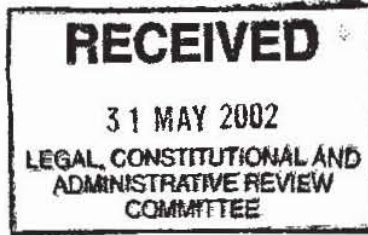


MAGISTRATES' ASSOCIATION, QUEENSLAND INC

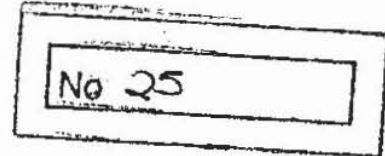
Tony Pascoe
President
30-40 Quay Street
BRISBANE 4000
Ph: 07 32359846

Sheryl Cornack
Secretary
P O Box 103
SOUTHPORT 4215
Ph: 07 55835975



31 May 2002

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000



Dear Sir or Madam

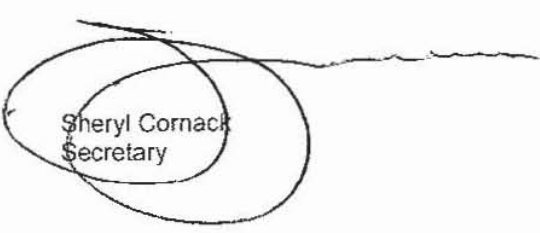
Submission to the Legal Constitutional and Administrative Review Committee The Queensland Constitution Specific Content Issues - The Judiciary

I enclose an electronic copy of a submission from this Association. I will forward a hard copy in the post this afternoon.

Would you please confirm by electronic mail that you have received the submission.

Thank you.

Yours faithfully


Sheryl Cornack
Secretary

*Original forwarded
to you 31.5.02*

Submission
to the
Legal Constitutional and Administrative Review Committee

The Queensland Constitution
Specific Content issues
The Judiciary

The Magistrates' Association, Queensland, Inc. is an incorporated association of Queensland magistrates. The vast majority of Queensland magistrates are members of the Association.

The objects of the Association include the improvement of conditions under which members perform their duties and the advancement of the interests of the members.

The Association wishes to make a submission in respect of the inclusion within Chapter 4 the Constitution of provisions concerning the magistracy and related matters. The Association commends and supports the matters raised in the issues paper published by the Committee concerning the magistracy of Queensland. The Association further commends and supports the submission made to the Committee by the Chief Magistrate of Queensland.

The Constitution currently provides protection for judges of the District and Supreme Courts in respect of appointment, terms of office, removal from office, salary, and the consequences of the abolition of their office. These provisions do not extend to provide similar protection for magistrates. The Constitution contains no recognition of the role of magistrates or the magistrates' court in the judicial process.

It is submitted that the provisions in the Constitution in respect of other judicial officers should be extended to include identical constitutional protection for magistrates. This would properly recognise the position of magistrates as independent judicial officers and accord them the same protection and recognition as judicial officers from other courts.

Recognition as Judicial Officers

It is clear that Magistrates are now widely acknowledged as independent judicial officers

The Queensland Parliament acknowledges this in the preamble to the *Magistrates Act 1991* with the words "An Act relating to the office of Magistrates, the judicial independence of the magistracy, and for related purposes".

Further the Salaries and Allowances Tribunal in its annual deliberations concerning the setting of appropriate salaries for magistrates and other judicial officers has unequivocally acknowledged that magistrates are part of the judiciary. The salaries of magistrates in Queensland are linked to the salaries of other judicial officers and in

the deliberations of the Salaries and Allowances Tribunal they are often expressed as a percentage of the salary of a Supreme Court judge.

Magistrates are members of the same professional associations as other judicial officers. Notably the Judicial Conference of Australia and the Australian Institute of Judicial Administration represent the whole of the judiciary including the magistracy.

The changed nature of the Magistracy

The past eleven years have seen a dramatic change in the structure, composition and jurisdiction of the magistrates' court. The transition of magistrates from public servants to independent judicial officers commenced with the enactment of the Stipendiary Magistrates Act 1991 and has proceeded incrementally to the present position where there is widespread community recognition of magistrates as judges in all but name.

