Remarks of the Hon. Marilyn Warren AC
Chief Justice of Victoria

Magistrates' Court - Professional Development Day
Wednesday, 23 July 2014
Melbourne Cricket Ground

Thank you very much, Chief Magistrate, for such a warm welcome, and good morning colleagues. It is an absolute privilege and honour to come and address the magistrates of the Magistrates' Court of Victoria, the court which is the busiest and largest court in the state, and the one which sees the face of the Victorian community in a way that no other jurisdiction does.

When we reflect on the jurisdictional limits of the Magistrates' Court, it has changed dramatically from when most of us started out in the law. When I was invited by His Honour to speak to you, he proposed that I speak to you about judicial independence. It is a topic that is very dear to my heart, and I know to each and every one of you.

One of my associates asked me if he could give me some assistance with the preparation of the speech. I paused for a moment and then I said "No, I could talk about judicial independence under water", and I think we all could.

If we reflect on judicial independence, it is very basic constitutional law that the judiciary is the third arm of the government, separate from the executive and separate from the legislature. Dealing as you do with such an array of

humanity day-in, day-out, we might reflect on what does judicial independence mean to the individual?

With that in mind, I did reflect on the fact that very eminent people have spoken very wisely about judicial independence. I reflected there was really not much I could add. Sir Owen Dixon, Sir Ninian Stephen and, more recently, the former Chief Justice of the High Court of Australia, Murray Gleeson. They have written and spoken in the most erudite terms about the basic legal principles.

This is a professional development occasion, and so I thought it might be more useful if, rather than delivering a highfalutin address with large quotations from the likes of Dixon, Stephen and Gleeson, I might instead take a practical perspective and draw on some reflections of my experience that I hope would resonate with you.

It's not so long ago that the magistrates of Victoria were not qualified lawyers. The Chief Magistrate referred to the fact that I worked in government, and as a very young lawyer starting out in the early 70s I came to work in the law department. At that time I had direct contact with many of the clerks who came in to the law department. There was a predominance of magistrates who had no legal qualifications, but there was a progression occurring by the requirement that magistrates have ten legal subjects.

So we came to see in the mid-1970s magistrates such as Magistrate Tony Ellis, Magistrate Brian Clothier were appointed, and they were among the very first to actually have a law

degree. That was a seismic shift in the role of magistrates in this state. During the 1980s, then Attorney-General Jim Kennan brought in the mandatory requirement for admission to practice, and that elevated the status of the magistrate in this state, but most importantly, it achieved a very, very significant change in the role of the magistrate and the interaction with the legal profession and all of the agencies that interact with the Magistrates' Court.

Some of us can reflect back to our times in practice and at the Bar when it was quite commonplace for palpable familiarity to be demonstrated between the Bench and the Bar table. Many of us as counsel or as solicitors have experience the frustration of a magistrate who has predetermined a case on the basis of the charges, on the basis of the identification of the informant or the identification of the prosecutor. We have all seen occasions of serious injustice perpetrators against individual clients.

Fortunately, that is long gone. The days of a magistrate going into the courtroom, facing a crowded courtroom and saying "Those who wish to have a bond, go over to the right, and those who wish to plead guilty, go to the left." And we might have some mirth reflecting on that, but that kind of behaviour did occur and it was a fundamental breach of the principle of judicial independence.

If we reflect day-in, day-out, as we do in our judicial function, we have to interact with many people who are very difficult to deal with. We have people who are obstructive, we have

people who are very set in their ways. Let me give some examples.

We all have encounters with lawyers who have been in practice, some since as long ago as the 1960s, and they still practice the way they did in the 1960s. There are individuals who would not be familiar with the Evidence Act, let alone the Criminal Procedure Act, and goodness knows they probably have never heard of the Civil Procedure Act.

Yet, they are being briefed, they are being asked by clients to represent them, and they come before us. They purport to represent an individual and to portray the legal profession in a way that is extremely frustrating, particularly when we sit - and you do, day-in, day-out - in an extremely busy court. You have large lists to get through. These individuals face a challenge and we face an even bigger challenge.

We have the obligation to ensure that justice is achieved for the individual client. We are under the pressure of moving through the business. At the same time, we have an obligation as part of judicial independence to resist the temptation to treat that individual lawyer in a peremptory way.

