

Magistrates – The Face of the Australian Judiciary – A Lonely Life*

Chief Justice Brian Ross Martin

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Historical Considerations

The role of modern-day justices of the peace and magistrates evolved from the powers and duties first bestowed upon justices under the *Justices of the Peace Act 1361* (UK). It makes interesting reading:

“First, That in every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Advisement; [and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labor as they were wont in times past:] and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison; and to take of all them that be not of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish; to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor put in fear by Peril which might happen of such Offenders; [and also to hear and determine at the king’s suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; and that writs of oyer and determiner be granted according to the statutes thereof made, and that the justices which shall be thereto assigned be named by the court, and not by the party. And the king will, that all general inquiries before this time granted within any seignories, for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed and that fines, which are to be made before justices for a trespass done by any person, be reasonable and just, having regard to the quantity of the trespass, and the causes for which they may be made.]”¹

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¹ As first enacted. The legislation continues to be in force, however, the sections in square brackets have since been repealed.

As is apparent, the ancient English office of the ‘Justice of the Peace’ possessed very broad executive powers which included responsibility for keeping the peace, apprehending offenders and performing law enforcement duties. These sat alongside the judicial functions of hearing and determining matters brought before the courts.

Between the 14th and 19th centuries, the powers of justices increased, peaking in the 18th and 19th centuries. The powers were increased to such an extent that it has been said that justices were often able to “control the entire administration of a county”² and, “de facto, the local justices had their own legal system”.³ This led to a “rising level of corruption” that prompted their ‘partial’ replacement by “a body of professional magistrates”.⁴ In 1792, twenty four magistrates were appointed by statute. By 1825 only four of the appointed magistrates were not barristers. In 1839 the introduction of the *Metropolitan Police Courts Act 1839* (UK) marked the establishment of a professional stipendiary magistracy requiring that all appointees to the position be barristers.⁵

In 1848 a group of three Acts, known as the Jervis Acts, codified the powers and duties of justices for the first time. The *Summary Jurisdiction Act 1848* (UK) dealt with the procedural aspects of their jurisdiction and, under the *Stipendiary Magistrates Act 1858* (UK), stipendiary magistrates were empowered to do all acts authorised to be done by two justices. In this way the powers of Justices (or lay magistrates) were significantly reduced and much greater powers were conferred upon stipendiary magistrates.

The Offices of Justice of the Peace and Magistrate were imported into Australia on white settlement. Dr Lowndes SM notes that magistrates exercised “jurisdiction over summary criminal offences ... and convict discipline cases from the first days of the colony of New South

² Dr John Lowndes, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I’ (2000) 74 *Australian Law Journal* 509 at 511 citing Kelly, *Ward & Kelly – Summary Justice South Australia* (Looseleaf, LBC, Sydney) at [1.410] 603 citing the *Encyclopaedia Britannica*.

³ ‘Justices of the Peace: Are They An Endangered Species?’ (2009) 83 ALJ 507 at 510.

⁴ Lowndes at 511 citing Frank, *The English Magistracy* (OUP, London, 1967) at 1-38 referred to in Michelides, *Report on the Change in Terminology From Magistrate to Judge* (Paper presented at the Australian Stipendiary Magistrates Association, 8 March 1995) at 3.

⁵ Lowndes, at 511 citing Frank, *The English Magistracy* (OUP, London, 1967) at 1-38 referred to in Michelides, *Report on the Change in Terminology From Magistrate to Judge* (Paper presented at the Australian Stipendiary Magistrates Association, 8 March 1995) at 3.

