Association of Australian Magistrates
12th Biennial Conference
"Integrity and Independence"
Hilton Hotel – Saturday 10 June 2000
9.30am

Opening Address – the Hon Paul de Jersey
Chief Justice of Queensland

In opening your conference, I wish to speak briefly on aspects of that concept central to the judicial system, and indeed your conference theme, the independence of the judiciary. These are buzz words uttered as an incantation with almost tedious frequency. But their scope is sometimes not sufficiently understood, resembling in that respect the related concept of the separation of powers.

Since becoming Chief Justice, I have been struck by an administrative focus on productivity: reduction of delay and expense, throughput of cases, management of litigation. The efficient conduct of our litigation is of prime importance. But the focus on efficiency cannot be allowed to blur proper public appreciation of the more fundamental significance of the judicial system.

Earlier in the year, addressing the new intake of law students at the University of Queensland, I described law as Athe community=s best attempt to assure what is sometimes called a `civil= society; a framework of known or predictable regulation necessary for our civilised interaction as sophisticated human beings≅. I mentioned Athe pivotal significance to society of the legal system≅, and affirmed that Athe judiciary is indeed the third `arm of government=, along with the legislature and the executive≅. I asserted that Athe justice system is a critically important component of

our social fabric. It protects all members of the community from harm. It ensures peace, order and good government. It secures personal freedom. It guarantees to the individual citizen the impartial, apolitical adjudication and securing of his or her rights≅. We need to remind ourselves of these aspects of the legal and judicial system in times of heady economic rationalism.

Of course when I describe the judiciary as an Aarm of government≅ I am not being original. The characterisation is time-hallowed, apart from being the truth. But the public generally, I feel, tends to think of government as confined to the legislature, or perhaps including the bureaucracy, as implied in the complaint: "we are over-governed.≅ And so we judicial officers endeavour to emphasise the real significance of the judicial system as a part of government, an arm pivotal to the peace, order and good government of the people.

A particular feature of the Australian judiciary is that the judges are not elected, by contrast with the judges of some American States, and some people think us distinctive in that regard. We have all heard of those judges: they tend to impose outlandishly long terms of imprisonment - up to hundreds of years in length - especially when they are seeking re-election. In this country, and reflecting the English Act of Settlement of 1701, judges of most courts are appointed for life, meaning usually until the age of 70, subject to removal for misbehaviour. Magistrates are appointed in Queensland until 65 years. This manner of appointment, coupled with rigorous limitations on removal, is an important factor in guaranteeing judicial independence. We have in this State fortunately been spared the problems associated with short term appointments, which are generally inimical to proper perceptions of judicial independence. So in principle are "acting" appointments.

What does this independence involve? Essentially, impartiality, and that entails freedom from any external influence which may corrupt. As an important adjunct of that "freedom", judicial officers enjoy statutory immunity from suit in respect of their

decisions. I will come later to the other correlative, accountability.

The independence of the judiciary is intimately connected with the separation of powers. That concept is sometimes not readily understood. Our system of government is the so-called AWestminster system≅, inherited from England in 1788. The Commonwealth Constitution reflects it. There are three branches of government, the executive, the legislature and the judiciary. Each has distinct powers. The executive comprises the Queen, represented by the Governor-General at the Federal level and the State Governors, together with Cabinet Ministers at both levels. The executive administers the law. The Legislature is the nation=s parliaments. It makes the law. The Judiciary, the judges of all the courts of the land, interprets and applies that law. In theory, the branches are distinct and separate. In practice, however, the executive and the Legislature have been brought together in Parliament with systems of checks and balances to ensure they carefully monitor each other. Both the executive and the Legislature comprise elected representatives of the people, save of course the Monarch and the Governors, and so both those arms are subject to political forces.

For the Westminster system to operate democratically, the independence of the non-political judiciary must be absolutely secure. In the words of Montesquieu, Athere is no liberty, if the power of judgment be not separated from the legislative and executive powers.≅ Of course in a democracy the creating and administering of the law must be subject to the will of the people. But to ensure the impartial application of the law, the judiciary must be completely immune from political pressure.

Accordingly, while judges and magistrates are dedicated to public service, they must not be considered “public servants”, the designation of those who administer the executive – which stands separately. Public servants implement ministerial policy while judges deliver justice according to law – at no-one’s behest.

