



## **REPORT**

# **The Status of Magistrates' in the Commonwealth**

CMJA  
February 2013

## **COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION**

The Association was formed in 1970 as the Commonwealth Magistrates' Association and in 1988 changed its name to the Commonwealth Magistrates' and Judges' Association in order to reflect more accurately its membership.

Most Commonwealth countries and dependencies are represented in full membership which is open to national associations of magistrates, judges and any other judicial body. Associate membership is open to any individual who is a past or present member of any level of the judiciary or has connections with the courts within the Commonwealth.

The aims and objectives of the Association are to:

- advance the administration of the law by promoting the independence of the judiciary;
- advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth;
- disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

*"The Rule of Law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formally protected by constitutional guarantees, the best protection rests in the support of government and people on the one hand, and in the competence and confidence of judges and magistrates in the performance of their offices on the other."*

Victoria Falls Proclamation, Zimbabwe, 1994

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# INTRODUCTION

The right to a competent, independent, and impartial tribunal is articulated in the **Universal Declaration of Human Rights** (Article 10) and the **International Covenant on Civil and Political Rights** (Article 14), as well as in regional treaties and conventions including the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (Article 6), the **American Convention on Human Rights** (Article 8), and the **African Charter on Human and Peoples' Rights** (Article 7).

In 1985, the UN General Assembly recognised the essential role played by a competent, independent and impartial judiciary in the protection of human rights and fundamental freedoms and endorsed the **Basic Principles on the Independence of the Judiciary** which must be “*taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general.*”<sup>1</sup>

*“The principle of the independence of judges has been defined as international custom and general principle of law recognized by the international community, respectively, in the sense of article 38 (1) (b) and (c) of the Statute of the International Court of Justice.”*<sup>2</sup> Leandro Despouy goes further pointing out that the United Nations Human Rights Committee established that the right to an independent tribunal is an absolute right that is not subject to any exception.<sup>3</sup>

Within the Commonwealth, the importance of an independent, integrity led judiciary has also been recognised in strengthening democratic standards and in fulfilling Commonwealth countries' commitments to the Commonwealth fundamental values cannot be understated. *“The independence and integrity of the judiciary is a right of every Commonwealth citizen.”*<sup>4</sup>

The UN Basic Principles on the Independence of the Judiciary states that all judicial officers should be treated equally and uses the term “judge” to denote judicial officers at all levels.

In 1970, Sir Thomas Skyrme pointed out that *“Notwithstanding the impressive powers which they could exercise and the fact that many Commonwealth Magistrates worked under heavy pressure their security and independence left much to be desired and in some places the conditions under which they had to operate were appalling”*<sup>5</sup>.

<sup>1</sup> Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<sup>2</sup> “Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development” Report Of The Special Rapporteur On The Independence Of Judges And Lawyers, Leandro Despouy Human Rights Council - Eleventh Session – May 2009

<sup>3</sup> Human Rights Committee, art. 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (footnote 1), para. 19. (2007) which points out that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal.

<sup>4</sup> Paragraph 16 - Senior Officials of Commonwealth Law Ministers Meeting – Communiqué October 2004

<sup>5</sup> Extract from the memoirs of Sir Thomas Skyrme in the History of the CMA/CMJA

## DEFINITION

“Magistrate” means:

*“any judge of a Court not being a Court of unlimited jurisdiction in civil or criminal matters” (CMJA Constitution)*

whether or not they are professionally qualified as lawyers or are lay members of society.

Although a number of countries may not use the term “magistrate” and may describe those working in the lower courts as “district judges” or “provincial court judges”, for ease of reference this paper will refer to a judicial officer in the lower courts as a “magistrate”.

Some 40 years later, there are still problems related to the treatment, training and security of tenure of the magistracy across the Commonwealth. In 2008, at the CMJA's Regional Conference in Cape Town, South Africa, delegates called on the CMJA to look into the position of the lower judiciary in order to assist them in being able to operate independently, across the Commonwealth.

At the CMJA's Triennial Conference held in Turks and Caicos in 2009, the General Assembly adopted the following resolution:

**“This General Assembly deplores the fact that in parts of the Commonwealth the independence of the magistracy is inadequately safeguarded and requests Council in collaboration with the Commonwealth Secretariat to take positive steps to eliminate these breaches of the Latimer House Principles wherever they occur.”**

In 2009 the CMJA set up a Taskforce to advance this resolution and the following paper reflects the findings and recommendations of the Taskforce.<sup>6</sup>

In the past the CMJA had gathered anecdotal information on the status of magistrates or received representations from different jurisdictions about the status of magistrates, during the course of constitutional or legislative consultations.

Following an investigation of the current situation, the Taskforce has identified problems with the implementation of the Commonwealth (Latimer House) Principles on the Three Branches of Government (“The Principles”) of 2003 in relation to magistrates. Though the Principles refer to “judges” throughout, the drafters of this document and of the Commonwealth Latimer House Guidelines (“The Guidelines”) which pre-dated the Principles used the word “judge” as a generic term, in line with the established practice of the United Nations.<sup>7</sup> The fact that the Guidelines refer to “*all levels of the judiciary*” only serves to emphasize the point.<sup>8</sup>

Magistrates are usually the first and often the only point of contact the public have with the judicial system and as such they are the backbone of all justice systems. Magistrates mainly deal with criminal cases and civil cases such as civil debts, family disputes and child welfare. They may also sit in youth courts. Magistrates make the vital decisions that determine what direction is best for a case and whether the defendants are at liberty or held in custody before their case is heard. For example, in England and Wales all criminal cases arrive in the first instance in the magistrates' courts and about 95% of them are dealt with at that level. In Australia, magistrates' courts handled 96% of all criminal lodgements and 96% of all criminal finalisations in 2010. These courts also handled 89% of all civil lodgements and 88% of all civil finalisations in the same year<sup>9</sup>.

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<sup>6</sup>Led by Justice Leona Theron (South Africa), the Taskforce includes Dr Karen Brewer (Secretary General), Sir Henry Brooke (England and Wales), Mr Dr John Lowndes (Australia) and Justice Charles Mkandawire (SADC Tribunal) who have been actively involved and contributed greatly to its work. Regional Council Members of the CMJA who are elected by the membership have been consulted on the content of this document and therefore this document is representative of the situation and concerns throughout the Commonwealth .

<sup>7</sup> See UN Basic Principles on the Independence of Judges.

<sup>8</sup> Chapter II, 1

<sup>9</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2011*, This data excludes family courts, the federal magistrate's court and coroner's courts.

