makes the observation that the current jurisdiction exercised by Australian magistrates “can be equated to that historically performed by the District/County Courts throughout the country.” (**op cit at p6**).

Michelides makes a similar point:

“ A significant amount of work previously undertaken by the District Court is being incorporated into the Magistrates’ Courts, increasing the workload in both quantity and the level of seriousness of matters dealt with.” (**op cit at p 2**)

The trend in recent years has been to transfer judicial work hitherto done by the superior courts presided over by judges to the lower courts presided over by magistrates. (See Michelides **op cit at p 12**)

¹⁹⁵ **Supra at 35.**

It is not without importance that in the criminal sphere magistrates exercise a very onerous function which Judges are not required to perform:

“Unlike a Judge, a Magistrate is required to determine the ultimate question and so doing, apply questions of law to the findings of fact. In criminal cases, a Judge is not required to make findings of fact. His sole responsibility is to advise the jury of the law to be applied and summarise the facts applicable to the case before him.”¹⁹⁶

There is often a perception that the work done by magistrates is trivial, inferior, non-qualitative judicial work: nothing could be further from the truth. The present “Magistrate/Judge” dichotomy is responsible for this perception and perpetuates an artificial distinction between the role of judges and magistrates and the work they perform. The renaming of magistrates as “judges” would remove this erroneous perception.¹⁹⁷

In some Australian jurisdictions the provisions for appeals from magistrates’ decisions in criminal matters require that magistrates make considered judgments backed up by reasons for decision. The reason for that is that in some jurisdictions the appeal is not way of rehearing de novo, but in line with appeals from District or County Courts.¹⁹⁸ By reason of the appellate procedures that

¹⁹⁶ See “**Futures Directions of the Australian Magistracy**” a paper presented by the Australian Stipendiary Magistrates’ Association at the 9th Biennial Australian Stipendiary Magistrates’ Conference on 13th June 1994 at p 4. It should be noted that magistrates, during the determination of criminal cases, must, like Judges, turn their mind to the applicable law, and in some instances direct themselves as to the relevant law.

¹⁹⁷ See C R Briese “**Future Directions in Local Courts of New South Wales**” *University of New South Wales Law Journal* 10 (1) p 133. See also Michelides *op cit* at pp 10, 13.

¹⁹⁸ In the Australian Capital Territory, an appeal lies to the Supreme Court of the ACT. The appeal is by way of rehearing (a rehearing rehears issues of fact and law) on the evidence received in the Magistrates’ Court but with the power to receive further evidence.

In the Northern Territory, an appeal lies to the Supreme Court of the Northern Territory. An appeal can only be entertained on a ground which involves sentence or an error or mistake on a matter of law or fact or both.

In New South Wales, an appeal lies to the District Court. The appeal is by way of hearing de novo

In Queensland, an appeal lies to the District Court. The appeal is by way of hearing anew if the parties consent or the judge so orders, but is otherwise on the materials before the Magistrates’ Court.

In South Australia, an appeal lies to the Supreme Court. Witnesses may be reheard and fresh evidence received only where the appellate court considers that the interests of justice so require.

In Tasmania, an appeal lies to the Supreme Court of Tasmania on the ground of error or mistake on a matter or question of fact, law, or fact and law or a jurisdictional ground. Note that the Supreme Court may order that a complaint be heard de novo in the interests of justice.

In Victoria an appeal lies to the County Court. An appeal to the County Court is conducted as a rehearing.

In Western Australia, an appeal lies to the Supreme Court of Western Australia on the ground that a magistrate made an error of law or fact or law and fact, imposed an inadequate or excessive penalty, or on jurisdictional grounds.

In the Epilogue to “**High and Responsible Office, A History of the Australian Magistracy**” I.H. Pike and A Reidel make the following comment referable to the New South Wales magistracy:

operate in some jurisdictions magistrates are required to sentence as meticulously as judges do.

There is a related aspect. It is often said that judges, not magistrates, make law: magistrates only apply the law. While the primary function of magistrates is to apply the law, and in so doing are bound by the precedents of superior courts, magistrates often “make law” indirectly. Review of magistrates’ sentencing decisions by appellate courts can result in the formulation of new sentencing law. Furthermore, magistrates are often charged with the responsibility of making decisions in relation to either new or previously unchartered legislation. Once again, review of such decisions by appellate courts may result in the creation of new law. Finally, but not least, occasionally constitutional issues are raised in magistrates’ courts which are referred to the High Court pursuant to Section 40(1) of the Judiciary Act 1903 (Cth). This process can also lead to the making of new law.¹⁹⁹

In those jurisdictions where the judiciary has only two tiers, magistrates effectively exercise the jurisdiction of a District or County Court Judge. In those jurisdictions with a three –tiered judiciary, the jurisdictional distinctions between the magistrates courts and the intermediate courts are becoming increasingly blurred, thereby laying the foundation for a possible amalgamation between the two jurisdictions, following the New Zealand and Canadian examples.²⁰⁰ In both of those countries, the designation of “Magistrate” within the judiciary has been eliminated and replaced with the title of “Judge”.²⁰¹

It is not possible to over-estimate the contribution of magistrates to judicial work in Australia. The Honourable Justice Thomas makes the following observation:

“A high percentage of the cases dealt with in Australia are resolved by magistrates. Figures can be misleading, but it seems fair to say numerically well over 90 per cent of all cases are dealt with in the Magistrates’ Courts.”²⁰²

The former Chief Justice of New South Wales, now Chief Justice of the High Court, The Honourable Justice Gleeson, made the following observation about

“..... the time has perhaps arrived for a review of the provisions for appeals from magistrates’ decisions in criminal matters to bring them in line with appeals from the District Court.” (at pp 215-216).

¹⁹⁹ For a fairly recent example that came out of the Northern Territory see **Svikart v Stewart (1994) 181 CLR 548.**

²⁰⁰ This point is made by I.H. Pike, Chief Magistrate and A.M. Reidel, Magistrate in the **Epilogue** to Golder’s book “**High and Responsible Office, A History of the Australian Magistracy**” at p 215.

²⁰¹ See R.B. Lawrence, **op cit** at p 6.

²⁰² “**The Ethics of Magistrates**” **The Australian Law Journal Vol 65, 387 at 388.**

A similar observation is to be found in Lawrence’s paper at p 6:

“..... Magistrates Courts are responsible for approximately 95% of matters that come before the Courts in this country.”

It seems very little has changed since the last century. During the 1840’s magistrates courts dealt with about 95% of all arrests in New South Wales.

the New South Wales magistracy, which is also applicable to the magistracy in all States and Territories of Australia:

“Magistrates bear a large and important part of the burden of administration of civil and criminal justice in this State.”²⁰³

However, the very substantial judicial contribution made by magistrates is not measured solely in quantitative or numerical terms, but is reflected, as stated earlier, in the qualitative judicial work they do, and in the judicial competency with which they discharge their judicial functions.

It must not be overlooked that the calibre of persons appointed to the magistracy over the last two decades or so has been very high, the appointees comprising highly qualified and experienced legal practitioners and legal academics drawn from both the public sector and private enterprise. The Australian magistracy constitutes a highly professional body of qualified lawyers.²⁰⁴ The professionalism of the judiciary would be neither diminished nor compromised by the elevation of magistrates to the status of judges.

A further ground for treating magistrates as judges is that the qualifications for appointment to the magistracy are generally the same as those required for appointment as a Judge.²⁰⁵ The fact that a number of magistrates have been appointed judges of a number of different courts adds further weight to the proposal that magistrates be elevated to the status of judges.²⁰⁶

In some Australian jurisdictions the salaries of magistrates are linked to salaries payable to Judges and expressed as a percentage of a Judge’s salary.²⁰⁷ Such arrangements reinforce the judicial status of magistrates ie as “judges” exercising jurisdiction at the lowest level of the judicial hierarchy.

