

*The Administrative Authority of Chief Judicial Officers in Australia**

Kathy Mack* and Sharyn Roach Anleu**

I Introduction

Many aspects of judicial independence support the core judicial function of ‘independent, impartial ... adjudication’.¹ This paper particularly considers the concept of internal judicial independence, which requires that a judicial officer’s adjudicative functions must be free from control by other judicial officers, including the presiding or most senior judicial officer.² Just as the independence of judges would be undermined by executive influence on judicial decision-making, improper direction from the presiding judicial officer — or any other judicial officer — would also

⁺ This research was initially funded by a University-Industry Research Collaborative Grant in 2001 with Flinders University and the Australian Association of Magistrates (AAM) as the partners with additional financial support from the Australian Institute of Judicial Administration. It is currently funded by an Australian Research Council Linkage Project Grant (LP210306) with AAM and all Chief Magistrates and their courts as industry partners with support from Flinders University as the host institution. Thanks to Deirdre Amos, Sandra Brooks, Ruth Harris, Julie Henderson, Wendy Hoad, Mary McKenna, Rose Polkinghorne, Frances Willis, and Dan Woods for research and administrative assistance. The Magistrates Research Project website is located at <<http://ehlt.flinders.edu.au/law/magistrates/>> Email: magistrates.research@flinders.edu.au. Earlier versions of this paper were given at the Annual Conference of the International Society for Reform of Criminal Law, The Hague, August 2003 and at the Australian Law and Society Conference, Newcastle, December 2003.

* Professor, School of Law, Flinders University.

** Professor, Department of Sociology, Flinders University.

¹ Sir Anthony Mason, ‘The Appointment and Removal of Judges’ in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 1, 4.

² Kate Malleson, ‘Judicial Training and Performance Appraisal: The Problem of Judicial Independence’ (1997) 60 *The Modern Law Review* 655; *Re Colina; Ex parte Torney* [1999] HCA 57 (22 October 1999) [29].

breach the requirements of judicial independence.³

At the same time, legitimate administrative functions must be exercised in a systematic fashion, and judicial officers must be accountable to the public they serve.⁴ '... [T]he purpose of ... independence ... is ... a protection and a privilege of the people, not the judges.'⁵ As expressed in a report by JUSTICE, '[j]udicial independence is not absolute [; ... it] has never justified substandard justice; ... [it is] constrained by the demands of good judicial administration ...'⁶

In most Australian courts,⁷ the chief judicial officer is given express power and responsibility to administer the court, sometimes subject to obligations of consultation. This structure firmly locates some aspects of administrative authority within the judiciary rather than the executive, consistent with international norms⁸ and Australian research,⁹ but does not meet the objection that a chief judicial officer should be no more than a first among equals.¹⁰ As Shimon Shetreet has argued, the 'introduction of hierarchical patterns into the judiciary ... [has] the result of chilling judicial independence'.¹¹

In this paper we are particularly concerned with the internal independence of magistrates, with a specific focus on the express administrative powers of Chief Magistrates, compared with the Chief Judges and Justices of the higher courts.

An examination of legislation and case law relating to the authority of chief judicial officers discloses significant differences between the authority of Chief Magistrates in comparison with the authority of Chief Justices and Chief Judges of the higher courts. The authority of Chief Magistrates tends to contain more specific powers, and to be less constrained by formal

³ Stephen Colbran, 'Judicial Performance Evaluation: Accountability without Compliance' (2002) 76(4) *Australian Law Journal* 235, 246; Douglas Drummond, 'Towards a More Compliant Judiciary? – Part I' (2001) 75 *Australian Law Journal* 304, 316; Shimon Shetreet, 'The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986' (1987) 10 *UNSW Law Journal* 4, 11.

⁴ Shetreet, 'The Limits of Judicial Accountability', above n 3, 6–7.

⁵ Mason, above n 1, 35.

⁶ Robert Stevens, *The Judiciary in England and Wales* (1992) 4.

⁷ Each Australian state and territory has a Supreme Court, which sits as a trial court hearing major civil and criminal matters and hears appeals, and a magistrates or local court hearing summary criminal matters and civil matters. There is also an intermediate trial court, the District or County Court, except in the smallest jurisdictions, ACT, NT, and Tasmania. Commonwealth courts include the Federal Court which has specialist jurisdiction in trade practices, federal administrative law, bankruptcy and some other matters arising under Commonwealth law, and the Family Court, with jurisdiction in marriage, divorce and custody of children in relation to divorce. The High Court is the final court of appeal for both federal and state courts.

⁸ See text at footnotes 36–42.

⁹ Thomas W Church and Peter A Sallmann, *Governing Australia's Courts* (1991) 65–6.

¹⁰ Michael Forde, 'Judicial Independence and Court Governance' (Paper presented at the Magistrates Court Conference, Brisbane, 7 April 2003) [4]–[5]. <<http://www.courts.qld.gov.au/publications/articles/speeches/2003/forde070403.pdf>> at 1 June 2004.

¹¹ Shetreet, 'The Limits of Judicial Accountability', above n 3, 11.

obligations of consultation or by powers of collective decision making vested in the members of the court acting as a whole.

The Australian magistracy has moved decisively away from its former public service status, and, as Chief Justice Gleeson commented, 'the role of the magistracy in the administration of civil and criminal justice...continues to evolve'.¹² However, it appears that some remnants of that previous structure remain in the administrative authority of Chief Magistrates. Shetreet points out that '[h]ierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of a judiciary whose members must enjoy internal independence *vis-à-vis* their colleagues and superiors'.¹³

At the same time, the actual effectiveness of these differential powers may be in some doubt. On several specific occasions, higher courts have not enforced a Chief Magistrate's attempts to exercise some forms of apparently administrative authority in the face of resistance from a magistrate.

Nonetheless, the current differences in authority appear to reflect the different historical developments of the courts and are not justified by any contemporary distinctions between magistrates' courts and the higher courts. Although there is 'no single ideal model of judicial independence, personal or institutional' and some legislative choice may be allowed in the ways judicial independence is established and protected,¹⁴ there must be some justification for current differences beyond historical pattern. Any risk to judicial independence created by hierarchical control should be minimised for all courts. Magistrates should not be subjected to any greater administrative control from a Chief Magistrate than Chief Judges and Chief Justices exercise over their colleagues.

II Judges, Magistrates and Judicial Independence

The entitlement to certain protections for judicial independence, ensured by specific mechanisms, is an intrinsic feature of the higher courts in Australia. These protections are derived from concepts developed for English judges in the seventeenth and eighteenth centuries.¹⁵ Judicial

¹² *NAALS v Bradley* [2004] HCA 31 [4].

¹³ *Ibid.*

¹⁴ *NAALAS v Bradley* [2004] HCA 31 [3].

¹⁵ James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 65; Martin L Friedland, 'Judicial Independence and Accountability: A Canadian Perspective' (1996) 7 *Criminal Law Forum* 605, 607-8; P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 53; Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 64-5; Ivan Potas, 'The Judicial Commission of NSW: Treading the Fine Line between Judicial Independence and Judicial Accountability' (2001) 18(1) *Law in Context* 102, 109-10.

independence is also an element in international norms.¹⁶

The independence of the Commonwealth courts rests on the entrenched provisions of Chapter III of the *Commonwealth Constitution*, especially s 72. Protections for state Supreme and District Court judges are expressed in legislation and sometimes embodied in the state constitutions.¹⁷

In contrast, the entitlement of magistrates to all features of judicial independence has not always been recognised or accepted.¹⁸ Three significant changes in the magistracy are linked with the recognition of the need for judicial independence: the separation of the magistracy from the public service; the formal requirement of qualification as a legal practitioner; and the increase in the range and seriousness of cases heard in the magistrates' courts.

