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EMBRACING INDEPENDENCE

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The evolution of the State magistracies is one of the most important chapters in Australian legal history. It has been considered in recent decisions of the High Court, including *North Australian Aboriginal Legal Aid Service Inc v Bradley*[1], *Fingleton v The Queen*[2], and *O'Donoghue v Ireland*[3]. It is still going on. My main concern is with the future, not the past, but there is a trajectory that I want to sketch because it will influence the future direction of the institution.

From the establishment of New South Wales as a British settlement, later a colony, and later still a constituent State in the Federal union, through the course of the 20th century and up to the present time, professional magistrates have carried a major share of the responsibility for the administration of civil and criminal justice. We have never had in New South Wales the social conditions that account for the British system, where lay justices of the peace, assisted and advised by legally qualified court officers, deal with most criminal offences. From

the beginning, New South Wales has depended upon a professional magistracy. The magistrates have always exercised a wide range of administrative, as well as judicial, powers. The history of their integration into the New South Wales Public Service, and their later, and relatively recent, separation from that service, is traced in Hilary Golder's work, published in 1991, entitled "High and Responsible Office"[4]. The author records[5] disagreements within the magistracy, in the middle of the 20th century, about whether magistrates were better to remain within the public service, and be subject to its system of recruitment, grading and remuneration, or whether they should seek or accept the separateness and independence associated with judicial status. Related to that issue was the question of the nature and scope of the administrative functions that could be assigned appropriately to magistrates. Another question concerned the proper relationship between magistrates and the police and prosecuting authorities.

Part of the context in which these issues were played out was the trend, in the second half of the 20th century, towards formal declarations designed to reinforce what were in truth ancient principles of human rights. The human rights declarations that emerged after World War II owed their existence, not to freshly discovered standards of civilised behaviour, but to a need to reinforce standards which recently had been grossly violated. The importance of an independent and impartial tribunal to administer criminal justice, and decide civil disputes, can be traced back in our legal history at least to Magna Carta and the *Act of Settlement* 1700 (UK)[6]. The Universal Declaration of Human Rights[7],

the International Covenant on Civil land Political Rights[8], and the European Convention on Human Rights[9] declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The same was declared in Art 2.02 of the Universal Declaration on the Independence of Justice, and in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region. What is at stake is not some personal or corporate privilege of judicial officers; it is the right of citizens to have their potential criminal liability, or their civil disputes, judged by an independent tribunal. The distinction is vital. Independence is not a perquisite of judicial office; the independence of judicial officers is a right of the citizens over whom they exercise jurisdiction.

The importance of an impartial and independent decision-maker in the administration of criminal justice is self-evident. Independent of whom? Independent of all potential sources of influence external to the law which the decision-maker is bound to apply. In particular, independent of the parties to the proceedings themselves. Those propositions are now regarded as self-evident, but for a long time their corollary was not. Most criminal prosecutions are instituted by or on behalf of the executive branch of government. The proceedings may be commenced by a police officer, or an official of a government department or public authority. The prosecution case may be conducted by a person in government employment. Plainly, independence in the exercise of criminal jurisdiction includes independence of the executive

government, because the executive government itself is a party to most criminal proceedings.

The position concerning civil justice is essentially the same, although perhaps less obvious. The executive government, in one or other of its manifestations, is frequently a party to civil litigation. The rule of law does not require that all controversies about rights and liabilities be decided by courts. The exercise of judicial power is only one of the ways in which controversies are resolved; in some respects it is one of the least satisfactory ways. Other kinds of dispute prevention or resolution, more or less formal or informal, have more to commend them; and administrative decisions, whether or not subject to judicial review, affect the rights of most citizens more than judicial decisions. Yet the right to go to court, even if only as a last resort, is a vital safety net. It may be the only way of standing up for your rights, or forcing others to face up to their responsibilities. It is not merely an alternative form of dispute resolution. It is an exercise of governmental power. The great United States Chief Justice John Marshall said, in *Marbury v Madison*[10]:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

Inevitably, the operation of the magistracy as a part of the apparatus of executive government, with all that entailed in terms of Ministerial and bureaucratic organisation and control, was increasingly called into question during the second half of the last century. It became

more and more obvious that it was difficult to reconcile with the standards that were promulgated internationally and nationally.