The role performed by magistrates throughout Australia is of immense practical importance to the Australian public. Courts presided over by magistrates are

²⁰³ See the Preface to “**High and Responsible Office, A History of the Australian Magistracy**” at p vii.

²⁰⁴ In the Preface to “**High and Responsible Office, A History of the Australian Magistracy**” The Chief Justice of New South Wales, the Honourable Justice Gleeson made such a remark about the New South Wales magistracy.

²⁰⁵ Lawrence makes this observation at p 3 of his paper.

Michelides makes a similar observation:

“ There is no real difference in Australia between judges and magistrates in terms of qualifications.....

Both are chosen from legal practitioners with formal legal qualifications. Judges are chosen from practising barristers and solicitors, while magistrates do not in all states have to have been practising, however this is a minor difference.” (**op cit at p 11**)

²⁰⁶ See Lawrence **ibid.**

²⁰⁷ For example The Statutory Salaries Act 1996 (Tas) provides that the Chief Magistrate, Deputy Chief Magistrate and Magistrates receive 75%, 70% and 67.5% of the salary of a Supreme Court Judge who receives 90% of the salary of the Chief Justice. The Chief Justice’s salary is fixed at the rate of the average of the salaries payable to the Chief Justices for South Australia and Western Australia at the beginning of each of each financial year.

usually the first court of the land with which the public has contact. Based on anecdotal evidence, there is a public perception that magistrates are judges.²⁰⁸ There is a concomitant expectation on the part of the community that those who preside over Magistrates' Courts will act judicially ie act as "judges".

Michelides suggests two other grounds for raising the status of the magistracy.

The first is along the following lines:

".... most of the public who encounter the court system do so through the Magistrates' Courts and changing the title to 'judge' would consequently increase the status of this office and the courts in the eyes of the public, and create a logical term for holders of this judicial office in the third tier of the judiciary."²⁰⁹

The second is to the following effect:

"In recent years magistrates throughout all states of Australia have experienced a sharp and consistent increase in their criminal and civil jurisdictions. It follows that at this time²¹⁰ it is appropriate to re-designate Magistrates' Courts as Local Courts and magistrates as judges which would clear the way for the Local Courts to handle even more substantial work perhaps some criminal trials with juries as is the case in New Zealand. This would also be a cost effective way of clearing the backlog of cases awaiting trial."²¹¹

In 1987, CR Briese, Former Chief Magistrate of New South Wales, gave yet another reason why magistrates should be elevated to the status of "judges":

".... The increased status and working conditions would attract more barristers and solicitors of high quality and ability to consider appointment as a Judge of the Local Court."²¹²

²⁰⁸ See R.B. Lawrence **op cit at p 3**:

"It is interesting to note that the majority of the public who appear before Magistrates Courts perceive the Magistrate to be a Judge and address that person accordingly."

Back in 1987, CR Briese, the then Chief Magistrate of New South Wales, stated that a re-designation of name was consistent with the public perception moulded by the media which shows magistrates to be judges who are addressed as 'Your Honour' ("Future Directions in Local Courts of New South Wales", **1987 University of New South Wales Law Journal 10 (1) p133**; see also Michelides **op cit at p 11**)

²⁰⁹ **Op cit at p 2.**

²¹⁰ ie as at 1995.

²¹¹ **Op cit at p 10.** See also the **Epilogue to "High and Responsible Office, A History of the Australian Magistracy"** where the authors state:

"The jurisdiction of magistrates in both the criminal and civil spheres continues to increase. It could well be that the criminal jurisdiction is at such a level that a magistrate sitting with a jury would be justified, especially for straightforward property offences." (**at p 215**)

²¹² **Op cit at p 133.** See also Michelides **op cit at pp 10-11.** At **p 13** of his paper Michelides makes the following comment:

"Briese suggests that it is time to further improve the quality of justice in the lower courts, and governments must adopt policies and make decisions which will attract lawyers of higher ability and talent to the magistrates' bench. This can only be done by raising the status of magistrates and improving their

Finally, the elevation of magistrates to the status of “Judges” is not without precedent. New Zealand and Canada have already gone down the path of eliminating the designation of “Magistrate” and replacing it with the title of “Judge”.

Thus far, direct arguments have been put forward for elevating magistrates to the status of “Judges”. There is, however, an indirect argument which is to the effect that the designation of “magistrate” is no longer an apt title for those who preside over what are currently called Local Courts, Magistrates’ Courts and Courts of Petty Sessions.

According to the Shorter Oxford Dictionary the word “Magistrate” means :

“1. The office and dignity of a magistrate. 2. A civil officer charged with the administration of the laws, a member of the executive government. 3. Spec. A ‘justice of the peace’; also applied to salaried officials having criminal jurisdiction of the first instance; as police, stipendiary and, in Ireland, resident.”²¹³

It is readily apparent that none of these meanings satisfactorily describe a legally qualified judicial officer, who is independent of the Executive Government, exercising a very broad jurisdiction, involving many aspects of the law.²¹⁴

The term “Magistrate” is historically linked to an institution which until recent times was not structurally independent of the Executive arm of Government.²¹⁵ It is a derivative of the designation of “police magistrate”, an office which had an undesirable linkage with the police force²¹⁶ during last century and the first half of the present.²¹⁷ It is inappropriate to retain the title of “Magistrate” because of its lingering unhealthy connection with the executive arm of government during the early years of settlement, its inextricable link with the public service until recent times and its consequent tendency to undermine the now generally

working conditions. If this was done governments could confidently transfer even more work from the higher courts.” (**at p 13**)

²¹³ Lawrence discusses the definition of “magistrate” in his paper **at p 1**.

²¹⁴ Lawrence also deals with the inappropriateness of the designation of “Magistrate”:

“ The term Magistrate by definition, has a direct relationship with the term Justice of the Peace. Such a relationship and description misrepresents the responsibilities and functions now performed by Magistrates.” (**op cit at p 1**)

²¹⁵ This aspect is adverted to by Lawrence **op cit at p 1**.

²¹⁶ How could “police magistrates” hearing cases involving charges laid by police be perceived as impartial.

²¹⁷ As Michelides says :

“ The term “police magistrates” was not abolished in NSW until 1947 and it contributed to the public’s perception of an association between police and the magistrates. Despite the fact that in 1947 the title was changed to ‘stipendiary magistrate’, the term still has lingering associations with the police rather than the judiciary. The adoption of the title ‘judge’ would promote a greater awareness of the judicial independence of the lower courts.” (**at pp 7-8**).

accepted judicial independence of those officers who preside over our lower courts.²¹⁸

Consideration, of course, needs to be given to the actual process for effecting the elevation of magistrates to the status of judges. Favourable expressions of opinion about the stature of magistrates from the upper echelons of the judiciary are by themselves insufficient to achieve the elevation of magistrates to the status of judges. The proposal needs to have the support of the Judges, Magistrates and members of the profession as represented by the Law Council of Australia (the National Council of Lawyers) and State and Territorial Law Societies and Bar Associations. It is envisaged that a number of organisations could play an active –even a key - role in effecting this fundamental change to the Australian magistracy. The primary entity is the Association of Australian Magistrates (A.A.M). A.A.M is the successor of the Australian Stipendiary Magistrates Association which back in 1994 was advocating the elevation of magistrates to the status of judges. Indeed, AMM passed a resolution at the 1996 Biennial Conference in Sydney to pursue the adoption of the title of “Judge” for magistrates in each State or Territory. Like its predecessor (ASMA) , A.A.M has as one its objectives “ to uphold and advance the status of the type of judicial office held by its members, including doing all things necessary to promote the efficient and impartial performance of the duties of that type of office.” A.A.M is pre-eminently suited to play an active role in renewing the impetus for change. The Judicial Conference of Australia is also capable of playing an active role in effecting the proposed change. Although the Conference’s primary objects relate to the “public interest in maintaining an independent judiciary within a democratic society which adheres to the rule of law”, it has a community educative role and “contributes to public debate and discussion about contemporary issues relating to the judiciary (which includes the magistracy)”.²¹⁹ The Conference, through its educative function, has the ability to marshal the necessary support for the proposed change. Finally, but not least, there is the Law Council of Australia which has a well recognised capacity to contribute to and influence changes within the legal system.²²⁰

R.B Lawrence has stressed the need for the development of an appropriate strategy:

“.....we must develop a strategy for presentation to the Australian Government and State Governments through the Attorneys-General respectively. We must persuade them, with the support of the Australian Law Council, the State and

²¹⁸ The designation of “stipendiary magistrate” has gradually been eliminated (note that magistrates in the Northern Territory continue to be called “stipendiary magistrates”). The next logical step is to eliminate the designation of “magistrate”.

