FUTURE DIRECTIONS IN LOCAL COURTS OF NEW SOUTH WALES

C. R. BRIESE*

Until 1985, magistrates in New South Wales were officers in the public service so that although their duties were judicial, they were nevertheless structured as part of the executive arm of government. After a difficult struggle on the part of magistrates commencing in 1979, it was finally recognised by Parliament in December 1982, that this arrangement was contrary to established principle in terms of independence for judicial officers. The Local Courts Act 1982 (N.S.W.) was passed to put magistrates into a position similar to that of judges of the District Court. This was recognised by the New South Wales Court of Appeal in *Macrae* v. *Attorney-General (N.S.W.):*[1]

> [t]he Act provided for a new court, with a new structure, enhanced independence and larger jurisdiction. Accordingly, it was clear that Parliament was endeavouring to improve the standard of the magistracy.[2]
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> One of the purposes of the Local Courts Act was to make the position of Magistrates and the courts in which they sat resemble more closely that of judges and courts generally than was the case until the new system came into operation.[3]

Unlike the situation obtaining in the Supreme Court where removal of judges could only be by Parliament, District Court judges were subject to removal by the Governor under s.14 of the District Court Act 1973 (N.S.W.). Section 18 of the Local Courts Act was therefore included to give the Governor similar power over magistrates. The Local Courts Act finally became effective on 1 January 1985.

*B.A., Dip.Crim.(Cantab), Chief Magistrate, New South Wales.

1 [1987] 9 NSWLR 268.
2 *Id.*, 277 *per* Kirby P.
3 *Id.*, 288 *per* Priestley J.A.

Allegations of misconduct involving judicial officers during the years 1983-1986 triggered a Government response in 1986 to set up a Judicial Commission for New South Wales. The Judicial Officers Act 1986 (N.S.W.) established that Commission. In so doing it gave to all judges and magistrates identical tenure of judicial office. Magistrates henceforth became judicial officers under the Act and all judicial officers by virtue of that Act remain in office during ability and good behaviour. They can be removed from office only by Parliament. The judicial independence of magistrates in terms of structure is now assured.

The independence of the judiciary has long been recognised as one of the cornerstones of democracy. But not until the Local Courts Act 1982, followed by the Judicial Officers Act 1986, was that independence thought necessary for those judicial officers called magistrates. Indeed the perception of some judges appeared to be that magistrates did not qualify to be regarded as judges. For example, in *The Sydney Morning Herald,* in an article on judges, it was reported that

> [j]udges spoken to by the Herald were quick to point to the difference between the magistracy and the judiciary... 'Magistrates are not judges', they said.[4]

But not all judges saw it that way. At a seminar in Canberra on 9 May 1975, Mr Justice Fox of the Federal Court of Australia, who subsequently became the first President of the Australian Institute of Judicial Administration, made the following observations:

> [t]he independence and recognition of magistrates must be jeopardised by their inclusion in the administrative structure of the general public service. Magistrates should be in the same position as respects their independence as judges. If this were so they could merge more closely into the general court system thus achieving some lessening of arbitrary jurisdictional limits and of rigidity in court structure. By all operating within one court system such benefits as the ready transfer of cases and records and the ability to interchange judicial personnel would be facilitated.[5]

That there are differing views about the role and status of magistrates in the judicial system stems from historical developments. For centuries the Magistrates' Courts of England have been presided over by lay Justices of the Peace, men and women who are not lawyers and who perform their duties on a voluntary, unpaid basis. The use of paid magistrates in the administration of justice arose as the result of serious problems with Justices of the Peace in certain parts of the country. Idleness, incompetence and corruption among the lay Justices in England developed to such an extent in the 18th century it was decided that in London they should be replaced for most purposes by a body of professional magistrates called Stipendiary Magistrates. A few of these magistrates were also appointed to preside over courts in cities other than London. The arrival of Governor Phillip in New South Wales ensured that the existing legal institutions of England were transplanted to Australia. Justices of the Peace were appointed by Governor Phillip who himself was a

4 (1984) August 13, 9.
5 J. Newton, *The Magistrates' Court 1975 and Beyond* (1975) 5.

