



**A GUIDE FOR THE MAGISTRATE
IN THE COMMONWEALTH:
FUNDAMENTAL PRINCIPLES AND
RECOMMENDED PRACTICES**

January 2017

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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PREFACE AND ACKNOWLEDGEMENTS

This is the third edition of the “Magistrate in the Commonwealth, Basic Principles and Practice – A Training Manual”, which, as explained below, has been re-titled “A Guide for the Magistrate in the Commonwealth: Fundamental Principles and Recommended Practices”.

The first edition of the Manual, which was published in 1991, was intended to provide practical guidance to magistrates within the Commonwealth in relation to their role as members of one of the three branches of government – the judiciary - and the performance of their judicial functions and duties. The Commonwealth Magistrates’ and Judges’ Association (CMJA) is grateful to the editors of the Manual, Margaret Rogers JP and the late Jane Kellock JP and other contributors, the late Professor A.N. Allott and the Honourable J.O. Wilson QC for their contributions to the Manual. The CMJA is also grateful to the Commonwealth Legal Education Association (CLEA) for producing the original publication.

The first edition was widely distributed and became a significant resource for magistrates around the Commonwealth.

In 2005 the need for an updated version of the Manual was identified. Although since the Manual was originally published the CMJA had worked within many Commonwealth countries to improve the professionalism of magistrates and many jurisdictions had developed their own training manuals and bench books to assist them in carrying out their duties and functions to the best of their abilities, there remained a number of jurisdictions where resources were limited and development was ongoing. The second edition of the Manual, which was published, was intended to assist magistrates in those jurisdictions.

The up dated Manual placed increased emphasis on the key concepts and principles underpinning the role of the judiciary as one of the three branches of government and the important part played by the magistracy in promoting the rule of law and good governance.

The CMJA duly acknowledges the contributions made by the following persons to that second edition: Mrs Rose James, Mrs Nicky Padfield, His Worship Dan Ogo and CMJA interns, Mr Bryan Padgett and Miss Amina Zukogi.

This third edition of the Manual is an up-date of the second edition and has largely been prompted by the findings and recommendations contained in the 2013 CMJA Report on the “Status of Magistrates in the Commonwealth – and in particular the recommendation that the CMJA’s training of magistrates should focus on ways of enhancing the integrity and independence of magistrates.

This third edition of the Manual was edited by his Honour John Lowndes, the Chief Magistrate of the Northern Territory of Australia (now Chief Judge of the Local Court of the

Northern Territory). He was assisted by the following three interns assigned to the Northern Territory Magistrates/Local Court in 2015-2016. The editor thanks Prudence Davie who made substantial contributions to the structure and content of several chapters of this publication, Stephanie Kelly for her contributions to the final chapter and to Peta White for formatting and proof reading this publication.

Without in any way diminishing the ground –breaking work of previous editors and contributors, the editor has re-titled this valuable resource “A Guide for the Magistrate in the Commonwealth: Fundamental Principles and Recommended Practices”, because, in the opinion of the editor, documents of this type are, according to contemporary standards (which have emerged many years after the first edition), better characterised as a guide rather than a manual.

The CMJA is grateful to the CMJA Endowment Fund for their donation towards the production of this Guide.

**SPECIAL ACKNOWLEDGMENT TO
HER MAJESTY THE QUEEN
HEAD OF THE COMMONWEALTH
PATRON OF THE CMJA
On the Occasion of her 90th Birthday**

The CMJA acknowledges the support that Her Majesty The Queen, as Head of the Commonwealth, has given to the advancement of the Commonwealth fundamental values

The CMJA in particular acknowledges Her Majesty’s support as Patron of the CMJA since 1995 especially in the year that celebrates the 25th Anniversary of the Harare Declaration on the Commonwealth political values as well as in the year that celebrates Her Majesty’s 90th Birthday.

The CMJA is grateful for the continued support for its work. Without the support of Her Majesty of the Commonwealth fundamental values and in particular the independence of the judiciary and the rule of law, principles which are also included in the Commonwealth Charter of 2013, the CMJA’s work in advancing and protecting the independence of the judiciary especially for the lower judiciary would not be possible.

The CMJA is grateful to the Patron’s Lunch Foundation for their support in assisting with the production of this Guide which we hope will be of value to all judicial officers in the lower judiciary in the Commonwealth.

THE PURPOSE OF THE GUIDE

The purpose of this Guide is to provide practical guidance to magistrates within the Commonwealth in relation to their role as members of one of the three branches of government – the judiciary - and the performance of their judicial duties and functions. The Guide focuses on enhancing the integrity and independence of magistrates with a view to promoting the rule of law and good governance within the Commonwealth.

This Guide is only intended as a guide for magistrates. The title “magistrate” means:

Any judge of a Court not being a Court of unlimited jurisdiction in civil or criminal matters, 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 as a “magistrate”.

The Guide is expected to be a very valuable resource for all magistrates within the Commonwealth, and in particular newly appointed magistrates.

The previous two editions, as well as this latest edition, recognise the inherent difficulties in producing a publication of this type. Although the legal systems of the Commonwealth have many features in common there are many points of difference, not least in countries where a plurality of legal systems co-exist. For that reason the Guide is not intended to be exhaustive.

Furthermore, it is not possible to produce a guide that covers every facet of the judicial function – many of which require the contribution of judicial officers with a special expertise in a particular field of judicial activity. The Guide focuses on what are considered to be the core aspects of the judicial function.

Similarly, this Guide is intended to complement sections, prepared locally, on topics which differ from one region to another; for example, legislation governing land or domestic disputes, sentencing policies, or the extent of a magistrate’s jurisdiction. (The preparation of these sections is rightly the task for judicial officers within the jurisdiction concerned).

Finally, but not least, this Guide is not intended to be prescriptive in any way, as it is expected that the special circumstances of Commonwealth jurisdictions may require adaptation of the material contained in the Guide.

With these aspirations and intentions, this Guide is divided into a number of chapters which each deal with a specific core aspect of the judicial function.

Although the basic structure and substantive content of the previous edition of this publication has been maintained, the various chapters have been rearranged and restructured so that they are thematically connected so as to assist magistrates in the

performance of their role as members of the third branch of government. Furthermore, this latest edition contains additional chapters and material dealing with other facets of the judicial function.

This third edition builds upon the previous two editions and would not have been possible without those two foundational resources and the efforts of those who were involved in their creation.

It is hoped that this third edition will, like its predecessors, prove to be a valuable resource for all magistrates within the Commonwealth.

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CHAPTER ONE

THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE OTHER BRANCHES OF GOVERNMENT

The purpose of the first chapter of this Guide is to explain the relationship between the judiciary and the other two branches of government – the executive and the legislative – in Commonwealth countries and to identify the role of the judiciary within that relationship, according to the doctrine of the separation of powers. The Commonwealth (Latimer House) Principles on the Accountability and Relationship Between the Three Branches of Government¹ (to which all Commonwealth countries have agreed to adhere) and other related international statements of the principles of judicial independence structure, confine and define that all important relationship between the judiciary and the other two branches of government.

This preliminary chapter establishes the foundation for the over-arching purpose of the Guide, which is to provide a practical guide as to how judicial officers should conduct themselves within that theoretical framework in the performance of their judicial duties and functions.

1.1 The Latimer House Principles and Guidelines

The objective of the Latimer House Principles is “to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth’s fundamental values.”² Those fundamental values are the promotion of democracy, human rights, good governance, the rule of law, individual liberty, egalitarianism, free trade, multiculturalism and world peace.

The Latimer House Principles provides:

that each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.³

As to the relationship between Parliament and the Judiciary, the Principles state:

- (a) Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand.
- (b) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.⁴

With respect to the independence of the judiciary, the Latimer House Principles state:

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.⁵

The Latimer House Principles stress the need for ethical governance within the judiciary:

...judicial officers... in each jurisdiction should develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived with a view to enhancing the transparency, accountability and public confidence.⁶

On the matter of judicial accountability the Principles have this to say:

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

The Latimer House Principles were distilled from a set of Commonwealth Guidelines on Parliamentary Supremacy and Judicial Independence which serve as an annex to the Principles (“The Latimer House Guidelines”) “in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles”.⁷

The guidelines are underpinned by the following principles:

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require an adaptation of these Guidelines.⁸

The Guidelines contain the following guidelines in relation to Parliament and the Judiciary:

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial measures.
2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.
3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant rights environment throughout the Commonwealth.
4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It can also help expand the scope of a Bill of Rights making it more meaningful and effective.
5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.
6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.
7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Office of the Ombudsman and mechanisms for alternative dispute resolution.
8. Everyone, especially judges, parliamentarians and lawyers should have access to human rights education.

The Guidelines contain the following guidelines in relation to the preservation of judicial independence:

1. Judicial Appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made 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.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments 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.

2. Funding

Sufficient and sustained funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising proper control over the judiciary.⁹

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

3. Training

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional training.

The Guidelines contain the following provision in relation to the matter of judicial ethics:

- (a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.
- (b) The Commonwealth Magistrates and Judges Association should be encouraged to complete its Model Code of Judicial Conduct now in development;
- (c) The Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries which will serve as a resource for other jurisdictions.

Included in the Guidelines is the following provision in relation to the development of mechanisms for ensuring judicial accountability:

- (a) Discipline
 - (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.
Grounds for removal of a judge should be limited to:
 - (A) inability to perform judicial duties and
 - (B) serious misconduct.
 - (ii) In all other matters the process should be conducted by the chief judge of the courts;
 - (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private by the chief judge
- (b) Public Criticism
 - (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
 - (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

1.2 Aspects of Judicial Independence Enshrined in the Latimer House Principles and Guidelines

The Latimer House Principles and Guidelines support two fundamental principles: the rule of law and judicial independence.

Although a difficult notion to define,¹⁰ the “rule of law” is seen as the “antithesis of the exercise of arbitrary power”¹¹ and entails “the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”.¹² The twin notions of non-arbitrariness and equality before the law have a direct relationship with the concept of judicial independence:

If the governed and the governors are to stand equally before the law it is imperative that the judiciary should be impartial and have the appearance of impartiality.¹³

As an impartial judiciary is not possible without a truly independent judiciary, judicial independence is fundamental to the effective operation of the rule of law.¹⁴

The Latimer House Principles stress the importance of the separation of powers between the three branches of government and implicitly address the relationship between the independence of the judiciary and the rule of law. This relationship was noted by the Australian Constitutional Commission in 1988:

The independence of the judiciary and its separation from the legislative and executive arm of government is, of course, an essential feature of the rule of law. It is regarded as of great importance in all democratic societies.¹⁵

The indispensability of judicial independence to the operation of the rule of law was reflected in the CMJA’s *Victoria Falls Proclamation* 1994:

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.

The tri-partite relationship between the doctrine of the separation of powers, the rule of law and judicial independence was noted 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.¹⁶

The relationship between the judicial independence and the rule of law was explained by Sir Gerard Brennan in these terms:

The reason why judicial independence is of such public importance is that a free society exists so long as it is governed by the rule of law – the rule which binds governors and the governed, administered impartially and treating equally all of those who seek its remedies or against whom its remedies are sought. However vaguely it

may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.

In the Bangalore Principles of Judicial Conduct (commonly referred to as the Bangalore Principles), judicial independence was stated to be “a pre-requisite to the rule of law”.¹⁷ In a similar vein, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (often referred to as the Beijing Principles) stated that judicial independence is “essential to the attainment of [judiciary’s] objectives and to the proper performance of its functions in a free society observing the rule of law.”¹⁸

The independence of the judiciary and hence the rule of law is guaranteed by the structural or institutional separation of the judiciary from the other two branches of government – namely the institutional independence of the judiciary.¹⁹

Institutional independence is a pre- requisite for ensuring that the judiciary (as a branch of government) in performing its judicial function is independent of external pressures from the executive branch of government and the influence of parliament.²⁰ Institutional independence – commonly referred as “collective independence”²¹ - is propounded as a foundational element of the concept of judicial independence in the CMJA “Guidelines for Ensuring the Independence and Integrity of Magistrates”.²²

The following statement contained in a document prepared by the Judicial Office for Scotland stresses the importance of institutional independence:

Independence of the judiciary refers to the necessary and collective or institutional independence required for impartial decisions and decision making. Judicial independence thus characterises both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge’s impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government.²³

The document goes on to speak of the principle of the separation of powers and the relationship between impartiality and independence and the importance of all three to impartial decisions and decision making:

In order for the decisions of the judiciary to be respected and obeyed, the judiciary must be impartial. To be impartial, the judiciary must be independent. To be independent the judiciary must be free from interference, influence or pressure. For that, it must be separate from the other branches of the State or any other body.

The principle of the separation of powers of the State requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and seen to be, independent of the executive and legislative branches of government. The relationship between the judiciary and the other branches of government should be one of mutual respect, each recognising the proper role of the others.²⁴

The document goes on to say:

Judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is the cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence. Judicial independence means that judges are not subject to pressure and influence, and are free to make good decisions based solely on fact and law.²⁵

It follows that there is an important relationship between the institutional or collective independence of the judiciary and the independence of individual judicial officers in making decisions in court cases between litigants. The two work in tandem.²⁶

In *Valente v The Queen* [1985] 2 SCR 673 Le Dain J stressed that even if a judicial officer enjoyed the essential conditions such as security of tenure, he or she would not constitute a truly independent tribunal unless the court over which he or she presided was independent of the other branches of government. This was an implicit recognition of the indispensability of institutional independence to the adjudicative independence of individual judicial officers.

Similarly, in *MacKeigan v Hickman* [1989] 2 SCR 796 MacLaughlin J stated that "the underlying relationship between the judiciary and the other branches of governmentserves to ensure that the court will function and be perceived to function impartially" – again an implicit recognition of the intrinsic relationship between the institutional independence of the judiciary and the adjudicative independence of individual judicial officers.

The interface between institutional independence and the adjudicative independence of individual judicial officers is captured in the observations made by R.E. McGarvie to the effect that principle of judicial independence requires judicial officers, in making decisions in court cases between litigants to be "individually independent in the sense of being free from pressures which could tend to influence a judge to reach a decision in a case other than that which is indicated by intellect and conscience based on a genuine assessment of the evidence and an honest application of the law".²⁷ It follows that judicial officers are not able to enjoy such adjudicative independence without the institutional independence that protects the judiciary from such external pressures and influences.

As pointed out by Mack and Anleu, "the core elements of judicial independence are freedom from external control by the executive government and freedom from internal control by other judicial officers..."²⁸ Accordingly, judicial independence can be dissected into "external judicial independence" and "internal judicial independence".²⁹

At the heart of both external and judicial independence sits the notion of decisional or adjudicatory independence.³⁰ This aspect of judicial independence relates to “the independence with which a judge exercises his or her decision-making functions”.³¹

As explained by Ananian-Welsh and Williams, decisional independence has two facets:

Judicial independence requires that the decision making powers of courts be insulated from inappropriate interference by the executive government. One aspect of this is that the courts should have jurisdiction over issues of a justiciable nature. Another is that the powers and processes of courts ought not be controlled by, or conflated with, those of the executive government.³²

In *Pompano* (2013) 87 ALJR 458 at [67] French CJ identified the reality and appearance of decisional independence and impartiality as one of the defining characteristics of a court, and observed that the institutional integrity of a court is distorted if this characteristic (which distinguishes a court from other decision-making bodies) is absent. Institutional integrity of courts is an indispensable condition for the operation of the rule of law.

The relationship between external judicial independence and the decision making powers of courts is explained in the following terms by Mack and Anleu:

External judicial independence enables judicial officers to make decisions they regard as just according to law and fact, without being influenced by the state to reach a particular result. As Gleeson CJ recently pointed out:

It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assured with confidence to exercise authority without fear or favour.³³

The authors also explain how the rule of law is enhanced by external judicial independence.³⁴

External judicial independence enhances the rule of law in several ways. In cases between citizens, it supports decision-making based on the facts established by the evidence and legal arguments rather than “external direction”.³⁵ When the court must decide disputes between citizens and government, independence from government reduces the risk of apprehended or actual bias in favour of the government as a litigant.³⁶ External judicial independence also supports the rule of law by maintaining public confidence in the judiciary and courts as institutions. “A judicial officer... who could be dismissed for making a decision of which the government disapproved, would be unlikely to command the confidence of the public.”³⁷

As pointed out by Gleeson CJ and Gummow J in *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 398:

The independence of the judiciary includes the independence of judges from one another. The Chief Justice of a court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibility.³⁸

Mack and Anleu point out the significant role played by internal judicial independence in relation to the adjudicative function:³⁹

Internal judicial independence is also a key mechanism in the rule of law. Just as executive direction of an adjudication would be inconsistent with the rule of law, so would improper direction from the presiding judicial officer – or any other judicial officer.⁴⁰

The Latimer House Principles also establish various mechanisms for preserving the independence of the judiciary.

The primary and central mechanism for “protecting judicial independence is security of tenure, which supports both external and internal judicial independence”.⁴¹ Security of tenure supports external independence by providing “a means of preventing the executive government from influencing judicial decision-making”.⁴² Furthermore, “security of tenure reinforces the independence of mind and action of judicial officers, essential to the proper discharge of their functions”.⁴³ It also “promotes both internal and external judicial independence by limiting the ability of either the executive or the chief judicial officer to determine the conditions or terms of appointment of judicial officers”.⁴⁴ Finally, but not least, security of tenure preserves internal judicial independence by “limiting the authority of the chief judicial officer over individual judges or magistrates”.⁴⁵ For all of these reasons security of tenure requires appropriate procedures and standards for removal and suspension of judicial officers are guaranteed.⁴⁶

However, as stated by the High Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 – “no single ideal model of judicial independence, personal or institutional” exists. There is “no constitutional requirement that all judicial officers must have their independence secured to the highest possible degree in every respect” and “some legislative choice is allowed in the mechanisms employed to promote judicial independence”.⁴⁷ As the High Court stated in *NAALAS v Bradley* it is not possible to give an “exhaustive statement of what constitutes ...the relevant minimum characteristics of an independent and impartial tribunal exercising the jurisdiction of the courts”.⁴⁸ However, the High Court stated that important indicators of breaches of minimum standards necessary to ensure the substance and appearance of an independent and impartial tribunal include whether:

- the judicial officer is “inappropriately dependent on the legislature or executive... in a way incompatible with requirements of independence and impartiality”;
- the circumstances “compromise or jeopardise the integrity of the... magistracy or the judicial system”;

- “reasonable and informed members of the public [would] conclude that the magistracy... was not free from the influence of the other branches of government in exercising their judicial function.”

It is essential that all judicial officers be aware of the essential relationship between judicial independence and the impartial discharge of their judicial functions and the “relevant minimum characteristics of an independent and impartial tribunal exercising the jurisdiction of the courts”⁴⁹ necessary to ensure the substance and appearance of an independent and impartial tribunal. All judicial officers need to be aware of the various mechanisms for protecting judicial independence, including the important relationship between judicial independence and judicial accountability.

As is clear from the Latimer House Principles and Guidelines, judicial independence and judicial accountability are not only compatible but complementary concepts.⁵⁰ The Principles and Guidelines accept that all judicial officers should be accountable for the exercise of their judicial functions, and provide a structure for balancing judicial accountability with judicial independence.

As pointed out earlier, judicial officers should individually and collectively protect, encourage and defend judicial independence, as well as being judicially accountable.⁵¹ The reason for this is that absolute confidence in the impartiality of the judiciary can only exist if the judiciary is seen to be truly independent.⁵² As pointed out Chief Justice Antonio Lamer of Canada “judicial independence is not an end in itself”; and is “essential for the maintenance of public confidence in the impartiality of the judiciary”.⁵³

¹ “The Latimer House Principles”. <http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>

² Objective.

³ Principle I.

⁴ Principle II.

⁵ Principle IV.

⁶ Principle VI.

⁷ Introduction to the “Commonwealth Guidelines on Parliamentary Supremacy and Judicial Independence”.

<http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>

⁸ See Principles in the Latimer House Guidelines.

⁹ 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 ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.

¹⁰ AV Dicey *An Introduction to the Study of the Law of the Constitution* 10th edition London 1959, 202; see also Raz “The Rule of Law and its Virtues” (1977) 93 *Law Quarterly Review* 195.

¹¹ E Campbell and HP Lee *The Australian Judiciary* 2001, 51

¹² Dicey n 10, 202 cited in Campbell and Lee n 11, 51.

¹³ See Sir Gerard Brennan “The State of the Judicature” (1998) 72 *Australian Law Journal* 33, 34 cited in Campbell and Lee n 11, 51.

¹⁴ See Campbell and Lee n 11, 51.