## RECOMMENDATIONS

1. That Member Associations of the CMJA and Heads of the Judiciary in the Commonwealth press for the Law Ministers to fulfil their recommendation from the CLMM in July 2011 to “consider taking appropriate steps to strengthen their domestic legal frameworks and other measures for assuring the independence and integrity of their magistracy.”
2. That the CMJA continue to press, at the Commonwealth level for appropriate steps to strengthen and ensure the independence and integrity of the magistracy including through the Latimer House Working Group.
3. That the CMJA’s training should focus on ways of enhancing the integrity and independence of magistrates

## KEY ISSUES

The independence of magistrates is inadequately safeguarded in parts of the Commonwealth. The appointment of magistrates, their security of tenure and removal as well as their conditions of service fall short of the requirements of an independent judiciary as contained in the Commonwealth fundamental values and in particular the Commonwealth (Latimer House) Principles on the Three Branches of Government and international law. They are not always adequately protected by statute.

In some jurisdictions the distinction between the title of “magistrate” and that of “judge” may give the impression that magistrates are not members of the judiciary as such.

## OBJECTIVE

To ensure that Commonwealth countries comply with their Commonwealth and international obligations in relation to the safeguarding of judicial independence at all levels of the judiciary.

## METHODOLOGY

In the past the CMJA had gathered anecdotal information on the status of magistrates’ or had made representations in different jurisdictions about the status of magistrates’, during the course of constitutional or legislative consultations. However, until 2009 no in-depth study had been undertaken on the status of magistrates across the Commonwealth and this was undertaken in 2010 by the Association.

In the first instance the taskforce team gathered together existing information on a per jurisdiction basis drawing on the following sources:

- Responses to CMJA’s survey on “*Understanding the Courts and the Judiciary*” and in particular Question 2, “*Do all levels of judicial officer, including magistrates and, where appropriate tribunal chairs with a judicial function, have the same level of constitutional protection? If not, what are the safeguards for the independence of more junior levels of judicial officer?*”;
- Direct responses to a Request for Information on the Status of Magistrates’ which was circulated to Chief Justices and Member Associations in October 2009 on behalf of the Taskforce;

- Research into the Constitutions of Commonwealth countries;
- Information previously received by the CMJA on this issue.

Following the compilation of this material, it was agreed between the members of the task-force team that a Questionnaire should be circulated to all the Liaison Persons nominated by the Chief Justices and Member Associations when responding to the Request for Information. The responses to these Questionnaires (see Annex for copy of Questionnaire) were summarised on a per jurisdiction basis and the main findings were drawn out of the responses to the Questionnaire.

Following a number of consultations, it was suggested that a set of Guidelines should be drawn up for policy makers across the Commonwealth to consider in order to comply with the Commonwealth fundamental values and international law as it affects the independence of the judiciary.

The opportunity arose for the CMJA to put a summarised report of its findings and a draft set of Guidelines before the Commonwealth Law Ministers Meeting held in Sydney, Australia in July 2011 for their consideration. Law Ministers agreed to:

*“to consider taking appropriate steps to strengthen their domestic legal frameworks and other measures for assuring the independence and integrity of their magistracy in compliance with the Commonwealth fundamental values, having due regard to the suggested Guidelines.”*

(Paragraph 8 of the Communiqué).

Following the Regional Conference in Malaysia in July 2011, the draft report and guidelines were circulated to Member Associations and Chief Justices for final input.

## PRELIMINARY FINDINGS

The taskforce team's preliminary findings are set out under eight main headings:

1. Constitutional/Legislative protection
2. Appointments
3. Career Progression
4. Security of Tenure
5. Salaries and Benefits
6. Training
7. Discipline/Removal
8. Institutional issues affecting the status of magistrates'.

### **1. CONSTITUTIONAL /LEGISLATIVE PROTECTION**

In most jurisdictions the process for the appointment and removal of judges of the higher courts is mentioned in the Constitution of the jurisdiction in question. Otherwise it is mentioned in statutes. In contrast, in the majority of Commonwealth jurisdictions, the legislative safeguards of the independence of magistrates' are minimal if they exist at all.

The absence of appropriate safeguards means that the judiciary is dependent on convention and on executive self – restraint. Conventions may not in certain cases be enough to prevent the perception of lack of independence. Reference should be made to the *Starrs v Procurator Fiscal (Linlithgow)* case in Scotland (reported in Times 17 November 1999)<sup>10</sup> where the Privy Council held that the existing system of appointment of temporary sheriffs by the Lord Advocate brought into question their independence. As a result of this judgment, the system of appointing sheriffs was radically changed and there are no longer any temporary sheriffs in Scotland<sup>11</sup>.

If self-restraint is not exercised or if conventions are disregarded, salaries of magistrates may be affected, magistrates may be transferred by the executive without prior notification to other posts (as in the Cameroon) or in extreme cases may be dismissed without due process, as has happened in the Gambia or Fiji.

In a number of jurisdictions magistrates are still considered as “civil servants” and their mode of appointment, ethical obligations, disciplinary procedures and grounds for removal reflect this situation. For example, in Barbados, the Judicial Services Commission is responsible for the discipline, transfer and removal of members of the lower judiciary but the grounds for taking such action are similar to those relating to civil servants. Even in South Africa where magistrates have not been considered “civil servants” since the ending of apartheid, there persists within the Executive the illusion that they are still under the control of the government. Until the recent proposed reforms in South Africa magistrates' were appointed by a separate commission whereas Judges were appointed by the Judicial Services Commission although currently there is a proposal to reform this being considered. There have even been a number of disciplinary cases affecting magistrates' where the magistrate was treated for all intents and purposes as a civil servant.

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<sup>10</sup> [2000] SLT 42.

<sup>11</sup> In England and Wales, too, changes were made which involved the abolition of “assistant recorders”.



Sometimes the only safeguards for a magistrate are the statutory safeguards that guarantee immunity from civil or criminal liability for actions taken during the course of the judicial function (Kenya).

In some jurisdictions the abolition of the lower courts is not protected and there is no guarantee that a judicial officer of an abolished court will be re-deployed elsewhere.

Even when procedures are set down in legislation or in the country's Constitution, these provisions are not always followed in practice. For example, there exists no protection in Belize for members of the lower judiciary against the reduction or freezing of their remuneration, allowances or benefits.

It is interesting to note that even in developed jurisdictions, like Canada, constitutional protection is not expressly provided for the lower judiciary. The Supreme Court of Canada has however applied the same principles of independence to all levels of the judiciary (*see: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*[1997] S.C.J. No. 7<sup>12</sup>)

In England and Wales since the Constitutional Reform Act 2005, all members of the judiciary have the same level of protection though the administrative autonomy of the lower judiciary may be less independent as it depends on professional staff employed by the Executive.

## **2. APPOINTMENTS**

In a number of jurisdictions, especially the smaller jurisdictions or overseas/dependent territories, which still retain a Governor or Governor General, the latter has been given the responsibility for the appointment of magistrates' as opposed to the Chief Justice, although the Chief Justice may be consulted. The Governor may also be responsible for the training and welfare of magistrates' rather than the Head of the Judiciary.

