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

August 2021
The Association was formed in 1970 as the Commonwealth Magistrates' Association and in 1988 changed its name to the Commonwealth Magistrates' and Judges' Association in order to reflect more accurately its membership.

Most Commonwealth countries and dependencies are represented in full membership which is open to national associations of magistrates, judges and any other judicial body. Associate membership is open to any individual who is a past or present member of any level of the judiciary or has connections with the courts within the Commonwealth.

The aims and objectives of the Association are to:

• advance the administration of the law by promoting the independence of the judiciary;
• advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth;
• disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

"The Rule of Law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formally protected by constitutional guarantees, the best protection rests in the support of government and people on the one hand, and in the competence and confidence of judges and magistrates in the performance of their offices on the other."

Victoria Falls Proclamation, Zimbabwe, 1994

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PREFACE AND ACKNOWLEDGEMENTS

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

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

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

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

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

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

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

This third edition of the Manual was edited by his Honour Dr John Lowndes, the Chief Judge of the Local Court of the Northern Territory. He was assisted by the following three interns

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

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

This is the fourth edition of the Guide, which was again edited by Dr John Lowndes, Immediate Past President of the CMJA. This latest edition not only expands upon the material contained in Chapters Seven and Nine of the previous edition of the Guide, but includes a revised version of Chapter Ten and its addendum (now Chapter Eleven). However, the most distinctive feature of this fourth edition of the Guide is that it includes three new chapters. The first is Chapter Ten which deals with the dynamics of oral decision-making. The second new chapter (Chapter Twelve) is concerned with the use of social media by judicial officers. The third additional chapter (Chapter Thirteen) deals with the well-being of judicial officers and judicial personnel. These new chapters address matters of immense importance to magistrates around the Commonwealth and the work that they perform at the coalface of the judiciary.

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

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

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

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

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

The CMJA is grateful to the Patron’s Lunch Foundation for their support in assisting with the production of this Guide which we hope will be of value to all judicial officers in the lower judiciary in the Commonwealth.
The purpose of this Guide is to provide practical guidance to magistrates within the Commonwealth in relation to their role as members of one of the three branches of government – the judiciary - and the performance of their judicial duties and functions. The Guide focuses on enhancing the integrity and independence of magistrates with a view to promoting the rule of law and good governance within the Commonwealth.

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

Any judge of a Court not being a Court of unlimited jurisdiction in civil or criminal matters, whether or not they are professionally qualified as lawyers or are lay members of society and irrespective of whether they bear the title of “magistrate” or “district judge” or “provincial court judge”.

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

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

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

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

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

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

This fourth edition builds upon the previous three editions and would not have been possible without those earlier resources and the efforts of those who were involved in their creation.
It is hoped that this fourth edition will, like its predecessors, prove to be a valuable resource for all magistrates within the Commonwealth.

Although the Guide is aimed at judicial officers of limited jurisdiction, judicial officers at all levels may find the topics and issues dealt with in the Guide to be of relevance.
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CHAPTER ONE
THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE OTHER BRANCHES OF GOVERNMENT

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

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

1.1 The Latimer House Principles and Guidelines

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

The Latimer House Principles provides:

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

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

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

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

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

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

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

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

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

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

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

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

The guidelines are underpinned by the following principles:

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.
Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

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

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

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament’s legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries’ international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It can also help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Office of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers should have access to human rights education.
The Guidelines contain the following guidelines in relation to the preservation of judicial independence:

1. Judicial Appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of State acting on the recommendation of such a commission.

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

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

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

Judicial vacancies should be advertised.

2. Funding

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

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

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

3. Training

A culture of judicial education should be developed.

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

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

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

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

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

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

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.

(b) The Commonwealth Magistrates and Judges Association should be encouraged to complete its Model Code of Judicial Conduct now in development;

(c) The Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries which will serve as a resource for other jurisdictions.

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

(a) Discipline
   (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:
      (A) inability to perform judicial duties and
      (B) serious misconduct.
   (ii) In all other matters the process should be conducted by the chief judge of the courts;
   (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private by the chief judge

(b) Public Criticism
   (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
   (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

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

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

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

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

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

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

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

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

The rule of law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws.

The tri-partite relationship between the doctrine of the separation of powers, the rule of law and judicial independence was noted by Sir Anthony Mason:

The separation of judicial power is not only protection against the exercise of arbitrary power, but it also assists in maintaining the independence of the judiciary, and contributes to public confidence in the administration of justice.

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

The reason why judicial independence is of such public importance is that a free society exists so long as it is governed by the rule of law – the rule which binds governors and the governed, administered impartially and treating equally all of those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.

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

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

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

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

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

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

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

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

The document goes on to say:

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

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

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

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

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

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

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

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

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

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

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

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

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

The authors also explain how the rule of law is enhanced by external judicial independence:\textsuperscript{34}

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

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

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

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

Internal judicial independence is also a key mechanism in the rule of law. Just as executive direction of an adjudication would be inconsistent with the rule of law, so would improper direction from the presiding judicial officer – or any other judicial officer.\textsuperscript{40}
The Latimer House Principles also establish various mechanisms for preserving the independence of the judiciary.

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

However, as stated by the High Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 – “no single ideal model of judicial independence, personal or institutional” exists. There is “no constitutional requirement that all judicial officers must have their independence secured to the highest possible degree in every respect” and “some legislative choice is allowed in the mechanisms employed to promote judicial independence”. 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”. However, the High Court stated that important indicators of breaches of minimum standards necessary to ensure the substance and appearance of an independent and impartial tribunal include whether:

- the judicial officer is “inappropriately dependent on the legislature or executive… in a way incompatible with requirements of independence and impartiality”;
- the circumstances “compromise or jeopardise the integrity of the… magistracy or the judicial system”;
- “reasonable and informed members of the public [would] conclude that the magistracy… was not free from the influence of the other branches of government in exercising their judicial function.”

It is essential that all judicial officers be aware of the essential relationship between judicial independence and the impartial discharge of their judicial functions and the “relevant minimum characteristics of an independent and impartial tribunal exercising the jurisdiction of the courts” necessary to ensure the substance and appearance of an independent and impartial tribunal. All judicial officers need to be aware of the various mechanisms for protecting judicial independence, including the important relationship between judicial independence and judicial accountability.
As is clear from the Latimer House Principles and Guidelines, judicial independence and judicial accountability are not only compatible but complementary concepts. The Principles and Guidelines accept that all judicial officers should be accountable for the exercise of their judicial functions, and provide a structure for balancing judicial accountability with judicial independence.

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

2 Objective.
3 Principle I.
4 Principle II.
5 Principle IV.
6 Principle VI.
8 See Principles in the Latimer House Guidelines.
9 The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.
11 E Campbell and HP Lee The Australian Judiciary 2001, 51
12 Dicey n 10, 202 cited in Campbell and Lee n 11, 51.
14 See Campbell and Lee n 11, 51.
19 In Valente v The Queen [1985] 2 SCR 673 Le Dain J referred to institutional independence as being “reflected in institutional or administrative relationships to the executive and legislative branches of government”.
21 J Debeljak n 20, 2.
22 These guidelines are annexed to the CMJA’s Report on “The Status of Magistrates in the Commonwealth” which can be accessed at www.cmja.org.

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See the Hon Justice Nicholson “Judicial Independence and Accountability: Can They Co-Exist?” 1993 *Australian Law Journal* Vol 67 404 at 405 where his Honour states that these two aspects of independence are encompassed within the principle of judicial independence.


This is also a core aspect of judicial independence referred to in the CMJA “Guidelines for Ensuring the Independence and Integrity of Magistrates”.

Ananian -Welsh and Williams n 17, 600-601.

Ananian and Williams n 17, 613.

Mack and Anleu n 28, 373.

Mack and Anleu n 28, 373.


Internal judicial independence is also included in the CMJA Guidelines for Ensuring the Independence and Integrity of Magistrates as a key mechanism for ensuring the judicial independence of the magistracy.

Mack and Anleu n 28, 374.


Mack and Anleu n 28, 373.

Mack and Anleu n 28, 380.

Mack and Anleu n 28, 374.

Mack and Anleu n 28, 374.

Mack and Anleu n 28, 380.

Mack and Anleu n 28, 392-398.

Mack and Anleu n 28, 381-382.

Mack and Anleu n 28, 382.

Mack and Anleu n 28, 382.

The Hon Justice Nicholson n 26, 414.

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

Campbell and Lee n 11, 49.


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CHAPTER TWO

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

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

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

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

As pointed out by Justice Thomas:

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

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

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

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

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

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

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

2.1 The Common Approach of Relevant Guides

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

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

The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual judge and what follows is not intended to be prescriptive, unless stated to be. There may be occasions when the overall interests of justice require a departure from propositions as literally
stated in the guide. It is also acknowledged that there is a range of reasonably held opinions on some aspects of the restraints that come with the acceptance of judicial office.

The CJC Ethical Principles for Judges takes a similar approach:

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

2.2 The Underlying Principles and Values of the Guides

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

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

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

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

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

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

The Bangalore Principles of Judicial Conduct consist of six fundamental values:17
1. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

2. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

3. Integrity is essential to the proper discharge of the judicial office.

4. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.

5. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

6. Competence and diligence are prerequisites to the due performance of judicial office.

These principles are also recognised as key principles in the Judiciary of England and Wales Guide to Judicial Conduct.\(^\text{18}\)

- **Judicial Independence**

The AIJA Guide to Judicial Conduct emphasises the imperative for there to be independence in the discharge of judicial duties:\(^\text{19}\)

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

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

The CJC Ethical Principles for Judges states that:\(^\text{22}\)

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

The Guide sets out the following four fundamental principles concerning judicial independence:\(^\text{23}\)

1. Judges must exercise their judicial functions independently and free of extraneous influence;

2. Judges must firmly reject any attempt to influence their decisions in any manner before the Court outside the proper process of the Court;
3. Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary;

4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

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

• **Impartiality**

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

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

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

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

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

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

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

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

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

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as attendance at political gatherings, political fund raising events or through contribution to a political party, should be avoided.

- The judge’s primary task and responsibility is to discharge the duties of office. A judge should avoid extra-judicial activities that are likely to cause a judge to have to refrain from sitting on a case because of an appearance of bias or because of a conflict of interest that would arise from the activity.

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

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;

- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit.
In a similar vein, the CJC Ethical Principles for Judges states that “the appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and reasonable person”. Applying that test the CJC Ethical Principles for Judges states:

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

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

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

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

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

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

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

(a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.

(b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:

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(i) The head of the jurisdiction;
(ii) The person in charge of listing;
(iii) The parties or their legal advisers

not necessarily personally, but using the court’s usual methods of communication.

(c) Disqualification is for the judge to decide in light of any objection, but trivial objections are to be discouraged.

(d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.

(e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.

(f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.

(g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.

(h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge’s own view, there is any objection.

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

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

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

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

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

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

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

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

Magistrates may find it also useful to refer to pages 48 and 49 of the CJC Ethical Principles for Judges, which deals with the disqualification procedure. In relation to the principle of necessity the Guide states:
The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.

**Integrity and Personal Behaviour**

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

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

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

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

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

The CJC Guide states that:

- Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.

- Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.
Later on, the CJC Ethical Principles for Judges stresses the important role played by judicial demeanour (in the court room) in maintaining integrity, impartiality and, of course, independence:

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

The CJC Guide goes on to consider the part played by judicial demeanour in promoting public confidence in the judiciary:\(^{52}\)

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

The starting point is the conduct of a judicial officer in court. This is addressed in the AIJA Guide to Judicial Conduct:\(^{53}\)

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, integrity, the impartiality and independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

Nevertheless, the entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. It is worth remembering that many complaints to the Judicial Commission of New South Wales by litigants and their lawyers have had as their foundation remarks made by judicial officers in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.
A judge must be firm but fair in the maintenance of decorum, and above all even handed in the conduct of the trial. This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Judges should inform themselves on these matters so that they do not inadvertently give offence.

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

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

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

The AIJA Guide to Judicial Conduct states the importance of a judicial officer maintaining impartiality in the court room. It states that that when it becomes necessary for the judge to question a witness or engage in debate with counsel, the judicial officer must be careful not “to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion”.

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

It is important to bear in mind that breaches of the principle can occur through oversight, sometimes when attempts are made to adopt what may seem to be practical, convenient or time-savings measures. Care should be taken, for example, on country circuits if suggestions are made about shared travel that seem sensible at the time, but in fact may involve a breach of the principle.
The fifth chapter of the AIJA Guide to Judicial Conduct is particularly instructive in that it deals with specific examples of conduct or activities engaged in by a judicial officer outside the courtroom which may have the potential to impact upon the impartiality, independence or integrity of the judicial officer, such as:

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

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

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

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

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

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

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

The AIJA Guide to Judicial Conduct at 5.4 states:

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

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

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

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1. A judicial officer must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;

2. The venue at which, or the occasion on which, a judge participates may cause the public to connect the judicial officer with a particular organisation, group or cause;

3. There exists a risk that the judicial officer may express views, or be led in the course of the debate to express view, that will give rise to issues of bias or pre judgment in cases that later come before the court;

4. Expressions of views on private occasions must also be considered carefully as they may lead to a perception of bias;

5. Other judicial officers may hold conflicting views, and may wish to respond, possibly giving rise to a public conflict between judicial officers which may cause the judiciary to be held in disrepute or reduce the authority of a court;

6. A judicial officer, subject to the restraints that adhere to judicial office, has the same rights as other members of the public to take part in public debate;

7. A judicial officer who participates in a public debate cannot expect to receive the respect that he or she would receive in court and cannot expect to take part in and leave the debate on their terms.

