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30 April 2009

Mr Peter Hallahan
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Department of the Senate
Parliament House
CANBERRA ACT 2600

RE: SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS: INQUIRY INTO AUSTRALIA'S JUDICIAL SYSTEM AND THE ROLE OF JUDGES

The Association of Australian Magistrates (AAM) wishes to make a submission in relation to the Senate Inquiry into Australia's Judicial System and the Role of Judges.

By way of background, AAM is the representative body of Australian magistrates nationally and internationally. The objects of the Association are to:

(a) to confer and liaise with, and if appropriate, to act in conjunction with all Chief Magistrates, Judicial Conference of Australia, the Australian Institute of Judicial Administration or any other body with objects consistent with those of AAM;

(b) ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia;

(c) promote and improve the quality of the judicial system in Australia;

(d) promote a better public understanding and appreciation of the role of the judiciary in the administration of justice;

(e) promote, foster and develop within the executive and legislative arms of government, and within the general community, an understanding of the importance of a strong and independent judiciary in Australia;

(f) promote and encourage continuing legal, social and cross cultural study and learning by all members;

(g) promote legal research in collaboration with any university or educational institution of similar standing including comparative jurisdictional analysis of courts exercising summary jurisdiction throughout Australia; and

(h) promote and exchange legal, educational, practical or professional information between members and other persons or bodies, nationally and internally.

The Executive Committee of AAM has seen the submission made by Professor Kathy Mack and Professor Sharyn Anleu, both of Flinders University, Adelaide, South Australia. That submission has been prepared largely on the basis of research conducted by the two professors, to which members of AAM have contributed.

Please find attached a submission prepared by the Executive Committee on behalf of the Association. The submission addresses some points not dealt with in the Mack and Anleu submission, but otherwise expands upon the matters addressed therein.

On behalf of the Executive Committee I thank the Senate Committee for taking the time to read and consider our submission.

Yours sincerely

John Lowndes
President Association of Australian Magistrates

SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS: INQUIRY INTO AUSTRALIA'S JUDICIAL SYSTEM AND THE ROLE OF JUDGES

Magistrates and the Australian Judicial System

The Australian court systems are now served at every level by highly qualified judicial officers, including the magistrates' courts which comprise the level of courts with which the vast majority of court users have contact. By virtue of the distribution of work and appellate structure which binds the courts in the various jurisdictions' hierarchies, the courts at the various levels form a multi-tiered structure, no part of which exists in a vacuum, and all of which contribute together to the effective administration of justice. This means that any examination of the Australian court system, and the judiciary, cannot ignore the integral role of the magistrates' courts.

Within that structure, there is no longer any reason to distinguish "magistrates" from "judges", as the obligations of the judicial role do not differ.

The magistracy is an integral part of the Australian judiciary, and magistrates are judges in all but name. The fact that the judicial officers of magistrates' courts continue to be distinguished by title from the judicial officers of the higher courts is purely the result of the separate historical development of the magistracy and the traditional distinction between the office of magistrate and that of a judge.[1] That historical distinction was based upon the relative position or inferior status of the magistracy in the judicial hierarchy.[2] However, that distinction can no longer be maintained. The anachronistic title of "magistrate" belies the true character of the judicial officers who now preside over magistrates' courts and their true judicial status within the hierarchy.

There is no material difference in the function performed by judges and magistrates. Magistrates are responsible "as an integral tier of the Australian judiciary for performing identical tasks to those persons identified as judges".[3]

Just as much as judges, magistrates engage in "the business of judging".[4] Just as judges do, magistrates perform the primary task and carry the basic responsibility of the judiciary to "resolve disputes between citizens, or between citizens and government, by the application of statute law and by the judge made common law".[5] In the same way as judges, magistrates decide cases "by finding the facts, ascertaining the law and applying the law to the facts as found or admitted". [6]

The business of judging also involves elements of pragmatism, discretion and choice;[7] and magistrates exercise all three in deciding cases.

There are other important dimensions to the business of judging – the notion of "fairness" and the need for openness, transparency and impartiality. Both magistrates and judges are required, in accordance with the precept of natural justice, to respond to the arguments advanced by the parties and to give

reasons for decision so as to lend openness and transparency to the judicial process.[8] Impartiality, which requires neutrality and objectivity on the part of a judge, is an essential component of judicial decision-making;[9] and magistrates are required to bring the same open, unbiased and impartial mind to the decision making process.