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- ¹⁵ Final Report of the Constitutional Commission (Canberra AGPS 1988) para 6.128 cited in Campbell and Lee n 11, fn 110.
- ¹⁶ Sir Anthony Mason “A New Perspective on Separation of Powers” (1996) 82 *Canberra Bulletin of Public Administration* “ 1 at 4 cited in Campbell and Lee n 11, 49.
- ¹⁷ Judicial Integrity Group Bangalore Principles of Judicial Conduct ESC Res 2006/23 cited most recently by Rebecca Ananian – Welsh and George Williams “Judicial Independence From the Executive: A First Principles Review of the Australian Cases” (2014) *Monash University Law Review* Vol 40 No 3, 593.
- ¹⁸ LAWASIA Beijing Principles of the Independence of the Judiciary in the LAWASIA Region (28 August 1997) clause 4.
- ¹⁹ In *Valente v The Queen* [1985] 2 SCR 673 Le Dain J referred to institutional independence as being “reflected in institutional or administrative relationships to the executive and legislative branches of government”.
- ²⁰ J Debeljak “Judicial Independence in the Modern Democratic State” 74 *Australian Law Reform Commission Journal* 35, 2.
- ²¹ J Debeljak n 20, 2.
- ²² These guidelines are annexed to the CMJA’s Report on “The Status of Magistrates in the Commonwealth” which can be accessed at www.cmja.org.
- ²³ This document can be accessed at scotland-judiciary.org.uk
- ²⁴ www.scotland-judiciary.org.uk
- ²⁵ www.scotland-judiciary.org.uk
- ²⁶ See the Hon Justice Nicholson “Judicial Independence and Accountability: Can They Co-Exist?” 1993 *Australian Law Journal* Vol 67 404 at 405 where his Honour states that these two aspects of independence are encompassed within the principle of judicial independence.
- ²⁷ RE McGarvie “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 *Journal of Judicial Administration* 3, 6.
- ²⁸ K Mack and S Anleu “The Security of Tenure of Australian Magistrates” [2006] *Melbourne University Law Review* Vol 30 370 at 372 citing K Maleson “Judicial Training and Performance Appraisal: The Problem of Judicial Independence” (1997) 60 *Modern Law Review* 655; S Shetreet “ The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*’ (1987) 10 *University of New South Wales Law Journal* 4, 7.
- ²⁹ See Mack and Anleu n 28, 373.
- ³⁰ This is also a core aspect of judicial independence referred to in the CMJA “Guidelines for Ensuring the Independence and Integrity of Magistrates”.
- ³¹ Ananian -Welsh and Williams n 17, 600-601.
- ³² Ananian and Williams n 17, 613.
- ³³ Mack and Anleu n 28, 373.
- ³⁴ Mack and Anleu n 28, 373.
- ³⁵ J Crawford and B Opeskin *Australian Courts of Law* 4th edition 2004, 65; E Handsley “Issues Paper on Judicial Accountability” (2001) 10 *Journal of Judicial Administration* 179, 187.
- ³⁶ Crawford and Opeskin n 35, 65; G Winterton *AIJA Judicial Remuneration in Australia* (1995), 13-14.
- ³⁷ Chief Justice M Gleeson “Forward in H Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) xi; see also J Toohey “Without Fear or Favour, Affection of Ill –Will: The Role of Courts in the Community” (1999) 28 *University of Western Australia Law Review* 1, 8.
- ³⁸ Internal judicial independence is also included in the CMJA Guidelines for Ensuring the Independence and Integrity of Magistrates as a key mechanism for ensuring the judicial independence of the magistracy.
- ³⁹ Mack and Anleu n 28, 374.
- ⁴⁰ S Colbran “Judicial Performance Evaluation: Accountability without Compliance” (2002) 76 *ALJ* 235 at 246; D Drummond “Towards a More Compliant Judiciary?” – Part 1 (2001) 75 *Australian Law Journal* 304 at 316-317; S Shetreet “The Limits of Judicial Accountability” (1987) 10 *University of NSW Journal* 4, 11.
- ⁴¹ Mack and Anleu n 28, 373.
- ⁴² Mack and Anleu n 28, 380.
- ⁴³ Mack and Anleu n 28, 374.
- ⁴⁴ Mack and Anleu n 28, 374.
- ⁴⁵ Mack and Anleu n 28, 380.
- ⁴⁶ Mack and Anleu n 28, 392-398.
- ⁴⁷ Mack and Anleu n 28, 381-382.

⁴⁸ Mack and Anleu n 28, 382.

⁴⁹ Mack and Anleu n 28, 382.

⁵⁰ The Hon Justice Nicholson n 26, 414.

⁵¹ See the United Nations Basic Principles on the Independence of the Judiciary which state that “it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system”. Similarly, the Principles require that “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.

⁵² Campbell and Lee n 11, 49.

⁵³ Chief Justice Lamer “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 *University of New Brunswick Law Journal* 3, 7 cited in Campbell and Lee n 11, 51. See also Sir Anthony Mason “The Independence of the Bench, The Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 *Australian Bar Review* 1, 3, also cited in Campbell and Lee n 11, 51 where Sir Anthony Mason explains that judicial independence is “a privilege of, and a protection for, the people”.

CHAPTER TWO

GUIDE TO JUDICIAL CONDUCT WITHIN THE FRAMEWORK OF THE LATIMER HOUSE PRINCIPLES AND GUIDELINES

The Latimer House Principles and Guidelines stress the importance of a strong and independent judiciary as the cornerstone of a free and democratic society and good governance, as well as the guarantor of the rule of law and the administration of justice.

The purpose of this part of the chapter is to give practical guidance to magistrates as to how they should conduct themselves in the performance of their judicial duties and functions within the framework of the Latimer House Principles and in upholding the independence and integrity of the judiciary and promoting the rule of law and good governance.

The Latimer House Principles stress the importance of judicial accountability.¹ At the core of judicial accountability stands the notion that a judicial officer is primarily accountable to the law, which he or she must administer in accordance with the terms of the judicial oath, “without fear or favour, affection or ill-will”.²

As pointed out by Justice Thomas:

No one doubts that judges are expected to behave according to certain standards of conduct both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations. We form a group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations...

If these standards are not effectively maintained, public confidence in the independence and trustworthiness of judges will erode and the administration of justice will be undermined.³

The Latimer House Principles themselves recognise the importance of developing standards of judicial conduct as a means of ensuring the accountability of all judicial officers.⁴

As pointed out in the AIJA Guide to Judicial Conduct:

It is possible to identify principles or standards of conduct appropriate to the judicial office, but their application to particular issue may, sometimes, reasonably give rise to different answers by different judges. The answer may vary according to the jurisdiction of the court or the place in which the court sits. To give to such standards of conduct the status of rules is to invest them with a prescriptive role which may well be inappropriate.⁵

Members of all judiciaries within the Commonwealth aspire to high standards of conduct and maintaining such “standards is essential if the community is to have confidence in its judiciary”.⁶

Many Commonwealth countries have Guides to Judicial Conduct or Codes of Ethical Principles for Judicial Officers. Examples are the Australian AIJA Guide to Judicial Conduct, the Judiciary of England and Wales Guide to Judicial Conduct and the Canadian Judicial Council (“CJC”) Ethical Principles for Judges.

It is proposed to refer to each of these important documents which are intended to provide a valuable tool in assisting judicial officers to deal with a range of ethical problems which they will inevitably have to face as judges. In referring to these three guides to judicial conduct, it is not intended to summarise or comment on all of the material contained in the guides, but only to draw attention to key aspects of the guides, leaving it to the reader to access the full text of one or more of the guides.

2.1 The Common Approach of Relevant Guides

As with comparable guides to judicial conduct, the AIJA Guide to Judicial Conduct is not intended to be prescriptive, unless it is so stated. The publication “recognises that in cases of difficulty or uncertainty, the primary responsibility of deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual judge, but is strongly recommends consultation with colleagues in such cases and preferably with the head of jurisdiction”.⁷

In a similar vein, the Judiciary of England and Wales Guide to Judicial Conduct states that the guide is “intended to offer assistance to judges on issues rather than to prescribe a detailed code and to set up principles from which judges can make their own decisions and so maintain their judicial independence”.⁸ Further on, the Guide makes the following preliminary statement:⁹

The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual judge and what follows is not

intended to be prescriptive, unless stated to be. There may be occasions when the overall interests of justice require a departure from propositions as literally stated in the guide. It is also acknowledged that there is a range of reasonably held opinions on some aspects of the restraints that come with the acceptance of judicial office.

The CJC Ethical Principles for Judges takes a similar approach:

The Statements Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not intended and shall not be sued as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.¹⁰

2.2 The Underlying Principles and Values of the Guides

The AIJA Guide to Judicial Conduct, which is applicable to judicial officers at all levels, identifies three basic principles by reference to which judicial conduct should be tested in order to ensure compliance with the objectives of upholding public confidence in the administration of justice, enhancing public respect for the institution of the judiciary and the protection of the reputation of individual judicial officers and of the judiciary – all of which are embraced by the Latimer House Principles.¹¹ Those three basic guiding principles are:

- Judicial independence;
- Impartiality;
- Integrity and personal behaviour¹²

As noted in the AIJA Guide to Judicial Conduct, the judicial oath embraces all three of those guiding principles, and in many cases the concepts of independence and integrity are part of the notion of acting impartially.¹³

These guiding principles are also identified in the CJC Ethical Principles for Judges.¹⁴ This Guide also includes as key principles; diligence and equality.

The Judiciary of England and Wales Guide to Judicial Conduct is a development of the 2001 Bangalore Principles of Judicial Conduct (2001)¹⁵, which have as their stated intention the following:¹⁶

To establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and Legislature, and lawyers and the public in general, to better understand and support the judiciary.

The Bangalore Principles of Judicial Conduct consist of six fundamental values:¹⁷

1. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
2. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
3. Integrity is essential to the proper discharge of the judicial office.
4. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
5. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
6. Competence and diligence are prerequisites to the due performance of judicial office.

These principles are also recognised as key principles in the Judiciary of England and Wales Guide to Judicial Conduct.¹⁸

- ***Judicial Independence***

The AIJA Guide to Judicial Conduct emphasises the imperative for there to be independence in the discharge of judicial duties:¹⁹

Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence.

The Judiciary of England and Wales Guide to Judicial Conduct implicitly acknowledges the core principle of the Latimer House Principles – namely that “the relationship between the judiciary and the other arms [of government] should be one of mutual respect, each recognising the proper role of the others”.²⁰ The Guide also echoes the AIJA Guide’s position on the need for judges not to undermine their institutional or individual independence or public appearance of independence.²¹

The CJC Ethical Principles for Judges states that:²²

An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.

The Guide sets out the following four fundamental principles concerning judicial independence.²³

1. Judges must exercise their judicial functions independently and free of extraneous influence;
2. Judges must firmly reject any attempt to influence their decisions in any manner before the Court outside the proper process of the Court;
3. Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary;
4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

As pointed out in the Judiciary of England and Wales Guide to Judicial Conduct “the concept of judicial independence is another aspect of judicial integrity and judicial impartiality and... there is substantial overlap between the principles relevant to the application of the values”.²⁴ This interrelationship between independence, impartiality and integrity permeates all three of the guides to judicial conduct.

- **Impartiality**

As stated in the CJC Ethical Principles for Judges, “judges must be and should appear to be impartial with respect to their decisions and decision making”; and to that end “should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary”.²⁵

These statements are echoed in the Judiciary of England and Wales Guide to Judicial Conduct and the AIJA Guide to Judicial Conduct.²⁶

As stated broadly in the AIJA Guide, the requirement of impartiality in court requires a judicial officer to be “fair and even handed, to be patient and attentive and to avoid stepping into the arena or appearing to take sides”.²⁷ However, “none of this... debars the judge from asking questions of witnesses or counsel which might even appear to be ‘loaded’ in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law”.²⁸

The requirement of impartiality obliges a judicial officer to ensure that his or her impartiality is not impugned by reason of:

- either actual or perceived bias;
- conflict of interest or
- prejudgement of an issue²⁹

The AIJA Guide identifies a number of circumstances in which actual or perceived bias or conflict of interest may arise:³⁰

1. professional or business associations involving directly or indirectly litigants, litigants' legal advisers and witnesses;³¹
2. close relationships with any such persons;³²
3. social contact with parties or witnesses;
4. current commercial or business activities including shareholding in public or private companies or other investments;
5. close family relationships or personal friendships;³³
6. personal or family financial activities;
7. membership of or involvement with educational, charitable or other community organisations if they become parties to litigation;³⁴
8. an appearance of continuing ties with a political party such as membership of or active participation in a political party after appointment to judicial office;³⁵ or
9. public statements or expression of opinion on controversial social issues or matters in issue in litigation made before or after appointment to judicial office.

There are other possible circumstances that may give rise to bias or conflict of interest for example where the judicial officer is known to “hold strong views on topics that are relevant to issues in the case by reason of public statements or other expression of opinion on such topics” or where a close member of a judge’s family may be politically active.³⁶ In circumstances such as these where the judge’s own impartiality and detachment may be in question, possible disqualification of the judge may have to be addressed.³⁷

The AIJA Guide to Judicial Conduct refers to two well-established limitations and principles which need to be considered in relation to the potential for extra-judicial activities to give rise to bias or a conflict of interest.³⁸

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties.³⁹ An appearance of continuing ties such as attendance at political gatherings, political fund raising events or through contribution to a political party, should be avoided.⁴⁰
- The judge’s primary task and responsibility is to discharge the duties of office. A judge should avoid extra-judicial activities that are likely to cause a judge to have to refrain from sitting on a case because of an appearance of bias or because of a conflict of interest that would arise from the activity.

As stated in the AIJA Guide to Judicial Conduct at 3.2, the guiding principles are:

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;
- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit.

In a similar vein, the CJC Ethical Principles for Judges states that “the appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and reasonable person”.⁴¹ Applying that test the CJC Ethical Principles for Judges states:⁴²

Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded person would have a reasoned suspicion of conflict between a judge’s personal interest (or that of a judge’s immediate family or close friends or associates) and a judge’s duty.

Disqualification is not appropriate if (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

The matter of conflicts of interest is also dealt with in the Judiciary of England and Wales Guide to Judicial Conduct and provides the following practical guidance:⁴³

The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a judge from hearing a case is the subject of Strasbourg, English and Welsh, and Commonwealth jurisprudence which will guide judges in specific situations and any attempt to summarise, or comment in detail, would be unhelpful and inappropriate. Recent English cases include *Locobail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451; *R v Bow Street Magistrates ex parte Pinochet (No 2)* [2000] 1 AC 119; *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *M v Islington LBC* [2002] 1 FLR 95; *Lawal v Northern Spirit Ltd* [2003] UKHL 35.

Circumstances will vary infinitely and guidelines can do no more than seek to assist the judge in the judgment to be made, which involves, by virtues of the authorities, considering the perception the fair minded and informed observer would have.

It is important for judicial officers to follow an appropriate procedure when the question of disqualification arises. A recommended procedure is outlined in the AIJA Guide to Judicial Conduct:⁴⁴

- (a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.
- (b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:
 - (i) The head of the jurisdiction;
 - (ii) The person in charge of listing;
 - (iii) The parties or their legal advisersnot necessarily personally, but using the court's usual methods of communication.
- (c) Disqualification is for the judge to decide in light of any objection, but trivial objections are to be discouraged.
- (d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.
- (e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.
- (f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.
- (g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.
- (h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.

- (i) The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

The Judiciary of England and Wales Guide to Judicial Conduct contains the following additional practical guidance:⁴⁵

Judges should... be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately. If the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear a case, parties would be encouraged to attempt to influence the composition of the bench or to cause delay and the burden on colleagues would increase. A previous finding or previous findings by the judge against a party, including findings on credibility, will rarely provide a ground for disqualification. The possibility that the judge's comments in an earlier case, particularly if offered gratuitously, might reasonably be perceived as personal animosity, cannot be excluded but the possibility should occur, and is likely to occur, only very rarely.

The Guide goes on to consider the practical aspects of the disqualification procedure:⁴⁶

If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present so that they are to be disclosed to the parties, that should be done well before the hearing, if possible. Case management procedures will often enable this to be achieved. Disclosure, if followed by recusal, on the day of the hearing will almost certainly involve additional costs for the parties and will frequently cause listing difficulties. It must, however, be acknowledged that listing arrangements in many courts will be such that advance notification may often not be possible and disclosure only on the day of the hearing will be appropriate and sometimes inevitable. The judge should bear in mind the difficult position in which parties, and their advisers, are placed by disclosure on the day of the hearing, when making a decision whether to proceed.

Disclosure should of course be to all parties and save, when the issue has been resolved by correspondence before the hearing, discussion between the judge and the parties as to what procedure to follow should normally be in open court, unless the case itself is to be heard in chambers. The consent of the parties is a relevant and important factor but the judge should avoid putting them in a position in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties consent to the judge sitting, if the judge, on balance, considers that recusal is the proper course, the judge should act. Conversely, there are likely to be cases in which the judge has thought it appropriate to bring the circumstances to the attention of the parties but, having

considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

A judge is entitled to keep in mind his general duty to try the case in his or her list and the listing burden and delay which may be occasioned by a recusal. Moreover, it must be recognised that the urgency of the situation may be such that a hearing is required in the interests of justice notwithstanding the existence of arguable grounds in favour of disqualification.

Magistrates may find it also useful to refer to pages 48 and 49 of the CJC Ethical Principles for Judges, which deals with the disqualification procedure. In relation to the principle of necessity the Guide states:

The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.

- **Integrity and Personal Behaviour**

The AIJA Guide to Judicial Conduct recognises the duty of all judicial officers to “uphold the status and reputation of the judiciary, and to avoid any conduct that might diminish public confidence in, and respect for, the judicial office”.⁴⁷ There is a duty imposed on all judicial officers to avoid any conduct in and out of court that may have such a negative effect.

The Judiciary of England and Wales Guide to Judicial Conduct at 4.1 contextualises the duty:

As a general proposition, judges are entitled to exercise the rights and freedoms available to all citizens. While appointment to judicial office brings with it limitations on the private and public conduct of a judge, there is a public interest in judges participating insofar as their office permits in the life and affairs of the community. Moreover, it is necessary to strike a balance between the requirements of judicial office and the legitimate demands of the judge’s personal and family life. Judges have to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. Judges should avoid situations which might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations which might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour which might be regarded as merely unfortunate if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.⁴⁸

The CJC Ethical Principles for Judges also stresses the importance of judicial integrity:⁴⁹

Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.

The CJC Guide states that:⁵⁰

- Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.
- Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

Later on, the CJC Ethical Principles for Judges stresses the important role played by judicial demeanour (in the court room) in maintaining integrity, impartiality and, of course, independence:

While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.⁵¹

The CJC Guide goes on to consider the part played by judicial demeanour in promoting public confidence in the judiciary:⁵²

Litigants and others scrutinise judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudice and intemperate and impatient behaviour may destroy the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality... It bears repeating... that any action which, in the mind of a reasonable, fair minded and informed person who has considered the matter, would give rise to reasoned suspicion of a lack of impartiality must be avoided. When such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.

The starting point is the conduct of a judicial officer in court. This is addressed in the AIJA Guide to Judicial Conduct:⁵³

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, integrity, the

impartiality and independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

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

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

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

The Judiciary of England and Wales Guide to Judicial Conduct embraces these statements, but goes somewhat further:⁵⁴

A judge's conduct in court should uphold the status of judicial office, the commitment made in the judicial oath and the confidence of litigants in particular and the public in general. The judge should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. The judge should ensure that no one in court is exposed to any display of bias or prejudice on grounds said in the *Bangalore Principle* entitled "equality" to include but not limited to "race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes". There should be no bias or prejudice on those grounds, which are described in the principles as "irrelevant grounds". In the case of those with a disability care should be taken that arrangements made for and during a court hearing do not put them at a disadvantage.

The AIJA Guide to Judicial Conduct states the importance of a judicial officer maintaining impartiality in the court room. It states that that when it becomes necessary for the judge to question a witness or engage in debate with counsel, the

judicial officer must be careful not “to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion”.⁵⁵

As stressed by the Guide, “ the principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise, then in the presence of, or with the previous knowledge and consent of the other party (or parties) once a case is under way is, very well known”.⁵⁶ The Guide guards against inadvertent breaches of this very important principle:

It is important to bear in mind that breaches of the principle can occur through oversight, sometimes when attempts are made to adopt what may seem to be practical, convenient or time-savings measures. Care should be taken, for example, on country circuits if suggestions are made about shared travel that seem sensible at the time, but in fact may involve a breach of the principle.⁵⁷

The fifth chapter of the AIJA Guide to Judicial Conduct is particularly instructive in that it deals with specific examples of conduct or activities engaged in by a judicial officer outside the courtroom which may have the potential to impact upon the impartiality, independence or integrity of the judicial officer, such as:

- membership of a government advisory body or committee;
- making of a submission or giving evidence to a parliamentary inquiry relating to the law or the legal system;
- judge acting as a law reform commissioner;
- membership of a non-judicial tribunal;
- membership of a parole board;
- participation in public debate;
- public debate about judicial decisions;
- writing for newspapers or periodicals; appearing on television or radio;
- legal teaching;
- legal writing;
- taking part in conferences;

- professional development;
- welfare of judicial colleagues

Chapter 5 of the AIJA Guide to Judicial Conduct begins with the general statement that “principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction and approval to approach the judge in question”.⁵⁸ It is then for the head of jurisdiction to consider “the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court”.⁵⁹ As part of that consideration, the head of jurisdiction will consult with other members of the jurisdiction as appropriate, and if there no objection in principle the head of jurisdiction will consider whether the judicial officer concerned can be made available to take up the appointment.⁶⁰ As stated in the Guide “it is inappropriate, subject to legislative provision, for a serving judge to accept payment other than reimbursement of expenses or an equivalent allowance, in connection with a non-judicial appointment”.⁶¹

The AIJA Guide acknowledges that there is no simple answer to the question whether a judge should serve on a statutory or advisory body or committee; however it goes on to say that “it is generally not inappropriate for a judge to be a member of a committee dealing with matters having a direct relationship with judicial office such as court structures, law reform or other legal issues, and there may be other cases in which it would be desirable in the public interest to have the benefit of a judge’s expertise and experience on a government committee or advisory body”.⁶² Much will depend upon the role and terms of the body or committee; and the judicial officer should always be aware that membership of such a body or committee may entail advising on issues that are of a controversial nature and may “be inconsistent with the perceived impartiality and political neutrality of judge”.⁶³

The AIJA Guide also acknowledges that it is appropriate for a judicial officer to make a submission or give evidence to a parliamentary inquiry relating to the law or the legal system provided the judicial officer takes care to “avoid confrontation or the discussion of matters of a political rather than a legal nature” and preferably consults beforehand with the head of jurisdiction.⁶⁴

As regards a judicial officer acting as a law reform commissioner, the AIJA Guide at 5.3 recommends:⁶⁵

As long as time spent in the work of the commission does not interfere with judicial duties, and if the approval of the head of the jurisdiction has been given, there need not be any conflict between the role of the commissioner and judge.

As in situations dealt with already, the experience of a judge can be valuable in considering the need for reform in a particular area of the law, and in looking at the effect in practice of proposed changes. This need not be in conflict with a judge's judicial duties or detract from judicial independence.