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

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

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

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

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

The AIJA Guide does not regard legal teaching and the performance of judicial functions as being incompatible, provided so long as the teaching does not interfere

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with judicial duties and the judicial officer is aware of the danger of expressing a particular view on an uncertain aspect of the law during the course of teaching students that they may have to decide as a judicial officer.  

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

The AIJA Guide to Judicial Conduct points out that judicial officers may and frequently deliver papers at legal conferences. Although “participation in, or the giving of papers at non-legal conference, without a fee, is not objectionable… it would generally be advisable to avoid speaking or writing on controversial or politically sensitive topics”. The AIJA Guide emphasises the importance of professional development in maintaining the high standards expected of the judiciary, and acknowledges that whilst judicial officers are individually responsible for pursuing opportunities for professional development, it is expected that the courts of which they are a member “will support them by providing reasonable time out of court and appropriate funding”.

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

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

The Guide makes it clear that upon appointment judicial officers should cease to hold inconsistent offices or positions and to undertake inconsistent work. Judicial officers need to be extremely careful about engaging or becoming involved in commercial activities. The AIJA Guide acknowledges that it is not possible to be definitive about the kind of commercial activities that are appropriate or inappropriate. However, the Guide points out “the permissible scope of involvement” in such activities is limited by a number of considerations:
1. Judicial office is a full time position which must take priority over any non-judicial activities;
2. The terms and conditions of judicial office (including judicial salary) should afford a sufficient level of financial security to obviate the need for a judicial office to engage in commercial activities in order to obtain additional income that might give rise to a conflict of interest or other otherwise undermine public confidence in the judiciary;
3. Directorships of public companies should be relinquished on appointment to judicial office and not accepted during the tenure of office.  

Furthermore, the judicial officer should always consider how the non–judicial activity might “reflect on the judicial office”.  

For example, involvement in unlawful activity would obviously fall outside the permissible scope; and engaging in an activity likely to arouse controversy would be ill–advised.  

Involvement in activities that might reasonably be perceived to take advantage of the judicial officer’s office or in business activities with persons likely to come before the court are to be avoided.  

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

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

The Guide cautions judicial officers to weigh the risks before taking on the role of trustee.  

The AIJA Guide to Judicial Conduct deals with the acceptance of gifts by judicial officers.  

Whilst gifts from family or close friends received by a judicial officer in a personal capacity (unrelated to judicial office) pose no problem, gifts which in some way relate, or might relate, to the judicial office require careful consideration on the part of a judicial officer before such a gift.  

As regards the latter category of gift, a small gift to judicial officer by way of gratitude for making a speech or otherwise taking part of a public or private function is unobjectionable.  

Engagement in community organisations is addressed by the AIJA Guide to Judicial Conduct (at 6.5). Involvement in community organisations, particularly educational, charitable and religious organisations, is to be encouraged because such engagement carries with a “broad based public benefit” – provided it does not compromise judicial independence or threaten judicial integrity.  

The permissible scope of such activity is subject to the following considerations: the activities should not be too many or time consuming, the judicial role should not involve active management and the extent to
which the organisation is subject to governmental control or intervention must be weighed.\textsuperscript{100} As the AIJA Guide points out, certain risks attach to involvement in community organisations: the organisation may become involved in disputes (in particular with executive arm of government), the organisation may fail to comply with legislation and the organisation may get into financial difficulty.\textsuperscript{101}

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

The matter of judicial officers providing character references and giving character evidence in court proceedings is dealt with in the AIJA Guide at 6.7.\textsuperscript{103} In States other than New South Wales,\textsuperscript{104} the position is summarised by the Guide as follows:\textsuperscript{105}

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

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

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

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

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

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

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

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

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

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

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

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

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

• Other Standards of Conduct

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

• Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court’s operation;
• Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office;
• Judges should endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness;
• Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

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

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

The Guide goes on to say:120

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

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

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

2.3 The Use of Social Media and Judicial Ethics

The use of social media by judicial officers, both individually and collectively, raises specific questions and ethical risks - namely risks to judicial independence, impartiality
and integrity. Although some codes of judicial conduct around the Commonwealth include guidelines as to the use of social media by judicial officers, this appears to be the exception rather than the rule.

Those codes which include such guidelines are dealt with in Chapter Twelve as part of an overall discussion of the involvement of, and participation in, social media by judicial officers and the ethical risks associated with such use, including practical tips for judicial officers using social media.

2.4 Judicial Wellbeing and Codes of Judicial Conduct

The well-being of judicial officers and court personnel and colleagues is essential to the proper functioning of a court and its fulfillment of the core values of a court. The extent to which existing judicial codes of judicial conduct around the Commonwealth address this very important aspect of judicial conduct is dealt with more conveniently in Chapter Thirteen where the psychological concept of judicial wellbeing is discussed generally along with appropriate court strategies and initiatives to promote the wellbeing of judicial officers and judicial personnel.

2.5 The Relevance of Gender Related Integrity Issues to the Integrity of Judicial Conduct and Decision-Making, Court Administration and Public Perceptions of the Judiciary

In January 2020, the United Nations on Drugs and Crime (UNODC) published a paper on Gender Related Integrity Issues ("The Paper") following wide consultations on the issue across the globe. This was part of the work that has been undertaken under the auspices of the Gender Judicial Integrity Network (GJIN) and an expert group came together to undertake the first draft. The Advisory Committee of the GJIN, which includes the CMJA’s Regional Vice President for East, Central and Southern Africa, Justice Lynne Leitch also provided guidance as to the content of the paper. The CMJA, as a partner organisation of the UNODC in the GJIN, was also consulted on the Paper.

The objective of the Paper was to look at the gender-related issues that may affect the integrity of the judiciary and analyse the existing safeguards to promote appropriate conduct or in taking corrective action where inappropriate conduct is found. The Paper examines “the ways in which gender plays a role in the integrity of judicial conduct and decision-making, court administration and public perceptions of the judiciary.”

As pointed out by the Paper, “gender-related judicial integrity issues take many forms, including sextortion, sexual harassment, sexual discrimination, gender bias, unequal gender representation, gender stereotyping or inappropriate sexual conduct”; and “while some gender-related conduct might be seen as more offensive and egregious than other conduct, none of it is compatible with the principles of judicial ethics”.

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There is an expectation that judicial officers will “set an example for the rest of society” and adhere to “a higher standard of conduct that is defined not merely what is lawful or intentional, but by what is ethical”.\textsuperscript{127} Conduct that is lawful may still “lack integrity and undermine public trust and confidence in the judiciary”; and “conduct that reflects lack of knowledge or unconscious bias may still be inappropriate, unfair and harmful”.\textsuperscript{128}

Gender-related integrity issues can subvert the integrity of the decision-making process and the court’s capacity to ensure substantive equality for everyone that uses or is part of the justice system.\textsuperscript{129} As further noted in the Paper, such issues may “arise in any aspect of a judge’s professional or personal life, including rendering decisions, presiding over a courtroom, interacting with court personnel or colleagues, fulfilling administrative duties, making work assignments, providing professional opportunities or engaging in private social activities”.\textsuperscript{130}

As recognised by the Paper, there are three primary mechanisms or safeguards for “protecting and promoting judicial integrity”: \textsuperscript{131}

- judicial codes of conduct and other policies that provide guidance about what constitutes inappropriate conduct;
- judicial accountability mechanisms that provide procedures for identifying and correcting misconduct; and
- educational and training programmes that raise awareness about gender-related integrity issues and promote appropriate conduct.

As many of the above mechanisms or safeguards were put in place prior to “heightened global awareness of gender issues”, they do not fully or properly address the entire spectrum of gender-related issues.\textsuperscript{132} In order to meet these deficiencies, the Paper says that “it is incumbent on judiciaries to consider ways to strengthen these safeguards and clarify standards of judicial conduct, to hold those who violate the standards accountable and educate and inform people about their ethical responsibilities, legal rights and available recourse”.\textsuperscript{133}

The Paper stresses the need for “clear and comprehensive guidance about gender-related integrity issues”.\textsuperscript{134} Moving forward, the Paper recommends the following action:\textsuperscript{135}

- incorporating gender-specific provisions in ethical codes;\textsuperscript{136}
- strengthening the \textit{Bangalore Principles of Judicial Conduct};\textsuperscript{137}
- adopting codes of judicial conduct that are consistent with the \textit{Bangalore Principles of Judicial Conduct};\textsuperscript{138}
• consider adopting and implementing gender – sensitive policies and other guidance;\(^{139}\)
• anchoring judicial integrity in the international gender equality and anti-corruption framework.\(^{140}\)

Finally, but not least, the Paper stresses the crucial role that effective educational and training programmes can play in raising awareness about gender-related integrity issues and promoting appropriate conduct in the courtroom and courthouse – as well as in the broader community. \(^{141}\)

In its overview of gender – related integrity issues the UNODC Paper recognises that the notion of “gender-related integrity issues” covers “the myriad ways in which gender issues may influence judicial conduct and implicate judicial integrity” and that it is a “broad topic [which is not yet well defined], but requires looking at integrity from a gender perspective and considering all the ways in which judges interact with others and are responsible for promoting public confidence in the courts”. \(^{142}\)

The Paper acknowledges that judicial officers, when presiding over a court, are responsible for ensuring that all – including parties, witnesses, counsel, other professionals and judicial colleagues – are treated with respect by not only themselves, but by other people in the courtroom and are “not subjected to inappropriate demands, comments, or behaviour”. \(^{143}\)

The Paper also points out that in making and delivering their decisions, judicial officers are under a duty to prevent “personal bias or prejudice to affect the outcome of the case”. \(^{144}\) As stated in the Paper: \(^{145}\)

> When conscious or unconscious biases, stereotypes and prejudices are allowed to shape the way judges interpret the law, the justice system becomes a mechanism for preserving inequality rather than protecting equal rights and human dignity.

Gender-related integrity issues ranging from extortion and sexual harassment to other conduct such as “discrimination on the basis of gender, unequal gender representation, gender stereotyping and gender bias” affect “the impartiality and integrity of the judiciary”. \(^{146}\) In particular, if a bias (conscious or unconscious) “distorts the outcome of a case, it affects the integrity of the judicial process and the public’s perception of that process”. \(^{147}\) The Paper refers to a number of cases that illustrate the manner in which “gender-related integrity issues have manifested themselves in the judiciary”. \(^{148}\)
2.6 Conclusion

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

1 Principle VII (b).
4 Principle VI on Ethical Governance.
5 1.2 of the AIJA Guide to Judicial Conduct.
6 Preface to the AIJA Guide to Judicial Conduct where this observation is made in relation to the Australian judiciary.
7 1.1 of the AIJA Guide to Judicial Conduct.
8 Foreword to the Judiciary of England and Wales Guide to Judicial Conduct.
9 1.6.2 of the Guide.
10 1.2 Purpose.
11 2 of the AIJA Guide to Judicial Conduct.
12 2 of the AIJA Guide to Judicial Conduct.
13 2.1 of the AIJA Guide to Judicial Conduct. See also 2.2 of the Judiciary of England and Wales Guide to Judicial Conduct.
14 Chapters 2, 3 and 6 of the Guide.
17 1.4 of the judiciary of England and Wales Guide to Judicial Conduct.
18 Chapters 2. 3 and 4 of the Guide.
19 2.2.2(a) of the Guide.
20 2.1 of the Guide.
21 2.1 of the Guide.
22 2 Judicial Independence, Statement.
23 2 Judicial Independence, Principles 1 to 4.
24 1.6.3 of the Guide.
25 6 Impartiality, Statement.
26 Principle 3.1 of the Judiciary of England and Wales Guide which adds that a judge should also ensure that their conduct maintains and enhances the confidence of the legal profession and litigants in the impartiality of the judge and of the judiciary. See the introduction to Chapter 3 of the AIJA Guide to Judicial Conduct which extends this requirement to both the public and private life of a judicial officer.
27 2.1 of the Guide.
28 2.1 of the AIJA Guide to Judicial Conduct.
29 2.1 and Chapter 3 of the AIJA Guide to Judicial Conduct.
30 For a full discussion of these circumstances and their potential to give rise to bias or a conflict of interest see 3.1 and 3.2 of the AIJA Guide to Judicial Conduct which can be viewed by accessing the following link: www.aija.org au.aija publications. A full discussion of these various aspects can also be found at in 6 Impartiality (Statement, Principles and Commentary) of the CJC Ethical Principles For Judges which can be accessed via the
following link: www.cjc-ccm.gc.ca. See also Principle 3 and 4 of the Judiciary of England and Wales Guide to Judicial Conduct which is available to the following link: www.judiciary.gov.uk/wp-content/.

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

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

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

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

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

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


38 3.2 of the Guide.

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

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

41 Principle 6, Impartiality.

42 Principle 6 E.

43 3.5 and 3.6 of the Guide.

44 3.5 of the Guide.

45 3.11 of the Guide


47 See 2.3 of the Guide.

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

49 Principle 3, Integrity.

50 Principle 3, Integrity.

51 Principle 3, Impartiality.

52 Principle 6 B.

53 4.1 of the Guide.

54 4.2 of the Guide.

55 4.2 of the Guide.

56 4.3 of the Guide.

57 4.3 of the Guide.

58 Preface to Chapter 5.

59 Preface to Chapter 5.

60 Preface to Chapter 5.

61 Preface to Chapter 5.

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

63 5.1 of the AIJA Guide to Judicial Conduct.

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

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

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

66 5.5 of the Guide.


68 See 5.6.1 of the AIJA Guide to Judicial Conduct.

69 See 5.6.1 of the AIJA Guide to Judicial Conduct.

70 5.6.2 of the Guide.

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

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

5.8 of the Guide.

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

5.9 of the Guide.


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

5.11 of the AIJA Guide to Judicial Conduct.