Historically, Australian magistrates were public servants, often promoted from within the ranks of clerks of the court on the basis of merit and/or seniority.¹⁹ As public servants, magistrates were subject to a hierarchical regime of supervision and promotion, significantly different from that of judges of the higher courts.

This public service structure created the potential for, or appearance of, executive interference with the adjudicative role of magistrates.²⁰ In several cases, claims were made that magistrates should disqualify themselves from hearing cases on grounds of apprehended bias when a party or lawyer was within the same government department as the magistrate.²¹

In an influential decision, Justices Wells and Sangster commented:

The principles of judicial independence apply just as forcibly to magistrates who, statistically, are seen to administer justice by a far greater number of people than are Supreme Court judges.²²

¹⁶ Melissa A Perry, *Disqualification of Judges: Practice and Procedure A Discussion Paper* (2001) 3; Friedland, 'Judicial Independence and Accountability', above n 13, 622–9; David Malcolm, 'Judicial Independence' (paper presented to 15th International Conference for the International Society for the Reform of the Criminal Law, Canberra, 28 August 2001); Justice Michael Kirby, 'A Global Approach to Judicial Independence and Integrity' (2001) 21 *University of Queensland Law Journal* 147; George Winterton, *Judicial Remuneration in Australia* (1995) 12–13.

¹⁷ Note, however, that state constitutions or legislative provisions regarding judicial tenure may not be fully entrenched, as is the Commonwealth Constitution. The actual constitutional source for the independence of state judicial officers is not entirely settled. Lane, above n 13, 66.

¹⁸ Sir Anthony Mason, above n 1; *Spratt vs Hermes* (1965) 114 CLR 226.

¹⁹ Chief Justice Murray Gleeson, 'A Changing Judiciary' (2001) 75 *Australian Law Journal* 547, 547–8; Hilary Golder, 'The Making of the Modern Magistracy' (1991) 77 *Journal of the Royal Australian Historical Society* 30; New South Wales Law Reform Commission, *The Magistracy: Interim Report: First Appointments as Magistrates under the Local Courts Act, 1982*, Report No 38 (1983).

²⁰ Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 590, 621–2; Crawford and Opeskin, above n 13, 93.

²¹ *Fingleton v Christian Ivanoff* (1976) 14 SASR 530; *R v Moss; ex parte Mancini* [1982] 29 SASR 385; *Falconer v Howe and Baker* [1978] WAR 81.

²² *Fingleton v Christian Ivanoff* (1976) 14 SASR 530, 546.

Eventually, public service status was recognised as inconsistent with the needs of magistrates, magistrates' courts and, most importantly, the public they serve. The parliamentary debates establish that providing at least some features of judicial independence for magistrates was an express motivation for the legislation in several states constituting magistrates' courts and magistrates as separate from the public service.²³

In all Australian jurisdictions, the magistracy is now constituted under its own legislation, separate from the public service. However, this separation from the public service is fairly recent, ranging from 1977 in the ACT and the Northern Territory, to 1991 in Queensland.²⁴

As public servants, magistrates were not necessarily required to have legal practice qualifications.²⁵ Now, the minimum statutory qualification for appointment as a magistrate in Australia includes admission as a barrister/solicitor/legal practitioner of one or more named jurisdictions, usually for five years (except in New South Wales and Western Australia, where no minimum time of admission is specified).²⁶ These requirements are substantially the same as for the higher courts, though the minimum term as a legal practitioner is sometimes longer.²⁷

The increased range and seriousness of the cases heard in magistrates' courts is also an important factor in the need for judicial independence of magistrates.²⁸ When cases formerly heard by the Supreme Court are moved into magistrates' courts, a significant range of matters may lose some of the protections of judicial independence available in the higher courts.²⁹

²³ Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 1991, 1981 (D M Wells, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 8 November 1983, 1452 (Chris Sumner, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 1979, 1775 (I G Medcalf, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 19 October 1983, 1163 (C J Sumner, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1982, 3584 (J R Hallam); Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 August 1979, 1756 (W Bertram).

²⁴ *Court of Petty Sessions (Amendment) Ordinance* (No 4 of 1977) (ACT); *Magistrates' Court (Appointment of Magistrates) Act 1984* (Vic); *Magistrates Act 1983* (SA); *Stipendiary Magistrates Act 1969* (Tas); *Local Courts Act 1982* (NSW); *Magistrates Act 1991* (Qld); *Stipendiary Magistrates Amendment Act (No 15 of 1979)* (WA).

²⁵ New South Wales Law Reform Commission, above n 17, [A.4].

²⁶ *Court of Petty Sessions (Amendment) Ordinance 1977* (ACT); *Local Courts Act 1982* (NSW) s 12; *Magistrates Amendment Act 1988* (NT) s 5; *Magistrates Act 1991* (Qld) s 4; *Magistrates Act 1983* (SA) s 5(5); *Magistrates Court Act 1987* (Tas) s 8(1); *Magistrates Court Act 1989* (Vic) s 7(3).

²⁷ Enid Campbell and Hoong Phun Lee, *The Australian Judiciary* (2001) 80, n 30.

²⁸ John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I' (2000) 74 *Australian Law Journal* 519; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part II' (2000) 74 *Australian Law Journal* 592, 595.

²⁹ *Macrae v Attorney-General for NSW* (1987) 9 NSWLR 269; Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 1989, 487–8 (A McCutcheon, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 5 September 1984, 125 (Storey).

The litigants and the public expect impartial and independent adjudication from magistrates just as they expect it from 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.³⁰

Magistrates' courts were separated from the public service specifically to provide a greater degree of judicial independence. The formal qualifications needed to be appointed to the magistracy are, in most jurisdictions, very similar to those for judicial appointment. The types of cases heard in magistrates' courts now include serious civil and criminal matters previously heard in District or Supreme Courts.

These changes establish that judicial independence, as a principle, is applicable to and necessary for, the magistracy, just as for the higher courts. Any contextual or historical differences which might once have justified differences in the mechanisms used to ensure judicial independence for magistrates as compared to judges are no longer applicable to magistrates today.

III Judicial Administration and Independence

As principles, both internal judicial independence and the need for proper administration are well justified, but particular forms of administrative control can cause considerable tension with the ideals of judicial independence.³¹

Conflicts between court administration and judicial independence can arise in a range of ways. Directions which are administrative in form can indirectly constrain adjudicative independence. Executive control of resources can impose burdens on a court's ability to carry out judicial functions.³² Administrative or managerial allocation of work may amount to a de facto suspension.³³ Some kinds of performance evaluation for courts could appear to be, or be experienced as, a burden on independent judicial decision making.³⁴

³⁰ Sir Ninian Stephen, *Judicial Independence* (1989) 2.

³¹ Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond — Part II', above n 26, 600–4; Shetreet, 'The Limits of Judicial Accountability', above n 3, 6–7; Church and Sallmann, above n 9, 7–14.

³² Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 179, 187–8; Lane, above n 13, 4; Winterton, above n 14; Alan Barnard and Glenn Withers, *Financing the Australian Courts* (1989).

³³ Enid Campbell, above n 13, 77–8; Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges', above n 18, 608.

³⁴ Colbran, 'Judicial Performance Evaluation: Accountability without Compliance', above n 3, 244; Drummond, 'Towards a More Compliant Judiciary? — Part I', above n 3, 316.

Internal independence and its relation to judicial administration has been raised in several international statements of principle or standards of judicial independence.³⁵ The primary concern in these statements is to ensure judicial, rather than executive, control³⁶ of key aspects of administration, such as allocation of work³⁷ or transfer of judges,³⁸ and to emphasise that judicial hierarchies cannot be a basis for interference with adjudicative decision-making.³⁹ This emphasis on separation of executive from judicial administration recognises the potential for administrative direction to impact negatively upon adjudication, and so to violate judicial independence.⁴⁰

These norms anticipate that once within judicial control, the exercise of such administrative authority will be accepted by judicial officers.

Generally, one cannot deny the need for administrative supervision over judges to promote efficiency of judicial administration. Therefore, judges must submit to administrative guidance by other judges who are in charge of the administrative management of the court. Such administrative guidance should be directed to matters of case management and court administration but should not refer to the exercise of the judicial function itself, ie the procedural and substantive decision-making aspect of adjudication.⁴¹

Although international norms support giving a chief judicial officer supervisory authority in administrative matters,⁴² the allocation of administrative authority to the judiciary does not, in and of itself, resolve all tensions between proper judicial administration and internal judicial independence. International norms do not give unfettered

³⁵ Shimon Shetreet and Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* (1985).

³⁶ Leonard King, 'The IBA Standards on Judicial Independence: An Australian Perspective' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 403, 413; Shetreet, 'Judicial Independence: New Conceptual Dimension and Contemporary Challenges', above n 18, 608, 630.

³⁷ 'International Bar Association Code of Minimum Standards of Judicial Independence' [9], [11] in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 388, 389; 'The Syracuse Draft Principles on the Independence of the Judiciary' [Arts 8,19] in Shimon Shetreet and Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* (1985) 414, 415, 418; 'Universal Declaration on the Independence of Justice' [2.43] in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 447.

³⁸ 'International Bar Association Code of Minimum Standards of Judicial Independence' [12], above n 36, 389; 'The Syracuse Draft Principles on the Independence of the Judiciary' [Art 9], above n 36, 415; 'Universal Declaration on the Independence of Justice' [2.18], above n 36, 415.

³⁹ 'International Bar Association Code of Minimum Standards of Judicial Independence' [47], above n 36, 392; 'The Syracuse Draft Principles on the Independence of the Judiciary' [Art 18], above n 36, 417; 'Universal Declaration on the Independence of Justice' [2.03], above n 36, 450.

⁴⁰ Church and Sallmann, above n 9, 7–14.

⁴¹ Shetreet, 'Judicial Independence; The Contemporary Debate', above n 34, 642.

⁴² 'Universal Declaration on the Independence of Justice' [2.44], above n 36, 454.

power to judicial administrators. Some of these administrative powers are expressly subject to consultation or even consent.⁴³ The authority of the chief judicial officer of each court and the way that authority is used in specific situations remains a site of controversy.⁴⁴

The following section examines specific powers of the chief judicial officers of Australian courts, contrasting the authority of Chief Magistrates with Chief Judges and Chief Justices. We then consider several decisions in which a magistrate challenged an apparently administrative direction of a Chief Magistrate.

IV The Powers of Chief Judges and Chief Justices

James Crawford asserts that, at common law, a Chief Justice had no inherent supervisory authority over colleagues.⁴⁵ However, legislation, convention and practice establish some degree of authority to administer courts in a range of ways which inevitably involves some direction to the judiciary.⁴⁶ Chief Justices and Chief Judges in several Australian courts are given explicit statutory authority for some aspects of the administration or organisation of the work of the court, including

- ensuring the orderly and expeditious discharge of the business of the court,⁴⁷
- being responsible for the administration of the court,⁴⁸
- managing the administrative affairs of the court,⁴⁹
- giving directions for sittings,⁵⁰
- determining who is to constitute the court in particular matters,⁵¹ and
- making 'intra-curial arrangements'.⁵²

There are no similar provisions for the Tasmanian, Victorian or Western

⁴³ 'International Bar Association Code of Minimum Standards of Judicial Independence' [11], [12], above n 36, 389; 'The Syracuse Draft Principles on the Independence of the Judiciary' [Art 9], above n 36, 415; 'Universal Declaration on the Independence of Justice' [2.18], above n 36, 452.

⁴⁴ Forde, above n 10.

⁴⁵ James Crawford, *Australian Courts of Law* (3rd ed, 1993) 67.

⁴⁶ Drummond, 'Towards a More Compliant Judiciary? – Part I', above n 3, 316–7; Crawford and Opeskin, above n 13, 129–30.

⁴⁷ *Federal Court of Australia Act 1976* (Cth) ss 15(1), 18A(1); *Federal Magistrates Act 1999* (Cth) s 12(1); *Supreme Court Act 1933* (ACT) s 7; *Supreme Court Act* (NT) s 34; *Supreme Court of Queensland Act 1991* s 13A; *District Court of Queensland Act 1967* s 28A(1); *Family Law Act 1975* (Cth) s 21B(1).

⁴⁸ *Supreme Court of Act 1935* (SA) s 9A; *District Court Act 1991* (SA) s 11.

⁴⁹ *Family Law Act 1975* (Cth) s 38A(1).

⁵⁰ *District Court of Western Australia Act 1969* s 20; *Federal Magistrates Act 1999* (Cth) s 12(4).

⁵¹ *Federal Court of Australia Act 1976* (Cth) s 15; *Federal Magistrates Act 1999* (Cth) s 12(3).

⁵² *Supreme Court Act 1970* (NSW) s 39(1).

Australian Supreme Courts or the Victorian County Court.

The High Court, as a result of internal tensions when Sir Garfield Barwick was Chief Justice,⁵³ is expressly empowered to 'administer its own affairs',⁵⁴ a power which can be exercised 'by the justices or by a majority of them'.⁵⁵ It is the only Australian court where the administration of the court is entirely and expressly located collectively in the judges of the court. A similar provision authorising the Federal Magistrates Court to 'administer its own affairs' is expressly made subject to other provisions which give the Chief Federal Magistrate specific administrative powers.⁵⁶

The administrative authority of the chief judicial officer, even when created by legislation, may be limited in various ways. Sometimes powers are expressly subject to consultation with the judges of the court.⁵⁷ As part of their general administrative authority, the Chief Justices of the Federal Court, of the ACT Supreme Court and of the Northern Territory Supreme Court have the power to determine which judges are to 'constitute the court in particular matters or classes of matters'.⁵⁸ In the Federal Court and in the ACT Supreme Court, this power is expressly '... subject to such consultation with the judges as appropriate and practicable'.⁵⁹ The Northern Territory Chief Justice's power is subject to 'such consultation as the Chief Justice thinks is appropriate'.⁶⁰

The New South Wales Supreme Court appears to envision judges acting collectively in some circumstances, though the authority of the Chief Justice is also maintained in several respects.⁶¹ Within a Division of the Supreme Court, 'intra-curial arrangements' shall be made by the Chief Justice or the Chief Judge of the Division, subject to arrangements which 'may be made by all the Divisional Judges or by a majority of those of them present at a meeting summoned for that purpose and attended by at least ten of them'.⁶² Except for arrangements made collectively, Chief Judges of Divisions are 'responsible to ... and subject to the direction of the Chief Justice ...' in relation to administration.⁶³ In a slightly less hierarchical tone, 'intra-curial arrangements' for the Court of Appeal are to be made by the President of the Court, 'with the concurrence of the Chief Justice'.⁶⁴ The overall effect is to confirm the administrative authority of the Chief

⁵³ Forde, above n 10, [9]–[10].