The AIJA Guide to Judicial Conduct at 5.4 states:

There are a number of tribunals in respect of which there is a statutory authority for judicial membership, but in some other cases – particularly if decisions of the tribunal are likely to be controversial as in the case of some sporting disciplinary tribunals – the judge should weigh the risks of involvement and adverse publicity before accepting appointment. In the case of private or sporting tribunals, the judge should consider whether any apparent conferring of judicial authority on the tribunal is appropriate.

The AIJA Guide sees no objection to a judicial officer being a member of a parole board if there is legislative provision for judicial membership – however in the absence of such a provision, “the risk of conflict with a sentencing judge and a threat to judicial comity, however slight, might be seen by some judges as making membership undesirable”.⁶⁶

The AIJA Guide to Judicial Conduct recommends that considerable care be exercised by a judicial officer before participating in and contributing to public debate.⁶⁷ When considering whether it is appropriate to do so the judicial officer should take into account the following:⁶⁸

1. A judicial officer must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;
2. The venue at which, or the occasion on which, a judge participates may cause the public to connect the judicial officer with a particular organisation, group or cause;
3. There exists a risk that the judicial officer may express views, or be led in the course of the debate to express view, that will give rise to issues of bias or prejudice in cases that later come before the court ;
4. Expressions of views on private occasions must also be considered carefully as they may lead to a perception of bias;
5. Other judicial officers may hold conflicting views, and may wish to respond, possibly giving rise to a public conflict between judicial officers which may cause the judiciary to be held in disrepute or reduce the authority of a court;

6. A judicial officer, subject to the restraints that adhere to judicial office, has the same rights as other members of the public to take part in public debate;
7. A judicial officer who participates in a public debate cannot expect to receive the respect that he or she would receive in court and cannot expect to take part in and leave the debate on their terms.

In some cases the issue (which is the subject of public debate) calls for a response on behalf of the judiciary, and that response should come from the head of jurisdiction.⁶⁹

The AIJA Guide confirms the well-established prohibition on public debate about judicial decisions:

It is well established that a judge does not comment publicly once reasons for judgment have been published even to clarify ambiguity.⁷⁰

Where the decision of a court attracts unfair, inaccurate or ill-informed criticism or comment – which may unfairly reflect upon the competence, integrity or independence of a court – it may be appropriate for the head of jurisdiction to respond.⁷¹

The AIJA Guide to Judicial Conduct states that there is no objection to judicial officers writing for legal publications;⁷² nor any objection to a judicial officer writing articles in newspapers or non-legal periodicals with a view to informing the public about either the law or the administration of justice generally, subject to desirability of the judicial officer consulting with the head of jurisdiction before agreeing to write such an article.⁷³ Participation in radio talk back or television programs should be restricted to speaking on matters concerning the administration of justice – subject to the considerations set out in [5.6.1] of the Guide.⁷⁴

The AIJA Guide does not regard legal teaching and the performance of judicial functions as being incompatible, provided so long as the teaching does not interfere with judicial duties and the judicial officer is aware of the danger of expressing a particular view on an uncertain aspect of the law during the course of teaching students that they may have to decide as a judicial officer.⁷⁵

A preface to a legal textbook written by a judicial officer is unlikely to be open to objection;⁷⁶ however, the AIJA Guide points out that care and discretion may be called for in writing a preface to a non-legal book: “both the subject matter of the work and the relationship of the judge to the author need to be weighed in order to avoid any perception that the judge may be promoting a particular cause or taking a political stance, or that the author’s reason for seeking to involve the judge might be more mercenary than personal”.⁷⁷ It is not considered to be wrong for a judicial officer to receive payment for writing or contributing to a legal textbook.⁷⁸

The AIJA Guide to Judicial Conduct points out that judicial officers may and frequently deliver papers at legal conferences.⁷⁹ Although “participation in, or the giving of papers at non-legal conference, without a fee, is not objectionable... it would generally be advisable to avoid speaking or writing on controversial or politically sensitive topics”.⁸⁰

The AIJA Guide emphasises the importance of professional development in maintaining the high standards expected of the judiciary,⁸¹ and acknowledges that whilst judicial officers are individually responsible for pursuing opportunities for professional development, it is expected that the courts of which they are a member “will support them by providing reasonable time out of court and appropriate funding”.⁸²

As pointed out in the AIJA Guide to Judicial Conduct, a court is “a collegial institution” and “members of a court can be expected to care about the welfare of their colleagues, particularly if a colleague’s health or wellbeing might affect the discharge of his or her duties.”⁸³ As also pointed out in the Guide, it will “usually be appropriate to inform the head of jurisdiction if there is cause for concern about the welfare of a colleague”.⁸⁴ Furthermore, a judicial officer whose ability to perform judicial functions is affected by ill-health should themselves raise the matter with the head of jurisdiction.⁸⁵

Chapter six of the AIJA Guide provides practical guidance to judicial officers as to the compatibility of non-judicial activities with the performance of judicial duties.

The Guide makes it clear that upon appointment judicial officers should cease to hold inconsistent offices or positions and to undertake inconsistent work.⁸⁶

Judicial officers need to be extremely careful about engaging or becoming involved in commercial activities.⁸⁷ The AIJA Guide acknowledges that it is not possible to be definitive about the kind of commercial activities that are appropriate or inappropriate.⁸⁸ However, the Guide points out “the permissible scope of involvement” in such activities is limited by a number of considerations:

1. Judicial office is a full time position which must take priority over any non-judicial activities;
2. The terms and conditions of judicial office (including judicial salary) should afford a sufficient level of financial security to obviate the need for a judicial officer to engage in commercial activities in order to obtain additional income that might give rise to a conflict of interest or otherwise undermine public confidence in the judiciary;

3. Directorships of public companies should be relinquished on appointment to judicial office and not accepted during the tenure of office.⁸⁹

Furthermore, the judicial officer should always consider how the non-judicial activity might “reflect on the judicial office”.⁹⁰ For example, involvement in unlawful activity would obviously fall outside the permissible scope; and engaging in an activity likely to arouse controversy would be ill-advised.⁹¹ Involvement in activities that might reasonably be perceived to take advantage of the judicial officer’s office or in business activities with persons likely to come before the court are to be avoided.⁹²

The AIJA Guide considers the following to be within the permissible scope of non-judicial activities: hobby farms and similar recreational pursuits and directorships of small family companies.⁹³

Whilst the Guide considers management of deceased estates for close family members (either as executor or trustee) as being an unobjectionable extra-judicial activity and may be “acceptable even for other relatives of friends if the administration is not complex, time consuming or contentious”, the Guide points out that “the risks associated with the office of trustee, even of a family trust, should not be overlooked” - include the dissatisfaction of beneficiaries with the management of the trust.⁹⁴ The Guide cautions judicial officers to weigh the risks before taking on the role of trustee.⁹⁵

The AIJA Guide to Judicial Conduct deals with the acceptance of gifts by judicial officers.⁹⁶ Whilst gifts from family or close friends received by a judicial officer in a personal capacity (unrelated to judicial office) pose no problem, gifts which in some way relate, or might relate, to the judicial office require careful consideration on the part of a judicial officer before such a gift.⁹⁷ As regards the latter category of gift, a small gift to judicial officer by way of gratitude for making a speech or otherwise taking part of a public or private function is unobjectionable.⁹⁸

Engagement in community organisations is addressed by the AIJA Guide to Judicial Conduct (at 6.5). Involvement in community organisations, particularly educational, charitable and religious organisations, is to be encouraged because such engagement carries with a “broad based public benefit” – provided it does not compromise judicial independence or threaten judicial integrity.⁹⁹ The permissible scope of such activity is subject to the following considerations: the activities should not be too many or time consuming, the judicial role should not involve active management and the extent to which the organisation is subject to governmental control or intervention must be weighed.¹⁰⁰ As the AIJA Guide points out, certain risks attach to involvement in community organisations: the organisation may become involved in disputes (in particular with executive arm of government), the organisation may fail to comply with legislation and the organisation may get into financial difficulty.¹⁰¹

On the matter of public fund raising, the AIJA Guide makes it clear that a judicial officer should “avoid any involvement in fund raising such as might create a perception that use is being made of, or advantage taken, of the judicial office”.¹⁰²

The matter of judicial officers providing character references and giving character evidence in court proceedings is dealt with in the AIJA Guide at 6.7.¹⁰³ In States other than New South Wales,¹⁰⁴ the position is summarised by the Guide as follows:¹⁰⁵

1. The provision of a character reference or a reference as to professional competence of a person is unobjectionable as long as the person is well known to the judicial officer;
2. The giving of character evidence in court must be carefully considered by the judicial officer in the particular context of the case – preferably in consultation with the head of jurisdiction.¹⁰⁶

The AIJA Guide to Judicial Conduct recommends care be taken in relation to the use by a judicial officer of the judicial title:

...care should be taken not to create an impression that a judge’s name, title or status is being used to suggest in some way that preferential treatment might be desired or that the status of office is being used to seek some advantage, whether for the judge or someone else.¹⁰⁷

Similarly, the use of judicial letterhead by a judicial officer in relation to correspondence unconnected with official duties should be avoided, as such use might be perceived as seeking preferential treatment.¹⁰⁸

The caution that a judicial officer needs to exercise in relation to the protection of personal interests is addressed at 6.10 of the AIJA Guide to Judicial Conduct:

Judges should be circumspect about becoming involved in personal litigation, even if the litigation is in another court. Good sense must prevail and although this does not mean that a judge should abandon the legitimate pursuit or defence of private interests, their protection needs to be conducted with great caution to avoid creating any impression that the judge is taking improper advantage of his or her position.

The extent to which it is proper for a judicial officer to engage in social and recreational activities is, as pointed out in the Guide, not straightforward and is replete with “grey areas”.¹⁰⁹ The primary guideline is that “judges should themselves assess whether the community may regard a judge’s participation in certain activities as inappropriate”.¹¹⁰

The AIJA Guide specifically deals with social contact between judicial officers and the legal profession.¹¹¹ Although there is no objection in principle to social contact between judicial officers and the profession, there is one caveat – which is that direct association with members of the profession who are engaged in current or pending cases before the judicial officer concerned is to be avoided.¹¹²

The AIJA Guide also refers to the difficulties in relation to circuit courts and country sittings:

Circuit courts, however, may pose some difficulties. It is common for members of the legal profession in country areas to entertain the judge, either in a group or in private homes. The judge in accepting or offering hospitality must be seen to be even-handed towards legal practitioners engaged in the current sittings. The judge should not be regularly entertained by or retain too close a relationship with a practitioner who regularly has litigation before the court.

Similarly, in country sittings involving criminal cases, care must be taken not to accept assistance outside the court from police who might be appearing in cases in the sittings. Some judges consider that they should not rely on the police to supply transport to and from the courthouse in order that it might not be thought that the judge is siding with those regarded as representing the prosecution.¹¹³

As to membership of clubs, the AIJA Guide states that it is generally accepted that a judicial officer should refrain joining a club that engages in any “form of invidious discrimination”.¹¹⁴ The Guide points out that there are different views as to whether a judicial officer should become a member of a club that permits only male or female membership – noting that in some courts the collective view is that social functions organised by judicial officers should not be held at such clubs.¹¹⁵

Finally, the Guide states that there is in general no objection to a judicial officer serving on sporting and other club committees provided such activity does not unreasonably impinge upon the performance of judicial duties.¹¹⁶

• **Other Standards of Conduct**

The CJC Ethical Principles for Judges emphasises the need for judicial diligence: “judges should be diligent in the performance of their judicial duties”.¹¹⁷ Judicial diligence requires the following efforts and endeavours on the part of judicial officers:¹¹⁸

- Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court’s operation;
- Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office;

- Judges should endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness;
- Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

In a similar vein, the Judiciary of England and Wales Guide to Judicial Conduct emphasises the importance of judicial competence and diligence, reflecting the statement made by Lord Bingham of Cornhill in his 1993 lecture to the Society of Public Teachers of Law entitled *Judicial Ethics*:¹¹⁹

It is a judge's professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence.

The Guide goes on to say:¹²⁰

Plainly this requires the judge to take reasonable steps to maintain and enhance the judge's knowledge and skills necessary for the proper performance of judicial duties, to devote the judge's professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.

Chapter 5 of the CJC Ethical Principles for Judges points out that judges should conduct themselves and proceedings before them so as to ensure equality according to law.¹²¹ With a view to maintaining and enhancing such equality the Guide states:

- Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination;
- Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability;
- Judges should avoid membership in any organisation that they know currently practices any form of discrimination that contravenes the law;
- Judges, in the course of proceedings before them, should dissociate themselves from and disapprove of clearly irrelevant comments or conduct staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.¹²²

Conclusion

The purpose of this chapter has been to provide practical guidance to magistrates throughout the Commonwealth as to how they should conduct themselves both in and out of court within the framework of the Latimer House Principles – by reference to three significant guides to judicial conduct which, consistent with the Latimer House Principles, are concerned with developing standards of judicial conduct so as to preserve the independence as well as the accountability of all judicial officers.

¹ Principle VII (b).

² 1.1 of the Guide to Judicial Conduct (2nd edition 2007) published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration (AIJA) incorporated.

³ Justice Thomas *Judicial Ethics in Australia* 2nd ed 1997, 9.

⁴ Principle VI on Ethical Governance.

⁵ 1.2 of the AIJA Guide to Judicial Conduct.

⁶ Preface to the AIJA Guide to Judicial Conduct where this observation is made in relation to the Australian judiciary.

⁷ 1.1 of the AIJA Guide to Judicial Conduct.

⁸ Foreword to the Judiciary of England and Wales Guide to Judicial Conduct.

⁹ 1.6.2 of the Guide.

¹⁰ 1.2 Purpose.

¹¹ 2 of the AIJA Guide to Judicial Conduct.

¹² 2 of the AIJA Guide to Judicial Conduct.

¹³ 2.1 of the AIJA Guide to Judicial Conduct. See also 2.2 of the Judiciary of England and Wales Guide to Judicial Conduct.

¹⁴ Chapters 2, 3 and 6 of the Guide.

¹⁵ 1.3 and 1.4 of Judiciary of England and Wales Guide to Judicial Conduct.

¹⁶ 1.4 of the Judiciary of England and Wales Guide to Judicial Conduct.

¹⁷ 1.4 of the judiciary of England and Wales Guide to Judicial Conduct.

¹⁸ Chapters 2, 3 and 4 of the Guide.

¹⁹ 2.2.2(a) of the Guide.

²⁰ 2.1 of the Guide.

²¹ 2.1 of the Guide.

²² 2 Judicial Independence, Statement.

²³ 2 Judicial Independence, Principles 1 to 4.

²⁴ 1.6.3 of the Guide.

²⁵ 6 Impartiality, Statement.

²⁶ Principle 3.1 of the Judiciary of England and Wales Guide which adds that a judge should also ensure that their conduct maintains and enhances the confidence of the legal profession and litigants in the impartiality of the judge and of the judiciary. See the introduction to Chapter 3 of the AIJA Guide to Judicial Conduct which extends this requirement to both the public and private life of a judicial officer.

²⁷ 2.1 of the Guide.

²⁸ 2.1 of the AIJA Guide to Judicial Conduct.

²⁹ 2.1 and Chapter 3 of the AIJA Guide to Judicial Conduct.

³⁰ For a full discussion of these circumstances and their potential to give rise to bias or a conflict of interest see 3.1 and 3.2 of the AIJA Guide to Judicial Conduct which can be viewed by accessing the following link: www.aija.org au.aija publications. A full discussion of these various aspects can also be found at in 6 Impartiality (Statement, Principles and Commentary) of the CJC Ethical Principles For Judges which can be accessed via the following link: www.cjc-ccm.gc.ca. See also Principle 3 and 4 of the Judiciary of England and Wales Guide to Judicial Conduct which is available to the following link: www.judiciary.gov.uk/wp-content/.

³¹ See also 7.2.3, 7.2.5, 7.2.6 and 7.2.8 of the Judiciary of England and Wales Guide to Judicial Conduct.

³² See also 7.2 of the Judiciary of England and Wales Guide to Judicial Conduct.

³³ See also 7.2.1, 7.2.2 and 7.2.8 of the Judiciary of England and Wales Guide to Judicial Conduct.

³⁴ See also Principle 6.C(1) of the CJC Ethical Principles For Judges.

³⁵ See also 3.3 of the Judiciary of England and Wales Guide to Judicial Conduct; p 28 of the CJC Ethical Principles For Judges.

³⁶ 3.4 of the AIJA Guide to Judicial Conduct. See also 3.10 and 3.3 of the Judiciary of England and Wales Guide to Judicial Conduct.

³⁷ 3.10 of the Judiciary of England and Wales Guide to Judicial Conduct.

³⁸ 3.2 of the Guide.

³⁹ Principles 6, C, D, E of the CJC Ethical Principles for Judges.

⁴⁰ Principles 6, C, D, E (and the commentaries on these principles) of the CJC Ethical Principles for Judges.

⁴¹ Principle 6, Impartiality.

⁴² Principle 6 E.

⁴³ 3.5 and 3.6 of the Guide.

⁴⁴ 3.5 of the Guide.

⁴⁵ 3.11 of the Guide

⁴⁶ 3.12 and 3.13 of the Guide.

⁴⁷ See 2.3 of the Guide.

⁴⁸ In a similar vein see the AIJA Guide to Judicial Conduct at 2.3.

⁴⁹ Principle 3, Integrity.

⁵⁰ Principle 3, Integrity.

⁵¹ Principle 3, Impartiality.

⁵² Principle 6 B.

⁵³ 4.1 of the Guide.

⁵⁴ 4.2 of the Guide.

⁵⁵ 4.2 of the Guide.

⁵⁶ 4.3 of the Guide.

⁵⁷ 4.3 of the Guide.

⁵⁸ Preface to Chapter 5.

⁵⁹ Preface to Chapter 5.

⁶⁰ Preface to Chapter 5.

⁶¹ Preface to Chapter 5.

⁶² 5.1 of the Guide. See also 5.1 (11.3) of the Judiciary of England and Wales Guide to Judicial Conduct.

⁶³ 5.1 of the AIJA Guide to Judicial Conduct.

⁶⁴ 5.2 of the Guide. See also 5.1(11)(2) of the Judiciary of England and Wales Guide to Judicial Conduct.

⁶⁵ See also Principle 2(8) of the CJC Ethical Principles for Judges which stresses that great care needs to be exercised by judicial officers who are requested to serve as “inquiry commissioners”:

“In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticised and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.

⁶⁶ 5.5 of the Guide.

⁶⁷ 5.6.1 of the Guide. See also 8.2 of the Judiciary of England and Wales Guide to Judicial Conduct and Principle 6 D(3)(d) of the CJC Ethical Principles for Judges.

⁶⁸ See 5.6.1 of the AIJA Guide to Judicial Conduct.

⁶⁹ See 5.6.1 of the AIJA Guide to Judicial Conduct.

⁷⁰ 5.6.2 of the Guide.

⁷¹ 5.6.2 of the AIJA Guide to Judicial Conduct.

⁷² 5.7 of the AIJA Guide to Judicial Conduct. See also 5.1(11)(1) of the Judiciary of England and Wales Guide to Judicial Conduct.

⁷³ 5.7 of the AIJA Guide to Judicial Conduct.

⁷⁴ 5.7 of the AIJA Guide to Judicial Conduct.

⁷⁵ 5.8 of the Guide.

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- ⁷⁶ 5.9 of the AIJA Guide to Judicial Conduct.
- ⁷⁷ 5.9 of the Guide.
- ⁷⁸ 5.10 of the AIJA Guide to Judicial Conduct.
- ⁷⁹ 5.11 of the Guide. See also 5.1 (11) (1) of the Judiciary of England and Wales Guide to Judicial Conduct.
- ⁸⁰ 5.11 of the AIJA Guide to Judicial Conduct.
- ⁸¹ 5.12 of the Guide.
- ⁸² 5.12 of the Guide.
- ⁸³ 5.13 of the Guide.
- ⁸⁴ 5.13 of the Guide.
- ⁸⁵ 5.13 of the AIJA Guide to Judicial Conduct.
- ⁸⁶ 6.1 of the AIJA Guide to Judicial Conduct. See also 5.1(12) of the Judiciary of England and Wales Guide to Judicial Conduct which provides that a judge shall not practise law while the holder of judicial office.
- ⁸⁷ 6.2 of the AIJA Guide to Judicial Conduct. See also 8.3 of the Judiciary of England and Wales Guide to Judicial conduct.
- ⁸⁸ 6.2 of the Guide.
- ⁸⁹ 6.2 of the Guide.
- ⁹⁰ 6.2 of the AIJA Guide to Judicial Conduct.
- ⁹¹ 6.2 of the AIJA Guide to Judicial Conduct.
- ⁹² 6.2 of the AIJA Guide to Judicial Conduct.
- ⁹³ 6.2 of the Guide.
- ⁹⁴ 6.3 of the Guide.
- ⁹⁵ 6.3 of the Guide. See also pp 50-51 of the CJC Guide.
- ⁹⁶ 6.3 of the Guide. See also 5.1 (14) – (16) and 8.8 of the Judiciary of England and Wales Guide to Judicial Conduct.
- ⁹⁷ 6.3 of the AIJA Guide to Judicial Conduct.
- ⁹⁸ 6.3 of the AIJA Guide to Judicial Conduct.
- ⁹⁹ 6.4 of the AIJA Guide to Judicial Conduct. See also 8.4 of the Judiciary of England and Wales Guide to Judicial Conduct and Principle 6 C (and commentary on 6 C) of the CJC Ethical Principles for Judges.
- ¹⁰⁰ 6.5 of the AIJA Guide to Judicial Conduct.
- ¹⁰¹ 6.5 of the Guide.
- ¹⁰² 6.6 of the Guide.
- ¹⁰³ See also 8.5 of the Judiciary of England and Wales Guide to Judiciary.
- ¹⁰⁴ The Judicial Commission of New South Wales has expressed the view that judicial officers should not give character evidence or provide written testimonials directed to the same issue except where it would be unjust or unfair to deprive the beneficiary of special knowledge possessed by the judicial officer and where a member of the judicial officer’s staff is given a reference relating to employment.
- ¹⁰⁵ 6.7 of the Guide.
- ¹⁰⁶ The type of issues to be considered and weighed include: whether it would be unfair to deprive the person in question of the benefit of such evidence, the availability of other persons to speak of the person’s generally good repute, the fact that evidence given by a judicial officer may put pressure on the court and the fact that the outcome of the case (whether favourable or not to the person concerned) may receive ill-informed publicity referable to the judicial officer’s involvement in the case.
- ¹⁰⁷ 6.8 of the Guide.
- ¹⁰⁸ 6.9 of the AIJA Guide to Judicial Conduct.
- ¹⁰⁹ 6.11 of the Guide.
- ¹¹⁰ 6.11 of the AIJA Guide to Judicial Conduct.
- ¹¹¹ 6.11.1 of the Guide.
- ¹¹² 6.11.1 of the AIJA Guide to Judicial Conduct.
- ¹¹³ 6.11.1 of the Guide.
- ¹¹⁴ 6.11.2 of the Guide.
- ¹¹⁵ 6.11.2 of the Guide.
- ¹¹⁶ 6.11.4 of the Guide. Note, as pointed out in the Guide, some judges consider that “a judge should not sit on a committee exercising disciplinary powers”.

