THE STATUS OF AUSTRALIAN MAGISTRATES

Introduction

The purpose of this document is to report on the current status of magistrates in Australia, in terms of the level of judicial independence they enjoy. The report draws upon current constitutional and legislative provisions, a significant body of literature and commentary and submissions and reports from a variety of sources.

The paper is divided into the following four sections:

1. The relationship between the magistracy and the executive and legislative branches of government.
2. The tension between judicial administration and internal judicial independence in magistrates courts
3. The process for appointing magistrates.
4. The security of tenure of magistrates.

The Relationship between the Magistracy and the Executive and Legislative Branches of Government

Both the doctrine of the separation of powers and the Latimer House Principles require the judiciary (which includes the magistracy) not only to be structurally separate from the other two branches of government – the executive and the legislature – but also to be ideologically independent of those two arms of government.

As pointed out by Sir Anthony Mason:

The separation of judicial power is not only protection against the exercise of arbitrary power, but it also assists in maintaining the independence of the judiciary and contributes to public confidence in the administration of justice.1

Furthermore, it has often been observed that the perception of independence is as important as its reality:

Public perception of judicial impartiality, which is the essence of judicial independence, is promoted when the judiciary is seen to be separate from the other branches of government.2
In the not too distant past the magistracies of each State and Territory of Australia were part of the public service, and therefore linked to the executive arm of government. However, that architecture changed during the last few decades of the twentieth century when the various Australian magistracies gradually became structurally independent of the public service, and hence the executive branch of government. As observed by Mack and Anleu, "magistrates in all Australian jurisdictions are [now] separate from the public service, and magistrates courts are formally constituted under separate legislation." As pointed out by Wells and Sangster JJ in Fingleton v Christian Ivanoff Pty Ltd there are very good reasons why the magistracy should be segregated from the public service:

There are strong grounds for maintaining that no person holding judicial office should be in the public service, more especially if he or she has to hear and determine prosecutions or civil cases in which the Crown or some instrumentality thereof is a party... The principles of judicial independence apply just as forcibly to magistrates who, statistically, are seen to administer justice by a far greater number of people than are Supreme Court judges.

In the Queen v Moss; Ex parte Mancini King CJ explained the dangers of there being a nexus between the judiciary and the executive branch of government:

...members of the judiciary might be influenced in a way which would impair the impartial administration of justice, or at least that public confidence in the impartial administration of justice might be impaired by suspicions, reasonably ascertained, that members of the judiciary might be so influenced.

Although the magistracy and the legislature have always been separate institutions in Australia there was a possible perception, in the days when the magistracy was still part of the public service, that the judiciary and the legislative branch of government were not entirely independent of one another. That was so because of the Westminster system of government that operates in Australia. According to that model of government there is no real separation of powers between the legislature and the executive. In addition, there are constitutional provisions that require that "the members of the political executives – Ministers of the Crown – be drawn from the ranks of members of parliament, or else become members of parliament within a certain time after their appointment as Ministers," and these ministers are "responsible to the relevant parliament." As observed by Campbell and Lee "the theory of responsible government enables the executive branch of government to remain in power as long as it continues to command the confidence of a majority of the lower house of Parliament." Furthermore, the importance accorded to the doctrine of parliamentary sovereignty has "resulted in the separation doctrine having no application to the legislative power." As recognised by the High Court in Victoria Stevedoring and
General Contracting Co Pty Ltd v Dignan the Federal Parliament is able to delegate its law-making power to the executive.

However, as a result of the severance of the magistracy from the public service (and the executive) that indirect connection no longer exists.

Although magistrates in all States and Territories are now separate from the public service, that fundamental structural change has not ensured a clear separation of the powers exercised by the magistracy - as an integral part of the judiciary - and the powers exercised by the executive and legislature in the manner contemplated by the Latimer House Principles. The reason for that is that the doctrine of the separation of powers, upon which those Principles are predicated, is not firmly entrenched at all levels of government in Australia.

Although the doctrine of the separation of powers is not expressly enunciated in the Australian Constitution, there is a "strong textual and structural basis" within the Constitution for the operation of the doctrine of the separation of powers, and the doctrine has "been perceived to be implicit" in the Constitution's framework. As a result of a process of refinement through judicial decisions the separation of judicial power from the powers exercised by the other two branches of government has become constitutionally entrenched at the Federal level. However, that is not to say that such doctrinal entrenchment has always operated as an effective bastion against executive and legislative interference with the exercise of the judicial power.

By way of contrast, the doctrine of the separation of powers - and in particular the principle of the separation of judicial power - is not constitutionally entrenched in the Australian States. As observed by Campbell, "the constitutions of the States do not explicitly require any separation of the judicial and non judicial powers of government."

Although the separation of powers is not constitutionally embedded in the States and in the self governing Territories, it appears to exist or operate as a matter of constitutional convention or accepted political practice. No matter how one might describe this subdued form of separation of powers, it has not functioned effectively, and its fragility has been demonstrated by the freedom with which the States have from time to time intruded upon the exercise of the judicial power and the inability of the doctrine to restrain such invasions. The fact is that any doctrine of the separation of powers at the State or Territory level, "derived from politics and convention, grounded in history" is not legally enforceable and does not bind the States or the Territories; and it can be overcome by ordinary legislation.

However, it is important to stress that the blurring of the boundaries between the powers exercised by the three branches of government - particularly at the State and Territory level - exists across the board, and affects judges as much as magistrates.
The extent to which the Latimer House Principles have been applied in Australia in defining the relationship between the judiciary and parliament and their respective critical roles in the promotion of the rule of law was examined in a paper titled "The Relationship between Parliament and the Judiciary in Australia and the Latimer House Principles", which was presented at the 15th CMJA Triennial Conference 2009. It is not intended to repeat the observations and statements contained in that paper, but to simply treat the contents of that paper as part of the present paper.

It remains to consider the extent to which the Latimer House Principles have been implemented in Australia in defining the relationship between the judiciary (including the magistracy) and the executive, and the respective roles of those two branches of government.

Campbell and Lee have identified two key areas in which the judiciary and the executive have an interlocking relationship: judicial appointments and the public funding of courts. To these two aspects a third area of interaction needs to be added – the determination of judicial remuneration.

The executive arm of government can "affect the judiciary through the manner in which it seeks to exercise its power of judicial appointments." Although in Australia "this power has generally been viewed as having been exercised in a responsible way", there have been occasional controversies over judicial appointments, including appointments to the magistracy. Such controversy has probably stemmed from the less than open and transparent manner in which appointments have been made, and an apparent failure on the part of governments to comply with the Latimer House Principles which require all judicial appointments to be made on the basis of clearly defined criteria and by a publicly declared process designed to ensure appointment on the basis of merit. As the process for the appointment of magistrates is a discrete subject matter of this paper, it is more conveniently dealt with in the next part of the paper.

Turning to the public funding of courts, Campbell and Lee make the following observations (including relevant extracts):

The ability of the courts to perform their functions efficiently is dependent on adequate public funding. This requires the involvement of the executive arm of government in determining the number of judicial officers to be appointed and the amount of funds to be allocated to the court system...

The reliance by the courts on executives and legislatures for their funding has implications for judicial independence. Professor Stephen Parker thus observed:

The power to decide a court's budget has some potential to be used to undermine judicial independence because declining resources and working conditions are bound to concern dedicated professional people. Similarly, the failure to increase the number of judges proportionate to the increase in caseload can make the judges of a court, collectively, supplicants to government.
However, Professor Parker acknowledged that in such situations the motive of the government is important. He added:

It may be reprehensible to refuse to appoint more judges because a government does not like the decisions of a court or the behaviour of the Chief Justice. However, refusing to appoint more judges because of the work practices of the court are thought to be inefficient might be supportable on the facts.33

L J King, a former judge of the Supreme Court of South Australia, has said:

It is the law minister's function to demand of Cabinet that adequate resources be provided and to explain publicly why an adequately performing judicial system is so fundamental to society that financial pruning must never be allowed to impair its ability to deliver prompt and effective justice.34

However, the dependence of the judiciary (including the magistracy) upon the administrative and financial resources provided by the executive arm of government has more fundamental implications for the institutional independence of the judiciary.35 Those implications were spelt out by the Hon Ken Marks:

A more fundamental difficulty is that the judiciary is dependent on the Executive to provide remuneration, courts, equipment and staff. In Australia (save, to an extent, the High Court and the Federal courts) the courts do not enjoy institutional independence. Judges cannot be said to be truly independent if the purse strings which sustain the court system in which they work are held directly by the executive government.36

Such fundamental concerns were echoed in the Fitzgerald Report:

One of the threats to judicial independence is an overdependence upon administrative and financial resources from a government department or being subject to administrative regulations in matters associated with the performance of the judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts.37

Although this threat to judicial independence "permeates all tiers of the judiciary, affecting judges and magistrates equally in the performance of their judicial functions"38 the threat is at its strongest at the level of the magistracy. Being at the lowest level of the judicial hierarchy, magistrates' courts "tend to be under-resourced and often the recipients of the bread crumbs from the "fiscal bread basket"."39 In a similar vein, Lawrence points out that "the standard of court conditions and resources are significantly less than that provided for the superior jurisdictions."40

There is a continuing debate in Australia as to the level and amount of administrative dependence that courts should have on the executive arm of government.41 As pointed out by one commentator:42
The theoretical debate essentially boils down to this: the general judicial view is that "the judiciary should to the fullest practicable extent be in control of its own affairs, including all administrative and governance arrangements". The opposing view is that the administrative aspects (as distinct from the purely judicial aspects) of the courts and the provision of courts and court services is the responsibility of the executive arm of government.

According to the opposing view, "the Executive needs to be accountable, especially in Parliament, for the courts, and that is best achieved when the Executive is heavily involved in court administration." Church and Sallman have reached the following conclusion:

Our view is that, while the theoretical debate between proponents of judicial independence and ministerial accountability illuminates important issues, it provides inconclusive answers to the many questions underlying the search for an appropriate model of court governance.

As pointed out by Sallman:

Essentially, Australian jurisdictions have experimented with five broad options or models of governance:

- "The traditional" model, in which a multi-disciplinary department of state (commonly a justice or attorney-general' department) provides services to the judiciary and the judiciary has no responsibility for, or formal power over those providing the support;

- The "separate department" model which provides a range of services to an independent judiciary which, as in the case of the traditional model, has no responsibility for, or power over, the administration;

- The current Federal model, in which each court individually controls is own administration (the "chief justice autonomous" model);

- The High Court or "autonomous collegiate" model;

- The current South Australian model involving a judicial governing council and separate courts administration authority which together provide all the needs of the court system under judicial direction and control (the "judicial commission autonomous" model).

With the exception of South Australia, the magistracies of the other States and Territories are subject to either the traditional or separate department model of court governance.
The traditional model of court governance has been criticised on the ground that "its Executive-oriented style of court administration compromises judicial independence". Church and Sallman refer to "the potential dangers to adjudicatory independence in a court system administered by the executive branch of government – dependent upon the executive for nearly all their daily administrative needs, from staffing and financing the courts, to providing equipment and supplies, to maintaining the very court buildings in which justice is dispensed... the ultimate concern is that politicians and bureaucrats could use their control over the necessities of judicial life to pressure courts into rendering particular kinds of decisions".

The separate department model also has the potential to compromise the independence of judges and magistrates because it retains some of the features of the executive-oriented style of court administration provided by the traditional model of court governance.