⁵⁴ *High Court of Australia Act 1979* (Cth) s 17(1).

⁵⁵ *High Court of Australia Act 1979* (Cth) s 46(1).

⁵⁶ *Federal Magistrates Act 1999* (Cth) s 89.

⁵⁷ *Federal Court of Australia Act 1975* s 15(1); *Supreme Court Act 1933* (ACT) s 7; *Supreme Court Act* (NT) s 34.

⁵⁸ *Federal Court of Australia Act 1975* s 15(1); *Supreme Court Act 1933* (ACT) s 7; *Supreme Court Act* (NT) s 34.

⁵⁹ *Federal Court of Australia Act 1975* s 15(1); *Supreme Court Act 1933* (ACT) s 7.

⁶⁰ *Supreme Court Act* (NT) s 34.

⁶¹ *Supreme Court Act 1970* (NSW) s 39.

⁶² *Supreme Court Act 1970* (NSW) s 39(2)(a).

⁶³ *Supreme Court Act 1970* (NSW) s 39(2A).

⁶⁴ *Supreme Court Act 1970* (NSW) s 39(1).

Justice, and to clearly recognise the power of judges, acting collectively, to make different arrangements.

In Victoria there is a provision for a council of judges in the Supreme Court and in the County Court which must meet at least once a year to consider operation of rules, working of the offices of court, and administration and court procedure.⁶⁵ There is a similar provision for a council of judges in South Australia.⁶⁶ These provisions imply, but do not expressly require, consultation. In contrast, there is an express requirement of the agreement of a majority of the judges of the Victorian Supreme Court before the creation of a new office in the court.⁶⁷

This emphasis on consultation and collegiality recognises that the line between appropriate administration and internal independence of judicial decision-making is not always clear cut, and that hierarchical administrative authority can be misused, whether deliberately or not, with a risk of '... latent pressures on judges which may result in subservience to judicial superiors.'⁶⁸ This risk appears to be even greater for the magistracy in light of the greater authority of Chief Magistrates.

V Powers of Chief Magistrates

All Chief Magistrates in Australia have some express administrative authority. This often includes specific powers of direction, such as assigning magistrates to particular locations. Chief Magistrates also have informal and sometimes formal roles in disciplining magistrates in relation to misconduct. Several recent Queensland decisions have addressed issues which arise when a magistrate objects to a direction from a Chief Magistrate.

A General Powers of Administration and Direction

In all Australian jurisdictions, some aspects of the authority of Chief Magistrates are spelled out in legislation, sometimes in greater detail than for the superior courts. These provisions are more likely to include

⁶⁵ *Supreme Court Act 1986* (Vic) s 28(1); *County Court Act 1958* (Vic) s 87.

⁶⁶ *Supreme Court Act 1935* (SA) s 16.

⁶⁷ *Supreme Court Act 1986* (Vic) s 104(2). Even the question of wearing robes has come in for legislative attention. Compare Victoria's *Supreme Court Act 1986* s 9A which requires consultation among the judges before any decision about robing is made, with NSW's *Local Courts Act 1982* s 19A which simply forbids magistrates to robe. In South Australia it is a matter of choice for the individual magistrate: 'Magistrates Robing' (2002) (April) *Law Society Bulletin*.

⁶⁸ Shetreet, 'The Limits of Judicial Accountability', above n 3, 11; Church and Sallmann, above n 9, 67-71.

reference to specific powers of direction, and less likely to require formal consultation. Legislation sometimes imposes an express obligation on magistrates to obey administrative directions, a provision not found in any of the legislation applicable to the higher courts.

In several jurisdictions the Chief Magistrate is given general responsibility for managing the court and ensuring its orderly conduct of business.⁶⁹ In the ACT the Chief Magistrate 'is responsible for ensuring the orderly and prompt discharge of the business of the Magistrates Court'.⁷⁰ In South Australia the Chief Magistrate is responsible for 'the administration of the magistracy'.⁷¹ In Tasmania the Chief Magistrate 'is responsible for ensuring the orderly and expeditious discharge of the business of the lower courts' and determining the administrative procedures.⁷² In Queensland the Chief Magistrate is responsible for ensuring the 'orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts'.⁷³

In most jurisdictions the Chief Magistrate is given express power to direct other magistrates in some specific aspects of their work, such as assigning magistrates to divisions, locations, duties or functions; these powers may be in addition to, or instead of, a general administrative power.⁷⁴ When the Tasmanian provision was enacted in 1987, the practical significance of these powers was queried in the Tasmanian Parliament. One member asked the Attorney-General '... what happens when the Chief Magistrate says, "Go and do this" and Magistrate A says, "No?"'⁷⁵ There was then some discussion about '... an agreement where ... magistrates say they will accept the reasonable direction of the Chief Magistrate'.⁷⁶ The Attorney-General expressed the view that if a magistrate refused to accept an appropriate direction, the magistrate could either resign or be brought before the Parliament to be suspended or sacked.⁷⁷ A version of this problem has arisen on several occasions in Queensland, in connection with transfer decisions, and has recently been addressed in case law and further legislation as discussed below.

Perhaps the most startling feature of the authority of Chief Magistrates is the provision in several jurisdictions which imposes an express duty on magistrates to comply with such directions.

⁶⁹ *Magistrates Act 1983* (SA) s 7; *Magistrates Court Act 1987* (Tas) s 15(6); *Magistrates Act 1991* (Qld) s 12; *Magistrates Court Act 1930* (ACT) s 10G.

⁷⁰ *Magistrates Court Act 1930* (ACT) s 10G.

⁷¹ *Magistrates Act 1983* (SA) s 7(1).

⁷² *Magistrates Court Act 1987* (Tas) s 15(6).

⁷³ *Magistrates Act 1991* (Qld) s 12(1).

⁷⁴ *Stipendiary Magistrates Act 1957* (WA) s 10(8); *Local Courts Act 1982* (NSW) ss 11, 14; *Magistrates Act* (NT) s 13A; *Magistrates Court Act 1987* (Tas) s 15(1),(4),(5),(7); *Magistrates' Court Act 1989* (Vic) ss 5(3), 5A, 6(1), 13(1).

⁷⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 8 July 1987, 2073 (J M Bennett, Attorney-General).

⁷⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 8 July 1987, 2074 (J C White).

⁷⁷ Tasmania, *Parliamentary Debates*, above n 75.