²¹⁹ See this year’s JCA programme under the heading “ **About the JCA** ”

²²⁰ According to its “Mission Statement” the Law Council of Australia “ exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice and general improvement of the law.” (see **Australian Lawyer – Newsletter of the Law Council of Australia October 1999.**

Territorial Law Societies and or Bar Associations, that such a step will benefit the system and the public generally.”²²¹

The development of an appropriate strategy needs to be carefully considered. Should individual magistracies lobby for the change on a purely local State or Territorial level or should a nationwide collective strategy be developed with a view to elevating all magistrates within Australia to the status of judges? The chance of effecting the change may be higher in those jurisdictions which have only two tiers to their judiciary. In those jurisdictions which have a three tiered judiciary the bid to elevate magistrates to the status of judges may have to be combined with a proposal to amalgamate lower and intermediate court jurisdictions. Finally, the possible impact of the proposed establishment of a Federal magistracy on the proposed change in the status of State and Territory magistrates will need to be factored into whatever strategy is to be deployed.

Magisterial Independence and Judicial Accountability

The recognition that magistrates are judicially independent officers is a relatively recent event in the history of the Australian magistracy:

“In earlier times there were historical and other reasons for not extending the requirement or protection of judicial independence to inferior courts. Judicial independence, as the term suggests, was a concept associated with judges, notably the judges of superior courts. There was simply no place for it in courts constituted by lay justices. Much the same view was taken of courts constituted by police magistrates. And in **Alexander’s Case**²²² Isaacs and Rich JJ seem to have taken the view that no real purpose would be served by protecting the judicial independence of inferior courts, at least those at the lower end of the scale.

Why this view should still prevail is by no means clear. The litigants and public expect impartial and independent adjudication from magistrates just as they expect it from judges. The common law principles relating to bias and ostensible bias apply to magistrates as well as judges. Magistrates’ courts undertake important work extending over a wider range of issues. They exercise an important jurisdiction in relation to summary offences. They are the principal point of contact that the community has with the court system. Today there are strong reasons for applying the concept of judicial independence to magistrates.

Nowadays, judicial independence is seen as a desirable, if not essential, characteristic of a wider court system, extending to judges of district and county courts. It was otherwise in earlier times. Courts of petty sessions were constituted by justices and later by police or stipendiary magistrates who were

²²¹ **Op cit at p 7.**

²²² **(1918) 25 CLR 469**

officers of the executive. Today consistently with the rule of law, crucial determinations should be made by judicial officers who are independent.”²²³

A number of factors, which are interrelated, have contributed to the recognition of the judicial independence of the Australian magistracy:

1. The gradual severance of the magistracy from the executive arm of government ie the public service
2. The emergence of a self-consciousness on the part of the magistracy as to the importance of the concept of judicial independence and its application to the magistracy.
3. The introduction of higher qualifications (ie legal) for appointment as a magistrate and the appointment of legally qualified persons.
4. The expanding jurisdiction of magistrates which by necessity shed them of their administrative functions and diverted them into the performance of judicial functions.
5. The public expectation that magistrates will hear and determine cases in the same impartial and judicially independent way that judges do.

The severance of the Australian Magistracy from the public service, which was undoubtedly influenced by all of the factors enumerated above, represents a landmark in the recognition of the judicial independence of the Australian magistracy. Gradual recognition of the potential for conflict between the incorporation of the magistracy within the public service and the common law principles relating to bias and ostensible bias²²⁴ no doubt formed part of the impetus for the dissociation of the magistracy from the public service. The application of the common law principles of bias is the cornerstone of an impartial and independent adjudicatory process which in turn is the essence of judicial independence.

The severance of the magistracy from the public service ensured judicial independence to the extent that in a purely structural sense²²⁵ the magistracy was independent of the Executive Government.²²⁶ Clearly, there cannot be judicial independence without structural independence. However, what are the boundaries of judicial independence? It is arguable that judicial independence requires institutional independence. But how does one define “institutional

²²³ “Fragile Bastion Judicial Independence in the Nineties and Beyond” *The Judicial Commission of NSW at pp31-32.*

²²⁴ A number of cases throughout the twentieth century highlighted this potential conflict. See for example **Quelch v Story (unreported decision of the Supreme Court of the Northern Territory 23 June 1924 per Roberts J)** and **R v Moss; Ex parte Mancini (1982) 29 SASR 385**

²²⁵ ie the magistracy no longer formed part of the executive arm of government.

²²⁶ The severance of the magistracy from the public service also put magistrates on equal footing with the judges. As the Honourable Justice Gleeson, now Chief Justice of the High Court of Australia, said: “All judges, it is hoped, regard themselves as servants of the public. They are, however, not public servants. They are part of an arm of government which is separate from the executive arm, to which public servants belong.” (“**Who Do the Judges Think They Are? The Sir Earle Page Memorial Oration**” at Parliament House in Sydney on 22nd October 1997 at p 4).

independence”? These are questions that confront judges (who have enjoyed structural independence far longer than magistrates) as well as magistrates. These are issues which affect and confront all existing levels of the judiciary at the turn of the present century and which, inevitably, will carry over into the new millenium.

It is logical to argue that so long as the judiciary (which includes the magistracy) continues to be substantially dependent upon the administrative and financial resources provided by the Executive arm of government then the judiciary does not enjoy “institutional independence”. The point is succinctly made by The Honourable Ken Marks:

“A more fundamental difficulty is that the judiciary is dependent on the Executive to provide remuneration, courts, equipment and staff. In Australia (save, to an extent, the High Court and the federal courts) the courts do not enjoy institutional independence. Judges cannot be said to be truly independent if the purse strings which sustain the court system in which they work are held directly by the executive government.”²²⁷

This problem is acute in magistrates’ courts which, being at the lowest level of the judicial hierarchy, tend to be under- resourced and often the recipients of the bread crumbs from the “fiscal bread basket”.

The threat posed by the administrative and financial control of the Executive over courts was highlighted by the **Fitzgerald Report**:

“One of the threats to judicial independence is an overdependence upon administrative and financial resources from a government department or being subject to administrative regulations in matters associated with the performance of the judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts.”²²⁸

This threat to judicial independence, and its impact on the administration of justice, permeates all tiers of the judiciary, affecting judges and magistrates equally in the performance of their judicial functions.

A distinction is drawn between “adjudicatory independence”, which is concerned with decision-making free from improper extraneous influences, and “administrative independence”, which involves the autonomy of the judiciary in managing its courts. As Church and Sallman have pointed out “a critical issue is the level and amount of administrative independence required to support a satisfactory level of adjudicatory independence.”²²⁹

²²⁷ “**Judicial Independence**”, **The Australian Law Journal – Vol 68 March 1994 173 at p 174.**

²²⁸ **At p 713** of the Report. This part of the Fitzgerald Report is referred to by the Honourable Ken Marks **op cit at p 175.**

²²⁹ “**The Australian Institute of Judicial Administration – Governing Australia’s Courts**” at p 7.