One commentator has identified a possible problem with the autonomous model of court governance:

...the autonomous model, which is often advanced as the model which is designed to maximise judicial independence, has the potential to create its own difficulties. One such difficulty arises out of the composition of judicial council or courts' commission, which is the mainstay of the autonomous model. If the council or commission were chaired by a Chief Justice and perhaps dominated by judges, there might be a real concern on the part of the magistracy that the council or commission might give short shrift to priorities of the lower courts... However the concern may not be one way; judges may be adverse to magistrates (being members of the council or commission) having a say in matters affecting superior courts.

The autonomous model of court governance may present another type of problem:

...some judges believe that the federal and South Australia judicially autonomous models pose a risk to the collegial traditions of judicial involvement in policy and administration. They worry that the judicial officers as a whole will not be sufficiently involved in decision making when that function is performed by a small group of chief judicial officers, in the case of South Australia, and a single chief judicial officer in the case of the Federal system.

Back in 1999 Byron commented that it remains a very live issue as to what is the best model of court governance:

In the implementation of the various models in Australia, it is clear that insufficient research and evaluation has been conducted in an attempt to find the best model. Each of course has its strong points, but what is best in the Australian context is still very much a matter of opinion and the evidence in support of each model is substantially based upon perspective and anecdote.
Court governance continues to be a live issue. On 30 April 2009 The Chief Justice of the Supreme Court of Victoria, the Hon Justice Marilyn Warren, made the following submission to the wrote to the Senate Standing Committee on Legal and Constitutional Affairs, in relation to its inquiry into Australia's judicial system and the role of judges:

Judicial independence, community confidence in the justice system and efficient, effective court administration are clear themes in this inquiry as issues of national importance. Court governance arrangements have a significant role in maintaining these values...

Research by the Australian Institute of Judicial Administration has demonstrated that the "executive" model of court governance raises significant concerns from a managerial perspective as it splits authority and responsibility. Judges with operational responsibility lack clear authority over the resources to carry out that responsibility producing sub-optimal outcomes in terms of efficiency.

The Judicial Conference of Australia has identified the significant issues of principle involved in court governance arrangements. The degree of executive control of court infrastructure and resources under the executive model presents a challenge to the community's expectations of an independent and impartial judiciary to try issues between the citizen and the State.

Australian courts, while the creatures of their own jurisdictions, administer the law as a whole: the common law and State and Federal statute law. The independence and efficiency with which Australian courts operate is therefore a significant national issue. Developing the most appropriate and effective court governance arrangements through a national discussion would strengthen our system of government and the administration of the law at every level.

The issue of court governance goes to the core of judicial independence as observed by the High Court in Fingleton v The Queen.\textsuperscript{53}

In recent years, the Supreme Court of Canada,\textsuperscript{54} and the Constitutional Court of South Africa\textsuperscript{55} have found it necessary to examine the theoretical foundations of judicial independence for the purpose of considering whether arrangements in relation to particular courts satisfied the minimum requirements of that concept. In that context reference was made to "matters of administration bearing directly on the exercise of [the] judicial function.\textsuperscript{56} The adjudicative function of a court, considered as an institution was seen as comprehending matters such as the assignment of judges, sittings of the court and court lists, as well as related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out that function. Judicial control over such matters was seen as an essential or minimum requirement for institutional independence.\textsuperscript{57} The distinction between adjudicative and administrative functions drawn in the context of discussions of judicial independence is not clear cut.

Before leaving the vexed area of the relationship between the judiciary and the executive branch of government reference needs to be made to R v
Doogan [2005] ACTSC 74 where the Supreme Court of the Australian Capital Territory identified an increasing and unfortunate tendency for the boundaries between the courts (especially the magistracy) and the executive to become blurred.

In R v Doogan (supra) the Supreme Court of the Australian Capital Territory, inter alia, considered the situation of an ostensibly independent investigator not appointed by the Coroner, but engaged by a department of the government of the Australian Capital Territory in relation to an inquest into the bushfires that ravaged the Australian Capital Territory in January 2003.

The Court found that the Coroner – a magistrate of the Australian Capital Territory – had been misled as to the engagement of expert witnesses called to give potentially crucial evidence at the inquest. The Coroner had been led to believe that the expert witnesses had been independently appointed pursuant to s 59 of the Coroners Act (ACT) to assist the court, when in fact the witnesses had been engaged by the Australian Capital Territory government, and that entity had been granted leave to be represented at the inquest as an interested party.

In referring to the confusion concerning the appointment of the expert witnesses the Supreme Court of the Australian Capital Territory made the following observations at [90] – [92]:

This confusion clearly reflects what appears to be an increasing tendency for the boundaries between the courts and the executive branch to become blurred. Courts are not, of course, part of the public service. The courts as a group constitute one of the three arms of government, the others being the legislature and the executive. The role of the courts is to see that justice is done according to law, and that frequently requires them to stand between the citizen and the other arms of government. Public confidence in the ability of courts to dispense justice in a fair and impartial manner is largely dependent upon continuing recognition of their independence. There are obvious indications of such independence, including the fact that jurisdiction must be exercised according to law rather than government policy, and that judges and magistrates generally enjoy guaranteed tenure of office. On the other hand, there are some grounds for concern that, at least at an administrative level, courts in some jurisdictions may be seen as mere sub-branches of a public service department. The treatment of courts in that manner may be administratively convenient but, as the former Chief Justice of Victoria has recently warned, any perception that courts are part of the executive would be inconsistent with due recognition of their fundamental role and underlying independence. Indeed, due recognition of that principle has led magistrates who were also officers of the Executive being regarded as disqualified from hearing any matter concerning the Executive. See Fingleton v Christian Ivanoff Pty Ltd (1976) 14 SASR 530, Lyle v Christain Ivanoff Pty Ltd (1977) 16 SASR 476, R v Moss ex parte Mancini (1982) 29 SASR 385.

We recognise that some who are more familiar with the culture and ethos of the public service rather than the social policy considerations relating
to the essential requirement for the perceived independence of the courts may think that, so long as their essential independence is in fact maintained, some risk of confusion is a small price to pay for assumed gains in administrative efficiency. However, such views reflect a failure to understand the fundamental importance of maintaining public confidence in the independence of the judiciary, and hence in their capacity to decide any dispute fairly and impartially, even if that means standing between the individual and the State. The oft-repeated aphorism that justice must not only be done but must manifestly be seen to be done is particularly apposite in such cases. Furthermore, applications of this kind actually turn on issues of perception and, as we have mentioned, the test is a relatively undemanding one. It is for this reason that the administration of courts is in many instances now independent of the executive government (see eg *Courts Administration Act 1993* (SA)).

An apprehension of bias may easily arise when, as appears to have occurred in this case, a judicial officer has been led to believe that an expert witness has been independently appointed to assist the court when, in fact, he or she has been engaged by the ACT government and that entity has also been granted leave to be represented as an interested party to the proceedings. It may be understandable that departmental officers accustomed to treating courts as a sub-branch of their department may have failed to appreciate the impression that could be created in this manner. However, s 59 of the Act was clearly intended to permit coroners to engage investigators who would be independent of any of the interested parties, and whose opinions could not therefore be called into question on the grounds that they may have been influenced by competing loyalties. A lay observer could well become apprehensive on learning that a coroner had treated a person as an independent investigator when, in fact, he or she had been engaged by one of the interested parties.

This blurring of the boundaries between the judiciary and the executive had earlier been commented upon by a former Judge of Appeal, the Hon Justice John David Phillips. During a farewell sitting in the Banco Court of the Supreme Court of Victoria on 17 March 2005, on the occasion of His Honour’s pending retirement from the bench,58 His Honour said that “within the Department of Justice this Court (ie the Supreme Court of Victoria) is now identified and dealt with...as ‘Business Unit 19’ within a section labelled ‘Courts and Tribunals’, a section which indiscriminately includes all three tiers of the court structure and VCAT [the Victorian Civil and Administrative Tribunal].59 His Honour proceeded to express concern that “the judge’s computers are part of the departmental network and potentially accessible by departmental officers”.60 Later, His Honour stated:

Nobody is suggesting that the Executive would ever seek to influence a judge’s decision directly, otherwise than by argument in open court, but what has been happening is most insidious. What is evolving is a perception of the Court as some sort of unit or functionary within the Department of Justice, a perception which is inconsistent with this Court’s fundamental role and underlying independence.61
In the Australian context, where magistrates are paid for their judicial services, the relationship between judicial independence and judicial remuneration assumes the same importance as it does in the case of judges. As observed by the Supreme Court of Canada in *Ell v Alberta* [2003] 1 SCR 857, 203 SCC 35 at [28] one of the essential conditions of judicial independence is financial security. As commented upon by Weinberg J, "the arrangements for judicial remuneration are obviously central to judicial independence". As pointed out by Mack and Anleu financial security, or security in relation to salary as authors put it, has three important aspects:

- payment at a high enough level to ensure a high quality judiciary;
- a process for fixing remuneration which is itself independent of political influence; and
- an assurance that the remuneration will not be reduced during the judicial officer’s tenure.

In 1994 the Commonwealth Remuneration Tribunal, during the course of one of its determinations, stated:

The Tribunal accepts that an independent judiciary is fundamentally important to the Australian community. For courts to resolve disputes impartially and to pass judgment acceptable to the parties when one of them may often be the government, the court must be independent and free from external pressure... More generally, it reflects an important component of the principle of the separation of powers between the executive, the legislature and the judiciary, central of governance in Australia.

For the individual judges who make up the judiciary in Australia, two basics of that independence in practice are the constitutionally provided security of tenure and the provision of salaries not by the government but by Parliament. The constitutional provision is that federal judicial salaries cannot be reduced by government.

Mack and Anleu stress the importance of an independent process for setting judicial salaries:

The prospect of judicial officers negotiating directly with the executive for increases of salaries – of “begging” as a Canadian judges characterised it - would raise concerns about the appearance, at least, of judicial independence from the government.

The two authors have conveniently summarised the current mechanisms in Australia for fixing magistrates’ salaries:

Mechanisms for setting magistrates’ salaries do not differ significantly from the method of setting salaries for judges of the higher courts within their respective states or territories. In all jurisdictions except Tasmania, salaries are set via various independent remuneration tribunals. Most tribunals make recommendations which must be confirmed by, or may be
disallowed by the legislature. As a practical matter, magistrates' salaries are linked with the salaries of higher courts, as the remuneration tribunals usually set or express magistrates' salaries as a percentage of the salary of judges of the higher courts. In Tasmania, magistrates' salaries are set, legislatively, as a percentage of the salary of a Supreme Court Justice. The link between salary-setting mechanism and judicial independence is expressly recognised in South Australia where the remuneration tribunal "must, where appropriate in determining remuneration under this Act, have regard to the constitutional principle of judicial independence."

In *North Australian Aboriginal Legal Aid Service Inc v Bradley* McHugh Gummow, Kirby, Hayne, Callinan and Heydon JJ described the process in the following terms:

> Judicial remuneration is regularly reviewed by remuneration tribunals, but the ultimate power to decide such remuneration from time to time rests with Parliament. Judicial officers are given an opportunity to make representations as to changes that should be made, and that opportunity is sometimes taken up. This is not a process of negotiation. It is a common procedure, consistent with requirements of fairness, transparency and accountability and consistent also with judicial independence.

However, concern has been expressed over the relationship between such arrangements and the independence of magistrates:

> The independence of such tribunals is also in question. Some independent tribunals only have jurisdiction to make recommendations which are subject to ratification by the legislators. [It is open to governments to decline to accept a tribunal's recommendations. Refer to the Victorian experience during the 1990's]. Such recommendations are subject to political influence. This is a most unacceptable situation, particularly as most of the tribunals are also responsible for the determination of salaries and allowances for parliamentarians.