¹¹⁷ Principle 4, Diligence.

¹¹⁸ Principle 4 of the CJC Ethical Principles for Judges.

¹¹⁹ 6.1 of the Guide.

¹²⁰ 6.1 of the Guide.

¹²¹ Principle 5, Equality.

¹²² Principle 5, Equality.

CHAPTER THREE

THE JUDICIAL FUNCTION AND PROCESS

In discharging the judicial function and duties, a judicial officer is required to perform an adjudicatory role in a variety of situations, and to make decisions. Adjudication is characteristically a judicial function, which may involve not only resolving disputes between parties in civil cases, but also determining the guilt or otherwise of an accused person in criminal proceedings. Judicial decision-making extends further, and encompasses rulings on the admissibility of evidence in both criminal and civil proceedings, rulings on interlocutory applications in civil cases, decisions as to whether or not an accused person should be granted bail and sentencing decisions in criminal matters. There are many other instances in which a judicial officer can be called upon to make a decision.

The judicial function is intertwined with the judicial process, which is a set of procedures or rules within the framework of which judicial officers perform their judicial function and duties.

The purpose of the remaining chapters of this Guide is to provide magistrates around the Commonwealth with practical guidance as to:

- the performance of their very important adjudicatory/decisional role – which must at all times be performed in an independent and impartial manner; and
- the process by which that adjudicatory/decisional role should be performed so as to ensure the independence, impartiality and integrity of the judiciary in a manner consistent with the Latimer House Principles and Guidelines and Commonwealth Guides to Judicial Conduct.

Chapter 4 deals with the multi-faceted adjudicatory role performed by magistrates in the exercise of their criminal jurisdiction – including the granting of bail, pleas of guilty, sentencing and the conduct of a summary criminal hearing before a magistrate.

Chapter 5 is concerned with self-represented accused persons and litigants and offers practical guidance in relation to the conduct of cases involving persons who are not legally represented.

Chapter 6 outlines the burdens and standards of proof that govern the decision – making process in criminal and civil proceedings and which provide a bastion against arbitrary decision making.

Chapter 7 deals with judicial evaluation of witnesses in criminal and civil proceedings - the cornerstone of the fact finding process.

Chapter 8 covers the process involved in reaching a decision in criminal and civil cases.

Chapter 9 deals with the importance of giving reasons for decision.

Chapter 10 addresses the writing of judgments.

CHAPTER FOUR

CONDUCT OF CRIMINAL PROCEEDINGS BEFORE A MAGISTRATE

The purpose of this chapter is to provide a guide for magistrates in the exercise of their criminal jurisdiction. Given there are 53 countries comprising the Commonwealth of Nations and an equal number of criminal legal systems with individual differences, this chapter only purports to be a general guide for magistrates and confines itself to fundamental aspects of the judiciary's conduct of criminal proceedings.

The chapter is divided into the following sections:

- Bail Determinations;
- Pleas of Guilty;
- Sentencing;
- Conduct of a Summary Criminal Hearing before a Magistrate

4.1 Bail Determinations

The decision to grant or refuse bail to an alleged offender is one of the most common judicial functions performed by a judicial officer, in the exercise of his or her criminal jurisdiction. It is apt to begin with the following overview of the bail process (provided by Arensen, Bagraic and Neal) in order to understand the concept of bail and its place within the criminal justice system and the competing interests to which the concept gives rise:

A fundamental hallmark of our criminal justice system is that a person (or corporation) accused of committing an offence is cloaked with a presumption of innocence. On the other hand, society also has a poignant interest in not only ensuring that the accused will appear for any scheduled court appearance, but also in protecting itself from criminals that present a very real danger to person or property. In many instances, the only means of achieving these interests is to incarcerate an accused, notwithstanding that he or she is cloaked with a presumption of innocence and the Crown has yet to substantiate the allegations against him or her. The inherent tension between the two competing interests becomes even more poignant when there is substantial or, in some instances, overwhelming evidence in support of the alleged offence(s). Thus, the concept of bail was introduced in order to assuage the seemingly irreconcilable tension between these competing and very legitimate interests. Another important factor

in ameliorating this tension is that an accused who is convicted and sentenced to a term of imprisonment must be credited with any time spent in custody prior to his or her ultimate conviction and sentence. Such considerations aside, there is no escaping the fact that any deprivation of an accused's liberty prior to conviction is inimical to the sacrosanct precept that all accused are cloaked with a rebuttable presumption of innocence which remains in effect unless and until they are convicted of one or more offences that are punishable by a term of imprisonment. Individuals or corporations who are arrested and charged with an offence can, as noted above, secure their liberty pending trial by agreeing, on certain conditions, to appear before the court to answer the charge (s) at a future date. The process by which the accused is permitted to remain at liberty unless and until ultimately convicted and sentenced to a term of imprisonment is known as bail. A person who is granted bail must appear in court as required by the terms of his or her bail.¹

In a similar vein, see the following observation made by Justice Adams in relation to the tension between the presumption of innocence and the protection of the community:

As there is no legal mandate for pre-trial punishment, a bail application can, at a theoretical level, be reduced to an assessment between the competing interests of the accused (who is presumed innocent until proven guilty and entitled to remain at liberty) on the one hand, and the community (which expects to be protected from "dangerous offenders") on the other hand. However, any realistic assessment of bail needs to work on the basis that the presumption of innocence must give way, in certain circumstances, to accommodate the community's interest in having guilt determined (which is facilitated by the accused's attendance at court) and protecting society against further harm from the offender. It is important that judicial officers and police bear these broader theoretical constructs underpinning the bail system in mind when they are making decisions concerning bail.²

The decision whether to grant or deny bail involves the exercise of a judicial discretion, which in turn entails the balancing of competing interests. However, as observed by Feld, Hemming and Anthony:

When speaking of the balancing of competing interests, it is important to keep in mind that the interests that need balancing are each public interests – bail is not simply a balancing of individual against public interests. The interests expressed in the presumption of bail and individual freedom are collective interests. They are part of the legal fabric that the entire community has an interest in protecting. This is important because it demonstrates that the question of bail is how to reconcile two public interests, which is a different task from that of balancing the competing claims of the individual against the community. If there is a competition between the individual interests and the community interests, many would regard the interests of the community as more important and the balance

would be struck differently. In questions of bail, we are balancing a strong community interest in freedom and presumption of innocence against other important public interests such as security and welfare of the community: see Judge Cross in *R v Wakefield* (1969) 89WN (Pt1) (NSW) 325, 326 cited in the NSW Law Reform Commission's report into bail (*Bail*, Report 133 (2012) p22).³

It is important to bear in mind that:

the decision to grant or refuse bail is an extremely important one. Refusal of bail not only seriously infringes an individual's basic liberty, but also has broader ramifications in the subsequent criminal processing of that individual, such as lack of access to legal and rehabilitation resources.⁴

It is well beyond the ambit of this chapter to deal with every bail system in every Commonwealth country. However, most, if not all, countries have legislation which creates a statutory regime in accordance with which a court makes a determination as to bail.

Some statutes create a presumption in favour of bail for some offences, and a presumption against bail for other offences. The statutes commonly prescribe the criteria to be considered in determining bail, such as the probability of the accused answering his or her bail by appearing in court on the scheduled date, the risk of re-offending and the interests of the accused which must be weighed and balanced in the context of the presumption in relation to bail (whatever that may be).

Where there is a presumption against bail in order for a court to grant bail the court must be satisfied that there are sufficiently countervailing considerations that support a grant of bail. Conversely, where the presumption is in favour of bail, a court should grant bail unless there are sufficiently countervailing considerations that support a refusal of bail.

The determination of bail involves the exercise of a judicial discretion. The discretion must not only be exercised judicially but in accordance with any statutory criteria for the granting of bail. Only relevant considerations are to be taken into account when determining the question of bail: irrelevant considerations are to be disregarded.

Generally speaking (subject to specific legislation), in deciding to grant bail to an accused the court may release the accused on his or her own undertaking (commonly referred to as a "recognisance" or "security"), release the accused on his or her undertaking together with a deposit of money or other security; release the accused on his or her own undertaking with a surety or sureties,⁵ or release the accused on his or her own undertaking together with a deposit of money or other security and with a surety or sureties.

As stated in the previous version of this Guide:

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Sureties of a specific sum of money may... be required from the accused and from relatives or others who may be willing to undertake that the accused will appear in court in due course. It is important, since the sums of money pledged may be forfeited if the accused fails to appear, that the bench makes certain that those standing surety appreciate what they are taking on. It is good practice to call a surety to give evidence on oath as to his or her means, since much distress may be caused to well-intentioned people, who, deceived into believing the accused's protestations of innocence and intention to stand trial, find themselves before the magistrate and in danger of losing their life savings or, if they cannot raise the sum pledged, of going to prison.

In addition the court may also impose such conditions as it sees fit to ensure that the accused attends court on the scheduled date and does not interfere with witnesses or offend whilst on bail.⁶ However, when imposing such conditions a magistrate should exercise care in ensuring the conditions are necessary and reasonable in all the circumstances, in light of the particular circumstances of the alleged offence and the alleged offender.

Where the court refuses bail the presiding magistrate should ensure as far as practicable that the proceedings against the accused are dealt with expeditiously so as to ensure the time the accused spends in custody is reduced to a minimum (bearing in mind the presumption of innocence) – being always mindful of the maxim “justice delayed is justice denied”.

Whenever a judicial officer makes a bail determination it is amenable to review by a higher court. As the judicial officer is duly accountable through the appellate process it is imperative that the bail determination be made in accordance with the rule of law.

Particular care should be taken by a magistrate when the question of bail arises in relation to a self-represented accused. The magistrate should make the self-represented accused aware of the nature of bail, that bail can be sought and what matters a court will take into account in deciding whether to grant bail.

4.2 Pleas of Guilty

Magistrates must ensure that all persons appearing before the court receive a fair trial; and that process extends to ensuring that persons – particularly to those who appear before the court without legal representation – when pleading guilty to a charge(s) understand the significance of a guilty plea and its consequences. Magistrates should follow an appropriate procedure when dealing with pleas of guilty by persons who are not legally represented.

There is an excellent section on this aspect of the criminal justice process in Ward Kelly *Summary Justice South Australia*. What follows is a summation of the commentary to be found at [8.210 – 8.310] of that loose leaf service:

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1. Best practice requires that the self-represented accused be told briefly and simply what the charge is and the nature of the charge before a plea is taken. The self-represented accused should be made aware that the plea is a matter for independent decision and that legal advice and representation may be sought. If the case is to be proceeded with, the self-represented accused should be informed of the seriousness of the charge and the penalties that may be imposed, including any power to impose a term of imprisonment, disqualify the accused from holding or obtaining a driver's licence, order compensation or forfeiture of property. The magistrate should in appropriate cases warn the self-represented accused in general terms of the possibility of imprisonment.
2. On a plea of guilty the magistrate should make it clear to the self-represented accused that matters of mitigation may be put to the court and that witnesses may be called. The magistrate should if necessary elicit the personal circumstances of the accused by questioning. The magistrate should inform a self-represented accused of statutory provisions empowering the court to refrain from recording a conviction upon a finding of guilt
3. On a plea of guilty, prior to the prosecutor placing before the court the alleged material facts, the magistrate should inform the self-represented accused that he or she is entitled to dispute or comment on the facts about to be alleged (including any previous criminal history). If the facts are disputed, the magistrate should afford the self-represented accused the opportunity to support the defence version by giving sworn evidence and/or by calling witnesses. If appropriate, consideration should be given by the magistrate to treating the accused's disputation of the facts as a plea of not guilty.
4. The magistrate should inform a self-represented accused where a term of imprisonment is being considered and afford the accused an opportunity to obtain legal advice, even at such a late stage of the proceedings.
5. Before accepting a plea of guilty from a self-represented accused a magistrate should be satisfied that the accused appreciated the nature of the charge and intended to admit his guilt with respect to the alleged offence and on the basis of the admitted facts the accused could in law be found guilty of the offence as charged. The magistrate should also be satisfied that the plea of guilty is attributable to a genuine consciousness of guilt. The plea of guilty must be unequivocal and not made in circumstances indicating that the plea is not a true admission of guilt. The plea must not have been induced by threats or other impropriety such as to render the plea not a free and voluntary admission of guilt, and not a reflection of a genuine consciousness of guilt.

6. It is important for the magistrate to ensure, as best he or she can, that the plea of guilty conforms to these requirements, because if the plea of guilty falls short of meeting these requirements the accused may be granted leave to withdraw his or her plea.

In the previous edition of this Guide some examples were given of unclear or equivocal pleas of guilty, which a magistrate should be cautious about accepting as a true admission of guilt:

Defendant A: The defendant says “I might as well plead guilty as I want to get it over today”.

Defendant B: The defendant says “If you say I drove through the red light I suppose I did”.

Defendant C: The defendant says “I suppose I’m guilty. I agreed to look after my boyfriend’s bike and now he’s been copped for stealing it”.

Defendant D: The defendant says “Of course I was drunk, but I don’t remember a thing about being disorderly or hitting the police officer or breaking the window”.

The plea of defendant A is obviously based on personal convenience and not a true admission of guilt; and should not be accepted as a true admission of guilt. Unless the defendant makes a definite admission of guilt the magistrate should adjourn the case to enable the defendant to obtain legal advice.

Similarly, the plea of defendant B does not amount to a true admission of guilt, because it leaves open the possibility that the defendant did not in fact disobey the red traffic signal, and may, to the extent that the relevant legislation permits, have a statutory defence. Again, if necessary, the magistrate should adjourn the case to enable the defendant to obtain legal advice.

The magistrate should not accept the plea of defendant C without affording the defendant to obtain legal advice.

The magistrate should not accept the defendant D’s plea unless it is satisfied that notwithstanding his or her lack of memory, the defendant is prepared to accept the version of facts put forward by the prosecution. Otherwise the magistrate should adjourn the matter to enable the defendant to obtain legal advice.

Magistrates should be particularly vigilant where the sole or main evidence against a self-represented accused is a confession made to police or other persons in authority. If the accused says or suggests that the confession was involuntary or illegally or improperly obtained the confession may not be admissible as evidence

against the accused. The magistrate should inform the accused accordingly and grant an adjournment to enable the defendant to obtain legal advice.

4.3 Sentencing

Criminal sentencing is the process by which a court determines what if any penalty should be imposed on a person found guilty of an offence.

Most, if not all, countries in the Commonwealth have a legislative framework within which the sentencing process takes place.

Such legislation usually sets out the aims or purposes of sentencing such as adequate punishment, deterrence (general and specific), protection of the community, denunciation, retribution, incapacitation, restoration and rehabilitation, which are also often dealt with in sentencing guidelines.

These various aims or purposes are conveniently discussed by Feld, Hemming and Anthony whose commentary is summarised as follows:⁷

“Adequate punishment” requires the imposition of a sentence that is appropriate in the sense of the sentence being a proportionate response to the seriousness of the offence, the maximum sentence for the offence and subjective features of the case.⁸

“Deterrence” is based on the notion that punishment acts as a disincentive and prevents further crime. The notion of deterrence operates at two levels: specific deterrence and general deterrence. Specific deterrence focuses upon the individual offender and aims to discourage him/her from participating in further criminal acts in fear of the consequences”. General deterrence “aims to discourage potential offenders in the community from engaging in criminal behaviour by showing them the severe consequences of such action.

“Denunciation” is aimed at delivering sentences that condemn the offender for his or her criminal conduct and communicating to the community that certain conduct is morally wrong as well as reflecting community disapproval of the conduct.

“Retribution” is based on the notion of “just deserts” by seeking to satisfy the community and the victim of the offence; however, it is not to be equated with the notion of vengeance.

“Incapacitation”, which is linked with the aim of community protection, is aimed at restricting an offender’s ability to re-offend by depriving the offender of his or her liberty.

“Community Protection” is directed at protecting the community against the risk of further offending.

“Rehabilitation” is predicated on the notion that criminal behaviour is the product of social, psychological and psychiatric factors and aims to address these factors through treatment and therapeutic programs to cure the root cause of the offending and to re-integrate the offender into society as a law abiding citizen.

“Restoration” or “restorative justice” is directed at bringing together all parties affected by the criminal conduct and restoring the damage caused by the offending through a process of therapeutic justice.

The relevant legislation usually establishes a range of sentencing options available to the sentencing court. Those options range from non-custodial dispositions (with or without conviction) such as good behaviour bonds, fines and community work orders to custodial sentences involving an actual or suspended term of imprisonment as well as community based custodial orders such as home detention. In some jurisdictions within the Commonwealth the availability of some of these options may be subject to the fulfilment of certain statutory pre-conditions or excluded by mandatory sentencing provisions requiring the imposition of a minimum term of imprisonment (which in some cases may be avoided by substantiation of “exceptional circumstances”).

The common law recognises a number of factors that are relevant to the determination of an appropriate sentence. These factors which commonly fall into two categories – aggravating factors and mitigating considerations – are often required by legislation to be taken into account by the sentencing court.

The sentencing of an offender is one of the most difficult and complex judicial functions undertaken by a magistrate. The sentencing process involves a number of considerations which must be taken into account and weighed and balanced – as well as being prioritised - with a view to arriving at an appropriate sentence. The methodology of sentencing becomes all important for the sentencing magistrate.

The common law countenances two different sentencing methodologies: the two-tiered method and the instinctive synthesis methodology.

According to the two-tier approach, the judicial officer first determines a sentence by reference to the “objective circumstances of the case”.⁹ The judicial officer then increases or reduces the sentence incrementally or decrementally by reference to other factors, usually, but not limited to, the personal circumstances of the offender.¹⁰

The two-tier approach is to be contrasted with the instinctive synthesis approach by which the sentencing magistrate identifies all of the factors that are relevant to the

determination of a proper sentence, discusses their significance and then renders a value judgment as to what is the appropriate sentence in light of all the sentencing factors of the case.¹¹

Which of these two different methodologies are to be applied by a magistrate presiding over a court in a Commonwealth country depends upon the local jurisprudence which may prefer one of these sentencing methodologies over the other, or indeed prescribe an entirely different methodology. The sentencing magistrate should follow the key principles guiding the sentencing methodology prescribed in their jurisdiction.

As stated in the previous edition of this Guide, arriving at any sentence is the most difficult of all judicial tasks. In undertaking that onerous task, courts are guided by the general principle that imprisonment is a measure of last resort and all other sentencing options should be considered prior to depriving a person of his or her liberty – particularly in relation to juvenile or young offenders.¹²

4.4 Conduct of a Summary Criminal Hearing before a Magistrate

If an accused person pleads not guilty to a criminal charge(s) a contested hearing is conducted before a magistrate.

The usual procedure at the hearing is for all witnesses for both the prosecution and the defence, with the exception of the accused, to leave the court room and wait outside until they are called to give evidence. An exception may be made for expert or technical witnesses, who are generally allowed to remain in court until it is their turn to give evidence.

Once a person has given evidence it is usual for them to remain in court for the rest of the case, but some may ask to be released to return to their normal routines. However, they should not be allowed to have any contact with those still outside the court room waiting to give their evidence. All efforts must be made to ensure that no access exists between those witnesses who have given evidence and those who are waiting to give evidence. This is important because all witnesses must give their evidence freely and independently, and free of influence or contamination.

After the charge is read and the defendant has pleaded not guilty, the prosecution opens its case. Sometimes the prosecution opens by stating the nature of the case against the accused – but there is no hard and fast rule in that regard. The prosecution then calls their witnesses to give evidence in relation to the alleged offence and events directly connected with it. Prior to giving evidence witnesses either take an oath, swearing according to their religious beliefs to tell the truth, or an affirmation whereby they formally undertake to the court to tell the truth.

The prosecutor may ask questions of witnesses to elicit their evidence in relation to the alleged offence – but this must be done in accordance with the rules of evidence. The presiding magistrate needs to be familiar with the rules of evidence operating in their jurisdiction.

After each of the prosecution witnesses have given evidence the accused or his lawyer has the right to cross examine the witnesses.

At the close of the prosecution case - when all of the evidence upon which the prosecution seeks to rely upon by way of proof of the guilt of the accused is before the court – the presiding magistrate may have to consider whether there is a case for the accused to answer. If the accused is legally represented then the lawyer may choose to make a “no case to answer” submission. If the accused is not legally represented, the accused should be given an opportunity to make such a submission, after the court has explained to him or her the nature of such a submission.

The concept of a “no case to answer submission” is well recognised in all common law jurisdictions throughout the Commonwealth. It is a submission by which an accused seeks to have a charge(s) dismissed without having to present a defence because of the insufficiency of the evidence adduced by the prosecution in support of the charge(s).

The test to be applied in relation to a “no case to answer” submission was explained by Lord Lane CJ in *R v Galbraith* {1981} 1 WLR 1039 at 1042:

If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allowed the matter to be heard by the jury.

In England and Wales this is the current approach to be taken to a no case to answer submission; and it is equally applicable to non-jury trials.

