MAGISTRATES COURT CONFERENCE

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Judicial Independence and Court Governance

by

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Introduction

1. Judicial independence is closely tied to the nature of the structure of the administration of the Court. Judicial independence may relate to the individual independence of the judicial officer or the independence of the Court as a body. It is the former meaning which is relevant to this commentary. The latter is more relevant to a discussion concerning the funding of the Court and general criticism in relation to the performance of the Court as a whole.

2. It is not intended in this commentary to touch upon the specifics of recent problems in the Magistrates Court. Rather, the discussion will concern other Courts but comment will be made in relation to similar legislation viz. s.28A of the District Court Act. The equivalent legislation with some differences is to be found in s.10 of the Magistrates Court Act. The latter legislation is more specific and makes provision for "…such consultation with Magistrates as the Chief Magistrate considers appropriate and practicable".

History of s.28A of the District Court Act

3. The relevant section of the District Court Act provides as follows:

> "28A (1) The Chief Judge is responsible for the administration of the District Court and for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the District Court.
>
> a. Subject to any Act, the Chief Judge has power to do all things necessary or convenient to be done for the administration of the

> District Court and for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the District Court."

4. Prior to this legislation being passed in 1997, an overwhelming majority of District Court judges had passed a motion supporting the legislative creation of a Statutory Council of Judges.[1] The Court had appointed a committee of Judges to present a report[2] on a desirable model consistent with a collegiate approach. The Council of Judges was seen as being more consistent with a collegiate system of court governance. The present s.28A as found in a draft Bill was opposed by the judges of the District Court. A delegation of the judges called upon then Attorney General, Mr. Beanland, to express that view of strong opposition to the draft Bill. The view was consistent with the position subsequently taken by the Legislative Scrutiny Committee of the Parliament which wanted the passage of the Bill delayed. In its report[3], that Committee quoted the present Federal Attorney General[4]:

> "The legislative imposition of a particular hierarchical model seems to be inconsistent with the independence of the judiciary. There are also the practical risks that judges will not embrace administrative decisions that they have not played an active role in achieving and that some judges will shirk administrative responsibilities.
> …
> It is more likely that they would choose to vest their management responsibilities in some of their number. They might, alternatively, adopt a 'mini-college', comprising, for example, the Chief Justice and a number of judges elected by the other members of the court."

[1] Annual Report of the District Court, 1996-1997 p.47
[2] Report of Committee, 1997
[3] Report of the Legislative Scrutiny Committee of the Queensland Parliament in commenting on the Courts Reform Amendment Bill 1997 p.25
[4] Williams D. "Judicial Independence, the courts and the community" 7 February 1997.

Mr. Williams had earlier stated in the House in commenting on legislation concerning the safety of Federal judges[5]:

> "Whether the statutory vesting of the administration of a court in the head of jurisdiction, as applies in the case of the Chief Justice of the Family Court and the Chief Justice of the Federal Court, is a good thing is open to very serious doubt.
> My personal view, which I have expressed publicly before, is that the administration of the court should be vested in all members of the court who can make whatever administrative arrangements are appropriate, having regard to the geographic distribution of the members of the court across the country and the practice or non-practice of engaging in circuits.
> It is wrong, in my view, for the administration to be vested solely in one person who is, in effect in a position to dictate to other members of the court what happens in administration. What happens in administration can affect the functioning of the court."

5.The draft legislation was considered by the judges of the District Court who opposed the legislation as infringing upon the principle that the head of Court was "first amongst equals". That principle has been indorsed as applicable to the position of the Chief Justice of Queensland[6]. It is a principle which has been indorsed by the Judicial Committee as applicable to the position of Chief Magistrate[7]. It is suggested that the principle should apply to all heads of court in Queensland. Prior to the 1997 amendments, the long standing tradition of the common law was that the head of court was "first amongst equals"[8]

6. Any system of internal court governance should be so structured so as to take into account the wide variation in temperament, personality and ability of the head of court from time to time. There should be safeguards against a head of court who is arbitrary and capricious and who refuses to consult the members of the court. A formal structure in which the head of court is first amongst equals is more likely to

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[5] Parliamentary Debates of House of Representatives 23 August 1995 p.187.
[6] de Jersey Chief Justice of Queensland "The Role of Chief Justice of Queensland" a paper presented to a seminar of the justices of the Supreme Court 11 April 2001 p.1
[7] Chief Magistrate v Thacker 11 October 2002.
[8] McPherson Justice of the Supreme Court of Queensland "Structure and Government of Australian Courts" a paper presented to the Conference of Judges, Sydney in January 1990.

provide such a safeguard. In some jurisdictions the personality of the head of court has been more important than formal mechanisms. I refer to the Hon. Chief Justice Black, the Chief Justice of the Federal Court and the present Chief Justice of Queensland. The Chief Justice of Queensland has stated[9] that the use of the powers under s.13A had "rarely arisen"; that the Court was administered in a collegiate fashion. There is no doubt about that proposition. S.13A is similar to s.28A of the District Court Act. Chief Justice Black has adopted the collegiate approach in the Federal Court[10]. Both Chief Justices have been outstanding in their acceptance of a collegiate and consultative approach to court governance. Both Chief Justices enjoy the respect and confidence of their judicial colleagues. Smith quoted a consultant to the Federal Court:

> "Without leadership, these processes are bound to fail. For the court, the whole process was driven and sponsored very effectively by the Chief Justice. He was a very, very strong leader".