The jurisdiction of the magistrates' court has expanded considerably. Magistrates are performing increasingly more complex work. This clearly evidences the recognition by parliament of the qualifications of magistrates and the confidence parliament has in the quality of the magistrates' court. A high proportion of all cases are determined to finality in the magistrates court. More and more avenues of appeal from government administrative authorities are conferred upon magistrates as a court of final appeal.

Members of the public are most likely to encounter a magistrate rather than a judge of a higher court as the public face of the Queensland judicial system. According to the Queensland Magistrates Court Annual Report "more than 90% of people who appear before a court in Queensland appear in the Magistrates Court. Up to 96% of criminal matters are dealt with in the Magistrates Court. In addition to criminal matters the court also deals with civil matters up to \$50,000.00, industrial matters, coronial matters, family law and domestic violence matters." There is a high level of public expectation that magistrates will deliver justice to the public in the same manner and to the same extent as other judicial officers.

Qualifications for appointment are identical for magistrates and other judicial officers. This has not always been the case. All but one of the currently serving seventy-five magistrates possess the appropriate qualifications for appointment. Over the past eleven years solicitors and barristers have been appointed from the private profession and from government departments. Some of these appointments include legal practitioners who are registrars of magistrates courts, many of whom have lengthy and extensive experience as acting magistrates. According magistrates full recognition as independent judicial officers will attract legal practitioners of very high calibre and ability. This can only strengthen the bench of the Magistrates' Court of Queensland.

Queensland and two other states have now seen a serving magistrate appointed as a judge of the District Court. Magistrates perform the same functions as judges. Magistrates' Courts operate on the same principles of law as the Supreme and District Courts. In other Commonwealth jurisdictions notably Canada and New Zealand the title Magistrate has now been eliminated and replaced with the title "Judge".

Legal commentators have acknowledged the changing role of the Magistracy. Justice J.B. Thomas in "The Ethics of Magistrates" (1991) 65 ALJ 387 at 390 says:

"I take it to be established that the magistracy is here to stay as a primary and clearly identifiable sector of the Australian judiciary... They pursue the same ideal, the dispensing of justice according to law.....(they) have the same basic duties and procedures."

John Lowndes Magistrate from the Northern Territory, argues in his article "The Australian Magistracy: from Justices of the Peace to Judges and Beyond" that there has now emerged a modern judicially independent magistracy whose members are true judicial officers, deserving of the title of "judges". See 74 ALJ August 2000 at p. 509 & 510 and September 2000 at p. 592.

Conflict with the Executive

In February 2000, the Queensland Constitutional Review Commission delivered a report relating to the Queensland Constitution and at page 62 of the report the Commission recommended that the District Court be brought under the same protection as is afforded the Supreme Court. The level of the existing jurisdiction of the District Court was seen to have the same potential to bring its judges into conflict with the other two arms of government and attract their enmity.

It is the submission of this Association that the same considerations to apply with equal force to the magistracy which should therefore be accorded the same constitutional protection as the judicial officers of other courts.

An independent magistracy has potentially the same opportunity for magistrates as for other judicial officers to attract the ire of the other arms of government. Magistrates regularly deal with matters that challenge the validity of legislation passed by the government and matters to which the government is a party. Magistrates regularly sit as a final court of appeal from the decisions of government administrative authorities. Magistrates hear cases involving constitutional issues, have the power to dismiss serious charges at committal hearings, manage coronial inquiries having serious and far reaching consequences for the executive government and are required to consider very large penalties in cases of considerable concern to the executive government. These matters enhance the likelihood of conflict between the executive arm of the government and the magistracy as part of the judiciary.

A further area of very real and serious concern is the method of determining the remuneration of magistrates. The current legislative framework of the Judges (Salaries and Allowances) Act 1967 draws a distinction between the magistracy and other judicial officers in relation to allowances and conditions. This distinction effectively allows the executive branch of the government to treat magistrates as simply a group of public servants so far as allowances and conditions are concerned.