In a number of jurisdictions the process of appointing magistrates differs from that of judges. Judges may be appointed by the Prime Minister of a country, after consultation with the Chief Justice or after a process which is transparent and merit-based, which may also involve confirmation by the Legislature. However, in some countries the appointment of magistrates may only require a majority decision of the Judicial Service Commission or the Legal and Judicial Service Commission as opposed to the involvement of the Prime Minister. In some instances there may be separate commissions for appointing different judicial officers (Judicial Services Commissions who appoint judges and Magistrates' Commissions who appoint magistrates, as in Namibia and South Africa).

In some jurisdictions, such as Canada, there are independent appointments advisory committees who make recommendations to the Ministry of Justice.

There are also different processes depending on whether or not the lower judiciary is lay or not. For example in England and Wales a lay magistrate is appointed by the Lord Chancellor on the advice of a local advisory committee whereas the Judicial Appointments Commission is responsible for recommending all other appointments.

In some jurisdictions, members of the lower judiciary are appointed after qualifying in the judicial service examination held in each state, which is conducted either by the High Court or by the State Public Service (India/Sri Lanka).

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<sup>12</sup> [1997] 3 SCR 3.

### **3. PROGRESSION WITHIN THE JUDICIARY**

In some jurisdictions, such as Australia, the “expectation of promotion” may be seen as a challenge to judicial independence since “a judicial officer seeking promotion may appear to be tempted to decide a case in a way which pleases the Executive government or other individuals or groups which may have influence in judicial appointments.”<sup>13</sup>

However, international norms, such as the Basic Principles on the Independence of Judges<sup>14</sup>, expressly contemplate promotion based on objective factors “...[such as] ability, integrity, and experience”.

In jurisdictions where human resources are limited, progress from the lower judiciary to the higher judiciary can be seen as preferable to the appointment of lawyers with limited experience in court or on the bench. It is especially a challenge when those lawyers are appointed from the ranks of government. In jurisdictions where practising lawyers are favoured for the higher bench, resentment from the lower bench can be detrimental to judicial independence.

### **4. SECURITY OF TENURE**

The essential requirement of security of tenure is “protection against unjustified or arbitrary removal from judicial office”<sup>15</sup>.

Although some countries (Malta/Cyprus) do provide the same security of tenure to all levels of the judiciary and may require a parliamentary process before magistrates can be removed (as in the case of Malta), most jurisdictions differentiate between the lower and higher judiciary when it comes to security of tenure.

As has already been observed in the section on constitutional and legislative protection, the protection against removal or suspension of judicial officers can vary between jurisdictions. In some cases a simple decision by the Attorney General may suffice. In Queensland, for example, magistrates 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 a proper case for removal exists”.<sup>16</sup>

In some countries where there are lay magistrates’ security of tenure may be precarious. In Belize lay magistrates do not have security of tenure. However, the Constitution of Belize does provide that magistrates who are qualified attorneys at law have security of tenure similar to the higher judiciary. But there is no protection against the reduction or freezing of remuneration, allowances or benefits.

In some jurisdictions, especially smaller jurisdictions, magistrates may be appointed on fixed term contracts whereas the judges have stronger tenure, lasting until they retire. In these cases, protection is derived only from the labour laws or from the contractual terms that have been agreed. In a recent case, however, (*Fraser v JLSC*, which related to a magistrate in St Lucia<sup>17</sup>), the Privy Council held that “where there was a conflict between a constitutional provision protecting the independence of the

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<sup>13</sup> Kathy Mack and Sharyn Anleu “The Security of Tenure of Australian Magistrates” [2006] 30 Melbourne University Law Review

<sup>14</sup> These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<sup>15</sup> Kathy Mack and Sharyn Anleu

<sup>16</sup> Kathy Mack and Sharyn Anleu

<sup>17</sup> [2008] UKPC 25.

judiciary and the terms of a contract entered into with a member of that protected class, the constitutional provision must prevail”.

## **5. SALARIES AND BENEFITS**

A distinction should first be drawn between the status of lay magistrates and that of professionally qualified magistrates. In most jurisdictions (apart from Canada) lay magistrates are volunteers who do not receive a salary and may only be paid an allowance and/or expenses (including sometimes a reimbursement for loss of earnings (England and Wales). They are not entitled to any other benefits such as pensions.

In the case of professionally qualified magistrates, on the other hand, salaries, allowances and benefits may be fixed by the Legislature or the Executive following a recommendation by an independent salary commission (Canada/England and Wales).

In some cases the salaries, allowances and benefits may be fixed by the Government in consultation with the higher judiciary (India) and there may be constitutional protections against any arbitrary reduction or freezing of financial benefits.

However in the majority of developing Commonwealth jurisdictions, the wages and other conditions of service for magistrates follow those awarded to other government employees whereas the salaries and services of the higher judiciary are guaranteed by the Constitution. The Executive may also have control over the housing, welfare and security of magistrates and have frequently used this control to exercise pressure on magistrates to comply with government policy.

In some jurisdictions (Namibia, for instance) negotiations in relation to salaries and benefits are dealt with by separate bodies (one for magistrates and one for judges).

In Uganda the decision on a Constitutional petition resulted in magistrates being recognised as part of the judiciary and being given the same tax privileges that judges received. (see Constitutional Petition No 5 of 2005 Wilson and others v. Attorney General (Uganda)).

The age of retirement of magistrates differs from that prescribed for judges in a number of jurisdictions. It may conform with the age of retirement of civil servants (in Nigeria, for instance).

## **6. TRAINING**

Because funding for training courses is usually hierarchical, it is rare that magistrates receive the opportunity to undertake training, especially foreign training. They are always the last on the list of recipients for funding to attend CMJA conferences, for example. In the case of lay magistrates, training may be limited, as it is in England and Wales, and has to be undertaken by the magistrate in their own personal time. Funding has also been reduced dramatically for training even though training now comes under the auspices of the Judicial College in England and Wales. Until recently, the training of magistrates of South Africa was the responsibility of the Department of Justice. This in itself can call into question the independence of the magistracy. All training in South Africa now fall under the auspices of the Chief Justice.

Access to training materials, law reports, books and periodicals can be limited. In a number of jurisdictions court libraries may be centralised at the High Court, and magistrates at regional level (as in Swaziland) may not be able to access essential materials on a regular basis. Law Reports may not be

readily available. Access to law reports at a national level (not to mention access to international law reports) is essential to the development of legal standards within a jurisdiction.

Access to IT is also hierarchically based and magistrates are often the last judicial officers to receive computers or laptops or training to use such equipment. Of course, magistrates working in rural areas may also face even more basic problems relating to power outages or internet access (or, indeed, access to basic IT facilities). These restrictions may limit the development of their skills.

Professionally qualified magistrates, however, because of their educational qualifications, may enjoy better training opportunities than magistrates at lower grades and may be afforded better opportunities to study abroad or attend conferences, although it is usually the higher judiciary that are privileged to gain such opportunities.