Justice by his commission with power to appoint others. Police Magistrates were also appointed by the Governor and they presided as chairmen of the benches of magistrates of lay Justices. The Police Magistrate was primarily the Superintendent of Police. He always held a Commission of the Peace and being the official magistrate he was therefore known as the Police Magistrate. No legislative authority existed for the appointment of police magistrates until 6 August 1833, when by virtue of the Police Act 4 Will. IV No. 7 (1833) the Governor was empowered to appoint two or more persons as Justices of the Peace to execute the duties of police magistrates within the town or port of Sydney. A later enactment gave the same authority for the appointment of country police magistrates. Prior to the passing of the Police Act, an early ancestor of the Justices Act 1902 (N.S.W.), the appointment of police magistrates by the Governor had been purely an administrative act. By a despatch dated 11 September 1825, Earl Bathurst authorised the Governor to establish Courts of Petty Sessions throughout the country, and at the more important townships to appoint stipendiary magistrates at a small salary to take the chair at these Sessions. Governor Brisbane followed these instructions in part only, by creating Courts of Petty Sessions at settled townships by choosing to call such magistrates "police" rather than "stipendiary" magistrates. Because of this failure to comply with instructions an amendment to the Justices Act became necessary in 1947 to abolish the designation "Police Magistrate". After 1947 all police magistrates were designated "Stipendiary Magistrates" who sat in Courts of Petty Sessions and that title remained until 1 January 1985, when the Local Courts Act varied the title from "Stipendiary Magistrate" to "Magistrate". The history of these changes is summarised in plaque form on the Central Court in Liverpool Street, Sydney:

Central Police Courts
Central Court of Petty Sessions
Central Local Court.

It is to be expected that judicial officers with a history of the kind just described would find it difficult to be accepted as part of the judiciary. But there were further handicaps. In New South Wales it became the practice for all magistrates to be drawn from officers in the Petty Sessions Branch of the Justice Department and on a seniority basis. Any person wishing to be a magistrate had to embark upon a career in the Justice Department. Magistrates were therefore public servants and like all other public servants they were under the control of the Public Service Board. Furthermore, up until the mid 1950's there was no requirement for magistrates to be qualified as lawyers and the vast majority were not lawyers. To fit themselves for Bench duties they were obliged to pass a number of departmental examinations in relevant legal subjects.

Beginning in 1955, changes to the magistracy took place which were to be fundamental and far reaching. In the first place no person henceforth could be appointed a stipendiary magistrate unless qualified as a solicitor or barrister. Secondly, steps were taken by the magistrates themselves to add to

their qualifications, and so improve their expertise by studies and official examinations in criminology as well as law. Within two decades after 1955, more than half the Bench of magistrates had acquired a diploma or degree in criminology.

By 1980 magistrates were exceptionally well qualified as judicial officers but were not recognised as such in terms of their structure or their status. As members of the public service they did not enjoy the judicial independence of judges. Nevertheless, it was always maintained that membership in the public service did not mean that in the exercise of their judicial functions they were interfered with or influenced in any way by the Minister or any member of the executive. In *Ex parte Blume; re Osborn*[6] it was said that the Under-Secretary of Justice had advised a magistrate to go ahead and hear a case in which the magistrate felt he should disqualify himself on the ground of bias as one of the parties was a personal friend of his. Holding that the magistrate was wrong in then deciding to hear the case, the Court in its judgment said:

> [t]he appointment of magistrates is made under s.49 of the Public Service Act namely, by the Governor on the recommendation of the Public Service Board. Such an appointment can only be made if the proposed appointee has certain qualifications. A magistrate is an officer of the Department of Justice and the Under-Secretary of Justice is the permanent head of that Department. Magistrates may be dismissed or removed from office for breaches of certain statutory obligations (s.56) and may be suspended by the senior officer of the branch in cases of emergency, otherwise by the permanent head of the Department. The Public Service Board may inquire into cases of suspension, the officer having an appeal from the Board's decision to the Crown Employees' Appeal Board. Magistrates' duties are allocated by the Public Service Board on the recommendation of the Under-Secretary of Justice but in this allocation all that is done is that the Magistrate is allocated to a particular district, his list in that district being controlled by the Clerk of the Court. There is no other control of the magistrates by the Department in so far as their judicial duties are concerned. It is a Departmental rule of long standing that the judicial functions of magistrates are not interfered with by the Department and that it is not competent for the Minister or any member of the Executive to give any direction affecting his judicial functions to a judicial officer.[7]