The independent Salaries and Allowances Tribunal determines the salary and allowances of Judges of the Supreme and District Court, and of Members of the Industrial Court and Commission and the Members of the Land Court. It determines only the salaries of Magistrates. Unlike other judicial officers the magistracy must negotiate and bargain with the executive government for any improvement of conditions and allowances in a situation where conditions for magistrates fall well short of the standard set for other judicial officers. The Tribunal may fix amounts for allowances for other judicial officers for expenses of office, the provision of robes, conference expenses, and continuing legal education but has no power to fix any similar allowances for magistrates.

This is an area of significant conflict between the magistracy and the executive arm of government. Further the executive government has consistently indicated by its response to various approaches made to it by magistrates that it will never voluntarily relinquish this remaining control it has over magistrates. Constitutional recognition and protection of the independence of magistrates and legislative change in relation to the manner of determining of allowances would more properly reflect the judicial status of magistrates.

Pensions

Recognition of magistrates as independent judicial officers should also extend to the provision of non-contributory pensions for magistrates as for the judges of the Supreme and District Court. There are considerable ethical considerations that indicate that not providing an adequate pension for magistrates is inconsistent with the proper discharge of their duties. Judicial office is a full-time occupation and the discharge of judicial duties takes priority over other activities. The emoluments of judicial office, including pensions and superannuation, should give a comfortable level of financial security for life so there is no need for magistrates or judges to augment their income by activities that may lead to a conflict of interest or pose a threat to public confidence. Magistrates, as other judicial officers, are usually appointed toward the end of their careers with retirement not too distant.

This Association submits that the provision of pensions should be uniform over the whole judiciary and that the constitution should guarantee adequate pensions for all levels of the judiciary.

Retirement Age

This Association supports the retention of the compulsory retirement age of 70 for Supreme and District Court judges and recommends that this should also apply to magistrates whose current retirement age is 65. No other judicial officer in Australia, whether judge or magistrate, is required to retire at 65. The current retirement age of 65 for Queensland magistrates is both discriminatory and wasteful of the valuable contribution of judicial officers wishing to remain on the bench. It is submitted that it would be both equitable and appropriate for the provisions concerning retirement age to be consistent for all judicial officers in Queensland.

Removal from Office

The process for removal of magistrates should be identical to those governing the removal of other judicial officers. The provisions governing the removal of magistrates should also be included in the constitution.

Process of Appointment

This Association submits that the process for the appointment of magistrates should be identical to that which applies to the appointment of other judicial officers to both the District Court and the Supreme Court. The requirements for appointment in terms of qualifications and experience are identical for appointment to the Magistracy

as to the other levels of the judiciary. Magistrates are appointed by the Governor in Council on the recommendation of the Attorney General.

The current process for appointment of Magistrates differs only in that the Attorney General regularly calls for the written expressions of interest for appointment by suitably qualified legal practitioners.

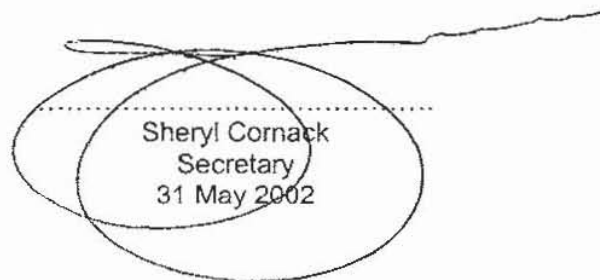
The criticisms and concerns in respect of the method of appointment of judges to the District and Supreme Court on the grounds that it weakens the separation of powers doctrine, risks politicisation and the perception of politicisation of appointments, involves unnecessary secrecy, and lacks external scrutiny extend with equal application to appointment of magistrates.

This Association supports the recommendation for possible reform including the establishment of a judicial commission to recommend suitable appointees to the Attorney General, and a process requiring more extensive consultation by the Attorney General, together with the publication of the fact and extent of the consultation.

Submission

The Parliamentary Legal, Constitutional and Administrative Review Committee is urged to recommend to the Government and the Parliament the inclusion within Chapter 4 the Constitution of provisions concerning the magistracy to the full extent of the current provisions in respect of other judicial officers in Queensland. The Committee is further urged to include magistrates in any recommendation for reform in the process of appointment of judicial officers.

The members of the Management Committee of this Association are available to clarify and expand upon the matters raised in this submission if required.



Sheryl Cornack
Secretary
31 May 2002