PAPER PRESENTED AT THE *BEYOND THE BARRIERS* CONFERENCE

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THE ROLE OF THE MAGISTRACY IN ADMINISTERING THE *DOMESTIC VIOLENCE (FAMILY PROTECTION) ACT* 1989

OR "WOMEN SPEAK UP"

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I think I know, from the sessions yesterday, what I can most usefully speak about, to you, today. I have called my paper, "The Role of the Magistracy...." - alternatively "Women Speak Up".

You may think that title contradictory, because there are only 9 women out of *73* magistrates in Queensland. These new appointments are welcomed by myself, one of six only women at the time of my appointment in 1995. The calibre of recent appointments of women magistrates cannot be underestimated, either. For instance, Ms Tina Previtera, Ms Barbara Tynan and Ms Stephanie Tonkin are all highly respected former private practitioners now a part of our magisterial team. Ms Sheryl Cornack would be well known to many of you from the DV. services on the Gold Coast.

So we, as women, begin to have a voice on the bench. This may be of particular comfort to those of you who work in the area of domestic violence. It may be considered that female judicial officers have a greater understanding of the issues in and around this area, while this is by no means a given.

I carried out some research recently in relation to the effect on the courts of' the appointment of women as judges and magistrates. I was directed to an article relating to research into the acceptance or otherwise of a number of women magistrates in Victoria, at a period in 1991, when a number of women were appointed to that bench. The crux of the research was that, in the end, certainly in the area of criminal law, it did not make much difference as to the gender of the judicial officer. It had been expected that some women would be more lenient sentencers - we are, after all, the nurturers in society. This was not found to be so. (There were no specific findings in relation to the performance of the women magistrates domestic violence applications).

You see, in the end, it was concluded, it is the law that matters. Both to male and female judicial officers. In this regard, I wish to comment on some criticisms of the role of male magistrates in relation to domestic violence, here at the conference and generally. On the whole. the men who make up the Queensland Magistracy are decent men, who are very often appalled by the horrendous stories that come before them in the domestic violence courts. Some are the subject of complaints to me and I wish to talk later about what I can do upon receiving such complaints (and I am most open to them) and as to what I see as some possible conceptual difficulties for magistrates in general in this complicated area. Given that it is an area where magistrates are required to deal with a social problem, albeit involving behaviour otherwise considered and dealt with as criminal, in civil courts, affecting, overwhelmingly women and children. It is not a criminal court, it is not a family court, it is not a children's court - it is a different and, a relatively, new and evolving court.

I referred earlier, to women speaking up. We have heard moving stories here at the conference about survivors of domestic violence, women law reformers working tor important breakthroughs in New Zealand in relation to the protection of children exposed to domestic violence, about the

need for understanding of the complicated issues involved in violence in indigenous communities and about the excellent work being done by workers in the area of d.v. services - all women speaking up.

And isn't this what irritates so many men?? And here I am - a woman - at the top of the magistracy, speaking up about what I believe I can do to help facilitate the appropriate interpretation and administration of this vital piece of legislation. It is often women speaking up that gets them into trouble in the first place, although I was reminded by Ruth Busch yesterday, that so many women experience horrendous violence in silence - so that the children won't hear; so that he will stop if only she doesn't answer him back.

This legislation - the Domestic Violence (Family Protection) Act 1989 - gives so many women the opportunity to speak up and be heard, given that it is generally accepted that women are overwhelmingly the victims of domestic violence. I have heard the 'D.V. Court" as it is colloquially referred to in the system, referred to as

"The Women's Court". I don't see why that should be resiled from at all. It is the court where women get to speak up, to say that what they have been subjected to is not good enough and they don't have to put up with it any more.

Whether or not their plea for help and protection is answered in the courts, and we assume the assistance of police or the legal system in getting the aggrieved spouse into the court in relation to an application under the Act, is where my colleagues come in.

I have given some thought to what I think might be some conceptual difficulties for some

magistrates (and I emphasise some) in relation to this legislation. I refer to Gracelyn Smallwood's

Comments yesterday that magistrates have to -'get out of the criminal courts' way of thinking and into the civil court mode". I believe Gracelyn has a point. Although this legislation has been around for some time now and some magistrates are more than used to dealing with it, it is, for some magistrates coming into the system, a challenge to deal with behaviour, otherwise criminal in nature, in a civil court.

We should not, however, underestimate the magistracy. In a single day, especially in suburban and regional courts, a magistrate will work in a number of jurisdictions - overwhelmingly criminal law, as well as civil, family law, small claims, coroner's, children's, and quasi-criminal matters. Whilst they are well aware of the civil nature of the applications under the DV. Act. and the onus of proof applicable, perhaps the difficulty can be explained in that, for some reason, the issue, being "domestic" in nature, presents some difficulties in shooting home to respondent spouses the responsibilities for their actions.