Occasionally controversies have arisen out of recommendations of tribunals not being accepted by governments. As stated in the Mason Report (the Consultancy Report: System for the Determination of Judicial Remuneration 2003) legislation was enacted in New South Wales in 1982 to override the determination of the Statutory and Other Offices Remuneration Tribunal on the basis of economic restraint. The Report also makes reference to a number of occasions on which the recommendations of the Victorian Judicial Remuneration Tribunal were overridden by legislation. In 1998 the Federal government rejected a substantial increase in judicial remuneration which had been recommended by the Commonwealth Remuneration Tribunal, which ignited "a significant public controversy about the remuneration of the judiciary".

It is worth noting a relatively recent controversy concerning judicial remuneration in Victoria.
In response to Victoria’s Judicial Remuneration Tribunal’s proposal of a 13.6% salary increase for State judges, the State Government announced in April 2004 that it was not acceptable because it was not in line with community expectations. The Government was much influenced by the fact that persons in other occupations, such as teachers and nurses, would only be granted a 3% pay rise. The Government’s position was severely criticised by the judges and the legal profession, who argued that the rejection of the recommendation would mean that Victorian judges would be paid significantly less than federal and New South Wales judges, and the prestige of the Victorian courts would suffer. The Chief Justice of Victoria and the Law Council of Australia accused the Government of threatening the independence of the courts. In May 2004 a compromise was reached whereby the judges would receive several small pay increases in phases so that in four years’ time their salaries would be brought into line with those of federal judges.

One commentator has suggested a possible solution to the problems occasioned by the current system for determining judicial remuneration of magistrates:...there remains a potential threat to magisterial independence in the area of magistrates’ salaries. Because of that potential threat it has often been argued that the remuneration of magistrates should bear a relationship (expressed in percentage terms) with the salary of a Supreme Court Judge so that, whenever, there is a change in the salaries of Supreme Court Judges there would be an automatic proportionate increase in the salaries payable to magistrates. There are many advantages to such an arrangement. It removes remuneration fixing from the political sphere, it affirms the principle of judicial independence and introduces certainty and impartiality into the process. It also, to a certain extent, acts as bastion against an alteration to a magistrate’s salary while he or she holds office. However, there still needs to be statutory recognition in all States and Territories that the remuneration payable to magistrates and their other terms and conditions cannot be altered to their detriment.

However, it is necessary to retain some machinery for reviewing magistrates’ salaries where there are jurisdictional changes which increase the level of complexity and responsibility of work carried out by magistrates. In the event of such changes there should be recourse to a truly independent remuneration tribunal charged with the sole responsibility of determining (rather than merely recommending) magistrates’ salaries.
One of the greatest threats to judicial independence is the ability of governments to "arbitrarily reduce the salaries of the judiciary generally or worse, of a particular judicial officer." 84

As pointed out by the Commonwealth Remuneration Tribunal in 1994, one of the two basics of the independence of the judiciary is the constitutional provision that federal judicial salaries cannot be reduced by government. Although the principle that "judicial remuneration is not to be reduced during a judicial officer's tenure is a recognised constitutional convention", 85 the extent to which "the convention is formally recognised is different for magistrates compared with other judicial officers". 86

As stated by Mack and Anleu: 87

In all Australian jurisdictions (except Tasmania) the remuneration – sometimes expressed as salaries and allowances – of the judges of the higher courts is expressly protected against reduction by constitutional or legislative provisions, 88 although such legislation is not usually entrenched against amendment or repeal. 89 Tasmania achieves the effect of avoiding a reduction in salary of the Justices of the Supreme Court by legislation which links judicial salaries with that of the Chief Justices of Western Australia and South Australia, whose salaries are protected. 90

By way of contrast, constitutional and legislative protection against the reduction of magistrates' remuneration is much more variable: 91

The Australian Capital Territory, New South Wales, the Northern Territory and South Australia have express provisions which protect magistrates' "remuneration and allowances" (Australian Capital Territory), "remuneration" (New South Wales), "salary, allowances and other benefits" (the Northern Territory) and "rate of salary" (South Australia). 92

In Tasmania, magistrates' salaries are expressed in legislation as a percentage of the salary of a Supreme court Justice, which as indicated above, is itself linked with other Chief Justice’s salaries with express protection against reduction. 93 This would provide some protection against reduction in salary for a magistrate.

In Queensland, there is a guarantee that salaries of magistrates must not be reduced by a determination of the tribunal, but this does not expressly apply to the combined rate of salary and allowances as is specified for some other courts in Queensland. 94

Victoria and Western Australia have no statutory guarantee that magistrates' salaries will not be reduced.

It should be noted that even where magistrates' remuneration is protected by express provisions – as is the case in the Australian Capital Territory, New South Wales, South Australia, Queensland and the Northern Territory – it is only in the Northern Territory that every aspect of magistrates' "remuneration", namely "salary; allowances and other benefits", has legislative protection. It would appear that in the Australian Capital Territory "other benefits" paid to
magistrates are not protected. Similarly, although "remuneration" in the New South Wales context, includes "allowances", it would appear that "other benefits" are not protected. Although, in the South Australian context, "remuneration" includes salary and allowances, it is only the rate of salary that is protected against reduction.

It should be noted that allowances and other benefits can represent a significant component of magistrates' remuneration. That component should be guaranteed as much as judicial salary, and should not be liable to be arbitrarily reduced.

In all Australian jurisdictions, there should be a clear and explicit statutory protection for security of magistrates' remuneration, with an express prohibition against reduction in salary, allowances and other benefits payable to a magistrate during the term of his or her office.

The Tension between Judicial Administration and Internal Judicial Independence in Magistrates Courts

In their article "The Administrative Authority of Chief Judicial Officers in Australia" Kathy Mack and Sharyn Anleu explore the administrative authority of Chief Magistrates, and the degree to which the exercise of that authority has the potential to impinge upon the internal independence of magistrates.

Mack and Anleu point out that although the Australian magistracy has "moved decisively away from its former public service status", it appears that "some remnants of that previous structure remain in the administrative authority of Chief Magistrates". In other words, certain aspects of the administrative authority exercised by Chief Magistrates reflect a hierarchical regime of supervision and control. According to Shimon Shetreet, "hierarchical patterns are usual in the civil service, a typically hierarchical organisation, but are objectionable in the context of a judiciary whose members must enjoy internal independence vis-à-vis their colleagues and superiors.

Mack and Anleu make the point that there "are significant differences between the authority of Chief Magistrates in comparison with the authority of Chief Justices of the higher courts" and that "the authority of Chief Magistrates tends to contain more specific powers, and to be less constrained by formal obligations of consultation or by powers of collective decision making vested in the members of the court acting as a whole."

The authors conclude as follows:

...the current differences in authority appear to reflect the different historical developments of the courts and are not justified by any contemporary distinctions between magistrates' courts and the higher courts. Although there is "no single ideal model of judicial independence, personal or institutional" and some legislative choice may be allowed in the ways judicial independence is established and protected, there
must be some justification for current differences beyond historical pattern. Any risk to judicial independence created by hierarchical control should be minimised for all courts. Magistrates should not be subjected to any greater administrative control from a Chief Magistrate than Chief Judges and Chief Justices exercise over their colleagues.\textsuperscript{102}

Although the authors consider that the greater administrative authority exercised by Chief Magistrates may not fall below the bare minimum constitutional standards necessary to underpin an impartial judiciary, they are of the view that there is no justification for that discrepancy.\textsuperscript{103} At a minimum, they recommend that the powers and responsibilities of court administration which Chief Magistrates exercise should be expressly made subject to consultation with magistrates at least to the same extent as the administrative authority of Chief Justices and Chief Judges.\textsuperscript{104}

In conclusion the authors state:

This analysis is not to suggest that magistrates in Australia are undertaking their judicial duties in a way that displays less independence than other, better protected judicial officers nor is it a suggestion that Chief Magistrates are any more prone to misusing their administrative authority than Chief Justices or Chief Judges. When the wider political and social context is considered, as well as the individualism of judicial officers, the personal qualities of a chief judicial officer and the use of what is perceived as consultative, rather than a hierarchical approach, may well be more important than formal authority.\textsuperscript{105} Nonetheless, there is no justification for the lesser protection of magistrates when compared with other judicial officers. Nothing in the present context or current judicial functions of magistrates and their courts would support the existing difference. Formal legal mechanisms which may reduce the internal judicial independence of Australian magistrates is inconsistent with the central role played by the magistracy in the Australian legal system.\textsuperscript{106}

Although the greater administrative authority given to Chief Magistrates undoubtedly has the potential to create tension with the ideals of judicial independence,\textsuperscript{107} the current administrative regimes do not appear to fall below the essential conditions of judicial independence. Furthermore, one might seek to justify the differences between the authority of Chief Magistrates in comparison with the authority of Chief Justices and Chief Judges of the higher courts on practical grounds. Generally speaking, Chief Magistrates are the head of a much wider jurisdiction in which there a greater number of judicial officers and a much larger number of courts to administer. Arguably, on account of those circumstances, Chief Magistrates may require greater administrative authority in order to ensure the orderly and expeditious discharge of the business of the court, to properly manage the administrative affairs of the court and to discharge his or her responsibility for the administration of the court. Furthermore, the logistics of being the head of jurisdiction may not allow the same scope for consultation and collective decision making that exists at the higher levels of the judiciary. All of those circumstances may provide "some justification for current differences beyond historical pattern". As recognised by Mack and Anleu, "the line between
appropriate administration and internal independence is not always clear cut.\textsuperscript{108}

The Process for Appointing Magistrates

As recently observed by the International Commission of Jurists – Victoria (ICJ – Victoria), “the procedure for appointment and method of termination of judges goes to the heart of the constitutional principle of judicial independence”.\textsuperscript{109}

It is widely accepted in Australia that the principle of judicial independence applies equally to magistrates,\textsuperscript{110} and the processes by which magistrates are appointed goes to the core of their independence.

In a submission made to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its recent Inquiry into the Australia’s Judicial System and the Role of Judges, the Association of Australian Magistrates stressed the importance of the appointment process in establishing the judicial independence of magistrates:

> The need to secure judicial independence is one of the fundamental principles underpinning a system of judicial appointments. To that end the appointment process should be open and transparent, and judicial appointments should only be made on the basis of merit.\textsuperscript{111}

In its Report the Senate Legal and Constitutional Affairs References Committee made the following observation:

> ...there is a variety of ways in which appropriate procedures for appointment and termination can be formulated while still meeting the essential conditions of independence.\textsuperscript{112}

This is consistent with the view expressed by Gleeson J in \textit{North Australian Aboriginal Legal aid Service Inc v Bradley} that there is “no single ideal model of judicial independence, either personal or institutional”. However, what is required is that the method of judicial appointment accords with the essential conditions of judicial independence.

Although the appointment process for State and Territory magistrates differs between the States and Territories the methodology is generally the same. The appointment process begins with advertisements in local (and sometimes national) newspapers inviting expressions of interest in appointment to the magistracy.\textsuperscript{113} All applicants must meet the qualifications set out in the relevant legislation. A selection or advisory panel is convened for the purpose of considering the expressions of interest (or nominations) and preparing a short list of suitable candidates. Usually, all candidates on the short list are interviewed by the panel, although there is no strict obligation to interview all, or any, of the candidates. The panel then prepares for the consideration of the Attorney General a small pool of suitable candidates. Generally speaking, from that pool the Attorney General identifies the person that he or she considers most suitable and recommends that appointment to Cabinet;
however there is no restriction on an Attorney recommending another candidate. If Cabinet approves of the Attorney’s recommendation, the selected candidate is appointed under the relevant legislation. The appointment is made by either the State Governor or Territory Administrator.