6.1 of the AIJA Guide to Judicial Conduct. See also 5.1(12) of the Judiciary of England and Wales Guide to Judicial Conduct which provides that a judge shall not practise law while the holder of judicial office.


6.2 of the AIJA Guide to Judicial Conduct.

6.2 of the AIJA Guide to Judicial Conduct.

6.2 of the AIJA Guide to Judicial Conduct.

6.2 of the AIJA Guide to Judicial Conduct.

6.3 of the Guide. See also pp 50-51 of the CJC Guide.

6.3 of the Guide. See also 5.1(14)-(16) and 8.8 of the Judiciary of England and Wales Guide to Judicial Conduct.

6.3 of the AIJA Guide to Judicial Conduct. See also 5.1(14)-(16) and 8.8 of the Judiciary of England and Wales Guide to Judicial Conduct.

6.4 of the AIJA Guide to Judicial Conduct. See also 8.4 of the Judiciary of England and Wales Guide to Judicial Conduct and Principle 6C (and commentary on 6C) of the CJC Ethical Principles for Judges.

6.5 of the AIJA Guide to Judicial Conduct.

6.6 of the Guide.

6.7 of the Guide. See also 8.5 of the Judiciary of England and Wales Guide to Judiciary.

The Judicial Commission of New South Wales has expressed the view that judicial officers should not give character evidence or provide written testimonials directed to the same issue except where it would be unjust or unfair to deprive the beneficiary of special knowledge possessed by the judicial officer and where a member of the judicial officer’s staff is given a reference relating to employment.

6.8 of the Guide.

6.9 of the AIJA Guide to Judicial Conduct.

6.11 of the Guide.

6.11 of the AIJA Guide to Judicial Conduct.

The type of issues to be considered and weighed include: whether it would be unfair to deprive the person in question of the benefit of such evidence, the availability of other persons to speak of the person’s generally good repute, the fact that evidence given by a judicial officer may put pressure on the court and the fact that the outcome of the case (whether favourable or not to the person concerned) may receive ill-informed publicity referable to the judicial officer’s involvement in the case.

6.11 of the Guide.
6.11.1 of the Guide.

6.11.1 of the AIJA Guide to Judicial Conduct.

6.11.1 of the Guide.

6.11.2 of the Guide.

6.11.2 of the Guide.

6.11.4 of the Guide. Note, as pointed out in the Guide, some judges consider that “a judge should not sit on a committee exercising disciplinary powers”.

Principle 4, Diligence.

Principle 4 of the CJC Ethical Principles for Judges.

6.1 of the Guide.

6.1 of the Guide.

Principle 5, Equality.

Principle 5, Equality.

The full Paper on Gender Related Integrity Issues published by the UNODC, with all the recommendations, is available from Gender_2020.pdf (unodc.org)

UNODC Paper p 5.

UNODC Paper p 5.

UNODC Paper p 5.


UNODC Paper p 5.

UNODC Paper p 5.

UNODC Paper p 5.


UNODC Paper p 5.


UNODC Paper pp 10 - 12. The key features of such education and training are: “mainstream consideration of gender issues into every stage of legal education”; relevant education and training that targets “all those within the justice system”; education of the general public about the role of judges and ethical standards; judicial leadership as “key in addressing gender-related integrity issues”; mandatory training on gender-related integrity issues, wherever possible; gender training that is comprehensive and addresses “the full range of gender-related integrity issues” as well as being “engaging and valuable for both men and women”; “compliance training” as a
“key component of any training on gender-related integrity issues”; training that addresses “the attitudes, behaviours and institutional culture that allow gender-related misconduct to occur”; the inclusion of “bystander intervention” as part of “the efforts to address gender-related integrity issues”; regular evaluation of “education and training programmes, using a variety of evaluation methods, to ensure [the] continued relevance and effectiveness” of such programmes; and the sharing of “good practices within judicial networks”.

144 UNODC Paper, p 13.
146 UNODC Paper, p 13.
147 UNODC Paper, pp 13-14.
148 UNODC Paper, pp 13-14. The cases cover sextortion generally, sextortion in the context of judicial proceedings, sextortion in the work place, sexual harassment, quid pro quo sexual harassment, uninvited sexual activity, touching and sexual comments, pornography in the work place, unprofessional and overly friendly conduct, sex discrimination, gender representation within the judiciary, discriminatory working conditions, gender bias, hostile, sexist or misogynistic statements, gender stereotyping, inappropriate sexual conduct.
CHAPTER THREE
THE JUDICIAL FUNCTION AND PROCESS

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

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

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

- the performance of their very important adjudicatory/decisional role – which must at all times be performed in an independent and impartial manner; and

- the process by which that adjudicatory/decisional role should be performed so as to ensure the independence, impartiality and integrity of the judiciary in a manner consistent with the Latimer House Principles and Guidelines and Commonwealth Guides to Judicial Conduct.

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

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

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

Chapter Seven deals with judicial fact-finding.
Chapter Eight covers the process involved in reaching a decision in criminal and civil cases.

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

Chapter Ten covers oral decision-making.

Chapter Eleven deals with judgment writing.
CHAPTER FOUR

CONDUCT OF CRIMINAL PROCEEDINGS BEFORE A MAGISTRATE

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

The chapter is divided into the following sections:

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

4.1 Bail Determinations

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

A fundamental hallmark of our criminal justice system is that a person (or corporation) accused of committing an offence is cloaked with a presumption of innocence. On the other hand, society also has a poignant interest in not only ensuring that the accused will appear for any scheduled court appearance, but also in protecting itself from criminals that present a very real danger to person or property. In many instances, the only means of achieving these interests is to incarcerate an accused, notwithstanding that he or she is cloaked with a presumption of innocence and the Crown has yet to substantiate the allegations against him or her. The inherent tension between the two competing interests becomes even more poignant when there is substantial or, in some instances, overwhelming evidence in support of the alleged offence(s). Thus, the concept of bail was introduced in order to assuage the seemingly irreconcilable tension between these competing and very legitimate interests. Another important factor in ameliorating this tension is that an accused who is convicted and sentenced to a term of imprisonment must be credited with any time spent in custody prior to his or her ultimate conviction and sentence. Such considerations aside, there is no escaping the fact that any deprivation of an accused’s liberty prior to conviction is inimical to the sacrosanct precept that all accused are cloaked with a rebuttable presumption of innocence which remains in effect unless and until they are
convicted of one or more offences that are punishable by a term of imprisonment. Individuals or corporations who are arrested and charged with an offence can, as noted above, secure their liberty pending trial by agreeing, on certain conditions, to appear before the court to answer the charge(s) at a future date. The process by which the accused is permitted to remain at liberty unless and until ultimately convicted and sentenced to a term of imprisonment is known as bail. A person who is granted bail must appear in court as required by the terms of his or her bail.¹

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

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

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

When speaking of the balancing of competing interests, it is important to keep in mind that the interests that need balancing are each public interests – bail is not simply a balancing of individual against public interests. The interests expressed in the presumption of bail and individual freedom are collective interests. They are part of the legal fabric that the entire community has an interest in protecting. This is important because it demonstrates that the question of bail is how to reconcile two public interests, which is a different task from that of balancing the competing claims of the individual against the community. If there is a competition between the individual interests and the community interests, many would regard the interests of the community as more important and the balance would be struck differently. In questions of bail, we are balancing a strong community interest in freedom and presumption of innocence against other important public interests such as security and welfare of the community: see Judge Cross in *R v Wakefield* (1969) 89WN (Pt1) (NSW) 325, 326 cited in the NSW Law Reform Commission’s report into bail (*Bail*, Report 133 (2012) p22).³
It is important to bear in mind that:

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

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

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

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

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

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

As stated in the previous version of this Guide:

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

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

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

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

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

4.2 Pleas of Guilty

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

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

1. Best practice requires that the self-represented accused be told briefly and simply what the charge is and the nature of the charge before a plea is taken. The self-represented accused should be made aware that the plea is a matter for independent decision and that legal advice and representation may be sought. If the case is to be proceeded with, the self-represented accused should be informed of the seriousness of the charge and the penalties that may be imposed, including any power to impose a term of imprisonment, disqualify the accused from holding or obtaining a driver’s licence, order compensation or
forfeiture of property. The magistrate should in appropriate cases warn the self–represented accused in general terms of the possibility of imprisonment.

2. On a plea of guilty the magistrate should make it clear to the self-represented accused that matters of mitigation may be put to the court and that witnesses may be called. The magistrate should if necessary elicit the personal circumstances of the accused by questioning. The magistrate should inform a self-represented accused of statutory provisions empowering the court to refrain from recording a conviction upon a finding of guilt.

3. On a plea of guilty, prior to the prosecutor placing before the court the alleged material facts, the magistrate should inform the self-represented accused that he or she is entitled to dispute or comment on the facts about to be alleged (including any previous criminal history). If the facts are disputed, the magistrate should afford the self-represented accused the opportunity to support the defence version by giving sworn evidence and/or by calling witnesses. If appropriate, consideration should be given by the magistrate to treating the accused’s disputation of the facts as a plea of not guilty.

4. The magistrate should inform a self-represented accused where a term of imprisonment is being considered and afford the accused an opportunity to obtain legal advice, even at such a late stage of the proceedings.

5. Before accepting a plea of guilty from a self–represented accused a magistrate should be satisfied that the accused appreciated the nature of the charge and intended to admit his guilt with respect to the alleged offence and on the basis of the admitted facts the accused could in law be found guilty of the offence as charged. The magistrate should also be satisfied that the plea of guilty is attributable to a genuine consciousness of guilt. The plea of guilty must be unequivocal and not made in circumstances indicating that the plea is not a true admission of guilt. The plea must not have been induced by threats or other impropriety such as to render the plea not a free and voluntary admission of guilt, and not a reflection of a genuine consciousness of guilt.

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

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

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

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

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

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

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

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

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

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

Magistrates should be particularly vigilant where the sole or main evidence against a self-represented accused is a confession made to police or other persons in authority. If the accused says or suggests that the confession was involuntary or illegally or improperly obtained the confession may not be admissible as evidence against the accused. The magistrate should inform the accused accordingly and grant an adjournment to enable the defendant to obtain legal advice.

4.3 Sentencing

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

Most, if not all, countries in the Commonwealth have a legislative framework within which the sentencing process takes place.
Such legislation usually sets out the aims or purposes of sentencing such as adequate punishment, deterrence (general and specific), protection of the community, denunciation, retribution, incapacitation, restoration and rehabilitation, which are also often dealt with in sentencing guidelines.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The two-tier approach is to be contrasted with the instinctive synthesis approach by which the sentencing magistrate identifies all of the factors that are relevant to the determination of a proper sentence, discusses their significance and then renders a value judgment as to what is the appropriate sentence in light of all the sentencing factors of the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

Generally speaking this approach applies to jury and non–jury trials (hearings before a magistrate or judge alone) in all Commonwealth countries; though there are variations from one jurisdiction to another. However, the common thread of a no case to answer submission is that the evidence presented by the prosecution is insufficient for any jury properly directed to convict the accused of the alleged offence(s). The question is whether the accused could – not would – be found guilty of the alleged offence(s).

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

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

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

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• After the close of the prosecution case, the court must afford the self-represented accused the opportunity to make a submission that there is not sufficient evidence to prove the charge(s) and the charge(s) should be dismissed;

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

• It should be made clear to the self-represented accused that whether or not they give evidence or call witnesses is entirely a matter for them. They must be informed that the prosecution has to prove the case against them; and they do not have to prove anything; 14

• The self-represented accused should be advised that the prosecution has the right to cross examine them as well as any witnesses they call; and that at the end of the cross examination the self-represented accused may ask each witness further questions to explain or contradict matters put to them in cross examination which they might have been unable to explain or contradict during the cross examination itself. The self-represented accused should also be told that after they have been cross examined they have a similar opportunity to explain or contradict any such matters put to them during cross examination;

• The self-represented accused should be told that it is very important that all the evidence they want the court to hear be given during their case;
• When all the evidence has been presented, both the self-represented accused and the prosecution should be told that they have the opportunity to make final submissions to the court.

1 K Arenson, Bagaric and Neal *Criminal Processes and Investigative Procedures: Victoria and Commonwealth* 2010, [5.1].
3 F Feld, A Hemming and T Anthony *Criminal Procedure in Australia* 2015, 2.126.
5 Sureties are persons who guarantee and provide an undertaking that accused will attend court on the due date.
6 Those conditions may include reporting to a police station on fixed days and at set times, residential conditions including a curfew, non-association and non-contact conditions and non-trave conditions (including surrender of passport)
7 Feld, Hemming and Anthony n 3, [10.19].
8 These refer to the personal circumstances of the offender including his character, antecedents, criminal history and prospects of rehabilitation.
12 Of course the application of this principle to subject to legislation imposing mandatory minimum sentences of imprisonment for certain offences or offenders.
14 The latter is of course subject to any legal burden imposed on the accused.
CHAPTER FIVE

SELF REPRESENTED LITIGANTS AND ACCUSED PERSONS

As stated in the previous edition of this Guide:

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

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

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

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

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

- not understanding complex legislation and case law;
- not fully understanding the language of the law nor the language of the court;
- an inability to accurately evaluate the merits of their case;
- not fully understanding the nature and purpose of the proceedings in which they are engaged;
- not fully understanding the rules of court and/or an inability to apply the rules to the proceedings;
- lacking emotional objectivity (or distance) and being excessively passionate about their case;
- lacking advocacy skills and an inability to adequately test an opponent’s case or cross examine in an effective manner;
- experiencing anxiety, fear, frustration, or bewilderment as a result of many of these shortcomings.
The difficulties experienced by self-represented persons in turn create difficulties for courts. Those difficulties are identified by the Judicial Commission as follows:4

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

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

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

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

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

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

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

Reference has already been made to the Judicial Commission’s guidelines in relation to the conduct of criminal proceedings when the accused person is self-represented.9 In addition, and in all other cases, the Commission recommends that the presiding judicial officer should, in simple and direct and non-legal language, explain:10
• who is in court and their respective roles;
• how to address the presiding judicial officer and the other party (or their legal representative(s));
• the need to ensure mobile phones are either turned off or switched to silent mode;
• that notes of the proceedings may be taken but that the proceedings cannot be recorded;
• how to get access to any record of the court proceedings;
• the usual course of proceedings and the difference between evidence and submissions;
• the opportunity to ask questions if uncertain about any aspect of the proceedings and request a break in the proceedings; and
• that each party to the proceedings will be given an opportunity to present their case, but on the basis that only one person may speak at a time and that all parties must conduct themselves with politeness and respect;
• the purpose of the proceedings;
• the role of the presiding judicial officer – which is to ensure that all parties are able to present their evidence as fairly and effectively as possible, but to remain neutral and not favour either side, and ultimately to decide the case; and
• the central issues in the proceedings that need to be decided by the court.