If, as the opponent to that individual, there is a prosecutor or an individual lawyer who is far more up-to-date, who appears before us regularly, who knows how we like to do things, who knows that the clever way to move the thing along and win the favour and support of the magistrate or the judge, as the case might be, is to have a quick written submission, a minute of order, which is something we all like to have because a

carefully, cleverly thought-out minute of order can enable us to push things through quickly.

Yet, if we have the cumbersome 1960s, 1970s, not up-to-date barrister, solicitor appearing before us, we must resist that temptation to favour the other side, the other party that might be represented by a more clever lawyer, or might be represented - if it is the state - by a prosecutor who appears before us most days, who we are very familiar with.

Familiarity is one of the most difficult things as judges that we must face. It is so easy when an individual comes before us, who does so regularly, to be civilised, perhaps even smile because we're very pleased that that person is running the list today. We might even be tempted on occasion to respond to a joke made from the Bar table. As part of our judicial independence we must be so careful, so wary of familiarity.

That does not mean in dealing with the array of humanity that you do, you must necessarily be a stern, cold, difficult or perceived as even unpleasant magistrate, or judge, in my case. But we must, as part of judicial independence, be constantly vigilant and mindful of the person in the back of the room, and how do they see us performing? What is their perception of the administration of justice which we are providing? It is a constant thing.

Recently I had an experience where I had quite a long list to get through in Civil Applications in the Court of Appeal. A barrister came along, and that barrister fairly much knew how the Court of Appeal liked to operate, had prepared the written

submission, provided the minute of order. On the other side there was what might be sometimes described as the bright young thing. You know exactly what I mean; the reader at the Bar, the individual who's only been at the Bar for a couple of years.

They have met the mantra of the Bar reader's course to perfection. They are told preparation, preparation, preparation. And these individuals do that exactly. They have possibly even stayed up till the early hours of the morning preparing their brief. And when they appear before us, of course they want to show us. They want us to know the work that they have done. Some of them may not necessarily exercise the judgment that we do not need to be re-educated about fundamental things.

When those individuals appear before us, as part of our judicial independence, how do we deal with them? It is very easy to simply put the head on the chin - on the Bench and listen to them politely, but then, if you have 50 people seated behind them, you have that sense of pressure surging towards you.

So what do you do? In my case, I have attempted to politely say, "Yes, we have read the submission. No, there is no need to take us through those matters. Yes, we are familiar with the basic authorities," and then to say to the individual politely, as courteously but directly, "What are your three key points?" If I know what the three key points are, I will say "It seems to me your three points are these, do I state the propositions correctly?"

That takes some energy, and it also takes some personal self-control and some tolerance. But it is important. We never know; that individual, the bright young lawyer, may actually have a particular point that should be heard that may be pivotal in our determining the particular case or the application. So, as part of judicial independence, we ought not dispatch the clever young lawyer quickly, out the door, but we do need to handle them carefully.

Sometimes as judicial officers we are tempted to be very territorial about our space. I wonder if any of us have ever said to an individual "No, not in my court you don't." If we think about it, however, we should not be proprietorial about our court space, because it is not our individual courtroom. It is a courtroom, a facility within the context, the architecture of the administration of justice. So sometimes when we are tempted to speak very, very directly to an individual, we can do so in a dignified way, but always with a measure of courtesy. I suggest we should aspire to.

What I have said is all very well. The lawyer who has not looked at the legislation and the textbook since they went to law school in the 1960s, the bright young thing, they're two examples. But what about the self-represented litigant? I know you have heard earlier this morning from Magistrate MacCallum about the new reforms in relation to self-represented litigants.

In your jurisdiction you see more self-represented litigants than any other court. In the Supreme Court we see them after they have been through the Magistrates' Court or VCAT and they

find their way to us, and we are but - more often than not for many - a station post on the way to the High Court.

Because of the nature of your jurisdiction, you, like the Supreme Court have a coterie of individuals who are not necessarily declared vexatious litigants, but they are individuals who are unwell, suffering ill-health and very difficult circumstances. At the same time, there is a very large number in your jurisdiction of individuals who, because of the current state of the justice system, are unable to obtain Legal Aid or legal representation.