A practical example of the embarrassment that could arise was the 1976 South Australian case of *Fingleton v Christian Ivanoff Pty Ltd*[11]. The Crown Solicitor of South Australia was the acting head of the Department of Legal Services. A complaint alleging a breach of certain licensing laws came for hearing before a Special Magistrate. Both the Special Magistrate and the solicitor who appeared for the prosecution were officers of the Department of Legal Services. They were both subordinate to the acting head of the Department, who was the Crown Solicitor. The defendant argued that the magistrate was disqualified because of the appearance of bias resulting from the departmental arrangements. The Full Court of the Supreme Court of South Australia upheld the argument.

Disengaging the magistracy from the executive branch of government, and establishing and recognising it as a part of the judicial branch, might have appeared an obvious solution, but it raised large practical questions. First, the principle of separation of legislative, executive, and judicial powers reflected in the Australian Constitution has never been taken to apply with the same strictness at the State level. State judges have always exercised some powers that are non-judicial. Secondly, State magistrates have always exercised, and to this day continue to exercise, powers and functions that are administrative rather than judicial in character. This is a matter to which it will be

necessary to return. Thirdly, public service procedures of appointment, oversight, and remuneration could not be swept aside without provision for adequate alternatives. In some respects, they had much to commend them, and in terms of what would now be called accountability some people would have compared them favourably with the position that applied in relation to the judiciary. Fourthly, within the system there had developed industrial and other mechanisms that were intertwined with the established arrangements and that were threatened by any possibility of a change. Fifthly, within the executive government there were territorial interests that were threatened. There were people whose power and influence - indeed, to put it bluntly, whose jobs - were bound up with the status quo, and who could be counted on to defend it. It is part of human nature that people find it easy to convince themselves that without their continued control the result will be inefficiency, or even chaos. Moreover, there was genuine concern about the capacity of courts to manage their own affairs; a concern that was not without foundation. There were people in the public service who believed, and there are still some who believe, that the most judges lacked managerial skills. Under sufferance, they were content to leave it to judges to run small courts, but their view was, and is, that the larger the court, the greater is the need for public service management. The largest and most complex of all Australian courts was and is the New South Wales magistracy. Part of the response to this legitimate concern has been the development of a class of specialist court administrators, with management skills related to the particular needs of courts, who operate

within the judicial branch of government and who work with judicial leaders in a relationship that reflects constitutional principles.

There was a further problem with both theoretical and practical dimensions. Historically, in Australia and in comparable common law jurisdictions, there has been general acceptance of different degrees of independence among judicial officers. In a series of cases the Supreme Court of Canada has examined the minimum conditions of judicial independence[12]. The Court said that "[t]he manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal"[13] and that "[c]onceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible"[14]. In 2002, in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[15], the Constitutional Court of South Africa held that the South African Constitution does not require that all courts must have their independence protected in the same way. The capacity of some courts to supervise the operations of others, for example by the exercise of what used to be called the prerogative writs, was taken to mean that the need for the indicia of independence was less in the latter than in the former. There is no single ideal model of judicial independence and there is, therefore, room for legislative choice consistent with constitutional principle[16]. In the past, it has been assumed that Parliament could make different choices for different courts.

The principle which many regarded as offended by the arrangements concerning the magistracy is itself far from clear-cut. When it comes to the practical application of that principle, courts in Australia and elsewhere have never been able to ignore historical and pragmatic considerations[17]. In theory, for example, there is something to be said for the view that all forms of promotion within the judiciary create an appearance inconsistent with strict impartiality. (I have noticed that some people who are very sensitive about certain issues affecting the appearance of impartiality take a more robust attitude to the topic of promotion). If a judicial officer can be rewarded in any way by the executive government, does that not create at least the appearance of an incentive to comply with government policy? Winning or losing promotion is easy to fit within that question. Yet some forms of judicial promotion are common, and generally accepted. All the present members of the High Court of Australia were previously judges of other courts. For all of them, appointment to the High Court was a promotion, involving increased salary and standing in the judicial hierarchy. Similar promotions occur regularly throughout the Australian judiciary, Federal and State. In the United Kingdom, it is rare for a person other than a serving member of the Court of Appeal to be appointed to the House of Lords. Most members of the English Court of Appeal reach that Court by promotion. In practice, previous judicial experience is generally regarded, as a qualification for higher office. If appellate courts consisted entirely, or even mainly, of people with no prior judicial

experience there would be real questions about their competence and the credibility of their decisions.

