THE SECURITY OF TENURE OF AUSTRALIAN MAGISTRATES

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[Security of judicial tenure is essential for the independence and impartiality of Australia's courts. Although magistrates and their courts deal with over 90 per cent of all civil and criminal matters resolved in Australian courts, the tenure of magistrates is not protected to the same extent or in the same ways as the tenure of judges of the higher courts. This disparity is especially marked in the processes and criteria for removal and suspension from office and in the lack of salary guarantees. Lesser protection for the magistracy is not justified by any relevant distinction between the courts. Those who appear before magistrates are entitled to a judicial officer who is accorded at least the same degree of independence — protected by appropriate mechanisms — as other courts.]

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I INTRODUCTION

Adequate security of tenure for judicial officers is essential to the independence and impartiality of Australia's courts. This article identifies significant inconsistencies in conditions of tenure between magistrates[1] and judges of the district, supreme and Commonwealth courts,[2] as well as between magistrates in different jurisdictions. Although magistrates are becoming more like judges of the higher courts in their functions and characteristics, this article demonstrates that the tenure of magistrates is not protected to the same extent or in the same ways as the tenure of judges of the higher courts, especially in the key areas of guaranteed remuneration, and procedures and standards for removal and suspension from office.

Following a brief introduction in Part II of the concepts of security of tenure and judicial independence, Part III of this article considers magistrates' judicial independence — reviewing the legislative changes which constituted magistrates courts[3] and separated magistrates from the public service, often with the express purpose of providing greater formal protection for the independence of Australian magistrates. Next, Part IV analyses the constitutional requirements for the protection of judicial independence and the implications of the different protections of security of tenure. This Part also considers a number of specific aspects of security of tenure, including abolition of the court as a whole, promotion, retirement and superannuation, salary and remuneration, and removal and suspension of magistrates. Each aspect is considered by comparing the protections available to magistrates with those applicable to the judges of the higher courts and then in light of the qualities which establish the minimum constitutional standards for judicial independence.

Although the High Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley*[4] held that there is 'no single ideal model of judicial independence, personal or institutional',[5] the lesser protections for magistrates identified in this analysis are not justified by any relevant differences between the courts. Fur-

[1] Detailed consideration of the Federal Magistrates Court is beyond the scope of this article. Although designated as a magistrates court, it has a substantially different jurisdiction from state and territory magistrates courts with a different relation to the superior courts. As a Commonwealth court, it is governed by constitutional principles not applicable to other magistrates courts.

[2] Each Australian state and territory has a Magistrates or Local Court, which hears summary criminal matters and civil matters and a Supreme Court, which sits as a trial court for major civil and criminal matters and hears appeals. There is also an intermediate trial court, called the District or County Court, except in the smallest jurisdictions (the Australian Capital Territory, the Northern Territory and Tasmania). The High Court is the final court of appeal for both federal and state courts. This article uses the term 'district court' to refer generically to all intermediate trial courts and 'magistrates court' to refer generally to courts in which magistrates preside. This article does not capitalise the name of any court unless it is referring to a specific court. When discussing supreme or district or magistrates courts generically, these phrases are not capitalised, in the same way that a general reference to higher courts or lower courts would not be capitalised.

[3] The court is called the Magistrates Court in all Australian jurisdictions, except in New South Wales, where it is called the Local Court. This article will use the term 'magistrates courts' to refer generically to all courts in which magistrates preside.

[4] (2004) 218 CLR 146 ('*NAALAS v Bradley*').

[5] Ibid 152 (Gleeson CJ).

thermore, some fall below minimum constitutional standards necessary to ensure the substance and appearance of 'an independent and impartial tribunal'.[6] These concerns are particularly acute in relation to the processes and criteria for removal of magistrates, the grounds and mechanisms for their suspension from office and the lack of salary guarantees. The contemporary context and the current judicial functions of magistrates courts require better protection for magistrates' security of tenure. This will provide greater assurance to the community that the impartiality of magistrates' decisions is fully supported by law.

II SECURITY OF TENURE AND JUDICIAL INDEPENDENCE

Judicial independence is a fundamental aspect of the rule of law in common law countries, since at least the 17th century in England,[7] and is also the subject of international norms and declarations.[8] Spigelman CJ has emphasised that 'courts perform a core function of government: the administration of justice according to law'.[9] The central, distinctive judicial function is 'independent, impartial … adjudication'.[10] The independence of individual judicial officers enables impartial adjudication on the merits of each case and so protects parties appearing before the court and the legitimacy of the court system itself.[11]

The core elements of judicial independence are freedom from external control by the executive government and freedom from internal control by other judicial officers, including the Chief Justice, Chief Judge or Chief Magistrate.[12] The

6 Ibid 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

7 James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 65–6.

8 See, eg, Committee of Experts, the International Association of Penal Law and the International Commission of Jurists, *The Syracuse Draft Principles on the Independence of the Judiciary* (1981), available in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) ch 35 ('*Syracuse Draft Principles*'); First World Conference on the Independence of Justice, *Universal Declaration on the Independence of Justice* (1983), available in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) ch 39 ('*Universal Declaration on the Independence of Justice*'). See further Melissa A Perry, 'Disqualification of Judges: Practice and Procedure' (Discussion Paper, Australian Institute of Judicial Administration, 2001) 3; Martin L Friedland, 'Judicial Independence and Accountability: A Canadian Perspective' (1996) 7 *Criminal Law Forum* 605, 622–9; Chief Justice David K Malcolm, 'The Judiciary under the *Constitution*: The Future of Reform' (2003) 31 *University of Western Australia Law Review* 129; Justice Michael Kirby, 'A Global Approach to Judicial Independence and Integrity' (2001) 21 *University of Queensland Law Journal* 147; George Winterton, Australian Institute of Judicial Administration, *Judicial Remuneration in Australia* (1995) 12–13.

9 Chief Justice J J Spigelman, 'Seen To Be Done: The Principle of Open Justice — Part II' (2000) 74 *Australian Law Journal* 378, 381.

10 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 1, 4.

11 Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10 *Journal of Judicial Administration* 179, 187; Winterton, above n 8, 13–17; *Ell v Alberta* [2003] 1 SCR 857, 869 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

12 Kate Malleson, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) 60 *Modern Law Review* 655; Shimon 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. Note that other powerful individuals or institutions may seek to exert improper influence on judicial decision-making. Sir Ninian mentions 'commerce and industry, trade unions, employers' organisations, political parties and pressure groups': Sir

primary mechanism for protecting judicial independence is security of tenure,[13] which supports external and internal judicial independence.[14]

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.[15]

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 the legal arguments rather than 'external direction'.[16] When the court must decide disputes between citizens and government, independence from the government reduces the risk of apprehended or actual bias in favour of the government as a litigant.[17] External judicial independence also supports the rule of law by maintaining public confidence in the judiciary and the 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'.[18]

Internal judicial independence is also a key mechanism in the rule of law. Just as executive direction of adjudication would be inconsistent with the rule of law,

Ninian Stephen, 'Judicial Independence' (Speech delivered at the Inaugural Annual Oration in Judicial Administration, Brisbane, 21 July 1989) 8. The media, especially when calling for harsher sentencing, could be added to this list: John Doyle, 'The Well-Tuned Cymbal' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 39. However, potential influence of this kind raises issues more appropriately considered under the concepts of bias, or apprehended bias, rather than the structural aspects of judicial independence effected by institutional arrangements with the executive and the internal hierarchical structures within a court itself. However, such pressures can act on the government of the day, which then uses its administrative powers in ways which are inimical to independent judicial decision-making. For a recent example, see the action of the Western Australian executive in moving Judge O'Brien from the Children's Court to the District Court, allegedly in response to media criticisms of light sentencing: Victoria Laurie, 'Chief Justice Comes to Defence of Sacked Judge', *The Australian* (Sydney), 6 February 2004, 6.

13 Crawford and Opeskin, above n 7, 65; Justice Ronald Sackville, *Acting Judges and Judicial Independence* (2005) Judicial Conference of Australia <http://www.jca.asn.au/docs/Age28Feb05.doc> also available as Justice Ronald Sackville, 'The Threat to Victoria's Courts', *The Age* (Melbourne), 28 February 2005, 11.

14 Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 590, 598–9.

15 *Fingleton v The Queen* (2005) 216 ALR 474, 486.

16 Crawford and Opeskin, above n 7, 65; Handsley, 'Issues Paper on Judicial Accountability', above n 11, 187; Winterton, above n 8, 13–14.

17 Crawford and Opeskin, above n 7, 65; Winterton, above n 8, 16–17.

18 Chief Justice Murray Gleeson, 'Foreword' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) xi, xi; see also John Toohey, '"Without Fear or Favour, Affection or Ill-Will": The Role of Courts in the Community' (1999) 28 *University of Western Australia Law Review* 1, 8.

so would improper direction from the presiding judicial officer — or any other judicial officer.[19]

> [T]he 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.[20]

Security of tenure 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. Security of tenure 'reinforces the independence of mind and action of judicial officers, essential to the proper discharge of their functions'.[21] This independence is essential for public confidence in the impartiality of courts.[22] However, magistrates in Australia do not enjoy the same security of tenure as judges of the higher courts. In some respects — especially the lack of guaranteed remuneration and the procedures and standards for removal and suspension — their security of tenure falls below what is desirable and perhaps what is constitutionally required.