The changes with respect to funding to Legal Aid have impacted on the Magistrates' Court far more dramatically than any other jurisdiction, and so last year, when the Supreme Court delivered judgments that forced Legal Aid to ensure that there were lawyers to instruct in cases, rather than leaving counsel to run trials uninstructed, that had an impact. What Legal Aid doubtlessly did, I would anticipate, is rearrange the funding, and the funding that was then being absorbed in the Supreme Court was reduced in your court.

How is this relevant to judicial independence? It is acutely relevant, I would suggest, because it comes back to this question of how we perform on the Bench and how we interact with the individuals appearing before us. It is so easy with a self-represented litigant to treat them in a peremptory way, to assume that some may be mentally unstable, to think that there is no foundation to their particular case.

I would suggest that one of the deepest worries we have as magistrates and judges is this: there just might be something in their case. As part of judicial independence we need to satisfy ourselves that we do not fall for the temptation of putting the matter through and overlooking that particular point that just might be hidden in there. As part of judicial independence, if we have that doubt, then we need to pursue it.

With self-represented litigants who have problems, not necessarily psychologically, but with their total misunderstanding of the system, they often travel in a group, in my experience, and they will bring their relatives, sometimes those from an immigrant background. Thus those individuals who appear before us may sometimes have a language difficulty. They will ask if their child, or their spouse in some instances, can address the court on their behalf.

I have had the experience, and I am sure you have to, of multiple voices from the Bar table endeavouring to make the submission to the court. It is so very easy to lose control of the occasion. Sometimes in order to achieve control it is very easy to lapse into a loud voice. I have observed judicial colleagues on occasion actually shout at a self-represented litigant.

For my part I endeavour not to do that. Aside from the fact that I would see it as undignified and as unseemly, it is an indication that the self-represented litigant is frustrating the Bench. We, as part of achieving judicial independence, need to rise above that.

So I have days like you where I go through the list. This particularly arises in civil applications in the Court of Appeal. We will have in the order of ten or 12 matters listed. More often than not, more than half of the list is taken up by self-represented litigants. By the time those individuals have been through often, on many occasions, multiple appearances in the Magistrates' Court or multiple appearances in VCAT, they've come into the Supreme Court, they've been before associate judges, they've gone into the Practice Court, they may have been to court easily ten to 15 times.

They'll come into the Court of Appeal, they want to tell their story and they want to tell it all over again. It is very, very difficult - very difficult - but it is a challenge as part of judicial independence that we must, I suggest, manage in a careful, considered and dignified way.

Those reflections I offer in relation to what we do day-in, day-out in our sitting as magistrates and judges. There are other things in terms of judicial behaviour about which we must be careful. Sometimes are we impatient? Occasionally does that impatience verge into bullying? This is something we do need to be very careful about. In our judicial performance, are we unduly assertive? Do we interrupt too much? Do we over-awe the individual barrister, perhaps the new barrister who is extremely nervous? How do we manage these things? As part of judicial independence we need to be mindful, I would suggest, of our performance and how we are seen.

Sometimes the way to view it is to put ourselves in the shoes and the mind of the individual sitting in the back row of the

courtroom. If they watched us as we perform that day, how would they assess us? Would they see us as operating, functioning independently in the delivery of justice?

As part of judicial behaviour, I would venture to suggest that it is part of our judicial ethic as a judicial officer. Judicial ethics underpin judicial independence. We cannot simply talk about the courts being separated from the executive arm of government and think that that is the end of the story. Judicial ethics underpin every part and parcel of what we do as judicial officers.

Let me give you an example drawing from my experience last year on visiting the United States, where I met at an international conference on judicial education Canadian judges. In Canada, as part of the judicial ethic, continuing judicial education and professional development is seen as that - as a judicial ethic, that we have an obligation to continually develop and improve.

I reflected this morning when I looked at your program, and then when I came in and had the benefit of hearing the last part of Magistrate Rozencwajg's presentation, how much what the Canadians say should resonate with us. There has been extensive law reform by the current Attorney-General in the present Parliament. We now, as magistrates and judges, have an obligation to be up-to-date and up-to-speed with that legislation. Part and parcel of that is your presence and careful listening here today.