The relationship between “adjudicatory independence” and “administrative independence” has been commented upon by Church and Sallman:

“Judges concerned with the lack of administrative independence in Australia frequently draw links between adjudicatory and administrative independence, arguing that without the latter, the former is put at risk. They point out the potential dangers to adjudicatory independence in a court system administered by the executive branch of government- dependent upon executive for nearly all their daily administrative needs, from staffing and financing the courts, to providing equipment and supplies, to maintaining the very court buildings in which justice is dispensed.....the ultimate concern is that politicians and bureaucrats could use their control over the necessities of judicial life to pressure courts into rendering particular kinds of decisions. Of more practical day-to-day concern is that excessive judicial dependence on the executive in the operation of the courts may have a deleterious impact on the ability of the courts to provide a high standard of substantive justice.”²³⁰

The lines of debate over the links between “adjudicatory independence” and “administrative independence” have been firmly drawn. The Judiciary argue that the Executive-orientated Australian system of court administration compromises judicial independence while governments contend that “the Executive needs to be accountable, especially in Parliament, for the courts, and that is best achieved when the Executive is heavily involved in court administration.”²³¹

Church and Sallman reached the following conclusion:

“Our view is that, while the theoretical debate between proponents of judicial independence and ministerial accountability illuminates important issues, it provides inconclusive answers to the many questions underlying the search for an appropriate model of court governance.”²³²

The theoretical debate essentially boils down to this: the general judicial view is that “the judiciary should to the fullest practicable extent, be in control of its own affairs, including all administrative and governance arrangements²³³; the

²³⁰ **Op cit at p 8.**

²³¹ See Church and Sallman **op cit at p 10.**

²³² **At p 13.**

²³³ See Byron “**Court Governance: The Owl and the Bureaucrat**” 1999 8 JJA 142 at p 148 where the author states that the judicial view is typified in the following statements made by McGarvie J:
“ Durable judicial independence today requires two additional safeguards: that judges exercise responsibility for the well-being of their court and for controlling its administration and operation; and that the court have an effective system of internal government and administration which enables the judges to do so.

As mentioned later, to bring these two additional safeguards into effect, the judges must clearly control the premises, facilities staff and budget of their court.

The judicial arm of government must bring itself to the position where it is, to the fullest practicable extent, in control of its own affairs. That change can only be brought about if the basic units, the individual

opposing view is that the administrative aspects (as distinct from the purely judicial aspects) of the courts and the provision of courts and courts services is the responsibility of the executive arm of government.²³⁴

It has been said that judicial independence cannot be secured without complete control over all court buildings and facilities being vested in the judges and magistrates. This aspect of judicial independence has been commented upon by The Honourable Sir Guy Green:

“By control of court buildings, I mean the right to exclusive possession of the building, the power to exercise control over ingress to or egress from the building, the power to allocate the purposes to which different parts of the building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings, its independence and its capacity properly to perform its function are impaired or threatened in a number of respects.”²³⁵

The Honourable Sir Guy Green goes on to say:

courts, transform their administrative and operational side from relatively passive, inert structures into active, initiating organisational units. It is no overstatement to say that a precondition for the continued independence of judges is that the judges of the courts quickly construct and develop effective internal systems of self-government and administration. (“**The Foundations of Judicial Independence in a Modern Democracy**” (1991) 1 JJ A , 1 p 5)

In the same article McGarvie J added:

“ The last decade has seen a shift in judicial attitudes in Australia. The prevailing view that 10 years ago left the whole operation and administration of the courts to a supposedly benevolent government and public service has all but gone. Judges know the community regards them as trustees of the court system and its values. They are placed in a position where they are the natural leaders within their courts and can exercise great influence there. They accept they have an inescapable responsibility to the community to use their influence to ensure that their courts operate efficiently so as to provide applied justice and so that they retain their independence.” (at p 22).

Byron (op cit at p149) notes that since making the above statements, McGarvie J has indicated that he does not support an unlimited breadth of independence because a narrower definition: “ ... makes the case for it clearer and more persuasive by emphasising that it springs from the need for judicial impartiality.” Byron (ibid) further notes that in his paper “**Supping with the Devil**” (a paper delivered at the National Conference “**Courts in a Representative Democracy**” Canberra, 13th November 1994) McGarvie J stated: “ It is important in this area not to cast a good principle too widely. The only independence which I seek to justify within the principle of judicial independence, is that which if, absent, would put at risk impartiality in deciding court cases. Apart from that , judges (and magistrates and other judicial officers), as public officials, are not, and should not, be independent.”

²³⁴ See Byron **ibid**.

²³⁵ “ **The Rationale and Some Aspects of Judicial Independence**” ,**The Australian Law Journal –Vol 59 135 at p 144.**

In his Farewell Speech (16th December 1993), Judge Frank McGrath, former Chief Judge of the NSW Compensation Court echoed Sir Guy Green’s sentiments:

“ Finally, the judges of the various courts should have a major voice in the location and design of the courts in which they expected to sit. They should not be directed by the Executive into unsuitable locations, having regard to the needs of the court, nor should their wishes be ignored in relation to the particular allocation of space within the court buildings or overridden by reference to some preconceived standard to which all courts are obliged to submit. What is suitable for one court is not necessarily suitable for another.”

“In varying degrees the quality and the effectiveness of proceedings in court depend upon the nature of the physical environment in which they are conducted and upon adequate facilities being available for the participants and the public..... If, as I think is the case, there exists in the public mind a tendency to identify the administration of the law with its outward manifestations, then it would follow that public confidence in the judiciary could be significantly affected by the nature and the suitability of its court buildings and its court facilities and by whether those buildings are seen to be controlled by the government or by the judges.”²³⁶

In order to give full force and effect to the general principle that judicial proceedings should take place in public judges must have effective control over court buildings.²³⁷

Control over court buildings is only one of many areas where there is clear potential for tension between administrative control of the courts by the Executive and the judicial independence of the Judiciary. As noted by Church and Sallman Executive arms of governments in Australia are exerting increasing pressure on courts and judicial officers to be more efficient, to increase their productivity and to justify requests for additional funds and staff.²³⁸ The risk to judicial independence under these circumstances is substantial as the following statements made in the 1991 **AJJA Discussion Paper on “Court Management Information”** reveal:

“There may also be a greater risk to judicial independence if, in order to receive additional resources, judges are asked to be more productive. The stage is set for the quality, or timeliness, of justice being bargained for increased resources.”²³⁹ This must be resisted.”²⁴⁰

These observations apply with equal force to the magistracy.

The Honourable Sir Gerald Brennan AC KBE, former Chief Justice of the High Court, has highlighted the dangers inherent in placing the budgetary and administrative control of courts in the hands of the Executive arm of Government:

“It has always been the practice - indeed an essential constitutional convention – that executive governments , both of the Commonwealth and the States, seek an appropriation and Parliament appropriate sufficient funds to permit the courts to perform their constitutional functions. In times of financial stringency, there is a risk that governments might regard the courts simply as another Executive

²³⁶ **Ibid.**

²³⁷ See Sir Guy Green **ibid.**

²³⁸ **Op cit at p 3.**

²³⁹ See former Chief Justice of the High Court, Sir Anthony Mason , “**The Courts and Their Relationship with Government**”, Address to the Bicentennial Legal Convention, August 1988.

²⁴⁰ **At p 16.**

agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its own agencies. It cannot be too firmly stated that the courts are not an Executive agency. The law, including the laws enacted by Parliaments or by Executive regulation and including Executive orders affecting the government of the country, goes unadministered if the courts are unable to deal with ordinary litigation.

The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would immediately be imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.²⁴¹

Budgetary and administrative control of courts by judges and magistrates is often viewed as a solution to removing a potential threat to judicial independence. As part of his Farewell Speech (16th December 1993) His Honour Judge Frank McGrath former Chief Judge of the NSW Compensation Court had this to say:

"I believe that there is more to judicial independence than these two matters (ie security of tenure and security of salary). In my view the judges of the various courts must have control of, and responsibility for, the administration of their registries. The various courts should have control of and responsibility for their own day-to-day budgets, subject only to the overall supervision of the Auditor-General."