- 'Every Magistrate must comply with every reasonable direction given to, or requirement made by, the Chief Magistrate or by another Magistrate authorised in that behalf by the Chief Magistrate.'⁷⁸
- 'A Magistrate shall comply with any direction which relates to the Magistrate given under subsection (2) [location of court sittings] by the Chief Magistrate.'⁷⁹
- 'The Chief Magistrate may require specified functions of Magistrates to be exercised by specified Magistrates or Magistrates of a specified class, and any Magistrate of whom a requirement is made under this subsection shall comply with the requirement.'⁸⁰
- 'It shall be the duty of stipendiary magistrates to act in accordance with the arrangements and assignments made by the Chief Stipendiary Magistrate under this section.'⁸¹
- 'A Magistrate or Justice must comply with a direction given by the Chief Magistrate.'⁸²
- 'A magistrate (being a stipendiary magistrate or an acting magistrate) is responsible to the Chief Magistrate in relation to administrative matters and, in particular, is subject to direction by the Chief Magistrate as to the duties to be performed by him and the times and places at which those duties are to be performed.'⁸³
- 'A magistrate or acting magistrate must carry out the duties that are from time to time assigned to him or her by the Chief Magistrate.'⁸⁴

Some legislation appears to expressly limit the duty to obey to a particular direction or type of direction, such as in relation to sittings,⁸⁵ or 'arrangements and assignments'.⁸⁶ In other jurisdictions, the directions are more generally expressed as relating to 'duties'⁸⁷ or 'specified functions'.⁸⁸ In Queensland, the power is not limited to a particular kind of direction, but it must be a 'reasonable direction ... or requirement'⁸⁹ (emphasis added).

There is nothing to indicate that these provisions are intended to, or have been interpreted as, relating to the adjudicative functions of magistrates. However, as pointed out by Shetreet, 'hierarchical patterns', 'latent pressures' and 'subservience to judicial superiors' can reduce

⁷⁸ *Magistrates Act 1991* (Qld) s 41(1).

⁷⁹ *Local Courts Act 1982* (NSW) s 11(4).

⁸⁰ *Local Courts Act 1982* (NSW) s 14(4).

⁸¹ *Stipendiary Magistrates Act 1957* (WA) s 10(9).

⁸² *Magistrates Act* (NT) s 13A(3).

⁸³ *Magistrates Act 1983* (SA) s 8(1).

⁸⁴ *Magistrates' Court Act 1989* (Vic) s 13(2).

⁸⁵ *Local Courts Act 1982* (NSW) s 11(2).

⁸⁶ *Stipendiary Magistrates Act 1957* (WA) s 10(9).

⁸⁷ *Magistrates' Court Act 1989* (Vic) s 13; *Magistrates Act* (NT) s 13A; *Magistrates Act 1983* (SA) s 8(1).

⁸⁸ *Local Courts Act 1982* (NSW) s 14(4).

⁸⁹ *Magistrates Act 1991* (Qld) s 41(1).

judicial independence.⁹⁰ An express requirement to obey increases the risk of a form of subordination which could ‘chill’ judicial independence.

No similar provisions exist in any legislation relating to the higher courts although, of course, some duty to obey could be implied in giving the Chief Judge or Justice the responsibility for administration of the court. Such an obligation appears to be accepted as a matter of general principle. ‘As a general rule, a judge cannot rely on ... internal independence [as a] shield from guidance by the judges who are responsible for administration of the court’.⁹¹

The express obligations on magistrates to obey are in sharp contrast to the greater emphasis on consultation, or even collective action, in the higher courts, as discussed above. There are very few formal requirements for Chief Magistrates to consult with magistrates. Only the ACT and Queensland have express provisions for consultation. In Victoria the Council of Magistrates implies consultation in the same way as the Councils of Judges in the County Court and Supreme Court.

- In the ACT the power to make arrangements for a magistrate who is to constitute a court in particular matters is expressly subject to ‘such consultation with the Magistrates ... as [the Chief Magistrate considers] ... appropriate and practicable’.⁹²
- In Queensland the general power to ensure the ‘orderly and expeditious discharge of the business of the lower courts’ is expressed to be subject to ‘such consultation with Magistrates as the Chief Magistrate considers appropriate and practicable’.⁹³
- Queensland has very recently (November 2003)⁹⁴ established a ‘court governance advisory committee’.⁹⁵ This committee’s primary functions are to make recommendations on transfer policy, but it also may ‘consider and make recommendations about other matters affecting Magistrates Courts referred to it by the Chief Magistrate’.⁹⁶
- In Victoria, the magistrates collectively make up the Council of Magistrates, ‘which must meet once ... [a] year’ to review the operation of the Act, ‘the working of the offices of the court’ and examine procedural systems and the administration of justice in the Court.⁹⁷ This provision is identical to the parallel provisions for the Supreme Court and County Court.⁹⁸ As discussed, this implies, but does not expressly require, consultation.

⁹⁰ Shetreet, ‘The Limits of Judicial Accountability’, above n 3, 11.

⁹¹ Shetreet, ‘Judicial Independence: New Conceptual Dimensions and Contemporary Challenges’, above n 18, 637.

⁹² *Magistrates Court Act 1930* (ACT) s 10G.

⁹³ *Magistrates Act 1991* (Qld) s 12(2).

⁹⁴ *Magistrates Amendment Act 2003* (Qld).

⁹⁵ *Magistrates Act 1991* (Qld) s 15.

⁹⁶ *Magistrates Act 1991* (Qld) s 16.

⁹⁷ *Magistrates’ Court Act 1989* (Vic) s15.

⁹⁸ *Supreme Court Act 1986* (Vic) s 28; *County Court Act 1958* (Vic) s 87.

- In Tasmania some of the determinations of the Chief Magistrate for jurisdictions of courts and administrative procedures are to be done in consultation with the Administrator.⁹⁹

In addition to consultation, two jurisdictions have other express limits on the Chief Magistrate's powers. In South Australia the Chief Magistrate is 'responsible, subject to the control and direction of the Chief Justice, for the administration of the magistracy'.¹⁰⁰ There are no similar provisions for Chief Judges or Justices in any of the higher courts to be supervised by a chief judicial officer of another court.¹⁰¹ In the Northern Territory the Chief Magistrate may not give a direction for the purpose of affecting the exercise by a magistrate or justice of his or her judicial discretion.¹⁰²

This last provision expresses the central proposition of internal judicial independence which should apply to all judicial officers, whether governed by legislation of the sort discussed here, or any implied or inherent power of administration. Judicial officers are to act independently in the exercise of their adjudicative functions and cannot be directed by any other judicial officer — including the presiding judicial officer — of their court. This was made explicit by the High Court in writing about the Family Court:

[T]he independence of the judiciary includes the independence of judges from one another. The Chief Justice of a superior court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities. ... [R]esponsibility for ensuring the orderly and expeditious discharge of the business of the court ... does not extend to directing, or influencing, or seeking to direct or influence, judges as to how to decide cases that come before them.¹⁰³

This is, of course, a re-statement of the core concept of internal judicial independence and makes explicit that administrative authority of a chief judicial officer does not override judicial independence in the exercise of judicial functions or decisions.

In spite of their formal powers, there is a view that the principles of judicial independence require that Chief Magistrates are regarded as first among equals.¹⁰⁴ This attitude has been strongly urged by some Chief

⁹⁹ *Magistrates Court Act 1987* (Tas) s 15(4),(6),(8).

¹⁰⁰ *Magistrates Act 1983* (SA) s7(1).