As to the Under-Secretary, the Court said:

> [h]e had no authority to direct the appellant as a stipendiary magistrate as to any matter involving a judicial decision and, despite some possible confusion in the [magistrate's] mind as to this, we do not feel that [the Under-Secretary] intended to give any such direction.[8]

For a number of reasons, not all of which need be canvassed here, the magistrates themselves took the initiative to have the magistrates of New South Wales recognised as judges of their courts in terms of judicial independence and conditions of service. One important reason was the changes to the Public Service Act in 1979. These changes meant that control of all public servants was transferred from the Public Service Board to

6 (1958) 75 WN 411 (hereinafter *Osborn*).
7 *Id.*, 415.
8 *Id.*, 414.

relevant Ministers. In the case of magistrates this was the Minister of Justice. This development had the effect of increasing the power of the executive over the magistrates and so made an already unsatisfactory situation with regard to judicial independence for magistrates even worse. In theory the Minister through his Departmental Head had the power to allot one of his officers, a magistrate, who by the 1979 Act was directly under his control, to adjudicate upon a prosecution which he himself might launch. It would of course continue to be maintained that the judicial functions of magistrates are not interfered with by the Department or members of the executive in accordance with long standing practice, as in the *Osborn* case.[9] In *Macrae* v. *Attorney-General (N.S.W.),*[10] Kirby P. said:

> [t]he Attorney-General would also have known that magistrates appointed under the *Justices Act* in this State, by convention if not by law, enjoyed respect of and protection for their judicial independence. Indeed so shocking was the suggestion that there had been interference in that independence, that it recently resulted in a Royal Commission of Inquiry and other proceedings. Disciplinary action against magistrates appointed under the *Justices Act* was rare. The last such proceeding which resulted in dismissal of a magistrate from office occurred half a century ago. Because these considerations would have been familiar to the Attorney-General, suggestions that the State's magistrates were, under the former law, simply ordinary members of the public service, flies in the face of the status which they had long enjoyed as independent judicial officers, performing responsible tasks of a judicial character and enjoying a place in society to which attached respect and standing in the community.[11]

Nevertheless, a public service arrangement whereby magistrates are placed under the control of the Minister creates a situation whereby the appearance of justice being done is simply disregarded. In *Fingleton* v. *Christian Evanoff Pty Ltd,*[12] Wells and Sangster JJ. were in no doubt about the matter:

> [t]here 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...[13]

Independence of the judiciary involves the basic requirement that in the exercise of his judicial function, a judicial officer must be free from interference by the executive or the legislature, and must be free from any suspicion of such interference. Shimon Shetreet in *Judges on Trial* identified two essential elements which make up the independence of the judiciary:

> [f]irst, that in making judicial decisions and in exercising other official duties they are subject to no authority but the law. Second, that their terms of office and tenure are adequately secured.[14]

The Local Courts Act 1982, and the Judicial Officers Act 1986, combine to ensure that magistrates now enjoy that kind of judicial independence. But they are still titled "magistrate" which does not adequately describe the work they are required to do or their role as judges of the Local Courts.

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9 *Ibid.*
10 Note 1 *supra,* 278.
11 *Ibid.*
12 (1976) 14 SASR 530.
13 *Id.,* 546.
14 (1976) 17.