The threat to the judicial independence of judges posed by an overdependence upon administrative and financial resources from the Executive arm of government also represents a threat to the judicial independence of magistrates because magistrates are "judges" all but in name. Court governance and "administrative independence" are as much an issue for Australian magistrates as they for Australian judges - perhaps even more so as generally "the standard of Court conditions and resources are significantly less than that provided for the superior jurisdictions."²⁴²

The current arrangements concerning the administrative control of courts in the Australian States and Territories is as follows.

New South Wales, Victoria and Western Australia adopt what has come to be known as the "traditional model". According to this model Court services are provided by "a generalist executive department" which is responsible for the

²⁴¹ "The State of the Judicature", *Australian Law Journal* Vol 72 33 at 35.

²⁴² Lawrence *op cit* at p 3.

administration of a variety of justice and justice related services.²⁴³ The traditional model treats court employees as public servants who are employed by the executive arm of government. Those employees are accountable to the executive government through a chief executive officer. Byron describes the working relationship between the judiciary (which includes the magistracy) and these organisations in these terms:

“The courts’ divisions of these organisations work in consultation with the judiciary in matters of court administration. The administrative authority of the judiciary in these circumstances is obtained in part by legislation, but in the main by means of convention, co-operative effort, negotiation and structural devices and arrangements.”²⁴⁴

The traditional model has been criticised on the ground that its executive-orientated style of court administration compromises judicial independence.²⁴⁵ As to whether that is the fact the case must depend upon the level of consultation and the fruits thereof.

South Australia initiated what has come to be known as the “separate department” model.²⁴⁶ In 1981 the “Courts Department” (subsequently renamed the “Court Service Department”) was established in South Australia for the purpose of providing administrative services to the courts and court services to the community. Structurally speaking, the department fell “within the portfolio of the Attorney-General but was administratively separate from the Attorney-General’s Department which undertook all of the traditional legal functions and law-related activities.”²⁴⁷

In 1991 New South Wales adopted the “separate department model” with the establishment of the Department of Courts Administration. However, in 1995, that Department was abolished and responsibility for the administration of courts was returned to the Attorney-General’s Department, thereby reinstating the traditional model of court governance and administration.

Both the Northern Territory and the Australian Capital Territory have adopted the “separate department model” of court governance and administration.

In 1992 South Australia adopted the “autonomous model” of court administration. The “autonomous model”, which is well established at the Federal level of the

²⁴³ See Byron **op cit at p 150**. In New South Wales, Victoria and Western Australia the relevant departments are respectively the Attorney-General’s Department, the Department of Justice and the Ministry of Justice.

²⁴⁴ **Op cit at p 150**.

²⁴⁵ See Byron **ibid**.

²⁴⁶ Byron **ibid**.

²⁴⁷ Byron **ibid**. Byron says: “Significantly, the Court Services Department was not responsible for the formulation of government policy and, in practice, assisted the judiciary with the development and implementation of judicial policy.” (**at p 151**)

judiciary²⁴⁸, basically involves the governance of courts by a judicial council or court's commission made up of judges and magistrates.²⁴⁹ Thus, in South Australia, a State Courts Administration Council consisting of judicial officers was created and charged with the responsibility for providing facilities and services to courts to enable them to properly discharge their judicial functions.

It remains a very issue as to which of the various models of court governance and administration adopted in Australia is the best model.²⁵⁰ The traditional and separate model departments create the potential for problems in terms of the judicial independence of both magistrates and judges. However, the autonomous model, which is often advanced as the model which is designed to maximise judicial independence, has the potential to create its own difficulties. One such difficulty arises out of the composition of the judicial council or court's commission, which is the mainstay of the autonomous model. If the council or commission is chaired by a Chief Justice and perhaps dominated by judges, there might be a real concern on the part of the magistracy that the council or commission might give short shrift to priorities of the lower courts.²⁵¹ However, the concern may not be one way: judges may be adverse to magistrates (being members of the council or commission) having a say in matters affecting superior courts.²⁵²

Issues of court governance and administration are not the only current issues which impact upon the judicial independence of Australian magistrates. The issue of magisterial remuneration is high on the list.

The relationship between judicial independence and judicial remuneration is well defined. In 1994, the Commonwealth Remuneration Tribunal stated, in its reasons for decision:

“The Tribunal accepts that an independent judiciary is fundamentally important to the Australian community. For courts to resolve disputes impartially and to pass judgment acceptable to the parties when one of them may often be the government, the court must be independent and free from external pressure..... More generally, it reflects an important component of the principle of the separation of powers between the executive, the legislature and the judiciary, central of governance in Australia.

²⁴⁸ See The High Court of Australia, the Federal Court and the Family Court of Australia.

²⁴⁹ See Byron (**op cit at 152**) citing Church and Sallman “ **Governing Australia’s Courts (AIJA 1991) at p 38.**

²⁵⁰ See Byron (**op cit at p 155**) who states:

“ In the implementation of the various models in Australia, it is clear that insufficient research and evaluation has been conducted in an attempt to find the best model. Each of course has its own strong points, but what is best in the Australian context is still very much a matter of opinion and the evidence in support of each model is substantially based upon perspective and anecdote.”

²⁵¹ Query whether this concern would persist if magistrates were elevated to the status of “judges”.

²⁵² Query again whether the attitude of judges would be different if magistrates were renamed “judges”.

For the individual judges who make up the judiciary in Australia, two basics of that independence in practice are the constitutionally provided security of tenure and the provision of salaries not by the government of the day but by Parliament. The constitutional position is that federal judicial salaries cannot be reduced by government.”

In addition to recognising the importance of an independent judiciary, the Tribunal acknowledged the need to ensure that remuneration levels are adequate to allow recruitment and retention of quality appointees consistent with that importance.

Although tribunals have been put in place in most Australian jurisdictions for making determinations and recommendations in relation to salaries payable to magistrates, there are some continuing concerns over the relationship between such arrangements and the independence of magistrates. Those concerns are set out in the ASMA paper entitled “ **Future Directions of the Australian Magistracy**”:

“The independence of such Tribunals is also in question. Some independent tribunals only have jurisdiction to make recommendations which are subject to ratification by the legislators.²⁵³ Such recommendations are therefore subject to political influence. This is a most unacceptable situation, particularly as most of the tribunals concerned in this process are also responsible for the determination of salaries and allowances for parliamentarians.”

Furthermore, except in the Australian Capital Territory²⁵⁴, there is no statutory guarantee that a magistrate’s salary cannot be reduced while he or she holds office. So long as the power exists to alter magistrates’ salaries allowances and other benefits to their detriment during their term of office, they cannot be said to be judicially independent.²⁵⁵

Accordingly, there remains a potential threat to magisterial independence in the area of magistrates’ salaries. Because of that potential threat it has often been argued that the remuneration of magistrates should bear a relationship (expressed in percentage terms) with the salary of a Supreme Court Judge so that, whenever there is a change in the salaries of Supreme Court Judges there would be an automatic proportionate increase in the salaries payable to

²⁵³ It is open to governments to decline to accept a Tribunal’s recommendations. Refer to the Victorian experience during the 1990’s.

²⁵⁴ See Section 73(3A) of the Australian Capital Territory (Self-Government) Act 1988.

²⁵⁵ A matter of some interest is that until about 1994 Northern Territory magistrates received a rent subsidy which was generally applicable to Executive Officers in the Northern Territory Public Service. In 1994 the rent subsidy was discontinued. This coincided with the changes within the Public Service and the introduction of employment contracts. It would appear that there was no formal basis for extending the rent subsidy in the first place. Notwithstanding, the rent subsidy had always been represented as a magisterial entitlement and interstate applicants were appointed on that basis.

magistrates.²⁵⁶ There are many advantages to such an arrangement. It removes remuneration fixing from the political sphere, it affirms the principle of judicial independence²⁵⁷ and introduces certainty and impartiality into the process. It also, to a certain extent, acts as a bastion against an alteration to a magistrates' salary while he or she holds office. However, there still needs to be statutory recognition in all States and Territories that the remuneration payable to magistrates and their other terms and conditions cannot be altered to their detriment.