## **7. DISCIPLINE/ REMOVAL**

Again, the procedure for the removal of magistrates' may differ whether or not they are lay or professionally qualified. In England and Wales, the procedure for the removal of lay magistrates' is now set down in primary and secondary legislation (the Constitutional Reform Act 2005 and the Judicial Discipline (Prescribed Procedures) Regulations 2006). There is a vigorous disciplinary investigation and the Lord Chancellor can only remove a magistrate after agreement of the Lord Chief Justice.

However, in some jurisdictions the removal of magistrates, like their appointment, may be left in the hands of politicians – with the criteria for removal sometimes being quite vague (as in Gibraltar).

In India, an inquiry into the conduct of a member of the lower judiciary can be held by the High Court and the latter can recommend punishment but any such investigation must follow the norms of procedural fairness enshrined in the Constitution. The judicial officer, in line with the Latimer House Guidelines, is entitled to be represented and may appeal. If the misconduct in question is so grave as to warrant removal, dismissal or reduction in rank, the High Court then acts as a recommending authority, and any necessary action is taken by the Governor of the State.

In a number of jurisdictions the differences between the lower /higher judiciary at the appointment stage are replicated at the dismissal stage with powers being granted to the judicial service commission for the removal of members of the lower judiciary (Kenya).

In some jurisdictions, the dismissal of magistrates may be governed by the rules that apply to civil servants. In most jurisdictions, it is far easier to remove a magistrate than a judge from office.

## **8. INSTITUTIONAL ISSUES AFFECTING THE STATUS OF MAGISTRATES'**

### **8.1 Finances and Resources**

The dependence of the judiciary on the administrative and financial resources that are provided by the Executive arm of government is always problematic. The threat to judicial independence is at its strongest at the level of the magistracy. Being at the lower level of the judicial hierarchy, magistrates' courts "tend to be under-resourced and often the recipients of the bread crumbs of the 'fiscal bread basket.'"<sup>18</sup>

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<sup>18</sup> John Lowndes "The Australian Magistracy: From Justices of the Peace to Judges and Beyond" Pt II [2000] 74 ALJ 592.

This can manifest itself in the lack of facilities available at the courts. These may include the absence of any space to file case notes or the absence of any provisions to enable vulnerable members of society to be protected in court (as in Swaziland). In some cases, as happened in Fiji in the late 1990s, the Executive, or even the Head of the Judiciary may “forget” to allocate funds for essential repairs to court premises, thereby forcing judicial officers to move their courts to alternative, less suitable premises. In some countries the court rooms are “spare” rooms at the back of police stations (Swaziland) or in town halls (which may lead to the perception that the judiciary is not as independent as it ought to be), or the space provided in magistrates’ courts may be too small (Belize).

If magistrates or members of the lower judiciary are on circuit, they may have to share accommodation with the lawyers for the prosecution and/or defence.

Magistrates’ courts may be situated at some distance from the nearest town. In these situations transport may be problematic to and from the court.

The recent global economic crisis has hit the judiciary in a number of countries. In a number of Overseas Territories of the UK, there have been moves to control expenditure within the court system and administrators /registrars have either been required to work on a part-time basis (as in the Falkland Islands) and/or work for other “government” departments as well (as is proposed in the Turks and Caicos Islands where consideration is being given to court registrars also working for the Attorney-General’s chambers). In a number of jurisdictions, the lay magistracy has been affected by the closure/amalgamation of courts which has a detrimental affect on access to justice for the public. The closure of courts in England and Wales for example has resulted in adjournments, non-attendance of victims, witnesses and defendants who have to travel long distances. Whilst the moves to centralise justice in this way may provide more rational and consistent justice, it often leads to reduced access to justice, and the loss of local knowledge, whether by law magistrates or legally qualified magistrates.

## **8.2 Threats against judicial discretion**

Such threats have had a particular impact on magistrates (lay or otherwise) in England and Wales who have seen their jurisdiction reduced, with the transfer of some of their powers (such as licensing powers) to local authorities or the creation of alternative “out of court disposals” that are administered by the police or other “authorised” persons.

Limitations on sentencing powers imposed by the Executive may threaten the independent judgement of the magistrate if political concerns override administration of justice needs.

Magistrates rely on the police and bailiffs to serve summonses, but the police may not always attend to the needs of the lower courts and bailiffs may not always operate within the same ethical norms that are laid down for judicial officers.

## **8.4 Performance**

In the Falkland Islands the structural relationship between the lower judiciary and the Executive is strong because the Senior Magistrate is remunerated by the government and is answerable for the performance of his judicial duties to the governor who is also responsible for the training and welfare of magistrates. In Gibraltar training and welfare issues relating to magistrates are the responsibility of the Governor and/or the part-time President of the Court of Appeal.

### **8.5 Lack of interaction and support of the lower judiciary by the higher judiciary**

In England and Wales, lay magistrates do sit on appeals at the crown court level and there are liaison judges who are appointed in each bench so there is interaction at the practical level. In addition lay magistrates in England and Wales are represented on the Judges Council

However, in most jurisdictions there is little if any interaction between the higher and lower judiciary. In many countries the higher judiciary may dismiss “magistrates” as not being part of the judiciary. In many jurisdictions, separate associations have been set up. This chasm between the lower and higher judiciary can be detrimental to judicial independence as a whole if the lack of support by the higher judiciary leads to a lowering of standards in the overall administration of justice and a division of loyalties. The moves by the Executive in Lagos State (Nigeria) to improve the status of magistrates has, for example, led to a backlash from the higher judiciary and the “suspension of the magistrates’ court laws” until the differences of approach are resolved in court.

In administrative matters the higher judiciary may impede the independence of the lower courts through the transfer of qualified support staff away from those courts.

In some jurisdictions the distinction between the title of “magistrate” and that of “judge” may give the impression that magistrates are not members of the judiciary as such. In some countries, indeed, consideration is being given to a change in title so that magistrates may receive the respect now accorded to judges (Trinidad and Tobago).

## **CONCLUSION**

*“The right to a fair trial before an independent and impartial tribunal is not only recognised in treaties but it is also part of customary international law. Therefore, those countries that have not acceded to or ratified these treaties are still bound to respect this right and arrange their judicial systems accordingly”.*<sup>19</sup>

In order to ensure the right to a fair trial, the judiciary as a whole should be and be seen to be independent and Member Associations and Heads of the Judiciary have a duty to ensure that judicial officers at all levels are able to ensure the right to a fair trial, which is the right of all citizens.