Furthermore, the judicialisation of the magistracy nationally[10] has resulted in significant inter-connectedness of magistrates' courts with the intermediate and higher courts. The professionalisation of the magistracy as a result of changes in formal qualifications – similar to those required for appointment at the other levels of the judiciary– has contributed significantly to the integration of magistrates' courts with the other tiers of the judiciary.

The ever increasing jurisdiction of magistrates' courts and the transfer of jurisdictions previously exercised by the intermediate courts to magistrates' courts has also contributed to the integration of the magistracy with the rest of the judiciary.

That the magistracy is indistinguishable from the judiciary of the higher courts has been recognised at the highest judicial level and within the legal profession:

> "The development of the Local Court judiciary from a group of public service administrators with special legal training into a judiciary indistinguishable from judges by attitude and competence has been remarked on many times in recent years by diverse figures as the Chief Justice of Australia, Justice Gleeson, the Chief Justice of NSW, Justice Spigelman and Mr Ian Harrison, President of the Bar Council."[11]

Recently, the Judicial Conference of Australia overtly recognised that magistrates are in fact judges by supporting the proposal put forward by the Association of Australian Magistrates (AAM) to change the title of magistrates to "Judge".

Most significantly, in April 2008 the Federal Court of Australia in *Gregory Ronald Alfred Clark and Commissioner of Taxation* SAD 110 of 2007 judicially recognised the status of magistrates as judges by unanimously holding that the applicant, a magistrate of the State of South Australia, was a "judge of a court of a State" within the meaning of section 7 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) at the commencement of that Act.

All of the above aspects have been addressed in a paper prepared on behalf of AAM, which sets out the rationale behind the proposal to change the title of magistrates to "Judge". The Senate Committee may find it helpful to refer to that paper when considering the relationship between the magistracy and the other tiers of the judiciary within the judicial system and the terms of reference of the inquiry. The Association has, therefore, taken the liberty of attaching a copy of the paper to this submission.

For the foregoing reasons, Australia's judicial system and the role of judges cannot be considered without regard to magistrates' courts and the magistracy.

Terms of Reference

It is noted that the terms of reference for the inquiry into Australia's judicial system and the role of judges requires the Committee to have particular reference to:

(a) procedures for appointment and method of termination of judges;

(b) term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;

(c) jurisdictional issues, for example, the interface between the federal and state judicial system; and

(d) the judicial complaints handling system.

Most, if not all, of these matters have the potential to affect the independence of the judiciary. Therefore, it is essential that the mechanisms for dealing with those aspects "establish and maintain a sufficient degree of judicial independence".[12]

Judicial independence, as a principle, "is applicable to and necessary for the magistracy, no less than for the higher courts";[13] and as stated above, the magistracy is indistinguishable from the judiciary of the intermediate and higher courts. Therefore, a strong case can be mounted for having common legislative provisions relating to such matters as procedures for appointment and termination of judicial officers, terms of appointment and the handling of judicial complaints.

However, at the present time, there are significant differences between the magistracy and the other tiers of the judiciary, particularly in terms of security of tenure, which are unjustified and which impinge upon the independence of the magistracy.

Security of tenure is the primary or central mechanism for protecting judicial independence.[14] As pointed out by Mack and Anleu, "magistrates in Australia do not enjoy the same security of tenure as judges of the higher courts", and "in some respects – especially the lack of guaranteed remuneration and the procedures and standards for removal and suspension – their security of tenure falls below what is desirable and perhaps what is constitutionally required".[15]

The key concerns are as follows:

- Although the security of tenure of the Commonwealth judiciary is protected by s 72 and other provisions of Chapter 111 of the *Australian Constitution*, "the extent of constitutional protection for security of tenure as an aspect of the judicial independence of magistrates in the lower courts of Australia is unclear".[16] Although in New South Wales and Victoria there is legislation requiring that any judicial officer holding an abolished judicial office be given another comparable judicial office,[17] magistrates in the other States and Territories have no such protection.[18]

- Magistrates in the Australian Capital Territory, New South Wales, Tasmania and Victoria have the same protections and procedural safeguards against removal from office as judges of the Commonwealth, Supreme and District (or County) courts, with the same process requiring legislative and executive action.[19] However, magistrates in Western Australia, Queensland, South Australia and the Northern Territory do not have the same protections.[20]