Wales”, and also exercised a civil jurisdiction during the early days of white settlement in New South Wales.⁶ Magistrates were “heavily involved in the administration of districts over which they had control” and in the administration of the convict system.⁷

After 1850, in most jurisdictions the paid magistracy began to be “regarded as officials who were basically judicial-style functionaries” that were expected to be “more like judges, compared to earlier years”.⁸ In New South Wales, this was cemented in 1895 when the magistracy was incorporated into the public service. By 1914, justices of the peace were complaining that they had been reduced to “mere witnessing machines”.⁹

In 1982 the *Local Courts Act 1982* (NSW) exempted magistrates from the provisions of the *Public Service Act 1895* (59 Vict 25), but it was not until 1986 that their position as ‘judicial officers’ was confirmed by the *Judicial Officers Act 1986* (NSW). That Act dealt with the independence of judicial officers, including magistrates. It was only in 1955 that new recruits to the New South Wales magistracy had to be legally qualified.¹⁰

In South Australia, separation of the magistracy from the public service came about as a result of the decision of the Full Court in *Fingleton v Christian Ivanoff Pty Ltd*.¹¹ The Court held that special magistrates, including stipendiary magistrates, who were permanent members of the public service were disqualified, by reason of bias, from hearing a complaint prosecuted by an officer of the public service because both the prosecutor and magistrate were members of the same Department and subject to the same departmental head. In a somewhat remarkable move, all magistrates were then transferred to the Premier’s Department. A later challenge failed in *Lyle v Christian Ivanoff Pty Ltd*¹² when a court of five Judges held that magistrates were not disqualified from hearing cases brought by officers in other branches of the public service and prosecuted by a practitioner of the Department of Legal Services.

⁶ Lowndes at 512.

⁷ Lowndes at 512 citing Neal, ‘Law and Authority: The Magistracy in New South Wales 1788-1840’ (1985) 3 *Law in Context* at 52-30.

⁸ Lowndes at 514 citing Castles, *An Australian Legal History* (1982) at 234.

⁹ Lowndes at 515 citing Golder, ‘The Making of the Modern Magistracy’ (1991) 77(3) *J Royal Aust Hist Soc* at 34.

¹⁰ Hilary Golder, *High and Responsible Office: A History of the New South Wales Magistracy* (1991) at 175.

¹¹ (1976) 14 SASR 530.

¹² (1977) 16 SASR 476.

Commonsense finally prevailed in 1983 when the *Magistrates Bill 1983* (SA) was introduced with the professed intention that it “place magistrates, in relation to the exercise of their judicial functions, in the same position as other members of the judiciary”.¹³

The Northern Territory reacted to the decision in *Fingleton* with a Bill in 1976 that became the *Magistrates Act 1977* and separated magistrates from the public service. In *North Australian Aboriginal Legal Aid Service v Bradley*,¹⁴ the plurality judgment observed that the passage of that Act “was part of a movement at the time throughout Australia whereby magistrates achieved a legal status more compatible with judicial independence”.

Separation from the public service was not the only change linked to increased judicial independence for magistrates. Changes to their qualifications for appointment, increases in jurisdiction and changes to manner of removal from office have also been significant. Every jurisdiction now requires legal qualifications and a number specify a minimum of five years admission as a legal practitioner. Commonly, the jurisdiction in criminal matters has expanded to encompass significant criminal matters and substantial increases in the civil jurisdiction have occurred. Northern Territory magistrates possess jurisdiction to hear and determine specified claims up to \$100,000.

Of significance to the position magistrates now occupy in the judicial hierarchy is the breadth of jurisdiction now exercised either generally or when sitting as a specialist court. While not every magistrate in all States and Territories is empowered to sit in all of the following jurisdictions, this list compiled by Dr Lowndes¹⁵ is demonstrative of the extent to which magistrates are the face of the justice system for the vast majority of the community who access the system:

- coroners;
- *Family Law Act 1975* (Cth);
- children’s court;
- child welfare and child protection matters;

¹³ Memorandum from Dean Mildren, ‘Proposal to Change the Title of Magistrate to Judge’; Kathy Mack and Sharyn Anleu, ‘The Security of Tenure of Australian Magistrates’ [2006] MULR 13 citing South Australia, *Parliamentary Debates*, Legislative Council, 8 November 1983 at 1452 per C J Sumner, Attorney-General.

¹⁴ (2004) 218 CLR 146 at 167 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

¹⁵ Lowndes at 524.