The practical example of judicial promotion shows the danger of pushing theory beyond its limits. The law concerns itself with appearances as well as actuality, but its standards are those of reasonableness. The appearance of a risk of partiality is judged by the standards of the fair-minded observer, not the paranoid, or the pedant. In the result, certain kinds of judicial promotion are widely accepted by the public and the judiciary. Judicial independence is a constitutional principle, and constitutional principles are concerned with the practical business of government. They do not inhabit a world of theoretical abstraction. At the same time, it is easy to think of possible examples of judicial preferment within the judiciary that would be regarded as unacceptable. As in many areas of human conduct, the difficulty of drawing a bright line between the acceptable and the unacceptable does not invalidate the difference.

Another problem confronting those who advocated withdrawal of the magistracy from the executive branch was that, within the executive, there are many tribunals and other decision-makers who exercise functions which, from the point of view of a member of the public, are difficult to distinguish from judicial functions. Some of those persons are attached to the court system itself. Registrars, and assessors, for example, may exercise powers and responsibilities very similar to those exercised by judges and magistrates. The difference between judicial

and non-judicial power, and judicial and non-judicial officers, may be blurred. If magistrates were to be identified as judicial officers and separated institutionally from the executive government, how far was that to extend? What other decision-makers should be regarded as judicial officers? This has been an issue in relation to the educational and complaints functions of the Judicial Commission of New South Wales. How far into the ranks of people who participate in the exercise of judicial power are they to extend?

Notwithstanding these substantial problems of theory and practice, the decision was made, and rightly made, to recognise the judicial status of magistrates, to give them that most basic of all the indicia of independence, judicial tenure, and to assimilate them with judges upon the creation of the Judicial Commission of New South Wales. (The Judicial Commission was unique, in its combination of educational and complaints functions. The explanation for that is related to particular circumstances prevailing in New South Wales at the time it was established.) In this connection I should pay special tribute to the vision, courage and commitment to principle of
Mr C R Briese CSM whose advocacy of change was so important.

The *Judicial Officers Act* 1986, which set up the Judicial Commission, dealt, in Part 2, with tenure of judicial office. Section 4 declared that, subject to the Act, every judicial officer was to remain in office during ability and good behaviour and that a judicial officer could not be suspended or removed from office except by or in accordance

with the Act or another Act. One of the qualifications in contemplation, of course, was legislation requiring retirement at a certain age. "Judicial officer" was defined to include a judge or master of the Supreme Court, a member of the Industrial Commission, a judge of the Land and Environment Court, or the District Court, or the Compensation Court, and a magistrate. Part 4 of the Act dealt with judicial education, among other things. Part 6 dealt with complaints. Magistrates were included, along with judges, in those functions of the Commission.

In 1992, the subject of judicial tenure was removed from the Judicial Officers Act and placed in the *Constitution Act* 1902. The political background concerned certain demands made on the government of the day by a group of independents in the New South Wales Parliament who were in a position of temporary power. *The Constitution (Amendment) Act* 1992 (NSW) inserted into the New South Wales Constitution Act Part 9, dealing with "The Judiciary". It dealt with removal from office in the familiar manner, retirement, and the abolition of judicial office. The point of present relevance is that, again, the position of judges and magistrates was dealt with, in the respects covered by the legislation, compendiously. Since 1992, the Constitution Act has treated magistrates as part of the judiciary.