In most parts of the world, and particularly in the United States of America and in Continental Europe, the distinction judge/magistrate does not exist. All courts are presided over by judges. Furthermore in Commonwealth countries where magistrates are traditionally employed in the lower courts, a trend is developing to redesignate magistrates as judges. New Zealand is one such example. Over a period of time the jurisdiction of Magistrates' Courts in New Zealand was gradually increased taking over more and more of the work which had originally been vested in the Supreme Court. Finally in 1980, the Magistrates' Courts became the District Courts presided over by judges in lieu of magistrates. New Zealand now has a three-tier system of courts, namely Court of Appeal, High Court and District Court all presided over by judges. The head of the District Court (formerly the Chief Magistrate) Chief Judge Sullivan informed the magistrates of Australia assembled at their Third Biennial Convention at Canberra in June 1982, that "with regard to the increased status, salary and conditions, I believe that the quality of judgment and work has been lifted as a result".[15]

In the last forty years the magistrates in New South Wales have experienced a substantial increase in their jurisdictions, both civil and criminal. The Attorney-General has advised that the Government is again considering further substantial increases and they are to be the subject of attention by Parliament this year. One can anticipate that this trend will continue and indeed accelerate if economic and financial imperatives become more dominant and demand less expensive ways of resolving civil and criminal disputes. I suggest that the time is now appropriate in New South Wales to consider redesignating the magistrates of the Local Courts as judges of the Local Courts. This would assist in clearing the way for the Local Courts to handle even more substantial judicial work, including some criminal trials with juries. The experience of New Zealand in this regard is apposite. Chief Judge Sullivan informed the magistrates of Australia as follows:

> [t]he criminal jurisdiction of the District Court was increased to enable District Court judges to sit with juries in respect of certain indictable offences. Speaking generally, these offences are those which carry a penalty of less than ten years imprisonment. The legislation enacting these recommendations was passed to enable judges to preside over jury trials as from 1 May 1980. The judges designated to so preside have special warrants, and there are fourteen such judges throughout New Zealand. Some of these came from the existing bench, other appointments came from the criminal bar ... to date 375 trials have been carried out in the District Court and there appears to be general satisfaction with the manner and expedition in which these trials have been completed ... Prior to the commencement of jury trials, Sir David Beattie and I gave a course of instruction to the trial judges. Sir David was kind enough to give me his book of precedents in respect of summing up, and with the assistance of Judge Peter Graham, formerly of the Crown Law Office, a trial judges' manual was prepared and supplied to each trial judge. I believe that the trial judges commenced their work far better prepared than any Supreme Court judge in earlier times.[16]

15 Unpublished papers of The Third Biennial Convention of the Magistrates of Australia (1982).
16 *Ibid.*

There is a reported backlog of some 4,000 criminal cases awaiting trial in the District Courts of New South Wales. It is unlikely that a backlog of this magnitude can be brought under control by appointing the necessary number of judges and providing sufficient court rooms, given the present stringent economic climate. A more radical and fundamental approach is required. One such approach is to follow the example of New Zealand and commission a number of magistrates, retitled judges, to preside over minor trials. To cope with the increased work load thereby generated, Local Courts can be organized to shed a considerable amount of their present work by streamlining procedures in connection with committal proceedings and by a greatly expanded use of the infringement notice procedure. Legislation is presently being prepared to make the "paper" committal procedure mandatory and this should ensure considerable savings in time to dispose of those committals. The infringement notice, so successful in the traffic jurisdiction, could easily be adapted for use in connection with minor criminal offences. Indeed it has recently been brought into use by the State Rail Authority in respect of offences prosecuted by it under the Railways Act. There is no reason why all first offenders who are charged in a police station with a minor or relatively minor criminal offence, for example offensive behaviour, shoplifting, possession of small quantities of illegal drugs et cetera, could not be served with an infringement notice in conjunction with being bailed to a court twenty-one days hence. Payment of the infringement notice would conclude the matter and obviate a court appearance. Literally thousands of such cases, now processed through the courts and dealt with by standard fines, could be handled in this way. As in the traffic jurisdiction, the court is there to superintend the infringement notice procedure and any defendant dissatisfied with the infringement notice for whatever reason can take the matter to a court for its consideration in the same way as traffic offenders are so entitled.

To create a bench of Local Court judges at this time is also sensible from a number of other perspectives:

1. It accords with the public perception, shaped as it is by American television which shows magistrates to be judges who are addressed as "Your Honour".
2. It removes an artificial distinction between the work and role of judges and that of magistrates. Magistrates are as much judges of the Local Courts as are judges of the District and Supreme Courts. The title "magistrate" is historically more appropriate for the lay Justice of the Peace who is not a legally qualified person and who provides service on a voluntary, unpaid basis.
3. Very importantly, the increased status and improved working conditions of a judge would attract more barristers and solicitors of real quality and ability from the Bar and legal profession to consider an appointment as Judge of the Local Court than under present arrangements.