- There are no "formal provisions for suspension of the Commonwealth, Supreme or District court judiciary except in the Australian Capital Territory and New South Wales, where all judicial officers, including magistrates, are subject to identical regimes through their respective Judicial Commissions."[21] By way of contrast, magistrates in Queensland, South Australia and Western Australia may be suspended "on the basis of a preliminary finding that grounds may exist to justify removal from office".[22]

- While the salaries of Commonwealth, Supreme and District (or County) courts judges and most magistrates are protected, in Victoria and Western Australian there is no statutory guarantee that magistrates salaries will not be reduced.

In relation to security of tenure, there is no justification for the different treatment of magistrates and judges, nor for treating magistrates in one jurisdiction differently to magistrates in another jurisdiction. Those differences mean that magistrates do not have the same degree of judicial independence that is enjoyed by judicial officers of the intermediate and higher courts. It also means that some magistrates in Australia are less judicially independent than other magistrates.

At pages 18 -19 of their submission Professor Kathy Mack and Professor Sharyn Anleu refer to the superannuation entitlements of magistrates. Although magistrates are "differently situated than judges of the higher courts in relation to their retirement ages and superannuation entitlements, their conditions do not presently appear to fall below 'the minimum characteristic of an independent and impartial tribunal'".[23]

It is also important to bear in mind the pronouncements of the High Court in *NAALAS v Bradley* (2004) 218 CLR 146,153 that "there is no constitutional requirement that all judicial officers must have their independence secured 'to the highest possible degree in every respect and some legislative choice is allowed in the mechanisms employed to promote judicial independence'"[24]

Furthermore, the constitutional freedom of states to appoint and remunerate judges (including magistrates) was stressed in *Austin* (2003) 215 CLR 185, 264. Retirement benefits are entirely a matter for individual governments. In that regard, it is noted that Tasmania has moved to a superannuation scheme for new judges.

It is also worth noting that the Council of Chief Magistrates, which supports the proposed change of title from "magistrate" to "judge", has agreed that any approval for a change of title by any Attorney General of a State or Territory or by SCAG would occur in circumstances where it was acknowledged that such a change would not mean automatic access to existing Judges' Pensions Schemes operating in States and Territories.

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[1] See *Clark v Commissioner of Taxation* [2008] FCAFC 51 (3 April 2008) at [56] per Dowsett J.
[2] *Clark v Commissioner of Taxation* [2008] FCAFC 51 (3 April 2008) at [56] per Dowsett J.
[3] R Lawrence "Magistrates – Change of Name", paper presented to the Executive Committee of the Australia Stipendiary Magistrates Association 25 March 1995, p 5.
[4] "Judging "is referred to as a "business" in "The Business of Judging: Selected Essays and Speeches, (2000 Oxford University Press)
[5] M Sexton and L.W Maher *the Legal Mystique, The Role of Lawyers in Australian Society* (1982) Angus & Robertson Publishers, p 62.
[6] Sir Anthony Mason " The Nature of the Judicial Process" in *A Matter of Judgment – Judicial Decision-making and Judgment Writing*, Judicial Commission of New South Wales, p 1
[7] Sir Anthony Mason, n 6, p 1.
[8] Sir Anthony Mason, n 6, p 2. See also Kirby J " Judging: Reflections on the Moment of Decision" in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 45.
[9] The Right Honourable McLachlin PC "Judicial Impartiality: The Impossible Quest" in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 15.
[10] The "judicialisation of the magistracy" refers to the process whereby the magistracy has gradually become separated from the executive arm of government and become part of the judiciary, and "increasingly associated with the mainstream court system": see The Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, "The Independence of the Magistracy: Crossing Over to Judicialism" (2005) 7 TJR 293 at 301.