However, it is necessary to retain some machinery for reviewing magistrates' salaries where there are jurisdictional changes which increase the level of complexity and responsibility of work carried out by magistrates. In the event of such changes there should be recourse to a truly independent Remuneration Tribunal charged with the sole responsibility of determining (rather than merely recommending) magistrates' salaries.

While on the subject of magistrates' salaries and terms and conditions, it is noted that in the Northern Territory, and this may well be the case in other jurisdictions, some of the terms and conditions applicable to magistrates have a nexus with Public Service entitlements. Such an arrangement is both unnecessary and undesirable. Since the severance of the magistracy from the Public Service, there is no need for such continuing connections with that service. Furthermore, the residual nexus is inconsistent with magisterial independence. It also exposes magistrates to the risk of having their terms and conditions altered to their detriment during term of office.²⁵⁸

Before leaving the question of magistrates' salaries and terms and conditions something needs to be said about the extension of judicial pensions to magistrates. The following observations and statements were made in the 1994 ASMA paper, "**Future Directions of the Australian Magistracy**":

" Magistrates should be entitled to a non-contributory pension, as are other members of the Judiciary. As recently recommended by the Marks-O'Connor Review in Victoria, it was determined that the Magistracy should be regarded as the third tier of the Judiciary system in that State.

They recommended that Magistrates should be entitled to a non-contributory pension along similar lines to that of the two higher courts in that State. Unfortunately, the Government did not follow this recommendation. However, it is

²⁵⁶ See for example the Tasmanian system (*supra* at 49) which has the effect that on 1 July each year, magistrates salaries automatically increase if there has been an increase in salary for either or both the Chief Justices for South Australia or Western Australia.

In Western Australia and the Australian Capital Territory remuneration tribunals have determined that magistrates' salaries shall be calculated as a percentage of a Judge's salary.

²⁵⁷ It overcomes the unbecoming "cap in hand" approach which carries with it an over-dependence on the Executive.

²⁵⁸ See footnote 255

imperative that Magistrates should receive identical entitlements in this regard.”²⁵⁹

The Commonwealth Superannuation surcharge legislation threatens the judicial independence of both judges and magistrates.

According to the legislation, Superannuation tax is not to apply to all Judges appointed by the Commonwealth Government prior to 20th August 1996. To apply the tax to those judicial officers would result in a diminution of their remuneration during their continuance in office and therefore involve a breach of Section 72(iii) of the Constitution. It would also be an attack on their judicial independence. However, the remuneration of magistrates and judges will be diminished by the superannuation/pension tax and their judicial independence will be compromised when they exercise jurisdiction in Commonwealth matters.²⁶⁰

Apart from its impact on the judicial independence of judges and magistrates, the Judicial Conference has recently received legal opinion to the effect that the superannuation legislation is constitutionally invalid in that it contravenes Section 55 of the Constitution by dealing with more than one subject of taxation and offends the principle in the **State Banking Case (1947) 74 CLR 31**.²⁶¹

One of the basics of judicial independence is security of tenure. In 1998 the then Chief Minister of the Northern Territory, The Honourable Shane Stone, announced proposals for legislation providing for the appointment of magistrates for fixed terms of 10 years. The Judicial Conference strongly expressed its opposition to the proposed legislation, saying:

“It is wrong in principle. Whether such appointments are contemplated to include prospects of reappointment or not, fixed term appointments to any magisterial or judicial office, save perhaps for acting appointments, strike at judicial independence, the fundamental purpose of which is the maintenance of the rule of law.... Judicial independence is at risk if future appointment or security of tenure is, or appears to be, within the gift of the Executive.”²⁶²

²⁵⁹ At p 12.

²⁶⁰ The Judicial Conference of Australia has expressed grave concerns about the impact of the Superannuation surcharge on judicial independence. (See **Judicial Conference News Vol 1.2 Nov 1997, Vol 2.1 May 1998 and Vol 3.1 July 1999**) See in particular **Vol 2.1** where the following comments were made on behalf of the Conference:

“ The legislation still seems to the Conference objectionable in principle and practice. For example, it will apply to virtually all magistrates in Australia..... The purpose of Section 72(iii) is clearly to safeguard judicial independence, and yet the government is proposing to allow magistrates’ remuneration to be reduced simply because of the absence of any explicit constitutional protection. We view this as an attack on the independence of the magistrates, who constitute the bulk of Australia’s judicial officers.”

²⁶¹ See **Judicial Conference News Vol 3.1 July 1999**.

²⁶² See **Judicial Conference News Vol 2.1 May 1998**.

The following statements about the proposed legislation appeared in the July 1999 edition of the **Judicial Conference News**:

“The Legislative Assembly of the Northern Territory had before it a Bill to amend s7 of the Magistrates Act to limit the tenure of the office of magistrates in that jurisdiction, while leaving them eligible for reappointment after that period had expired. The practical effect of such a provision is to confer on the Executive a power to remove judicial officers after 10 years without demonstrating either misconduct or incapacity on their part. Since in the Territory there is no equivalent of District Courts, magistrates there exercise a jurisdiction much larger than in other places in Australia.

Legislation like that proposed has the potential to extend Executive influence directly into the judicial process. Whether or not the power to remove or re-appoint is in fact exercised, its existence has a tendency to affect the way in which judicial functions are discharged. 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. What is equally, if not more, important even if such pressure is resisted, is that there will always be dissatisfied litigants who will be tempted to suspect the contrary and to publicise their suspicions.

The Judicial Conference of Australia is firmly opposed to forms of tenure that promote a risk that this will happen. The independence of the judiciary is not something which has evolved to protect the careers of judges. It exists to serve the public interest and is constitutionally safeguarded to ensure that judicial functions are, and are seen to be, exercised with complete impartiality and independence. If the Territory proposal had become law, it is difficult to see how public confidence in the impartial administration of justice could be maintained, even if the legislation were to survive constitutional challenge based on the reasoning in **Kable v DPP (1996) 189 CLR 51.**”

As reported in the same edition of the **Judicial Conference News**, the Northern Territory Government Bill has been shelved.

The problem with fixed term appointments for magistrates – indeed any judicial officer - is that the appointee is subject to political influence, and precluded from administering justice both in the criminal and civil sphere without fear or favour, affection or ill-will. A magistrate may, out of fear of not being reappointed, sentence offenders in a way that accords with the wishes of government, and hence fail to act impartially. Similarly, in a civil suit in which one of the parties is the government, a magistrate may be inclined to favour the government with a view to securing reappointment; or alternatively feel disinclined to find against the government out of fear that he or she will not be reappointed. Once again there is the risk that the magistrate might act less than impartially. The problem is particularly acute in the case of magistrates who act as coroners. Often coroners

are required to be critical of government departments implicated in the death of a person which is the subject of an inquest. It is difficult to see how magistrates acting as coroners could remain “completely indifferent to the potential impact of giving a decision likely to be unacceptable to a government having the power to dismiss them.”

Another issue which affects magistrates as much as judges is the issue of judicial accountability. There is an inter-relationship between judicial independence and judicial accountability.²⁶³

“Judicial accountability” has a dual personality. There are basically two forms of judicial accountability: “adjudicative accountability” and “administrative accountability”.²⁶⁴

Adjudicative accountability requires all judicial officers to be accountable in terms of the judicial decisions they make. Judicial officers are expected to make good decisions: that is one objective of adjudicative accountability.²⁶⁵ Another objective of adjudicative accountability is to secure public acceptance of judicial decisions.²⁶⁶

The long-established principles requiring judicial officers to generally conduct curial proceedings in public, to reach a decision only after hearing full legal argument from all parties in a legal proceeding and, having reached a decision, to publicly give reasons for that decision are intended to serve the objectives of adjudicative accountability.²⁶⁷ Accountability is also reinforced by the existence of appellate processes which expose the decisions of judicial officers to scrutiny.²⁶⁸

Adjudicative accountability does not require judicial officers to be accountable to the executive arm of government for their decisions.²⁶⁹ To do so would offend the concept of judicial independence. But as the present Chief Justice of the High Court, The Honourable Justice Gleeson said in 1994 “independence and accountability are not opposed, but work towards the same end”.²⁷⁰ The independence of the judiciary benefits the “community in general and litigants.”²⁷¹ With its emphasis on good and reasoned decision making, adjudicative accountability also benefits the general community and litigants.