- adoptions;
- domestic violence;
- workers compensation/work health;
- licensing and industrial;
- mining wardens;
- tenancy;
- mental health;
- criminal injuries compensation;
- marine jurisdiction;
- tribunals; and
- appellate.

If a moment is taken to reflect on the range of issues with which magistrates are required to grapple, and to absorb the statistical information as to the number of matters with which magistrates deal annually, the extent of contact with the broadest possible cross section of the community is quite astonishing.

Statistics

For the year 2007-2008, the Australian Bureau of Statistics reported the following:

- Of 675,765 defendants dealt with in Australian criminal courts, higher courts dealt with 16,811 while 619,542 proceeded through Magistrates' Courts and 39,412 were dealt with in Children's Courts.
- The breakdown of offences was as follows:
 - (i) road traffic – 45%
 - (ii) public order – 11%
 - (iii) dangerous/negligent acts endangering persons – 9%
 - (iv) acts intended to cause injury – 8%
 - (v) offences against justice procedures – 6%
 - (vi) theft – 5%
 - (vii) drugs – 5%.

Regrettably, 33% of defendants dealt with in Australian Magistrates' Courts during that period were aged under 25 years.

The population of the Northern Territory is a little over 200,000. Statistics gathered by the Department of Justice record that in the period 1 July 2008 – 30 June 2009, 14,410 criminal matters were lodged in the Magistrates Court in comparison with 438 in the Supreme Court. 3,350 civil filings occurred in the Magistrates Court while 539 were lodged in the Supreme Court. To the figures for the Magistrates Court must be added the filing of 2,969 matters in the domestic violence jurisdiction. In the same period the Magistrates Court disposed of 11,600 criminal matters and 3,950 civil matters. The Supreme Court dealt with 368 criminal cases and 466 civil matters.

One of the special features attached to the work of magistrates in the Northern Territory concerns indigenous persons. Nationally, indigenous people represent approximately 2.5% of the total population, while in the Northern Territory they account for approximately one third of the relatively small overall population. Significantly, for the 2007 – 2008 year just short of 65% of defendants in Northern Territory Magistrates Courts were indigenous. As at 30 June 2009, statistics produced by Correctional Services record that approximately 82% of prisoners in the Northern Territory were indigenous persons. The next highest percentage of indigenous prisoners was 40% in Western Australia, followed by approximately 28% in Queensland. These bald figures provide a glimpse into the particular “coalface” at which magistrates in the Northern Territory work.

Localities

Another significant aspect of the role of magistrates as the face of the Australian judiciary is the wide range of localities in which magistrates sit. I appreciate that some larger centres have resident Judges and there are numerous Supreme and county/district circuits to country centres across Australia, but as widespread as those sittings might be, their reach into the local communities is nowhere near as extensive as the reach achieved by magistrates.

In the Northern Territory, while occasionally sitting under a tree in a remote locality, the Supreme Court sits in Darwin and Alice Springs. Magistrates are permanently stationed in

Darwin, Alice Springs and Katherine and, from those localities, administer sittings at a number of remote communities. The following list is taken from a paper by Blokland J, when she was Chief Magistrate of the Northern Territory, delivered at the National Indigenous Legal Conference on 24 September 2009,¹⁶ and in considering this list it is appropriate to bear in mind that almost all of these localities encompass very small communities:

The Top End

Administered from the Darwin Court

- Alyungula (Groote Eylandt)
- Daly River (Naiyu)
- Galiwin'ku (Elcho Island)
- Jabiru
- Milikapiti (Snake Bay)
- Nguiu (Bathurst Island)
- Nhulunbuy
- Numbulwar
- Oenpelli (Gunbalunya)
- Wadeye (Port Keats)
- Pirlingimpi (Garden Point)
- Maningrida

Central Australia

Administered from Alice Springs Court

- Hermannsburg
- Ali Curung
- Elliot
- Kalkaringi
- Kintore
- Lajamanu
- Mutitjulu
- Papunya
- Ti Tree
- Tennant Creek
- Yuendumu

¹⁶ Jenny Blokland, "Current Legal Issues in the Northern Territory Concerning Indigenous People and the Criminal Justice System", a paper delivered at the National Indigenous Legal Conference, Adelaide, 24 September 2009.