The methodological differences that exist between the jurisdictions relate mainly to:

- the composition of the selection or advisory panels;
- the extent to which the selection criteria are made public and
- the manner in which recommendations are made to the Attorney General.

Invariably the State or Territory Chief Magistrate is a member of the selection or advisory panel. However, the composition of the rest of the panel is variable. For example, in New South Wales the other panel members are usually the Solicitor General, a Judge of the District Court together with the Head of the Department of the Attorney General. In Victoria, apart from the Chief Magistrate, the panel usually comprises the Executive Director of Courts and a representative of the Judicial College of Victoria. By way of further example, in Tasmania, the additional panel members are usually the departmental Secretary and a nominee of the Law Society/Bar Association. Variations in the composition of panels can be found in other jurisdictions.

The above information is largely based on anecdotal evidence because the composition of panels is not usually published.

It has not been common practice for the States and Territories to publish the section criteria for appointing magistrates. However, New South Wales has taken that initiative.

The following information appears on the New South Wales Government’s website (Lawlink Justice & Attorney General):

Selection Criteria

The Attorney General has approved a list of personal and professional criteria, which will be considered in selecting candidates for every judicial office in New South Wales.

The statutory requirements for qualification for office are set out in the relevant legislation establishing the court.

Overriding Principle

Appointments will be made on the basis of merit. Subject to this principle, including the relevant considerations listed below, there is commitment to
actively promoting diversity in the judiciary. Consideration will be given to all legal experience, including that outside mainstream legal practice.

Professional qualities

- Proficiency in the law and its underlying principles
- High level of professional expertise and ability in the area(s) of professional specialisation
- Applied experience (through the practice of law or other branches of legal practice)
- Intellectual and analytical ability
- Ability to discharge duties promptly
- Capacity to work under pressure
- Effective oral, written and interpersonal communication skills with peers and members of the public
- Ability to clearly explain procedure and decisions to all parties
- Effective management of workload
- Ability to maintain authority and inspire respect
- Willingness to participate in ongoing judicial education
- Ability to use, or willingness to learn, modern information technology

Personal qualities

- Integrity
- Independence and impartiality
- Good character
- Common sense and good judgement
- Courtesy and patience
- Social awareness

There is a paucity of information concerning the precise manner in which the names of suitable candidates are submitted to Attorneys General following the interview process, that is, whether the candidates are ranked in terms of their suitability (1, 2, 3 etc) or put up as being of equal merit. The reason for the dearth of information is that the process of recommendation is not usually
published. However, the New South Wales government has again taken the initiative by publishing, on its website, the relevant process:

The panel develops a short list of candidates for interview. Following interviews candidates are assessed as being highly suitable, suitable or unsuitable for judicial office – candidates are not otherwise ranked within these categories. A report is then provided to the Attorney General.

In early 2008 the Commonwealth Attorney General introduced new processes for appointing magistrates to the Federal Magistrates Court. Those processes included:

- broad consultation to identify persons who are suitable for appointment;
- notices in national and regional media seeking expressions of interest and nominations;
- notification of appointment criteria; and
- appointing advisory panels to assess expressions of interest and nominations against the appointment criteria to develop a shortlist of highly suitable candidates.

The Association of Australian Magistrates made the following submission to the Senate Standing Committee on Legal and Constitutional Affairs relating to judicial appointments:

Although the appointment of judicial officers is a prerogative of the Crown, exercised by the executive arm of government through Cabinet, it is essential to ensure that political considerations do not intrude into the actual appointment process. The appointment process needs to guard against judicial appointments made on a basis other than merit, and on the basis of personal or political affiliation.

The need to secure judicial independence is one of the fundamental principles underpinning a system of judicial appointments. To that end the appointment process should be open and transparent, and judicial appointments should only be made on the basis of merit.

The Association believes that a formal protocol for judicial appointments setting out the appointment process should be established and made publicly available so as to ensure that the requirements of openness and transparency are met and to enhance public confidence in those who are appointed to judicial office.

The Association recommends that the following protocol be established in relation to the appointment of magistrates; though it would seem that a similar protocol could be adopted in relation to judicial appointments to the intermediate and superior courts.
As has been the practice for some time, there should be a call for expressions of interest in relation to a judicial vacancy or vacancies, affording interested persons the opportunity to put themselves forward as applicants for the position or third parties to nominate suitable candidates. It is important to ensure that the advertisement calling for expressions of interest in no way detracts from the status of the court to which the appointment is to be made.

The virtue of calling for expressions of interest is that it gives the appointment process greater openness and widens the pool of suitable candidates.

However, it is recognised that some potential candidates may be reticent in expressing interest in a judicial appointment. Therefore, the protocol should permit the Attorney General to consult with the Chief Magistrate, the President of the local Bar Association as well as the President of the Law Society and such other persons or bodies as he or she thinks fit and to invite such persons or bodies to submit names of suitable candidates whom they recommend, by way of nomination, be considered for appointment. Wide consultation should be encouraged to increase the pool of suitable candidates generated by the advertising process.

The established protocol should not treat self nomination through the advertising process any differently from nomination by third parties during either the consultation or advertising process. The protocol should make it clear that every candidate should receive equal consideration for appointment.

It is essential that confidentiality be maintained in relation to all expressions of interest and nominations in order to attract suitable candidates. Potential candidates may be dissuaded from expressing interest if their expression of interest were to become publicly known. Similarly, third parties may be reluctant to nominate suitable candidates if their nominations were to become public knowledge.

The established protocol should set out any statutory criteria for appointment together with the judicial attributes that candidates are expected to possess. The selection criteria should be published to enhance the openness and transparency of the appointment process.

The New South Wales Attorney General’s Department has formulated and published a list of requisite or expected attributes...

It is noted that these criteria approximate the attributes for judicial office referred to in the Law Council’s submission. However, the latter include additional criteria such as decisiveness and the ability to discharge judicial duties promptly, reputation, fairness, maturity and sound temperament and gender and cultural awareness. Although it is arguable that these criteria are subsumed under some of the attributes referred to in the NSW selection criteria, they are best treated as discrete criteria which reflect either necessary or desirable qualities for judicial office.

In light of the findings of the Flinders University Magistrates Research Project referred to in the submission made by Professors Mack and
Anleu, it may be necessary to make some minor adjustments to the list of criteria used to assess merit in relation to judicial appointments.

The Association considers that the selection criteria presently applied in NSW coupled with the additional criteria suggested above provide a good working model for the appointment of judicial officers. Although the concept of merit is somewhat elusive, the specified attributes are designed to assess a candidate’s suitability for judicial office and to facilitate appointments on the basis of merit. As pointed out in the Mack and Anleu submission, merit “at the very least must relate to those qualities and skills which are needed to carry out the institutional role and the specific tasks of the judicial position” and “judicial appointments must be made on the basis of a close correspondence between the attributes of the candidate and the requirements of the job”.

Of course, the more difficult question relates to how the various criteria should be weighted in assessing merit. The Association needs to consider this question more fully, and does not propose to express an opinion at this stage.

As made clear in the submission made by the NSW Law Society “the sole criterion is merit: the best candidate for the position, irrespective of whether the candidate is a barrister, solicitor or academic lawyer, should be appointed”. This view is reflected in the commitment in NSW to “actively promoting diversity in the judiciary” and giving consideration to “all legal experience, including that outside mainstream legal practice”.

The protocol should next provide for the establishment of a selection or assessment panel by the Attorney General to assess all applications and nominations against the published selection criteria.

There appears to be no general consensus as to the composition of selection or assessment panels.

In relation to appointments to Federal Courts (other than the High Court) the Law Council of Australia favours a tripartite panel comprising the head of the court or jurisdiction to which the appointment is being made (or their nominee), a retired senior judicial officer or officers of the Commonwealth and a senior official from the Attorney General’s Department. This model currently operates at the Federal level.

With respect to the appointment of magistrates, the Department of Justice of Tasmania stipulates that an assessment panel shall consist of the Chief Magistrate (or their nominee), Secretary of the Department of Justice (or their nominee) and the Attorney General’s nominee.

In New South Wales the practice has been for the panel to consist of the Chief Magistrate, the Director General of the Attorney General’s Department, a leading member of the legal profession and a prominent community member.

The Association has reached no definitive view as to the composition of selection or assessment panels, though it makes the following observations.
The Chief Magistrate (or his or her nominee) would be an obvious member of such a panel. It is essential to have as a member of the panel a member of the Court in which the appointment is to take place and a serving judicial officer who possesses significant judicial experience.

The Association also sees merit in having a senior magistrate on the panel in addition to the Chief Magistrate for the same reasons that support the presence of the Chief Magistrate (or nominee) on the panel. Whether or not that judicial officer is retired, or is serving, is of no real moment provided the judicial officer has recent significant experience in the judiciary.

As noted above, it has been usual to appoint as a panel member a nominee of the Attorney General or the Departmental Secretary or some other senior public servant. If a selection panel is intended to be independent of institutional or political bias, one might well question the desirability of having a representative of government on a selection panel.

The Association sees no problem with including on the panel a leading member of the legal profession and a prominent community member. The selection process would stand to be enhanced by the presence of such persons who would approach the selection process from their own particular perspective — one that more broadly reflects the makeup of the community — and bring to bear upon the selection process their special expertise.

Finally, there would appear to be merit in ensuring that there is at least one female member on the panel. It is understood that this is a practice which is favoured in Victoria. The virtue of that practice is that it establishes a balance of women and men on the panel, thereby ensuring that the membership of the panel again more faithfully reflects the makeup of the community.

According to the established protocol the selection panel should then proceed to shortlist the candidates against the published criteria. Although there are views to the contrary, at least in relation to judicial appointments in the Federal courts, the Association maintains that all short listed candidates should be interviewed by the selection panel.

The value of conducting face to face interviews with candidates for positions in magistrates' courts cannot be overstated. Candidates for the magistracy come from a large pool of potentially suitable candidates, and generally speaking are less well known than candidates for appointment to the intermediate and higher courts.

The interview process can be helpful in identifying the best candidate for the position. The process is designed to identify the necessary qualities in a candidate. Furthermore the interview process may give candidates a better understanding of the function which he or she is to discharge, if appointed and may reveal qualities of a candidate not previously known.

Interviewing all short listed candidates is not only the most effective way of assessing the merit of candidates, but it is also the fairest and most equitable way of considering their expressions of interest. By subjecting
each candidate to a similar series of questions, the interview process enables the selection panel to compare and properly assess the respective merit of the candidates.

Finally, owing to the low volume of candidates (which is usually between 5 and 10, depending upon the number of judicial vacancies) the time and effort taken to interview the shortlisted candidates is far outweighed by the benefits of the process.

The protocol should require the selection panel to assess each candidate as being highly suitable, suitable or unsuitable for judicial office, without otherwise ranking the candidates within those three categories. The panel should then provide the Attorney General with a report containing those assessments.

Finally, the protocol should provide that although the Attorney General, and ultimately Cabinet, is not bound by the assessments made by the panel any appointment that represents a marked departure from those assessments should be explained through an appropriate mechanism and in an appropriate forum.

Although the Senate Legal and Constitutional Affairs References Committee did not make any recommendations regarding the appointment process in relation to State and Territory magistrates, it made a number of comments and recommendations in relation to judicial appointments to higher courts. Those recommendations could have some application to the appointment process for magistrates.