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

• as mentioned before the self-represented person should be able to present their evidence as effectively as possible;
• any intervention by the presiding judicial officer for the purpose of assisting the self-represented person in that regard must be done without demonstrating any partiality and without assuming (or appearing to assume) the role of advocate for the self-represented person;
• it should be explained (in simple and direct, non-legal language) to the self-represented person when it is their turn to present their case and the manner in which they must do this;
• it is permissible for the presiding judicial officer to intervene, as and when necessary, to ensure that the evidence given by a self-represented person accords with the rules of evidence and that the evidence is fully understood by the court;
• It should be explained that the other party may want to question them (cross-examine) about the evidence they have given;
• Once cross-examination has been completed, the self-represented person should be asked if they wish to add anything more to their evidence based on
their answers in response to cross-examination (in order to clarify any of those
answers), and then permit them to do so;\(^\text{15}\)

- The self–represented person should be made aware that they can, with the
  leave of the court, give additional evidence that has not emerged in either
evidence in chief or cross-examination;
- It should be explained that if such leave is given, the other party may ask any
  final questions;
- If the self-represented person wishes to call witnesses they should be informed
  that witnesses should be called one by one in whichever order they think will
  best tell their version of events or explain their story; and that they should
  ensure that their witnesses give their evidence in a manner that adheres to the
  rules of evidence and allows the court to understand the evidence of the
  witnesses;\(^\text{16}\)
- It should be explained that the other party may wish to cross–examine their
  witnesses;
- Once cross-examination has been completed, the self-represented person
  should be asked if they wish to ask their witness anything more (in order to
  clarify any part of their evidence), and then allow them to do so;\(^\text{17}\)
- It should be explained that if any witness called by a self–represented person
  gives new evidence, the other party may ask any final questions;
- It should then be explained that it is now the other party’s turn to present their
  evidence, or it is now time for each party to make final submissions.

Recognising the difficulties faced by a self–represented person in determining issues
of admissibility of evidence or testing the other party’s or their witnesses’ evidence,
the Judicial Commission of NSW states that as a matter of fairness the presiding
judicial officer may need to intervene in the following circumstances:\(^\text{18}\)

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

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

The Judicial Commission stresses the need for such intervention to occur without
demonstrating any partiality or without the presiding judicial officer assuming (or
appearing to assume) the role of advocate for the self–represented person.
Finally, but not least, the presiding judicial officer must let the self–represented person that they have the right to present final submissions. In that respect the presiding judicial officer may, in simple and direct non–legal language, need to:\n
- explain the purpose of final submissions, which is tell the court why they think they have proved their case;
- explain again the requisite standard of proof;
- explain that the other party is also allowed to make final submissions.

Generally speaking the self–represented person should be allowed to make their submissions without interruption, unless they are failing to comply with court rules or legal requirements, or the presiding judicial officer needs to have a particular submission clarified.\n
The Commission’s Bench Book makes the point that if the presiding judicial officer does not give his or her decision at the end of the hearing, then they should explain precisely when the decision will be given and in what form the parties will receive it, including whether the parties are required to attend court to receive the decision.\n
5.4 Re F: Litigants in Person Guidelines

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

1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;

2. A judge should inform the self–represented person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;

3. A judge should explain to the self–represented person any procedures relevant to the court proceedings;

4. A judge should generally assist the self–represented person by taking basic information from witnesses, such as name, address and occupation;

5. If a change in normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to the self–represented person, explain to him or her the effect and perhaps the
undesirability of the interposition of witnesses and his or her right to object to that course;

6. A judge may provide general advice to a self-represented person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;

7. If a question is asked, or evidence is sought to be tendered in respect of which the self-represented person has a possible claim of privilege, to inform the self-represented person of his or her rights;

8. A judge should attempt to clarify the substance of the submissions of the self-represented person;

9. Where the interest of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a self-represented person or the bases for such orders.

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

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

In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer and to prevent destruction from the traps which our adversary procedure offers to the unwise and untutored. But the court should be astute to see that it does

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not extend its auxiliary role as to as confer upon a litigant in person a positive advantage over the represented opponent…

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

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

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

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

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

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

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


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

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

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

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

A. To promote Rights of Access

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

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

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

All self–represented persons should be:

1. Informed of the potential consequences and responsibilities of proceeding without a lawyer;

2. Referred to available sources of representation, including those available from Legal Aid, pro bono assistance and community and other services;

3. Referred to other appropriate sources of information, education, advice and assistance.

B. To Promote Equal Justice

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

Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

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

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

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

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

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

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

5.6 The UNODC Gender-Related Integrity Issues Paper

As mentioned in Chapter Two, the Gender-Related Integrity Issues Paper produced by the Global Judicial Integrity Network points out how gender-related integrity issues can undermine the integrity of the decision making process and the court’s capacity to ensure substantive equality for everyone that uses or is part of the justice system.31

It is essential that, when presiding in a courtroom, all judicial officers treat everyone particularly self-represented parties, with respect and dignity and maintain a sensitivity to gender-related integrity issues so as to ensure that conscious or unconscious biases, stereotyping and prejudices are not allowed to affect the outcome of the case and result in an unfair outcome. Otherwise, the impartiality and integrity of the judicial process will be affected and likewise the public’s perception of that process and the impartiality and integrity of the judiciary.32
This includes procedural steps such as the filing of court documents and the rules of evidence and cross examination.

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

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

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

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

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

Again it is permissible for the presiding judicial officer to intervene if the self-represented person neglects to clarify or explain an aspect of the witness’ evidence.
The burdens of proof in criminal and civil proceedings as prescribed by law are an essential mechanism for ensuring equality before the law (and hence the rule of law) and providing a safeguard against unprincipled and arbitrary decision making.

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

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

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

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

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

However, it should be noted that the presumption of innocence is not absolute and unqualified: Sheldrake v DPP (2004) UKHL 43(9). It is open to the legislative branch of government to override the presumption of innocence by reversing or shifting the burden of proof. But in order to do so the legislative provision in question must shift the onus of proof in clear and unambiguous language – otherwise the principle of statutory interpretation, known as the “principle of legality”, will afford protection to the presumption of innocence:
When interpreting a statute, courts will presume that Parliament did not intend to reverse or shift the burden of proof, unless the intention was made unambiguously clear.\(^{14}\)

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

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

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

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

As stated by Ligertwood and Edmond:\(^{18}\)

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

The burden borne by the prosecution in a criminal trial is commonly referred to as the “legal” or persuasive burden (or burden of proof), which can only be discharged by the prosecution proving each and every element of a criminal charge beyond reasonable doubt.
As pointed out by Ligertwood and Edmond, *Woolmington* leaves open the matter of who bears the burden of adducing evidence on issues of accident and the more specific defences of self-defence, provocation and duress.\(^2\) However, the common law generally imposes “an evidential burden upon the accused in respect of defences, with the prosecution then being required to negative the defence once it has been properly raised by the accused”.\(^2\)

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

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

In order to discharge the evidential burden, the accused must either point to or adduce evidence that is capable of raising a reasonable doubt as to his or her guilt. The evidence must give rise to a real possibility of the existence of the facts argued by the defence.\(^2\) As an evidential burden is not an onus of proof it need not be discharged to a particular standard of proof (such as on the balance of probabilities).

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

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

### 6.2 The Burden and Standard of Proof in Civil Proceedings

In civil proceedings the burden of proof is on the claimant to prove the facts in issue in the case that they bring against the defendant. The claimant must prove the facts in issue on a “balance of probabilities” so that it is more probable than not.
Contrary to earlier common law authorities, it is now generally accepted that in civil proceedings there is one standard of proof (proof on the balance of probabilities), and no third intermediate standard of proof between the civil and criminal standard of proof.\textsuperscript{25}

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

6.3 The Relationship between the Standards of Proof and Evidence

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

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

\textsuperscript{1} Blackstone’s Commentaries on the Law of England, 1765, 352.
\textsuperscript{2} Momcilovic v The Queen (2011) 245 CLR 1, 51 at [54].
\textsuperscript{3} Woolmington v DPP [1935] AC 1, 481-482.
\textsuperscript{5} Sheldrake v DPP (2004) UK HL 43(9).
\textsuperscript{8} Article 14(2) of the International Covenant on Civil and Political Rights 1979
\textsuperscript{9} Australian Law Reform Commission n 6, [9.17].
\textsuperscript{10} Section 11(d) of the Charter.
\textsuperscript{11} Section 25(1) of the Charter.
\textsuperscript{12} Section 22(1).
\textsuperscript{15} (2011) 245CLR 1, [44].
\textsuperscript{16} Australian Law Reform Commission n 6, [9.16].
\textsuperscript{17} Australian Law Reform Commission n 6, [9.16]
\textsuperscript{18} A Ligertwood and G Edmond Australian Evidence 5th ed 2010, [6.8].
\textsuperscript{19} Woolmington v DPP was approved by the High Court in Moffa v R (1977) 138 CLR 601.
Sodeman v R (1936) 55 CLR 192.

Ligertwood and Edmond n 18, [6.8].

Ligertwood and Edmond n 18, [6.8].


Ligertwood and Edmond n 18, [6.8].

See for example, Re B [2008] 3 WLR 1; Re S-B (Children) [2009] UKSC 17; F.H v McDougall (2008); Briginshaw v Briginshaw.

On occasions the legislature may relax the rules of evidence and provide that a court is not bound by the rules of evidence.
CHAPTER SEVEN
JUDICIAL FACT-FINDING

This chapter examines the dynamics and methods of judicial fact-finding – a process which is essential to reaching a decision in a contested criminal or civil case. An integral part of that process is the evaluation of evidence given by witnesses in either criminal or civil proceedings. The facts that are required to be found in a court proceeding can only be established after carefully analysing the whole of the evidence and determining the credibility and reliability of the accounts given by each witness. Findings of fact are based on the evidence of those witnesses that is accepted as credible and reliable by the court, as well as other evidence accepted by the court.

By summarising and synthesising a wealth of academic material, case law and judicial commentary (both curial and extra-curial) this chapter provides practical guidance for magistrates charged with the onerous task of fact-finding – though duly recognising that “there is no substitute for experience as a teacher”.2

7.1 General Observations about the Fact-Finding Process

Fact-finding is a difficult and complex process that cannot be “performed mechanically”; and “each case is different”.3

Waye has described the multi-faceted nature of judicial fact-finding in these terms:4

Like all forms of complex decision-making judicial fact-finding requires the integration of multiple, fallible, incomplete and conflicting items of evidence to draw inferences about past events. Evidence garnered on an ex post facto basis is neither true nor false, but uncertain. Inferences linking evidence do not depend on empirically validated assumptions, but upon common-sense knowledge constructed according to experience and learning. Conclusions are not merely the sum of each individual item of evidence and the inferential links between them. They are dependent upon the variable weight attached to each item of evidence and the relative strength of the inferential links between the evidence, as well as the plausibility of the overall narrative of each party’s case. Determining the weight that should be attached to evidence, and relative reliance that ought to be placed on various inferences, cannot be objectified because the probabilities underpinning the inferences are unknown.

The author points out that the “story model” of fact-finding has consistently been observed to be used by judges and jurors in finding the facts in a particular case.5 This approach “organises, interprets and evaluates evidence against a narrative construction of the events supplied by the parties and from the knowledge and experience of the decision-maker”.6 Waye also points out:7
According to research, judges and jurors often construct a number of stories about an event and will accept one story as the best when it best accounts for the evidence presented at trial and is the most coherent in the sense of being internally consistent, plausible and complete. Confidence in a story is increased where the story appears to be the only explanation of the evidence.

There are other methods of judicial fact-finding that are related to the “story model”. They include the “no plausible alternative story” model and “the narration” approach. According to the “no plausible alternative” model “the courtroom is a confrontation of competing narrations offered by the defendant and by the prosecutor and the theory should be the most plausible one”. The “narration” model “conceptualises the [fact-finding process] in terms of competing narrations of what (allegedly) happened”; and “on the narration approach the fact-finding process proceedings are seen as an interplay of evidence and various stories of crime presented by opposing parties and the assessment of their relative plausibility plays a crucial role in the court’s decision”.

Justice David Hodgson has described “legal decision making” (and by necessary implication the process of “fact-finding”) as generally not following a “mathematical or computational system of fact-finding”:

[legal] decision making generally involves a global assessment of a whole complex array of matters which cannot be given individual numerical expression. Such a decision depends very much more on common sense, experience of the world and beliefs as to how people generally behave… than on mathematical computations; and concentration on mathematical probabilities could prejudice this common sense process.

The approach described by Justice Hodgson has much in common with the “story model” of fact-finding due to its emphasis on common sense, knowledge and the ordinary experience of life, as well as overall judgment.