Administered from Katherine Court

- Barunga
- Borroloola
- Timber Creek
- Ngukurr
- Mataranka

In these communities magistrates directly and indirectly touch the lives of a significant percentage of the population. They do so across diverse areas of daily life when performing both administrative functions and the true judicial role.

On a broader front, the wide-ranging role of magistrates necessarily requires intrusions into the affairs of thousands of people across Australia who, generally speaking, do not welcome these intrusions. Commonly, the affairs under consideration involve traumatic and distressing circumstances in the lives of those caught up in the events and subsequent proceedings. In an environment unfamiliar to them, unwilling participants are required to submit to an exploration by a stranger of otherwise intimate and confidential details of their lives generally or of particular episodes in their lives.

It is in this context that magistrates carry out their duties as the wider community passes through their doors in large numbers. Contact is not only with accused persons or parties. It is with witnesses, families and friends of participants, curious members of the public, the legal profession and the media.

It cannot be emphasised too highly that all judicial officers occupy a unique position of authority from which they create impressions and exercise powers in ways which have great impacts upon the lives of litigants and those close to litigants. Not infrequently the impacts are felt across the wider community whose overall well-being is affected by civil disputes, crime and judicial decisions quelling controversies. In the judicial hierarchy, however, the special position occupied by magistrates as the major link between the community and our system of justice imposes a very large responsibility to respond accordingly as representatives of that system. Public confidence in and respect for the system is essential and cannot be earned or maintained

unless all judicial officers properly fulfil their vital role, but it is magistrates who present the face of the system to the vast majority of those persons who are brought into contact with it.

A lonely life

Magistrates sit alone. Each magistrate discharges an individual responsibility which must be assiduously discharged alone in the face of long lists involving defendants and other litigants who are seeking a fair and speedy resolution of their particular controversy. Not infrequently, consideration of a plethora of extensively amended legislation is required, often in circumstances where only limited assistance is available. The Magistrates' Court is the nursery where young practitioners "practice", in every sense of that word, with the inevitable consequence that the quality of assistance varies significantly.

The onerous nature of the duty undertaken by all judicial officers is readily ascertained from the Guide to Judicial Conduct (2nd Edition).¹⁷ For magistrates, the factual context which I have endeavoured to outline provides the setting in which the principles and standards identified in the Guide are to be applied.

The identification of the standards and the importance of their proper application begins with the following observations in the Preface by the Hon Murray Gleeson, then Chief Justice of Australia:

"The members of the Australian judiciary aspire to high standards of conduct. Maintaining such standards is essential if the community is to have confidence in its judiciary."

The Guiding Principles governing conduct by judicial officers are stated in the following terms:

"2 GUIDING PRINCIPLES¹⁸

The principles applicable to judicial conduct have three main objectives:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.

¹⁷ Published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration.

¹⁸ Chapter Two.

Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided.

There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives. These are:

- Impartiality;
- Judicial independence; and
- Integrity and personal behaviour.

These objectives and principles provide a guide to conduct for a judge in private life and in the discharge of the judge's functions. If conduct by a judge is likely to affect adversely the ability of a judge to comply with these principles, that conduct is likely to be inappropriate."

As to conduct in court, the Guide provides the following advice:

“4 CONDUCT IN COURT¹⁹

4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

Nevertheless, the entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. It is worth remembering that many complaints to the Judicial Commission of New South Wales by litigants and their lawyers have had as their foundation remarks made by judicial officers in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.

A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial. This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Judges should inform themselves on these matters so that they do not inadvertently give offence.

A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases.

¹⁹ Chapter Four.

4.2 Participation in the trial

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.”