III MAGISTRATES AND JUDICIAL INDEPENDENCE

The entitlement of magistrates to any formal security of tenure has not always been recognised or accepted.[23] For example, in 1965, Windeyer J in *Spratt v Hermes* found it 'not surprising, nor … contrary to tradition or principle' that magistrates in the Australian Capital Territory should hold office at the pleasure of the Crown.[24]

Magistrates and their courts have undergone substantial changes since 1965.[25] There has been an increasing professionalisation of magistrates as judicial officers. Magistrates are now separated from the public service; they are required to have legal practice qualifications and they hear and decide a wide variety of serious cases. Magistrates today are more like judges of the higher courts in their functions and characteristics and are hence deserving of similar protections for their independence, especially security of tenure. At the same time, as discussed more fully in this Part, magistrates courts have a number of distinctive features. These differences between the courts and their status do not justify any lesser protection for the magistrates and the public they serve; rather, they reinforce the need for clearer protections for magistrates' security of tenure.

19 Stephen Colbran, 'Judicial Performance Evaluation: Accountability without Compliance' (2002) 76 *Australian Law Journal* 235, 246; Douglas Drummond, 'Towards a More Compliant Judiciary? — Part I' (2001) 75 *Australian Law Journal* 304, 316–17; Shetreet, 'The Limits of Judicial Accountability', above n 12, 11.

20 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 398 (Gleeson CJ and Gummow J).

21 *Fingleton v The Queen* (2005) 216 ALR 474, 507 (Kirby J).

22 Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 49.

23 Mason, above n 10; *Spratt v Hermes* (1965) 114 CLR 226.

24 (1965) 114 CLR 226, 272.

25 Crawford and Opeskin, above n 7, 92–3; John Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond' (2000) 74 *Australian Law Journal* 509; John Willis, 'Magistracy: The Undervalued Work-Horse of the Court System' (2001) 18 *Law in Context* 129.

A *Separation from the Public Service*

In the past, Australian magistrates were part of a public service department, promoted from positions as clerks of the court on the basis of merit and/or seniority. As clerks and magistrates they were subject to public service terms and conditions.[26] Now, magistrates in all Australian jurisdictions are separate from the public service, and magistrates courts are formally constituted under separate legislation.[27]

One factor leading to this change was a concern about the independence of magistrates who were also public servants. In *Fingleton v Christian Ivanoff Pty Ltd*,[28] the Supreme Court of South Australia upheld a magistrate's decision to disqualify himself from hearing a case on the ground of apprehended bias because the magistrate was a member of the same government department as the lawyer representing a party (also a government department) in the litigation. Wells and Sangster JJ commented:

> There are strong grounds for maintaining that no person holding judicial office should be in the public service, more especially if he or she has to hear and determine prosecutions or civil causes in which the Crown or some instrumentality thereof is a party … The principles of judicial independence apply just as forcibly to magistrates who, statistically, are seen to administer justice by a far greater number of people than are Supreme Court judges.[29]

However, the separation of magistrates from the public service was not universally regarded, even by magistrates, as a necessary or even positive change.[30] Later cases either disagreed with the view in *Fingleton v Christian Ivanoff Pty Ltd* about apprehended bias,[31] or concluded that the arrangement, while undesirable, was lawful under the existing statutory arrangements.[32] For example, the Supreme Court of Western Australia did not uphold a magistrate's disqualification of himself when the prosecutor was from another government department, on the basis that the connection was too tenuous to create a concern about bias.[33]

In New South Wales, departmental practice and convention were seen as providing sufficient protection for the independence of magistrates who were public servants. One judgment describes a departmental rule that magistrates could not be directed in their judicial functions as a sufficient guarantee of

[26] Chief Justice Murray Gleeson, 'A Changing Judiciary' (2001) 75 *Australian Law Journal* 547, 547–8; Hilary Golder, 'The Making of the Modern Magistracy' (1991) 77(3) *Journal of the Royal Australian Historical Society* 30, 32; New South Wales Law Reform Commission, *The Magistracy: Interim Report — First Appointments as Magistrates under the* Local Courts Act, 1982, Report No 38 (1983) app A, 69.

[27] *Court of Petty Sessions (Amendment) Ordinance [No 4] 1977* (ACT); *Local Courts Act 1982* (NSW); *Magistrates Ordinance 1977* (NT); *Magistrates Act 1991* (Qld); *Magistrates Act 1983* (SA); *Stipendiary Magistrates Act 1969* (Tas); *Magistrates' Court (Appointment of Magistrates) Act 1984* (Vic); *Stipendiary Magistrates Amendment Act 1979* (WA).

[28] (1976) 14 SASR 530.

[29] Ibid 546.

[30] See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 8 November 1983, 1449 (K T Griffin).

[31] See, eg, *Lyle v Christian Ivanoff Pty Ltd* (1977) 16 SASR 476.

[32] *R v Moss; Ex parte Mancini* (1982) 29 SASR 385.

[33] *Falconer v Howe* [1978] WAR 81.

independence.[34] In *Macrae v Attorney-General (NSW)*, Kirby P similarly asserted that magistrates in New South Wales

> by convention, if not by law, enjoyed respect and protection for their judicial independence. … [This was a] status which they had long enjoyed as independent judicial officers, performing responsible tasks of a judicial character.[35]

Eventually, the potential for, or appearance of, executive interference with judicial officers created by the public service structure was recognised as inconsistent with the right of the public, served by magistrates and magistrates courts, to have their matters heard by a formally independent judiciary. The goal of providing at least some degree of judicial independence for magistrates is clearly expressed in the parliamentary debates in several states and territories in relation to legislation to constitute magistrates courts and separate magistrates from the public service.[36] For example, in South Australia the Attorney-General stated that the purpose of the Magistrates Bill 1983 (SA) was to 'place magistrates, in relation to the exercise of their judicial functions, in the same position as other members of the judiciary'.[37]

The move away from public service status was clearly intended as a mechanism to improve the formal status of magistrates as independent judicial officers.[38] However, separation from the public service was not the only change linked to increased judicial independence for magistrates. Changes to their qualifications for appointment and increases in their jurisdiction were also significant.

B *Qualifications*

Once magistrates were separated from the public service and its system of promotion, the question of qualifications for appointment needed further consideration. In all Australian jurisdictions the current minimum statutory qualification for appointment is admission as a barrister/solicitor/legal practitioner of one or more named jurisdictions, usually for five years (except in New South Wales, where no minimum time of admission is specified).[39] This formal requirement of admission to practice was sometimes introduced as part of the

34 *Ex parte Blume; Re Osborn* [1958] SR (NSW) 334, 340 (Roper CJ, Owen and Herron JJ).

35 (1987) 9 NSWLR 268, 278 ('*Macrae*').

36 New South Wales, *Parliamentary Debates*, Legislative Council, 1 December 1982, 3584 (J R Hallam, Minister for Agriculture and Fisheries); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 November 1976, 771 (E Andrew); Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 1991, 1981 (D M Wells, Attorney-General); South Australia, *Parliamentary Debates*, Legislative Council, 19 October 1983, 1163 (C J Sumner, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 August 1979, 1756 (W Bertram).

37 South Australia, *Parliamentary Debates*, Legislative Council, 8 November 1983, 1452 (C J Sumner, Attorney-General).

38 *NAALAS v Bradley* (2004) 218 CLR 146, 167 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

39 *Magistrates Court Act 1930* (ACT) s 7A; *Local Courts Act 1982* (NSW) s 12(2); *Magistrates Act 1977* (NT) s 5; *Magistrates Act 1991* (Qld) s 4; *Magistrates Act 1983* (SA) s 5(5); *Magistrates Court Act 1987* (Tas) s 8(1); *Magistrates' Court Act 1989* (Vic) s 7(3); *Magistrates Court Act 2004* (WA) sch 1 cl 2(2)(a).

legislation to separate magistrates from the public service (in Queensland, South Australia and Victoria), though in some jurisdictions (the Australian Capital Territory, South Australia and Tasmania) the practice of appointing magistrates with legal practice qualifications and/or experience was well established.[40] In other jurisdictions, the appointment of magistrates from 'outside' — that is, from the legal profession — is quite recent. For example, the first such appointment in Queensland was in 1991, when the legislative changes were enacted. In some jurisdictions, there are still serving magistrates who were appointed under the former public service qualifications.

The minimum formal qualifications for appointment to the higher courts are very similar to those for magistrates, though a longer period of admission as a practitioner is sometimes required before appointment as a judge.[41] This slight difference in formal qualifications does not provide any basis for distinguishing between judges and magistrates as judicial officers; nor should it affect their respective entitlements to judicial independence.

C *Increasing Jurisdiction of Magistrates Courts*

A third factor linked to the need for recognition of the judicial independence of magistrates is the increased range and seriousness of the cases heard in magistrates courts. The legislation removing magistrates from the public service was sometimes accompanied, either immediately or shortly thereafter, by an increase in the civil and criminal jurisdictions of magistrates courts.[42] For example, in supporting the Victorian legislation to separate all magistrates from the public service, the opposition expressly referred to the increase in civil and criminal jurisdiction.[43] While there was no immediate link in the Australian Capital Territory, Tasmania or Western Australia[44] there have been increases in jurisdiction since the separation from the public service.