7. With lesser mortals the hierarchical structure of the Federal Court and the Supreme Court may have resulted in great disharmony and the efficient functioning of the courts may have been seriously impaired. Legislation such as (s.28A) may be used in an arbitrary or capricious fashion and is not consistent with a collegiate approach. The Magistrates Court may have issues such as transfers which come within the province of the Chief Magistrate. In the District Court such issues as submissions on entitlements, judicial education, budgets and strategic planning, circuits, listings and the distribution of work are potentially just as controversial. A judge of the District Court can be away on circuit for up to three months each year. It is submitted that any review of the legislation relating to court governance should include the District Court as well as the Magistrates Court. The Supreme Court is in a different situation because of the creation of the Court of Appeal, the Trial Divisions

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[9] de Jersey C.J. op. cit..p.4
[10] Smith, B. Australian Financial Review," Judges learn management" 20 November 1998 p.24

of the Supreme Court and a Senior Judge Administrator[11]. It is not intended to comment on that different structure.

Case Study.

8. Sir Garfield Barwick was Chief Justice of the High Court for many years. He was an able judge and a competent administrator. Sir Garfield wanted an administrative structure for the High Court with power in the hands of himself leaving the other justices with little or no say in its running. He alienated the six puisne justices by refusing to consult them in the administration of the High Court and generally behaving in a dictatorial fashion.[12] Those who ignore the mistakes of history are doomed to repeat them. The other justices of the High Court opposed absolute power being in the hands of the head of court.

9. As a result of this opposition, the High Court of Australia Act of 1979 provided in s.17(1) that:

> "The High Court shall administer its own affairs subject to and in accordance with, this Act."

The "High Court" was defined (s.5) as meaning :'

> "5. The High Court is a superior court of record and consists of the Chief Justice and six other Justices appointed by the Governor-General by commission.

[11] Supreme Court of Queensland Act 1991.
[12] Marr, D. "Barwick" George Allen and Unwin p.298-9

…

With reference to the exercise of powers of the Court in administrative matters, the following provision appears:

> "46(1) Subject to this section, the powers of the High Court under this Act may be exercised by the Justices or by a majority of them".

10.The effect of the 1979 legislation was to thwart the efforts of Sir Garfield to administer the Court in the way he wanted to administer it. Sir Garfield also wanted the justices to be based in Canberra. The justices made a submission to the Attorney-General directly that they be allowed to continue to live in their home states and that they be based there. Up until this time, it was not customary for the Attorney to be contacted directly without the Chief Justice being involved. The Government decided that the Court "would continue to hold hearings in all capitals except Sydney and Melbourne, that registries would be maintained in each of the States, and that the judges would be allowed to commute to Canberra for sittings." The National Times described the opposition of the puisne judges as a massive "vote of no confidence" in the Chief Justice by the six puisne judges. Marr commented[13]:

> "The 1979 legislation ensured there will never again be an all-powerful Chief Justice in the Barwick mould".

Independence of the Judiciary, Court Governance an Accountability

[13] ibid. p.298

11. In the debate in Parliament on the 1979 legislation, a Mr. Ruddock had this to say about judicial independence:

> "The independence of the judiciary and the respect which is accorded to it in the community is not intended for the benefit of the judiciary but for the benefit of the public. Any loss of independence on the part of the judiciary will lead to a corresponding loss of respect in the community and the ultimate failure of our legal system".[14]

Recent comments on the role of the magistrates in the court system have been made by the present Chief Justice of the High Court. Chief Justice Gleeson made it clear that the term judges includes all judicial officers.[15] His Honour went on to discuss the position of magistrates:[16]

> In the last 20 years the magistracy has been taken out of the public service and has become part of the judiciary".

He went on to say:[17]

"Judicial independence means, amongst other things, that judges are independent of each other. Judges enjoy what is, by most workplace standards, extraordinary personal independence and freedom from interference by their leadership. This is in aid of one thing: reinforcing the public's confidence that they will exercise their judicial power without fear or favour, and without the prospect of being subjected to pressure, direct or indirect, from any authority but the law itself".