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<sup>19</sup> *International Principles On The Independence And Accountability Of Judges, Lawyers And Prosecutors: A Practitioners’ Guide* Practitioners’ Guide Series N°1, International Commission Of Jurists Geneva, Switzerland 2004

# GUIDELINES FOR ENSURING THE INDEPENDENCE AND INTEGRITY OF MAGISTRATES

## DEFINITION

*The CMJA constitution defines “magistrate” as: “any judge of a Court not being a Court of unlimited jurisdiction in civil or criminal matters”.*

*The current guidelines therefore apply to all judicial officers at this level whether or not bear the title of “magistrate” or “judge” and whether or not they are legal qualified or lay.*

*The United Nations Universal Declaration on Human Rights provides in Article 10 that*

*“ Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal”*

*The right to a fair trial is provided for in international human rights conventions and national constitutions and applies to hearings before all courts be they courts of limited jurisdiction or ‘superior’ courts of record*

*“Members of the judiciary, like other citizens in a democratic society, are entitled to all the rights enshrined in the Constitution and in the UN Charter, which include the right to freedom of expression, movement, assembly and association. In exercising those rights they must always conduct themselves in such a manner as to preserve the dignity and integrity of their office and the impartiality and independence of the judiciary”*

## STRUCTURAL OR INSTITUTIONAL INDEPENDENCE

*As an integral part of the judiciary, the magistracy must be, and seen to be, structurally independent of the executive and the legislative branches of government.<sup>20</sup>*

*Provision should be made in constitutional and legislative provisions to ensure that the magistracy is treated as an integral part of the judiciary and receives such protections as are required to ensure independence.*

*The Head of the Judiciary should ensure that the magistracy is seen to be an integral part of the judiciary by fully involving it (through the Chief Magistrate and others) in decisions relating to court procedures, sentencing guidelines, and other mechanisms to ensure the smooth running of the courts and the good administration of justice.*

## ADJUDICATORY OR DECISIONAL INDEPENDENCE

*In order to discharge their judicial functions and duties and in order to adjudicate with impartiality in accordance with the law, magistrates (including the Chief Magistrates) must be free from any actual or apparent duress, pressure or influence. They must also be seen to be free from such pressure or interference from any persons or institutions. In order to ensure the good administration of justice and the smooth running of their courts, the executive and legislative branches of government must respect that the independence of the judicial function of the magistrate.<sup>21</sup>*

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<sup>20</sup> This guideline seeks to address the institutional or collective independence of the magistracy. See the *Latimer House Principles; Universal Declaration on the Independence of Justice (The Montreal Declaration)* 1983; *Guide to Judicial Conduct* (Second Edition 2007) published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration at 2.2.1; *Fingelton v Ivanoff Pty Ltd* (1976) 14 SASR 530; *The Queen v Moss; Ex parte Mancini* (1982) 29 SASR 385; *Mackeigan v Hickman* [1989] 2 SCR 796; *Campbell and Lee The Australian Judiciary* Cambridge University Press 2001.

<sup>21</sup> This guideline is concerned with the individual independence of magistrates in the discharge of their judicial functions and duties. See the *Montreal Declaration* 1983; *The Beijing Statement of Principles on the Independence of the Judiciary in the law Asia Region* 1995; Sir Guy Green “The Rationale and Some Aspects of Judicial Independence” (1985) 59 ALJ 135; Church and Sallman “Governing Australia’s Courts” Australian Institute of Judicial Administration 1991. It should be noted that the *Beijing Principles* confine the principle of judicial independence to the decision- making process. The problem with that is that it presupposes a consensus as to what is comprehended by decision- making. Does it include administrative aspects such as case management and procedural aspects such as rulings on evidence, as well as substantive decision making, as suggested by Shetreet and Deschenes in *Judicial Independence: The Contemporary Debate* Martinus Nijhoff Publishers 1985. Furthermore, there seems to be no reason why the principle of judicial independence should not extend all to facets of the judicial function, some of which fall outside the adjudicative function. It is for those reasons that the proposed guideline

## ADMINISTRATIVE INDEPENDENCE

*The control of the administration of justice should be under the jurisdiction of the Head of the Judiciary (a judicial officer) and adequate funding and resources should be allocated for the smooth running of the courts*

*In order to ensure the institutional independence of the magistracy and the adjudicatory<sup>22</sup> independence of magistrates:<sup>23</sup>*

- 1) *the assignment of cases and other work to a magistrate must be treated as a matter of internal judicial administration over which the Chief Magistrate or Chief Justice has absolute control;*
- 2) *the magistracy needs to be provided with the means and resources, financial or otherwise, necessary for the proper fulfilment of its judicial functions and duties such as to allow for the due administration of justice;*
- 3) *the magistracy must be given as much autonomy as possible in the internal management of the administration of the courts over which magistrates preside; and at a bare minimum:*
  - a) *the necessary resources provided to the magistracy for the administration and operation of its court(s) should be under the control of those courts;*
  - b) *the court staff should be appointed in line with criteria and qualification requirements set out by the Chief magistrate or Chief Justice);*
  - c) *the court staff should be responsible to the court(s) and not to the executive branch of government in relation to all matters pertaining to the business of the court(s);*
  - d) *the control of court buildings and facilities should be vested exclusively in the judiciary, with the right to exclusive possession of those buildings and facilities together with the power to exercise control over ingress and egress, to and from those buildings and facilities, and to determine the purposes to which various parts of the buildings and facilities are to be put;*
  - e) *the magistracy should have the right to maintain and make alterations to court buildings.*

## INTERNAL JUDICIAL INDEPENDENCE

*In the discharge of their judicial functions and duties - in particular the adjudicatory function - all magistrates must be independent from one another and must be, and seen to be, free from any actual or apparent form of duress, pressure or influence from, or interference by, a fellow magistrate. The reference to "magistrates" or "magistrate" includes the "Chief Magistrate".*

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has been expressed in the above terms. However, for the purpose of ready reference – and given that the guideline is centrally concerned with impartial decision making – the guideline has been headed “Adjudicatory or Decisional Independence”. An alternative heading might be “Functional Independence”.

<sup>22</sup> Or perhaps “Functional” in lieu of “Adjudicatory”.

<sup>23</sup> This guideline, which is concerned with the autonomy of the magistracy in managing its courts, seeks to establish the direct link between institutional/individual independence and administrative independence – without the latter the former is put at risk. The guideline is derived from a number of sources: Church and Sallman, n 2; the *Fitzgerald Commission of Inquiry* 1989; the Hon Justice McGarvie “Judicial Responsibility for the Operation of the Court System” 63 ALJ 79; *Ell v Alberta* [2003] 1 SCR 857; *Valente v The Queen* [1985] 2 SCR 673; the Hon Justice Len King “Minimum Standards of Judicial Independence” (1984) 58 ALJ 340; the Hon Justice David Malcolm “The Independence of the Judiciary in the Asia Pacific Area”, 10<sup>th</sup> Conference of Chief Justices of Asia and the Pacific, 2003; Articles 8 and 24 of the *Syracuse Principles on the Independence of the Judiciary* 1981; Principle 14 of the *United Nations Basic Principles on the Independence of the Judiciary* 1985; Clauses 10 and 13 of the *International Bar Association Code of Judicial Independence (New Delhi Standards “Jerusalem Approved Standards”* 1982; *Draft Declaration on the Independence and Impartiality of the Judiciary*, United Nations 1987; Articles 4.2.3 and 4.2.6 of the *Independence of the Judiciary: A Statement by the Australian Bar Association* 1991; Articles 35,36,37,41 and Art 42 of the *Beijing Statement of Principles of the Independence of the Judiciary in the Law-Asia Region* 1995; Procedure 5 of the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary* 1989; Clauses 26 and 27 of the *Australian Bar Association “Charter of Judicial Independence”* 2004; *Latimer House Principles, Guidelines* (11) Preserving Judicial Independence 2 Funding; *Edinburgh Plan of Action for the Commonwealth for the Development, Promotion and Implementation of the Latimer House Principles* 1.3 Independence of the Judiciary – Proposed Action.