To reduce the prospect of unnecessary conflict, the Judges of the Supreme Court of Queensland specifically resolved some years ago not to constitute Royal

Commissions of Inquiry. These bodies, which recommend to the executive, are not judicial and judges desirably should not constitute them. This is also the policy position of the Supreme Court of Victoria. I mention this to illustrate how fundamentally we realise and protect this separation.

In practical terms there is however some difficulty maintaining a completely independent judiciary, and that is because there is necessary material dependence on the other arms of government. The executive is the Apaymaster≅. In the Canadian case of *Valente v R* (1985) 2 SCR 673, Justice Le Dain specified three Acrucial aspects of independence: security of tenure, financial security and institutional security≅. Security of tenure, meaning a guaranteed term of appointment, is necessary so that Judges are not concerned about making decisions to please the body responsible for their possible re-appointment. Financial security is necessary, it is said, to ensure that Judges are not tempted to accept bribes - although I refute the need for that justification in modern day Australia. Institutional security, or control over administration of the court, prevents, among other things, the other branches of government from influencing the allocation of Judges to hear particular cases. In Australia, and in many other countries, the judiciary depends upon the other arms of government to respect this independence. Of course as I have said, the executive pays Judges= salaries and pensions, and as well provides buildings and staff to run the courts, and maintains the legislation which ensures security of tenure. Obviously enough this places the judiciary in a potentially difficult situation. And so I say that the maintenance of an independent judiciary necessarily depends to some extent upon the co-operation of the executive.

We can become complacent about these fundamental notions. In Queensland there have been notable challenges to judicial independence over the years. Some of you may recall the Ithaca election petition case in 1938. The relationship between the courts and the executive in this State has been characterised by some tension, as the history books show. The executive, not surprisingly, has sometimes been distrustful of a body which can pass independently upon the validity and operation of

legislation and cut down the operation of governmental decisions. Some years ago I declared unlawful the proposed Aworld=s tallest building≅ project, a project which had inspired considerable political interest. In doing so I found that a Minister of the Crown had breached a statutory obligation. I hasten to say that there was no adverse ramification. Other Judges in past decades have not fared so well. I am pleased to say that in recent Queensland history, there has been respect for these concepts. But as I say, we can become unduly complacent, as the Malaysian experience only twelve years ago graphically shows. Subsequent Malaysian experience, and events elsewhere, Pakistan for example, are too recent to suffer comment by me now, but let us go back a decade or so.

In 1988 the security of tenure of the Malaysian judiciary was seriously challenged. The King removed from office the Lord President, the Malaysian equivalent of Chief Justice. Malaysia has a Westminster system. Its Constitution provides that a Judge may not be removed from office unless following a recommendation made by a tribunal appointed by the King. How did all this arise? In 1973 a young Prince was convicted of a criminal offence. He was a prospective candidate for the position of King. The King is elected every five years by the Sultans of the various Malaysian States. Sultans are the only eligible candidates. The young Prince=s chances of being elected King once he became Sultan would possibly have been hampered by the existence of a criminal record. The Solicitor-General at the time, the person responsible for prosecuting the Prince, was later to become Lord President. The young Prince was in due course granted a full pardon by his father, the Sultan, and his record expunged. He became Sultan after his father=s death and in the late 1980s was elected King. In 1988 as King he appointed a tribunal to consider recommending removal of the Lord President who had prosecuted him fifteen years earlier. It is said there was a Apaucity of evidence of any misconduct by the Lord President≅. The Lord President attempted to prevent his removal by applying to the Supreme Court for orders prohibiting the tribunal from making a recommendation. The Supreme Court made the order, but the King suspended the Judges. The recommendation was made and the King removed the Lord President from office.

To top off the whole show, the chairman of the tribunal which made the recommendation was appointed as the new Lord President.

This is a well publicised, clearly established example of how an improperly motivated executive can easily frustrate the determinations of an independent judiciary found to be Ainconvenient≅.