A major problem in Local Courts, and one which is related to the above discussion, concerns the current appeals system over the sentencing decisions of magistrates. They are not subject to a centralised system of appellate review similar to that which exists for sentences handed down by judges of the District Court. One criticism of sentences imposed by magistrates is that directed against the disparities in those sentences. The criticism implies that there is a failure by magistrates to be consistent in the penalties they impose and a failure by them, or some of them to understand when and how to apply the various sanctions the law provides.[17]

It is well known that the law, as it has developed, requires sentencers to pursue objectives which can be mutually conflicting. In 1895 the Gladstone Committee reported that "prisoners have been treated too much as a hopeless or worthless element of the community", and laid down the principle that "prison treatment should have as its primary and concurrent objects, deterrence and reformation".[18] It followed from this report that the courts were required to take notice of this principle in their sentencing deliberations. The idea was thereby fostered that courts should be concerned not only with the gravity of the offence but also with the needs of each individual offender. The movement towards individualisation in the sentencing process has meant that:

> [t]here is no decision in the criminal process that is as complicated and as difficult as the one made by the sentencing judge. A sentence prescribes punishment, but it should also be the foundation of an attempt to rehabilitate the offender, to ensure that he does not endanger the community, and to deter others from similar crimes in the future. Often these objectives are mutually inconsistent, and the sentencing judge must choose one at the expense of the others.[19]

Some disparity in sentencing, then, is guaranteed, for it is required as a matter of law. No sentencer today can be criticised for producing disparate sentences properly based on the principle of individualisation. As Hilbery J. said:

> [i]t follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to one and not to the other...the argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in characters and antecedents of the two convicted men and discriminates between them because of those differences.[20]

Surely this is sound principle. It would be manifestly unjust to deprive an accused, considered likely to respond to some form of probation, of his chance of rehabilitation simply because a like prospect of reformation is not the prognosis for his co-accused.

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17 See J. Lawrence and R. Homel, "Sentencing in Magistrates' Courts" in I. Potas (ed.), *Sentencing in Australia* (1986) 151.

18 *Gladstone Committee on Prisons* (1895).

19 President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) 141.

20 *The Queen* v. *Ball* (1951) 35 Cr App R 164, 166.

Difficulties for the magistrate today are inherent in any sentencing decision because he, too, must individualise in appropriate cases. A judgment as to which sentencing objective or objectives to pursue has to be made on the basis of the offence committed, and the character, circumstances and antecedents of the defendant, and very often in summary courts the difficulties in making such a judgment are compounded by the existence of flimsy, misleading or erroneous information about the offence or the defendant. But the problem is even more complex than that. Whilst the court is required by law to have regard to the objectives of sentencing — punishment, deterrence, rehabilitation, protection of the public — our state of knowledge about these objectives is such that we know very little about them and how they might best be achieved. In particular we know very little about what penalties should be employed to achieve them.

As to the objective of deterrence, Norval Morris writes:

> [e]very criminal law system in the world, except one (the Greenland Criminal Code 1962) has deterrence as its primary and essential postulate. It figures most prominently throughout our punishing and sentencing decisions — legislative, judicial and administrative. We rely most heavily on deterrence; yet we know very little about it.[21]

And Gordon Hawkins, commenting on this statement, says:

> [t]here can be no doubt about the validity of Professor Morris' statement. There are few other spheres of human action in which our operations are so firmly based on ignorance and unfounded assumptions.[22]

As for the objective of rehabilitation, theories based on the correction of offenders through treatment have reached the point of bankruptcy and many people want to jettison the objective of rehabilitation as a primary sentencing principle.