The features of conduct in court to which the Guide draws attention underline the importance of conveying a strong impression of fairness, impartiality and a willingness to listen, together with respect for the dignity of all persons who enter a courtroom. This aim will not be achieved by sitting as the inscrutable sphinx merely listening attentively to counsel and witnesses. Listening attentively is obviously important, but the duty is to ensure that a trial is fair to both parties. This duty encompasses an active role to ensure that questioning of witnesses is fair to each witness. This aspect of the duty is particularly important when dealing with vulnerable witnesses such as children and those who might be susceptible to confusion or intimidation.

Courts have always possessed the power to prevent unfair treatment of witnesses, but transcripts of trials from some years past demonstrate vividly failures to use these powers and that too often children and other vulnerable witnesses were not adequately protected. It is unnecessary to explore why, in the past, judicial officers did not use their powers in this area, but we can safely assume that myths and unjustified assumptions about the reliability of children and complainants in sexual cases played a significant role. In turn, no doubt this was brought about by a lack of understanding concerning the cognitive and linguistic development of children and lack of knowledge as to appropriate methods of extracting reliable evidence from children. With respect to complainants in sexual cases, myths and unjustified assumptions abounded and were centred upon the fundamental premise that such witnesses were likely to be unreliable.

In the past, the “system of justice” also failed to appreciate the true impact on children and other complainants in sexual cases of their involvement in the system. The “system” failed to understand properly the difficulties faced by such witnesses when confronted initially by police in uniform and, subsequently, by the hostile environment of the court containing authority figures dressed in intimidating apparel. As a consequence the “system” did not provide the necessary assistance and protection for these vulnerable witnesses.

It was not merely a fad which led to significant legislative amendments involving the abolition of the traditional warning that it is dangerous to convict on the uncorroborated evidence of a child or a complainant in a sexual case. In part, this was a response to political pressures in connection with sexual assault proceedings and what was perceived to be an imbalance too far in favour of an accused and against complainants generally, and child complainants in particular. In the main, however, the legislative reaction was brought about by a large amount of research carried out into the competence and reliability of children as witnesses, and of other complainants in sexual assault cases, together with a recognition that such witnesses were being subjected to procedures and questioning that were both unfair and causing irreparable damage to them.

With respect to child witnesses, it is readily apparent that in the past courts acted on wrong assumptions and lacked understanding of child development and comprehension issues which affect the capacity of children to give reliable evidence. When I say reliable evidence, I use that expression in its widest form and not merely limited to whether children are deliberately telling untruths. This concept embraces the ability of children to understand questions and subjective factors related to their development which affect their capacities and responses.

As a consequence of the failure of courts to provide adequate protection for these types of witnesses, in recent years legislatures across the country have amended procedural and substantive laws to increase protection for vulnerable witnesses and to spell out in statutory form the wide powers of courts to protect vulnerable witnesses from inappropriate questioning. These amendments reflect community concern that judicial officers were not doing enough to protect these witnesses. It is the duty of the courts to respond accordingly.

In mentioning protection of vulnerable witnesses, I do not mean to suggest that judicial officers should necessarily interrupt all questioning that becomes rigorous and demanding. That is not the law. Much depends upon the individual witness and the topic being addressed. Ultimately the issue is whether the questioning is unfair and there is a duty resting on all judicial officers to intervene when that point is reached. The power existed at common law, but was exercised too infrequently. Hence the statutory response.

In this area, the power must be exercised irrespective of the attitude of counsel for the party whose witness is being questioned. The failure of counsel to object is a factor to be taken into account, but counsel may or may not be competent and may have their own motives for allowing unfair questioning to proceed. They may simply lack the necessary understanding of the impact of the questioning on a vulnerable witness. Counsel are not under the same duty as judicial officers to ensure fairness to a witness. In addition, judicial officers are in a unique position in the trial setting. They are the only disinterested observers of the evidence. They possess the advantage of experience in assessing the effects of questions and in assessing the capacities of each witness to comprehend questions and withstand the pressures that arise from time to time in the witness box.