The Committee considered the current appointment process in relation to the Federal Court, Family Court and the Federal Magistrates Court. That process was summarised by the Committee as follows:\(^{116}\)

- The Attorney-General invites nominations from a broad range of individuals and organisations, including the Chief Justices of the Federal Court and Family Court, the Chief Federal Magistrate, the Chief Judge of the Family Court of Western Australia, the Law Council of Australia, the Australian Bar Association, Law Societies and Bar Associations of each State and Territory, Deans of law schools, Australian Women Lawyers, National Association of Community Legal Centres, National Legal Aid, Administrative Appeals Tribunal, Council of Australasian Tribunals and the Veterans' Review Tribunal;

- Information regarding expressions of interest and nominations for appointment is also published in Public Notices in national and local newspapers and on the Attorney-General's Department website;

- Candidates must meet the relevant qualifications and demonstrate a number of published qualities;

- An advisory Panel which includes the Chief Justice (or the Chief Federal Magistrate) or their nominee, a retired judge or senior member of the Federal or State judiciary and a senior member of the
The Attorney-General’s Department considers the nominations and provides a report to the Attorney-General recommending appropriate candidates for appointment. To assist in preparing its report, the Advisory Panel may conduct interviews of candidates;

- The Attorney-General considers the Advisory Panel’s report and, for each position available, identifies the person whom he or she considers most suitable. The Attorney-General then recommends this appointment to the Cabinet;

- Appointments are made by the Governor-General in Council.

By way of comment, the Senate Committee considered the reference in the appointment process to the Attorney-General considering the Advisory Panel’s report and then identifying “the person whom he considers most suitable” to be unfortunate:

If the Attorney-General identifies the most suitable person based on their assessment against the selection criteria then it is desirable for this to be articulated. On the other hand, if the Attorney-General is not willing to state that selection is directly based on the selection criteria then this should also be articulated.\textsuperscript{117}

The Committee went on to observe that “it is appropriate for the Attorney to retain the final decision making authority, but this point goes to the transparency of the process and, if the Attorney is making appointments other than based on an assessment against selection criteria, it also goes to the integrity of the process.”\textsuperscript{118}

The Committee was also of the view that “the transparency of all federal judicial appointments would be improved by the Attorney-General making public the number of nominations and applications received for each vacancy and, if a short-list of candidates is part of the process, to make public the number of people on the short-list”.\textsuperscript{119} The Committee did not consider that personal details of a candidate, or any information that could identify him or her, should be made public unless that person was appointed as a judicial officer and it is appropriate to do so.\textsuperscript{120}

The result was that the Committee recommended that when the appointment of a federal judicial officer is announced the Attorney General should make public the number of nominations and applications received for each vacancy and, if the government or department prepared a short-list of candidates for any appointment, the number of people on the list should also be made public.\textsuperscript{121}

The Committee was of the view that, in relation to appointments to judicial office, it is important to take “a comprehensive approach to judicial appointments to ensure that as many as possible meritorious candidates participate in the process”.\textsuperscript{122} The Committee stated that “it appears that to
rely solely on one approach – either only advertising or only privately canvassing people – could exclude worthy applicants.”

The Committee appears to have accepted a submission from the ICJ – Victoria that both approaches are acceptable:

The system of inviting or permitting people to apply for appointment to judicial office does not adversely impact upon the achievement of independence.\textsuperscript{124}

Commenting on the current practice in relation to appointments to federal courts, the Committee said:

The approach taken by the Attorney-General, which includes a combination of broad consultation and advertising nationally and locally, seems well suited to maximising the range of possible appointees from which the Attorney-General can draw.\textsuperscript{125}

The Committee noted that in relation to appointments to the High Court, the present process is "significantly more flexible (and less transparent)"; and "beyond meeting statutory requirements and consulting widely, appointments are selected after the Attorney-General considers the candidates nominated and...identifies the person whom he considers most suitable."\textsuperscript{126} The Committee further noted that there are “mixed views about whether or not it is appropriate to have a different process for the High Court.”\textsuperscript{127}

The Committee was not persuaded that “a model identical to that of the other federal courts is necessary to maintain confidence in judicial appointments to the High Court.”\textsuperscript{128} However, it did consider that there is “scope to increase transparency in the existing process”.\textsuperscript{129} Although the establishment of an advisory panel was not considered necessary, the Committee considered that it is desirable for the Attorney–General to adopt the other procedures for appointments to federal courts, which include advertising judicial vacancies widely, confirming that selection is based on merit, and detailing the selection criteria that constitute merit for appointment to the High Court”.\textsuperscript{130} The Committee was also of the view that the Attorney General should make public the number (not names) of candidates considered for appointment to the High Court (whether they were nominated by another person, self-nominated or suggested by government).\textsuperscript{131}

The Committee made the following important observation:

...sound and transparent selection processes for all levels of appointment (although not necessarily identical processes) is an important factor in maintaining public confidence in the judiciary, but it is one component of an effective independent judicial system that needs to be supported by other features such as appropriate judicial complaints handling and termination processes.\textsuperscript{132}

The Committee received some submissions arguing strongly that the establishment of an independent judicial advisory commission (JAC) is
desirable. The purpose of such a commission would be to make recommendations to the Attorney-General regarding suitable candidates for judicial office.

According to the Committee, "the minimum conditions for judicial independence, including security of tenure and appointment based on merit are essential and these are currently being met". The Committee was not persuaded that a JAC is "the only way to implement effective and appropriate selection processes". The Committee was not convinced that "the cost of establishing a separate judicial appointments advisory commission is currently warranted".

Security of Tenure

As stated by Crawford and Opeskin, the primary mechanism for protecting judicial independence is security of tenure. Mack and Anleu point out the importance of security of tenure in supporting both external and internal judicial independence.

The core requirement of "security of tenure is protection against unjustified or arbitrary removal from judicial office". Mack and Anleu have dealt with this aspect, in the Australian context, and have made the following observations:

Provisions for tenure and removal of magistrates are sometimes similar to and sometimes different from those for the higher courts in their jurisdiction, reflecting magistrates' changing status from public servants to judicial officers. Tenure and removal provisions are also different for magistrates in different jurisdictions.

Mack and Anleu have undertaken a detailed comparative analysis of the security of tenure enjoyed by Australian judges and magistrates.

Commonwealth judges and judges of the Supreme and District/County Courts in each jurisdiction have "guaranteed tenure, until retirement, sometimes expressed as 'during good behaviour'". Such judges can removed from office by the executive branch of government (the Governor-General, Governor or Administrator) only by "an address from Parliament, usually at the request of the executive".

As pointed out by Mack and Anleu, "in some jurisdictions proved misbehaviour or incapacity is required for removal". In South Australia and Western Australia there is "no express requirement of misbehaviour for removal of judges but, coupled with the express guarantee of tenure during good behaviour, the implication is that removal should only be based on lack of good behaviour".

Mack and Anleu point out that in "New South Wales, the Australian Capital Territory and Victoria, the executive and legislative action must be based on a report or finding of incapacity or misbehaviour by a judicial commission (New
South Wales and Australian Capital Territory)\textsuperscript{146} or investigating committee (Victoria).\textsuperscript{147}

Turning to the magistracy, while magistrates in New South Wales, Victoria, Tasmania and the Australian Capital Territory have the same protection against removal from office and are regulated by the same removal mechanism as judges,\textsuperscript{148} magistrates in South Australia, Queensland, Western Australia, and the Northern Territory do not enjoy the same security of tenure.

In Western Australia the removal of a magistrate on grounds other than physical or mental capacity necessitates the same hybrid process that regulates the removal of judges from office.\textsuperscript{149} According to Schedule 1 clauses 13 and 14 of the Magistrates Court Act 2004 (WA) the Attorney General is empowered to initiate proceedings to determine a magistrate’s mental or physical fitness for office. Such proceedings can result in the magistrate being temporarily relieved of duties or his or her appointment being terminated (which is deemed to be a disability retirement).

In Queensland and South Australia magistrates can be removed from office following an application made by the Attorney General and upon “proper cause” being found by the Supreme Court.\textsuperscript{150} According to s 43(4) of the Magistrates Act 1991(Qld) and s11(8) of the Magistrates Act 1983 (SA) “proper cause” is established upon proof of any of the following:

- mental or physical incapacity;
- conviction of an indictable offence;
- incompetence or serious neglect; or
- other unlawful or improper conduct in the performance of judicial duties.

In Queensland “proper cause” also includes “proved misbehaviour, misconduct or conduct unbecoming a magistrate” and “failing to comply with a transfer order.”\textsuperscript{151} In South Australia, there is provision for a prior investigation of inquiry by a single Justice of the Supreme Court.\textsuperscript{152}

The position in the Northern Territory is that a magistrate can be removed by a decision of the Administrator on any of the following grounds:\textsuperscript{153}

- incompetence or incapacity;
- failure to comply with a direction of the Chief Magistrate; or
- if, for any other reason, the magistrate is unsuited to the performance of duties.
Having compared the security of tenure of judges with that of magistrates, Mack and Anleu reached the following conclusions.\textsuperscript{154}

Guarantee of judicial tenure during good behaviour, with removal requiring executive and legislative action, is the core protection for security of tenure which underpins judicial independence and impartiality. Magistrates in Queensland, South Australia and, most especially, the Northern Territory, lack the full substantive and procedural protections against unwarranted removal accorded to judges of the higher courts and to magistrates in other jurisdictions. This distinction cannot be justified.\textsuperscript{155} Even allowing for the principle of legislative choice and the scope for different mechanisms of protection for judicial independence, this structure makes the magistracy inappropriately dependent on the executive and is inconsistent with the institutional integrity of magistrates courts. Removal by the executive alone, without legislative action, should be regarded as falling below the "minimum characteristic of an independent and impartial tribunal"\textsuperscript{156} required by constitutional principles.

The authors proceed to stress the absolute need for formal, legal mechanisms to ensure security of tenure for magistrates:

Procedures and standards for removal of magistrates in South Australia, Queensland and the Northern Territory should provide the same protection as is accorded the judicial officers in the higher courts. This gap is perhaps the most significant difference and is the area where the lack of protection for magistrates most apparently breaches "the permitted minimum criteria for the appearance of impartiality".\textsuperscript{157}

As pointed out by Mack and Anleu, "another issue related to security of tenure is the power to suspend a judicial officer".\textsuperscript{158}

As observed by the authors, there are no formal mechanisms for suspension of Commonwealth, Supreme or District/County Court judges, except in the Australian Capital Territory and New South Wales.\textsuperscript{159} In those two jurisdictions, all judicial officers, including magistrates, fall under the jurisdiction of judicial commissions which possess the power to suspend a judicial officer in particular circumstances.\textsuperscript{160}

The position is different for magistrates in Queensland, South Australia and Western Australia: magistrates in those three jurisdictions can be suspended "on the basis of a preliminary finding that grounds may exist to justify removal from office".\textsuperscript{161}

In Queensland a magistrate can be suspended from office if a Supreme Court Justice, on application by the Attorney General, "decides that there are 'reasonable grounds for believing that proper cause' for removal exists."\textsuperscript{162} The position is similar in South Australia, where a magistrate can be suspended if the Chief Justice of the Supreme Court of South Australia "advises the Governor to do so, on suspicion of guilt of an indictable offence, or where an investigation is underway to determine if cause exists."\textsuperscript{163}
The process in Western Australia is somewhat different. In that State the Governor may suspend a magistrate on "an allegation of misbehaviour, including incompetence, neglect, or failure to follow directions of the Chief Magistrate".\textsuperscript{164} The process begins with the Attorney General giving notice to the magistrate in question and reporting to the Chief Justice, who is charged with the task of inquiring into the matter and then reporting back to the Attorney-General.\textsuperscript{165} There is a different process for suspension on the grounds of illness. According to \textit{Magistrates Court Act 2004 (WA) sch 1 cl 13(3)}, "if the Attorney-General is of the opinion that a magistrate is physically or mentally incapable of undertaking official duties, the Attorney-General may relieve the magistrate of duties and must constitute a committee (including the Chief Justice or nominee) and two medical practitioners to inquire".\textsuperscript{166}