> Under the rehabilitative model, we have been able to abuse our charges, the prisoners, without disabusing our consciences. Beneath this cloak of benevolence, hypocrisy has flourished, and each new exploitation of the prisoner has inevitably been introduced as an act of grace. Finally, to sentence people guilty of similar crimes to different dispositions in the name of rehabilitation — to punish not for act but for condition — violates, this book argues, fundamental concepts of equity and fairness. And so we as a group, trained in humanistic traditions, have ironically embraced the seemingly harsh principle of just deserts.[23]

If the current emphasis on individualisation coupled with ignorance and confusion about sentencing objectives were sufficient of themselves to generate some illogical and irrational disparities in sentencing, there is yet a third complicating factor:

> [b]ut despite the fact that judges earnestly endeavour to apply the principles and to have regard to the individual circumstances of each crime and each criminal, the sentences imposed by different judges on criminals who are substantially in the same situation will differ. This is axiomatic because not only do judges differ in their approach to the problem

21 N. Morris, "Impediments to Penal Reform" (1966) 33 *U Chi L Rev* 631.

22 G. Hawkins, "Deterrence: The Problematic Postulate" in Proceedings of the Institute of Criminology, *Judicial Seminar on Sentencing* (1969) 38.

23 A. von Hirsch, *Doing Justice* (1976) xxxviii.

> of sentence, but they differ themselves. Some are compassionate, some are severe and all do not give equal value to the matters quite properly to be taken into account in determining the sentence.[24]

Mr Justice Taylor's emphasis on the personal characteristics of individual sentencers as a crucial variable in sentencing decisions is supported by Hogarth's study of the magistrates of Ontario.[25] Hogarth concludes that magistrates exercise their powers by reference to their own views of the objects of the penal system and the means for obtaining them. But how could this be otherwise? Elementary logic tells us this must be so whilst structural arrangements for summary courts make little or no provision for authoritative guidance and settled criteria in the work of sentencing. Under the permissive procedures which presently exist, magistrates are essentially free to give full play to personal predilections, free to pick and choose from among the various theories of punishment in sentencing those which suit their own personal idiosyncracies, and free to impose disparate sentences. The encouragement which all this gives to the expression of individuality in sentencing and sentencing approaches is justified by reference to the need for magistrates to be independent, and to the proposition that magistrates must be completely unfettered in their judicial roles if justice is to be done. Yet magistrates, who themselves are a cross-section of the differing personalities in the community, who are required to individualise punishments or impose tariff penalties in the absence, for the most part, of authoritative criteria, and who are expected to have regard to sentencing objectives which are little understood by anybody, are criticised for not producing sentences which are consistent. The wonder of it all is that there are not more marked disparities in sentencing decisions rather than less. Nevertheless sentences passed under the present slipshod arrangements continue to be justified by appeals to statements like the following:

1. Individualisation:

> [i]f you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.[26]

2. Tariff sentencing:

> [b]riefly, the attitude of the courts has always been that there is *in gremio judicis* a moral scale which enables the judge to pronounce what quantum of punishment is justly appropriate to what offence. This is the punishment that fits the crime.[27]

The foregoing discussion makes it plain that whilst the principle of individualisation in sentencing continues to be seen as necessary for the pursuit of justice, disparities in sentencing can only be tackled by the establishment of authoritative criteria upon which to base individualisation.

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24 Taylor J., "Sentencing: Is there Disparity?" in Proceedings of the Institute of Criminology, *Judicial Seminar on Sentencing* (1969) 15.

25 J. Hogarth, *Sentencing as a Human Process* (1971).

26 Cardozo J., *The Nature of the Judicial Process* (1921) 113.

27 G. Williams, "The Courts and Persistent Offenders" [1963] *Crim L Rev* 730, 733.

Dr Andrew Ashworth, in a recent seminar on sentencing in Australia, regards the criticisms levelled against sentencers as:

> largely the manifestation of one single defect: the absence of an agreed sentencing policy. Legislatures have tended to avoid fundamental issues, the executive has become concerned mostly about the economic implications of sentencing, and the judiciary has continued in the piecemeal fashion which is the natural result of a wide discretion and a narrow appeals system.[28]

Roger Hood has argued that there is a real need for discussion by magistrates as to the criteria and principles to be used in their sentencing policy. He put it this way:

> [w]hile benches may tend to agree in general on the appropriate fine, there is less agreement when cases present 'unusual' features. Our analysis seems to indicate that disparities in these cases may arise out of too great a reliance on systems to achieve uniformity in 'ordinary' cases ... I am inclined to believe that disparities were due to lack of discussion about the principles which should be used in deciding what weight should be given to various aggravating circumstances in 'out of the ordinary' cases.[29]