¹⁰¹ The Chief Judges of the Divisions of the New South Wales Supreme Court and the President of the Court of Appeal are subject to their own Chief Justice: *Supreme Court Act 1970* (NSW) s 39(1).

¹⁰² *Magistrates Act* (NT) s 13A(2).

¹⁰³ *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1582 [29] (Gleeson CJ and Gummow JJ), cited in Drummond, 'Towards a More Compliant Judiciary? – Part I', above n 3, 317.

¹⁰⁴ *Chief Magistrate v Magistrate Thacker* (Determination of Judicial Committee pursuant to Part 4 *Magistrates Act 1991* (Qld), 11 October 2002, Wolfe Chief Judge, Davies and White JJ), [16]; Forde, above n 10.

Magistrates as well as magistrates themselves.¹⁰⁵ Nonetheless, there are some additional status features which distinguish Chief Magistrates from other magistrates. In both New South Wales and Queensland there is provision for the Chief Magistrate to have the conditions of appointment, including superannuation, of a District Court judge.¹⁰⁶ In Queensland this includes an express recognition that the Chief Magistrate can only be removed as Chief Magistrate through the provisions for removal of a judge.¹⁰⁷ In Victoria, there is provision for the Chief Magistrate to have a judicial pension.¹⁰⁸

Overall, the statutory power of Chief Magistrates to direct magistrates in various ways encompasses general and specific directions. Magistrates are expressly obligated to obey and statutory obligations of consultation are limited. However, the question still remains: what happens when a magistrate refuses a direction? This has been addressed in several recent Queensland cases.

B *Assignment of Magistrates to Specific Locations*

In several jurisdictions, the administrative power of Chief Magistrates expressly includes power to assign magistrates to specific locations and to arrange the locations for court sittings.¹⁰⁹ As Australia has a relatively small population, spread over a very large geographic area, magistrates are sometimes located in quite remote areas and must travel widely on circuit. A transfer to a distant location for a period of years will have a significant impact on the magistrate's professional and personal life.

There have been two recent disputes between former Chief Magistrates and magistrates in Queensland about the power of the Chief Magistrate to compel a magistrate to relocate to a remote area. These Queensland disputes have been highly publicised, formally contested and have resulted in reported decisions of the Queensland Supreme Court. Although transfers may be a source of tension within other courts, they have not been resolved by formal public judicial determinations.

In *Payne v Deer*¹¹⁰ a newly appointed Queensland magistrate successfully challenged an order of the Chief Magistrate for immediate transfer to a remote area of Queensland. Within one month of her appointment, Magistrate Payne was directed to transfer from Brisbane to Townsville within two weeks. At that time she was separated from her husband

¹⁰⁵ Remarks by Chief Magistrate Ron Cahill, Phoenix Magistrates Program, National Judicial College of Australia, Canberra, 6 August 2003.

¹⁰⁶ *Local Courts Act 1982* (NSW) s 14A; *Magistrates Act 1991* (Qld) s 11.

¹⁰⁷ *Magistrates Act 1991* (Qld) s 11(4).

¹⁰⁸ *Magistrates' Court Act 1989* (Vic) s 10A(1).

¹⁰⁹ *Magistrates Act* (NT) s 13A(1); *Magistrates Act 1991* (Qld) s 12(2)(a); *Magistrates Court Act 1987* (Tas) s 15(5); *Magistrates Court Act 1991* (SA) s 16(3); *Magistrates' Court Act 1989* (Vic) s 5(3); *Stipendiary Magistrates Act 1957* (WA) s 10(1),(4); *Local Courts Act 1982* (NSW) s 11(2); *Federal Magistrates Act 1999* (Cth) s 12(4).

¹¹⁰ [2000] 1 Qd R 535.

with whom she shared the care of five children all aged under 12. The Queensland Supreme Court held that the magistrate could not refuse a transfer, but there was an issue as to timing.¹¹¹ The immediate transfer direction was ‘a decision which could not reasonably have been made [and] ... therefore involved an improper exercise of power and should be set aside’.¹¹² The Chief Magistrate retired shortly after the decision. This case led to changes in the *Magistrates Act* requiring consultation prior to transfer and providing a procedure to challenge transfer decisions in a committee of the Supreme Court.¹¹³

In 2002, another magistrate successfully challenged a transfer order, from the next Chief Magistrate.¹¹⁴ Magistrate Thacker had indicated that she would accept a transfer to Townsville and was given sufficient time to plan for the move. After the decision to transfer her was made, she objected on the basis of family circumstances — her husband’s work and her children’s ‘tender years’.¹¹⁵ The committee set aside the transfer order, on the basis that fairness required that all magistrates be canvassed to see if someone might accept a voluntary transfer.

New legislation has recently (November 2003) been enacted which creates an elaborate administrative structure for consultation, and possible challenge, for transfer decisions. However, there is now an express provision that a magistrate’s refusal of a transfer decision ‘without reasonable excuse’ can amount to proper cause for removal.¹¹⁶ International principles generally state that transfer should be made with the consent of the judicial officer, but that consent should not be withheld unreasonably.¹¹⁷ These standards do not specifically address the consequence of an unreasonable withholding of consent.

C Discipline

The new Queensland provision raises the question of whether removal is an appropriate sanction for a judicial officer who refuses to accept guidance or direction from a chief judicial officer in an apparently administrative matter. Although a general consideration of the grounds and procedures for removal of judicial officers is beyond the scope of this paper, the role

¹¹¹ *Payne v Deer* [2000] 1 Qd R 535, 541.

¹¹² *Payne v Deer* [2000] 1 Qd R 535, 541.

¹¹³ *Magistrates Act* 1991 (Qld) ss 24, 33.

¹¹⁴ *Chief Magistrate v Magistrate Thacker* (Determination of Judicial Committee pursuant to Part 4 *Magistrates Act* 1991 (Qld), 11 October 2002, Wolfe Chief Judge, Davies and White JJ).

¹¹⁵ *Chief Magistrate v Magistrate Thacker* (Determination of Judicial Committee pursuant to Part 4 *Magistrates Act* 1991 (Qld), 11 October 2002, Wolfe Chief Judge, Davies and White JJ), [11].

¹¹⁶ *Magistrates Act* 1991 (Qld) s 43(4)(d).

¹¹⁷ ‘International Bar Association Code of Minimum Standards of Judicial Independence’ [12], above n 36, 389; ‘Universal Declaration on the Independence of Justice’ [2.18], above n 36, 447.

of chief judicial officers in dealing with forms of misconduct which does not justify removal is rarely addressed in legislation.

Traditionally, when a judge or magistrate is not performing up to standard, it is the role of the chief judicial officer of the court to address the matter internally and informally.