The value of civil cases now heard by magistrates ranges from $20 000 to $100 000.[45] Criminal jurisdiction has also increased. For example, in 1985, the Court of Petty Sessions in Western Australia had jurisdiction over charges of stealing only up to $1000 in value, and no jurisdiction over charges of receiving stolen goods or burglary.[46] By 1997, the Court's jurisdiction was unlimited in cases of stealing, if the magistrate and the accused consented, and included fraud and burglary up to a value of $10 000.[47] Sentencing powers have been increased,

40 New South Wales Law Reform Commission, above n 26, app A, 70.
41 Campbell and Lee, above n 22, 80; Crawford and Opeskin, above n 7, 63.
42 *Macrae* (1987) 9 NSWLR 268, 278 (Kirby P).
43 Victoria, *Parliamentary Debates*, Legislative Council, 5 September 1984, 125 (Haddon Storey).
44 New South Wales Law Reform Commission, above n 26, app A, 75.
45 *Magistrates Court Act 1930* (ACT) s 257(1); *Local Courts Act 1982* (NSW) s 4(1); *Local Court Act 1989* (NT) s 3; *Magistrates Court Act 1921* (Qld) s 4; *Magistrates Court Act 1991* (SA) s 8; *Magistrates Court (Civil Division) Act 1992* (Tas) s 7; *Magistrates' Court Act 1989* (Vic) s 3(1); *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 4.
46 *Criminal Code* (WA) s 426.
47 *Criminal Code* (WA) s 426(2).

enabling magistrates in most jurisdictions to impose sentences of two or three years imprisonment for one offence and up to five years for multiple offences.[48]

As these more serious cases were formerly heard in district or supreme courts, there can be no doubt about the essentially judicial nature of the work of magistrates courts today. Sir Ninian Stephen points out that moving cases formerly heard by a supreme court into a magistrates court removes a significant range of matters from the full formal protections of judicial independence.[49] Sir Anthony Mason links the importance of judicial independence for magistrates with their increasing jurisdiction:

> The litigants and the public expect impartial and independent adjudication from magistrates just as they expect it from judges. … Magistrates' courts undertake important work extending over a wider range of issues. They exercise an important jurisdiction in relation to summary offences. They are the principal point of contact that the community has with the court system. Today there are strong reasons for applying the concept of judicial independence to magistrates.[50]

State and territory magistrates courts also exercise considerable federal jurisdiction under more than 100 different pieces of legislation, often involving summary prosecutions or committals for Commonwealth crimes, as well as in family law.

Magistrates are no longer public servants because that status did not provide sufficient judicial independence. In most jurisdictions, magistrates possess very similar formal qualifications to those appointed to higher courts. Magistrates now hear and decide serious civil and criminal matters once allocated to district or supreme courts, as well as exercising jurisdiction in a range of Commonwealth matters. These developments all combine to require that magistrates courts, and the public they serve, should be accorded protections for judicial independence similar to those available to the higher courts.[51]

At the same time, magistrates courts in Australia have several distinctive features. They deal with a very high volume of cases; over 90 per cent of all civil and criminal cases are initiated in a magistrates court.[52] Magistrates sit in urban, suburban and remote rural areas. They typically hear a large number of matters each day. Criminal defendants and civil litigants in magistrates courts are often unrepresented. The criminal charge or civil claim may be only one aspect of the

48 *Crimes Act 1900* (ACT) s 375(10), (11), (12); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58; *Criminal Procedure Act 1986* (NSW) s 267; *Criminal Code Act 1899* (Qld) s 552H; *Criminal Law Sentencing Act 1988* (SA) s 19; *Sentencing Act 1997* (Tas) s 13; *Sentencing Act 1991* (Vic) ss 113, 113B.

49 Stephen, above n 12, 11.

50 Mason, above n 10, 31.

51 Malcolm, above n 8, 133; L J King, 'The Attorney-General, Politics and the Judiciary' (2000) 29 *Western Australian Law Review* 155, 176–8.

52 Steering Committee for the Review of Commonwealth/State Service Provision, Council of Australian Governments, *Report on Government Services 2002* (2002) vol 1, 466; Steering Committee for the Review of Commonwealth/State Service Provision, Council of Australian Governments, *Report on Government Services 2003* (2003) vol 1, 6.20; Steering Committee for the Review of Government Service Provision, Council of Australian Governments, *Report on Government Services 2004* (2004) vol 1, 6.18.

varied problems they may face, such as financial hardship, precarious employment, mental and physical disabilities and substance dependence.

In several respects, magistrates work in greater isolation than other judicial officers. Magistrates sit without juries on many serious criminal matters, requiring them to make impartial decisions on fact as well as law.[53] This is a significant obligation rarely imposed on judges of the higher courts in criminal matters. Magistrates do not have the opportunity to sit on panels with other judicial officers in appellate matters, as do members of the supreme courts or higher Commonwealth courts. In many jurisdictions magistrates sit alone in regional areas for extended periods, rather than occasionally on circuit, and exercise a very wide range of jurisdictions including coronial, family and children's, as well as adult civil and criminal. There is often a lack of legal representation, which puts distinctive obligations on magistrates to balance their duties of impartiality with duties to ensure a fair trial.[54]

Magistrates courts are sometimes characterised as inferior courts, in contrast to superior courts of record. However, this and other distinctions according to court hierarchy are increasingly criticised.[55] Magistrates, by implication or by express legislation, are generally able to punish for contempt and to stay cases to prevent an abuse of the court's process, powers thought to be inherent in a superior court.[56] Similarly, whether by legislation or implication, magistrates are accorded the immunities of superior court judges.[57]

The High Court in *NAALAS v Bradley* suggested that counsel, in argument, may have accepted a remark drawn from a Canadian case that 'less stringent conditions are necessary to satisfy [the] security of tenure of inferior courts'.[58] This comment is not properly applicable to the gaps identified in the security of tenure of Australian magistrates today. The Canadian case was considering a decision to reappoint justices of the peace without legal qualification to a limited position as 'non-sitting justices' in contrast with 'sitting' justices, who would be required to have legal qualifications before presiding at a trial.[59] The Supreme Court of Canada upheld this decision substantially on the basis of deference to a genuine executive reorganisation of court structure,[60] similar to the grounds on which the High Court of Australia upheld the creation of the New South Wales Local Court.[61]

53 See, eg, *Magistrates Court Act 2004* (WA) s 13.

54 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) 5–6.

55 Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6 *Journal of Judicial Administration* 249, 258–9; *Fingleton v The Queen* (2005) 216 ALR 474, 485 (Gleeson CJ), 509 (Kirby J).

56 Campbell, 'Inferior and Superior Courts and Courts of Record', above n 55, 258; *Neill v County Court of Victoria* (2003) 40 MVR 265, 278 (Redlich J); *Loveridge v Commissioner of Police* (2004) 89 SASR 72, 81 (White J).

57 *Fingleton v The Queen* (2005) 216 ALR 474, 487 (Gleeson CJ).

58 (2004) 218 CLR 146, 172 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

59 *Ell v Alberta* [2003] 1 SCR 857, 863 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

60 Ibid 858 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

61 *A-G (NSW) v Quin* (1990) 170 CLR 1, 2 (Mason CJ, Brennan and Dawson JJ) ('*Quin*').

A significant factor in the Canadian Court's acceptance of variable levels of security of tenure is the gradation in constitutional adjudication undertaken by the different levels of Canadian courts as a result of the *Charter of Rights and Freedoms*. That constitutional role is one of the three public interest justifications for judicial independence in Canada. The other two are the rule of law and public confidence.[62] As justices of the peace would not be deciding constitutional cases, their need for full security of tenure was thought to be less significant.[63] This justification for the differential treatment of inferior courts has no application in Australia.

As this Part has described, magistrates and their courts have become like the higher courts in several respects — particularly in their separation from the public service, requirements of professional qualifications and the judicial nature of their work. At the same time, the distinctive features of magistrates courts suggest that the obligations of magistrates to be and to appear to be impartial can be particularly demanding. Regardless of whether similarities or differences are emphasised, those who appear before magistrates are entitled to a judicial officer who is accorded at least the same degree of independence as would be available in other courts, protected by appropriate mechanisms. However, an examination of the specific protections for security of tenure applicable to the magistracy discloses significant and unjustified differences, which may fall below minimal constitutional standards for judicial independence in Australia.

IV MAGISTRATES AND SECURITY OF TENURE

Once it is accepted that judicial independence, as a principle, is applicable to and necessary for the magistracy, no less than for the higher courts, the next step is to identify the mechanisms necessary to establish and maintain a sufficient degree of judicial independence.[64]

A central mechanism for ensuring both external and internal judicial independence is security of tenure.[65] If a judicial officer is worried about keeping his or her job or being reappointed by the government, she or he may be, or may be perceived to be, insufficiently impartial — at risk of deciding cases in a way which is favourable to the government as a party or to government policy more generally. In this way, security of tenure is a means of preventing the executive government from influencing judicial decision-making. Furthermore, security of tenure has the effect of limiting the authority of the chief judicial officer over individual judges or magistrates, thus also preserving internal judicial independence.

62 *Ell v Alberta* [2003] 1 SCR 857, 861, 875 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

63 Ibid 874 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

64 P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 53, 56; *NAALAS v Bradley* (2004) 218 CLR 146, 153 (Gleeson CJ), 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

65 Handsley, 'Issues Paper on Judicial Accountability', above n 11, 183; Lane, above n 64, 66; Malcolm, above n 8, 136–9.