Generally speaking this approach applies to jury and non-jury trials (hearings before a magistrate or judge alone) in all Commonwealth countries; though there are variations from one jurisdiction to another. However, the common thread of a no

case to answer submission is that the evidence presented by the prosecution is insufficient for any jury properly directed to convict the accused of the alleged offence(s). The question is whether the accused could – not would – be found guilty of the alleged offence(s).

If there is no case to answer then the presiding magistrate should dismiss the charge(s) against the accused. If the presiding magistrate finds there is a case to answer, then the prosecution against the accused must proceed. Having found a case to answer the accused may elect to give evidence or call witnesses to give evidence on their behalf or to do both; or choose to close their case without giving evidence.

When all the evidence has been presented, both the legally represented accused and the prosecution have the opportunity to make final submissions to the court.

Particular care must be taken in relation to accused persons who are not legally represented (self-represented accused). The usually recommended procedure to be followed by the presiding magistrate is reflected in the set of guidelines issued by the Judicial Commission of New South Wales, which are to the following effect:¹³

- After the close of the prosecution case, the court must afford the self-represented accused the opportunity to make a submission that there is not sufficient evidence to prove the charge(s) and the charge(s) should be dismissed;
- In the event the self-represented accused does not make such a submission or a submission is made but rejected, the court must afford the person the opportunity to present any evidence they may wish to answer the prosecution case. The self-represented accused must be told that they do not have to give evidence themselves; nor do they have to call any witnesses to give evidence on their behalf. They should be told that they may give evidence themselves or choose not to give evidence. They should be told that if they choose not to give evidence their silence cannot be used against them. Even if they do not give evidence, they can still call witnesses to give evidence. They should also be told that they may also tender any relevant documents or things as exhibits in their case. They should be told that if they intend to give evidence and call witnesses it is normal for them to give their own evidence before calling their witnesses because if they give evidence after any of their witnesses have given evidence, the court may form the view that the self-represented accused has tailored his own evidence to accord with the evidence given by the witnesses. A decision not to call witnesses cannot be used against the self-represented accused;

- It should be made clear to the self-represented accused that whether or not they give evidence or call witnesses is entirely a matter for them. They must be informed that the prosecution has to prove the case against them; and they do not have to prove anything;¹⁴
- The self-represented accused should be advised that the prosecution has the right to cross examine them as well as any witnesses they call; and that at the end of the cross examination the self-represented accused may ask each witness further questions to explain or contradict matters put to them in cross examination which they might have been unable to explain or contradict during the cross examination itself. The self-represented accused should also be told that after they have been cross examined they have a similar opportunity to explain or contradict any such matters put to them during cross examination;
- The self-represented accused should be told that it is very important that all the evidence they want the court to hear be given during their case;
- When all the evidence has been presented, both the self-represented accused and the prosecution should be told that they have the opportunity to make final submissions to the court.

¹K Arenson, Bagaric and Neal *Criminal Processes and Investigative Procedures: Victoria and Commonwealth 2010*, [5.1].

² Justice Adams "Bail" a paper delivered to the Local Courts of NSW 2002 Annual Conference 2002.

³ F Feld, A Hemming and T Anthony *Criminal Procedure in Australia 2015*, 2.126.

⁴ J Stubbs "Bail or Remand" (1991) 16(6) *Legal Services Bulletin* 304.

⁵ Sureties are persons who guarantee and provide an undertaking that accused will attend court on the due date.

⁶ Those conditions may include reporting to a police station on fixed days and at set times, residential conditions including a curfew, non-association and non-contact conditions and non-travel conditions (including surrender of passport)

⁷ Feld, Hemming and Anthony n 3, [10.19].

⁸ These refer to the personal circumstances of the offender including his character, antecedents, criminal history and prospects of rehabilitation.

⁹ See for example see *Markarian v R* (2006) 228 CLR 357, 377-8.

¹⁰ *Markarian v R* (2006) 228 CLR 357, 377-8.

¹¹ *Markarian v R* (2006) 228 CLR 357, 377-8.

¹² Of course the application of this principle to subject to legislation imposing mandatory minimum sentences of imprisonment for certain offences or offenders.

¹³ Judicial Commission of NSW at www.judcom.nsw.gov.au/publications/benchbks./self-represented_accused

¹⁴ The latter is of course subject to any legal burden imposed on the accused.

CHAPTER FIVE

SELF REPRESENTED LITIGANTS AND ACCUSED PERSONS

As stated in the previous edition of this Guide:

Courts of first instance give most people their only experience of the law in action. Whatever the reason for their presence there, be they the accused, the victim, a chance witness or a party in a civil dispute, they are likely to be anxious and ill at ease. The manner in which the court treats them is therefore likely to make a lasting impact on their attitude towards the whole system of justice. A magistrate takes on a great task. On these occasions, the magistrate must remain impartial and non-biased in order for the defendant and/ or plaintiff to receive a fair trial.

The purpose of this chapter is to provide practical guidance to magistrates as how to conduct themselves in relation to criminal and civil cases involving self-represented litigants and accused persons.

5.1 Recognition of the Difficulties Faced by Self-Represented Persons in the Court System

At the outset, there needs to be an appreciation of the difficulties that self-represented persons face in the court system

As pointed out by the Judicial Commission of New South Wales, most self-represented persons – especially if they are an accused person or the opposing party is legally represented – face significant barriers in presenting their case in court.¹ Those difficulties include:²

- not understanding complex legislation and case law;
- not fully understanding the language of the law nor the language of the court;
- an inability to accurately evaluate the merits of their case;
- not fully understanding the nature and purpose of the proceedings in which they are engaged;
- not fully understanding the rules of court and/or an inability to apply the rules to the proceedings;³
- lacking emotional objectivity (or distance) and being excessively passionate about their case;

- lacking advocacy skills and an inability to adequately test an opponent's case or cross examine in an effective manner;
- experiencing anxiety, fear, frustration or bewilderment as a result of many of these shortcomings.

The difficulties experienced by self-represented persons in turn creates difficulties for courts. Those difficulties are identified by the Judicial Commission as follows:⁴

- proper processes and procedures not being followed by self-represented persons;
- difficulties in quickly and fully understanding the case of a self-represented person;
- the necessity for the court to intervene much more than usual and the concomitant difficulties such as finding the appropriate balance between intervention and neutrality;
- the difficulties faced by the opposing party or the prosecution in dealing with a self-represented person;
- Some self-represented persons can be querulant – and with that comes all of the difficulties created by a querulant litigant.

As pointed out by the Judicial Commission, all of the above difficulties are compounded if both parties are self-represented as they often are in civil cases and if the self-represented party (or parties) do not have English as their first language.⁵

5.2 The Right to Self-Representation and the Duties of the Court

As stated by the Judicial Commission of NSW, every person has a common law right to represent themselves in both criminal and civil proceedings.⁶ However, a court hearing a case between the prosecution and a self-represented accused or a self-represented party and a legally represented party has an overarching duty to give the self-represented accused or party either a fair trial or hearing; but cannot give assistance to the self-represented person in such a way as to conflict with the court's role as an independent, impartial and neutral adjudicator.⁷

5.3 The New South Wales Judicial Commission's Practical Guide to Managing Cases Involving Self Represented Persons

The Judicial Commission of NSW has, by way of practical guidance, made a number of recommendations as to how a court may minimise the difficulties faced and occasioned by self-represented parties.

The Judicial Commission recommends that at the start of the court proceedings the presiding judicial officer explain to the self-represented person the process that will be followed and rules and conventions pertaining thereto.⁸

Reference has already been made to the Judicial Commission's guidelines in relation to the conduct of criminal proceedings when the accused person is self-represented.⁹ In addition, and in all other cases, the Commission recommends that the presiding judicial officer should, in simple and direct and non-legal language, explain:¹⁰

- who is in court and their respective roles;
- how to address the presiding judicial officer and the other party (or their legal representative(s));
- the need to ensure mobile phones are either turned off or switched to silent mode;
- that notes of the proceedings may be taken but that the proceedings cannot be recorded;
- how to get access to any record of the court proceedings;
- the usual course of proceedings and the difference between evidence and submissions;
- the opportunity to ask questions if uncertain about any aspect of the proceedings and request a break in the proceedings; and
- that each party to the proceedings will be given an opportunity to present their case, but on the basis that only one person may speak at a time and that all parties must conduct themselves with politeness and respect;
- the purpose of the proceedings;

- the role of the presiding judicial officer – which is to ensure that all parties are able to present their evidence as fairly and effectively as possible, but to remain neutral and not favour either side, and ultimately to decide the case;¹¹ and
- the central issues in the proceedings that need to be decided by the court.

The Commission also makes a number of recommendations in relation to the court proceedings as they progress:¹²

- as mentioned before the self-represented person should be able to present their evidence as effectively as possible;
- any intervention by the presiding judicial officer for the purpose of assisting the self-represented person in that regard must be done without demonstrating any partiality and without assuming (or appearing to assume) the role of advocate for the self-represented person;
- it should be explained (in simple and direct, non-legal language) to the self-represented person when it is their turn to present their case and the manner in which they must do this;¹³
- it is permissible for the presiding judicial officer to intervene as and when necessary to ensure that the evidence given by a self-represented person accords with the rules of evidence and that the evidence is fully understood by the court;¹⁴
- It should be explained that the other party may want to question them (cross-examine) about the evidence they have given;
- Once cross-examination has been completed, the self-represented person should be asked if they wish to add anything more to their evidence based on their answers in response to cross-examination (in order to clarify any of those answers), and then permit them to do so;¹⁵
- The self-represented person should be made aware that they can, with the leave of the court, give additional evidence that has not emerged in either evidence in chief or cross-examination;
- It should be explained that if such leave is given, the other party may ask any final questions;

- If the self-represented person wishes to call witnesses they should be informed that witnesses should be called one by one in whichever order they think will best tell their version of events or explain their story; and that they should ensure that their witnesses give their evidence in a manner that adheres to the rules of evidence and allows the court to understand the evidence of the witnesses;¹⁶
- It should be explained that the other party may wish to cross-examine their witnesses;
- Once cross-examination has been completed, the self-represented person should be asked if they wish to ask their witness anything more (in order to clarify any part of their evidence), and then allow them to do so;¹⁷
- It should be explained that if any witness called by a self-represented person gives new evidence, the other party may ask any final questions;
- It should then be explained that it is now the other party's turn to present their evidence, or it is now time for each party to make final submissions.

Recognising the difficulties faced by a self-represented person in determining issues of admissibility of evidence or testing the other party's or their witnesses' evidence, the Judicial Commission of NSW states that as a matter of fairness the presiding judicial officer may need to intervene in the following circumstances:¹⁸

- when there is an issue as to the admissibility of evidence;
- when the self-represented person fails to identify an aspect of the other party's evidence that needs to be tested;
- when the self-represented person is using cross examination to raise irrelevant matters or in an unfair manner.

The Commission provides a commentary on the scope of intervention in all these circumstances – including the rules and methods by which the other party may present their case, the purpose and scope of cross-examination as well as the nature of re-examination.¹⁹

The Judicial Commission stresses the need for such intervention to occur without demonstrating any partiality or without the presiding judicial officer assuming (or appearing to assume) the role of advocate for the self-represented person.

Finally, but not least, the presiding judicial officer must let the self-represented person that they have the right to present final submissions.²⁰ In that respect the presiding judicial officer may, in simple and direct non-legal language, need to:²¹

- explain the purpose of final submissions, which is tell the court why they think they have proved their case;
- explain again the requisite standard of proof;
- explain that the other party is also allowed to make final submissions.

Generally speaking the self-represented person should be allowed to make their submissions without interruption, unless they are failing to comply with court rules or legal requirements, or the presiding judicial officer needs to have a particular submission clarified.²²

The Commission's Bench Book makes the point that if the presiding judicial officer does not give his or her decision at the end of the hearing, then they should explain precisely when the decision will be given and in what form the parties will receive it, including whether the parties are required to attend court to receive the decision.²³

5.4 Re F: Litigants in Person Guidelines

Magistrates around the Commonwealth may obtain practical guidance from the guidelines for judges when dealing with self-represented parties (in family law proceedings) formulated by the Full Court of the Family Court of Australia in *Re F: Litigants in Person Guidelines* (2001) FLC 93-072. Those guidelines are:

1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
2. A judge should inform the self-represented person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
3. A judge should explain to the self-represented person any procedures relevant to the court proceedings;
4. A judge should generally assist the self-represented person by taking basic information from witnesses, such as name, address and occupation;
5. If a change in normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is

any serious possibility of such a change causing any injustice to the self-represented person, explain to him or her the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;

6. A judge may provide general advice to a self-represented person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
7. If a question is asked, or evidence is sought to be tendered in respect of which the self-represented person has a possible claim of privilege, to inform the self-represented person of his or her rights;
8. A judge should attempt to clarify the substance of the submissions of the self-represented person;
9. Where the interest of justice and the circumstances of the case require it, a judge may:
 - draw attention to the law applied by the Court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the Court;
 - suggest procedural steps that may be taken by a party;
 - clarify the particulars of the orders sought by a self-represented person or the bases for such orders.

Deputy Chief Justice Faulks, in his paper “Self-Represented Litigants: Tackling the Challenge”,²⁴ critically discusses these guidelines and refers to *Kenny v Ritter* [2009] SASC 139 at [17], [19] and [23], where the judicial officer’s role in assisting a self-represented party was discussed at length:

The courts have recognised that when faced with a litigant in person, a measure of judicial intervention is not simply permissible but necessary, in order to ensure a fair hearing. The nature of the duty of a judge conducting a trial with a self-represented party has been the subject of a number of authoritative discussions. The general approach which a court should take to a litigant in person in civil proceedings was addressed by Samuels JA in *Rajski v Scitec Corporation Ltd*:

In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role as to as confer upon a litigant in person a positive advantage over the represented opponent...

The scope of the duty of the court to the litigant in person is constrained by the fact that the judge must endeavour to maintain the appearance of impartiality...

...when the self-represented litigant is before the court, the judge must ensure that a fair trial takes place. In order to achieve this, the judge is required to assist the self-represented litigant. However, the judge must equally ensure that despite any assistance to the litigant in person, the perception of impartiality is maintained.

Commenting on *Re F* and *Kenny v Ritter*, Deputy Chief Justice Faulks says:²⁵

A judge can attempt to “level the playing field” by assisting the SRL in accordance with the principles set out in *Re F* and *Kenny v Ritter*. But the judge must take care not to assist the SRL so much as to appear to be partial towards the SRL or to create disadvantages for the represented party. This is almost always easier said than done. The difficulty in achieving this balance is aptly summarised by the Full Court in *Re F*:

...neutrality is a key feature of the adversarial system. Judicial assistance cannot make up for lack of representation without an unacceptable cost to matters of neutrality.

It is simply not possible to create a level playing field where one party is represented by a professional and the other is not. Thus to provide a guideline to judges of this type, if applied literally, not only sets the judge an impossible task but is likely to create unreal expectations on the part of the litigant in person and at the same time give a false impression of lack of impartiality by the judge to the party who is represented.

The presence of SRLs in our adversary system represents a conflict in the fundamental principles upon which our court system is predicated - namely fairness and impartiality. It is possible for the judicial officer to provide the SRL with some assistance while at the same time preserving an appearance of impartiality, but the assistance which the judicial officer can provide is extremely limited.

5.5 The Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons.

The Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons is also a useful resource to guide magistrates as how they should interact with self-represented persons.²⁶

As mentioned in the body of the Statement of Principles the purpose of the statement is to “foster equal access to justice and equal treatment under the law”²⁷ in the context of self-represented persons. The principles purport to be “advisory in nature and are not intended to be a code of conduct”.²⁸ However:

Judges and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, whether or not they have legal representation.²⁹

The Statement of Principles, which aspire to providing “a useful tool to foster better access to justice for Canadians”, contains a number of guiding principles:³⁰

A. To promote Rights of Access

Access to justice for those who represent themselves requires that all aspects of the court process be open, transparent, clearly defined, simple, convenient and accommodating.

The court process should, to the extent possible, be supplemented by processes including case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.

Information, assistance and self-help support, self-represented persons should be made available through the normal means of information, including pamphlets, telephone and court house inquiries, legal clinics and internet searches.

All self-represented persons should be:

1. Informed of the potential consequences and responsibilities of proceeding without a lawyer;
2. Referred to available sources of representation, including those available from Legal Aid, pro bono assistance and community and other services;
3. Referred to other appropriate sources of information, education, advice and assistance.

B. To Promote Equal Justice

Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

Depending on the circumstances and nature of the case, the presiding judge may:

1. explain the process;
2. inquire whether both parties understand the process and the procedure;
3. make referrals to agencies able to assist the litigant in the preparation of the case;
4. provide information about the law and evidentiary requirements;
5. modify the traditional order of taking evidence;
6. question witnesses.

C. Responsibilities of the Participants in the Justice System – Both Justices and Court Administrators

Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity and assistance.

Forms, rules and procedures should be developed which are understandable to and easily accessed by self-represented persons.

To the extent possible, judges and court administrators should develop packages for self-represented persons and standardised court forms.

Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, abusive, or making no reasonable effort to prepare their own case.

¹ Judicial Commission of NSW at www.judcom.nsw.gov.au/publications/benchbks/equality/section10, 10.1.

² Judicial Commission of NSW n 2, 10.1.

³ This includes procedural steps such as the filing of court documents and the rules of evidence and cross examination.

⁴ Judicial Commission of NSW n 2, 10.2.

⁵ Judicial Commission of NSW n 2, 10.2

⁶ Judicial Commission of NSW n 2, 10.1

⁷ Judicial Commission of NSW n 2, 10.1.

⁸ Judicial Commission of NSW n 2, 10.3.

⁹ See pp 58-60 above.

¹⁰ Judicial Commission of NSW n 2, 10.3.2.

¹¹ The presiding judicial officer may also mention that he or she may ask more questions than they normally would in order to ensure that they understand the case presented by the self-represented person, with the proviso that if any such question concerns the other party in relation to the neutrality of the court that party should raise the matter.

¹² Judicial Commission of NSW n 2, 10.3.3.

¹³ It is recommended by the Commission that in discharging this function the presiding judicial officer should explain in a methodical manner (10.3.3.1):

1. That this is their opportunity to prove their version of events/side of the story;
2. What the standard of proof is in the proceedings;
3. The need to present all evidence that they think proves their case – subject to the qualification that in a criminal trial a self-represented accused has the right to remain silent.
4. That it is usual for a party to present their case by first giving their own evidence followed by the evidence of witnesses in their case.
5. That the giving of evidence is subject to the rules of evidence.

¹⁴ The Judicial Commission recommends that if such intervention is necessary it is essential that the presiding judicial officer explain the reason for the intervention so as to ensure neutrality.

¹⁵ The Judicial Commission's guidelines allow the presiding judicial officer to intervene if the self-represented person neglects to clarify or explain something that the court thinks requires clarification or explanation – but again the reason for the intervention should be explained so as to preserve neutrality.

¹⁶ It is permissible for the presiding judicial officer to intervene in the manner stated previously.

¹⁷ Again it is permissible for the presiding judicial officer to intervene if the self-represented person neglects to clarify or explain an aspect of the witness' evidence.

¹⁸ Judicial Commission of NSW n 2, 10.3.3.2.

¹⁹ Judicial Commission of NSW n 2, 10.3.3.2.

²⁰ Judicial Commission of NSW n 2, 10.3.3.3

²¹ Judicial Commission of NSW n 2, 10.3.3.3

²² Judicial Commission of NSW n 2, 10.3.3.3.

²³ Judicial Commission of NSW n 2, 10.3.3.3

²⁴ Deputy Chief Justice Faulks "Self-Represented Litigants: Tackling the Challenge", a paper delivered at the Managing People in Court Conference NJCA ANU 2013.

²⁵ Deputy Chief Justice Faulks n 24, 21 -22.

²⁶ Canadian Judicial Council (CJC) Issues Statement of Principles on Self-Represented Litigants and Accused Persons "Ottawa 12 December 2006, which can be accessed at <https://www.cjc-ccm.gc.ca>

²⁷ CJC Issues Statement n 26, 1.

²⁸ CJC Issues Statement n 26, 2.

²⁹ CJC Issues Statement n 26, 2.

³⁰ CJC Issues Statement n 26, 3-5.

CHAPTER SIX

BURDENS AND STANDARDS OF PROOF AND DECISION MAKING IN CRIMINAL AND CIVIL CASES

The burdens of proof in criminal and civil proceedings as prescribed by law are an essential mechanism for ensuring equality before the law (and hence the rule of law) and providing a safeguard against unprincipled and arbitrary decision making.

6.1 The Presumption of Innocence and the Criminal Burden and Standard of Proof

It is a fundamental common law principle that a person who is charged with a criminal offence is presumed to be innocent until proven guilty. The presumption of innocence, which was developed at common law towards the end of the 18th century,¹ is inextricably linked to the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt.² This has been described as “the golden thread of English criminal law”,³ and regarded as “a cardinal principle of our system of justice”.⁴ The presumption of innocence is such an important fundamental principle supported by “ordinary notions of fairness,⁵ and is an integral part of “the broader concept of a fair trial entrenched in common law”.⁶ It is a bedrock principle that not only protects the innocent from wrongful conviction, but also promotes the rule of law⁷ (which an independent judiciary is duty bound to uphold and safeguard).