What normally happens is that a judicial officer who is not performing to standards may be assigned very little or no work by the head of his [sic] court, is given sick leave or, in the case of magistrate, assigned to purely administrative functions. Cases do arise from time to time where judges become feeble, addicted to alcohol or otherwise incapable of performing their judicial duties. In such cases it is generally left to the Chief Justice or Chief Judge to endeavour to persuade the judge to take sick leave or to retire. Normally, these procedures have proved adequate to cope with difficulties of this kind, without the need for special machinery.¹¹⁸

This emphasis on informal complaint handling is still the norm in some jurisdictions, as indicated by a very recent Victorian analysis.¹¹⁹

In contrast, New South Wales has established a Judicial Commission which is empowered to receive and investigate complaints against judges and magistrates.¹²⁰ If the matter is minor — that is, one which would not justify removal — the Commission may, after a private hearing by a Conduct Division composed entirely of current or retired judicial officers, dismiss an unsubstantiated complaint.¹²¹ If the complaint is wholly or partially substantiated, the commission may inform the judicial officer involved and/or refer the complaint to an appropriate body or person.¹²² In the case of a substantiated minor complaint, this would be the chief judicial officer of the court.¹²³

There was considerable controversy about the establishment of the commission, though its operation has generally been less intrusive — some might say less effective — than anticipated.¹²⁴ No similar commissions

¹¹⁸ Justice Michael Kirby, 'Australia' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 8–27, 20.

¹¹⁹ Peter A Sallmann, *The Judicial Conduct and Complaints System in Victoria* (2003).

¹²⁰ *Judicial Officers Act 1986* (NSW) s 14.

¹²¹ *Judicial Officers Act 1986* (NSW) s 26.

¹²² *Judicial Officers Act 1986* (NSW) ss 21, 27, 28, 35.

¹²³ *Judicial Officers Act 1986* (NSW) s 21(2).

¹²⁴ Campbell and Lee, above n 25, 120. In 2001–02, 107 complaints were either examined and dismissed under sections 18 and 20 of the *Judicial Officers Act 1986* (NSW), or otherwise disposed of. Nineteen complaints remained pending at 30 June 2002: Judicial Commission of New South Wales, *Annual Report 2001–2003*; (2003) 20. In 2002–03, of 84 complaints made against judicial officers none were substantiated, although there were still 7 pending at 30 June 2003. One serious complaint against a magistrate, made in January 2002, was referred to the Conduct Division and a public hearing commenced 15 July 2003. However, the investigation was abandoned shortly afterwards, when the magistrate concerned resigned: Judicial Commission of New South Wales, *Annual Report 2002–2003*; (2003) 27.

have been established, except in the ACT,¹²⁵ and a recent report in Victoria recommended against such a system after its proposal was 'vigorously opposed by all three courts and Victorian Civil and Administrative Tribunal [VCAT] as well as the Bar and the Law Institute'.¹²⁶

Unlike the considerable formality of the Judicial Commission structure, and in contrast to the considerable informality of the usual role of a chief judicial officer in discipline of judges and magistrates, the Chief Magistrate of Queensland had (until November 2003) a unique statutory authority to formally reprimand magistrates:

- (8) The Chief Magistrate may discipline by way of reprimand a magistrate who, to the Chief Magistrate's satisfaction—
- (a) is seriously incompetent or inefficient in the discharge of the administrative duties of office; or
 - (b) is seriously negligent, careless or indolent in the discharge of the administrative duties of office; or
 - (c) is guilty of misconduct; or
 - (d) is absent from duty without leave or reasonable excuse; or
 - (e) wilfully fails to comply with a reasonable direction given by the Chief Magistrate or a magistrate authorised to give the direction; or
 - (f) is guilty of conduct unbecoming a magistrate.¹²⁷

Although this power was unique to Queensland,¹²⁸ some insight into the usefulness of a legislative power enabling a chief judicial officer to discipline judicial officers short of removal can be gained from cases which arose under this statutory authority. Also, some of the grounds for discipline, such as incompetence or misconduct are similar to the grounds for suspension and/or removal in other jurisdictions: Queensland, Victoria, the Northern Territory and South Australia.¹²⁹

On three recent occasions, disciplinary action taken by a Queensland Chief Magistrate against a magistrate for failing to comply with a direction of the Chief Magistrate was challenged in the Supreme Court by the magistrate affected, and the Supreme Court has upheld the challenge.

In *Payne v Deer*, Magistrate Payne was disciplined by way of reprimand for 'wilful failure to comply with the direction that she sit at Townsville'.¹³⁰ This decision was set aside as part of the Supreme Court's decision on the transfer order itself.

¹²⁵ *Judicial Commissions Act 1994* (ACT).

¹²⁶ Sallmann, above n 119, 67.

¹²⁷ *Magistrates Act 1991* (Qld) s 10(8), repealed by *Magistrates Amendment Act 2003* (Qld) (No 86 of 2003). Note that prior to magistrates' courts being separated from the public service, the proper direction for complaints, at least in some instances, would have been through the executive to the Attorney General: *Mann v Cahill* [1999] ACTSC 7 (24 February 1999) [16].

¹²⁸ *Gribbin & Anor v Fingleton* [2002] QSC 390 (27 November 2002) [11].

¹²⁹ *Magistrates Act 1991* (Qld) s 43(4); *Magistrates' Court Act 1989* (Vic) s 11(2); *Magistrates Act* (NT) s 10; *Magistrates Act 1983* (SA) s 11(8).

¹³⁰ *Payne v Deer* [2000] 1 Qd R 535, 536.

In *Cornack v Fingleton*,¹³¹ Magistrate Cornack sought administrative review of the Chief Magistrate's direction that she attend a meeting or be reprimanded. The Chief Magistrate had received complaints about the conduct of Magistrate Cornack. The Chief Magistrate directed Magistrate Cornack to meet with the Chief Magistrate or risk being reprimanded. There were a series of emails about the proposed meeting with Ms Cornack attempting to clarify issues such as what was to be discussed and who would/could attend. Eventually the meeting was held. The Chief Magistrate directed Magistrate Cornack to give a written response to the complaints, addressing how she planned to 'improve her demeanour in court'.¹³²

The Supreme Court held that it was beyond power for the Chief Magistrate to direct Magistrate Cornack to attend a meeting under threat of discipline,¹³³ to compel Magistrate Cornack to modify the way she conducted cases¹³⁴ or threaten to limit cases Magistrate Cornack heard. Such directions would be a breach of internal judicial independence. In reaching this conclusion the court stressed that, as the legislation did not clearly abrogate internal judicial independence, the principle was presumed to apply, and so found that the Chief Magistrate had acted beyond her power.¹³⁵ '[T]he fundamental proposition...that the process followed by the Chief Magistrate impinged on internal judicial independence has been made out.'¹³⁶

In *Gribbin and Thacker v Fingleton*,¹³⁷ Supervising Magistrate Gribbin successfully challenged a direction from the Chief Magistrate to 'show cause' as to why he should not be reprimanded and removed as a supervising magistrate for conduct which was allegedly 'disloyal'.¹³⁸ The specific elements of disloyalty referred to his role in the State Magistrates' Association, providing an affidavit in support of Magistrate Thacker as part of her challenge to a transfer order and an alleged breach of confidence regarding an email from the Chief Magistrate about another magistrate. Principles of judicial independence are not explicitly discussed in the Supreme Court decision. The areas of conflict between the Chief Magistrate and Magistrate Gribbin did not directly raise internal judicial independence issues as there was no express pressure on Magistrate Gribbin's adjudicative function. The Supreme Court held that providing the affidavit in support of Magistrate Thacker's challenge was an irrelevant basis for a decision to reprimand and so set aside the Chief Magistrate's show cause order. The court did acknowledge that a sufficient breakdown of trust between the Chief Magistrate and a supervising magistrate,

¹³¹ [2002] QSC 391.

¹³² *Cornack v Fingleton* [2002] QSC 391, [26].