In general, the security of tenure of judges of the state and Commonwealth courts is established by mechanisms developed for English judges in the 17th and 18th centuries.[66] The Commonwealth judiciary[67] is protected by the entrenched provisions in s 72 and other provisions of Chapter III of the *Australian Constitution*. Legislation and state constitutions protect the judicial tenure of the state supreme and district courts, though these protections may not be entrenched.[68]

The extent of constitutional protection for security of tenure as an aspect of the judicial independence of magistrates in the lower courts of Australia is unclear. Dicta in *Kable v Director of Public Prosecutions (NSW)*[69] would support an argument that the security of tenure of all judicial officers who exercise federal judicial power may need to meet heightened standards.[70]

This question was canvassed by Weinberg J in the first instance Federal Court decision in *North Australian Aboriginal Legal Aid Service Inc v Bradley*.[71] His Honour's review of judicial authority and academic commentary on the implication of Commonwealth constitutional protection for security of tenure in state courts leads to the conclusion that 'it is at least doubtful that [*Kable*] imposes limitations upon the power of territory legislatures to determine the appointment, tenure and remuneration of territory judges.'[72]

The High Court in *NAALAS v Bradley* did not expressly determine this general point, but clearly implied its possibility, stating:

> it is implicit in the terms of ch III of the *Constitution*, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.[73]

However, it is equally well established that there is no constitutional requirement that all judicial officers must have their independence secured 'to the

66 Friedland, above n 8, 607–8; Lane, above n 64, 58, 74, 78; Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 64–5; Ivan Potas, 'The Judicial Commission of NSW: Treading the Fine Line between Judicial Independence and Judicial Accountability' (2001) 18 *Law in Context* 102, 109–10.

67 Australia is a federal system (like the United States) with a Commonwealth (or national) court system and a separate state court system. In the Commonwealth system, the Federal Court has specialist jurisdiction over trade practices, federal administrative law, bankruptcy and some other matters arising under Commonwealth law while the Family Court has jurisdiction over marriage, divorce and custody of children in relation to divorce (except in Western Australia, which maintains a separate family law system). The High Court is the final court of appeal for both federal and state courts.

68 This leads to some debate about the precise constitutional basis for the independence of state judicial officers: Lane, above n 64, 66. The inadequacies of the *Constitution Act 1889* (WA) in this regard have been detailed by that state's Chief Justice: see Malcolm, above n 8.

69 (1995) 189 CLR 51, 102, 107 (Gaudron J) ('*Kable*').

70 Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 415; Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 236–41.

71 (2001) 192 ALR 625, 695–8 ('*NAALAS First Instance*').

72 Ibid 698.

73 (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), referring to *Ebner v Official Trustee* (2000) 205 CLR 337, 363 (Gaudron J); *Kable* (1995) 189 CLR 51.

highest possible degree in every respect'[74] and some 'legislative choice' is allowed in the mechanisms employed to promote judicial independence.[75] 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 over which the Chief Magistrate presides'.[76]

Important indicators of breaches of minimum standards include whether:

- the judicial officer is 'inappropriately dependent on the legislature or executive … in a way incompatible with requirements of independence and impartiality';[77]
- the circumstances 'compromise or jeopardise the integrity of the … magistracy or the judicial system';[78]
- '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'.[79]

More recently, the High Court has stated that public confidence and institutional integrity are not 'distinct and separately sufficient considerations'.[80] Rather '[p]erception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity', in particular, of courts with the capacity to exercise federal judicial power.[81] There has also been recent emphasis on the freedom of states to carry out their own powers and duties in relation to the appointment and remuneration of judges.[82]

This article will next consider in detail several aspects of security of tenure which are important for judicial independence. Each will be considered first by comparing the protections available for magistrates with those available for the judges of higher courts, and then each will be considered in light of the indicators of constitutional validity noted above.

74 *NAALAS v Bradley* (2004) 218 CLR 146, 153 (Gleeson CJ).

75 Ibid 152 (Gleeson CJ).

76 Ibid 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); see further Patrick Keyzer, 'Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the *Constitution*?' (2004) 32 *University of Western Australia Law Review* 30.

77 *NAALAS v Bradley* (2004) 218 CLR 146, 172 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

78 Ibid, citing *Kable* (1995) 189 CLR 51, 107 (Gaudron J), 117, 119 (McHugh J), 133 (Gummow J).

79 *NAALAS v Bradley* (2004) 218 CLR 146, 172 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Commonwealth v Wood* (2006) 148 FCR 276, 293 (Heerey J). The emphasis on public confidence raises questions about the basis on which courts might assess this public confidence or the views of 'reasonable and informed members of the public'. Further consideration of this point is beyond the scope of this article: see *Commonwealth v Wood* (2006) 148 FCR 276, 293 (Heerey J); Campbell, 'Constitutional Protection of State Courts and Judges', above n 70, 422; Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183, 195–7.

80 *Fardon v A-G (Qld)* (2004) 210 ALR 50, 78 (Gummow J).

81 Ibid; see also *Kable* (1995) 189 CLR 51.

82 *Austin v Commonwealth* (2003) 215 CLR 185 ('*Austin*').

The aspects of the security of tenure of Australian judicial officers which are discussed in detail below include:

- abolition of the court as a whole;
- promotion;
- retirement and superannuation;
- salary, including protection against reduction in remuneration;
- removal from office; and
- suspension from office.

Detailed examination of each component of security of tenure discloses similarities and differences between the legal protections available to Australian magistrates compared with the protections afforded to other state and federal judicial officers. Although securing some degree of independence was a motive in enacting the various Magistrates and Local Court Acts, some of the formal protections for the security of tenure of Australian magistrates appear insufficient when considered in light of the constitutional requirements for public confidence in an independent and impartial judiciary and the institutional integrity of the magistracy as a court. Concerns about the adequacy of the provisions applicable to magistrates are especially significant regarding security of remuneration and proceedings and grounds for suspension or dismissal from office.

A *Abolition of the Court as a Whole*

One possible way for the executive to end the tenure of a judicial officer might be to abolish the court itself. In *Macrae*, Kirby P refers to a 'strong legal tradition … of proper deference to the convention that judicial independence and tenure will be protected where new courts are created and old ones abolished'.[83] His Honour then gives a number of examples in Australia and elsewhere of how this has been done.

In most Australian jurisdictions, the transition from public service to separately constituted magistrates courts involved an automatic reappointment of all existing magistrates, either by legislation (in Tasmania and Western Australia)[84] or by express executive decision (in the Australian Capital Territory and Victoria).[85] The transition in New South Wales was not so smooth. In 1982, when the New South Wales Local Court was created by statute, five magistrates were not automatically reappointed to the new court because of concerns expressed to the Attorney-General about their fitness. These five magistrates could only be reappointed by applying and being considered in competition with others who might apply. There was extensive litigation about the legitimacy of this process. In one challenge, Lee J held that the principles of judicial independence did not

[83] (1987) 9 NSWLR 268, 278.
[84] New South Wales Law Reform Commission, above n 26, app A, 76, 77.
[85] Ibid 76; Victoria, *Parliamentary Debates*, Legislative Council, 5 September 1984, 124–5 (J H Kennan, Attorney-General).

create a private right and that there was no legitimate expectation of maintaining judicial office which had not been met by the process.[86] On appeal from this decision, the New South Wales Court of Appeal held that there was a legitimate expectation of being treated with procedural fairness. This meant that adverse information could not be taken into account in any reappointment application without giving the former magistrates an opportunity to be heard in relation to that information.[87] The lack of automatic reappointment was upheld by the High Court, which emphasised the reluctance of courts to intervene in the executive authority of judicial appointment and the genuineness of the plan of court reorganisation — it was not a sham to enable the indirect removal of judicial officers which could not be done directly.[88] The protections necessary for judicial officers when their court is abolished or restructured will likely only be determined when a future court reorganisation is challenged.

Thus, it appears that magistrates in these circumstances did not have guaranteed security of tenure when the New South Wales Local Court's predecessor court was abolished. However, the principles enunciated by the High Court do not appear to place magistrates in any different position from other judicial officers. Some commentators have suggested that dicta in *Kable* indicating that states cannot entirely abolish their supreme courts, could, if read broadly, impose other limits on the ability of state parliaments to reconstruct the state court systems more generally.[89] This issue will likely only be resolved when a future court reorganisation is challenged.

Current legislative protection is inconsistent. In New South Wales and Victoria, there is now express legislation requiring that any person holding an abolished judicial office be given another comparable judicial office.[90] In contrast, in the *Constitution of Queensland 2001* (Qld) the express protection for judges if the court is abolished does not include magistrates.[91] While it was decided in *Quin* that judicial independence could be adequately protected without the formal legislative guarantees now available in New South Wales and Victoria,[92] there is no justification for the different treatment accorded magistrates and judges in Queensland.

[86] *Macrae v A-G (NSW)* (Unreported, Supreme Court of New South Wales, Lee J, 20 February 1985).

[87] *Macrae* (1987) 9 NSWLR 268.

[88] *Quin* (1990) 170 CLR 1, 18 (Mason CJ); Campbell and Lee, above n 22, 115–17; Drummond, above n 19, 312. A similar result was reached by the Supreme Court of Canada in *Ell v Alberta* [2003] 1 SCR 857, 876 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ) when new legislation required justices of the peace who presided over criminal trials to have legal qualifications.

[89] Campbell, 'Constitutional Protection of State Courts and Judges', above n 70, 408, 419; Johnston and Hardcastle, above n 70, 221–4.

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

[91] *Constitution of Queensland 2001* (Qld) s 63.

[92] (1990) 170 CLR 1, 2 (Mason CJ, Brennan and Dawson JJ).

B *Promotion*

Another challenge to the security of judicial tenure can be created by the possibility or expectation of promotion. Promotion to a higher judicial office has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian legal system. A judicial officer seeking promotion may appear to be tempted to decide cases in a way which will please the executive government or other individuals or groups which may have an influence on judicial appointments.[93] In contrast, international norms, such as the *Basic Principles on the Independence of the Judiciary*, expressly contemplate promotion when based on 'objective factors … [such as] ability, integrity, and experience.'[94] Such promotion is a normal feature of European court systems.