Of course, if intervention is required, it should be conducted courteously and, if necessary, be accompanied by an explanation as to why intervention has occurred. Whenever intervention is to the disadvantage of a party, the natural reaction of the party or their counsel will often be to assume that the judicial officer is taking a view favourable to the witness and adverse to the opposing party. Every effort should be made to intervene in a manner which maintains the appearance of impartiality and evinces the primary concern of ensuring that the proceedings are fair to all parties and each witness.

The standards identified in the Guide are never easy to attain, particularly when the individual responsibility is discharged alone and in the face of the volume and nature of work with which magistrates are confronted on a daily basis. Every jurisdiction has its special problems. In the Northern Territory, magistrates often sit in remote localities where they are regularly faced with lengthy lists clogged almost exclusively by cases involving alcohol-induced violence, including sexual violence, and drink-driving. Day after day magistrates deal with this combination and with repeat offenders whose circumstances become well known to the magistrates. The “diet” is both distressing and depressing and it is a diet with which magistrates must cope alone in localities far removed from the comfort of major cities and large country towns.

For all magistrates, and particularly for those who sit in remote localities, in a legal sense and from a practical point of view it is a lonely life. This context means that the value of professional development programs run by the National Judicial College and gatherings such as

this Biennial Conference is not limited to providing opportunities for professional development. They are also of critical importance in providing magistrates with opportunities to share experiences, discuss mutual problems and exchange ideas.

Interaction with Judges should also be actively encouraged. At a professional level, the advantages for magistrates are obvious. On the other side, it is important that Judges who sit on appeals from magistrates gain an appreciation of the perspective of magistrates and the circumstances under which they discharge their duties.

Unrepresented Litigant

The observance of the standards identified in the Guide can be particularly demanding when faced with an unrepresented litigant. It is not uncommon for such litigants to be difficult persons who have become obsessed with their particular cause. The difficult litigant often regards the court as the ideal venue in which to air concerns and perceived injustices that are of no relevance to the issues before the court. In a busy court, such litigants can test the patience of even the most tolerant of judicial officers.

I do not possess a magic wand of solutions for this seemingly intractable problem. Not only should the judicial officer maintain the necessary equilibrium and patience, but the almost overwhelming temptation to take shortcuts must be firmly resisted. In *Birkeland-Corro v Tudor-Stack*,²⁰ I made the following observations:

“The duty imposed upon a presiding judicial officer to ensure that the fundamental requirements of a fair trial are met is an onerous duty, particularly if the unrepresented defendant behaves in an uncooperative manner. While it is readily understandable that judicial officers faced with difficult or recalcitrant defendants might become impatient, the behaviour of a defendant and the impatience that follows must not deflect the judicial officer from that fundamental duty of ensuring that appropriate explanations and opportunities are afforded to the unrepresented defendant which will ensure that the trial is fair.”

The fundamental duty is to ensure that the unrepresented litigant receives a fair trial. This will often place the judicial officer in the very difficult position of walking the fine line between giving such information and advice as is necessary to ensure that a trial is fair while avoiding

²⁰ (2005) 15 NTLR 208 at 226 [62].

giving advice as to how the litigant should conduct the case. This was the point made by Brennan J in *MacPherson v The Queen*:²¹

“Whether any and what advice should be given to an accused depends upon the circumstances of the particular case and of the particular accused. What can be said is that if it is necessary to give any advice, the necessity arises from the Judge’s duty to ensure that the trial is fair. That duty does not require, indeed it is inconsistent with, advising an accused how to conduct his case; but it may require advice to an accused as to his rights in order that he may determine how to conduct the case.”

In emphasising the importance of not losing patience with the difficult unrepresented litigant, I do not mean to suggest that firmness is not appropriate. Quite the contrary. Firmness in clearly identifying the issues to be aired and confining the wayward litigant to such issues is usually both appropriate and necessary. But firmness does not equate with a lack of courtesy. In this context it can be helpful to provide the unrepresented litigant with a document explaining the litigant’s rights, procedures to be followed and the issues to which the evidence and submissions are to be addressed.