In the Australian Capital Territory, New South Wales, Queensland and South Australia a suspended magistrate is entitled to be remunerated during any period of suspension.\textsuperscript{167} The position in Western Australia differs in that the "Governor has the power to make provisions regarding salary during suspension for misbehaviour, but a magistrate suspended due to illness is entitled to full remuneration".\textsuperscript{168}

According to \textit{Magistrates Court Act 1987 (Tas) s 9}, "the grounds and mechanisms for suspension are identical to those for removal – by the Governor on an address from both Houses of Parliament on grounds of proved misbehaviour or incapacity".\textsuperscript{169}

There are no grounds or mechanisms for the suspension of magistrates in the Northern Territory or Victoria.\textsuperscript{170}

Mack and Anleu make the following observations regarding the mechanisms for suspension of magistrates:

A properly designed and managed process for suspension of a judicial officer, while grounds for removal are being considered, is not in itself a denial of judicial independence. The transparency and procedural fairness of the Judicial Commission provides significant protection for the constitutional values of public confidence and institutional integrity. However, the contrast between the suspension provisions which can be used against magistrates in Queensland, South Australia and Western Australia, and the absence of such provisions for judges in those and other jurisdictions raises concerns. First, there is no justification for treating magistrates differently than judges. Second, the process and grounds for removal lack the transparency and fairness of a well-developed judicial commission process, which is necessary for the process to generate public confidence. Having both the executive and a justice of the supreme court involved in removing a magistrate threatens the institutional integrity of the supreme court as well as the magistrates court. For these reasons, the procedures for suspension in Queensland, South Australia and Western Australia do not appear to meet necessary constitutional standards for judicial independence.\textsuperscript{171}

The authors make the following further and final observation:
Provisions for suspension from office in South Australia, Western Australia and Queensland should be no different for magistrates than for judges of the higher courts. This difference also appears to breach the minimum constitutional standard, and is wholly unjustified by any relevant distinction between magistrates’ courts and the supreme and district courts. If suspension for cause is an appropriate means of ensuring public confidence and addressing judicial performance concerns, it should be applicable to all courts and judicial officers, in ways which enhance rather than detract from public trust.¹⁷²

The Senate Standing Committee on Legal and Constitutional Affairs, in relation to its inquiry into Australia’s Judicial System and Role of Judges, recently considered basic principles underpinning appropriate termination of judicial appointments.¹⁷³

In its Report the Committee expressed agreement with the following key principles articulated by the International Commission of Jurists, Victoria, (ICJ – Victoria), in its submission to the Committee:

...judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches of government. Removal of judges from office must be limited to fair and transparent proceedings for serious misconduct within judicial office, criminal offence, or such incapacity that renders a judge unable to discharge his or her functions. The system prevalent throughout Australia of removal being made by the Governor-General or the Governor following an address of parliament should continue. No lesser system is appropriate, nor could it guarantee the same independence from political interference which the Australian judiciary enjoys.¹⁷⁴

Further commenting on the view expressed by the ICJ-Victoria, the Committee stated:

The committee agrees with the ICJ-Victoria that the severe step of revoking a judicial appointment should follow the requirements described and should be limited to very serious misconduct or incapacity. This is consistent with the current federal arrangements.¹⁷⁵

The Committee reached the following conclusion:

In the committee’s view it is important to ensure that there is a complete statutory framework for termination that is principled and comprehensive. Along with thorough and appropriately transparent appointment processes and terms of appointment, the committee’s vision is for an updated system from which to continue to build an impressive judicial model that brings with it the benefit of a national approach but properly preserves the unique aspects each jurisdiction wishes to retain.¹⁷⁶

It is apparent that there are differences between the various States and Territories as regards the arrangements for investigating and handling judicial complaints against judges and magistrates, as a prelude to the removal process. In some jurisdictions the investigative or complaint handling process
is undertaken by a judicial commission (not necessarily permanent) or an investigative body, while in other jurisdictions the arrangements are more informal and ad hoc (as for example in the Northern Territory). As observed by Mack and Anleu, methods used for investigating and handling judicial complaints, as much as the methods of termination, raise issues of security of tenure.\textsuperscript{177}

As noted in the Report of the Senate Legal and Constitutional Affairs References Committee, “an appropriate complaint handling system is one that is balanced with safeguards for judicial independence”.\textsuperscript{178} Accordingly, the Committee expressed the following view:\textsuperscript{179}

The committee’s view is that a national judicial commission would be an ideal outcome, but understands that this is a longer term project. The Committee therefore supports a staged approach, which involves initially planning a federal judicial complaints commission (based on the Judicial Commission of New South Wales model\textsuperscript{180}) and then seeking the agreement of other jurisdictions to be involved in a national judicial commission of either a cooperative or fully integrated model.

A cooperative model could involve a uniform national approach, with jurisdictions able to operate independently or to combine resources. It has been noted that New South Wales is not interested in participating in a national judicial commission and that “without NSW it makes it rather hard for it to be an effective national complaints authority”. It seems that this could be accommodated in a cooperative model, or that New South Wales could take a leadership role in establishing a national commission based on its model.

The committee is interested in the SCAG\textsuperscript{181} work currently being undertaken and the fact that SCAG is apparently considering a range of options “for a national mechanism for handling complaints against judicial officers”.

The Committee made the following recommendations:

- That the Commonwealth government establish a federal judicial commission modelled on the Judicial Commission of New south Wales;

- That this new judicial commission include the three functions of complaints handling, assisting courts to achieve consistency in sentencing and judicial education;

- That within 12 months the government undertake planning and budgetary processes necessary for the establishment of this commission;

- That within 18 months the government introduce a bill to establish the new judicial commission; and

- That the above recommendations are implemented subject to any constitutional limits and in consultation with the federal courts.
Another possible way in which the security of tenure of magistrates may be undermined is through the ability of Australian governments to abolish the court of which they are a judicial member.\textsuperscript{182} This aspect was addressed in the recent paper, titled "The Relationship between Parliament and the Judiciary in Australia and the Latimer House Principles", which was presented at the last CMJA Triennial Conference. The following is an extract from that paper:

The scope for Australian legislatures to abolish and restructure courts – as much as the earlier discussed areas of interaction between parliaments and the judiciary - highlights the need for the two branches of government to be sensitive to, and respectful of, their respective functions, if the Latimer House Principles are to enjoy any level of acceptance and success in Australia.

The abolition and restructuring of courts can be seen as directly trespassing upon the province of the judicial branch of government because courts are the very vehicle through which the judiciary performs its function. For that reason the judiciary jealously guards its judicial institutions – the courts.

It is convenient to begin by examining what, if any, constraints - constitutional or otherwise - there are on Australian parliaments enacting legislation that abolishes or restructures an existing court.

By virtue of s 71 of the Australian Constitution the High Court is assured a continuing existence and "any attempt to disestablish the High Court would be adjudged unconstitutional".\textsuperscript{183} However, the Constitution does not impose the same constraint on the abolition of Federal courts created by Federal Parliament or State courts created by State parliaments.

At the State and Territory level there is very little by way of formal constitutional constraints or arrangements affording a guarantee against the abolition of Supreme courts and other State or Territory courts. The State Constitutions of New South Wales, South Australia, Queensland and Western Australia do not expressly enrench their Supreme Courts.\textsuperscript{184} The exception is Victoria where the Supreme Court of Victoria is constitutionally entrenched by the Constitution Act 1975 (Vic) Part 111.\textsuperscript{185}

However, as stated by Campbell, the decision in Kable v DDP has far reaching implications in terms of the powers of State legislatures to abolish courts;\textsuperscript{186} though the exact limits of the decision are yet to be tested.

As pointed out by Campbell, "there are dicta in some of the majority opinions which suggest that Chapter 111 of the Constitution [also] inhibits the powers of the State Parliaments to reconstruct State court systems".\textsuperscript{187} that is, State legislatures cannot abolish their Supreme courts.\textsuperscript{188} Furthermore, as pointed out by Mack and Anleu, some commentators have suggested that those dicta in Kable could, if read broadly, "impose other limits on the ability of state parliaments to reconstruct the state court systems more generally".\textsuperscript{189} In other words,
"State Parliaments are precluded from abolishing all lower State courts". However, as pointed out by Mack and Anleu, "this issue will only be resolved when a future court reorganisation is challenged".

The reason why there is concern in Australia over the power of State legislatures to abolish courts was explained in the majority opinions in Kable. According to Gaudron J, if the States "were free to abolish their courts...the provisions of Chapter 111 which postulate an integrated judicial system would be frustrated". In a similar vein, McHugh J stated that the "High Court would be rendered nugatory if the Constitution permitted a State to abolish its Supreme Court".

Perhaps a more fundamental objection to legislatures having the power to abolish or restructure courts is that courts, as previously noted, are "an integral part of the rule of law", and if courts are liable to be abolished or even restructured that may impact upon the rule of law.

Quite apart from those concerns, the potential for State or Territory legislatures to abolish their courts also raises concerns because "judicial independence can be subverted by the abolition of courts and the non-appointment of certain of their members" to another court or a new court that replaces the abolished court. This concern is also related to the rule of law, for as also noted earlier "the independence of the courts is...an integral part of the courts' role in preserving the rule of law" and "from the common law in Magna Carta with its rule of law and an intricately associated system of courts with their indispensable independence, the rule of law forms a constitutional foundation for the independence of the judiciary".

What if any safeguards are there against a subversion of judicial independence?

Sir Anthony Mason has stated that it is possible "to identify from the precedents a practice amounting seemingly at least to a convention respecting the continuation in judicial office of a judge of a restructured court" -- that is the judge of an old court would either be appointed to a new court or the old court would not be abolished until its judges ceased to hold office and in the meantime those judges would continue to hold the title and other entitlements. Justice Kirby has also observed the existence of such a convention.

However, the extent to which such a convention adequately protects judicial independence has proven to be questionable, as demonstrated by what Sir Anthony Mason has described as the "failure of legislatures and governments to respect fully the independence of judges".

Attorney General (NSW) v Quin was a case that highlighted the tension that the abolition of courts can create between the legislature and the judiciary. In that case a reorganisation of the NSW magistracy was effected by the Local Courts Act 1982 (NSW). All but five of the serving magistrates were appointed to the new Local Court. The reorganisation of the magistracy and the failure to re-appoint the five magistrates was seen to have posed a threat to judicial independence.
In Quin Mason CJ held that the reorganisation of the magistracy and the court structure was a genuine exercise, and "it was not suggested that its object was to enable the removal from office by covert means" of the magistrates who were not re-appointed.\textsuperscript{203}

Whether or not the abolition or restructuring of a particular court system represents an interference with the judicial independence of the judiciary depends upon the purpose for the change:

To abolish a court simply for the purpose of terminating the appointment of a judge or judges of that court would be to violate the constitutional provisions designed to protect judicial independence. However, the abolition of a court usually takes place as part of a planned re-organisation of the court structure, in circumstances where the legislature and the executive claim that the re-organisation is being undertaken in the public interest in order to provide a better or more efficient court system.\textsuperscript{201}

It should be noted that some Australian States, apparently as a measure of good faith and in attempt to build trust between parliament and the judiciary, have enacted legislation requiring that any person holding an abolished judicial office be given another comparable judicial office.\textsuperscript{202} Although the Constitution of Queensland 2001 (Qld) affords judges protection in the event a court is abolished, no such protection exists for magistrates. The other States and Territories provide no such formal legislative guarantees.