Furthermore, any hierarchical organisation of the magistracy and any difference in grade or rank shall in no way interfere with the right of a magistrate to freely and properly discharge his or her adjudicatory function and other judicial functions and duties.<sup>24</sup>

## PREREQUISITES FOR SECURING AND SAFEGUARDING JUDICIAL INDEPENDENCE

### Judicial Appointments on Merit

*In order to secure an independent, impartial, honest and competent magistracy appointments to the magistracy should be made in accordance with an appropriate independent process or by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of State acting on the recommendation of such a commission. In either case, the process and criteria for appointment should be independent, open and transparent and be made public and in accordance with clearly defined and published criteria. The process should be designed to guarantee the competence integrity independence and impartiality of those selected for appointment and should ensure:*

- *equality of opportunity for all who are eligible for judicial office;*
- *appointment on merit;*
- *that appropriate consideration is given to the need for progressive attainment of gender equity and the removal of other historic factors of discrimination such as race, culture or ethnicity. This does not preclude the use of quotas or positive discrimination in favour of one group as the goal of these measures is to achieve equality.*

*Appointments to the magistracy should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.*

*Judicial vacancies should be advertised.*<sup>25</sup>

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<sup>24</sup> Internal judicial independence, which recognises the independence of judicial officers from one another, is a key mechanism in the rule of law. The proposed guideline is based on a number of sources: Principle 2.03 of the *Universal Declaration on the Independence of Justice (The Montreal Declaration)* 1983; Mack and Anleu “The Security of Tenure of Australian Magistrates” (2006) 30 *Melbourne University Law Review* 370; Malleon “Judicial Training and Performance Appraisal: The Problem of Judicial Independence” (1997) 60 *Modern Law Review* 655; Shetreet “The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act” (1987) 10 *University of New South Wales Law Journal* 4; Colbran “Judicial Performance Evaluation: Accountability Without Compliance” (2002) 76 *ALJ* 235; Douglas “Towards a More Compliant Judiciary Part” (2001) 75 *ALJ* 304; Mack and Anleu “The Administrative Authority of Chief Judicial Officers in Australia” (2004) 8 *Newcastle Law Review* 1; *Re Colina; Ex parte Torney* (1999) 20 *CLR* 386.

<sup>25</sup> The proposed guideline is almost exclusively based on the *Latimer House Principles and Guidelines*. Like those principles and guidelines, it acknowledges that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial services commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general. Also in line with the *Latimer House Principles and Guidelines*, the proposed guideline recognises that the making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions. Apart from matters of syntax and semantics, one substantive difference between the proposed guideline and the *Latimer House Principles* is that the former gives greater emphasis to the need for the appointment process (however constituted) to be open and transparent. Another substantive difference is that the proposed guideline also gives expression to the important relationship between the appointment process and the impartiality of appointees: see Article 6 of the *Syracuse Principles on the Independence of the Judiciary* 1981. Independence and impartiality are not necessarily synonymous. Impartiality refers to the state of mind of a judicial officer while the concept of judicial independence connotes more than the notion of impartiality and embraces the notion of institutional independence. They are perhaps best viewed as reflecting different aspects of the principle of judicial independence: see the Hon Justice R.D.Thomas Nicholson “Judicial Independence and Accountability – Can They Co-Exist?” (1993) 67 *ALJ* 404. There is a crucial link between judicial impartiality and the principles of judicial independence, as noted in the *Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories* 1997. The twin minimum requirements for a court to be both independent and impartial was affirmed by the High Court in *Naala v Bradley* [2004] 218 *CLR* 146. Furthermore, the openness and transparency of the appointment process encourages public confidence in the impartiality of those selected for judicial office: see the Hon Justice David Malcolm ACA former Chief Justice of the Supreme Court of Western Australia “The Independence of the Judiciary in the Asia-Pacific Region” – 10<sup>th</sup> Conference of Chief Justices of Asia and the Pacific 2003.

The proposed guideline, consistent with the approach embraced by the *Tokyo Principles* 1982 (Principle 10(a)), does not prescribe any single mode of judicial appointment. Not only is there a leeway of choice between an independent process of appointment and a judicial services commission, but there are various methods of appointment that may qualify as an independent appointment process as envisaged by the *Latimer House Principles and Guidelines*.

## Promotion

*Promotion of magistrates, wherever such a system exists, should be based on objective factors, such as merit, independence, integrity and experience so as to guard against appointments to higher courts on the basis of personal or political affiliation with the executive branch of government and to ensure the independence of the judiciary as a whole.<sup>26</sup>*

## Security of Tenure

*Magistrates must have security of tenure, and a magistrate's tenure must not be altered to his or her detriment or disadvantage during their term of office.*

*Security of tenure requires that magistrates:*

- *have guaranteed tenure (by the Constitution or statute) until a mandatory retirement age or the expiry of their term of office, where a magistrate has been appointed for a fixed term;*
- *be constitutionally or legislatively protected against unjustified or arbitrary suspension, transfer or removal from judicial office prior to the mandatory retirement age or expiry of their term of office; and*
- *only be subject to suspension or removal from office on the grounds of incapacity or conduct that renders him or her unfit to perform their judicial functions and duties.*

*There must be appropriate constitutional or legislative procedures and standards for the suspension, transfer and removal of magistrates from office and these procedures should be followed in all cases. Such standards and procedures must not undermine, or be perceived to undermine, the independence of the magistracy.*

*A magistrate shall not be removed from office or transferred by the actions of the executive branch of government alone.*

*There should be clearly defined criteria for the removal of a magistrate. "Incapacity" should refer to a judicial officer's mental or physical fitness to discharge the duties of judicial office.*

*"Misbehaviour", on the other hand", should be concerned with matters such as a conviction for a serious offence, incompetence or serious neglect of the duties of judicial office, or other unlawful or improper conduct in the performance of duties or conduct unbecoming of a judicial officer.*