But why should it be supposed that if 110 magistrates in New South Wales had discussions as to the principles to be used in deciding what weight should be given to various aggravating circumstances in "out of the ordinary" cases, there would be common agreement reached as to what those principles are or how they should be applied? It is not likely that such discussions would have much effect on disparities in sentencing because, as has been observed, and as Hood himself has recognised, sentencers have different views and perceptions of the gravity of offences and the weight to be given to circumstances surrounding the offence and the offender. Furthermore, what also has to be understood is that some views and ideas of individual magistrates are so strongly held, they will not be altered by training or discussion of any kind.

The task, then, is to devise a sentencing structure for summary courts which:

1. Will constructively neutralise, so far as is possible, the influence of the personality of the individual magistrate; and
2. Will provide authoritative criteria and principles for mandatory use by magistrates in sentencing deliberations and decisions.

As to the first matter the structure will need to assist the development and maintenance of judicial qualities in magistrates, because:

> [j]udicious [sic] qualities are not easy to attain, to be sure, even with long training and experience, and many lawyers are temperamentally incapable of achieving them. The attainment of judicious [sic] qualities among judges is a relative matter, depending in great measure on the individual's capacity to exercise critical intellectual judgment in the face of emotion-provoking situations. Perhaps there is no other type of professional training and experience that places such value upon objectivity in harmonising conflicting interests.[30]

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28 A. Ashworth, "Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems" in I. Potas (ed.), note 17 *supra*, 41.

29 R. Hood, *Sentencing the Motoring Offender* (1972) 148.

30 P.W. Tappan, *Crime, Justice and Correction* (1960) 454.

As to the second point the only satisfactory way of providing the required criteria is through the use of case law and precedent. Whilst the sentencing decisions of the District Court in New South Wales and elsewhere, for example the Crown Court in England, are supervised by Courts of Appeal in accordance with principles established over the years by case law and precedent, as well as statute, and the judges are able to turn to them for guidance in sentencing considerations, no such guidance, except of the very flimsiest kind, is available to magistrates in New South Wales and the position is little better for magistrates in England. One Canadian authority, thinks the English magistracy particularly fortunate in the amount of statutory guidance it receives. After lamenting the absence of statutory help for magistrates in Canada, Jaffary declared:

> [i]f the [Criminal] Code itself should contain such guidance as does the Criminal Justice Act in England and the Model Penal Code in the United States, there would be less confusion and fewer contradictions in Canadian sentencing.[31]

The confidence of Jaffary in the efficacy of statutory guidance for magistrates has not been altogether vindicated by the English experience. Thomas points out that various attempts to control the discretion of sentencers by legislation have met with varying degrees of success.[32] After describing the three statutory techniques employed, Thomas concluded that attempts in that way to influence magistrates' sentencing decisions failed because of lack of adequate guidance and supervision from the Court of Appeal. However two attempts to use a statutory method of structuring discretion in the context of sentencing were relatively successful. The first of these was the stipulation in the Road Traffic Act 1972 (U.K.) that a driver convicted of any one of a number of serious motoring offences must be disqualified from driving for a minimum period of twelve months unless "the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified". The reason for the high degree of success was due to:

> the accident that the question of whether in a given case special reasons exist was treated as a matter of law, and thus appealable in the case of convictions in the Magistrate's Court to the Divisional Court of the Queens Bench Division at the instance of the prosecution... The existence of a prosecution right of appeal ... undoubtedly prevented magistrates from taking too lenient a view of what may constitute excepting circumstances, as the relative frequency of successful prosecution appeals demonstrated.[33]

The second reasonably successful attempt at legislative structuring of sentencing discretion was the 1967 legislation which provided that the court *must* make an order that the suspended sentence shall take effect with the original term unaltered unless "it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since suspended sentence was passed, including the fact of the subsequent offence". The