If such guarantees are to be effective in an integrated judicial system, such as exists in Australia, it is essential that such constitutional protections be afforded to all judicial officers and not limited to one tier of the judiciary. Furthermore, the constitutional protections need to be as strong as possible. The strength of constitutional protections in Australia varies from the optimal, which is provided for in section 128 of the Australian Constitution,\textsuperscript{203} to a less protective mode of constitutional amendment which requires any amending legislation to be passed by prescribed majorities.\textsuperscript{204} The latter provides only a frail protection "when the political executive of the day commands majorities in both Housed of Parliament".\textsuperscript{205}

The abolition and restructuring of courts by the legislature can be a real source of tension between parliament and the judiciary. While the judiciary and supporters of judicial institutions may be able to advance principled and cogent arguments for protecting the continuing existence of courts, particularly the High Court and the superior courts of the Australian judicial system, they should not, as Campbell and Lee suggest, treat the courts as "their personal and private properties" and should be sensitive to "the concerns that inspire legislators to promote legislative measures to alter existing court arrangements."\textsuperscript{206} Amongst those concerns are:

the costs to government and to litigants of resorting to the established judicial institutions of government for settlement of disputes; the demonstrable fact that, practically, many people do not have ready access to the ordinary courts for want of the requisite financial means and /or for want of the personal qualities which may be needed to withstand the traumas of combat before a court of law.\textsuperscript{207}
If the Latimer House Principles are to be successfully implemented in Australia serious consideration needs to be given to the extent to which it is necessary to prevent the abolition or restructuring of State or Territory courts, particularly when it may be in the public interest to permit parliaments to reorganise the judicial system to provide a better or more efficient court system or to facilitate greater public access to the judicial system or an alternative justice system. Accommodating that competing public interest – which legislatures may be keen and expected to serve – within the Australian constitutional framework, and in light of the implications of Kable, may prove a challenge. Obviously, if legislatures are given scope to abolish or restructure courts then there must be appropriate safeguards against such reorganisation violating the independence of the judiciary.

2 Campbell and Lee, n 1, p 49.
4 The executive arm of government operates through government departments (or bodies) and the public service, all of which administer and implement laws and policies.
6 Mack and Anleu, n 3, 375. The authors refer to the following pieces of legislation which effected the change: Court of Petty Sessions (Amendment) Ordinance [No 4] 1977 (ACT); Local Courts Act 1982 (NSW). Magistrates Ordinance 1977 (NT); Magistrates Act 1991(Qld); Magistrates Act 1983 (SA); Stipendiary Magistrates Act 1969 (Tas); Magistrates’ Court (Appointment of Magistrates) Act 1984 (Vic); Stipendiary Magistrates Amendment Act 1979 (WA).
7 (1976) 14 SASR 530 at 546.
9 Campbell and .Lee n 1, 37 citing Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73. See also I Zines The High Court and the Constitution (4th ed, Sydney Butterworths 1997) Ch 9.
10 Campbell and Lee, n 1, 37.
11 Campbell and Lee, n 1, 37.
12 Campbell and Lee, n 1, 37.
13 Sir Anthony Mason, n 1, 4 cited in Campbell and Lee, n 3, 67.
14 (1931) 46 CLR 73.
15 Campbell and Lee, n 1, 37.
17 Campbell and Lee, n 1, 36. See for example ss 1, 61 and 71 of the Constitution which vests the three functions of government in three institutions: parliament, the executive and the judiciary.
18 Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73; Attorney-General (Cth) v R (1957) 95 CLR 529.
20 Clyne v East (1967) 68 SR(NSW) 385 and Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372. Collingwood v Victoria (No 2) (1994) 1 VR 652; Nicholas v Western Australia (1971) WAR 186; Gilbertson v South Australia (1978) AC 772; Kabie v Director of Public Prosecutions FC 96/027 Cth Constitution. Nor is the doctrine of the separation of powers constitutionally entrenched in the Territories: Spratt v Hermes (1965) 114 CLR 226.

21 Enid Campbell “Constitutional Protection of State Courts and Judges” (1997) Monash University Law Review 397, 398. For the historical reasons as to why there no formal doctrine of the separation of powers operates at the State or Territory level see G Carney “Separation of Powers in the Westminster System” (1994) 8 Legislative Studies 59, 62.


23 Lowndes, n 19.

24 BLF v Minister Industrial Relations per Kirby J at 401.


26 P H Lane (Constitutional Aspects of Judicial Independence” in Fragment Bastion Judicial Independence in the Nineties and Beyond ed H Cunningham, 75

27 Lowndes, n 19.

28 Campbell and Lee n 1, p 60.

29 Campbell and Lee, n 1, p 62.

30 Campbell and Lee, n 1, p 62.

31 Campbell and Lee, n 1, p 61.

32 Professor Stephen Parker “The Independence of the Judiciary” in B Opeskin and P Wheeler (eds) The Federal Judicial System (Melbourne: Melbourne University Press, 2000), 80. This is especially so in relation to the magistracy which undertakes the bulk of the criminal caseload in the judicial system.

33 Parker, n 32, 80. These remarks apply with equal force to the appointment of magistrates.


38 Lowndes, n 35, 599 - 600.

39 Lowndes, n 35, 599.


41 Lowndes, n 35, 600-602.

42 Lowndes, n 35, 600.


44 Byron, n 43, 148, 149.

45 Church and Sallman Governing Australia's Courts (AIJA Carlton Vic 1991), 10.

46 Church and Sallman, n 45, p 13.

47 Professor Peter Sallman "Extract on Courts' Governance from Going to Court, a discussion paper on Civil Justice in Victoria", presented at the 18th AIJA Conference Darwin 2000, 3-4.

48 Byron, n 43, 150 cited by Lowndes, n 35, 602.

49 Church and Sallman, n 45, p 8 cited by Lowndes, n 35, 600.

50 Lowndes, n 35, 602. However, it should be noted that the Judicial Commission in South Australia primarily consists of the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Chief Magistrate of the Magistrates Court.

51 Professor Sallman, n 47, 5. However, Professor Sallman points out that "to overcome that problem a lot of work has been done in the use of informal committees of judges working on particular aspects of judicial administration within their own courts"; n 47, 6.

52 Byron, n 43, 155 cited by Lowndes, n 35, 602.


56 Palente v The Queen [1985] 2 SCR 673 at 708.
57 Palente v The Queen [1985] 2 SCR 673 at 709.
58 Coroner Doogan’s findings and recommendations in relation to the Inquests and Inquiries into Four Deaths and Four Fires between 8 and 18 January 2003, Chapter 9.1, p 200.
59 Page 11 of the transcript of the proceedings on 17 March 2005. See also Coroner Doogan’s findings and recommendations, Chapter 9.1, p 200.
60 See Coroner Doogan’s findings and recommendations Chapter 9.1, p 200. See also p 11 of the transcript of the proceedings on 17 March 2005.
61 See p 11 of the transcript of the proceedings on 17 March 2005. See also Coroner Doogan’s findings and recommendations, Chapter 9.1, p 200.
64 In 1994 the Commonwealth Remuneration Tribunal stressed the need to ensure that remuneration levels are adequate to allow recruitment and retention of quality appointees: see Lowndes, n 35, 603.
66 Mack and Anleu, n 3, 389.
69 Mack and Anleu, n 3, 389.
70 Remuneration and Allowances Act 1990 (Cth) s 4; Australian Capital Territory (Self-Government) Act 1988 (Cth) s 73; Local Courts Act 1982 (NSW) s 24; Statutory and Other Offices Remuneration Act 1975 (NSW) s 11; Magistrates Act 1997 (NT) s6(1); Remuneration Tribunal Act 1981 s 9B; Magistrates Act 1991(Qld) s47; Magistrates Act 1983 (SA) s 13(2); Judicial Remuneration Tribunal Act 1993 (Vic), s11; Magistrates Court Act 1989 (Vic) sch 1 cl3; Salaries and Allowances Act 1973 (WA) s7.
71 Winterton, n 67, 58.
72 Jason Silverii “On Call 24 hours” From the Bear Pit to the Bench” (2002) 76(2) Law Institute Journal 16, 24. However, it should be noted that the percentage is not constant, and may fluctuate from one tribunal determination to another.
73 Magistrates Court Act 1987 (Tas) s10.
74 Remuneration Act 1990 (SA) s 15.
76 Lowndes, n 35, 603.
77 Future Directions of the Australian Magistracy, a paper prepared by ASMA. See the Mason Report (the full title of which is the “Consultancy Report: System for Determination of Judicial Remuneration” (2003) para 6.20, where it is recommended that the role of independent remuneration tribunals should be confined to judicial remuneration exclusively.
78 Mason Report, n 77, para 4.32.
79 Mason Report, n 77, para 4.47.
81 This is referred to in a recent report of the Hong Kong Standing Committee on Judicial Salaries and Conditions of Service and is based on several Australian newspaper reports: see www.jssc.gov.hk/reports/en/jssc-08/ch - Chapter 5: The Australian Experience.
82 Lowndes, n 35, 603.
83 It overcomes the unbecoming “cap in hand” approach which carries with it an over-dependence on the Executive.
84 Mack and Anleu, n 3, 389.