[11] See page 1 of a document entitled "Change of Name from Magistrate to Judge" prepared by Magistrate Jillian Orchitson and presented to the Judicial Conference of Australia for its consideration.
[12] P.H.Lane "Constitutional Aspects of Judicial Independence" in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 53, 56 cited in K Mack and S Anleu "The Security of Tenure of Australian Magistrates" [2006] 30 Melbourne University Law Review 370 at 380.
[13] Mack and Anleu , n12 at 380.
[14] See Crawford and Opeksin *Australian Courts of Law* (4th ed, 2004) 65-6; Justice Ronald Sackville *Acting Judges and Judicial Independence* (2005) Judicial Conference of Australia; Mack and Anleu , n12 at 373.
[15] Mack and Anleu, n 12 at 374.
[16] Mack and Anleu, n 12 at 381.
[17] See *Constitution Act* 1902 (NSW) s56; *Constitution Act* 1975 (Vic) s87AAJ; *Courts Legislation (Judicial Conduct)Act* 2005 (Vic) s4. Note that the *Constitution of Queensland* 2001 (Qld) s 63 only affords judges protection against the abolition of a court. In other jurisdictions, judges of the Supreme Court and District Court are afforded such protection.
[18] However, such constitutional protections that are in place may not be entrenched: see Mack and Anleu citing Lane "Constitutional Aspects of Judicial Independence" in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 53, 56; see also *NAALAS v Bradley* (2004) 218 CLR 146, 153.
[19] Mack and Anleu, n 12 at 394.
[20] Mack and Anleu, n 12 at 394.
[21] Mack and Anleu, n 12 at 395.
[22] Mack and Anleu, n 12at 395.
[23] Mack and Anleu, n 12at 385.
[24] Mack and Anleu, n 12at 381-382.

PROPOSAL TO CHANGE THE TITLE OF "MAGISTRATE" TO "JUDGE"

There are a number of arguments that support the title of magistrates being changed to that of "Judge".

The gradual judicialisation of the magistracy[1] has resulted in it becoming an integral part of the Australian judiciary,[2] such that there is no logical basis for drawing a titular distinction between judicial officers of the lower courts (magistrates' courts) and those of the intermediate and higher courts. Magistrates are judges in all but name.[3] Judges and magistrates are subject to common standards of judicial conduct. Magistrates are also perceived by the general public to be judges. The change of title would not only recognise the important judicial role performed by magistrates[4], but by emphasising the fact that magistrates should be viewed in the same light as judicial officers of the higher courts[5] it would enhance the standing of the lower courts in the community at large and within the legal profession and increase public confidence in the administration of justice overall. [6]

Quite apart from the foregoing, the title of "magistrate" is anachronistic and misleading, reflecting a public service magistracy of a bygone age. Its continuing use has a tendency to compromise or otherwise affect the independence of the lower courts, as well as the collective independence and integrity of the judiciary as a whole.

The proposed change of title is neither radical nor without relevant international precedent. Considerations that influenced changes in Canada, England and New Zealand have equal application to the Australian magistracy and support an equivalent change in Australia.

The very substantial benefits to the community flowing from the change of title far outweigh the negligible cost of implementing the proposal.

THE JUDICIALISATION OF THE MAGISTRACY

A number of historical and systemic processes have contributed to the judicialisation of the magistracy:[7]

- The transformation of the Australian magistracy from a public service institution to an office which is structurally independent of the executive arm of government and the public service, and which now forms an integral part of the judiciary;[8]

- The consequent development of the judicial independence of the magistracy resulting in the alignment of magistrates with judges as judicially independent officers;[9]

- The transformation of a lay, untrained and unqualified magistracy into a professional, legally trained and competent body of judicial officers;[10]

- The expansion of the jurisdiction of courts presided over by magistrates and the increasing complexity of that jurisdiction;[11]

- The divestiture of the magistracy of its administrative duties and its diversion into the performance of judicial functions;[12]

- The allocation of "increasingly complex, qualitative, judicial work" to magistrates ;[13]

- The assumption by magistrates' courts of jurisdiction formerly exercised by judges of county or district courts, which has had the effect of considerably narrowing the gulf between magistrates and judges;[14]

- The fact that in some jurisdictions such as the ACT and the NT, where there is no intermediate court, magistrates' courts perform the role of a district or county court;[15]

Changing the title of magistrates to that of "Judge" is the next logical step, which, by marking the final disentanglement of the magistracy from the executive branch of government,[16] would complete the process of judicialisation.

MAGISTRATES ARE JUDGES IN ALL BUT NAME

There is no material difference in the function performed by judges and magistrates. Magistrates are responsible "as an integral tier of the Australian judiciary for performing identical tasks to those persons identified as judges".[17] Magistrates are judges in all but name.