²⁶³ See The Honourable Justice Gleeson “**Judicial Accountability**” in “**Courts in a Representative Democracy**” at p 166.

²⁶⁴ **Ibid.**

²⁶⁵ **ibid at p 168.**

²⁶⁶ **Ibid.**

²⁶⁷ **Ibid.**

²⁶⁸ **Ibid.**

²⁶⁹ **Ibid.**

²⁷⁰ **Ibid.** On another occasion, the Honourable Justice Gleeson stated that “independence and accountability are not inconsistent.” (See the Foreword to “**Fragile Bastion Judicial Independence in the Nineties and Beyond**” at pp xi-xii)

²⁷¹ See Byron *op cit* at p 146.

There is another dimension to adjudicative accountability which is related to the decision making process: judicial officers are expected to give timely decisions. In common with the concept of judicial independence, this requirement is intended to serve the best interests of the community and litigants.

There is a further relationship between adjudicatory accountability and judicial independence which defines the limits of the latter: a judicial officer who fails to meet the standards of adjudicative accountability is liable to be removed from office pursuant to the various mechanisms established in the Australian States and Territories.²⁷²

Adjudicative accountability has particular ramifications for magistrates.

Magistrates deal with a great volume of cases (on both a daily and annual basis) which are rapidly increasing in complexity. Many cases, owing to their complexity, require magistrates to reserve their decision. A contributing factor, in many jurisdictions, is that relatively inexperienced legal practitioners appear for the parties and magistrates are required to research the law before giving a decision. Unlike Judges, magistrates do not always have the benefit of experienced counsel. According to the principles of adjudicative accountability, magistrates are required to give good and reasoned decisions in a timely manner, but the sheer volume of their caseload compels them to either give quick, and often ill-considered, decisions or well –reasoned decisions with a consequent delay in the decision-making process. It is often very difficult to strike a “happy medium” between these two extremes. The expansion in the jurisdiction of magistrates during recent times with a concomitant increase in the complexity of the cases heard and determined by magistrates has placed a very burden on magistrates.

Furthermore, the appellate processes in some Australian jurisdictions, which do not merely proceed by way of a hearing de novo but are a strict review of a magistrate’s decision, increase the adjudicative accountability of magistrates. Such appellate processes encourage magistrates to reserve their decisions and reduce them to writing in anticipation of close scrutiny by a superior court.

The demands placed upon magistrates, in terms of their adjudicative accountability, are intensified by an expectation on the part of the public and litigants that they will get a quick or timely result in a magistrates’ court.

A common problem confronting magistrates’ courts, which lie at the bottom of the judicial hierarchy, is that they are often under-financed and under-resourced relative to superior courts. This has a considerable impact on the quality of magistrates’ decisions and the efficiency with which written decisions are delivered. Generally speaking, magistrates do not have associates and /or private secretaries to assist them in the preparation and delivery of their

²⁷² **Supra at pp 35-39.**

decisions. Consequently, magistrates must undertake their own research and either type their own decisions or submit written drafts to a secretary who works for more than one magistrate. Usually, magistrates are also required to proof-read their written decisions.

There is an undeniable relationship between the resources provided by the executive arm of government to magistrates' courts and the quality and efficiency of the decision making process in those lower courts. Budgetary control of the lower courts has a considerable impact upon the extent to which the judicial officers of those courts can satisfy the requirements of adjudicative accountability.²⁷³

It is that for reason that courts at all levels of the judiciary are clamouring for greater financial and administrative control of the courts. However, with financial and administrative autonomy comes increased administrative accountability²⁷⁴. As a former Federal Attorney-General has said:

"It is unfortunate that some have suggested that the question of administrative and management independence is the same as judicial independence. To reiterate that they are different issues in no way diminishes the importance of enabling courts and tribunals to operate separately from the mainstream of government administration. But in providing a statutory basis for independent administration and management, it does not follow that the courts....will or should be free of the need to account for their operations. It is the Parliament which appropriates the funds to these bodies and it is to Parliament that they will be answerable. Courts and tribunals, no less than other areas of public administration, must be accountable for efficiency in the management of their affairs. Ultimately, of course, the courts must be accountable to the public. Within the resources provided by the Parliament, the judicial system must ensure that it provides to all who use the courts impartial adjudication of issues which come before it without due delay."²⁷⁵

Magistrates and Judges may well complain that lack of budgetary and administrative control of their courts impairs their judicial independence and compromises their ability to satisfy the requirements of adjudicative

²⁷³ See the **Epilogue** to Golder's book "**High and Responsible Office A History of the Australian Magistracy**" (at p 217) where I H Pike Chief Magistrate and A Reidel Magistrate say:

"The greatest threat to our present judicial system, of course, of which the Local Courts are only a part, is the continuing economic need of governments to restrict the funds available for all areas of operation. Adequate funds are essential if the quality of justice is to be maintained and an efficient service is to be provided. There are those who urge that until the courts administer their own budgets (adequate or otherwise) there will never be true independence."

²⁷⁴ Courts are often criticised for being inefficient despite the limited resources, financial and otherwise, that are made available to them within the framework of the traditional model of court governance. Even within such a model courts have an obligation to account for the services which they use.

²⁷⁵ See L Bowen, **Hansard, House of Representatives p 2265 1 November 1989 (Second Reading Speech, Courts and Tribunals Administration Amendment Bill)** cited by P M Lane in "**Court Management Information**" **Discussion Paper AIJA at pp 12 –13.**

accountability; and their complaints may well be valid. However, whilst an autonomous model of court governance may maximise judicial independence, it increases the administrative accountability of magistrates and judges - it imposes upon them an absolute obligation to account for the resources they use - and at the same time elevates their adjudicative accountability in that they must make good and well reasoned decisions in a timely manner. Given the volume and increasing complexity of the work done by the lower courts, and the public perception that these are courts of summary jurisdiction providing instant decisions, magistrates need to think long and hard about adopting an autonomous model of court governance, especially one which is dominated by members of the upper rungs of the judiciary who are equally administratively accountable, and who might be inclined to give short shrift to the priorities of the lower courts.

There are other aspects of the magistracy that have an impact upon the judicial independence of its members. In his paper **“Report on the Change in Terminology from Magistrate to Judge”**, Michelides refers to those aspects which are unique to the magistracy:

“.....magistrates are often required to work under conditions which make it difficult to maintain their independence, such as being resident in small communities for several years. The magistrate must resist becoming too familiar with the police, other authorities and the public to avoid real or perceived bias. These difficulties do not affect a judge visiting infrequently on circuit.”

There is no easy solution to this problem. Rural and outlying areas require the provision of court services, and hence a resident magistrate or at least a magistrate who does a regular circuit which still brings him or her into regular and close contact with the community. The tension between the need to service smaller communities and the maintenance of magisterial independence (more so the appearance thereof) is not easily resolved. Perhaps the answer lies in the centralisation of court services in larger city areas with the use of video - conferencing to service rural and outlying areas.

Most matters that impact upon the judicial independence of the judiciary can be readily identified. However, in some cases the impact of a particular set of circumstances on judicial independence is not so easily resolved and requires careful consideration. One such area is mandatory sentencing legislation.