In a similar vein, Justice Peter Young says that fact-finding involves not only “the application of common sense and the judge’s experience of life”, but also the application of logic: for example, “if A, B and C are proved and Z logically follows , then Z is proved”.

The largely subjective nature of the process of fact finding has been highlighted by Wells J:

Finding facts is not based on technique, or, indeed, upon precepts or principles of any kind; it is based on a judge’s essentially personal and human qualities of judgment of character, temperament and reliability, of wisdom, of sympathy and understanding, combined with hard work and concentrated thought – in short, on the faculties, qualities, skills and experience that make a juror a good juror…

The subjective nature of the fact-finding process is compatible with – and readily accommodated within the structure of – the story model of fact-finding.
There are other methods of fact-finding such as the “Bayesian analysis/theorem” model and the “atomistic” model of fact finding. As pointed out by Waye “Bayesian analysis provides mechanisms for making probabilistic inferences of the kind required by curial fact finding”; and “requires information to be presented mathematically. The author describes the “atomistic” model as one “whereby the fact finder assigns probative weight to distinct pieces of evidence and arrives at a final determination by aggregating or disaggregating those probabilities”.

As stated by Justice Peter Young, “there is no magic formula to apply when finding facts”. Rather the trier of fact is left with a number of different methods of fact-finding, some of which were discussed above. It is left to the judicial officer concerned to employ whatever method he or she considers appropriate in order to arrive at the correct findings of fact. However, whatever method is employed, it is essential that the path of reasoning leading to the factual findings is apparent, and the mode of legal reasoning is capable of establishing the relevant facts to the required standard of proof, whether that be the civil or criminal standard.

7.2 The Role of the Rules of Evidence in Relation to Judicial Fact-Finding

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

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

It is important to note that many of the rules of evidence assist the trier of fact in evaluating the evidence of witnesses. In fact, Justice Mark Weinberg says that “some rules of evidence stipulate how a decision maker (whether a judge alone or jury) is to go about the task of finding facts”.

One of the most important rules of evidence was established in the 1893 English Court of Appeal decision of Brown v Dunn (1897) 6 The Reports 67 (HL). The effect of this rule, which applies both in criminal and civil cases, is that when a witness is giving evidence and it is intended to call evidence contradicting that witness, the substance of that contradictory evidence must be put to the witness during cross-examination and the witness must be given the opportunity to comment on it.

Where it is impossible or impractical to recall the witness or otherwise remedy a breach of the rule, the failure to comply with the rule in Brown v Dunn may provide the trier of fact with a basis for accepting the unchallenged evidence or entitle the trier of fact to
take into account the fact that the contradictory evidence was not put to the witness and accord that evidence less weight than it may otherwise receive.\textsuperscript{20}

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

Directions or warnings are commonly required in relation to:

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

It is important for the trier of fact to fully acquaint him or herself with the relevant rules of evidence in their jurisdiction concerning such directions or warnings because, firstly it is usually mandatory to give oneself the relevant direction, and secondly the warning assists in assessing the probative value of the witness’s evidence.

Most rules of evidence incorporate the principle of “judicial notice”, which is another helpful tool in the fact-finding process. The principle has been described by Bell in these terms:\textsuperscript{21}

Judicial notice is the acceptance of facts without formal proof. In effect, it is a substitute for proof. The principle applies to facts that are so notorious that they are not the subject of dispute among reasonable persons.

Finally, but one least, the standards of proof in criminal and civil proceedings commonly form part of the rules of evidence, and are a further tool at the disposal of the judicial fact-finder. The standard of proof in criminal cases is “beyond reasonable doubt” whereas in civil cases the standard is “on the balance of probabilities”. Rules concerning the standard of proof prescribe the level or degree of satisfaction that the trier of fact must have in order to find that a particular incident occurred or a state of
affairs existed. At a fundamental level, such rules stipulate how the fact-finder is to go about the job of finding the facts.

As pointed out by Judge JPO Barry:

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

However, the above specific rules of evidence provide only limited assistance to the trier of fact in its judicial evaluation of the evidence before the court. The trier of fact will still have to undertake a further evaluation of the evidence, which is subject to those directions or warnings, as well as the evidence before the court that does not require such a direction or warning. The purpose of this chapter is to provide practical guidance to magistrates as how to go about that important task.

7.3 Judicial Evaluation of Witnesses and Fact-Finding

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

7.3.1 The Assessment Process

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

As noted by Evan Bell, in a distinctively comprehensive article of highly practical value, there are no rules or formula for assessing credibility, and the assessment of credibility is essentially a subjective process, involving the consideration of a number of factors whose weight varies in accordance with the circumstances of the case.

Wells J has observed that whilst the assessment of “witness credibility” is largely a subjective function - involving the drawing of “conclusions about individual witnesses by considering them as persons” and an assessment of [their] personal worth as a witness, having regard to, inter alia, the demeanour of the witness - the assessment process can be assisted by looking at the larger picture:

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

This accords with the “story/narrative” model of fact-finding which attempts to construct one story that best accounts for the whole of the evidence.
The complex process of assessing credibility of a witness was explained by Lord Pearce in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403:

“Credibility” involves wider problems than mere “demeanour” which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however, honest, rarely persuades a Judge that his present recollection is preferable to that which was taken in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

This passage highlights the difficulties with assessing credibility (and ultimately the truthfulness) of witness by reference to his or her demeanour or presentation in the witness box and identifies some of the factors that may bear upon the witness' credibility.

### 7.3.2 The Limited Role of Demeanour in Assessing Credibility

In *Faryna v Chorny* [1951] BCJ No 128 O’Halloran JA outlined the limited role of demeanour in assessing a witness’ testimony in these terms:

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

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

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

As pointed out by Judge JPO Barry, the confidence with which a witness gives evidence may not be a reliable indicator that they are in fact telling the truth:26

It is, without doubt, a factor in courts, as in life, that the person who appears more confident is normally more persuasive. A witness displaying nervousness and/or shyness makes nowhere the same impression as a person who is able to give evidence confidently. There are, however, extensive psychological tests which indicate that the confidence with which a person asserts a proposition bears no relationship to its truth.27 People who put forward testimony in a different manner are just as likely to be telling the truth as those who assert the same proposition in a confident manner.

Therefore, the utility of relying upon demeanour as a means of assessing credibility has been seriously questioned.

As noted by Bell, courts have become "considerably more cautious with respect to the role that assessments of demeanour can play in making credibility determinations".28 In that regard, the author refers to empirical evidence casting doubt on the capacity of triers of fact to differentiate truth from falsehood on the basis of their observations of a witness in the witness box.29
As suggested by Justice David Ipp:\(^{30}\)

A finding based on demeanour is essentially an intuitive exercise without the intervention of any reasoning process and it is this absence of rationality that makes demeanour findings so arbitrary, so ephemeral, so uncertain, so personal and subjective, so susceptible to sub-conscious prejudice and so susceptible to error.

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

...in recent years, judges have become aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions when those principles are seen as critical.

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

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

Triers of fact need to exercise great care when taking into account the demeanour of a witness when assessing his or her credibility because demeanour can be deceptive. Bell gives as an example “accomplished liars [who] look judges straight in the eye and speak the most blatant falsehoods in a confident and forthright way whereas honest witnesses will sometimes avoid eye contact, stammer, hesitate, contradict themselves resulting in their evidence ending up in a complete shambles”.\(^{31}\)

Justice Mark Weinberg has summed up the shortcomings of demeanour evidence thus:\(^{32}\)

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Sadly, findings as to credibility are all too often based upon matters of impression, which are ephemeral, and lack rationality. These include demeanour, which we now know to be far less reliable as an indicator of truthfulness than was once thought to be the case.

Finally, the task of assessing witness demeanour becomes extremely difficult in the case of a witness who comes from a different race, culture, class or gender and whose experience of life significantly differs from that of the trier of fact that amongst other things has regard to its own background and personal experience.  

Katherine Biber has highlighted some of the difficulties with the assessment of indigenous witnesses based on demeanour:  

Where indigenous people appear as witnesses, they are exposed to methods of using and understanding language, silence and questioning that reveals a “courtroom culture” at odds with indigenous cultural modes. Where the witness speaks an indigenous language, studies have shown the difficulties experienced by interpreters – where interpreters can be found – of translating distinctions that may be crucial in one language and absent from the other. Where, for indigenous witnesses, silence may be a meaningful response to a question, Anglophone law infers certain meanings from that silence, and in many instances will compel an answer. The manner in which the questions are asked of an indigenous witness sometime invites what has been termed “gratuitous concurrence” where the witness agrees with a proposition that is contrary to their own knowledge, on the cultural misunderstanding that agreement is expected from a proposition that has been put in that form. 

It follows that it is inherently difficult for a fact finder to determine whether a witness is telling the truth or not based on demeanour.

7.3.3 Other Factors Relevant to the Assessment of Credibility

However, as pointed out by Bell, credibility not only embraces the concept of a witness’ truthfulness (based on demeanour) but also extends to the objective reliability of the witness, that is to say his ability to observe or remember events about which he is giving evidence”. However, because “truthfulness and reliability are not necessarily synonymous”, a witness may “sincerely attempt to be truthful, but lack the perception, recall or narrative capacity to provide reliable testimony on a given matter”. And for that reason, the witness’ evidence may be inaccurate, and hence unreliable.

The accuracy and reliability of a witness’ testimony may be affected by “imperfect observation”, a “faulty memory”, or “an over-active imagination”, self-interest and other biases.

Some people are more observant than others. It should be noted that even in the case of an observant witness, the reliability (and hence probative value) of the evidence is to be assessed by reference to the witness’ opportunity to make the
observation and the conditions under which the observation was made (for example distance, position, lighting conditions and amount of time available to observe).\textsuperscript{43}

The reliability of a witness also depends upon whether the witness has a good memory, that is whether he or she has correctly registered in their mind what they saw or heard. It further depends upon whether or not the witness is a good historian or a poor one. This refers to the ability of the witness to “describe clearly what has been seen and heard”.\textsuperscript{44}

As to the nature and operation of human memory, it is apt to note the view expressed by Leggatt J in \textit{Gestamin SGPS SA v Credit Suisse (UK) Limited} [2013] EWHC 3560 that “the legal system has not ‘sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony’ underlying some common errors about memory”.\textsuperscript{45}

A considerable body of research and literature has revealed a wealth of information about the nature of human observation and the basic processes and phenomena of human memory about which judicial officers should be mindful when attending to the task of assessing the reliability of a witness. If these phenomena are overlooked or not properly considered there is a risk that the trier of fact will arrive at an incorrect assessment of the reliability of a witness. Findings of fact are based on findings of witness reliability, and an incorrect evaluation of a witness’s testimony can lead to an unfair and unjust determination of the factual issues in a particular case. As pointed out by Justice IPP “justice depends on correct factual findings”.\textsuperscript{46}

Justice Ipp has identified a number of phenomena with human memory that need to be taken into account when assessing a witness’ reliability. First, “although recent psychological research has established that the more episodes of a certain type we experience, the harder it becomes to distinguish among them”, “repetition of episodes strengthens the overall memory for the entire class of event”.\textsuperscript{47} Secondly, “recent psychological research has also established that high levels of stress do not produce general impairments in memory: emotional stress enhances memory for the central features of the stressful event”.\textsuperscript{48} Thirdly, “studies have shown that persons who fall prey to misleading information consciously remember witnessing things that they have not seen” and “hold false memories with great confidence”.\textsuperscript{49} Fourthly, “a significant minority of people can unwittingly come to believe that they have experienced stressful events that never happened”.\textsuperscript{50} Fifthly, contrary to popular belief, a witness who has reconstructed his or her evidence should not be disbelieved because “recent research has established that …recollection is a reconstructive, not a reproductive, process” and memory of a past event is reconstructed “from encoded elements distributed throughout the brain”.\textsuperscript{51}

It is important to bear in mind further aspects of the operation of human memory when assessing the reliability of a witness’ testimony. In its 2017 Report the Australian Royal Commission into Institutional Responses to Child Sexual Abuse noted that “errors of
omission, such as gaps and missing information”, and errors of commission, such as self-contradictions, are fundamental features of human memory”; and “similarly, it was an error to think that recall of specific details was a hallmark of an accurate memory”.  

Justice Peter Young draws attention to another matter which has the potential to cloud a witness’ recollection of an event or occurrence:  

Lord Bingham …points out that the usual process of giving statement to and being interviewed by lawyers and being involved in preliminary hearings may lead to the witness being exposed to misinformation. That misinformation may then cloud the recollection of the true fact. A witness may indeed by a good observer and an honest person, but may be caught out in cross-examination on part of the absorbed misinformation.

Yet another factor which is said to have a considerable effect on the reliability of a witness’ testimony is that as time elapses the memory of a witness generally fades; and a written contemporaneous record of the witness’s recollection of an incident or event is generally to be preferred to a later or present recollection if it differs from the contemporaneous recollection. However, contemporary scientific research into “the nature of memory and the unreliability of eyewitness testimony” has identified some common errors about memory:

Underlying… these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved.

Evaluating the credibility and reliability of witnesses it is not an easy task. It is important to be mindful of the distinction between the wilfully dishonest witness and the witness who is “a truthful witness who is giving inaccurate [or unreliable] testimony”, for the reason that an adverse finding in relation to the credit of a witness can produce substantial unfairness to the witness in the immediate proceedings and beyond.

The trier of fact also needs to guard against the “forgetful witness”. There is the truly forgetful witness and the dishonest witness who seems to suffer from selective amnesia. The trier of fact should keep this in mind when assessing the credibility and reliability of a witness who professes loss of memory.