¹³³ *Ibid* [34–5].

¹³⁴ *Ibid* [36].

¹³⁵ *Ibid* [37].

¹³⁶ *Ibid* [118].

¹³⁷ *Gribbin & Anor v Fingleton* [2002] QSC 390.

could be appropriate grounds for terminating a magistrate in the role of supervising magistrate.¹³⁹

Magistrate Gribbin referred the email, indicating that he could be removed as supervising magistrate for providing an affidavit in support of Magistrate Thacker, to the Queensland Crime and Misconduct Commission, which referred the complaint to the Director of Public Prosecutions. The Chief Magistrate was charged with a violation of a recently enacted law to protect witnesses from intimidation, convicted and sentenced to a twelve month term of imprisonment, a result many justifiably regard as shocking.¹⁴⁰ The sentence was reduced on appeal to six months.¹⁴¹ This reduction acknowledged her previously unblemished record, considerable public service, personal and professional disgrace, loss of legal career and consequent financial hardship. This matter is currently on appeal to the High Court.

VI Conclusion: Magistrates, Chief Magistrates and Internal Judicial Independence

Although judicial independence principles are not expressly raised in all judgments, the Queensland cases can be read as demonstrating a strong judicial commitment to the protection of the internal judicial independence of magistrates in the face of directions from the Chief Magistrate which were substantially — and, in some cases, solely — administrative in nature. Except in the case of Magistrate Cornack, the attempted reprimands were unrelated to core adjudicative activities. However, the atmosphere of tension, distrust and suspicion, which was apparent within the court, may have made it more difficult for the court to carry out its judicial functions effectively and efficiently, creating a risk of ‘chilling’ judicial independence.

Any reading of these cases solely on grounds of internal judicial independence or a Chief Magistrate’s administrative authority may be too narrow. Several of the judgments considered in this paper disclose the existence and impact of wider political and social factors in all disputes.

- In *Payne v Deer* the court initially ‘urged the parties to ... resolve their differences by negotiation [because] the public ventilation of these issues was not good for the administration of justice generally.’¹⁴² Later in the case, the court comments that:

¹³⁸ Ibid [28].

¹³⁹ Ibid [58].

¹⁴⁰ ABC Radio National, ‘The Sentencing of Queensland Chief Magistrate Di Fingleton’, *The Law Report*, 10 June 2003 <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s876063.htm>> at 2 June 2004.

¹⁴¹ *R v Fingleton* [2003] QCA 266.

¹⁴² *Payne v Deer* [2000] 1 Qd R 535, 536 [3].

The case has attracted a lot of public attention. I have, of course, determined only on the evidence given before me. I will, however, mention having read in the newspaper, of a suggestion that the Chief Magistrate may possibly have been influenced against Ms Payne by her being a woman and of Aboriginal descent. ... [T]he evidence before the court suggested not the merest ground for thinking that the Chief Magistrate may have been influenced in such an improper way.¹⁴³

- In *Gribbin*, one of the other areas of conflict between the Chief Magistrate and Magistrate Gribbin revolved around his role in communications with another magistrate who had allegedly communicated with Magistrate Cornack's solicitor, as well as Magistrate Gribbin's letter to the Attorney-General requesting legislative changes for greater recognition of magistrates as independent judicial officers, including repeal of the provisions regarding reprimand.¹⁴⁴
- In *Cornack*, the court began its judgment by indicating the need to '...touch in some detail on the history of the relationship between the ... Chief Magistrate. During the hearing there was an allegation — rejected by the court — that Magistrate Cornack had begun the judicial review in bad faith. After the hearing, but before a decision was rendered, the Chief Magistrate offered an undertaking not to proceed with any discipline against Magistrate Cornack.¹⁴⁵
- In *Thacker*, the court commented that 'there are complaints from a number of magistrates ... that ... the [transfer] policy was not applied fairly'.¹⁴⁶ Later, the court also points out that 'The Chief Magistrate has required magistrates not to discuss with others circumstances surrounding transfers or possible transfers. Unfortunately, that has led to an atmosphere of suspicion, if not distrust'.¹⁴⁷

Recognising the significance of the external political and social context, one commentator has put forward a different view of the most recent Queensland cases. Rosemary Hunter argues persuasively that the process which led to the prosecution and conviction of Diane Fingleton is more accurately understood as reflecting personal and institutional resentment towards a woman who was perceived as a 'double queue-jumper', by being a woman and being appointed as Chief Magistrate ahead of more senior colleagues.¹⁴⁸ This kind of resentment against successful women has been

¹⁴³ Ibid 542 [25.1].

¹⁴⁴ *Gribbin & Anor v Fingleton* [2002] QSC 390.

¹⁴⁵ *Cornack v Fingleton* [2002] QSC 391.

¹⁴⁶ *Chief Magistrate v Magistrate Thacker* (Determination of Judicial Committee pursuant to Part 4 *Magistrates Act* 1991 (Qld), 11 October 2002, [5].

¹⁴⁷ Ibid [14].

¹⁴⁸ Rosemary Hunter, 'Fear and Loathing in the Sunshine State' (2004) 19 *Australian Feminist Studies* 145.

well documented in other jurisdictions and professions.¹⁴⁹ The notion that appointment to higher office should depend on time served or seniority may exist in some bureaucratic or public service contexts, but it has no place in a branch of the judiciary which is no longer part of the public service.

Whatever view is taken of the specific events in Queensland, and the judicial decisions growing out of those conflicts, this review of cases and legislation makes it clear that some aspects of the legislation governing magistrates and Chief Magistrates are inconsistent with the nature and degree of administrative authority imposed on other judicial officers in Australia. While the provisions applicable to magistrates and Chief Magistrates may not fall below the bare minimum constitutional standards necessary to underpin an impartial judiciary,¹⁵⁰ there is no justification for these inconsistencies and change is long overdue. At a minimum, two specific changes are needed:

- The powers and responsibilities of court administration which Chief Magistrates exercise should be expressly made subject to consultation with magistrates at least to the same extent as the administrative authority of Chief Justices and Chief Judges.
- The Chief Magistrate in South Australia need not be subject to the supervision of the Chief Justice. This is the only chief judicial officer in Australia under such an obligation and there is no justification for this distinction.

This analysis is not to suggest that magistrates in Australia are undertaking their judicial duties in any way that displays less independence than other, better protected judicial officers nor is it a suggestion that Chief Magistrates are any more prone to misusing their administrative authority than Chief Justices or Chief Judges. When the wider political and social context is considered, as well as the individualism of judicial officers, the personal qualities of a chief judicial officer and the use of what is perceived as a consultative, rather than a hierarchical approach, may well be more important than formal authority.¹⁵¹ Nonetheless, there is no justification for the lesser protection of magistrates when compared with other judicial officers. Nothing in the present context or current judicial functions of magistrates and their courts would support the existing difference. Formal legal mechanisms which may reduce the internal judicial independence of Australian magistrates is inconsistent with the central role played by the magistracy in the Australian legal system.

¹⁴⁹ Rosemary Hunter, 'Women Barristers and Gender Difference' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 103, 117–8.

¹⁵⁰ *NAALAS v Bradley* [2004] HCA 31 [5, 31].

¹⁵¹ Forde, above n 10, [6]–[10]; Church and Sallmann, above n 9, 69.