These developments in New South Wales have been matched, to a greater or lesser degree, in other Australian jurisdictions. Local conditions and circumstances vary, and influence the rate of progress, but there is no doubt about the general direction of change. It has been

to establish the magistracy as a fully accredited part of the judicial branch of government, in recognition of the entitlement of the community to a magistracy that shares all the essential incidents of judicial independence.

I refer to the entitlement of the community; not to the entitlement of judges or magistrates. This is the point I made earlier. Judicial independence is a right of the citizens of New South Wales, not of its judiciary. The right of those citizens is to have criminal and civil justice administered by tribunals that are competent, impartial and independent. From the standpoint of individual members of the judiciary, there might be a number of respects in which they would be better off if they were members of the public service. There are, I am sure, some ways in which magistrates were better off in the days when they were part of the New South Wales Public Service. Perhaps their superannuation entitlements were better than the pension entitlement of judges. Perhaps those representing their interests had better access to certain decision-makers, or greater input into certain decisions. Perhaps their environment was in some respects more sheltered. Moreover, I have no doubt that from the standpoint of some of those involved in public administration, management of the magistracy by the executive government promoted efficiency, and self-management by the courts was an alarming prospect.

An aspect of managerial efficiency that I encountered when I was Chief Justice of New South Wales, and that concerned, and I am sure

still concerns the magistracy, is the operational relationship between the courts and government agencies such as the police, corrective services, welfare organisations and others. Bail applications are a simple example. Arranging for the evidence of police witnesses is another. In a host of ways, courts, in their day-to-day activities, interact with providers of services, public and private. It is understandable that people saw advantage in unified control of those activities, and resisted, and perhaps in some ways continue to resist, the prospect of separate control. A related problem is that of resources. It is one thing to say that courts should control their own essential activities, but in practice such control requires funding. In the result, whatever independence of control the courts have, they need to cooperate with the executive government which provides their funding and is democratically accountable for the use of those resources. Once again, theory cannot be pushed beyond its limits.

It is now established that judicial independence requires judicial control of administrative functions that bear directly on decision-making. These functions include the assignment of business within a court, fixing of times and places of sitting, and the arrangement of court lists. Without doubt, managers in the executive government would believe they were better than judges or magistrates at exercising organisational skills; and they may be right. But it is unacceptable that the executive government should assign judicial officers to particular cases, or control court listing procedures, because so many cases involve the government itself. As I said, co-operation is necessary. A court can list

a case for hearing on a particular day, but the court does not have to provide transportation for a prisoner, or re-arrange the commitments of a police witness, or ensure the presence of a welfare officer. One of the issues that will continue to be worked out in future years, and I am sure occupies the attention of administrators within the courts and the executive at present, is the making of practical arrangements that respect judicial independence and at the same time allow for managerial realities. In these matters the relationship need not be adversarial. Courts can assert their independence while respecting considerations of practical necessity, and the executive government can recognise and respect the minimum principles of independence without abandoning its own responsibilities, and above all its responsibility for the efficient use of public resources.

Independence often comes at a cost to those who obtain it, and to those who yield it. Judicial independence is sometimes resented by those who misunderstand its purpose; who believe, erroneously, that it exists for the benefit of the judiciary. This is especially so at a time when issues of accountability are raised. Issues of efficiency give rise to questions of performance review; questions that I believe will become more pressing in future years. The established forms of judicial accountability are well known. Judicial officers conduct their proceedings in public; they hear both sides of the case; they give reasons for their decisions; and their judgments routinely are subject to appellate scrutiny. As a system of performance review, this is, by the standards that apply to most decision-makers, both inside and outside

government, quite extensive. The judicial system involves elaborate mechanisms of peer review, the most obvious of which is the appeal. What would not be acceptable as a method of performance review, because it would be radically inconsistent with the appearance and reality of independence and impartiality, would be the subjection of decisions to evaluation by one of the parties to litigation (commonly the executive government itself), and the administration of a scheme of rewards or penalties according to the outcome of such evaluation. Judicial officers should have nothing to gain and nothing to lose from the way they decide a case; least of all should they have anything to hope or fear from one of the parties to the case. A subjection of judicial officers to a form of performance review according to which the outcomes of their decisions are measured against the expectations of the executive government, above all in cases to which the executive government itself is a party, plainly would be inconsistent with the right of the other parties, and the public, to the decision of an impartial and independent tribunal. The subject will affect the whole judiciary in coming years, and the magistracy will be caught up in it. It will cause some friction, but it is essential that basic constitutional principles be understood and respected.