Chief Justice Murray Gleeson when in office, I recall quite vividly, said on one conference occasion "It always ought be that the Bench is ahead of the Bar." In the months ahead you will have individuals appear before you, not just those who haven't looked at the law since the 1960s, but others who will not be aware of all the law reform that has occurred. This places a greater burden on us, and particularly you, and especially in relation, I anticipate, to sentencing.

With sentencing you have to grapple with the most tragic, appalling circumstances, but you, I suspect, far, far more so than the Supreme Court, deal with individuals who provide an opportunity to facilitate rehabilitation, to facilitate an individual not returning to the system. That will be confronted and challenged in the months ahead for you with the reforms with respect to the abolition of suspended sentences and also the imposition of baseline sentencing.

Judicial independence will be confronted in a way, in this state, with respect to sentencing and the sentencing discretion that has never been encountered before. It will call for extraordinary courage and resilience for all of us. But that we must aspire to as part of our judicial independence.

In that respect, the concerns, the anticipation, the dread in some cases that all of you face, is something that is shared by your judicial colleagues across all jurisdictions. We all face the difficulties that the legislative reforms will give rise to.

In the Supreme and County Courts we have had to grapple with the loss of the opportunity of sentencing an individual to a

suspended sentence. Take the young man who has been unduly intoxicated and on a one-off occasion has made the most dramatic mistake of his life. The sentencing opportunities for those types of individuals are about to change, and in a way that will render extraordinary hardship on some individuals.

Your jurisdiction, more than any other, will be confronted by the weeping mother, spouse, the crying babies, the young children calling out to Dad or Mum. How you deal with those situations, as you do day-in, day-out, does call for great courage and resilience. You have achieved that to date, if I may say with the utmost respect, and I have the utmost confidence, that you will continue to do that.

In the coming months with the law reform that we all face, there will be legal challenges, and that will place a greater burden on you. There will be members of the Bar, particularly the criminal Bar, who will want to take opportunities to challenge the validity of the legislation. We will have to see how that pans out and where it occurs at its earliest. If it arises in the Supreme Court it may well be referred quickly to the Court of Appeal, but that is something that we wait to see.

Meanwhile, as judicial officers we must do what we took the judicial oath to do. There are times where we, in our past, have had to apply the law in a way that has been harsh and personally difficult. The times ahead may even be more difficult. As part of judicial independence we will do just that, apply the law.

I have spoken quite a deal about how we perform as judicial officers. I did touch upon judicial education. That is a way in which we can maintafn and maximise our performance. As chair of the Judicial College, may I encourage you to embrace all those opportunities? His Honour the Chief Magistrate is a member of the Board of the Judicial College and shares my enthusiasm, support and encouragement of the Judicial College.

There are opportunities constantly to make ourselves better as judicial officers. I have spoken about performance extensively. One facility that is available through the Judicial College is the 360 degree review and the court craft program. Most of the heads of jurisdiction, including myself, have undergone the program. I personally encourage you, if you have not participated, to speak to the Chief Magistrate about at some point having that opportunity.

We all, when we do it, are filled with anticipation that the program will be a galling experience. It's not. But I do believe, on a personal note, that it has been very important to my own judicial performance to have gone through that 360 degree and court craft program. The report on myself that I received at the end was not the confronting document I anticipated, but it has given me commentary that I keep on my shelf in my Chambers. I take it out every now and again, and I give myself a check.

It is very, very useful. Including one of mine: "Don't be too quiet in court. Speak up more. Be more of an interactive listener". But one of my colleagues, he had the converse

recommendation in his, and he keeps a note on the Bench, "Be quiet". Occasionally, if I'm sitting with that judge I will point to the note.

I've spoken, as I have said, about judicial performance and judicial education. I would like now to shift to the question of practical judicial independence. His Honour the Chief Magistrate adverted to Court Services Victoria. As of 1 July we have now control of our own buildings and our own budget. The budget for the state is in the order of $480 million for the courts and we control it. We control the contingency funding that previously lay within the Department of Justice. In the past, unspent moneys in that contingency fund went back into the pool of the Department of Justice and was spent on other aspects of that department.

We now have new court facilities that are underway for Shepparton. We will design the Shepparton court. There is consideration underway of how we can provide better access and facilities, and in particular prisoner transfer at Bendigo. We, the courts, will manage that.

There is now finalised a memorandum of understanding between the Department of Justice and Court Services Victoria. That memorandum provides that there are obligations - unenforceable, albeit - but nonetheless important statements that the Department of Justice will provide particular services that remain with it to the standard that we require.