Today’s magistrates live in very interesting times as some Australian governments have legislated mandatory penalties for some offences²⁷⁶ whilst other governments are contemplating such measures. Such legislative provisions undercut the general sentencing discretion conferred upon the sentencing court. These provisions have the greatest impact in criminal courts presided over by

²⁷⁶ For example the Northern Territory and Western Australian legislatures.

magistrates.²⁷⁷ To what extent does the proscription of mandatory penalties which deprive a court of its discretionary powers in imposing sentence represent an erosion of judicial independence?

Legal authority indicates that mandatory sentence regimes do not infringe the doctrine of judicial independence:

“It is beyond question that Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and.....it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor.... is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed... If Parliament chooses to deny the court such a discretion.... The court must obey the statute in this respect assuming its validity in other respects. It is not.... A breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.”²⁷⁸

In **Wynbyne v Marshall** ²⁷⁹ the Supreme Court of the Northern Territory reached a similar conclusion in relation to a constitutional challenge to the Northern Territory’s mandatory sentencing legislation.

Query whether the position would be different if a mandatory sentencing regime was introduced out of a clearly articulated perception on the part of government that the sentences passed by magistrates were inadequate and with the avowed purpose of “toughening up” magistrates’ sentences. After all, judicial independence involves “the capacity of the judiciary to perform their designated function free from actual or apparent interference from the government of the day”.²⁸⁰

Mandatory sentencing legislation does, however, have a discernible effect on the judicial function: “it tends to lead to traditional legal processes being subverted in the desire to avoid an unduly harsh outcome.”²⁸¹

²⁷⁷ That is accounted for by the fact that magistrates’ courts are the first court before whom offenders appear and mandatory penalties are commonly attached to summary offences and or indictable offences that are capable of being disposed of summarily.

²⁷⁸ **Palling v Corfield (1970) 123 CLR 52 per Barwick CJ at p 58.**

²⁷⁹ **(1997) 7 NTLR 97.**

²⁸⁰ See “**Fragile Bastion Judicial Independence in the Nineties and Beyond**”, Helen Cunningham at **xiii**.

²⁸¹ See Morgan and Murray “**What’s in a Name? Guideline Judgments in Australia**” **Criminal Law Journal Vol 23 April 1999 90 at 95**. See also M Tonry “**Mandatory Sentences**” in M Tonry (ed) **Crime and Justice : A Review of Research** Vol 16, 1992, 243.

The abolition of courts by the government of the day raises issues of judicial independence which, as in the case of mandatory sentencing regimes, are not always easily resolved.

The abolition of the New South Wales Magistrates Court during the 1980's was one such instance. In his article "**Judicial Independence**"²⁸² the Honourable Ken Marks stated:

"In the course of reconstruction of the New South Wales inferior jurisdictions, the Government abolished the Magistrates Court and established what it called the Local Courts to which it appointed all except six magistrates who had been members of the Magistrates Court. The issue of judicial independence was mentioned by Sir Anthony Mason CJ in **Quin**:

'Underlying the respondent's argument and the majority judgment in the Court of Appeal are the importance of the doctrine of judicial independence and the need to protect the security of tenure of judicial officers. The importance of these matters requires no emphasis. These considerations are relevant to removal from judicial office rather than to appointment to judicial office, except insofar as they bear upon the terms of appointment. For my part I am unable to equate the failure to appoint magistrates to the Local Courts with removal from their previous office. It was not suggested that the re-organisation of the Court structure involving the creation of the Local Courts was other than a genuine re-organisation. It was not suggested that its object was to enable the removal from office by covert means of the respondent and former magistrates who did not accede under s 12.'

Whether or not the abolition and restructuring of a particular court system represents an interference with the judicial independence of the judiciary depends upon the motive. This is borne out by the following statements made by Sir Anthony Mason AC KBE, former Chief Justice of the High Court of Australia:

"To abolish a court simply for the purpose of terminating the appointment of a judge or judges of that court would be to violate the constitutional provisions designed to protect judicial independence. However, the abolition of a court usually takes place as a part of a planned re-organisation of the court structure, in circumstances where the legislature and the executive claim that the re-organisation is being undertaken in the public interest in order to provide a better or more efficient court system."²⁸³

²⁸² **The Australian Law Journal Vol 68 March 1998 173 at 180.**

²⁸³ See "**The Appointment and Removal of Judges**" which appears in the Judicial Commission of New South Wales publication "**Fragile Bastion Judicial Independence in the Nineties and Beyond**" at p 26

Whilst the freedom of the legislature to “lawfully put in place an improved or more effective court system”²⁸⁴ is freely conceded, the removal of a magistrate or any judicial office from office through the abolition and restructuring of a court under the subterfuge of improving the court system represents a most serious interference with judicial independence.²⁸⁵ If a magistrate or a judge is unfit to hold judicial office then recourse should be had to the appropriate mechanisms in each of the States and Territories.²⁸⁶

Conclusion

The focus of this Colloquium has been on “changes in the law and institutions during the twentieth century, where the legal system (including the Courts) has succeeded, and where it has failed, and what is to be learned for the future from our twentieth century experience”.

Viewing the Australian magistracy from each of these perspectives, the magistracy has undergone remarkable changes in three areas: (1) its structure; (2) its composition and (3) the jurisdiction exercised by it. Its major successes have been (1) its service to the general community and litigants through a “grass-roots/peoples” court system and (2) its attainment of judicial independence. There is an interrelationship between the two for “the ultimate beneficiaries of the independence of the judiciary are the community in general, and litigants and stakeholders in more specific circumstances.”²⁸⁷

One might argue that the latter success is only a partial one in that the magistracy has failed to achieve complete judicial independence.²⁸⁸ However, what constitutes “complete judicial independence”? The outer boundaries remain ill-defined. In any event, is complete judicial independence achievable, even in a democratic society? It is far too premature to make any evaluative judgment that the magistracy has failed to achieve complete judicial independence as much as is too early to pass a similar judgment in relation to Judges. What might be interpreted as failures are more appropriately described as future challenges.

The modern Australian magistracy is the result of a slow evolutionary process which is ongoing. It has developed against the backdrop of a combination of political, administrative and social factors. It is not at all surprising that the executive arm of government has expressed a reluctance to relinquish governance and administrative control of magistrates’ courts, indeed all courts. However, it may not be absolutely necessary for the Executive to totally relinquish control over the courts in order to maximise the judicial independence of magistrates and judges. One of the major challenges confronting the

²⁸⁴ **Ibid.**

²⁸⁵ In **Attorney –General (NSW) v Quin** there was some evidence suggesting that unsatisfactory performance was the reason for the non-appointment of some of the magistrates involved.

²⁸⁶ **Supra at pp 35-39.**

²⁸⁷ See Byron **op cit at p 146.**

²⁸⁸ This argument could be extended to the Judges as well.

magistracy - indeed the judiciary as a whole and the executive arm of government - during the next millenium is the quest for a model of court governance that guarantees and protects the judicial independence of all judicial officers. However, in the quest for the best model, there must be a recognition on the part of the magistracy that judicial independence carries with it judicial accountability, the twin aspects of which are adjudicative accountability and administrative accountability. It is also imperative that the model of court governance which is ultimately adopted does not allow short shrift being given to the priorities of lower courts, whether presided over by magistrates or judges.

The next important challenge confronting the Australian magistracy is to secure for its members the status of “judges”. I implore the Judicial Conference of Australia to support the elevation of magistrates to the status of judges.

Finally, courts at both the lower and upper levels of the judiciary need to promote, during the new millenium, the independence of the judiciary. Their task was clearly and succinctly defined by The Honourable John Doyle Chief Justice of South Australia:

“The Courts should promote the independence of the judiciary. They can do so by improving public understanding of their work, and in that way, improving public understanding of the independence of the judiciary. The time has come for the courts to accept a responsibility to inform the public about their work. In this way the courts can strengthen public confidence in their work and the public understanding of their work, upon which public confidence and understanding judicial independence rests.”²⁸⁹

²⁸⁹ See “**The Well –Tuned Cymbal**”, “**Fragile Bastion Judicial Independence in the Nineties and Beyond**” at 39.