Reasons

Independently of conduct in court, an important aspect of the work of all judicial officers is explaining to the parties and the wider community why a particular decision has been reached. Judicial officers should never be hesitant about giving the necessary explanation. I appreciate that authorities have repeatedly emphasised the need for reasons in appropriate cases in order to enable the appellate court to ascertain the processes of reasoning and to determine whether any errors have occurred, but in my view the primary concern should be to provide an adequate explanation to the parties as to why a particular decision has been reached. Nothing engenders a genuine sense of dissatisfaction more than a failure to explain.

Obviously, the required content of an explanation will vary greatly according to the particular circumstances. Imposing penalty for driving with an excessive blood alcohol level is far removed from a decision in a civil case concerning a commercial dispute. In addition, the large

²¹ (1981) 147 CLR 512 at 547.

workload of magistrates necessitates extensive use of brief *ex tempore* reasons. The remarks of Olsson J are apposite.²²

“When extempore reasons of magistrates are under consideration, it is inappropriate to dismember such reasons or subject them to hypercritical analysis. Magistrates work under considerable pressure which frequently requires the giving of brief oral extempore reasons without significant opportunity for reflection or preparation. It is necessary to take a broad view of (extempore reasons) and ascertain the essential thrust of the reasoning processes applied, without being unduly critical of the precise methods of expression used or according them a degree of definitiveness which was never intended.”

Of course, the same latitude cannot be extended when judgment has been reserved for a significant period and either written reasons or oral reasons given from notes are subsequently delivered.

There are numerous authorities dealing with the duty to give reasons, but I wish to mention only some of the observations made by McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd.*²³ His Honour observed that parties assume that the adjudicator of their dispute will decide the dispute according to relevant rules or principles and that the adjudicator will ascertain, as far as they can reasonably be ascertained, the facts of the dispute. His Honour noted that to give effect to these assumptions a judicial decision must be a “reasoned decision” and distinguished such a decision from one made arbitrarily. The judgment continued:²⁴

“However, without the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision. In my opinion the giving of reasons is correctly perceived as ‘a necessary incident of the judicial process’ because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law.

The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge’s decision. As Lord MacMillan has pointed out, the main object of a

²² *Semple v Williams* (1990) 156 LSJS 40 at 231[9] approved in *Peach v Bird* (2006) 17 NTLR 230.

²³ (1987) 10 NSWLR 247 at 273 and 278 – 280.

²⁴ At 279.

reasoned judgment ‘is not only to do but to seem to do justice’:²⁵ Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and the public.

Secondly, the giving of reasons furthers judicial accountability. ...

Thirdly, under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases: ...hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.”

McHugh JA added qualifications:²⁶

“However, neither the need nor the appearance of justice requires that reasons be given for every decision made by a judicial tribunal. ... In the course of an action, a judge may make many decisions concerning interlocutory matters which cannot reasonably be held to require reasons: ... Justice is a multi-faceted concept. In determining whether justice was done and seen to be done other interests and values, besides the giving of reasons, have to be considered. The limited nature of judicial resources and the cost to litigants and the general public in requiring reasons must also be weighed. For example, many questions concerning the admissibility of evidence may require nothing more than a ruling: ... It all depends on the importance of the point involved and its likely effect on the outcome of the case.”

The observations of McHugh JA were made in the context of a decision of a Judge of the Compensation Court of New South Wales. While they have a broader application, nevertheless it must be noted that the position of magistrates hearing a long list of pleas of guilty to traffic and minor criminal offences is a context far removed from the decision under consideration in that case.

Consistency

Another area of particular importance, and one in which the isolation of individual magistrates poses particular problems, concerns consistency of treatment of offenders. In *Postiglione v The Queen*,²⁷ Dawson and Gaudron JJ observed that:

“[e]qual justice requires that like should be treated alike ...”.