I can think of no feature of my 20 years as a Chief Justice more gratifying than the manner in which the New South Wales magistracy has embraced its independence.

The change was not a simple transfer, now completed and part of history. It is dynamic. Issues such as recruitment, professional formation and development, court management, funding, and relations with the public and the other branches of government will be addressed on the basis that the magistracy is a fully integrated part of the State's judiciary. It is, however, more than that. In many respects, magistrates' courts are the public face of justice.

One aspect of the future of the justice system that is evident is the increasing importance of the exercise of summary jurisdiction, especially in the administration of civil justice. Of our criminal justice system, I would say the same as has often been said about parliamentary democracy: it is far from perfect, but it is better than any alternative I know. The superiority of our system of civil justice is more debatable. The cost of civil justice is the greatest blot on the common law system. A large part of the solution must be greater resort to summary procedure. To borrow a word from a different context, the sustainability of civil justice depends upon directing a much greater proportion of work to courts of summary jurisdiction. This will happen. As it occurs, the true value of the work of magistrates will be understood.

Another challenge for the future is the need to draw boundaries between some of the administrative functions that historically have been performed by magistrates and the functions appropriate to the exercise of judicial power. I do not intend to suggest that the State system should become involved in the technical complexities that sometimes result

from the stricter federal separation of functions. Indeed, the best example of the impracticability of this is what might be regarded as a typical function performed by magistrates: the conduct of committal proceedings in respect of indictable offences. Technically, this is an administrative function[18], but it is performed by a judicial offer in a proceeding that has most of the attributes of judicial procedure. Although there are a number of areas in which the distinction is blurred, there are plenty of examples of activities traditionally undertaken by magistrates that are clearly non-judicial. It may be that, over time, the range of clearly non-judicial activities will be narrowed, so as to bring the activities of magistrates were closely into conformity with those of other State judicial officers.

The full implications of the move of New South Wales magistrates from the executive to the judicial branch of government are still being worked out. The Local Courts carry most of the burden of the practical administration of criminal justice and, for the reasons given earlier, they are the best hope for a reasonably accessible system of civil justice. For most ordinary citizens, an appearance in court is far more likely to be before a magistrate than any other judicial officer. Magistrates powerfully influence public perceptions of the justice system. From a national perspective, the New South Wales magistracy is Australia's largest single body of judicial officers. The high quality of their work is important to the whole Australian judiciary. Equally important is their manifest independence. In a rights-conscious age, the public expects nothing less.

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[*] Chief Justice of Australia.

[1] (2004) 218 CLR 146.

[2] (2005) 227 CLR 166.

[3] *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America* [2008] HCA 14.

[4] Golder, High and Responsible Office: A History of the NSW Magistracy, Sydney University Press in association with Oxford University Press Australia, 1991.

[5] Ibid at 175-177.

[6] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3].

[7] Article 10.

[8] Article 14(1).

[9] Article 6(1).

[10] 5 US (1 Cranch) 137 (1803) at 163.

[11] (1976) 14 SASR 530.

[12] eg *Valente v The Queen* [1985] 2 SCR 673; *Mackin v New Brunswick* [2002] 1 SCR 405; *Ell v Alberta* [2003] 1 SCR 157.

[13] *Ell v Alberta* [2003] 1 SCR 857 at 837.

[14] *Valente v The Queen* [1985] 2 SCR 673 at 692.

[15] 2002 (5) SAS 246 (cc).

[16] *North Australian Aboriginal Legal Aid Service inc v Bradley* (2004) 218 CLR 146 at 152 [3].

[17] See, for example, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; *Forge v ASIC* (2006) 80 ALJR 1606.

[18] *Ex parte Cousins*; *Re Blacket* (1946) 47 SR (NSW) 145.