A careful lookout should be kept for the “obliging witness” – the witness who wants to oblige the court and who tries to say what they think the magistrate wants to hear. Finally, but not least, the presiding judicial officer should be mindful that occasionally a witness, although apparently neutral, may have an unconscious bias as “being part of a team – I want my team to win”; though the witness “may otherwise appear neutral or uninvolved”.

When assessing the credibility or reliability of witnesses, the trier of fact needs to have the ability to differentiate between the various types of witnesses that they will
encounter in the courtroom. A judicial officer might “find a witness honest and reliable, or honest and unreliable”, but he or she is more likely to accept the evidence of a witness who is both honest and reliable than a witness who, although truthful, is unreliable.

7.3.4 Techniques or Tools for Assessing Credibility or Reliability

Consistent with the approach taken by the High Court in *Fox v Percy*, there are a number of techniques or tools for assessing the credibility or reliability of a witness (other than by way of an assessment of his or demeanour) with a view to finding the facts in a particular case:

1. Assess the evidence of a witness by reference to undisputed or indisputable facts. The witness is likely to be considered to be unreliable if their evidence is, in any serious respect, inconsistent with those facts. As pointed out by Justice Peter Young: “Sometimes one unassailable piece of evidence will reveal where the true facts fall: but take care that the unassailable piece of evidence really is unassailable”.

Care must be taken in relation to unchallenged or uncontradicted evidence. A judicial officer is not bound to act on such evidence if there is reason not to accept it; but “a cautious judge would articulate why he or she refuses to rely on such testimony”.

2. Assess the evidence of a witness by reference to the objective facts proved independently of the witness’ testimony, including in particular documentary evidence: see *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd’s Rep 1, 57. As observed in *Thompson v Foy* (2009) EWCA 1076 (Cth) contemporaneous documentation should be preferred where disputed oral evidence conflicts with such evidence. If the witness’ evidence is inconsistent with any of the proven objective facts or documentary evidence, then the witness is likely to be considered unreliable. Conversely, if the witness’ evidence is consistent with the proven objective facts or documentary evidence, then the witness is likely reliable. However, it is important to ensure that the documents are authentic and neither backdated nor forged or otherwise fabricated.

3. Assess the evidence of a witness by reference to its consistency with any proven forensic, medical or physical evidence. If the witness’ evidence accords with such evidence then it is likely that the witness is a credible witness.

4. Assess the consistency of a witness’ evidence with his or her conduct. By way of example Bell refers to the case of *Manderson v Forster* [2000] BCSC 787 (CanLII), where, on the basis of the conduct of the parties following the alleged agreement, Sinclair-Prowse J accepted the plaintiff’s evidence that the parties
had entered into an “verbal agreement under which he was to receive an
interest in property in exchange for a contribution of money and labour”.\textsuperscript{74}

5. Assess the evidence of a witness according to its internal consistency.\textsuperscript{75} A witness whose evidence is “internally consistent is more likely to be correct than a witness whose evidence is not internally consistent”.\textsuperscript{76} On the other hand, a witness is likely to be considered to be unreliable if they contradict themselves on important points.\textsuperscript{77} A witness may also be considered to be unreliable if they have at another time provided a contradictory spoken or written account.\textsuperscript{78} However, contradictions in a witness’s evidence must be treated carefully, for “one contradiction, or even several contradictions, does not necessarily mean that a witness’ evidence must be rejected”.\textsuperscript{79} It is not uncommon to find some internal inconsistencies in a witness’ evidence; and it befalls the tribunal of fact to accord such weight as it sees fit to those inconsistencies in evaluating the reliability of the witness.\textsuperscript{80} As noted by Nicholas J in \textit{S v Oosthuizen} 1982 (3) SA 571 9T:

\ldots it is not every error by a witness which affects his credibility. In each case, the trier of fact has to make an evaluation: taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness’ evidence. Two possibilities must be considered: the possibility of deliberate falsehood and the possibility of honest mistake.

Whether the witness has lied or made an honest mistake will, of course, bear upon the credibility of the witness.

Judicial officers need to be aware that “internal contradictions and unsatisfactory evidence may be caused by the stress of the court atmosphere and the hostile demeanour of the advocate”.\textsuperscript{81}

Finally, but not least, as Justice Sperling points out “internal consistency in a witness’ evidence can be overrated because “people tend to remember things the way they would like them to have happened”.\textsuperscript{82} An internal inconsistency my reveal “little more than the witness is human”.\textsuperscript{83}

The internal consistency of a witness’ evidence is not only a factor to be taken into account when deciding whether a witness is telling the truth, but is central to the fact - finding process. In \textit{Evidence, Proof and Probability} Richard Eggleston describes the factor in terms of “the inherent consistency of the story”. This goes to the heart of the “story/narrative” model of fact -finding which strives to find the one story that best accounts for the whole of the evidence and is “the most coherent in the sense of being internally consistent, plausible and complete”.

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6. Assess the evidence of a witness by reference to its inherent plausibility or implausibility, which may be “nothing more than common sense and experience”. The more plausible the account given by the witness the more likely it is to be accepted; while the more implausible the evidence the greater the likelihood it will be rejected. Inherent plausibility and inherent probability are often used interchangeably, and play an important part in the “story model” of fact-finding and probabilistic approaches to fact-finding. Whether something is inherently probable is context dependant and “will always depend upon the factual matrix of a particular case”. Furthermore, as pointed out by Justice Ipp, judges determine the reliability (or credibility) of witnesses “largely by weighing up probabilities by reference to the ordinary course of human behaviour”. Applying this methodology, fact-finding is a two stage process:

First the tribunal of fact needs to ask itself how inherently probable or improbable is the testimony of a witness concerning an event or occurrence. Secondly, if inherently improbable could the account be nonetheless true; and although inherently probable, could the account be untrue.

When inquiring as to how inherently probable or improbable is the evidence of a witness it is important to bear in mind the following matters:

(a) the usual is more likely to be what occurred;
(b) the unlikely sometimes occurs: if one eliminates the likely the unlikely must be true; but
(c) the unusual does not occur that often.

7. Assess the evidence of a witness by having “regard to the kinds of considerations which, as a matter of common sense and human experience, will affect the credibility of [a witness]”.

8. Assess the evidence of a witness by reference to its consistency with the evidence of other witnesses. As pointed out by HC Nicholas, the fact that two or more witnesses give consistent evidence may be “a strong and indeed decisive indication that their story is a credible one”. This approach to the assessment of the credibility of a witness, which emphasises the importance of corroborative evidence and the cumulative effect of evidence, is consistent with the “story model” of fact-finding. It is also consistent with other fact-finding methodologies such as the “only plausible story” model and probabilistic approaches to fact-finding.

However, in undertaking the fact-finding function, it is important to bear in mind that “in the ordinary course of events, it is expected that there will be inconsistencies in a litigant’s evidence, both internally and with the testimony of
other witnesses”. The question for the trier of fact is “that if there are inconsistencies amongst witnesses are they significant or are they the kind of minor inconsistencies that one might expect from multiple witnesses to the same event”. Regardless of the methodology chosen by the judicial officer for the purpose of finding the facts, it is “always a matter for the individual judge what emphasis he or she places on consistency or lack of it”.

It is important to keep in mind that “too much consistency can indicate witnesses have rehearsed the evidence and not giving their individual recollections.”

Finally, Justice Harold Sperling offers the following guidance:

It is often inherently unlikely that more than one witness called for one side has made the same error of recollection honestly or that a number of witnesses called for one side have dishonestly conspired to tell the same false story. However, a head count does not always carry the day. It often doesn’t.

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

10. Assess the evidence of a witness by reference to the absence of a particular aspect of the witness’s absence in a prior statement or affidavit:

Counsel often ask in cross-examination, “if that is so, why didn’t you put that in your affidavit” (or tell the police at the scene or otherwise say it when, if it were true, it would have been expected to be said). On some occasions, the witness may give a good reason. Mostly, however, some lame reason is proffered such as “I told my solicitor and trusted her to put everything relevant in the affidavit and did not notice it was not there.

The significance of the omission depends on the seriousness of the omitted material. As I set out in *Civil Litigation* a woman who complains that her husband insulted her, but does not put in her affidavit the statement she now makes that her husband called her a prostitute and slapped her face in front of her children is not likely to be accepted on her recent statement. If a person omits major matters from an affidavit or statement made closer to the event, there is a strong probability of recent invention.
11. Assess the evidence of a witness by reference to any lie or lies found to have been told by the witness. Although many witnesses will lie “when the matter is vital or when they think they can escape detection”, or, as pointed out by Lord Bingham, may lie out of “hope of gain, a “desire to avert blame or criticism” or “misplaced loyalty to one of the parties” it is difficult to “catch out” a liar. Therefore, it is important to be careful in branding a witness a liar when he or she may just be confused and have a faulty recollection. Particular care needs to be taken in a case where the person’s, especially a professional person’s, reputation is at stake.

According to the Latin maxim “falsus in uno falsus in omnibus”, a person who has “proved to have lied on one matter will be willing to lie on all matters”. Although this may be the case with a deliberate lie, “it is not universally true that a witness whose evidence is disbelieved on one matter should be disbelieved totally. Just because a person is giving evidence which must be wrong in one respect, this does not mean that his or her evidence is generally unreliable, though credibility is weakened by the error.

This is consistent with Judge J.P.O Barry’s observation that:

a judge does not have to reject all of a witness’s evidence simply because he or she rejects part of it. However, if a part of a witness’ testimony is found to be at odds with other reliable evidence it will cause a judge to scrutinise the remainder of such evidence with special care.

12. Assess the evidence of a witness by reference to any bias or motive to assist. Although bias and motive to assist a party may be relevant factors in the evaluation of a witness’ credibility or reliability, “a judge must be careful not to be carried away by counsel’s cross-examination which shows a bad motive or possible bias may exist”:

There will be many situations where a factor may exist from which one could find bias, but there is no bias or bad motive in fact. It is a common error to find from the proposition that a witness could be biased that he or she is in fact biased.

Thus, a police constable may possibly have a motive for lying to assist her sergeant because of solidarity in the police force. However, one cannot discount every piece of evidence the constable gives because of that factor.

13. Assess the evidence of a witness by reference to his or her good character. This is particularly relevant in the context of criminal proceedings where an accused’s prior good character may be admitted into evidence so as to make it more likely that the accused’s evidence is credible. However, in some jurisdictions once good character is raised by the defence the prosecution can
adduce evidence of bad character to contradict the evidence of good character, thereby impugning the credibility of the accused.

In most cases, the trier of fact is not only charged with the task of assessing the creditworthiness or reliability of individual witnesses but is required to undertake the overall task of resolving conflicting evidence from a number of witnesses. As pointed out by Justice Sperling, “the best guides for the resolution of conflicting testimony are the inherent likelihood or unlikelihood of the story, and the consistency or inconsistency of the story with contemporaneous documents (if themselves reliable) or with other objectively reliable evidence”. 113

7.3.5 Assessing the Demeanour of a Witness

Despite the earlier identified dangers in determining issues of witness reliability/credibility on the basis of demeanour, it is still permissible for triers of fact to take into account the demeanour or presentation of a witness when assessing the reliability or creditworthiness of a witness: though the fact finder should be “careful not to rely wholly upon observations of demeanour”. 114

The Judicial College of Victoria Serious Injury Manual provides a helpful guide for the purposes of assessing the demeanour or presentation of a witness: 115

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

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

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

Even if a court considers a witness not to be reliable on the basis of their demeanour it is important to stand back and take a global view of all of the evidence for the reason that the totality of the evidence may throw a different light on the witness’ credibility or reliability. 116
7.3.6 Unconscious Judicial Prejudice and Bias

In witness credibility cases, it is important for judicial officers to be aware of the phenomenon of unconscious judicial prejudice and bias, and its potential to influence judicial evaluation of witnesses (and hence judicial decision making)\textsuperscript{117} and to conflict with the judicial duty to be neutral and impartial. In particular, assessments of the credibility of a witness based on demeanour leave scope for unconscious judicial prejudice and bias to come into play.

Justice Ipp has highlighted the problem:\textsuperscript{118}

A judge’s life experience may cause him or her to form assumptions about certain groups of people that are not held by all. There are great dangers in relying on assumptions about the behavioural characteristics of particular groups of people. Judges are generally required to act on evidence actually adduced, and should be conservative about taking judicial notice of matters of supposed notoriety. Judges should make every effort to suppress feelings and attitudes that are neither impartial nor neutral, when deciding whether a witness is telling the truth.

Justice Keith Mason AC (the then President of the NSW Court of Appeal) in an article titled “Unconscious Judicial Prejudice” (2001) ALJ 676 refers to the Canadian case of \textit{R v S (RD)}\textsuperscript{119} which directly dealt with the question of unconscious judicial prejudice.\textsuperscript{120}

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

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

All four judges recognised that it was both inevitable and appropriate that the different experiences of judges may assist them in undertaking the decision-making process – but those experiences would have to be relevant to the case at hand, and not “based on inappropriate stereotypes” and prevent “a fair and just determination of the cases based on the facts in evidence.\textsuperscript{121}

As stated by Justice Mason, six of the justices in \textit{R v S (RD)} endorsed the following statement of the Canadian Judicial Council:\textsuperscript{122}

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

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.123

7.3.7 Assessing Expert Evidence

Thus far, this chapter has focused on the assessment of the credibility or reliability of lay witnesses, and not expert witnesses. As in the case of lay witnesses, a number of rules or guidelines have evolved at common law for assessing the testimony of expert witnesses.

An expert witness is a person who has specialised knowledge based on his or her training, study or experience. The rules of evidence permit an expert witness to give opinion evidence in relation to matters within his or her particular area of specialised knowledge and expertise. The probative value of any expert evidence depends on the reliability and accuracy of the material which the expert witness used to arrive at his or her opinion.