Apart from its entrenchment at common law, the presumption of innocence is protected by the International Covenant on Civil and Political Rights:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.⁸

Furthermore, in certain countries Bills of Rights or Human Rights statutes provide some protection in terms of the presumption of innocence.⁹ For example, the *Canadian Charter of Rights and Freedoms* provide that any person charged with an offence has the right to be presumed innocent until proven guilty.¹⁰ In a similar vein, the *Victorian Charter of Human Rights* affords protection to the presumption,¹¹ as does also the *Human Rights Act* of the Australian Capital Territory.¹²

However, it should be noted that the presumption of innocence is not absolute and unqualified: *Sheldrake v DPP* (2004) UKHL 43(9). It is open to the legislative branch of government to override the presumption of innocence by reversing or shifting the burden of proof.¹³ But in order to do so the legislative provision in question must shift the onus of proof in clear and unambiguous language – otherwise the principle of

statutory interpretation, known as the “principle of legality”, will afford protection to the presumption of innocence:

When interpreting a statute, courts will presume that Parliament did not intend to reverse or shift the burden of proof, unless the intention was made unambiguously clear.¹⁴

In *Momcilovic v The Queen* French CJ discussed the important relationship between the common law presumption of innocence and the principle of legality:

The common law “presumption of innocence” in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an accused person in criminal proceedings will ordinarily be construed as imposing an evidential burden.¹⁵

It would seem to follow that where a national law clearly and unambiguously overrides the presumption of innocence – at least in the Australian context – an international instrument such as the *International Covenant on Civil and Political Rights* cannot be used to override the national law.¹⁶ However, if the national law is ambiguous, it would seem – again at least in Australia – that the legislative provision would be construed in a manner consistent with the particular nation’s international obligations under the international instrument.¹⁷

Consistent with the rebuttable presumption of innocence, as a general rule at common law the prosecution bears the onus (or burden) of proving the accused’s guilt beyond reasonable doubt.

As stated by Ligertwood and Edmond:¹⁸

This general rule was endorsed by the House of Lords in *Woolmington v DDP* [1935] AC 162 where it was held that no persuasive burden was cast upon an accused charged with murder to establish the defences of accident, mistake, self-defence, and so on, and once properly raised, the prosecution was required to rebut these issues to the ordinary criminal standard, beyond reasonable doubt.¹⁹ The only issues upon which the accused person bears a persuasive burden in a criminal case is where the accused raises the defence of insanity (which the accused must establish on the balance of probabilities),²⁰ or where statute so directs (expressly or by implication).

The burden borne by the prosecution in a criminal trial is commonly referred to as the “legal” or persuasive burden (or burden of proof), which can only be discharged

by the prosecution proving each and every element of a criminal charge beyond reasonable doubt.

As pointed out by Ligertwood and Edmond, *Woolmington* leaves open the matter of who bears the burden of adducing evidence on issues of accident and the more specific defences of self-defence, provocation and duress.²¹ However, the common law generally imposes “an evidential burden upon the accused in respect of defences, with the prosecution then being required to negative the defence once it has been properly raised by the accused”.²²

The evidential burden imposed on the accused was explained in *Momocilovic v R* (2011) HCA 34 at [665] in the following way:

An evidential burden is not an “onus of disproof”. An evidential burden does no more than oblige a party to show that there is sufficient evidence to raise an issue as to the existence (or non-existence) of a fact. Discharge of an evidential burden may require that an accused lead evidence in a defence case; it may be discharged by evidence adduced in cross-examination of witnesses in the prosecution case. In rare cases it may be discharged by reference to evidence adduced by the prosecution in chief.

In order to discharge the evidential burden, the accused must either point to or adduce evidence that is capable of raising a reasonable doubt as to his or her guilt. The evidence must give rise to a real possibility of the existence of the facts argued by the defence.²³ As an evidential burden is not an onus of proof it need not be discharged to a particular standard of proof (such as on the balance of probabilities).

Once an evidential burden is satisfied by properly raising a defence it falls upon the prosecution (consistent with its legal or persuasive burden) to exclude the defence beyond reasonable doubt.

There is no inconsistency between the imposition of an evidential burden on the accused and the presumption of innocence. The rationale behind the imposition of such burden on the accused is that it avoids “obliging the prosecution to negative in advance every possible defence open to the accused”²⁴ – an obligation that in many cases the prosecution would find extremely burdensome, if not impossible, to meet. As stated by Lord Steyn in *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 at [40]-[42] the imposition of an evidential burden is compatible with the presumption of innocence because the legal burden of proving the guilt of the accused remains throughout a criminal trial on the prosecution.

6.2 The Burden and Standard of Proof in Civil Proceedings

In civil proceedings the burden of proof is on the claimant to prove the facts in issue in the case that they bring against the defendant. The claimant must prove the facts in issue on a “balance of probabilities” so that it is more probable than not.

Contrary to earlier common law authorities, it is now generally accepted that in civil proceedings there is one standard of proof (proof on the balance of probabilities), and no third intermediate standard of proof between the civil and criminal standard of proof.²⁵

Like the criminal burden and standard of proof, the civil standard of proof structures and confines the decision making process and promotes principled, consistent, non-arbitrary and fair and just decision making.

6.3 The Relationship between the Standards of Proof and Evidence

The standard of proof in criminal and civil proceedings dictates the amount and quality of evidence that the party who bears the burden of proof must present to the Court to enable the Court to be satisfied to the requisite standard about the facts in issue – whether it be in a criminal proceeding or civil proceedings.

Generally speaking only relevant and admissible evidence – according to rules of evidence - can be presented to the Court and considered by the Court when determining whether the requisite standard of proof has been satisfied.²⁶ The question is whether on the whole of the evidence before it, the Court can be satisfied that the facts in issue have been proved to the requisite standard of proof by the party bearing the onus of proof.

¹ Blackstone’s *Commentaries on the Law of England*, 1765, 352.

² *Momcilovic v The Queen* (2011) 245 CLR 1, 51 at [54].

³ *Woolmington v DPP* [1935] AC 1, 481-482.

⁴ *Sorby v The Commonwealth* (1983) 152 CLR 281, 294.

⁵ *Sheldrake v DPP* (2004) UK HL 43(9).

⁶ Australian Law Reform Commission “Traditional Rights and Freedoms – Encroachments by Commonwealth Laws” 10 December 2014 at [9.9] which can be accessed at www.alrc.gov.au/publications/protections-statutory-encroachments-2.

⁷ A Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* Current Issues in Criminal Justice Vol 22 (3) (2010) 505, 506.

⁸ Article 14(2) of the International Covenant on Civil and Political Rights 1979

⁹ Australian Law Reform Commission n 6, [9.17].

¹⁰ Section 11(d) of the Charter.

¹¹ Section 25(1) of the Charter.

¹² Section 22(1).

¹³ Australian Law Reform Commission n 6, [9.13] and [9.20] – [9.24].

¹⁴ Australian Law Reform Commission n 6, [9.13] where *Momcilovic v The Queen* (2011) 245 CLR 1 is cited.

¹⁵ (2011) 245CLR 1, [44].

¹⁶ Australian Law Reform Commission n 6, [9.16].

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- ¹⁷ Australian Law Reform Commission n 6, [9.16]
- ¹⁸ A Ligertwood and G Edmond *Australian Evidence* 5th ed 2010, [6.8].
- ¹⁹ *Woolmington v DPP* was approved by the High Court in *Moffa v R* (1977) 138 CLR 601.
- ²⁰ *Sodeman v R* (1936) 55 CLR 192.
- ²¹ Ligertwood and Edmond n 18, [6.8].
- ²² Ligertwood and Edmond n 18, [6.8].
- ²³ *Jayasena v R* [1970] AC 618, 623; *R v Zecevic* [1986] VR 797; *R v Youssef* (1990) 50 A Crim R 1, 3.
- ²⁴ Ligertwood and Edmond n 18, [6.8].
- ²⁵ See for example, *Re B* [2008] 3 WLR 1; *Re S-B (Children)* [2009] UKSC 17; *F.H v McDougall* (2008); *Briginshaw v Briginshaw*.
- ²⁶ On occasions the legislature may relax the rules of evidence and provide that a court is not bound by the rules of evidence.

CHAPTER SEVEN

JUDICIAL EVALUATION OF EVIDENCE AND FACT FINDING

Legally admissible evidence that comes before the court takes many forms: the oral testimony of witnesses, real evidence (including documentary evidence), circumstantial evidence, inferences, and identification evidence, and similar fact evidence just to mention a few.

It is trite to say that evidence adduced or tendered in either a criminal or civil proceeding before a magistrate is not tantamount to proof. The presiding magistrate is charged with the task of evaluating all of the evidence, with a view to determining the facts in a particular case. During that evaluative process, certain evidence may be accepted or rejected by the magistrate along the way to finding the facts.

There has evolved as part of the rules of evidence – either at common law or in statutory form – a set of directions or warnings a judicial officer should give to a jury or themselves (sitting as a judge alone) about the evidence of particular types of witnesses (i.e. potentially unreliable witnesses) or types of evidence. The purpose of these judicial directions or warnings is to assist in the reliable evaluation of the evidence in question and to ensure that when evaluating the evidence the trier of fact carefully considers the evidence before deciding whether it is safe to rely upon the evidence in deciding the facts in the case.

Directions or warnings are commonly required in relation to:

- Potentially unreliable witnesses;
- Accomplices;
- Evidence of witnesses requiring corroboration;
- Evidence in sexual cases;
- Circumstantial evidence;
- Identification evidence.

However, these particular rules of evidence provide only limited assistance to the trier of fact in its judicial evaluation of the evidence before the court. The magistrate, as the trier of fact, will still have to undertake a further evaluation of the evidence, which is subject to those directions or warnings, as well as the evidence before the court that does not require such a direction or warning. The purpose of this chapter

is to provide practical guidance to magistrates as how to go about that important task.

7.1 Judicial Evaluation of Witnesses and Fact Finding

When assessing the evidence of a particular witness – when deciding whether to accept or reject the evidence given by that witness – the presiding magistrate must inevitably make an assessment of the witness' credibility and reliability.

There is an abundance of case law and literature that deals with the complexity of this task and the analytical tools that are available to the trier of fact to facilitate the task.

In *Faryna v Chorny* [1951] BCJ No 128 O'Halloran JA outlined the complexity of this task:

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding, and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as factors, combine to produce what is called credibility... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of the credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Wells J has observed that whilst the assessment of "witness credibility" is largely a subjective function, involving the drawing of "conclusions about individual witnesses by considering them as persons" and an assessment of [their] personal worth as a witness, having regard to, inter alia, the demeanour of the witness, there are some analytical tools available to assist the trier of fact in discharging its function:¹

So often the overwhelmingly clear structure of the facts taken as a whole will, disengaged from the testimony of the particular witness under evaluation, provide a setting in which the value of the witness' testimony may be readily fixed. It is for that reason it is so important by the preparation of a chronological table and a recapitulation of the facts not in dispute to build a broad picture of the events or courses of conduct under inquiry so that every piece of evidence in the case can be reviewed in context and not in a void.

The salient point is that evaluation of witnesses solely on the basis of observation and assessment of demeanour is unreliable, and additional techniques need to be applied when assessing the credibility and reliability of witnesses.

As pointed out by Barry J, the confidence with which a witness gives evidence may not be a reliable indicator that they are in fact telling the truth:²

It is, without doubt, a factor in courts, as in life, that the person who appears more confident is normally more persuasive. A witness displaying nervousness and/or shyness makes nowhere the same impression as a person who is able to give evidence confidently. There are, however, extensive psychological tests which indicate that the confidence with which a person asserts a proposition bears no relationship to its truth.³ People who put forward testimony in a different manner are just as likely to be telling the truth as those who assert the same proposition in a confident manner.

In *Fox v Percy* (2003) 214 CLR 118 at [31] the High Court acknowledged the growing body of research casting doubt on the ability of judges to make accurate credibility findings based on demeanour:

...in recent years, judges have become aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the

appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions when those principles are seen as critical.

The decision in *Fox v Percy* signalled the move towards focussing on the objectively established evidence and comparing that to the witness's account – with the result that inconsistencies between the objectively established evidence and a witness' evidence will then reflect on the credibility and reliability of that witness.

In a similar vein, in *Devries v Australia National Railways Commission* (1993) 177 CLR 472 Deane and Dawson JJ explained the decreasing emphasis on demeanour as a determinant of the credibility and reliability of witnesses:

Judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible, and the conscientious truthful witness may be hesitant and uncertain. In that context, it is relevant to note that the cases in which findings of fact and assessments of credibility are, to a significant extent, based on observation of demeanour have possibly become, if they have not always been, the exception rather than the rule. Indeed, as Kirby ACJ pointed out in *Galea v Galea*, in many cases today, judges at first instance expressly “disclaim the resolution of factual disputes by reference to witness demeanour”. However, this does not deny that in many cases a trial judge's observation of the demeanour of witnesses as they give their evidence legitimately plays a significant and even decisive part in assessing credibility and in making factual findings.

As indicated in *Fox v Percy* there are other techniques for assessing the credibility and reliability of a witness other than that based on a personal assessment of demeanour:

1. Assess the evidence of a witness by reference to undisputed or indisputable facts. The witness is likely to be considered to be unreliable if their evidence is, in any serious respect, inconsistent with those facts;⁴
2. In a similar vein, assess the evidence of a witness by reference to the objective facts proved independently of the witness' testimony, including in particular documentary evidence: see *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 57. If the witness' evidence is inconsistent with any of the proven objective facts or documentary evidence, then the witness is likely to be considered unreliable;⁵

3. Assess the evidence of a witness according to its internal consistency. The witness is likely to be considered to be unreliable if they contradict themselves on important points;⁶
4. Assess the evidence of a witness by reference to its inherent plausibility or implausibility. The more plausible the account given by the witness the more likely it is to be accepted; while the more implausible the evidence the greater the likelihood it will be rejected;⁷
5. Assess the evidence of a witness by reference to its consistency with the evidence of other witnesses, but subject to the following observation made by Barry J:⁸

In the ordinary course of events, it is to be expected that there will be inconsistencies in a litigant's evidence, both internally and with the testimony of other witnesses. It is always a matter for the individual judge what emphasis he or she places on consistency or lack of it. For my part too much consistency can indicate witnesses have rehearsed the evidence and not giving their individual recollections.

6. Assess the evidence of a witness by reference to any apparent omission(s) in their evidence when one would reasonably expect their evidence to include such evidence: see *Wetton v Ahemd and Ors* [2011] EWCA Civ 61. When assessing the credibility of a witness, the absence of evidence can be as relevant as the presence of evidence; and an inference adverse to the witness's credibility can be drawn from the conspicuous absence of the evidence.

All of these judicial methodologies are available to be applied by magistrates when assessing the credibility and reliability of witnesses who have been called to give evidence in cases heard and determined by them in both the criminal and civil jurisdictions. However, in carrying out that function magistrates must firmly keep in mind that it is still legitimate for them to also take demeanour or presentation of a witness into account when assessing that witness's credibility and reliability.

In that regard, magistrates presiding over criminal or civil proceedings may find the following extract from the Judicial College of Victoria Serious Injury Manual a helpful guide for the purposes of assessing the demeanour or presentation of a witness:⁹

As in all court proceedings, the manner in which the plaintiff gives his or her evidence, especially under cross examination, can be an important part of determining questions of credit. Relevant matters can include:

- demeanour;

- tone of voice;
- manner of speech;
- spontaneity in answering questions;
- whether the plaintiff answered questions in a manner designed to satisfy the questioner or to give honest and truthful answers: see *Woolworths Ltd v Warfe* [2013] VSCA 22 [114]; *Markes v Futuris Automotive Interiors & Anor* [2014] VCC 142.

But judges must take into account whether these factors may be influenced by (a) language differences, whether or not an interpreter is used; or (b) cultural differences such as the reluctance to look at a person in authority or to talk about sensitive matters.

Although the Manual refers to a plaintiff giving evidence these observations are pertinent to any witness giving evidence in either criminal or civil proceedings.

Assisted by the techniques referred to above, together with assessment of a witness's demeanour, magistrates have to decide whether to accept or reject the evidence given by the witness in proceedings before them. However, in making that decision the presiding magistrate is guided by additional matters.

A magistrate is more likely to accept the evidence of a witness who is both honest and reliable than a witness who, although truthful, is unreliable.

The reliability of a witness depends upon whether or not they are a good or poor historian. In that regard, the presiding magistrate should question whether the witness has correctly registered in his or her mind what they saw or heard. Some people are more observant than others. There is the observant witness, as well as the unobservant witness.¹⁰ It should be noted that even in the case of an observant witness, the reliability (and hence probative value) of the evidence is to be assessed by reference to the witness's opportunity to make the observation and the conditions under which the observation was made (for example distance, position, lighting conditions and amount of time available to observe).¹¹

The presiding magistrate should also consider whether the witness has correctly retained in his or her memory what they believe they saw or heard, and whether the witness's recollection has been subsequently altered by unconscious bias, wishful thinking or interaction and excessive discussion with other persons.

In determining whether a witness is a good or poor historian, it is worthwhile noting that, as a matter of ordinary human experience, as time elapses the memory of a witness generally fades, and a written contemporaneous record of the witness's recollection of an incident or event is generally to be preferred to a later or present recollection if it differs from the contemporaneous recollection.¹²

When evaluating the credibility and reliability of witnesses it is important to be mindful of the distinction between the wilfully dishonest witness and the witness who is a truthful witness, but a poor historian, for the reason that an adverse finding in relation to the credit of a witness can produce substantial unfairness to the witness in the immediate proceedings and beyond.¹³

Magistrates around the Commonwealth may find the following guidance offered by Barry J helpful in making findings in relation to the credibility and reliability of witnesses:

When assessing facts in a particular dispute, judges have a wide number of options open to them. A judge might find a witness honest and reliable, or honest and unreliable. The courts are full of witnesses whose memory, as time passes, become more and more certain and less and less accurate. A judge does not have to reject all of a witness's evidence simply because he or she rejects part of it. However, if a part of a witness's testimony is found to be at odds with other reliable evidence, it will cause a judge to scrutinise the remainder of such evidence with special care.

A judge may find the conflict in the evidence is insoluble, in which case he or she falls back on the legal maxim "he who asserts must prove", together with a consideration of the relevant onus of proof.

A judge is not bound to act on the evidence placed before him or her even if such evidence is unchallenged or uncontradicted, but, once again, a cautious judge would articulate why he or she refuses to rely on such testimony.¹⁴

As mentioned in the previous edition of this Guide, the presiding magistrate also needs to guard against the "forgetful witness". There is the truly forgetful witness and the dishonest witness who seems to suffer from selective amnesia. The presiding magistrate should keep this in mind when assessing the credibility and reliability of a witness who professes loss of memory.

As also mentioned in the previous edition of this Guide, the presiding magistrate should keep a lookout for the "obliging witness" – the witness who wants to oblige the court and who tries to say what they think the magistrate wants to hear.

Finally, but not least, the presiding magistrate should be mindful that occasionally a witness, although apparently neutral, may have an unconscious bias as "being part of a team – I want my team to win".¹⁵

Before leaving the topic of evaluation of witnesses, something needs to be said about the phenomenon of unconscious judicial prejudice and bias, and its potential to influence judicial evaluation of witnesses (and hence judicial decision making) and to conflict with the judicial duty to be neutral and impartial.

This subject is comprehensively dealt with in an article by Justice Keith Mason AC (the then President of the NSW Court of Appeal) titled “Unconscious Judicial Prejudice” (2001) ALJ 676.

Relevantly, his Honour refers to the Canadian case of *R v S (RD)*¹⁶ which directly dealt with the question of unconscious judicial prejudice.

Four judges (L’Heurieux-Dube J and McLachlin JJ, Gonthier J and La Forest J), in drawing a distinction between judicial impartiality and judicial neutrality, stated that “while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality”. All four judges recognised that the hypothetical reasonable person would accept that:

Triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the court room took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.

All four judges recognised that it was both inevitable and appropriate that the different experiences of judges may assist them in undertaking the decision making process – but those experiences would have to be relevant to the case at hand, and not “based on inappropriate stereotypes” and prevent “a fair and just determination of the cases based on the facts in evidence.”¹⁷

As stated by Justice Mason, six of the justices in *R v S (RD)* endorsed the following statement of the Canadian Judicial Council:¹⁸

The need for neutrality of attitude and expression...does not mean that a judge does not, or cannot, bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of his heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.¹⁹

Justice Mason’s article is a valuable resource in that it proposes two solutions for unconscious prejudice or bias. The first solution is that judges need to recognise the nature and extent of any predispositions they may have. The second solution is more far-reaching and entails the creation of a more representative judiciary to “ensure that different voices contribute to the judicial debate”.

It is hoped that the various techniques outlined in this chapter, the observations made about assessment of demeanour and presentation of witnesses and the suggested solutions to unconscious judicial prejudice or bias will assist magistrates around the Commonwealth in undertaking the very difficult and complex task of evaluating the credibility and reliability of witnesses as an integral part of the fact finding process – and ultimately an essential part of the process of decision making.

7.2 Explaining Findings in Relation to the Credibility and Reliability of Witnesses

The need for a judicial officer to articulate the reasons for believing or accepting the evidence of a particular witness or version of disputed events was recently explained by Justice Steven Rares, President of the Judicial Conference of Australia:

A great deal of judicial decision-making involves a judge having to choose between two, or sometime more, reasonably acceptable alternatives. How the judge makes such a choice is often what matters to litigants and the public. Sometimes, especially where the judge is making a finding about which witness or version of contested events he or she believes or accepts, the judge's choice cannot be analytically or satisfactorily reasoned. It can come down to a choice of one or other witness's version based on what the judge believes about their reliability or credibility. For the public to trust the result of such a choice, they must be confident in the judiciary's integrity, just as they are when a jury makes such choices. When the solution to a dispute depends on one witness's word against another's, often the judge has a stark choice to make. If there is no reason for the public to doubt that the judge has made an honest choice, doing the best he or she can on only the evidence in the case, the integrity of that result will make it acceptable.²⁰

This observation highlights the importance of judicial integrity in relation to judicial fact-finding, which is lies at the heart of the judicial function.

The question that arises is how detailed must that articulation of reasons be?

The extent of reasons for decision will depend upon the circumstances of the case; but the presiding judicial officer should disclose both the reasons and the reasoning of fact and law which support the decision.²¹

Some further guidance can be found in *Soulemezis v Dudley (Holding) Pty Ltd* (1987) 10 NSWLR 247 at 259 Kirby J stated:

This decision does not require of trial judges tedious examination of detailed evidence or a minute explanation of every step in the reasoning process that leads to the judge's conclusion. But the judicial obligation to give reasons, and not to frustrate the legislative facility of appeal on questions of law, at least obliges a judge to state generally and briefly the grounds which have lead him or her to conclusions reached concerning disputed factual questions and to list the

findings on the principal contested issues. Only if this is done can this Court discharge its functions, if an appeal is brought to it. Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged.