Just as much as judges, magistrates engage in "the business of judging".[18] Just as judges do, magistrates perform the primary task and carry the basic responsibility of the judiciary to "resolve disputes between citizens, or between citizens and government, by the application of statute law and by the judge made common law".[19] In the same way as judges, magistrates decide cases "by finding the facts, ascertaining the law and applying the law to the facts as found or admitted". [20]

The business of judging also involves elements of pragmatism, discretion and choice;[21] and magistrates exercise all three in deciding cases.

There are other important dimensions to the business of judging – the notion of "fairness" and the need for openness, transparency and impartiality. Both magistrates and judges are required, in accordance with the precept of natural justice, to respond to the arguments advanced by the parties and to give reasons for decision so as to lend openness and transparency to the judicial process.[22] Impartiality, which requires neutrality and objectivity on the part of a judge, is an essential component of judicial decision-making;[23] and magistrates are required to bring the same open, unbiased and impartial mind to the decision making process.

Since there is no distinction between magistrates and judges in exercising their core function of "judging", which itself is the defining characteristic of being a "judge", as a matter of syllogistic logic, magistrates are indeed judges.

The title of the judicial officers of our lower courts, particularly in the present integrated systems of courts throughout Australia, should reflect what they do, that is, hear and determine cases on the same basis and in the same competent, judicially independent, open and impartial manner as occurs in the other courts – in other words "judge" cases.

The very important judicial role performed by magistrates should be appropriately recognised in the title accorded to them [24] and they should be seen in the same light as the judicial officers of the higher courts.[25] Although an integral part of the judiciary, magistrates "do not bear titles that suggest they are the members of the judiciary";[26] nor are they accorded "titles which indicate that they are judicial officers".[27] For those fundamental reasons, magistrates should be accorded the title of "Judge".

All Australian magistrates are now addressed as "Your Honour" - a form of address traditionally reserved for judges of the higher courts. [28] That common form of address reinforces the role of magistrates as judges.

That the magistracy is indistinguishable from the judiciary of the higher courts has been recognised at the highest judicial level and within the legal profession:

> "The development of the Local Court judiciary from a group of public service administrators with special legal training into a judiciary indistinguishable from judges by attitude and competence has been remarked on many times in recent years by diverse figures as the Chief Justice of Australia, Justice Gleeson, the Chief Justice of NSW, Justice Spigelman and Mr Ian Harrison, President of the Bar Council."[29]

Recently, the Judicial Conference of Australia overtly recognised that magistrates are in fact judges by supporting the proposal to confer upon them the title of "Judge".

Most significantly, in April 2008 the Federal Court of Australia in *Gregory Ronald Alfred Clark and Commissioner of Taxation* SAD 110 of 2007 judicially recognised the status of magistrates as judges by unanimously holding that the applicant, a magistrate of the State of South Australia, was a "judge of a

court of a State" within the meaning of section 7 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) at the commencement of that Act.

As the magistracy now forms an integral part of the judiciary – indistinguishable from the judicial officers of the higher courts – it is not only logical, but essential, to adopt terminology which acknowledges that the "judiciary" refers to "the judges of a State collectively".[30]

MAGISTRATES AND JUDGES ARE SUBJECT TO COMMON STANDARDS OF JUDICIAL CONDUCT

Magistrates are bound by the same body of judicial ethics as the judges of the higher courts:[31]

> "(they) pursue the same ideal, the dispensing of justice according to law…(they) have the same basic duties and procedures. There can be no doubt that (they) must respond to a common ethical perception and regulate (their) activities accordingly."[32]

The Introduction to the AIJA *Guide to Judicial Conduct* [33] states:

> "The purpose of this publication is to give practical guidance to members of the Australian judiciary at all levels. The words "judge" and "judiciary" when used include all judges and magistrates".[34]

The Guide makes it clear that the Chief Justices of Australia not only consider the magistracy to be an integral part of the judiciary, but also consider magistrates to be judges.

The reason why magistrates are subject to the same code of judicial conduct as the judges is because magistrates are in fact judges, and that is explicitly recognised by the *Guide to Judicial Conduct*.

It is inconsistent to regard magistrates as being subject to the same standards of conduct that apply to judges (on the basis that magistrates are judges) and to simultaneously withhold from them the title of "Judge". There is no basis to use different terminology when they are bound by the same set of ethical standards that apply to their superior colleagues in other courts.