Actual practices regarding appointments of judicial officers to higher courts in Australia suggest that questions about promotion and independence are not clearly resolved. Magistrates are occasionally appointed to higher judicial office. This is relatively rare and it is not part of any formal promotion structure, though Queensland has expressly recognised the possibility of promotion to different positions within the magistracy.[95] Judges of the district or supreme courts or the Federal Court are sometimes appointed to a higher court as well. Several current members of the High Court of Australia were previously judges on other courts. As with magistrates, there is no formal promotion process.

The lack of clarity about promotion is, in part, a consequence of the lack of transparency in judicial appointment criteria and process at all levels.[96] If previous judicial experience is thought to be an appropriate or desirable qualification for appointment to a particular judicial office, this should be openly stated so that the implications of promotion for the independence of all judicial officers can be appropriately resolved.

C *Retirement and Superannuation*

Superannuation entitlements are clearly a significant aspect of the overall remuneration of judicial officers.[97] Magistrates are differently situated than judges of the higher courts in relation to their retirement ages and superannuation entitlements. While some improvements for the magistracy are desirable, their conditions do not presently appear to fall below the 'minimum characteristic of an independent and impartial tribunal'.[98]

93 Handsley, 'Issues Paper on Judicial Accountability', above n 11, 188; Stephen, above n 12.

94 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* (1985) art 13, cited in Friedland, above n 8, 627–8. See also *Syracuse Draft Principles*, above n 8, arts 10, 11; *Universal Declaration on the Independence of Justice*, above n 8, art 2.17.

95 *Magistrates Act 1991* (Qld) s 47(3) requires that a magistrate only be promoted by a decision of the Governor-in-Council. Cf *Magistrates Act 1991* (Qld) s 12(3) which expressly provides that the Chief Magistrate is not authorised to promote a magistrate.

96 Sharyn Roach Anleu and Kathy Mack, 'Judicial Appointment and the Skills for Judicial Office' (2005) 15 *Journal of Judicial Administration* 37.

97 *Austin* (2003) 215 CLR 185, 284 (McHugh J).

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

Originally, security of tenure was thought to mean appointment for life, as reflected in s 72 of the *Australian Constitution* prior to its amendment by the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth). As James Crawford and Brian Opeskin comment, 'it is hard, however, to see how the independence of the judiciary could be affected by judges having to retire at a fixed age'.[99] Now, judicial officers in Australia are appointed until a fixed retirement age.[100] In district and supreme courts as well as Commonwealth courts, the mandatory retirement age is 70 in all jurisdictions except New South Wales and Tasmania, where it is 72.[101] The mandatory retirement age for magistrates is 65, except in Victoria, where it is 70, and in New South Wales and Tasmania, where it is 72.[102] Thus, the retirement age for magistrates and judges is identical only in Victoria (70), New South Wales (72) and Tasmania (72).

One consequence of appointments until a fixed age is to focus greater attention on superannuation entitlements for judicial officers on retirement. A secure retirement is important to judicial independence as it avoids the need for a judicial officer to seek paid employment after completing judicial service. A need for such further employment may create at least the appearance of a motive to decide cases in a way which would assist future employment prospects.[103]

It is a common practice in some jurisdictions for retired magistrates to be reappointed as acting magistrates, similar to the role of retired judges in many jurisdictions.[104] In Western Australia, retired magistrates can be appointed as acting magistrates until age 70.[105] There is also some provision for voluntary early retirement for magistrates.[106] Issues of judicial independence are also raised by the appointment of acting judicial officers.[107] However, the constitutional validity of acting judges in a territory supreme court has been upheld[108]

[99] Crawford and Opeskin, above n 7, 36.

[100] Any judicial officers who had been appointed under the previous regime retained their entitlement to lifetime tenure: see *Australian Constitution* s 72. Justice Kemeri Murray, currently serving on the Family Court, is an example.

[101] *Australian Constitution* s 72; *Supreme Court Act 1933* (ACT) s 4(3); *Judicial Officers Act 1986* (NSW) s 44(1); *Supreme Court Act 1979* (NT) s 38; *Supreme Court of Queensland Act 1991* (Qld) s 23(1); *District Court of Queensland Act 1967* (Qld) s 14(1); *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16(1); *Supreme Court Act 1887* (Tas) s 6A; *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) ss 8(3), 14(1); *District Court of Western Australia Act 1969* (WA) s 16; *Judges' Retirement Act 1937* (WA) s 3.

[102] *Magistrates Court Act 1930* (ACT) s 7D; *Judicial Officers Act 1986* (NSW) s 44(3); *Magistrates Act 1977* (NT) s 7; *Magistrates Act 1991* (Qld) s 42(d); *Magistrates Act 1983* (SA) s 9(1)(c); *Magistrates Court Act 1987* (Tas) s 9(4)(a); *Magistrates' Court Act 1989* (Vic) s 12(a); *Magistrates Court Act 2004* (WA) sch 1 cl 11(1)(a).

[103] *Syracuse Draft Principles*, above n 8, art 26; Judicial Conference of Australia, *Preliminary Response of the Judicial Conference of Australia to Proposed Changes in Pension Arrangements* (2004) <http://www.jca.asn.au/pubs/pensions.rtf>.

[104] Justice Ronald Sackville, 'Judicial Appointments: A Discussion Paper' (2005) 14 *Journal of Judicial Administration* 117; Campbell and Lee, above n 22, 86–8.

[105] *Magistrates Court Act 2004* (WA) sch 1 cl 9(2)(c), (3)(a).

[106] *Local Courts Act 1982* (NSW) s 20(c); *Magistrates Act 1991* (Qld) s 42(b); *Magistrates Act 1983* (SA) s 9(1)(b); *Magistrates Court Act 2004* (WA) sch 1 cl 12.

[107] This is especially so when the appointment is short-term and subject to reversal at the discretion of the executive: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 122 FCR 204, 251, 253 (Drummond J) ('*NAALAS Full Federal Court Appeal*').

[108] *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

and, as this issue is no different for the magistracy than for the higher courts, they are not discussed here.

Legislation in every jurisdiction creates substantial superannuation entitlements for judges of the higher courts which can take effect well before the mandatory retirement age. The usual provisions are that at age 60, after 10 years of service, a judge is entitled to an annual pension of 50–60 per cent of salary.[109] These entitlements do not depend on contributions by the judge or employer.

Magistrates in every jurisdiction (except the Chief Magistrate in New South Wales, Queensland and Victoria)[110] lack these substantial entitlements and, indeed, do not have any consistent superannuation entitlements, even within a given court. Magistrates are usually defined as employees for the purpose of the relevant legislation in their jurisdictions.[111] This entitles them to whatever superannuation may be available to employees generally, based on employer and employee contributions. In some jurisdictions, magistrates who were previously members of state superannuation schemes are expressly allowed to continue to participate in the relevant scheme.[112]

One consequence of the move from a public service system to appointment of magistrates from the legal profession is that magistrates within a single court may be on very different superannuation programs. Depending on their previous employment, some magistrates may have a lengthy history within a reasonably generous scheme, while others may have come from legal practice backgrounds with little or no superannuation entitlements. Different magistrates will be facing very different choices about when to retire and very different financial circumstances upon retirement.[113]

It is probably not financially or politically practical for magistrates to receive the same generous terms as judges of the higher courts. The constitutional freedom of states to appoint and remunerate judges stressed in *Austin*[114] would appear to bar a constitutional objection to this disparity. Nonetheless, judicial independence would be better protected by a greater degree of consistency and guaranteed minimum entitlements at least across all the members of a single court.

[109] *Judges' Pensions Act 1968* (Cth) s 6(1); *Supreme Court (Judges Pensions) Act 1980* (NT) s 4; *Judges (Pensions and Long Leave) Act 1957* (Qld) s 4; *Judges' Pensions Act 1971* (SA) s 6; *Constitution Act 1975* (Vic) s 83; *Judges' Salaries and Pensions Act 1950* (WA) s 6(1).

[110] *Local Courts Act 1982* (NSW) s 14A; *Magistrates Act 1991* (Qld) s 11; *Magistrates' Court Act 1989* (Vic) s 10A.

[111] *Local Courts Act 1982* (NSW) s 25; *Magistrates Act 1983* (SA) s 14; *Magistrates Court Act 1987* (Tas) s 4(2), (6)(b); *Magistrates' Court Act 1989* (Vic) s 7(7).

[112] *Magistrates Court Act 1930* (ACT) s 7H; *Local Courts Act 1982* (NSW) s 25(1); *Magistrates Act 1977* (NT) s 12; *Magistrates Act 1983* (SA) s 19(1)(b); *Magistrates Court Act 1987* (Tas) s 4(2); *Magistrates Court Act 2004* (WA) sch 1 cl 5(8).

[113] Kathy Mack and Sharyn Roach Anleu, 'Career Change and Retirement: A Preliminary Report' (Report No 3/04, Magistrates Research Project, Flinders University, 2004).

[114] (2003) 215 CLR 185, 264 (Gaudron, Gummow and Hayne JJ).

D *Salary and Remuneration*

In Australia, magistrates are paid (stipendiary) compared with the United Kingdom, where most are lay and unpaid.[115] In the Australian context, as Weinberg J commented, 'the arrangements for judicial remuneration are obviously central to judicial independence'.[116]

Security of tenure in relation to salary has several aspects:[117]

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

The aspect of remuneration as a component of security of tenure which raises the most significant concern is the lack of a guarantee against reduction in remuneration.

1 *Salary Levels*

In 2002, salaries for magistrates ranged from $139 270 (South Australia) to $160 265 (New South Wales).[118] These amounts are lower than those for other judicial officers (ranging from 67 to 76 per cent of the salary of supreme court justices in their jurisdictions),[119] just as district court salaries are less than salaries paid to supreme court justices, reflecting the hierarchy of the Australian court system.