In a similar vein, Mahoney JA stated at 273-274:

The weight which a judge will give to the evidence of a witness will often be not capable of rationalisation beyond the statement having heard him, I am not satisfied that I should accept what he says. The weight which a judge gives to a particular fact may be affected by, as it has frequently been put, his experience and, in particular, his experience of the significance of that fact in the order of things...In explaining the weight which he has given to a fact in a particular decision of fact, the judge is not, I think, required to detail why he sees, for example, the significance of a CAT scan, as being greater than, for example, the opinion of a treating doctor. His reasons, in the particular case, may partake as much of intuition based on experience as on formal and deductive reasoning.

That leads to, as I have described, the subjective element in the fact finding process. A fact is found in a particular case if the judge is satisfied that it is so.... I do not mean by this that decisions are, or are to be, made upon the basis of matters essentially idiosyncratic to the particular judge.

The determination of facts is assumed to be objective. But it would be to misunderstand the basis of a decision, and in particular decisions in matters of assessment, weight and the like, to assume that decisions can always, or perhaps ordinarily, be justified by objective rather than subjective considerations. And, if such be true of the reasoning process, it is, in my opinion, a mistake to conclude that a judge should or can set forth the reasoning process he has followed from one fact to another.

The need to adequately explain assessments of credit and choices between conflicting evidence was explained in *Shillingsworth v Murray* (2005) 2 DDCR 450.

In his article "Judgment Writing" (1993) 67 ALJ 494 at 497 Sir Harry Gibbs deals with the need for judicial officers to adequately explain fact-finding and credit assessment:

It is of critical importance for the judge of first instance to make a clear finding on any disputed issue of fact...If a finding of fact depends on an issue of credibility the judge should resolve that issue and in fairness to the parties should reveal why he prefers one witness to another...

If a finding of fact depends on the issue of credibility the judge should resolve that issue and in fairness to the parties should reveal the reasons why he prefers one witness to another...I believe that more injustices are created by erroneous findings of fact than by errors of law.

As pointed out by JRS Forbes in his book *Justice in Tribunals* (2010) at [13.19]:

Sometimes reasons for decision based on credit can be stated objectively, for example by pointing to a lack of corroboration or documentary support, or the inherent improbability of the version that is rejected. But at other times it is to be found in the adjudicator's impression of a witness's demeanour.

However, when making findings with respect to the credibility and reliability of witnesses magistrates should – regardless of the basis of their finding – provide the reason or reasons why they have accepted or rejected the evidence of a witness. By way of example, Barry J says that it is desirable for judicial officers when rejecting the evidence of a witness on the basis of the evidence being inherently implausible to explain why the evidence was found to be inherently implausible.²²

Forbes makes a number of other important points:²³

- when a decision turns on findings of fact, the presiding judicial officer should clearly summarise the relevant evidence and comment on its reliability;
- if the judicial officer is to reject a vital witness's evidence it is imperative that the reasons for rejecting the evidence are adequately explained;
- when there is a significant conflict of evidence the conflict should be dealt with and resolved by the presiding judicial officer, with reasons being given for preferring one version to another in a civil proceeding, after an analysis of the competing evidence.²⁴

¹ Wells J "The Finding of Facts" 1983 Canberra Judicial Conference cited in J.P.O Barry "The Methodology of Judging" (1994) 1 *JCULR* 135, 141.

² Barry J.P.O "The Methodology of Judging" (1994) 1 *JCULR* 135, 144.

³ D Muller, D Blackman and A Chapman (ed) *Psychology and Law – Topics from an International Conference* (1984).

⁴ MacKenna J, a paper read at University College Dublin 21 February 1973 printed in the *Irish Jurist* Vol IX New Series adopted by Lord Devlin in his book *The Judge*. See also Wells J n 1; Justice Peter Young "Practical Evidence: Fact Finding" (2007) 72 *Australian Law Journal* 21, 22 where his Honour says: "Sometimes one unassailable piece of evidence will reveal where the true facts fall". However, Justice Young stresses the need to ensure that "the unassailable piece of evidence really is unassailable". See also Justice Young "Fact Finding Made Easy" (2006) 80 *Australian Law Journal* 454, 458.

⁵ Justice Young "Practical Evidence: Fact Finding" n 4, 22 where his Honour observes: "The witness whose evidence is consistent with the documents is more likely to be correct".

⁶ MacKenna J n 4. See also Justice Young n 5, 21 where his Honour states: "A witness whose evidence suffers from no internal inconsistency is more likely to be correct than a person whose evidence cannot be so ranked". However, Justice Young recommends caution: "Be careful that apparent inconsistencies, especially as to times and dates, do not assume too great a prominence". See also Justice Young "Fact finding Made Easy" n 4, 458.

⁷ Justice Young "Fact finding Made Easy" n 4, 458.

⁸ Barry J n 2, 145. This perception can be created when two police officers give evidence in "parrot fashion and the evidence appears to be consistent throughout". See also Justice Young "Practical Evidence: Fact Finding" n

4, 21 where his Honour says: “Often the witnesses are in the same interest, for instance police. Here if all the witnesses are telling exactly the same story, suspect collaboration”.

⁹ 5.2 of the Judicial College of Victoria Serious Injury Manual: Matters Relevant When Assessing Credit, which can be accessed at <http://www.judicialcollege.vic.edu.au/node/1157>

¹⁰ As mentioned in the previous edition of this Guide, the unobservant witness is one whose recollection of an incident or event is less than accurate because at the time of the incident or event they were not fully observing it as it unfolded, and their account is based on a reconstruction of the incident or event according to their own guesses, perceptions, past experiences or biases.

¹¹ Justice Young “Practical Evidence: Fact Finding” n 4, 22.

¹² *Onassis v Vergottis* [1968] 2 LI Rep 403, 431 per Lord Pearce.

¹³ D Byrne *Assessing the Credibility of Witnesses*, presentation at Assessing Witnesses Conference 2012. See also Justice J Douglas “How Should Tribunals Evaluate Evidence”, presentation at the AJA Tribunals Conference 2004.

¹⁴ Barry J n 2, 142.

¹⁵ Barry J n 2, 143.

¹⁶ [1997] 3 SCR 484.

¹⁷ [1997] 3 SCR 484, 501.

¹⁸ Justice Keith Mason “Unconscious Judicial Prejudice” 75 *Australian Law Journal* 676, 679.

¹⁹ See Canadian Judicial Council *Commentaries on Judicial Conduct* 1991.

²⁰ Justice Steven Rares “What is a Quality Judiciary”, a revision of a paper presented at the Asia-Pacific Courts Conference, 406 October 2010, Singapore, 11.

²¹ *Fleming v R* (1998) 197 CLR 250.

²² Barry J n 2, 144.

²³ JRS Forbes *Justice in Tribunals* (2010), [13.19].

²⁴ However, where there is a conflict of evidence in a criminal case the conflict cannot be resolved by preferring one version to another. Any conflict of evidence can only be resolved in favour of the prosecution if the court is satisfied beyond reasonable doubt as to the truth of the version put forward by the prosecution. If the court reaches that level of satisfaction it must give adequate reasons for its decision.

CHAPTER EIGHT

REACHING A DECISION IN CRIMINAL AND CIVIL CASES

The purpose of this chapter is to provide practical guidance in relation to the decision making process in criminal and civil proceedings presided over by magistrates around the Commonwealth. It is intended to assist magistrates in arriving at a decision.

8.1 Determination of Guilt in Summary Criminal Proceedings

One of the most important functions performed by a magistrate is determining the guilt or otherwise of an accused following a summary trial without a jury.

In performing the dual role of judge and jury, the presiding magistrate should first identify the essential elements of the offence(s) which are the subject of the charge(s) and the principles of law that apply to proof of those essential ingredients.¹

The presiding magistrate should then consider the material facts that the prosecution is required to prove in order to substantiate the alleged offence(s). The magistrate should ascertain which of those material facts are admitted and which remain in issue; and consider whether there is sufficient admissible evidence to establish the facts in issue to the requisite standard of proof - being beyond reasonable doubt.

In undertaking the fact finding exercise the magistrate will be required to consider "any legal limits on the use of tendered evidence"² and direct himself or herself on any matter or aspect of the case which would require an instruction or direction from the judge in a jury trial.

As the trier of fact the magistrate is required to evaluate each item of evidence and assess the credibility and reliability of the witnesses³ in determining the facts in issue, which have to be established beyond reasonable doubt.

Where there is a conflict between the evidence of a prosecution witness and the evidence of a defence witness, the trier of fact must not convict the accused unless it is satisfied beyond reasonable doubt of the truth of the evidence for the prosecution.⁴ Even if the trier of fact does not positively believe the evidence for the defence, it cannot find an issue against the accused contrary to that evidence, if that evidence gives rise to a reasonable doubt as to that issue.⁵

The presiding magistrate must then find the material facts in the case. These facts must be established beyond reasonable doubt.

Having found the material facts the magistrate must then apply the relevant law to the proven facts. It is only if each and every element of the offence has, on the basis

of the established facts and as a matter of law, been proved beyond reasonable doubt and any legal defence open to the accused on the evidence has been negated beyond reasonable doubt, that the magistrate can then proceed to find the accused guilty of the offence. If any essential element of the offence has not been proved beyond reasonable doubt, or if any defence open to the accused on the evidence has not been negated beyond reasonable doubt, then the magistrate must acquit the accused and dismiss the charge.

8.2 Arriving at a Decision in Civil Proceedings

Magistrates perform an equally important role in adjudicating civil disputes.

When hearing and determining civil proceedings the presiding magistrate needs to consider the essential factual and legal elements of the plaintiff's case – the cause of action, whether it be based on contract or the law of torts or some other area of civil law. At the same time the magistrate must consider the nature of the defendant's defence to the civil claim, as well as the essential factual and legal elements of any counterclaim or set off brought by the defendant in response to the plaintiff's claim.

As in a summary criminal hearing, the magistrate should begin by identifying any common ground between the parties as disclosed by the court pleadings and any undisputed facts. Any disputed facts should then be identified. The magistrate is then charged with the task of making findings on those disputed facts.

In contrast to criminal proceedings, the civil standard of proof (on the balance of probabilities) is applied to the evaluation of evidence, and the credibility and reliability of witnesses is assessed by reference to that standard. In resolving conflicts in evidence in relation to disputed facts it is in order for the magistrate to prefer (on the balance of probabilities) one item of evidence over another item of evidence or the evidence of one witness over another witness.

Having made findings on disputed facts, the presiding magistrate must then proceed to consider the relevant law, make findings on any disputed points of law and then apply the law to the established facts.

In order to find in favour of the plaintiff the presiding magistrate must be satisfied on the balance of probabilities as to the factual and legal elements of the plaintiff's cause of action. If the magistrate is not so satisfied, then there should be judgment for the defendant. If there is a counterclaim or set off the presiding magistrate can only enter judgment in favour of the defendant if the factual and legal elements of the counterclaim or set off are established on the balance of probabilities.

¹ The magistrate should be familiar with any relevant case law and in a position to deal with and resolve any disputes as to the applicable law.

² A Ligertwood and G Edmond *Australian Evidence* 5th ed, [2.12].

³ See Chapter 7 of this Guide.

⁴ *Liberato v R* (1985) 159 CLR 507, 515.

⁵ *Liberato v R* (1985) 159 CLR 507, 515.

CHAPTER NINE

THE IMPORTANCE OF GIVING REASONS FOR DECISION

This chapter is dedicated to the need for magistrates to give reasons for the many and varied decisions they make in the performance of their judicial functions and duties.

9.1 The Duty to Give Reasons for Decision

Although there is a strand of legal authority generated by English Courts establishing a common law judicial duty to give reasons for decision,¹ and a number of legal commentators in common law jurisdictions speak of a common law judicial duty to give reasons for decision, the generally accepted position is that the giving of reasons for decision is an incident of the judicial process – subject to the qualification that it is normal but not universal: for example see *R v Awatere* [1982] 1 NZLR at p 169; *Public Service v Osmond* [1986] 159 CLR 656 at 667. However, the giving of reasons for decision is obligatory where the decision is subject to appeal.²

However, whether or not it is obligatory to give reasons for decision, there are a number of compelling reasons which make it highly desirable for magistrates to give reasons for the decisions they make.

9.2 Why Reasons for Decision Should be Given

The giving of reasons for decision is consistent with the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done.³

The giving of reasons promotes transparency and accountability through the provision of “accessible reasoning [which is] necessary in the interests of victims, the parties, appeal courts and the public”.⁴

The giving of reasons for decision furthers judicial accountability in the broader democratic sense:

...those who are entrusted with the power to make decisions affecting the lives and property of their fellow citizens should be required to give in public an account of the reasoning by which they came to those decisions.⁵

As pointed out by Justice Murray Gleeson:

Providing reasons promotes good decision-making because decision-makers who know that their decisions are open to scrutiny and who are obliged to explain them are more likely to make reasonable decisions.⁶

Furthermore, the provision of reasons for decision facilitates the appellate process by making it easier for the appellate court to identify and isolate errors in the decision making process, which may need to be corrected on appeal.⁷

The giving of reasons assumes particular importance in the context of sentencing decisions.

As stated by A Freiberg, “the law favours transparency, and reasons for sentencing are one of the means by which the law is transparent and accountable”.⁸

The giving of reasons for sentence assists all stakeholders in their understanding of the sentencing process.⁹ As pointed out by MacKenzie:¹⁰

...with constant criticism of the courts in the media, both in terms of public accountability and the perceived lack of sensitivity of the court to victims, it is important that the courts do whatever is possible to communicate the reasons for a particular decision, in a language that is understood by all the parties.¹¹ Without sufficient communication by judges of the reasons for sentence, there is greater room for misunderstanding of the sentencing process in general, particularly by the general public.

To the rights of litigants can also be added the needs of litigants; particularly in this context victims, who often have a justifiable need to understand what is happening and why. Policy reasons and public accountability provide a strong justification for the duty to give reasons.¹²

The provision of reasons for sentence makes it more likely that sentences will be accepted by those affected by the decision and by the public more generally.¹³

The purpose of reasons for sentence is to explain to the offender and the public what sentence is being imposed and why.¹⁴ This mechanism assists the appellate process by enabling the appellate court to identify errors in the sentencing process, which may need to be corrected.¹⁵

Finally, but not least, as pointed out by the Australian Law Reform Commission, the giving of reasons for decision serves the following important function:

It also enables interested persons to ascertain the basis upon which similar cases will probably be decided in the future. In this way it may guide judicial discretion and consistency in sentencing.¹⁶

It should be noted that in many Commonwealth jurisdictions there is also legislation that makes it mandatory for sentencing courts to give their reasons for sentence in relation to particular sentences – for example the imposition of a term of imprisonment.

9.3 The Nature and Extent of Reasons for Decision

Given the necessity or desirability of a court giving reasons for decision the question that commonly arises is how detailed should those reasons be.

The requisite amount of detail was discussed in Chapter 7 in the context of judicial evaluation of evidence and fact finding. However, in addition to the practical guidance provided at 7.2, something should be said about the amount of detail required for reasons for sentence.

The following extract from Odgers *Sentence* 2nd edition at [2.47] provides a useful guide as what should be addressed in reasons for sentence:

A sentencing court must give reasons for its decision as to an appropriate sentence. The matters of significance in determining sentence must be identified, including the facts giving rise to the offence, the findings in relation to all matters taken into in mitigation or aggravation of sentence and the reasoning that leads to the sentence imposed. Various statutory provisions require reasons to be given in respect of specified matters. Absent exceptional circumstances there must be contemporaneity between the handing down of the sentence and the expression of the reasons for the sentence. Statutory provisions require certain specific matters to be explained to the offender where a sentencing court makes a particular order when imposing sentence.

Similarly, in *Koumis v R* [2008] 18 VR 434 at [63] the Court of Appeal indicated what should be contained in reasons for sentence:

Without being prescriptive or exhaustive, one would generally expect the reasons to include the sentencing judge's findings as to the circumstances of the offence and any circumstances which the judge regards as aggravating or mitigating. Reference will normally be made to the impact of the offence upon the victims. The personal circumstances of the offender which bear materially upon the sentence should be identified. It is also desirable that conclusions reached by the sentencing judge as to the primary arguments advanced by the parties, particularly if they are in controversy, should be apparent from the reasons. That is not to suggest that the sentencing judge is obliged to address every argument advanced on the pleas... But the primary factors that have influenced the instinctive synthesis should be exposed during the course of the sentencing remarks. Where the sentencing remarks are deficient as to such material matters, transparency in the process is denied and interested parties are left to "speculate" about the reasoning process".

As pointed out by Odgers, the amount of detail in the reasons for decision will depend upon the facts and circumstances of the case.¹⁷ This aspect was dealt with

in *Hamieh v R* [2010] NSWCCA 189 at [32] where the NSW Court of Criminal Appeal made this observation:

It is important to recognise, therefore, that there is a practical tension between the principles requiring oral reasons, delivered in plain English and with brevity (usually in a busy list) and the need for reasons to satisfy the requirements of the law in the particular case. Remarks on sentence are frequently delivered *ex tempore* and, as the Chief Justice has observed in *R v McNaughten* [2006] NSWCCA 242: “The conditions under which District Court judges give such reasons are not such as to permit their remarks to be parsed and analysed.

This observation applies with even greater force to sentences imposed in magistrates courts, “given the volume of work and limited time available to magistrates”.¹⁸ Similarly, Mackenzie and Stobbs also point out that there are “arguments against giving reasons in every case, mainly in relation to expediency, particularly in courts of summary jurisdiction”.¹⁹

Similar guidance as to the content of reasons for sentence is to be found in the following extract from *Fox and Freiberg’s Sentencing State and Federal Law in Victoria*:²⁰

[the] judge’s remarks should provide a succinct statement of the relevant facts in order to place the sentence in an “intelligible context” in order to inform the prisoner and to record them as the basis for formulating the sentence. The sentence does not have to account for every single issue raised on the plea, nor reveal every step taken in arriving at the sentence. However, where there is a factor that may be unusual and carry weight in sentencing, a failure to explain how it has been taken into account may amount to a sentencing error. The degree of detail must be that which is practicable in the light of the business of the court²¹... But it must cover all important considerations so that to be sufficient to meet both the offender’s right to know they have received the particular sentence and public’s right to understand the process of sentencing.

¹ For example, with particular reference to magistrates, see *Re Mercer* (1877) 7 Ch D 194 at p 187 per Jessel MR; *Romilly v Romilly* (1934) 50 TLR 386 per Langton J; *Barker v Barker* (1905) 21 TLR 253; *Cobb v Cobb* [1900] P145; *Robinson v Robinson* [1898], 153.

² Justice Michael Kirby “Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory”, paper delivered at the Family Court of Australia Conference Sydney 1993, 4.

³ *R v Thomson v R* [2000] 49 NSWLR 383, [42].

⁴ *Markarian v R* [2005] 228 CLR 357, [39].

⁵ Justice Murray Gleeson “Judicial Accountability” (1995) 2 *The Judicial Review* 117, 122.

⁶ Justice Gleeson n 5, 122.

⁷ S Odgers *Sentence* 2nd edition, [2.48].

⁸ A Freiberg *Fox and Freiberg’s Sentencing State and Federal Law in Victoria* 3rd edition at [2.260] where the learned author cites a number of Australian legal authorities in support of the proposition.

⁹ G Mackenzie and N Stobbs *Principles of Sentencing* 2010, 27 where the learned authors make these observations:

“Communication is an important part of the process and without reasons there is greater scope for misunderstanding of what has occurred. Giving reasons is particularly important where the sentencing is unusually lenient or severe, and is likely to be subject to an appeal. In these cases, the more information that is on the record, the less likelihood there will be of a successful appeal against the sentence.”

See also G MacKenzie *How Judges Sentence* 2005, 25 where the learned author makes the following point:

“ The appellate courts have indicated on numerous occasions that they will be less likely to interfere with a sentence when reasons have been given by the sentencing court to justify a sentence which is otherwise outside the normal range”.

¹⁰ MacKenzie *How Judges Sentence* n 9, 26.

¹¹ Justice Kirby n 2, 17.

¹² Justice Kirby n 2, 16.

¹³ Justice Gleeson n 5, 122.

¹⁴ Odgers n 7, [2.48].

¹⁵ Odgers n 7, [2.48].

¹⁶ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (ALRC, 2006), [19.2].

¹⁷ Odgers n 7, [2.51].

¹⁸ Odgers n 7, [2.51] citing various Australian authorities.

¹⁹ See MacKenzie and Stobbs n 9, 27 where the learned authors refer to the following articles: B Beaumont “Contemporary Judgment Writing: The Problem Restated” (1993) 73 *Australian Law Journal* 743; M O’Loughlen “When Courts Must Give Reasons for Decision” (1999) 73 *Australian Law Journal* 630.

²⁰ A Freiberg n 8, [2.260].

²¹ It is accepted by appellate courts that Magistrates Courts are busy jurisdictions.

CHAPTER TEN

WRITING JUDGMENTS

Former Chief Justice of the High Court of Australia, the Honourable Justice Murray Gleeson AC, in the Introduction to the 2008 publication of the National Judicial College of Australia (NJCA) *Judicial Decisions: Crafting Clear Reasons* had this to say about the core judicial function - the writing of judgments - and its relationship to the requirement to state reasons for decision

The ultimate judicial responsibility of deciding cases justly and according to law, and the obligation to state reasons for decision, are closely related. In our system of justice, decisions at first instance are made by two different procedures. Most decisions are made by a professional judicial officer, sitting alone, who is required by law to give reasons. The acceptability of the decision to parties and the public is based upon the reputation for competence and integrity of the decision maker and the cogency of the reasons for decision. Some decisions are made by juries, who pronounce an inscrutable verdict. The acceptability of their decisions is based upon the integrity of the trial process, the accuracy of the legal instructions given to the jury by a presiding judge.

As expressed by Lord Hope of Craighead:¹

In our tradition writing judgments is an art, not a science. It is not something that is easily taught, and I am not really sure that it is an appropriate subject for a lecture.