²⁵ *The Writing of Judgments (1948)* 26 Can Bar Rev at 491.

²⁶ (1987) 10 NSWLR 247 at 279.

²⁷ (1997) 189 CLR 295 at 301.

While that observation was made in the context of a complaint of disparity of sentence between co-offenders, it is also applicable in a more general way to sentencing.

The importance of consistency in punishment was emphasised by Mason J in *Lowe v The Queen*:²⁸

“Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community”.

Consistency in punishment is a significant factor underlying the critical need for magistrates to be provided with appropriate resources in order to assist them in the task of discharging their sentencing duties. Databases of sentencing decisions exist in all jurisdictions and there can be no excuse for not providing magistrates with the necessary electronic resources to enable read access to those databases.

Specialist Courts

One of the themes for this Conference is Innovation. Magistrates have been at the forefront of innovative measures, particularly in the area of sentencing and dealing with indigenous offenders. Drug and alcohol courts are another example.

The innovations in these areas and the continued development of sentencing procedures and options and of alternative means of dispute resolution is to be encouraged and actively supported by governments. It is a large topic in itself upon which I will not embark. I mention it only to sound a note of caution.

In *Kirk v Industrial Relations Commission of New South Wales*,²⁹ the High Court was concerned with convictions recorded by the Industrial Court of New South Wales following the death of an employee on the appellant’s farm. They were convictions for criminal offences against the

²⁸ (1984) 154 CLR 563 at 610 – 611.

²⁹ (2009) 239 CLR 531.

Occupational Health and Safety Act 1983 (NSW). The employee had driven an All Terrain Vehicle down a steep slope on the side of a hill where there was no formed track instead of following an existing road. The Vehicle overturned and the employee was killed.

The High Court found jurisdictional error and quashed the conviction. In the course of his judgment, Heydon J observed that our legal system “has often had to balance the advantages of creating specialisation over the disadvantages of doing so”.³⁰ His Honour went on to discuss the dangers associated with the creation of specialist courts:³¹

“Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the *separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. ... So to courts set up for the purpose of dealing with a particular mischief can tend to exult that purpose above all other considerations, and pursue it into absolute array. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are ‘preoccupied with special problems’, like tribunals or administrative bodies of that kind, are ‘likely to develop distorted positions’.*” (footnotes omitted) (my emphasis).

Heydon J went on to qualify his remarks by observing that he was not necessarily questioning the view that the creation of specialist courts was the best way to achieve particular public goals. In doing so his Honour said:³²

“It is merely to raise a caveat about accepting too readily the validity of what specialist courts do – for there are general and fundamental legal principles which it can be even more important to apply than specialist skills.”

The judicial role is marked by distinctive characteristics of fundamental importance. In the creation and operation of specialist courts, care needs to be exercised in order to ensure that the judicial role and its fundamental characteristics are not compromised.

³⁰ Ibid, at 590 [122].

³¹ Ibid.

³² Ibid.

Conclusion

As is clearly evident from the nature and content of the workload with which magistrates deal annually, the description of the magistracy in Australia as “the undervalued work-horse of the court system”³³ is apt. The final word goes to Kirby J who accurately and concisely encapsulated the evolution of magistrates in the following few words:

“From an often dispirited group of lay justices and public servants, lacking complete independence from the executive government, magistrates throughout Australia have become true judicial officers and thus full colleagues of the judiciary. They are recognised as such and respected for the high standards of their appointments; the legal protections for their independence; and their participation in the professional bodies in which judges work with them as true equals on issues of common judicial concern.”³⁴

³³ Michael Kirby, ‘The Ongoing Ascent of the Australian Magistracy’ (2009) 9 *The Judicial Review* 147 at 148 citing J Willis, ‘The Magistracy: The Undervalued Work-Horse of the Court System’ in C Corns (ed), *Reshaping the Judiciary* (2001) 129.

³⁴ Michael Kirby, ‘The Ongoing Ascent of the Australian Magistracy’ (2009) 9 *The Judicial Review* 147 at 149.

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