A leading authority in Australia on expert evidence is Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705. In his judgment Heydon JA pointed out that it is only possible to assess the evidence of an expert witness if he or she explains the “essential integers underlying” their opinion; and it is incumbent upon the witness “to furnish the trier of fact with criteria enabling evaluation of the validity” of his or her conclusions”. In particular his Honour said [at 743 [85]:

…so far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on “assumed” or “accepted facts”, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is , the experts’ evidence must explain how the field of “specialised knowledge” in which the witness is expert by reason of “training, study or experience”, and on which the opinion is “wholly or substantially based”, applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG c The Queen (1999) 197 CLR 414 (at 428[41]), on “a combination of speculation,
inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise”.

There are number of techniques by which expert evidence can be evaluated.

Foremost, it is important that the judicial officer, as the trier of fact, closely examine the facts upon which the expert opinion is based to ensure that those facts accord with the facts as he or she has found. If the facts relied upon by the expert witness do not accord with the found facts, then the opinion cannot be accepted. Similarly, where the expert witness has based his or her opinion on assumed facts if “the reasonable accuracy” of those factual assumptions are not confirmed by the evidence, then the opinion is not soundly based, and unable to accepted by the trier of fact. This reflects the need for any expert evidence to be “assessed in the context of all other evidence”.

The probative value of an expert opinion depends upon the degree to which the expert analysed the material upon which the opinion is based, and the skill and experience brought to bear in formulating the opinion given. Furthermore, the methodology used by the expert witness may be flawed to such an extent as to lead the trier of fact to reject the expert opinion.

The reliability and accuracy of an expert opinion may also be tested by examining the “quality of the expert witness’s reasoning”, the “rationality and internal consistency” of the evidence given by the witness, its degree of objectivity and its reasonableness and cogency.

In assessing expert evidence, the trier of fact is entitled to a degree to apply its own “common sense and personal experiences if they are relevant to the issue [to] which the expert evidence relates”. If the expert evidence is inherently unbelievable the trier of fact is entitled to reject it.

In some cases the trier of fact may, after due reflection, consider the area of specialised knowledge on which the expert has based his or her opinion to be less reliable than other fields of knowledge, and therefore not worthy of the weight to be accorded to more established areas of expert knowledge.

The reliability and accuracy of expert opinion evidence may also be assessed by reference to documentary evidence such as medical, and clinical notes and the history given by a party (in legal proceedings) to an expert medical witness. Clearly, such documentary evidence has potentially highly probative value because “it is independent and contemporaneous”. Furthermore:

A court can generally infer that a plaintiff will inform his or her general practitioner of health issues of concern, and that the doctor’s notes will record health issues of concern to the patient, especially where the condition in question is said to be serious and the patient has seen the same practitioner over a continuous period of time. There will, however, be occasional exceptions to this general approach (Philippiadis v Transport Accident Commission [2016] VSCA 1, [105]-[106]).

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However, courts need to be cautious when assessing a treating doctor’s clinical notes or clinical history, as explained by Kaye JA in *Woolworths Ltd v Warfe* [2013] VSCA 22 [112].

Those histories are an important part of the information, upon which the medical practitioner forms a view as to matters such as the diagnosis and prognosis in relation to the plaintiff’s injuries. However, rarely, do the histories, contained in medical reports, purport to be a verbatim record of what the plaintiff has said to the medical practitioner on examination. They are often, at best, an approximate paraphrase or précis of the account given by the plaintiff to the medical practitioner. Sometimes, the discrepancy, between the account recorded by the medical practitioner, and the evidence of the plaintiff, cannot be adequately explained, even taking into account the limitations which attend the recording by a medical practitioner of the history given to the practitioner by the plaintiff. Nevertheless, it is important to bear in mind the nature and purpose of the history, recorded by medical practitioners in their reports, and of the limitations on their accuracy which I have just described.

The trier of fact must also exercise caution in “preferring the evidence of clinical notes from one practitioner above other evidence in the case”. The case needs to be decided on the whole of the evidence, including medical or clinical notes, clinical history and the medical diagnostic evidence and other relevant evidence.

Finally, although demeanour remains a factor in assessing the probative value of evidence given by an expert witness it is less important than in the case of other witnesses. However, where it is taken into account its use is subject to the limitations mentioned earlier. The need to assess expert evidence most commonly arises in cases where two or more witnesses give conflicting expert evidence and the trier of fact has to resolve the conflict. In such cases, it is important that the trier of fact not resolve the conflict by “purporting to develop their own expertise and substitute their own opinion for that of the experts”. It is necessary for the trier of fact to find “a basis for preferring the evidence of one expert (or group of experts) over another”. In *Alsco Pty Ltd v Mircevic* [2013] VSCA 229 [85] – [95] Robson AJA listed a number of factors or considerations to be taken into account when choosing between expert witnesses. First, which of the expert opinions “best aligns with the [proved] primary facts”. Secondly, which opinion “appears to be the most credible”. Thirdly, which expert “appeared to be the most objective”. Fourthly, after comparing the qualifications, expertise or experience of the experts, is there is a basis for preferring the evidence of one expert (or group of experts) over another. Fifthly, after examining the responses of “the experts under cross examination” or having regard to the fact that the evidence of one or more experts “was not tested under cross examination”, is there a basis for choosing the evidence of one expert (or group of experts) over another.

In *Alsco Pty Ltd v Mircevic* [2013] VSCA 229 the conflicting expert medical evidence was resolved on the basis of “quality of the evidence when tested in court, the specialisation of the practitioners and the length of time the practitioner treated the plaintiff”.

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Furthermore, as pointed out in Bartlett v ANZ Banking Group (2016) 92 NSWLR it is seldom that a conflict between expert witnesses will resolved by an examination of the demeanour of the witnesses.\textsuperscript{144} This will be the case unless the witness “has given dishonest or misleading evidence, or has become an advocate for a party or where the evidence is inherently unreliable”.\textsuperscript{145} In Bartlett v ANZ Banking Group Ltd the court made it clear that the assessment of an expert witness’s demeanour is to be a matter of “last resort” and “the differences between experts should usually be resolved by rational analysis”.\textsuperscript{146}

7.3.8 The Need to Take a Global View of the Evidence

The assessment of the credibility and reliability of witnesses – whether they be a lay witness or an expert witness - is a difficult and complex task which requires the trier of fact to take into account the many and varied factors discussed above and can only be satisfactorily carried out by taking a global view of all the evidence presented in a particular case.\textsuperscript{147} This is the touchstone for assessing the creditworthiness or reliability of any witness, whether it be in a criminal or civil proceeding.

It is the duty of the trier of fact “to keep an open mind about the truthfulness of any individual witness and about the accuracy of that witness’s recollection until all the evidence has been presented”.\textsuperscript{148} It is only after the trier of fact has “heard all of the evidence that it will be possible for [it] to assess to what extent, if any, that witness’s evidence has been confirmed, explained or contradicted by the evidence of other witnesses”.\textsuperscript{149} This is consistent with the previously referred to view expressed by Wells J that in many cases “ the clear structure of the facts taken as a whole will… provide a setting in which the value of the witness’s testimony may be readily fixed”. As also stated earlier this is consistent with the story/narrative model of fact finding.

The following is frank and useful advice from Justice Mark Weinberg:\textsuperscript{150}

Some judges seem to base their findings on matters of credibility, rather than having regard to the evidence as a whole. If they are doing so in order to render their judgments “appeal proof”, I need hardly say that this is improper. Moreover, it is likely to be ineffectual.

\textsuperscript{2} Justice Peter Young “Fact -Finding Made Easy” (2006) 80 ALJ 454, 461
\textsuperscript{3} Justice Peter Young “Practical Evidence: Fact Finding” (1997) 72 ALJ 21, 24.
6 Waye n 4, Part VI.
7 Waye n 4, Part VI.
8 Pennington and Reid n 5, 527-528.
12 Justice Peter Young n 2, 461.
13 Wells J “The Finding of Facts” (speech to the Supreme Court and Federal Court Judges Conference, Canberra 1983 cited by Bell n 1, 543.
14 Waye n 4, Part VI.
17 Justice Peter Young n 2, 461. See also Wells J n 13.
18 See Chapter 9 of the Guide.
19 Justice Mark Weinberg “ Weighing up Different Forms of Evidence – A View From the Court”, paper presented at the Administrative Appeals Tribunal 9 September 2020, [15].
20 However, great care needs to be exercised in taking either course of action, particularly in criminal trials, and judicial officers should acquaint themselves with the relevant jurisprudence in their jurisdiction as regards specific procedural remedies for a breach of the rule in Brown v Dunn which would preclude either option.
21 Bell n 1, 544.
22 Judge JPO Barry “The Methodology of Judging” (1994) 1 IICULR 135 135, 142. See also Bell n 1, 547 where the author discusses reliance upon the burden of proof as a means of resolving conflicting testimony.
24 Wells J n 13 cited by J.P.O Barry n 22, 141.
25 Bell n 1, 524.
26 Judge JPO Barry JPO n 22, 144.
28 Bell n 1, 530 citing R v Smith [2011] ON SC 5377 (CanL11).
29 Bell n1, 530 citing Kirby J “Judging: Reflections on the Moment of Decision (speech to the Fifth National Conference on Reasoning and Decision-Makin, Charles Sturt University, Wagga Wagga 4 December 1998).
30 Ipp J “Problems with Fact-Finding” (2006) 667 ALJ 674 cited by Bell n 1, 531. See also Ipp J “The Trial Judge’s Duties from an Appellate Point of view” ( edited version of a paper delivered to the National Judicial College, Beijing and to the Shanghai Judicial College, Shanghai 13 October 2004 and 19 October 2004), also cited by Bell n 1, 531.
31 Bell 1, 525 citing Faulkner v MNR [2006] TCC 239 (CanL11).
32 Justice Mark Weinberg n 19, [55].
33 Bell n1 532 citing President of the Republic of South Africa and Ors v South African Football Union and Ors [1999] ZAAC 11. See also Justice Peter Young n 3, 21 who stresses the need to take into account the cultural or other characteristics of the witness.
36 Eades n 35, 540.
37 Eades n 35, 545.
38 Eades n 35, 544-545

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Bell n 1, 525 citing Thornton v Northern Ireland Housing Executive [2010] NIQB 4.
Bell n 1, 525 citing Gilbert v Bottle [2011] BCSC 1389(CanL11).
Justice Ipp n 30, 667. See also Bell n 1, 525.
Justice Peter Young n 3, 22.
Justice Peter Young n 3, 22. See also Justice Peter Young n 2, 454 where his Honour notes that an observation may also be affected by “the insignificance of the event”, “the less than ideal conditions” under which it is made, the observer being under stress or “the observer’s physical condition”: see Meares J’s paper to the Australian Institute of Arbitrators (December 1984) The Commercial Arbitrator 64 at 66.
Bell n 1, 525 citing Faryna v Chorny [1952] 2 DLR 354.
Bell n 1, 525 citing Bharma v Dubb (t/a Lucky Country) [2010] EWCA Civ 13.
Justice Ipp n 30, 669 citing McNally n 49, p 277. See also Bell n 1, 525 citing Bharma v Dubb (t/a Lucky Country) [2010] EWCA Civ 13.
Justice Ipp n 30, 669 citing McNally n 49, p 35.
Justice Peter Young n 2, 458.
Onassis v Vergottis [1968] 2 Li Rep 403, 431 per Lord Pearce.
M Robinson SC and Juliet Lucy n 45, p 48 citing Gestmin SGPS SA v Credit Suisse (UK) Limited [2013]EWHC 3560 [17].
Bell n 1, 529.
Judge JPO Barry n 22, 143.
Judge JPO Barry n 22, 142.
This includes facts of which judicial notice is taken.
Justice Peter Young n 3, 22.
Judge JPO Barry n 22, 142. See also Bell n 1, 523 citing Ellis v Wallsend District Hospital (1989) 17 NSWLR 553.
Judge JPO Barry n 22, 142.
"Justice Peter Young n 3, 22 where his Honour observes:” “The witness whose evidence is consistent with the documents is more likely to be correct”.
Justice Peter Young n 3, 23. See also Bell n 1, 542 citing Lykiardopulo v Lykiardopulo [2010] EWCA Civ 315.
Bell n 1, 528. As forensic or medical evidence is in the nature of expert evidence its probative value depends upon a number of factors. These are discussed below.
Bell n 1, 528- 529.
Lord Bingham “The Judge as Juror: The Judicial Determination of Factual Issues” (1985) 38 Current Legal Problems 1-27. See also Richard Eggleston Evidence, Proof and Probability (1968); Justice Peter Young n 3, 23; Bell n 2, 526

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76 Justice Peter Young n 3, 21. See also Bell n 1, 526; Davies J “Common Pitfalls in Decision-Making” (Speech to the National Judicial Orientation Programme Sydney 25 October 2001).

77 MacKenna J n 66. See also Justice Young n 3, 21 where his Honour states: “A witness whose evidence suffers from no internal inconsistency is more likely to be correct than a person whose evidence cannot be so ranked”. However, Justice Young recommends caution: “Be careful that apparent inconsistencies, especially as to times and dates, do not assume too great a prominence”. See also Justice Young n 2, 458.

78 Bell n 1, 527. See Arbery v Chesham Precision Tools Ltd (QBD 7 December 1984).

79 Bell n 1, 527. As pointed out by Justice Peter Young n 2, 23 “A judge may accept part and reject part of a witness’s evidence”.

80 Bell n 1, 527.

81 Justice David Ipp n 30, 669.


83 Justice Sperling n 82, 333.

84 Richard Eggleston n 75. See also Justice Peter Young n 3, 23; Bell n1, 533-534.

85 Justice Mark Weinberg n 19, [60].

86 Justice Peter Young n 2, 458.

87 Bell n 1, 533-534.

88 Justice Ipp n 30, 669 cited by Bell n 1, 533. See the High Court’s discussion of the use of “compounding probabilities/improbabilities” in Pell v The Queen [2020] HCA 12 as a mode of reasoning in testing the account given by a witness.