When compared with the average annual Australian wage of $48 859[120] it would be difficult to argue that magistrates' salaries are unacceptably low or low enough to threaten public confidence in the independence of magistrates. A recent national survey of Australian magistrates found that 70 per cent were satisfied or very satisfied with their salary levels.[121]

2 *Remuneration Tribunals*

The need for an independent process for setting salaries is also important. The prospect of judicial officers negotiating directly with the executive for increases

115 Peter Seago, Clive Walker and David Wall, 'The Development of the Professional Magistracy in England and Wales' [2000] *Criminal Law Review* 631.

116 *NAALAS First Instance* (2001) 192 ALR 625, 699.

117 International Bar Association, *Code of Minimum Standards of Judicial Independence* (1982), available in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 388, arts 14, 15; *Syracuse Draft Principles*, above n 8, art 26; *Universal Declaration on the Independence of Justice*, above n 8, arts 2.19, 2.21; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof* [1997] 3 SCR 3.

118 Jason Silverii, 'On Call 24 Hours: From the Bear Pit to the Bench' (2002) 76(2) *Law Institute Journal* 16, 24. The current salary range, including the full value of salary packages, is somewhat higher today.

119 Ibid.

120 Australian Bureau of Statistics, *Average Weekly Earnings, Australia*, ABS Catalogue No 6302.0 (2004).

121 Kathy Mack and Sharyn Roach Anleu, 'Job Satisfaction v Stress: How Magistrates Rate Their Job' (2004) 78(10) *Law Institute Journal* 32, 34.

of salaries — or 'begging' as a Canadian judge characterised it[122] — would raise concerns about the appearance, at least, of judicial independence from the government.[123]

Mechanisms for setting magistrates' salaries do not differ significantly from the method of setting salaries for judges of the higher courts within their respective states or territories. In all jurisdictions except Tasmania, salaries are set via various independent remuneration tribunals.[124] Most tribunals make recommendations which must be confirmed by, or may be disallowed by, the legislature.[125] As a practical matter, magistrates' salaries are linked with the salaries of judges of higher courts, as the remuneration tribunals usually set or express magistrates' salaries as a percentage of the salary of judges of the higher courts.[126] In Tasmania, magistrates' salaries are set, legislatively, as a percentage of the salary of a Supreme Court Justice.[127] The link between the salary-setting mechanism and judicial independence is expressly recognised in South Australia where the remuneration tribunal 'must, where appropriate in determining remuneration under this Act, have regard to the constitutional principle of judicial independence'.[128]

3 *Reduction in Remuneration*

If a government has the ability to arbitrarily reduce the salaries of the judiciary generally or, worse, of a particular judicial officer, this could be a means of punishment for unwelcome decisions. Alternatively, an unjustified increase in salary could appear to be a reward for favourable decisions. It is the potential for reduction that has received the most attention as a threat to judicial independence.

The principle that judicial remuneration is not to be reduced during a judicial officer's tenure is a recognised constitutional convention.[129] However the extent to which the convention is formally recognised is different for magistrates compared with other judicial officers.

In all Australian jurisdictions (except Tasmania) the remuneration — sometimes expressed as salaries and allowances — of judges of the higher courts is expressly protected against reduction by constitutional or legislative provi-

122 Winterton, above n 8, 25, citing Judge François Beaudoin in Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (1991) 137.

123 Winterton, above n 8, 25; *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof* [1997] 3 SCR 3.

124 *Remuneration and Allowances Act 1990* (Cth) s 4; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 73; *Local Courts Act 1982* (NSW) s 24; *Statutory and Other Offices Remuneration Act 1975* (NSW) s 11; *Magistrates Act 1977* (NT) s 6(1); *Remuneration Tribunal Act 1981* (NT) s 9B; *Magistrates Act 1991* (Qld) s 47; *Magistrates Act 1983* (SA) s 13(2); *Judicial Remuneration Tribunal Act 1995* (Vic) s 11; *Magistrates' Court Act 1989* (Vic) sch 1 cl 3; *Salaries and Allowances Act 1975* (WA) s 7.

125 Winterton, above n 8, 58. Note the recent attempt by the Victorian Government to block pay increases for judges: ABC Radio, 'Bracks Vetoes Pay Rise for Judges', *The World Today*, 13 April 2004 <http://www.abc.net.au/worldtoday/content/2004/s1086355.htm>.

126 Silverii, above n 118, 24.

127 *Magistrates Court Act 1987* (Tas) s 10.

128 *Remuneration Act 1990* (SA) s 15.

129 Winterton, above n 8, 23.

sions,[130] although such legislation is not usually entrenched against amendment or repeal.[131] Tasmania achieves the effect of avoiding a reduction in salary for the Justices of the Supreme Court by legislation which links judicial salaries with that of the Chief Justices of Western Australia and South Australia, whose salaries are protected.[132]

In contrast, the protection for magistrates' remuneration is much more variable:

- the Australian Capital Territory, New South Wales, the Northern Territory and South Australia have express provisions which protect magistrates' 'remuneration and allowances' (Australian Capital Territory), 'remuneration' (New South Wales), 'salary, allowances and other benefits' (the Northern Territory), and 'rate of salary' (South Australia).[133]
- In Tasmania, magistrates' salaries are expressed in legislation as a percentage of the salary of a Supreme Court Justice which, as indicated above, is itself linked with other Chief Justices' salaries with express protection against reduction.[134] This would provide some protection against reduction in salary for a magistrate.
- In Queensland, there is a guarantee that salaries of magistrates must not be reduced by a determination of the tribunal, but this does not expressly apply to the combined rate of salary and allowances as is specified for some other courts in Queensland.[135]
- Victoria and Western Australia have no statutory guarantee that magistrates' salaries will not be reduced.

Until recently, magistrates in the Northern Territory appeared to have the least protection for salaries and remuneration. In *NAALAS v Bradley*,[136] the High Court considered the validity of a particular limited term remuneration entitlement, as well as various aspects of the judicial independence of magistrates discussed above. The Court held that, despite legislation providing that a magistrate's salary and terms were determined by the Northern Territory Admin-

130 *Australian Constitution* s 72; *Statutory and Other Offices Remuneration Act 1975* (NSW) s 21(1); *Supreme Court Act 1979* (NT) s 41(3); *Judges Salaries and Allowances Act 1967* (Qld) s 3(2); *Constitution of Queensland 2001* (Qld) s 62(2); *District Court Act 1991* (SA) s 13(2); *Supreme Court Act 1935* (SA) s 12(3); *County Court Act 1958* (Vic) s 10(6B); *Constitution Act 1975* (Vic) s 82(6B); *Judges' Salaries and Pensions Act 1950* (WA) s 5(1); *District Court of Western Australia Act 1969* (WA) s 12(1)(b).

131 Winterton, above n 8, 22–3.

132 *Supreme Court Act 1887* (Tas) s 7(3).

133 Lowndes, above n 25, 603; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 73(3A); *Statutory and Other Offices Remuneration Act 1975* (NSW) s 21; *Magistrates Act 1977* (NT) s 6(2); *Magistrates Act 1983* (SA) s 13(3). Note that this provision was only enacted in 2004 in the Northern Territory as a result of the decision in *NAALAS v Bradley*, discussed below.

134 *Magistrates Court Act 1987* (Tas) s 10(1).

135 *Judges (Salaries and Allowances) Act 1967* (Qld) ss 3(2), 3A(2), 3B(2), 4(2); *Constitution of Queensland 2001* (Qld) s 62(2).

136 (2004) 218 CLR 146.

istrator,[137] the remuneration of the recently appointed Chief Magistrate was guaranteed to some degree.

This case arose from a highly publicised controversy involving the Chief Magistrate of the Northern Territory, and makes clear the actual risks for security of judicial remuneration. It was initially proposed that a new Chief Magistrate would be appointed for a two-year term only. After further discussion, and public criticism from the legal profession, the Chief Magistrate was appointed, as usual, until retirement age, but under conditions agreed for only two years, including a remuneration package above that recommended by the Remuneration Tribunal. The regional Aboriginal Legal Aid organisation brought an action to have the Chief Magistrate removed from office. The challenge rested, in part, on a claim that the conditions of appointment were an unconstitutional violation of the principles of judicial independence.

Weinberg J hearing the case at first instance in the Federal Court commented that the arrangements for pay 'reflected an extraordinary lack of appreciation … of the fundamental importance of securing judicial independence'.[138] Nonetheless, the Court ultimately upheld the terms of appointment, in part on the ground that the *Magistrates Act 1977* (NT) did not show sufficient intent to ensure judicial independence. The Court relied on s 6, which at that time provided that 'a magistrate shall be paid such remuneration … and hold office on such terms … as the administrator determines', and on s 10, which allows for removal of a magistrate who is 'unsuited' to the duties of a magistrate. In light of these provisions, the Court stated 'it is difficult to discern a legislative intent to secure judicial independence in the provisions of the Act'.[139] The constitutional argument was rejected on the basis that existing authority and the language of s 72 of the *Australian Constitution* did not support guaranteed remuneration to Northern Territory magistrates.