31 S.K. Jaffary, *Sentencing of Adults in Canada* (1963) 103.
32 D.A. Thomas, "The Control of Discretion in the Administration of Criminal Justice" in R. Hood, *Crime, Criminology and Public Policy in Honour of Sir Leon Radzinowicz* (1974) 139.
33 *Id.*, 146-147.

result here was that generally courts enforced suspended sentences in accordance with Parliament's intentions, but:

> [t]he fact that the definition of excepting circumstances in this case cannot be characterised easily as an issue of law has prevented the development of a prosecution right of appeal in this case and it may be that the obligation to enforce a suspended sentence has not been honoured so consistently as the obligation to disqualify.[34]

The conclusion which Thomas then arrives at is significant:

> [a]n impressionistic survey of the effectiveness of various legislative techniques of structuring sentencing discretion in England and Wales suggests that the most effective device is that of the required disposition subject to excepting circumstances. This device will work best where the definition of the excepting circumstances is reasonably precise *and the statutory system is reinforced by appellate review* [emphasis added].[35]

The above discussion makes it plain that the key to the problem of structuring the sentencing discretion of summary courts in such a way as to deal effectively with, among other things, disparities in sentencing, does not lie:

1. In discussions among magistrates about sentencing principles and criteria; or
2. In statutory guidance alone.

It lies in the provision of a centralised system of appellate review similar to that of the Courts of Appeal in New South Wales which supervise the sentencing decisions of judges.

In 1968 Thomas argued that appellate review of sentences in England over many years has in fact led to the development of a complex and coherent body of sentencing principles and policy which significantly influences sentencing at the trial level.[36] In his well known *Principles of Sentencing*,[37] Thomas comprehensively documents the use of principle in achieving consistency in sentencing. Whilst one might query whether the amount of consistency achieved has been as much as Thomas claims, the argument of Thomas is sufficiently impressive to ask why there is no centralised system of appellate review for summary courts in New South Wales if rationality is to pervade summary court sentencing. As Thomas puts it:

> [t]he major weakness in the use of case law techniques of structuring sentencing discretion in the English system is that the jurisdiction of the Court of Appeal does not extend downwards to the Magistrates' Courts where the overwhelming majority of cases are tried. It may be that the solution to structuring sentencing decisions by magistrates is to be found in the thoughtful development of legislative techniques supported by a more centralised appeal system.[38]

The crucial weakness of present appeal systems is the failure of the reviewing court to provide the magistrate, fellow magistrates and the legal profession with reasons for the quashing, varying or upholding of sentences

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34 *Ibid.*
35 *Ibid.*
36 D.A. Thomas, "Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience" (1968) 20 *Ala L Rev* 193.
37 (2nd ed. 1980).
38 Note 32 *supra*, 151.

imposed. No body of principle to guide magistrates can therefore emerge from appellate review as it presently operates. The suggestion by Thomas for a centralised system of appellate review for summary courts had already been proposed by the Deputy Chairman of the Bench of Stipendiary Magistrates in New South Wales in 1969. He said:

> [o]ne dares to suggest as a desirable improvement that the so-called appeal to Quarter Sessions, which is an anachronism as its name and history indicate, be abolished and that instead an appeal to the Supreme Court by way of order to review be substituted as presently in Victoria and Queensland. This would soon create a reported and binding set of principles likely to be of the greatest assistance to summary courts.[39]

Appellate review of sentencing decisions of judges by the Court of Criminal Appeal has led to a reasonable consistency in the sentences imposed by judges.

> It is not my experience as a member of the Court of Criminal Appeal that there are flagrant disparities in sentences imposed in Victoria for indictable offences by the judges of the Supreme Court or of the county courts... The existence of the Court of Criminal Appeal may not have resulted in achieving the impossible, a science of sentencing, but unquestionably it has put an end to 'illogical and fortuitous variation between sentences' where the variation errs in the direction of excessive severity.[40]

There is no reason why appellate review of the same kind for summary courts could not do the same for "illogical and fortuitous variation between sentences" imposed by magistrates.

39 W. Lewer, "Disparity in Sentencing: Some Observations" in Proceedings of Institute of Criminology, *Judicial Seminar on Sentencing* (1969) 57, 61.

40 Sir J. Barry, *The Courts and Criminal Punishments* (1969) 36, 39.