Judgment writing is a skill that requires practice, care and self-reflection.² As pointed out by Murray Gleeson there is no single correct mode of writing a judgment. However, there are techniques and strategies that magistrates can employ to ensure that their judgment writing is clear as possible.³

The aim of this chapter is to provide magistrates with practical guidance as to how to go about the very important task of writing a judgment.

The chapter is divided into five separate parts, each dealing with an important aspect of the process of judgment writing:

- Preparing to write a judgment;
- Embarking upon the judgment writing process;
- Structuring the judgment;
- Determining the style in which the judgment is to be written;

- Other useful hints for effective judgment writing

10.1 Preparing to Write a Judgment

As a written judgment encapsulates the decision of a magistrate following a hearing, whether it be in a criminal or civil matter, it is essential that the magistrate be organised prior to the commencement of the hearing and during the hearing so as to alleviate the inherent stresses of writing a judgment.⁴

Prior to the hearing commencing, the magistrate should research the law relating to the charge in a criminal matter or the matters in dispute in a civil case.⁵ This will ensure that the magistrate is aware of any relevant statutory provisions or recent case law.⁶ This will also assist the magistrate in clearly focusing on the real issues in dispute and adopting an organised approach to the evidence,⁷ paying attention to the relationship between the critical issues and the relevant evidence. This approach may also put the magistrate in a better position to control the proceedings and ensure that counsel do not go off on an unnecessary tangent.⁸

It needs to be borne in mind that in relation to complex cases heard in the magistrates' court there is unlikely to be a running transcript of the proceedings, or any transcript, and the evidence is not always received continuously, with the evidence being given on separate occasions. Furthermore, there may be limited time out of court for the magistrate to write the judgment.⁹ Therefore, note-taking assumes special significance in the process of judgment writing. If the magistrate does not take adequate notes of the evidence of witnesses – including an assessment of the credibility and reliability of the witnesses – they will find the judgment writing task very difficult and protracted as they will have to reacquaint him or herself with the evidence, provided there is either a transcript or a sound recording of the evidence.

There a number of approaches to note-taking during the course of a hearing. Note taking will be the most helpful where the real issues have been identified prior to the commencement of the hearing. The use of headings in bench books, as well as the use of different coloured pens and markers to remind the magistrate of critical concessions or observations has been recommended.¹⁰ Another useful method for long hearings is to prepare a summary of the evidence heard on each day of the hearing.¹¹ It may also be useful to prepare a sheet for each witness that identifies their key evidence and its relationship to the issues in the case.¹² Other commentators have recommended assembling a dot point summary of the judgment during the course of the hearing that can be amended from time to time as the evidence proceeds to be given.¹³

Regardless of the method that is adopted it is necessary as part of the note taking process to make a written note of the following:¹⁴

1. Significant aspects of the evidence of witnesses;
2. Conflicts between the evidence of witnesses;
3. Issues that have arisen;
4. Thoughts about those issues;
5. Impressions of witnesses, including their credibility and reliability; and
6. Parts of the case considered to be significant in the writing of the judgment.¹⁵

10.2 Embarking Upon the Judgment Writing Process

As pointed out Justice Kenneth Hayne, it is critical to begin writing a judgment as early as possible:¹⁶

First, there is the challenge of doing it. There are always other things to do. So start now. Put the first thoughts on paper as soon as you can and then finish the task while the evidence and the arguments you have to consider are still fresh in mind. Delay and difficulty are directly related. The longer you wait, the harder it gets.

The sooner a judgment is started the better, while the issues and impressions of witnesses are still fresh in the mind of the magistrate, assisted by adequate note-taking (which, however, can never be equated with a verbatim record of the evidence in the nature of a transcript).

10.3 Structuring the Judgment

It is important that a written judgment have a clear structure. What follows is a guide as to the structure of judgments in civil and criminal cases.

- **Civil Cases**¹⁷

As pointed out by Justice David Bleby, the use of headings in a judgment in a civil case can very helpful in terms of structuring a judgment and making it more readable¹⁸ and comprehensible.

There are, of course, a number of ways to structure a judgment. However, a common approach is to structure a judgment along the following lines, with the use of headings, as suggested by Justice Bleby:¹⁹

Introduction

The Facts to be Determined

The Relevant Principles of Law

The Application of the Law to the Facts

Conclusion

Justice Bleby makes the following very helpful suggestions in relation to each of these headings:²⁰

- The *Introduction* should contain a brief summary or review of the issue or principal issues in the case, with the length of the introduction being appropriate to and commensurate with the overall length and complexity of the judgment.
- The section dealing with the *Facts to be Determined* should state the uncontroverted facts and dispose of each of the relevant facts in issue. The disposition of each factual issue may require a discussion of and findings as to the credibility of witnesses and/ or inferences to be drawn from non-contentious facts and documents. There may be a need for a number of sub-headings within this section.
- As regards the *Relevant Principles of Law*, this part of the judgment should state the applicable legal principles but only to the extent that is necessary in the circumstances of the case.
- In relation to the *Application of the Law to the Facts*, a laborious repetition of the parties' arguments or submissions should be avoided. Occasional reference to some aspect of the argument may be made if appropriate; however, what is of the most importance to the reader of a judgment is the line of reasoning that led to the ultimate decision contained in the judgment. Furthermore, a good outline or written submission from counsel can provide the basis for the text of the decision in part, if not in whole.
- With respect to the *Conclusion*, this need only be relatively brief as the conclusion will generally be apparent from the discussion appearing in the earlier sections of the judgment.

Justice Bleby says that in the case of a more complex judgment the recommended structure may need to be repeated according to the different issues that arise.

His Honour Magistrate Guiseppe Cicchini recommends a similar structure, which is as follows:²¹

1. *Introductory statement concerning what the case is about.*
2. *Identification of the issues.*
3. *Identification of the facts not in dispute and those which are.*

4. *Determination of the issues by making findings of fact in relation to the disputed facts, referring to the losing party's argument in relation to each issue and stating why that argument was rejected by reference to the findings of fact and/or the case law and/or statutory provisions.*
5. *Announcement of the result (i.e. the ultimate decision).*

His Honour Magistrate Michael Baumann suggests a similar format:²²

- *Introduction*
- *Factual Background*
- *Issues in Dispute*
- *Sequential Analysis of Issues, including Relevant Law*
- *Conclusion*

Finally, but not least, there is “the shotgun house” structure propounded by Professor Jim Raymond.²³ This structure is based on the design of a “shotgun house”, which is a simple house found in the southern states of the United States, in which each room follows the other in a straight line leading from a front porch to a back porch.²⁴ According to His Honour Magistrate Hugh Dillon a “shotgun house” structured judgment “begins with a short overview of the case, and then sets out the issues to be determined”, with each issue being “dealt with to its conclusion in a separate compartment of the judgment, with all the relevant evidence and arguments drawn together under one heading”.²⁵

- **Criminal Cases**

A similar structure is recommended for judgments in criminal cases. By way of example, Her Honour Theresa Anderson generally structures her judgment this way:²⁶

- *The charges.*
- *The ingredients of the offence (if necessary).*
- *A concise summary of the prosecution and defence cases, highlighting the real issues to be determined.*
- *The facts not in dispute.*

- *Disputed issues and further findings of related facts.*
- *The application of the facts to the law.*

One final element should be added to this format – namely the ultimate decision: guilty or not guilty (in which case the charge will be dismissed).

10.4 The Style of the Judgment

Judgment writing style is “a very individual thing”²⁷ and although there is no single ideal writing style for judgments, magistrates should consider methods for improving the clarity and precision of their judgments. It is important to bear in mind a number of aspects.

Foremost, the magistrate should consider for whom the judgment is written and the audience to which it is directed. Lord Hope of Craighead addresses this aspect thus:²⁸

Who do we think we are speaking to when we write our judgments? This is not an idle question. For, if we are unclear about this, how can we be sure that we are framing them in the right way? A judicial opinion is, of course, addressed to the parties in whose favour, or against whom, the judge is pronouncing judgment. Unless it is a decision taken in a court of last instance, a careful judge will ensure that the judgment will give a sufficient explanation of the reasons for use by the appeal court. But there is a wider audience. Obviously it includes the legal profession, including other members of the judiciary who may be seeking guidance about what to do in similar cases. Then there are the academics, whose interest is not just to comment and to criticise. They have a teaching function too, so a judgment which explains or develops the law ought to be capable of being used for that purpose. An extempore judgment in a matter which is of no general importance and which is addressed to those in court who know what the point is can be quite brief. But in a reserved judgment, written with an eye on the wider public, you may have to set out the facts and the contentions in some detail to make it intelligible, and you may have to set your decision of the legal issue into the context of previous decisions on the same point.

There are a number of ways a judgment may be made stylistically more accessible to the reader or audience for which it is intended. The following are useful suggestions:

- Try to minimise the use of long sentences.²⁹ As pointed out by Justice Bleby, “the reader’s attention is more likely to be retained by short descriptive sentences;³⁰
- Keep paragraphs short;³¹

- Write sparingly;³²
- Avoid double negatives;³³
- Use plain language, and avoid Latin phrases.³⁴
- Use the names of the parties rather than formal titles such as “the plaintiff”, “the defendant” or “the appellant” or “the respondent”.³⁵
- Use language with which you feel comfortable;³⁶
- Ask yourself whether the reasons could be simpler and shorter;³⁷
- Be selective about the use of block quotations. As raised by Justice Hayne, “Can you make the point in your own words? If not, would a shorter quotation make the same point? If you must use a quotation longer than 50 words, tell the reader in the lead-in what you say it shows”.³⁸
- As to issue of when to quote and when not to quote extensively from the judgments of other judicial officers, Lord Hope of Craighead provides the following practical guidance:

This is a distinct issue from the routine task of referring to previous authority. Quotations are useful where one wishes to trace the way the law has been developing or to explain the origins of a proposition which one wishes to adopt or must follow. They may be necessary where previous inconsistent authority has to be distinguished or departed from. But lengthy quotations can be very boring and they tend to interrupt the flow of the judgment. They should never be used as a substitute for explaining one’s own process of reasoning. It is perfectly in order to adopt the wording of a previous judgment as one’s own, so long as a reference is given to explain its origin.³⁹

10.5 Other Useful Hints and References for Effective Judgment Writing

The following are useful hints for effective judgment writing:

- If possible try to write the judgment over a continuous period of time rather than in a piecemeal fashion;⁴⁰
- It is preferable for some else to proof read the judgment;⁴¹

- It is important to be conscious of the fact that a magistrate does not always have available time to re-edit and revise his or her judgment time and time again.⁴² If the magistrate is satisfied that the judgment accurately captures what he or she is trying to say, and has been proof-read and edited, the judgment should be published.⁴³
- If possible attend a judgment writing course and a follow-up course or seminar some years later.⁴⁴

The previous edition of this Guide made reference to various extracts from a book by Mr Justice Wilson of the Supreme Court of Canada, written as a training manual for Justices and titled “A Book for Judges”. Those extracts remain a valuable source of practical guidance for judicial officers charged with the task of delivering written reasons for decision or judgment, and are reproduced as an addendum to this chapter.

For further practical guidance on judgment writing refer to the National Judicial College of Australia publication *Judicial Decisions: Crafting Clear Reasons* (2008) which has been referred to throughout this chapter and which can be accessed in its entirety at catalogue.nla.gov.au/Record4400222 or at www.njca.com.au

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ADDENDUM TO CHAPTER TEN

The Writing of Reasons for Judgment

“Where judgment has been reserved, written reasons should be got out promptly while the evidence and arguments are fresh in the judge’s mind. Each day of delay makes the task harder.”

A really first- rate written judgement in any but the most difficult and technical cases should generally be intelligible to an educated layman. You are not writing for a law journal nor are you writing entirely for the Court of Appeal. It is desirable that the defeated litigants should be able, on reading your judgement, to know why they lost. It is desirable that your writing should be comprehensible by news reporters. It is desirable that the workings of the law should not be a mystery, but clear to the public. This ideal may not always be attainable but it is always to be attempted.

Usually it is a good idea to begin by following the method normal to all forms of literary compositions: first to draw an outline of the matters you propose to deal with. In writing most judgements this general approach should serve:

- a) State the nature of the litigation;
- b) State the central issue to be resolved;
- c) Make your findings of fact;
- d) State the law applicable to those facts and give your rulings.

Some judgements are too brief; many more are too long. To avoid prolixity these suggestions are made:

- a) The quotation of long passages of evidence may in some cases be necessary, but in general it is not, and the purpose of the judgement can be served by giving the purport or essence of the evidence.
- b) It is not usually necessary to recite and discuss every authority referred to by counsel - normally the area of decision can be reduced to the consideration of what you find to be the effective authorities. If out of politeness to counsel or to show due diligence, you want to name other cases considered and rejected as inapplicable this can normally be done compendiously saying “I have also considered” and therefore listing the citations. Also the excessive quotation of long passages from judgements

relied on is to be avoided. Try to find shorter passages which express the meat of the matter.

A very experienced judge, Mr Justice McFarlane of the British Columbia Court of Appeal, has said this:

The first requisite must surely be clarity of thought. We should understand clearly what we intend to say before we start to say it, whether orally or in writing. This is of special importance in the case of oral judgements. An hour's concentrated study and thought is more valuable than a ready draft and any number of reversions. A pencil and a piece of paper provide no substitute for careful thought and for at least one simple reason such scribbling invites too much attention to words and form and diverts the mind from critical analysis of facts and argument.

We must certainly agree that one must think before one writes but in our opinion it is best to get your thoughts, tentative as they may be at first, on paper as soon as you can because nothing better exposes any fallacies in your ideas than reading them in cold type - what appeared at midnight to be inspiration may, when read in the clear light of the morning, disclose itself as error. The process of writing a good judgement requires generally repeated corrections, deletions and additions as your ideas develop:

...Hyperbole, the extravagant use of adjectives and adverbs, is to be avoided, Look out for clichés, when you find yourself writing one try to find another method of expressing the same thoughts.

One regrettable phrase often used in judgements is "I have carefully considered". Surely it is assumed that all judicial opinions are the product of careful consideration: the use of the cited phrase implies that some are not and the adverb "carefully" should be deleted.

We quote a phrase from a purposely unidentified judgement: "The question would seem to be..." There are two weakening qualifications here, the words "would" and "seem". If the judge had not yet arrived at the state of mind where he could write "the question is". He was not ready to deliver judgement...

We cite and approve this passage from the *American State Trial Judges Book* at p. 375 (2nd edition):

Limit the use of Italics for the purpose of emphasis. Their frequent use implies that the reader is not alert enough to catch the point without special help.

We recommend against the extensive use of Latin phrase save such words as "prima facie" which are now part of our own language.

The *American State Trial Judges Book* says at page 375 “Minimize the use of Latin phrases, it looks too pretentious”. Pretentious or not, the use of such phrases is common in the judgements of the English Courts. English judges are normally the products of a classical education and the use of Latin comes naturally to them. This is not always true of Canadian judges, lawyers or laymen and the over-use of Latin is to be avoided not through fear of pretentiousness, but for the sake of comprehensibility. And in England, the excessive use of Latin has been deprecated by Du Parcq L.J. in *Ingram v. United Automobile Services Ltd.* (1943) 2 all E.R. 71 where he said at page 73:

I think the cases are comparatively few in which much light is obtained by a liberal use of Latin phrases. Nobody can derive any assistance from the phrase *novus actus interveniens* until it is translated into English.

One of the purposes of written or, for that matter, oral reasons for judgement is to state the facts you have found and your reasons for finding those facts. In this process when credibility is a factor it is not ordinarily good enough just to say that you accept the evidence of witness A and reject that of witness B. You should give your reasons for the choice and, while demeanour may be an element, it is not necessarily acceptable as the only basis. The gaps, the contradictions, the uncertainties in the evidence rejected should be stated, as well as the strength of the evidence accepted.

We suggest that for a trial judge, their findings of fact may be even more important than their rulings on law. This is because, generally speaking, appellate courts will not overrule them on facts, but will not hesitate to do so on law. Thus it may be more important to the litigant that the judge should be right on fact than it is that their law should be correct. If their findings of fact are incorrect they may have done the litigant a wrong that cannot be righted by a higher court, as could an erroneous ruling in law.

Some judges, notably Lord Denning MR, make frequent use of subject headings in their judgments, similar to chapter headings in books. There is merit in this usage in long involved matters.

It will be noted also that such experts as Lord Denning do not always follow exactly the order of statement we have outlined. In *Thakrar v Secretary of State* (1974) 2 ALL ER 261, 264, his Lordship begins a judgement as it might appear, almost in *medias res* with this dramatic statement:

In 1972 a sword fell on the Asians living in Uganda. It was the sword of the President General Amin.

But thereafter, it will be observed, the arrangement followed by the Master of the Rolls was the conventional one we have suggested.

This trenchant and useful paragraph is from an article by Lord Macmillan in *The Writing of Judgements* (1948) 26 *Canadian Bar Review* 491, 499:

The judgement of a judge of first instance is properly framed on different lines from the judgements delivered in a court of appeal. The first judgement rightly covers the whole ground. In the court of appeal much is usually shed, but the first judge cannot foretell what points may commend themselves on appeal and he ought to provide all the material which may conceivably be regarded as relevant on a reconsideration of the case. In a court of appeal it is desirable, if possible, that there should be a single agreed narrative of the facts in the leading judgement and that the other appellate judges should not repeat them, but should confine themselves to dealing with any particular aspect of the case which they desire to emphasize or develop. The law reports are too often cumbered with unnecessary repetitions which add little of importance. A dissenting judge may of course find it necessary to give his own version of the facts as he sees them and to support his dissent by an independent argument.

We do not like the straight narrative style of writing a judgement which never really poses the question to be answered until near the end. Indeed, in some judgements the question is never clear stated but you are left to discover it from the narrative and the answer. A judgement is not a detective story; it consists really of the posing of a question or questions and thereafter of findings of facts germane to the questions and the stating of the answers to those questions, based on applicable law...

...You can, of course, from the bench or in a written judgement say what you think of a person's conduct without fear of being sued for libel. This power carries with it a responsibility to be careful and to be sure your facts before you describe a person or his acts in pejorative terms. Harsh words are only to be used when fully justified by the facts and recognition of the common frailties of mankind may often temper the denunciation.

But the judge need not fear to denounce when conduct has been so grossly wrong as to warrant severe words.

¹ Lord Hope of Craighead "Writing Judgments" 1.

² Justice Murray Gleeson "introduction" in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The Judicial College of Australia 2008) 1, 1.

³ Justice Murray Gleeson n 2, 1.

⁴ T Anderson: "The New Magistrate and the Lengthy Trial" in G Briggs (ed) *Judicial Decisions; Crafting Clear Reasons* 2008 4, 4.

⁵ M Baumann "Begin with the End in Mind" in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* 2008 13, 14; See also K Millard "A Magistrates Approach to Judgment Writing" in G Briggs (ed) *Judicial Decisions: Drafting Clear Reasons* 2008 75, 76.

⁶ K Millard n 5, 76.

⁷ C Holmes in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The National Judicial College of Australia 2008) 54, 56.

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- ⁸ Holmes n 7, 56.
- ⁹ Anderson n 4, 4.
- ¹⁰ Baumann n 5, 13-14.
- ¹¹ G Cicchini "Delivering Judgment's Mind" in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The National Judicial College of Australia 2008) 13, 13-14.
- ¹² Cicchini n 11, 27.
- ¹³ Murray Kellam in G Briggs (ed) *Judicial Decisions; Crafting Clear Reasons* (The National Judicial College of Australia 2008) 58, 59.
- ¹⁴ Anderson n 4, 4.
- ¹⁵ Holmes n 7, 56.
- ¹⁶ Justice K Hayne in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The National Judicial College of Australia 2008) 52, 52.
- ¹⁷ Civil cases also include family law matters.
- ¹⁸ The Hon Justice David Bleby in G Briggs (ed) *Judicial Decisions: Crafting Clearer Reasons* (The National Judicial College of Australia 2008) 17, 18.
- ¹⁹ Justice Bleby n 18, 18-19.
- ²⁰ Justice Bleby n 18, 18-19.
- ²¹ Cicchini n 11, 26.
- ²² His Honour Baumann n 5, 14.
- ²³ J Raymond "The Architecture of Argument" (2004) 7 *The Judicial Review* 39, 46.
- ²⁴ Raymond n 23, 46
- ²⁵ His Honour Magistrate H Dillon "On the Craft of Judgment Writing- Some Short Ruminations" in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The National Judicial College of Australia 2008), 31,35.
- ²⁶ Anderson n 4, 6.
- ²⁷ Holmes n 7, 55.
- ²⁸ Lord Hope n 1, 4.
- ²⁹ Justice Bleby n 18, 20.
- ³⁰ Justice Bleby n 18, 20.
- ³¹ The New Zealand Institute of Judicial Studies Judgment Writing Program.
- ³² The New Zealand Institute of Judicial Studies Judgment Writing Program.
- ³³ Her Honour Judge Murrell "Judgment Writing Tips for Judges Sitting in Crime" in G Briggs (ed) *Judicial Decisions: Crafting Clear Reasons* (The National Judicial College of Australia 2008), 89-90.
- ³⁴ Justice Bleby n 18, 20. See also Hayne n 16, 53 and The Hon Justice Alan Blow OAM "Judgment Writing Tips" in G Briggs (ed) *Judicial Decisions: Crafting Clear Decisions* (The National Judicial College of Australia) 22, 23.
- ³⁵ Justice Bleby n 18, 20.
- ³⁶ The New Zealand Institute of Judicial Studies Judgment Writing Program.
- ³⁷ Justice Hayne n 16, 53.
- ³⁸ Justice Hayne n 16, 53.
- ³⁹ Lord Hope n 1, 20.
- ⁴⁰ Anderson n 4, 5-6.
- ⁴¹ Justice Bleby n 18, 21.
- ⁴² Anderson n 4, 7.
- ⁴³ Anderson n 4, 7.
- ⁴⁴ Justice Bleby n 18, 21.