This decision was appealed to the Full Court of the Federal Court. On appeal all three Justices agreed that the legislation constituting the Northern Territory Magistrates Court in 1977 manifested an intent to secure some degree of judicial independence and that several specific mechanisms in support of judicial independence were used. The questions were how far the legislation had gone in establishing this independence and what mechanisms were used. Two Justices concluded that '[a]lthough providing for an impartial and independent magistracy, the legislature has … not … underpin[ned] the independence of Northern Territory magistrates … [by providing security of remuneration] at any particular level';[140] thus the appointment was valid. Drummond J disagreed, deciding that there must be a valid remuneration tribunal determination for the entire tenure at the time of appointment.[141]

The case was appealed to the High Court, which unanimously upheld the appointment, though the grounds upon which Gleeson CJ relied differed slightly

137 *Magistrates Act 1977* (NT) s 6, prior to amendments by *Magistrates Amendment Act 2004* (NT).
138 *NAALAS First Instance* (2001) 192 ALR 625, 699.
139 Ibid 678.
140 *NAALAS Full Federal Court Appeal* (2002) 122 FCR 204, 225 (Black CJ and Hely J).
141 Ibid 263.

from the joint judgment of McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. Gleeson CJ held that 'in a practical sense' the remuneration determination did not leave Chief Magistrate Bradley 'in any position of dependency or disadvantage materially different from the position that would have applied had the determination been for an indefinite period'.[142] The joint judgment adopted a construction of the legislation which would not allow for the possibility of any gap in remuneration, though it recognised that the statutory right to remuneration might, in an unlikely eventuality, need to be enforced by seeking administrative review in the Supreme Court.[143]

During the oral argument in the High Court there was some discussion about the effect on public confidence and judicial independence of the new Chief Magistrate having to effectively negotiate a new remuneration package after two years, at which time the package could go up (perhaps implying a reward) or down (perhaps reflecting executive displeasure).[144] The possibility, apparent in the legislation, of an unjustified reduction in salary was held to be impossible. The exercise of the power to make a remuneration determination 'cannot be to diminish that which has been provided already; it must be to continue or enhance that provision'.[145]

Read broadly, by requiring an interpretation of the legislation so that it guaranteed no reduction in remuneration, the decision implies that the minimum constitutional standards for judicial independence protect judicial remuneration against reduction, and this constitutional requirement would apply to magistrates generally. However, the case may be limited to its particular circumstances and legislative language. Nonetheless, the case provides clear evidence of the centrality of a guaranteed salary level for judicial independence, which should be as clearly secured for magistrates as for other judicial officers.

E *Removal from Office*

The core requirement of security of tenure is protection against unjustified or arbitrary removal from judicial office. Provisions for tenure and removal of magistrates are sometimes similar to and sometimes different from those for the higher courts in their jurisdiction, reflecting magistrates' changing status from public servants to judicial officers. Tenure and removal provisions are also different for magistrates in different jurisdictions.[146]

1 *The Higher Courts*

Judges of the Commonwealth, supreme and district courts in Australia are guaranteed tenure, until retirement, sometimes expressed as 'during good

142 *NAALAS v Bradley* (2004) 218 CLR 146, 158–9.
143 Ibid 171.
144 See, eg, *NAALAS v Bradley* [2003] HCATrans 408, 25 (Kirby J).
145 *NAALAS v Bradley* (2004) 218 CLR 146, 170 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
146 Crawford and Opeskin, above n 7, 69; Lowndes, above n 25, 525–7.

behaviour'.[147] They can be removed by the executive (the Governor, Administrator or Governor-General) only by an Address from Parliament, usually at the request of the executive.[148] In some jurisdictions 'proved misbehaviour or incapacity' is required for removal.[149] In South Australia and Western Australia, there is no express requirement of misbehaviour for removal of judges but, coupled with the express guarantee of tenure during good behaviour, the implication is that removal should only be based on a lack of good behaviour. In Queensland, misbehaviour or incapacity is proved only if the legislature accepts a tribunal finding made on the balance of probabilities that grounds for removal exist.[150]

In New South Wales, the Australian Capital Territory and Victoria, the executive and legislative action must be based on a report or finding of incapacity or misbehaviour by a judicial commission (New South Wales and Australian Capital Territory)[151] or investigating committee (Victoria).[152] The New South Wales Judicial Commission is a statutory body which receives and examines complaints about judicial officers; it has no disciplinary authority itself. In serious matters (those which justify consideration for parliamentary removal) the complaint will be considered by a Conduct Division of three judicial officers and a report can be forwarded to the Governor for action. In minor matters, the complaint can be referred to the head of the relevant jurisdiction.[153] All New South Wales judicial officers, including magistrates, are subject to the Judicial Commission process.[154] The Australian Capital Territory Judicial Commission is similar.[155] In Victoria, an investigating committee appointed by the Attor-

147 Campbell, 'Suspension of Judges from Office', above n 66, 63; Crawford and Opeskin, above n 7, 68; Lane, above n 64, 61–3, 68–74; *Australian Constitution* s 72(ii); *Family Court Act 1997* (Cth) s 18(3); *Supreme Court Act 1933* (ACT) s 4(2)(b); *Supreme Court Act 1979* (NT) s 40; *Constitution of Queensland 2001* (Qld) s 60(1); *Constitution Act 1934* (SA) s 74; *Supreme Court Act 1935* (SA) s 9(3); *Constitution Act 1975* (Vic) s 87AAB; *Constitution Act 1889* (WA) s 54; *Supreme Court Act 1935* (WA) s 9(1); *District Court of Western Australia Act 1969* (WA) s 11(1).

148 *Australian Constitution* s 72(ii); *Family Law Act 1975* (Cth) s 22(1)(b); *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 48D; *Judicial Officers Act 1986* (NSW) s 41(1); *Supreme Court Act 1979* (NT) s 40(1); *Constitution of Queensland 2001* (Qld) s 61(2); *District Court Act 1991* (SA) s 15(1); *Constitution Act 1934* (SA) s 75; *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1; *Constitution Act 1975* (Vic) s 87AAB; *District Court of Western Australia Act 1969* (WA) s 11(1); *Constitution Act 1889* (WA) s 55.

149 *Australian Constitution* s 72(ii); *Family Law Act 1975* (Cth) s 22(1)(b); *Federal Court of Australia Act 1976* (Cth) s 6(1)(b); *Judicial Commissions Act 1994* (ACT) s 5(1); *Constitution Act 1902* (NSW) s 53(2); *Judicial Officers Act 1986* (NSW) s 41(1); *Supreme Court Act 1979* (NT) s 40(1); *Constitution of Queensland 2001* (Qld) s 61; *Constitution Act 1975* (Vic) s 87AAB.

150 *Constitution of Queensland 2001* (Qld) s 61(3).

151 *Judicial Officers Act 1986* (NSW) s 41; *Judicial Commissions Act 1994* (ACT) s 5(3).

152 *Constitution Act 1975* (Vic) s 87AAB(2); *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.

153 Potas, above n 66, 112; Campbell and Lee, above n 22, 118–25; Chief Justice Murray Gleeson, 'Judicial Accountability' (1995) 2 *Judicial Review* 117, 126–30; *Judicial Officers Act 1986* (NSW) ss 23–9; *Bruce v Cole* (1998) 45 NSWLR 163.

154 *Constitution Act 1902* (NSW) ss 52, 53, refer to 'judicial office' and 'holders of judicial office'; *Judicial Commissions Act 1994* (ACT) s 3 and *Judicial Officers Act 1986* (NSW) s 3 each define 'judicial officer' as including magistrates.

155 *Judicial Commissions Act 1994* (ACT) ss 14–24.

ney-General investigates 'whether facts exist' that could prove misbehaviour or incapacity.[156] The committee must report its findings to the Attorney-General,[157] who 'may, if he or she considers it appropriate to do so, cause a copy of the report … to be laid before each House of Parliament'.[158]

2 *The Magistracy*

Magistrates in the Australian Capital Territory, New South Wales, Tasmania and Victoria have the same protections against removal as their colleagues in the higher courts of their jurisdiction, with the same process requiring legislative and executive action.[159] In comparison, magistrates in Western Australia, Queensland, South Australia and the Northern Territory do not have the same protections.

In Western Australia, removal of a magistrate on any basis other than physical or mental unfitness requires the same legislative and executive process as the higher courts.[160] However, the Attorney-General can initiate a proceeding to determine a magistrate's mental or physical fitness to discharge the duties of the office which can lead to relieving the magistrate of duties temporarily or terminating the magistrate's appointment, which is deemed a disability retirement.[161]

In Queensland and South Australia, magistrates are subject to the supervision of the Supreme Court and the Attorney-General. Magistrates can be removed from office where there is 'proper cause', as determined by the Supreme Court on the application of the Attorney-General.[162] Proper cause includes such matters as mental or physical incapacity, conviction of an indictable offence, incompetence or serious neglect, or other unlawful or improper conduct in the performance of duties.[163] Queensland also includes 'proved misbehaviour, misconduct or conduct unbecoming a magistrate' and failing to comply with a transfer order.[164] In South Australia, there is provision for a prior investigation or inquiry by a single Justice of the Supreme Court.[165]

Magistrates in the Northern Territory have the least formal protection. A magistrate can be removed by a decision of the Administrator on the grounds of incompetence or incapacity, failure to comply with a direction of the Chief Magistrate as to sittings, or if, for any other reason, the magistrate is unsuited to the performance of duties.[166]

156 *Constitution Act 1975* (Vic) s 87AAD; *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.
157 *Constitution Act 1975* (Vic) s 87AAE; *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.
158 *Constitution Act 1975* (Vic) s 87AAH(3); *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.
159 *Judicial Commissions Act 1994* (ACT) s 5(1); *Constitution Act 1902* (NSW) s 53(2); *Judicial Officers Act 1986* (NSW) s 41(1); *Magistrates Court Act 1987* (Tas) s 9(1); *Constitution Act 1975* (Vic) pt IIIA; *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 4.
160 *Magistrates Court Act 2004* (WA) sch 1 cl 15.
161 *Magistrates Court Act 2004* (WA) sch 1 cls 13, 14.
162 *Magistrates Act 1991* (Qld) s 46; *Magistrates Act 1983* (SA) s 11.
163 *Magistrates Act 1991* (Qld) s 43(4); *Magistrates Act 1983* (SA) s 11(8).
164 *Magistrates Act 1991* (Qld) s 43(4).
165 *Magistrates Act 1983* (SA) s 11(4).
166 *Magistrates Act 1977* (NT) s 10.

