

## Fit to sit?

On a Friday after work, there is nothing better we Northern Territory criminal lawyers like to do as we kick back and sip on our glasses of Château Lafite Rothschild Pauillac 2009 than to get stuck into the beak of the week. The particulars vary. We whinge about the smiling assassins and the limp dishrags, the cynics and the pushovers, the over-polite silvertails and the over-the-top bullies, the slowcoaches and the express trains. But one of the magistrates we tend not to whinge about is Peter Maley SM. It is generally considered that on the bench he is able, astute, affable, efficient, sensitive and fair.

Mr Maley, however, is also at the centre of a legal storm, largely if not entirely of his own making, arising from his apparent failure or refusal to unequivocally dissociate himself from party politics after taking judicial office. In case you haven't been paying attention, here is a potted history of how this has brewed up:

- On 16 September 2013, NT Attorney-General John Elferink announced the appointment of Mr Maley as a magistrate.
- On 9 May 2014, Mr Maley announced his resignation from the Country Liberals, "saying he no longer believed it was appropriate for a Magistrate to be involved in politics".<sup>1</sup>
- On 4 June 2014, John Lawrence SC, President of the NT Bar Association (and immediate past CLANT President), called for an inquiry into Mr Maley's conduct in maintaining membership of and involvement with a political party following his appointment to the magistracy.
- On 14 June 2014, Attorney-General Elferink rejected the call for an inquiry.
- On 25 June 2014, the NTBA again wrote to the Attorney-General, renewing the call for an inquiry.
- On 7 August 2014, having failed to elicit a further response from the Attorney-General, the NTBA published its correspondence relating to the issue on its website.<sup>2</sup>
- On 8 August 2014, the Attorney-General again rejected the call for an inquiry.<sup>3</sup> That evening, Jon Tippett QC (also a former CLANT President), spoke out against the NTBA's call for an inquiry, claiming that the Northern Territory Legal Aid Commission (NTLAC)<sup>4</sup> and the North Australian Justice Agency (NAAJA) supported Mr Maley.<sup>5</sup>
- On 9 August 2014, Mr Maley appeared as a participant/performer in the theatre piece "100% Darwin", before an audience of about 1700 people, including, as it happens, myself. In response to the questions "who's a member of a political party?" and "who works for the government", he stood in the "me" group.<sup>6</sup>
- On 11 August 2014, NAAJA published a statement disassociating itself from Mr Tippett's comments and endorsing the NTBA's action.
- On 12 August 2014, the Australian Bar Association also endorsed the NTBA's action.<sup>7</sup>

Like my predecessors Messrs Lawrence and Tippett, CLANT members are divided on this issue. On the one hand, it is argued, this is a storm in a teacup, and no useful purpose is served by picking an unwinnable fight over a properly appointed, well regarded and competent judicial officer. Attractive as this standpoint is, I for one am unable to accept it: fundamental matters of principle have been raised, and must be addressed. In order to uphold confidence in the administration of justice, enhance respect for the institution of the judiciary and protect the reputation of judicial officers, three basic principles are said to govern the conduct of judicial officers: impartiality, judicial independence and

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<sup>1</sup> <http://www.ntnews.com.au/news/northern-territory/clp-figure-and-nt-magistrate-hit-with-bribery-allegations-by-larisa-lee-in-parliament/story-fnk0b1zt-1226918974091>

<sup>2</sup> <http://ntba.asn.au/wp-content/uploads/NTBA-calls-for-inquiry.pdf>

<sup>3</sup> <http://www.abc.net.au/news/2014-08-08/call-for-magistrate-inquiry-rejected-again/5657258>

<sup>4</sup> The author is an employee and Board member of NTLAC. However, the views expressed in this article are the author's and are not made on behalf of or represent the views of the Northern Territory Legal Aid Commission.

<sup>5</sup> <http://www.abc.net.au/news/2014-08-09/territory-legal-fraternity-divided-over/5660356>

<sup>6</sup> To find out how Mr Maley answered the question "Who has put a crocodile in someone's pool?", go to Bob Gosford, "Peter Maley. 100% Territorian" at <http://blogs.crikey.com.au/northern/2014/08/11/peter-maley-100-territorian>

<sup>7</sup> Fiona McLeod SC (Vice-President, ABA) "Top End Magistrates must be above party politics"

integrity.<sup>8</sup> For a judicial officer to publicly continue an association with a political party is inconsistent with the principle of both impartiality and judicial independence. As I have previously written, judicial independence is constitutionally fundamental, but also peculiarly fragile.<sup>9</sup> There is of course nothing unusual, let alone improper, about judicial officers being actively involved in politics before their elevation to the bench: former Chief Justice Brian Frank Martin was once the mayor of Alice Springs, and Additional Judge John Reeves served as the Federal MHR for the Northern Territory. However, it is a “well established principle” that:

it is expected that, on appointment, a judge will sever all ties with political parties. An appearance of continuing ties, such as might occur by attendance at political gatherings, political fund raising events or through contributions to a political party, should be avoided.<sup>10</sup>

Before commencing to exercise or perform their judicial powers, functions or duties, Northern Territory magistrates are required to take an oath which includes these words:

...I will well and truly serve in the office of magistrate and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will.<sup>11</sup>

Throughout this imbroglio, no-one has suggested that Mr Maley has not been true to his oath of office. However, from time to time judicial officers are required to rule on issues which go the heart of political affairs,<sup>12</sup> which is why the wall separating judicial office from political involvement must be rigorously maintained: if judges or magistrates remain publicly associated or involved with a political party, there is a real risk that they will not be seen to exercise their judicial functions “without fear or favour”.

The Territory is unusual among Australian jurisdictions in not having a Judicial Commission to which complaints against judicial officers can be directed. For that reason, the only apparent remedy available in this case is to request the Attorney-General to initiate an inquiry pursuant to the *Inquiries Act 1945* (NT).

Exact standards of fitness and propriety to practice law in the Northern Territory are required by the *Legal Profession Act 2006* (NT) as construed and applied by the Supreme Court.<sup>13</sup> It is trite to observe that the standards expected of judicial officers are even more stringent. Regrettably, Mr Maley, whether in a moment of injudicious mischievousness or unguarded candour, has publicly reasserted his ties to a political party. “100% Darwin” was, I thought, terrific theatre, but not so good for maintaining confidence in the administration of justice.

Russell Goldflam  
President, CLANT

16 August 2014

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<sup>8</sup> Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2<sup>nd</sup> Edition) (AIJA, 2007), p 3

<sup>9</sup> Russell Goldflam, “Franz Schlegelberger and the Concentration of Powers”, *Balance* (Edition 4, 2013), p. 14

<sup>10</sup> The Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2<sup>nd</sup> Edition) (AIJA, 2007), p 10

<sup>11</sup> *Magistrates Act 1979* (NT), Section 20, Schedule

<sup>12</sup> For example, *Lansen v NT Minister for Mines and Energy* [2007] NTSC 28, in which a judicial decision brought to an immediate and grinding halt a very substantial zinc mining operation in the Borroloola area, contrary to the wishes of the government of the day

<sup>13</sup> *In the matter of an application by Julian Valvo* [2014] NTSC 27; *In the matter of an application by Andrew Hewitt Giles* [2014] NTSC 30; *In the matter of an application by Gadd* [2013] NTSC 13; *In the matter of an application by Thomas John Saunders* [2011] NTSC 63