As acknowledged by Chief Justice Gleeson, "members of the Australian judiciary aspire to high standards of conduct" and "maintaining such standards is essential if the community is to have confidence in the judiciary".[35] The best way of ensuring that magistrates are seen to be bound by the same ethical standards as the judges of higher courts and maintaining public confidence in the judiciary is to formally recognise magistrates as judges.

THE COMMUNITY PERCEPTION OF MAGISTRATES AS JUDGES

There is a considerable body of anecdotal evidence to the effect that "the public apparently (and correctly) perceive no difference between judges and magistrates: magistrates are routinely referred to as "judge" by lay members of the public".[36]

As long ago as 1987, former Chief Magistrate Briese, in the course of contemplating the future direction of the New South Wales magistracy, referred to the "public perception moulded by the media which shows magistrates to be judges who are addressed as 'Your Honour'".[37]

In a similar vein, back in 1995, Lawrence made the following observation:

> "It is interesting to note the majority of the public who appear before Magistrates' Courts perceive the Magistrate to be a Judge and address that person accordingly".[38]

As one more recent commentator has observed:

> "There is an expectation on the part of the community that those who preside over Magistrates' Courts will act judicially, that is, they will act as judges."[39]

THE ANACHRONISTIC TITLE OF "MAGISTRATE" AND ISSUES OF JUDICIAL INDEPENDENCE

The existing title of "magistrate" is an anachronism which links the modern magistracy with a public service magistracy of a bygone age when the judicial officers of the lower courts were neither structurally nor institutionally independent of the executive arm of government. Furthermore, the title suggests that the current judicial officers of our lower courts are an inferior class of judicial officer – a judicial style functionary [40] or "a hybrid creature, part public servant, part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role". [41] Nothing could be further from the truth.

Notwithstanding the very significant advances in the judicial independence of magistrates, the persisting ideological connection of today's magistracy with a past public service magistracy can give rise to some public misconception that magistrates are not truly independent judicial officers. It has frequently been observed that the perception of independence is as important as the reality of independence.[42]

Now that the magistracy forms an integral part of the Australian judiciary it is the responsibility of the judiciary as a whole to protect and to ensure the judicial independence of the lower courts should there be the slightest

perception that its judicial officers are not truly independent. The Australian judiciary needs to guard against institutional entropy or "judicial corrosion" within the judiciary, that is to say, a decline in the institutional independence of the judiciary.[43] It is essential that the perception, as much as the reality, of judicial independence at each level of the judicial hierarchy be maintained and preserved. As observed by Sir Anthony Mason, unless the independence of magistrates [either actual or perceived] is preserved, there is a risk that the interference with the independence of magistrates [again either actual or perceived] "will eventually contribute to the erosion of the concept of judicial independence as it applies to judges".[44] The final disentanglement of the magistracy from the executive arm of government by changing the title of magistrates to that of "Judge" is necessary in order to maintain the independence of judicial officers of our lower courts, and ultimately the collective independence and integrity of the judiciary as a whole.

There is a strong historical and ideological connection between judicial independence and the office of "judge":

> Judicial Independence, as the very term suggests, was a concept associated with judges, notably the judges of superior courts.[45]

The judicial independence of magistrates – and the rest of the judiciary – is best recognised and secured by renaming magistrates as "Judges".

THE PUBLIC ASPECTS OF THE PROPOSED CHANGE OF TITLE

The Attorney General of Victoria, the Hon Rob Hulls, has recognised that a change of title is important "not only to assist the public in recognising that the Court now has …more extensive jurisdictions but also to further help foster and encourage public confidence in the Government's determination both in the past and possibly in the future to widen the jurisdictions of [the Magistrates Court] thereby increasing the public's access to affordable and expeditious justice".[46]

These observations have equal application to magistrates' courts in other States and Territories, and there is the same justification for conferring the title of "Judge" on magistrates in those jurisdictions.

There is a further justification for the change of title:

> Whilst there may be many persons interested in accepting appointment to this Court, attracting the best candidates will also be assisted by a demarcation of this Court as it now is from the days when its members did not hold law degrees and had not practised as lawyers. It will help elevate the court's standing not only in the community at large but also within the legal profession and it will encourage the better integration and communication between all judicial officers of this State which in turn will help the administration of justice in many regards, judicial education both formal and informal being just one example.[47]

Although these observations were made in relation to the Victorian magistracy, they are equally applicable to other Australian magistracies and support the change of title in other States and Territories.