*Where there is a charge or complaint that a magistrate is incapable of performing his or her judicial functions and duties or has behaved in a way that renders him or her unfit to perform his or her functions and duties, an independent investigation should be carried by a judicial commission, investigating committee or the chief judicial officer of a superior court. In the event of a finding of incapacity or misbehaviour a magistrate should only be removed by the executive (the Governor, Administrator, Governor General or other appropriate authority) by an Address from Parliament, based on that finding.*

*Similarly, a magistrate shall not be suspended from office by the executive unless an independent investigatory body of the type described has formed the opinion that, having regard to the charge or complaint, grounds may exist to justify removal from office.*

*A charge or complaint made against a magistrate shall be dealt with expeditiously and fairly under an appropriate procedure. The magistrate shall have the right to a fair hearing, including the right to representation during any investigation. The investigation of the charge or complaint in its initial stages shall be kept confidential, unless otherwise requested by the magistrate.*

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<sup>26</sup> The proposed guideline is based on Principle 13 of the *Basic Principles on the Independence of the Judiciary*. As noted by Mack and Anleu "The Security of Tenure of Australian Magistrates" n.5 above "promotion to a higher judicial office has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian Legal system". However, the guideline acknowledges that promotion is an accepted feature of the judicial system of some Commonwealth countries and is, in fact, an international norm as recognised by the *Basic Principles on the Independence of the Judiciary*. The guideline has been drafted with a view to minimising the risks to judicial independence posed by a system of promotion within the judiciary.

*All suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct*<sup>27</sup>

### **Entitlement Following the Abolition or Reconstruction of a Court**

*A magistrate who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status.*

*The right remains operative for the period during which the magistrate was entitled to hold the abolished office, subject to suspension and removal in accordance with law. The right lapses if the magistrate declines appointment to the other office or resigns from it.*

*The right arises whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition or reconstruction of a court or part of a court.*

*Magistrates for whom no alternative office can be found must be fully compensated.*<sup>28</sup>

### **Financial Security**

*“The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministers are encouraged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available”.*<sup>29</sup>

*In order to ensure the independence of the magistracy, the salaries, benefits and terms and conditions of magistrates shall be:*

- (a) adequate, commensurate with the status, dignity and responsibility of judicial office and at such a level as to attract candidates of the highest quality to serve as magistrates and to minimise the reasonable likelihood that magistrates once appointed will be affected by improper, extraneous considerations;*
- (b) secured by law and not be diminished during the continuance of their term;*
- (c) periodically reviewed by the independent body referred to in (d) below, to overcome or minimise the effect of inflation and so as to avoid the remuneration of magistrates declining against wages and salaries generally or in particular against the most nearly comparable salaries;*

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<sup>27</sup> The proposed guideline recognises that security of tenure is essential to the independence and impartiality of the judiciary, of which the magistracy is an integral part. The guideline is derived from a number of sources: *Ell v Alberta* [2003] 1 SCR 857; *Valente v The Queen* (1985) 2 SCR 673; Article 12 of the *Syracuse Principles*; Principles 12 and 17-19 of the *United Nations Basic Principles on the Independence of the Judiciary* 1985; Principles 16, 26, 27, 28 and 30 of the *Draft Declaration on the Independence and Impartiality of the Judiciary, United Nations* 1987; Articles 18, 20, 21, 22, 23, 25, 26 and 27 of the *Beijing Principles*; Mack and Anleu “The Security of Tenure of Australian Magistrates”, n 5 above.

The guideline purports to only lay down some broad principles governing the removal and suspension of magistrates from office. Within the framework of those principles member nations are given a discretion as to the processes they adopt.

It is acknowledged that the guideline, insofar as it relates to the removal and suspension of magistrates, may have to be modified in the case of countries where there is not a tradition of a process of parliamentary removal of a judicial officer. Perhaps something along the lines of Articles 23- 23 of the *Beijing Principles*.

<sup>28</sup> As noted by Mack and Anleu “The Security of Tenure of Australian Magistrates” n 5 above “One possible way for the executive to end the tenure of a judicial officer might be to abolish the court itself”. The purpose of the proposed guideline is to provide an appropriate formal legal mechanism for the protection of security of tenure in the event of the abolition or reconstruction of a court resulting in the abolition of a judicial office.

The guideline is based on s 56 of the *Constitution Act 1902* (NSW) and s 87AAJ of the *Constitution Act 1975* (Vic). It is derived from Article 29 of the *Beijing Principles* and Principle 31 of the *Draft Declaration on the Independence and Impartiality of the Judiciary United Nations* 1987.

<sup>29</sup> Footnote V to the Commonwealth Latimer House Guidelines 1998.

- (d) set by a body independent of the executive branch of government (such as an independent remuneration tribunal) whose decisions shall be binding on both the executive and legislative branches of government.<sup>30</sup>

### **Physical Security**

*The magistracy must rely upon the executive to provide the security and protection which is necessary for the free and effective discharge of their functions, but the control of security measures in and around the courtroom and building should be firmly under the control of the judiciary”.*

*It is the responsibility of the judiciary and not the executive to determine whether there is a justification for the presence of armed police or other security officers in and around the courts or whether or not screening, identification or searching of visitors to the courts is required.*

*It is also the responsibility of the Chief Magistrate or the Chief Justice to determine whether individual magistrates require police protection outside the courts and the nature and extent of this protection. Where security measures are necessary, they must be firmly under the control of the judicial officer using a particular court. Such a determination involves a delicate balancing of competing interests which the judges alone can perform properly<sup>31</sup>.*

### **Immunity from Suit**

*Magistrates shall enjoy personal immunity from civil suits for monetary damages in respect of any act done or omission made in the execution of his or her duty, or any act done or omission made in good faith in the purported execution of that duty.<sup>32</sup>*

*Magistrates shall enjoy personal immunity from suits for any judgement made in the execution of his or her duty and from disingenuous suits brought by any parties on the basis of “bringing the profession into disrepute”.*

### **Welfare**

*Whilst maintaining internal independence, the responsibility for the welfare of a magistrate should be vested in the Head of the Judiciary or any other judicial officer appointed by the Chief Justice to undertake this function.*

### **Professional Judicial Training and Development**

*With a view to preserving and enhancing the independence of the magistracy:*

- (a) a culture of judicial education should be developed;*
- (b) training should be organised, systematic and ongoing and under the control of an adequately funded judicial body and the allocation of training resources should be under the control of the judiciary;*
- (c) judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues;*

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<sup>30</sup> The proposed guideline acknowledges the centrality of arrangements for judicial remuneration to the preservation of judicial independence. The guideline is derived from a number of sources: Article 26 of the *Syracuse Principles*; Principles 14 and 15 of the *New Delhi Principles*; Principle 11 of the *Basic Principles on the Independence of the Judiciary*; Principle 18 of the *Draft Declaration on the Independence and Impartiality of the Judiciary*; Article 21 of the *Australian Bar Association Charter of Judicial Independence 2004*; *Valente v The Queen* (1985) 2 SCR 673 ; *Naalas v Bradley* [2004] 218 CLR 146; Mack and Anleu, n 7 above.