I have not had the opportunity to have surveyed Queensland Magistrates as to their attitudes to domestic violence. I was recently asked to comment in relation to a N.S.W. magistrate's thoughtless remark about nagging women being the reasons for the assaults upon them. How could I. Firstly, this magistrate gave an answer he believed would remain confidential and to the extent that his identity was not disclosed, it was. However, there are a large number of magistrates in N.S.W. - well over 100 and this has been rather seized upon as an indication of an appalling attitude by the judiciary as a whole. I cannot go along with that. I would hope that the serious debate about this important topic is not sidetracked by a damaging comment by one magistrate - it doesn't rate up there with "rougher than usual handling' or "no can mean yes". Although it

bespeaks a particular attitude, it did not have the powerful endorsement of having been said in a court.

However, to the extent that ignorance of the nature of domestic violence is shown by any magistrate in a Queensland court. I am open to hearing about. I thought, however, I might just outline for you, as a matter of

interest, just what are my powers under the Stipendiary Magistrates Act 1991 in relation to Queensland magistrates in my role as Chief.

I may not interfere with their decision-making - I may not tell them they got something wrong nor how to do it in the future. That would be interference with their judicial independence. I have powers of discipline and reprimand but in relation only to behaviour unbecoming a magistrate, which has a specific meaning, e.g., laziness on the job, an addiction interfering with the performance of that job, inappropriate behaviour in court.

However, where I can be of assistance is, if I hear of the handling of applications for protection orders by magistrates which involve insensitivity to the needs of parties who should be dealt with with respect, any rudeness or bullying of aggrieved spouses, or other inappropriate behaviour.

Here I can intervene. I am in the process of attempting to set a very high standard for Queensland Magistrates in relation to courtesy and manners in court. It is the least we can do, especially in courts where there are allegations of abuse and mistreatment in the first place.

I also have to opportunity, on a fairly regular basis, to offer training and education to magistrates. Although the training budget is limited, I hope to encourage as many magistrates as possible to

attend conferences such as this on topics affecting our everyday work in court. I have been accompanied to this conference by two magistrates from the Southport court. At the forthcoming

special conference in November, a session will be devoted to the issue of domestic violence. There have been some recent technical amendments to the Act which will require explanation. Further, if magistrates keep an open mind, they may be refreshed in their attitude to the Act. And, of course, there are many recently appointed magistrates who need to understand the fundamentals of the Act.

I will work closely with well regarded trainers and thinkers in the area, such as Pam Godsell, Stephanie Belfrage and Dale Murrary, if I may, to ensure an effective training session. One of the benefits of my attendance at this conference has been hearing from various workers in the area as to the difficulties they are facing in various courts - it is not so much the individual magistrates I am interested in, as the issues which may well be reflected across the State, which I can raise as general matters at the conference.

I would ask two things in return for this undertaking to take complaints seriously and to ensure, to the best of my ability, adequate and timely training of magistrates.

Where decisions of magistrates are considered wrong, that decision should be appealed, funding permitting. Steps should be taken to obtain legal advice and institute an appeal. There is not such a depth of precedents in this area, that this process should be avoided.

This is preferable to an approach to the media, about a person's experience before a particular magistrate. Whilst this is, of' course, that person's absolute right, she or he may have experienced an embarrassment if, for instance, they had not gone down the road of an appeal firstly, in that if

the magistrate got it that wrong, they would have been overturned on appeal. I consider it would be more appropriate and I ask support workers in the area to bear this in mind, to proceed down the legal path, which will have a much more salutary effect on the magistrate concerned, than a wrap over the knuckles by the media.

One of the results of my recent appointment as CSM has been my membership of the Domestic Violence Council and also the Legal Issues Working Group of that Council. I have so far attended one meeting of the Council and the Legal Issues Working Group and consider this work one of the most important aspects of my new duties. It is where I will be able to be kept informed as to any developments in the area, any issues which I can address through the courts of an administrative nature and can best access the most up-to-date training facilities. I value my membership of this important body.

I was, again, interested in Ms Smallwood's comments about magistrates dealing with domestic violence issues on the Cape communities. This is of particular interest to me for the reason that I will shortly be travelling to Far North Queensland to accompany two magistrates from the Cairns court on their October circuit to Cape communities. I am looking forward to the trip immensely, as part of the aim is to meet with Community Justice

Groups and local elders in relation to the issue of consultations by magistrates with these groups, concerning the sentencing of indigenous offenders, often, of course, because of domestic violence against their women and children. I will also be meeting with representatives of local domestic violence groups and I can assure them of my commitment to improving the relationship between the bench and members of those communities.