Let me now recall briefly the state of the German judiciary under Hitler=s regime – historically distant but always salutary. Here we saw one of the most horrifying examples of how easily a community can be deprived of an independent judiciary. The laws of that regime permitted the Government to dismiss from office any Judge who was politically undesirable, or not AAryan≅, or who would not undertake Ato support the national state at all times and without reservation≅. Judges could even be removed from office without reasons being given (Muller: Hitler=s Justice (Harvard) 1991 page 72). Hitler dismissed Judges if their sentences were considered Atoo lenient, or whose conduct seemed insufficiently loyal to national socialism≅ (ibid). Judges were told by the equivalent of the Reich Chief Justice, AThere is no independence of law against national socialism. Say to yourselves of every decision which you make: `How would the Fuhrer decide in my place?=≅ (Shirer: The Rise and Fall of the Third Reich (New York, Simon and Schuster, 1960) page 334). The Judges had been Aliberated≅ from their obligation to the law only to be constrained by an incomparably more restricted Aobligation to the main principles of the Fuhrer=s Government≅, a step which in the last analysis had the effect of making Athe Judge a direct servant of the State≅, or as Freisler (a German legal commentator at the time) put it, AThe law is the bated breath of life ... but the guardian of the law must be the soldier at the front of life of the nation≅ (supra, page 73). An extreme example, but instructive.

I have spoken of the independence of the judiciary from the executive, only imperfectly achievable, but to that extent essential to the maintenance of healthy

government of the people. But it is unrealistic to speak of independence without emphasising its corollary, accountability – which is in a sense the quid pro quo. Especially as the people become apparently more interested in the operation of their courts, there is risk in focusing on independence divorced from its partner, accountability. The public more and more seeks an accountable judiciary, not just in justifying decisions made in important cases, but also on the more administrative side, in avoiding delay and minimising the expense of litigation. There are, currently, surveys being administered by academics around the nation with respect to possible judicial "performance standards". There is also promotion by the Australian Law Reform Commission of models for the treatment of complaints against judges. Just as judges of this era have generally been more accessible to the community which wishes to know more about them and what they do, so judges are I believe proactively addressing these sorts of issues – a matter to which I will return shortly.

There is inherent difficulty establishing a worthwhile formal complaints mechanism against judicial officers, because the only sanction which will stick ultimately is generally removal from office for misbehaviour. The theory is, however, that pressure from peers or heads of jurisdiction will more often than not resolve other problems which arise falling short of conduct warranting removal. In Queensland that appears to work very effectively. The infrequency of complaint against judicial officers in Queensland is presumably explained by good performance and a naturally high acceptance of the need for proper accountability.

Formal accountability is achieved through discharging the obligation to give comprehensive reasons for judgment, and the appeal process. Less formal accountability is facilitated fundamentally by the obligation to conduct judicial proceedings in public. That exposes judicial officers who do not display the requisite qualities to the prospect of public assessment, by the people, their peers, and the press. Public comment and criticism can be powerful forces for enhancement of the quality of judicial performance. A more recent form of public accountability is achieved through the statutory obligation on courts to publish annual reports. Such reports draw public attention, importantly, to rates of disposition of caseloads, and

that may lead to pressure for more expedition. They also tend to highlight judges' initiatives in the area of continuing legal education. The people expect their judges to keep up to date in their areas of expertise. In terms of current reasonable expectations, judges will be properly accountable only if they do so, and are seen to do so.

Reverting to the issue of conduct, the ultimate sanction for relevant misbehaviour is of course removal from office. But other behaviour falling short of utter integrity and the appropriate public presentation reasonably expected of judicial officers, but not warranting removal, can more often than not be addressed, as I have suggested, through peer pressure or counselling from the head of jurisdiction. Experience in other jurisdictions, New South Wales especially, suggests that the most frequent subject matter of complaint against judicial officers is delay in giving judgment, and discourtesy in court. As to the former, most courts are these days proactive in developing timelines for the disposition of cases. Two years ago, the judges of the Supreme Court voluntarily adopted a protocol requiring the delivery of reserved judgments in all but exceptional cases within three months of the conclusion of the hearing. This year, the judges adopted dispositional goals, which have been published on the Supreme Court's webpage. They specify times from commencement in court within which cases should ordinarily be concluded. The publication of such matters is itself an example of accountability.

We speak of the judiciary as the custodians of the rule of law. The effectiveness of that custody depends on maintenance of the independence, and its partner accountability, of which I have spoken. These are grandly significant notions. The risk is that they are here in Queensland, in Australia, so secure that they might be unduly taken for granted. And so it is important to reflect, from time to time, upon their essentials.

I commend you upon the theme of your conference. In formally opening the conference, I warmly wish you well in these important deliberations.