In relation to guideline (d) it should be noted that in some Australian jurisdictions the recommendations of an independent remuneration tribunal may be disallowed by the legislature. Therefore, query whether the guideline goes too far in making the decisions of a remuneration tribunal binding on the legislature.

<sup>31</sup> Measures of this kind have such a potential for interference with the independence of the judicial process that they must be vested in the judiciary. See: The Hon Justice Len King "Minimum Standards of Judicial Independence" (1984) 58 ALJ 340 at 343

<sup>32</sup> The rationale for the guideline is that without immunity from suit, judicial officers would be less able to perform their functions independently and without fear or favour. The proposed guideline is broadly based on Principle 16 of the *Basic Principles on the Independence of the Judiciary*. Note that sometimes the immunity from suit is expressed in wider terms to cover criminal proceedings. In the Australian context the immunity of magistrates is occasionally expressed as being the same as that enjoyed by a Justice of the Supreme Court.

- (d) *the curriculum should be controlled by judicial officers who should have the assistance of lay specialists;*
- (e) *where appropriate, and in order to enhance the good administration of justice, judicial training should also be holistic in nature and include judicial officers at different levels;*
- (f) *for jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided;*
- (g) *courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training;*<sup>33</sup>
- (h) *Judicial training should incorporate training on judicial independence and ethical behaviour in order to ensure integrity;*
- (i) *Magistrates' like all judicial officers should abide by a code of conduct or set of guidelines which should form the basis for any disciplinary actions by the Head of the Judiciary or any organisation created to deal with complaints against judicial officers, such as a judicial commission.*

### **Judicial Associations**

*Consistent with their fundamental rights, members of the judiciary shall be free to form and join associations or other organisations to:*

1. *ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;*
2. *promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;*
3. *promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies";*
4. *promote a better public understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting fundamental human rights and entrenching good governance and to do likewise within the Executive and Legislative branches of government;*
5. *seek improvements in the administration of justice and the accessibility of the judicial system; and*
6. *undertake supporting research that will further the achievement of these aims.*

Commonwealth Magistrates' and Judges' Association  
April 2012

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<sup>33</sup> This guideline, which is a full adoption of the *Latimer House Guidelines*, recognises the importance of judicial training and development as a key mechanism for ensuring the independence of the judiciary. Far from impinging upon the independence of the judiciary, it in fact enhances its independence.

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| <b>Status of Magistrates in the Commonwealth</b> |
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## Questionnaire

To complete, please place your cursor and begin typing in the shaded area. It will expand to fit your text.

Name

Jurisdiction

Email Address

1. Do lower levels of the judiciary (such as magistrates, judicial officers of limited jurisdiction) have the same level of constitutional protection as the higher judiciary?
2. If not, what are the safeguards for the independence of the more junior levels of judicial officer (please specify relevant legislative documents and where possible supply the CMJA with a copy).
3. Are procedures set down in the legislation or other documents followed in practice?  
 YES  NO
4. What is the structural or institutional relationship between the lower levels of the judiciary and the executive branch of government? Are they part of the civil or public service or are they separate from the executive?
5. What degree of administrative autonomy or independence is enjoyed by the lower levels of the judiciary with respect to matters of administration bearing directly on the exercise of the judicial function? How does that autonomy compare with that enjoyed by the higher judiciary?
6. What is the procedure for appointments to the lower judiciary?
7. What differences, if any, exist in the procedure for the appointment process for the higher judiciary and the lower judiciary?
8. For what term are members of the lower judiciary appointed, ie until an age of retirement, a fixed term or during the pleasure of government?  
  
 Who is responsible for the discipline, transfer and/or removal of members of the lower judiciary?
9. What are the grounds for disciplining, transferring or removing such judicial officers?
10. What, if any, protections are there against the abolition of courts of the lower judiciary and the non-appointment of a judicial officer of an abolished court to another judicial office?
11. What differences, if any, exist in relation to the security of tenure of the higher judiciary and the lower judiciary with reference to the matters raised by questions 6 to 11?

- 12. How are the salaries, allowances and benefits of members of the lower judiciary fixed: ie by the legislature, executive or a tribunal or committee?**
- 13. What, if any, protections are there against a reduction or freezing of the remuneration, allowances and benefits of such judicial officers?**
- 14. What differences, if any, exist in relation to the financial security of the higher judiciary and lower judiciary with reference to the matters raised by questions 13 and 14?**
- 15. Is career progression possible from the lower to the higher judiciary?**
- 16. What is the interaction between the lower and the higher judiciary in relation to training, mentoring or meeting?**
- (a) Does your jurisdiction have joint meetings between the higher judiciary and the lower judiciary?**  
YES NO
- (b) Is government funding available to all levels of the judiciary to participate in international judicial training?**  
YES NO
- (c) How is the lower judiciary addressed in court (please tick one of the following)**
- My Lord/My Lady
  - Justice
  - Your Honour
  - Your Worship
  - Other – please specify
- 19. Please specify any other concerns you have in relation to the status of magistrates in your jurisdiction.**

**JURISDICTIONS WHO RESPONDED  
TO THE QUESTIONNAIRE AND/OR  
THE REQUEST FOR INFORMATION (RFI)**

**Australia  
Barbados  
Belize  
Bermuda  
Canada  
Cyprus  
England and Wales  
Falkland Islands  
Gibraltar  
Ghana  
India  
Isle of Man  
Jersey (RFI)  
Jamaica  
Kenya  
Kiribati (RFI)  
Lesotho  
Malawi  
Malta  
Namibia  
Nauru(RFI)  
New Zealand (RFI)  
Nigeria  
Pakistan  
Eastern Caribbean States  
(Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica,  
Grenada, Montserrat, St Kitts and Nevis, St Lucia,  
St Vincent and the Grenadines)  
Scotland  
Seychelles  
Singapore  
Sri Lanka  
Tanzania (RFI)  
Trinidad and Tobago  
Uganda**



### OTHER SOURCES OF INFORMATION

which were used to compile these Preliminary Findings were:

- *The Judicial Institution in Southern Africa*, University of Cape Town. (2006) Cape Town, South Africa: Siber Ink CC.
- *Developments in Judicial Protection of Human Rights in the Commonwealth Caribbean*, Commonwealth Law Bulletin, Vol. 36, Number 2: June 2010
- The Canadian Association of Provincial Court Judges Journal Vol. 33, Number 1; Summer 2010
- Chief Justice's Annual Report on the Judiciary of Belize 2009-2010
- The papers from the CMJA's Cape Town Conference of 2008.
- CMJA Survey on Judicial Independence in the Commonwealth 2008-2010.