We control our own staff. Importantly, upon the signing of the memorandum of understanding between Court Services

Victoria and the Department of Justice, there are to be memoranda of understanding between individual jurisdictions and the CSV. So I anticipate that the Magistrates' Court of Victoria will have particular requirements that are relevant to the court that you will want to see to ensure that Court Services Victoria provides you with what you need.

This morning, before I came, I was at a meeting of what we now call in the Supreme Court the Board of Management. It consists of some judges with particular expertise, with responsibilities for portfolios, IT, HR, assets and finance. They reflect the four major portfolios within the CSV, and those judges have delegated individual responsibility to drive the reforms and achievements that we have in the Supreme Court. When I left the meeting, we had just approved in principle a memorandum of understanding between the Supreme Court and the CSV. It is a document to be finalised, but in principle we have approved it. We will have different needs in the Supreme Court from the Magistrates' Court.

The most challenging aspect of the CSV, and which resonates with our position concerning judicial independence, is the provision of IT. It is without doubt a hopeless system with which we are faced when we join our courts. We come from the profession, we come from the Bar, and we're used to a standard of technology. When we come to our courts it's as if we have gone back a decade. Most of us are used as busy lawyers in the weekends or in the evenings to doing some work at home. I'm sure if I did a survey of this room, when it comes to remote access, you very quickly give up on it.

That is about to change through the CSV. It will take a little bit of patience, but we have waited so long. It is fundamental. Let me give you a most recent example. In the Supreme Court we have been pressing most urgently for a separate judicial email. As matters stand within the Department of Justice, our emails can be monitored, as indeed is anything else that we put on the system, including our judgments.

The Department of Justice's answer has always been of course they wouldn't look. The Department of Justice, sometimes the Secretary of the Department and the State of Victoria, are major litigators in the Supreme Court, and I expect major litigators in the Magistrates' Court. How can it be that our IT is controlled and managed by a major party that litigates on most days, certainly most weeks, in our courts?

Notwithstanding the existence of the CSV, and notwithstanding the pressure that the Supreme Court brought to bear with respect to having a separate email, we thought we were almost there. But then we found out very recently that the Department of Justice implemented a facility which meant that notwithstanding the change, they could still read and monitor the email because it may be necessary for them to "look at the traffic".

Doubtless, as you can imagine, that will change. But it demonstrates a very, very basic, confronting aspect of the way in which the courts have been administered in this state by governments. From 1 July the significance of the CSV reform cannot be underestimated. His Honour the Chief Magistrate, together with the other heads of jurisdiction and I, have

worked assiduously to achieve the most fundamental separation of powers.

So to conclude on the CSV, I encourage you to participate and form part of that institution, and to support the Chief Magistrate in every way that you can.

In closing, I want to emphasise the need for transparency and accountability in everything that we do. I have touched upon technology. Technology will be a facility that enables us to make ourselves more accountable and more transparent. Our reasons for decision, where appropriate, particularly in the Magistrates' Court, will be capable of being published online.

We need to have debates about the openness of our courts through the use of technology. Streaming of hearings, filming of hearings; is that something we want? Is that a good thing? Is it part and parcel of opening up the courts? At the end of the day, when we reflect on judicial independence, we need to be mindful of this fundamental aspect. It is all about public confidence.

If the public have confidence in us and respect for what we do, judicial independence will be much, much safer, and that is vital to the rule of law. We are the ones who apply the rule of law in this state. We are its protectors.

Any of you who have been to the admissions ceremonies that I preside over on the second Tuesday of most months in the Banco Court will know that I speak to the young lawyers about judicial independence and the rule of law. One point that I

make to them is to reflect on what they see most nights on the ABC or the SBS news, the lawlessness that prevails around the world in the Middle East, Eastern Europe and in parts of Asia, and also Africa. We are very fortunate to live in the society that we do, but underpinning the strength of that society is the rule of law, which we apply and deliver every working day.

They are my reflections. I'm very happy if you wish, or there is time, to take comments or questions, and the Chief Magistrate has kindly invited me to stay for morning tea. I hope I have the opportunity to speak to you and chat a bit further. But thank you very much again for the privilege of speaking to you.