12.The concept of judicial independence has been discussed in recent cases involving the Magistrates Court in Queensland. It is not intended to go into the detail of those cases. However, it is relevant to refer to the principles applied therein. Justice Mackenzie[18] quoted from an article[19]:

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[14] Parliamentary Debates House of Representatives 13 November 1979 p.2919-2920.
[15] Gleeson, A.M. Chief Justice "Public Confidence in the Judiciary" a paper delivered to the Judicial Conference of Australia, Launceston, April 2002.
[16] ibid. p.7
[17] ibid. p.11
[18] Cornack v. Fingleton Supreme Court of Queensland 27 November 2002 pp.12-13.

> "Judicial accountability is, therefore, an important value to be maintained. However, its procedures and standards should not be formulated so as to exceed the boundaries of judicial independence. The task of balancing between judicial accountability and judicial independence is a difficult one. As shall be seen below, I am inclined to the view that the proposed reforms have not maintained that delicate balance.
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> Judicial independence has a number of aspects which should be expressly mentioned. The independence of the individual judge refers to his personal independence (that is his personal security of tenure and terms of service), as well as to his substantive independence (that is, in the discharge of his official function). In addition to the independence of the individual judge there is also the collective independence of the judiciary as a whole. This aspect is sometimes referred to as the corporate or institutional independence of the judiciary.
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> Another significant aspect of judicial independence is the internal independence of the judge, which refers to his independence vis-à-vis his judicial superiors and colleagues. This aspect of judicial independence has not attracted sufficient attention. Nevertheless, the modern concept of judicial independence , as expressed in recent legal literature, judicial decisions and international standards, does recognise collective judicial independence and internal judicial independence." (footnotes omitted)". (p.6-7).

At p. 11, the following statement is made by Shetreet:

> "A major problem in the Judicial Officers Act concerns the granting of disciplinary powers to the administrative heads of the judiciary collectively and individually. The result is the introduction of hierarchical patterns into the judiciary, which in turn have the result of chilling judicial independence. These hierarchical patterns may even bring about attempts by judges to influence other judges' decisions, or give rise to latent pressures on the judges which may result in subservience to judicial superiors. Hierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of the judiciary whose members must enjoy internal independence vis-à-vis their colleagues and judicial superiors".

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[19] Shetreet Professor, "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986 (1987) 10 UNSW Law Journal 3 at pp.6-7,11.

13.The hierarchical structure has recently been criticised not only in the legal system but also in universities.[20] The School of Media and Information ("SMI") at Curtain University underwent a re-structure in 2001 following allegations of plagiarism. The School had changed its governance structure from one of management by committees to management by executive managers. Standing committees were to be merely advisory bodies to executive managers. In effect, the senior management changed from collegial to a managerial mode of governance. This was part of a corporatisation process. Pyvis commented:[21]

> "Just over a year after the SMI 'coup' to restore collegial governance, a report appeared in The Age (19 June 2002) covering findings by the Hay Group of management consultants. They teamed with Harvard University and Dartmouth staff to conduct research to determine what makes a top executive team in business. They established that in business the best approach to governance was to 'avoid styles that position the leader as the ultimate authority – my way or the highway'. Helen Scotts, the Director of Business Development for Hay Group Pacific makes this comment; 'What we have found is that when the team process facilitates active dialogue on the issues which affect an organisation then the actions and implementation are better because of that process.' It appears that the type of governance the Hay Group identifies as best for business is much closer to the traditions of collegial decision-making than it is to the managerial model of governance. Perhaps those who call for universities to embrace managerial models of governance have missed their time (if ever they had one)."

14.When I wrote my thesis on the best model for court administration in 2000[22], the following passage that some may see as prophetic appears after discussing the hierarchical model as it exists in the Queensland Courts:

> "It remains to be seen whether the hierarchical traditional model will meet the needs of the twenty-first century. The importance of internal governance and leadership cannot be underestimated when

[20] Pyvis D., "Plagiarism and Managerialism" Australian Universities Review Vol.45,No.2 2002 pp.31-36.
[21] ibid.p.36.
[22] Forde M.W. Judge, "What model of court governance would optimize the expeditious delivery of justice, judicial independence and the accountability of Queensland's court system?" a thesis being part of a Master of Public Sector Management Griffith University, p.46; Extracts of this thesis can be found on the Queensland Courts website "Publications", "Articles and Speeches" District Court.

> discussing the approach to community expectations and the operational effectiveness of the courts (Sallmann, 1991; Nicholson, 1993; Glanfield 2000)"

Conclusion

There is a need for change in the legislation relating to the nature of court governance in both the Magistrates and District Court. The present legislation is more consistent with an outmoded style of management. In order for the courts to meet the challenges of accountability and change, a collegiate approach must be enshrined in legislation. This can only be achieved and maintained in the long term by the appropriate structure. It should not be dependent solely on the character and personality of the head of court for the time being.