Guarantee of judicial tenure during good behaviour, with removal requiring executive and legislative action, is the core protection for security of tenure, which underpins judicial independence and impartiality. Magistrates in Queensland, South Australia and, most especially, the Northern Territory, lack the full substantive and procedural protections against unwarranted removal accorded to judges of the higher courts and to magistrates in other jurisdictions. This distinction cannot be justified.[167] Even allowing for the principle of legislative choice and the scope for different mechanisms of protection for judicial independence, this structure makes the magistracy inappropriately dependent on the executive and is inconsistent with the institutional integrity of magistrates courts. Removal by the executive alone, without legislative action, should be regarded as falling below the 'minimum characteristic of an independent and impartial tribunal'[168] required by Australian constitutional principles.

F *Suspension of Magistrates*

Another issue related to security of tenure is the power to suspend a judicial officer. There are no formal provisions for suspension of the Commonwealth, supreme or district court judiciary except in the Australian Capital Territory and New South Wales, where all judicial officers, including magistrates, are subject to identical regimes through their respective Judicial Commissions. In the Australian Capital Territory a judicial officer, including a magistrate, may be 'excused' when a commission is appointed to examine a complaint.[169] A judicial officer in New South Wales, including a magistrate, can be suspended if the Conduct Division of the Judicial Commission gives an opinion that the matter could justify removal.[170]

In contrast, in Queensland, South Australia and Western Australia, magistrates (but not judges) can be suspended on the basis of a preliminary finding that grounds may exist to justify removal from office.[171] The precise procedures and grounds differ, though in all three jurisdictions there is a role for a justice of the supreme court, usually the Chief Justice:

- A magistrate can be suspended in Queensland if a Supreme Court Justice, on application by the Attorney-General, decides that there are 'reasonable grounds for believing that proper cause for removal' exists.[172] A magistrate is immediately suspended if arrested, appears in court to face a charge or is committed for trial, or indicted on an indictable offence.[173]

[167] Peter A Sallmann, Department of Justice, Victoria, *Report on the Judicial Conduct and Complaints System in Victoria* (2003) 37.
[168] *NAALAS v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[169] *Judicial Commissions Act 1994* (ACT) s 19(1).
[170] *Judicial Officers Act 1986* (NSW) s 4.
[171] Campbell, 'Suspension of Judges from Office', above n 66, 67–8; *Magistrates Act 1991* (Qld) s 43; *Magistrates Act 1983* (SA) s 10; *Magistrates Court Act 2004* (WA) sch 1 cls 13, 14.
[172] *Magistrates Act 1991* (Qld) s 43.
[173] *Magistrates Act 1991* (Qld) s 44.

- A magistrate in South Australia can be suspended if the Chief Justice of the Supreme Court advises the Governor to do so, on suspicion of guilt of an indictable offence, or where an investigation is underway to determine if cause exists.[174]
- In Western Australia, the Governor may suspend a magistrate on an allegation of misbehaviour, including incompetence, neglect, or failure to follow directions of the Chief Magistrate. The Attorney-General gives the magistrate notice and reports to the Chief Justice, who inquires into the truth of the allegation and reports to the Attorney-General.[175] The process for suspension for illness is different. If the Attorney-General is of the opinion that a magistrate is physically or mentally incapable of undertaking official duties, the Attorney-General may relieve that magistrate of duties and must constitute a committee (including the Chief Justice or nominee) and two medical practitioners to inquire.[176]

A suspended magistrate is entitled to be remunerated during a period of suspension in the Australian Capital Territory, New South Wales, Queensland and South Australia.[177] In Western Australia, the Governor has the power to make provisions regarding salary during suspension for misbehaviour, but a magistrate suspended due to illness is entitled to full remuneration.[178]

In Tasmania, the grounds and mechanisms for suspension are identical to those for removal — by the Governor on an address from both Houses of Parliament on grounds of proved misbehaviour or incapacity.[179] There do not appear to be any statutory grounds for suspension of a magistrate in the Northern Territory or Victoria.

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

174 *Magistrates Act 1983* (SA) s 10(3).
175 *Magistrates Court Act 2004* (WA) sch 1 cl 14.
176 *Magistrates Court Act 2004* (WA) sch 1 cl 13(3).
177 *Judicial Commissions Act 1994* (ACT) s 19(3); *Constitution Act 1902* (NSW) s 54(2); *Magistrates Act 1991* (Qld) s 45; *Magistrates Act 1983* (SA) s 10(4).
178 *Magistrates Court Act 2004* (WA) sch 1 cls 14(8), 13(2).
179 *Magistrates Court Act 1987* (Tas) s 9.

for suspension in Queensland, South Australia and Western Australia do not appear to meet necessary constitutional standards for judicial independence.

V CONCLUSION: ADEQUACY OF PROTECTION FOR MAGISTRATES' SECURITY OF TENURE

This analysis establishes that magistrates and magistrates courts lack some specific elements of security of tenure which are accorded to other judicial officers in Australia. Magistrates in Australia undertake their judicial duties with the same impartiality and integrity as other, better protected judicial officers. There is no justification for the lesser protection accorded to magistrates and to the public they serve. The aspects of security of tenure for Australian magistrates reviewed in this paper reflect some similarities of treatment between judges and magistrates, some undesirable distinctions and some features which appear to breach constitutional standards, based on the reasoning of the High Court in *NAALAS v Bradley*.

The conventions protecting the judiciary when a court is abolished provide some protection for the independence of all Australian judicial officers, including magistrates, though the actual scope and force of the protection is unclear. However, in Queensland, the legislative guarantee of continuous judicial position does not apply to magistrates; this difference is not justified.

The practices in relation to promotion of judicial officers to a higher court and appointment of acting judicial officers are no different for magistrates than those for judges of the higher courts. However, there is a general lack of accepted principles about the implications of such promotion for judicial independence.

In all but three jurisdictions, magistrates retire at 65, rather than at 70 or 72, as for judges. There is no express or apparent justification for this distinction. Early mandatory retirement can be undesirable, especially for a magistrate who needs a longer working life to build up sufficient superannuation entitlements. A guaranteed minimum superannuation entitlement across all members of a court would begin to address the problems created by the many different regimes currently operating.

Although magistrates' salaries are lower than those of other judicial officers, present salary levels are adequate for the standards of judicial independence. Magistrates' salaries are set in the same way as other judicial officers, directly or indirectly, by independent remuneration tribunals which are limited to making recommendations to Parliament.

However, there is no adequate protection against reduction in the remuneration of magistrates. This vulnerability to reduction in salary and the differences in provisions for removal and suspension as well as the lack of formal protection for magistrates' salary and remuneration are particularly marked and raise the greatest concern. When the 'specific context of the court or tribunal'[180] is considered, it is clear there is no legitimate basis for these inconsistencies and some appear to fall below minimum constitutional standards. Magistrates today

[180] *Ell v Alberta* [2003] 1 SCR 857, 874 (McLachlin CJC, Gonthier, Iacobucci, Major, Bastaracho, Binnie, Arbour, LeBel and Deschamps JJ).

are fully separate from the public service. Their formal qualifications are substantially the same as those of judges of the higher courts. They adjudicate serious state and Commonwealth matters, some of which were, until recently, heard in district courts or even supreme courts. Magistrates exercise powers, such as contempt, once thought to be exclusive to the superior courts. They sit without juries on serious criminal matters, requiring them to make impartial decisions on fact as well as law. The public who appear in the magistrates courts are entitled to have their cases heard by judicial officers accorded at least the same protections as judges of the higher courts, which meet minimum constitutional standards of judicial independence.

Several formal, legal mechanisms to ensure security of tenure for magistrates are needed:

- Procedures and standards for the removal of magistrates in South Australia, Queensland and the Northern Territory should provide the same protection as is accorded the judicial officers in the higher courts. This gap is perhaps the most significant difference and is the area where the lack of protection for magistrates most apparently breaches 'the permitted minimum criteria for the appearance of impartiality'.[181]
- Provisions for suspension from office in South Australia, Western Australia and Queensland should be no different for magistrates than for judges of the higher courts. This difference also appears to breach the minimum constitutional standard, and is wholly unjustified by any relevant distinction between magistrates courts and the supreme or district courts. If suspension for cause is an appropriate means of ensuring public confidence and addressing judicial performance concerns, it should be applicable to all courts and judicial officers, in ways which enhance rather than detract from public trust.
- Clear and explicit protection for security of remuneration with an express prohibition against reduction in salary and allowances should be provided in Queensland, Tasmania, Victoria and Western Australia. *NAALAS v Bradley* appears to interpret the Northern Territory legislation as not allowing a reduction, but the basis for this aspect of the decision is not fully developed. It may rest, at least in part, on interpretation of the specific legislation, though it clearly supports an inference that implied constitutional principles applicable to all Australian jurisdictions would invalidate unjustified reductions in salary. The better approach, to ensure the substance and appearance of the 'essential characteristics of an independent and impartial tribunal',[182] is to make this guarantee explicit in legislation.

Magistrates play a central role in the Australian legal system. They, and the public they serve, deserve appropriate formal legal mechanisms for the protection of security of tenure to support full judicial independence.

[181] *NAALAS v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[182] Ibid.