THE PERSUASIVE EFFECT OF PRECEDENT

Approximately 28 years ago in comparable jurisdictions, such as Canada and New Zealand, "the imperatives of change" were recognised and magistrates were renamed "Judges".[48]

The following observations made by the New Zealand Royal Commission on the Courts in 1978 are pertinent to the current position in Australia:

> "[258]… A further submission which we endorse is that Magistrates' Courts currently exercise wide general jurisdiction requiring a high degree of judicial competence that is not reflected in the term 'magistrate'. In our opinion, these courts should be named "District Courts' and presided over by judges…
>
> [410] One of the most distinctive features of the submission from the New Zealand Law Society and the Department of Justice was the common approach to many issues that are under our consideration. Not the least of these, as we have already mentioned, was the proposal, with which we readily concur, of giving adequate recognition to the standing of the Magistrates' Courts and stipendiary magistrates by changing the titles to 'the District Courts' and 'District Court Judge' respectively and giving the new court an increased jurisdiction…
>
> [411]… we must emphasise that our aim is not a radical transformation of the Magistrates' Courts; we seek to increase the respect for and the responsibilities of these courts but wish them essentially to remain the people's courts…[49]

As a consequence of the conferral of the title of "Judge" on magistrates in Canada and New Zealand, the Commonwealth Association of Magistrates (CMJA), which began life in 1968 as a magistrates' association (and which remains fundamentally an association of magistrates), changed its title to the Commonwealth Magistrates and Judges Association in 1988. The purpose of changing the name of the Association was not to extend membership to judges as such but to include magistrates whose title had been changed to that of "Judge" -a tacit recognition that magistrates are judges.

Even in England, "where one might have expected the appeal of traditional nomenclature to be strongest", stipendiary magistrates were renamed "District Judges" in 2000.[50]

The considerations that prompted the change of title in Canada, England and New Zealand have equal application to the Australian magistracy and support an equivalent change in Australia.

THE COST IMPLICATIONS OF THE PROPOSED CHANGE OF TITLE

The very substantial benefits to the community flowing from the change of title far outweigh the negligible cost of implementing the proposal.

The Council of Chief Magistrates, which supports the proposed change of title, has agreed that any approval for a change of title by any Attorney General of a State or Territory or by SCAG would occur in circumstances where it was acknowledged that such a change would not mean automatic access to existing Judges' Pensions Schemes operating in States and Territories. Consistent with the constitutional freedom enjoyed by the States and Territories in relation to the appointment and remuneration of judges, retirement benefits are entirely a matter for individual jurisdictions. In that regard, it is noted that Tasmania has moved to a superannuation scheme for new judges.

ENDNOTES

[1] The "judicialisation of the magistracy" refers to the process whereby the magistracy has gradually become separated from the executive arm of government and become part of the judiciary, and "increasingly associated with the mainstream court system": see The Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, "The Independence of the Magistracy: Crossing Over to Judicialism" (2005) 7 TJR 293 at 301.

[2] J Lowndes "The Australian Magistracy: From Justice of the Peace to Judges and Beyond" Part 11 (2000) 74 ALJ 592 at 593. See also J Lowndes "The Australian Magistracy: From Justices of the Peace to Judges and Beyond" Part 1 509 at 510; Chief Justice Warren, n 1 at 301.

[3] I Pike and A Reidel "Epilogue" in H Golder *High & Responsible Office: A History of the NSW Magistracy* (1991 Sydney University Press) p 215 cited in Lowndes n 2 at 592.

[4] See page 3 of a document entitled "Change of Name from Magistrate to Judge" prepared by Magistrate Jillian Orchitson and presented to the Judicial Conference of Australia for its consideration.

[5] This argument was raised by the magistracy of Victoria and presented to Rob Hulls, the Attorney - General in support of the proposed change of title.

[6] See endnote 5.

[7] Chief Justice Warren, n 1 at 301.

[8] J Lowndes "The Australian Magistracy: From Justices of the Peace to Judges and Beyond" Part 1 (2000) 74 ALJ 509 at 510. See also Lowndes , n 2 at 599; Chief Justice Warren, n 1 at 301.

[9] Lowndes, n 2 at 593. See also Lowndes, n 8 at 510.