It is only fair, I think, to acknowledge progress as it is made, or attempted to be made. I am currently working with Queensland Magistrates to ensure that they listen to Community Justice

Groups when sentencing Indigenous Offenders in their local community. This means that if a local group can provide to a Magistrate an alternative to sentencing which is not imprisonment, but which is a community based order, the magistrate must listen to that suggestion. They need not follow it - again the principle of judicial independence prevails - but they must listen. The proposal may be that that group itself supervises a community service order, which may include the removal of an offender and possibly his or her family with him, to an "outstation", which will be free from alcohol and other drugs and give the person a chance to settle down and rediscover their culture and their inner peace. Or the group may engage in a "shaming" of the defendant and require them to do community service in the community.

I do not yet know a lot about the initiatives yet — that is the purpose of my trip but I certainly look forward to learning more. And, of course, as stated, many of the offences are in relation to domestic violence, so I shall also learn about the special issues on the communities. There is also the new initiative of training indigenous justices of the peace, who can deal with criminal matters up to and including pleas of guilty on indictable offences (the more serious offences which are usually dealt with in the higher courts but which can be dealt with by the magistrates court on the election of the prosecution or the defendant). These j.p.'s being of the community involved, may have a better understanding of local issues and can more appropriately sentence the offenders. Also, justice will be rendered more immediately that the usual delay in waiting for the circuit magistrate or judge to arrive.

I should also point out, in that regard, that, recently, two district court judges have travelled on circuit to the cape communities — Judges Robertson and Bradley of the District Court. This is an

innovation, in that it means that offenders do not have to be flown down to venues such as Mount Isa for hearing and it also gives judicial officers an opportunity to witness, first hand, the conditions prevailing at those communities. I have read the reports of the visits of both of these

judges who both recommend, as has the Chief Judge of the District Court, that these cape visits become an integral part of the court's annual calendar. Both judges met with local community justice groups, domestic violence groups and elders before beginning court, as a matter of practice and this is to be commended.

I have had the opportunity t meet with workers from various centres here at the conference, who adopt an integrated approach to handling issues of domestic violence in their communities - a grouping of victim support workers, the police and providers of perpetrators programs. It is their desired aim and indeed some do, meet with, on a regular basis, the local magistrate or magistrates. This is an initiative which I will encourage, as I see it in the same light as the need for reaching out into the community in relation to indigenous sentencing. I have recently written to magistrates, enclosing a list of local community justice groups, encouraging them to make contact with those groups, in preparation for the valuable work to be carried out when the new legislation comes into force. I will also be encouraging them to meet with their local domestic violence workers and relevant police officers to broaden their approach, where necessary.

The issue of mandated perpetrator programs is of interest to me. It is not common practice in Magistrates Courts, whereas, for instance, it is common to refer offenders to drink driving programs in relation to traffic offences, such as drink driving. So the precedent is there. If magistrates know about such programs and they are available in their local community, they may refer to them on a regular basis, for instance, in relation to penalising an offender for a breach of a D.V. order. Perhaps I can receive a list of all such programs throughout the state for circulation to

magistrates? If there is some reservation by other workers about this process, please let me know.

Part of my aim as CSM, you may have gathered, is to broaden the approach of the courts presided over by magistrates. As we know, the classic courtroom situation, is that of a judicial officer

sitting in a box raised above the rest of the participants in the room. He or she hears formal submissions and comes to a conclusion based on precedent. This is sometimes most appropriate, given the seriousness of the matter, or the need for the judicial officer to enforce the authority of the state in relation to the violation of the community's laws. Sometimes it is not appropriate — for instance, the recent discussion in relation to child witnesses in sexual assault matters. Sometimes court formality is not appropriate and special witnesses need special protection. Courts have provided, in very many cases, improvements in relation to security for victims of domestic violence, through the provision of special rooms for complainants and witnesses. Perhaps a formal court setting is appropriate in that situation, in relation to the need for the shaming of the perpetrator.

In relation, however, to complex issues such as the sentencing of indigenous offenders, there are concepts such as the Canadian example of "sentencing circles" where judicial officers sit in a circle with elders, indigenous defendants, complainants and their legal advisers and attempt to arrive at a sentencing decision which is fair, just, compassionate and suitable to the local communities involved. (Not too far from the new proposals).

There also exists the situation, as we know also, that judicial officers, can confine their legal thinking to a box rather than to a circle. Circles can always be enlarged —boxes can keep new ideas out. Wish me well in my attempt to move aspects of the Queensland Magistracy from a box to a circle.

I thank you for your attention and for having me to speak today and for including me in your circle.

Di Fingleton

Chief Stipendiary Magistrate