38
Mack and Anleu, n 3, 389.
Mack and Anleu, n 3, 389.
Australian Constitution s 72; Statutory and Other Offices Remuneration Act 1975 (NSW) s 21(1); Supreme Court Act 1979 (NT) s 41(3); Judges Salaries and Allowances Act 1967 (Qld) s 3(2); Constitution of Queensland 2001(Qld) s 62(2); District Court Act 1991 (SA) s 13(2); Supreme Court Act 1935 (SA) s 12(3); County Court Act 1958 (Vic) s 10(6B); Constitution Act 1975 (Vic) s 82(6B); Judges’ Salaries and Pensions Act 1950 (WA) s 5(1); District Court of Western Australian Act 1969 (WA) s 12(1)(b).
Winterton, n 67, 22-23.
Supreme Court Act 1887 (Tas) s 7(3).
Mack and Anleu, n 3, 390.
Lowndes, n 35, 603; Australian Capital Territory (Self-Government) Act 1988 (Cth) s 73 (3A); Statutory and Other Offices Remuneration Act 1975 (NSW) s 21; Magistrates Act 1977 (NT) s 62(2); Magistrates Act 1983 (SA) s 13(3).
Magistrates Court Act 1987 (Tas) s 10(1).
Judges (Salaries and Allowances) Act 1967 (Qld) ss 3(2), 3A(2), 3B(2), 4(2); Constitution of Queensland 2001(Qld) s 62(2). It should be noted that the statutory protection has now been extended to allowances.
Mack and Anleu, n 68, 398.
Mack and Anleu, n 96, 3.
Mack and Anleu, n 96, 3.
NAALAS v Bradley [2004] HCA 31 [4].
Mack and Anleu, n 96, 2-3. See pp 8 – 20 where the authors compare the administrative authority of Chief Justices and Judges to the administrative powers of Chief Magistrates. In particular, attention is drawn to the general powers of administration and direction exercised by Chief Magistrates as well as their power to assign magistrates to specific locations.
NAALAS v Bradley [2004] HCA 31 [3].
Mack and Anleu, n 96, 3.
Mack and Anleu, n 96, 22.
Mack and Anleu, n 96, 22.
Mack and Anleu, n 96, 22.
Mack and Anleu, n 96, 6 citing Lowndes, n 35, 600-604.
Mack and Anleu, n 96, 10.
See for example Sir Anthony Mason “ The Appointment and Removal of Judges” in Fragile Bastion Judicial Independence in the Nineties and Beyond’ H Cunningham (ed), 31, 34. See also Mack and Anleu, n 3, 380.
The submission of the Association of Australian Magistrates, 1.
Senate Committee Report, n 109, para 3.4.
In some cases nominations for the judicial office are sought.
The Federal Magistrates Court was established in 1999 and was “invested with jurisdiction to deal with many of the matters which come within the jurisdiction of the Federal Court or the Family Court”; see Campbell and Lee The Australian Judiciary , n 1, 13. However, the Commonwealth Attorney General announced on 5 May 2009 that the Federal Magistrates Court is to be abolished and the functions currently performed by Federal magistrates are to be amalgamated with the Federal Court and the Family Court.
Senate Committee Report, n 109, paras 3.12 – 3.19.
Senate Committee Report, n 109 para 3.20.
Senate Committee Report n 109, para 3.21
119 Senate Committee Report, n 109, para 3.22.
120 Senate Committee Report, n 109, para 3.22.
122 Senate Committee Report, n 109, para 3.44.
123 Senate Committee Report, n 109, para 3.44.
124 Senate Committee Report, n 109, para 3.45.
125 Senate Committee Report, n 109, para 3.46.
126 Senate Committee Report, n 109, para 3.25.
127 Senate Committee Report, n 109, para 3.25.
128 Senate Committee Report, n 109, para 3.69.
129 Senate Committee Report, n 109,para 3.69.
130 Senate Committee Report, n 109, para 3.70.
131 Senate Committee Report, n 109, para 3.71.
132 Senate Committee Report, n 109, para 3.73.
133 Senate Committee Report, n 109,para 3.87.
134 Senate Committee Report, n 109, para 3.89.
135 Senate Committee Report, n 109, para 3.89.
138 Mack and Anleu, n 3, 392.
139 Mack and Anleu, n 3, 392.
140 Crawford and Opeskin, n 136, 69; Lowndes, n 35, 525-7.
141 Mack and Anleu, n 3, 392-398.
142 Mack and Anleu, n 3, 392, citing Enid Campbell “Suspension of Judges from Office” (1999) 18 Australian Bar Review 63, 63; Crawford and Opeskin, n 136, 68 and referring to the following constitutional and legislative provisions: Australian Constitution s 72(ii); Family Court Act 1977 (Cth) s 18(3); Supreme Court Act 1933 (ACT) s 4(2)(b); Supreme Court Act 1979 (NT) s 40; Constitution of Queensland 2001 (Qld) s 60(1); Constitution Act 1934 (SA) s74; Supreme Court Act 1935 (SA) s 9(3); Constitution Act 1975 (Vic) s 87AAB; Constitution Act 1889 (WA) s 54; Supreme Court Act 1935 (WA) s 9(1); District Court of Western Australia Act 1969 (WA) s 11(1).
143 Mack and Anleu, n 3, 393 referring to the following constitutional and legislative provisions: Australian Constitution s 72(ii); Family Law Act 1975 (Cth) s 22(1)(b); Australian Capital Territory(Self-Government) Act 1988 (Cth) s 48D; Judicial Officers Act 1986 (NSW) s 41(1); Supreme Court Act 1979 (NT); Constitution of Queensland 2001(Qld) s 61(2); District Court Act 1991(SA) s15(1); Constitution Act 1934 (SA) s 75; Supreme Court Judges Independence Act 1857 (Tas) s 1; Constitution Act 1975 (Vic) s 87AAB; District Court of Western Australia Act (WA) s 11(1); Constitution Act 1889 (WA) ss55.
144 Mack and Anleu, n 3, 393, referring to the following constitutional and legislative provisions: Australian Constitution s72(ii); Family Law Act 1975 (Cth) s 22(1)(b); Federal Court of Australia Act 1976 (Cth) s 6(1)(b); Federal Court of Australia Act 1983 (Cth); Judicial Commissions Act 1994 (ACT) s5(1); Constitution Act 1902 (NSW) s 53(2); Judicial Officers Act 1986 (NSW) s 41(1); Supreme Court Act 1973 (NT) s 40(1); Constitution of Queensland 2001(Qld) s 61; Constitution Act 1975 (Vic) s 87AAB. Note that in Queensland “misbehaviour or incapacity is proved only if the legislature accept a tribunal finding made on the balance of probabilities that grounds for removal exist”: Mack and Anleu , n 3, 393, referring to Constitution of Queensland 2001 (Qld) s 61(3).
145 Mack and Anleu, n 3, 393.
146 Judicial Officers Act 1986 (NSW) s 41; Judicial Commissions Act 1994 (ACT) s 5(3). The Judicial Commission of New South Wales has no disciplinary powers. It merely “receives and examines complaints about judicial officers”: Mack and Anleu, n 3, 393. In the case of serious matters, justifying consideration for parliamentary removal, the complaint is considered by a “Conduct Division of three judicial officers and a report can be forwarded to the Governor for action”: Mack and Anleu, n 3, 393. All minor matters can be referred to the head of the relevant jurisdiction: Mack and Anleu, n 3, 393. It is further noted by Mack and Anleu, n 3, 393 that “all New South Wales judicial officers, including magistrates, are subject to the Judicial Commission process”. A similar process is adopted by the Australian Capital Territory Judicial Commission: Mack and Anleu, n 3, 393.
147 Constitution Act 1975 (Vic) s 87AAB (2); Courts Legislation (Judicial Conduct) Act 2005 (Vic) s 4. It is noted by Mack and Anleu, n 3, 393, that in Victoria, “an investigating committee appointed by
the Attorney-General investigates ‘whether facts exist’ that could prove misbehaviour or incapacity”. The committee must report its findings to the Attorney-General, who “may, if he or she considers it appropriate to do so, cause a copy of the report … to be laid before each House of Parliament”: Mack and Anleu, n 3, 394.

See Constitution Act 1902 (NSW) s 52(2); Judicial Officers Act 1986 (NSW) s 41(1); Constitution Act 1975 (Vic) Pt 111A; Courts Legislation (Judicial Conduct) Act 2003 (Vic) s 4; Magistrates Court Act 1987 (Tas) 9(1); Judicial Commissions Act 1994 (ACT) s 5(1).

Magistrates Court Act 2004 (WA) Sch 1 cl 15.

Magistrates Act 1991 (Qld) s 46; Magistrates Act 1983 (SA) s 11.

Magistrates Act 1991 (Qld) s 43(4).

Magistrates Act 1983 (SA) s 11(4).

Magistrates Act 1977 (NT) s 10.

Mack and Anleu, n 3, 395.


NAALAS v Bradley (2004) 218 CLR 146, 163 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

Mack and Anleu, n 3, 398 citing NAALAS v Bradley (2004) 218 CLR 146, 163 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

Mack and Anleu, n 3, 395.

Mack and Anleu, n 3, 395.

Mack and Anleu, n 3, 395. In the Australian Capital Territory, a judicial officer may be “excused” upon the appointment of a commission to examine a complaint: Mack and Anleu, n 3, 395, referring to Judicial Commissions Act 1994 ACT s 19(1). In New South Wales, a judicial officer may be suspended if the Conduct Division of the Judicial Commission provides an opinion that the alleged misbehaviour or incapacity could justify removal: Mack and Anleu, n 3, 395, referring to Judicial Officers Act 1986 (NSW), s 4.

Mack and Anleu, n 3, 395 citing Campbell, n 142, 67-68 and referring to Magistrates Act 1991 (Qld) s 43; Magistrates Act 1983 (SA) s 10; Magistrates Court Act 2004 (WA) sch 1 cls 13, 14.

Mack and Anleu, n 3, 395 referring to Magistrates Act 1991 (Qld) s 43. Note that according to s 44 of the Act, a magistrate is immediately suspended if arrested, appears in court to face a charge or is committed for trial, or indicted on an indictable offence: Mack and Anleu, n 3, 395.

Mack and Anleu, n 3, 396 referring to Magistrates Act 1983 (SA) s 10(3).

Mack and Anleu, n 3, 396.

Mack and Anleu, n 3, 396, referring to Magistrates Court Act 2004 (WA) sch 1 cl 14.

Mack and Anleu, n 3, 396.

Mack and Anleu, n 3, 396, referring to Judicial Commissions Act 1994 (ACT) s 19(3); Constitution Act 1902 (NSW) s 54(2); Magistrates Act 1991 (Qld) s 45; Magistrates Act 1983 (SA) s 10(4).

Mack and Anleu, n 3, 396, referring to Magistrates Court Act 2004 (WA) sch 1, cls 14(8), 13(2).

Mack and Anleu, n 3, 396.

Mack and Anleu, n 3, 396.

Mack and Anleu, n 3, 396 – 397.

Mack and Anleu, n 3, 398.

Senate Committee Report, n 109.

Senate Committee Report, n 109, para 6.6.

Senate Committee Report, n 109, para 6.7.

Senate Committee Report, n 109, para 6.46.

Submission made by the Flinders Judicial Research Project to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Inquiry into Australia’s Judicial System and Role of Judges.

Senate Committee Report, n 109 para 6.47.

Senate Committee Report, n 109, paras 7.78- 7.80.

The New South Wales Judicial Commission handles complaints against all judicial officers – magistrates and judges. The commission deals with both minor and serious complaints. Minor complaints are those which might be dealt with by either the appropriate head of jurisdiction or the Commission’s Conduct Division. Serious complaints are those which might warrant removal from judicial office.

Standing Committee of Attorneys-General.

Enid Campbell and HP Lee *the Australian Judiciary* (Cambridge University Press 2001), 203.


Johnston and Hardcastle, n 184, 16, fn 40.


Campbell, n 186, 408.


Mack and Anleu, n 188, 384 referring to Campbell “Constitutional Protection of State Courts and Judges” (1997) 23 Monash University Law Review 397, 408,419 and Johnston and Hardcastle “State Courts: The Limits of Kable” (1998) 20 Sydney Law Review 216, 221-224. However, note that Kable J was not prepared to go that far, holding that leaving aside Supreme Courts, State legislatures could “abolish or amend the structure of existing courts and create new ones.”

Johnston and Hardcastle, n 184, 4.

Mack and Anleu, 188, 384.

(1996) 189 CLR 51, 103

(1996) 189 CLR 51,111.

Campbell and Lee n 183, 55.

P H Lane “Constitutional Aspects of Judicial Independence” in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* ed H Cunningham, 80.


Kirby J, n 196, 186.

Sir Anthony Mason, n 196, 33.

(1990) 170 CLR 1

(1990) 170 CLR 1,18. Justice Kirby was critical of the *Quin* decision because of its tendency to assist Australian governments to erode judicial independence and security of tenure: Justice Kirby “Abolition of Courts and Non-Appointment of Judicial Officers” (1965) 12 Australian Bar Review 181 at 192.

Sir Anthony Mason, n 196, 26 Mason,

*Constitution Act 1902* (NSW) s 56; *Constitution Act 1975* (Vic) s 87AAJ; *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.

Section 128 prescribes a mode of amendment which requires not only parliamentary approval of a proposed amendment but also approval of electors voting at a referendum: see Campbell, n 186, 397.

See for example ss18(2) and (2A) of the *Constitution Act 1975* (Vic).

Campbell, n 186, 406.

Campbell and Lee, n 183, 207-208.

Campbell and Lee, n 183, 208.