[10] Lowndes, n 2 at 599 See also Lowndes, n 8 at 510; Chief Warren, n 1 at 310.

[11] Lowndes, n 8 at 510. See also Lowndes, n 2 at 595; Chief Justice Warren, n1 at 301.

[12] Chief Justice Warren, n 1 at 301. See also Lowndes, n 2 sat 599.

[13] Chief Justice Warren, n 1 at 297.

[14] R Lawrence "Magistrates – Change of Name" paper presented to the Executive of the Australian Stipendiary Magistrates Association 25 March 1995, p 5.

[15] Lawrence n 14, p 5.

[16] See Chief Justice Warren, n 1 at 304 where Her Honour makes the following observation:

" …there are significant aspects of the state of the magistracy which indicate that it has a long way to go in untangling itself from its life-giver, the executive".
[17] Lawrence, n 14, p 1.
[18] Judging is referred to as a "business" in "The Business of Judging: Selected Essays and Speeches, (2000 Oxford University Press)
[19] M Sexton and L.W Maher *the Legal Mystique, The Role of Lawyers in Australian Society* (1982) Angus & Robertson Publishers, p 62.
[20] Sir Anthony Mason " The Nature of the Judicial Process" in *A Matter of Judgment – Judicial Decision-making and Judgment Writing*, Judicial Commission of New South Wales, p 1
[21] Sir Anthony Mason, n 20, p 1.
[22] Sir Anthony Mason, n 20, p 2. See also Kirby J "Judging: Reflections on the Moment of Decision" in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 45.
[23] The Right Honourable McLachlin PC "Judicial Impartiality: The Impossible Quest" in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 15.
[24] See endnote 4 , p 3. See Lowndes, n 2 at 595 where the author makes this observation:
"There is often a perception that the work done by magistrates is trivial, inferior, non -qualitative work; nothing could be further from the truth. The present "magistrate/judge" dichotomy is responsible for this perception and perpetuates an artificial distinction between the role of judges and magistrates and the work they perform. The renaming of magistrates as "judges" would remove this erroneous perception": see C Briese "Future Directions in Local Courts of New South Wales" (1987) 10(1) UNSWLJ 133; see also Michelides "Report on the Change in Terminology From Magistrate to Judge", paper prepared for the Australian Stipendiary Magistrates Association, March 1995, pp 10, 13.
[25] See endnote 5.
[26] E Campbell and H.P. Lee *The Australian Judiciary* Cambridge University Press 2001, p 17.
[27] Campbell and Lee, n 26, p 23.
[28] See Chief Justice Warren, n 1 where Her Honour makes the observation that the recent change in the form of address for magistrates in Victoria from "Your Worship" to "Your Honour" is a "sign of the times", and indicative of the gradual judicialisation of the magistracy.
[29] See endnote 4 , p 1.
[30] In a similar vein, "judge is a synonym for judiciary": citation subject to ethical clearance.
[31] Lowndes, n 2 at 595.
[32] Justice Thomas "The Ethics of Magistrates" (1991) 65 ALJ 387 at 389-390.
[33] This guide was published for the Council of Chief Justices of Australia by the Australian Institute of Judicial Administration Incorporated.
[34] *Guide to Judicial Conduct*, Chapter One [1.1], p1.
[35] See the preface to the *Guide to Judicial Conduct*.
[36] See endnote 4, p 1.
[37] Briese, n 24 at 133; see also Michelides, n 24, pp 10,13.
[38] Lawrence, n 14, p 3.
[39] Lowndes, n 2 at 596
[40] See A Castles *An Australian Legal History* (LBC, Sydney 1982), p 327.
[41] Justice Thomas, n 32 at 389-390.
[42] Campbell and Lee, n 26, p 49.
[43] J Kleinig " Judicial Corrosion: Outlines of a Theory", paper delivered at "Confidence in the Courts" conference, Canberra 9-11 February 2007, p 1.
[44] Sir Anthony Mason "The Appointment and Removal of Judges" in *Fragile Bastion Judicial Independence in the Nineties and Beyond* Judicial Commission of New South Wales, p 34.
[45] Sir Anthony Mason, n 44, p 31.
[46] See endnote 5.
[47] See endnote 5.
[48] See endnote 5.
[49] See endnote 5.
[50] See endnote 4, p 1.