89 Gheisari v Secretary of State for the Home Department [2004] EWC A Civ 185 per Lord Justice Sedley cited by Bell n 1, 534.

90 Justice Peter Young n 3, 21. See also Wood J “Assessing the Credibility of Witness’s” (Speech at the National Judicial Orientation Program Sydney October 2002).

91 Bell n 1, 547 citing Peart v Peel Police Services [2006] 37566 (ON CA) (CanL11).

92 Lord Bingham n 75, 1-127. See also Richard Eggleston n 75; Justice Peter Young n 3, 21; Bell n 1, 527-529.

93 HC Nicholas n 23 cited by Bell n 1, 528. See also Justice Peter Young n 3, 21 who suggests, as a practical aid, making a chart of the various witnesses and their evidence and noting if any particular witness is “the odd man out” and concentrating on that witness’ evidence”. In his article “Fact Finding Made Easy (2006) 80 ALJ 454, 457 Justice Peter Young similarly suggests that:

“Where there are a number of witnesses testifying as to an event, it is helpful to create a primitive spreadsheet of the evidence. First, one sees whether there is one witness whose observation differs significantly from the others. If so, one should examine that witness’ evidence very minutely. Secondly, one looks to see if there is a hypothesis with which all of the evidence, or most of the evidence is consistent”. This method is consistent with the “story/narrative” approach to fact-finding.

94 Judge JPO Barry n 22, 145.

95 Bell n 1, 528. See also Justice Peter Young n 3, 21 who points out that “inconsistencies as to time and place should not be given undue emphasis”.

96 Judge JPO Barry n 22, 145.

97 Bell n 1, 527 citing Judge JPO Barry n 22, 135. See also Justice Peter Young n 3, 21: “Often the witnesses are all in the same interest for example police. If all the witnesses are telling exactly the same story suspect collaboration (be aware that such witnesses may vary details to allay that suspicion).

98 Justice Sperling n 82, 333.

99 Justice Peter Young n 2, 459.


101 Justice Peter Young n 3, 22.

102 Bell n 1, p 529 citing Lord Bingham n 75, 1.

103 Justice Peter Young n 3, 22.

104 Justice Peter Young n 3, 22. See also Bell n 1, 524.

105 Justice Peter Young n 2, 459.

106 Justice Peter Young n 2, 459.

107 Justice Peter Young n 2, 459.
Judge JPO Barry n 22, 142 See also Bell n 1, 526 where the author says that it is not unusual for a judge to accept not all, but only part, of a witness’ evidence: “for example, a judge may accept part of a witness’ testimony because that testimony was supported by credible documentation produced during the trial but might reject other parts of his testimony because it was inconsistent with other evidence that he accepted or was not supported by relevant documentation”: Waxman v Waxman [2004] 39040 (ON CA) (CanL11). Hence judges may find a witness credible as to one issue but not as to another.”

Bell n 1, 532: “Where there is a conflict of evidence, the likely motives of a witness are another factor which can give a court assistance in ascertaining the truth... even if a witness is found to have had a motive to lie the court must then assess whether and to what extent, that motive affected the truthfulness of the witness’s testimony”.

Justice Peter Young n 2, 461.

Bell n 1, 535.

Judicial Commission of New South Wales 2-370, suggested direction in relation to the relevance of character evidence in criminal proceedings.

Justice Sperling n 82, 334.

Justice Peter Young n 3, 22.

5.2 of the Judicial College of Victoria Serious Injury Manual: Matters Relevant When Assessing Credit, which can be accessed at http://www.judicialcollege.vic.edu.au/node/1157. Although the Manual refers to a plaintiff in a serious injury case the matters are equally relevant to the assessment of any witness, whether it be in a civil or criminal case.

Bell n 1, 546.

Justice Ipp n 30, 671. It is noteworthy that his Honour points out it is not only subconscious attitudes or feelings that are capable of influencing the decisions of judges, but also conscious attitudes or feelings.

Justice Ipp n 30, 671 cited by Bell n 1, 544.

[1997] 3 SCR 484.

This case is also referred to and discussed by Justice Ipp n 30, 671.


Judicial Commission of New South Wales, Australia 2-1110, suggested direction in relation to expert witnesses.

Bell n 1, 537 citing Datasphere Inc v Computer Horizons Corp (USDCDN 13 July 2009 (unreported).

Bell n 1, 537.

Judicial Commission of New South Wales n 125. See also Bell n 1, 537 who points out that “the quality of the expert’s investigation may be lacking”, which is a matter relevant to the weight to be accorded to the evidence.

Bell n 1, 537 citing Mclean v Seisel [2004] 9418 (ON CA) (CanL11).

Bell n 1, 538 citing Henkel Canada Corp v Conros Group [2004] FC 1747 (CanL11).

Judicial Commission of New South Wales, n 125.

Judicial Commission of New South Wales, n 125.

Bell n 1, 537.

Judicial College of Victoria: “Assessing Expert Evidence 7.8”.

Judicial College of Victoria n 134, 7.8.

Judicial College of Victoria n 134, 7.7.

Judicial College of Victoria n 134, 7.10.


Bell n 1, 537-538.

Judicial College of Victoria n 134, 7.11.

Judicial College of Victoria n 134, 7.11. See Alsco Pty Ltd v Mircevic [2013] VSCA 229 per Robson AJA.

Judicial College of Victoria n 134, 7.11.

See also Bell n 1, 537 where the author says that in some cases it is legitimate “to prefer the evidence of one expert simply on the ground that that expert was better qualified to give it”. See also the Judicial Commission of New South Wales Australia n 125.

Judicial College of Victoria n 134, 7.12.
144 Judicial Commission of New South Wales: “Opinion Evidence 4-0630”.
145 Judicial Commission of New South Wales n 145.
146 Judicial Commission of New South Wales n 145.
147 Bell n 1, 546.
148 Judicial College of Victoria: “Assessing Witnesses 1.6.3”. See *Hau Tua Tau v Public Prosecutor* [1982] AC 136
149 Judicial College of Victoria n 149. See *Hau Tua Tau v Public Prosecutor* [1982] AC 136.
150 Justice Mark Weinberg n 19, [80].
CHAPTER EIGHT
REACHING A DECISION IN CRIMINAL AND CIVIL CASES

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

8.1 Determination of Guilt in Summary Criminal Proceedings

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

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

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

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

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

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

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

Having found the material facts, the magistrate must then apply the relevant law to the proven facts. It is only if each and every element of the offence has, on the basis of the established facts and as a matter of law, been proved beyond reasonable doubt and any legal defence open to the accused on the evidence has been negatived

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

8.2 Arriving at a Decision in Civil Proceedings

Magistrates perform an equally important role in adjudicating civil disputes.

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

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

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

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

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

1 The magistrate should be familiar with any relevant case law and in a position to deal with and resolve any disputes as to the applicable law.
2 A Ligertwood and G Edmond Australian Evidence 5th ed, [2.12].
3 See Chapter 7 of this Guide.
4 Liberato v R (1985) 159 CLR 507, 515.
5 Liberato v R (1985) 159 CLR 507, 515.
CHAPTER NINE
THE IMPORTANCE OF GIVING REASONS FOR DECISION

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

9.1 The Duty to Give Reasons for Decision

There is a strand of legal authority generated by English Courts establishing a common law judicial duty to give reasons for decision.¹ There is also “clear authority in Australia that reasons for judicial decisions should ordinarily, though not always, be provided; that a failure to provide reasons, where they are required, is an error of law”.² This general obligation is “an incident of the judicial process and essential for facilitating an effective right of appeal”.³ Specific statutory provisions may also mandate the giving of reasons.⁴

There are a number of compelling reasons why judicial officers should give reasons for the decisions they make.

9.2 Why Reasons for Decision Should be Given

The giving of reasons for decision is consistent with the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done.⁵

The giving of reasons promotes transparency and accountability through the provision of “accessible reasoning [which is] necessary in the interests of victims, the parties, appeal courts and the public”.⁶ Reasons for decision serve the dual function of allowing “the parties to see the basis for the judge’s decision” and “to see the extent to which their arguments have been understood and accepted”.⁷

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

…those who are entrusted with the power to make decisions affecting the lives and property of their fellow citizens should be required to give in public an account of the reasoning by which they came to those decisions.⁸

As pointed out by Justice Murray Gleeson:

Providing reasons promotes good decision-making because decision-makers who know that their decisions are open to scrutiny and who are obliged to explain them are more likely to make reasonable decisions.⁹

Furthermore, providing reasons for decision facilitates the appellate process by making it easier for the appellate court to identify and isolate errors in the decision -
making process, which may need to be corrected on appeal. At the end of the day, the giving of reasons facilitates “certainty in the law by assisting practitioners, the legislature and the public to see how similar cases may be decided”.

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

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

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

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

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

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

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

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

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

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

Given the necessity for a court to give reasons for decision, the question is how detailed should those reasons be. When are reasons adequate or sufficient? What extent of analysis is required?

An ideal approach would be to address this fundamental question by way of an examination of relevant case law across the Commonwealth. However, that would be a gargantuan task, and well beyond the scope of this Guide. Therefore, this chapter attempts to answer the question from the perspective of relevant Australian case-law which is based on the common law. As the legal systems of other member countries of the Commonwealth of Nations are also based on the common law, the Australian jurisprudence (or least its underlying principles) is potentially relevant to the position in other Commonwealth countries in relation to when reasons for decision in judicial proceedings are considered to be adequate. Therefore, the content of this section of the chapter may provide some guidance to judicial officers in other Commonwealth jurisdictions in meeting the obligation to provide adequate reasons for decision. Obviously, where the relevant body of law in other Commonwealth countries takes a different approach to the content and extent of reasons for decision, judicial officers in that jurisdiction should have regard to, and apply, the local law.

9.3.1 The Variable Nature of “Adequate Reasons”

As pointed out by Justice Weinberg, what are adequate or sufficient reasons “does not admit of a simple answer. It is always a matter of degree. Judges, acting reasonably, may have quite different views on this subject”.21

In Beale v Government Insurance Office of NSW (1997) 10 NSWLR 430 at 443 Meagher JA noted that the content of the obligation to give adequate reasons is related to and determined by “the function to be served by the giving of reasons”: Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378 at 386 per Mahoney JA. His Honour further noted that “the content of the obligation is not the same for every judicial decision and no mechanical formula can be given for determining what reasons are required”.

In Ta v Thompson [2013] VSCA 344 at [29] Osborn JA referred to Fletcher Construction Australia Pty Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2) [2002] 6 VR 1, 31 where the Court of Appeal recognised that “in any case in which reasons are required the necessary content will depend upon the circumstances of the particular matter”. His Honour went on to say that as explained by the High Court in Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43:

The standard of reasons required even of courts making judicial decisions can vary markedly with the context.

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Earlier in *Wainohu* (2011) 243 CLR 181, 215 [56] French CJ and Kiefel J observed that “the content and detail of reasons to be provided will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision”.

In “Reasons for Decision” published by the Judicial College of Victoria the context dependant nature of the requirement to give adequate reasons is described in these terms: 22

The extent of the obligation to give reasons varies with the circumstances of the case, the complexity of the issues and the availability of appeal rights. It is therefore not possible to precisely define the content of the obligation in all cases: *Perkins v County Court of Victoria* (2000) 2 VR 246; *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *R v Arnold* [1999] 1 VR 179; *Farrugia v The County Court of Victoria* [2000] VSC 11...

The complexity of the reasons required will depend on the nature of the decision, the complexity of the issues and whether the court is deciding a question of fact, law or a mixed question of fact and law*: Perkins v County Court of Victoria* (2000) 2 VR 246; *Soulemezis v Dudley Holdings* (1987) 10 NSWLR 247; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd*.

In Beale v GIO Meagher JA referred to the following observations made by McHugh JA (as he then was) in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 281:

In a case where a right of appeal is given only in respect of a question of law, different considerations apply from the case where there is a full appeal. An ultimate finding of fact, which is not subject to appeal, and which is no way dependent upon the application of a legal standard, can be treated less elaborately than an issue involving a question of law or mixed fact and law. If no right of appeal is given against findings of fact, a failure to state the basis of even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done.

The decision in *Perkins v County Court of Victoria* (2000) 2 VR 246 is particularly noteworthy. In that case the appellant, who had been convicted of summary offences in the Magistrates’ Court, appealed to the County Court by way of a re-hearing. The appeal only being partially successful, the appellant than brought a proceeding in the Supreme Court in the form of an originating motion seeking an injunction and relief by way of mandamus and certiorari. Harper J, who heard the motion, concluded that the reasons of the County Court judge disclosed no error of law, and his decision was not vitiated by any jurisdictional error. The appellant then appealed from that decision.
Buchanan JA, who was one of three justices constituting the Court of Appeal, pointed out that the proceedings before the Court “were not by way of an appeal from the County Court judge, and the principal relief claimed was in the nature of certiorari, which limited the Supreme Court to quashing the order of the County Court judge on one or more of a number of well-settled grounds”.

Buchanan JA (with whom Phillips and Charles JJ agreed) dismissed the appeal, stating [at 56]:

There is no general principle that a court’s failure to give reasons is an error of law which vitiates the court’s decision. This is not to deny the importance of the giving of reasons to the process of judicial decision-making. Want of reasons may amount to an error of law where the absence of reasons would frustrate a right of appeal, although even where a right of appeal exists, the nature and the circumstances of the case may require no more than a brief ruling and where an appeal is de novo, an absence of reasons below can have no effect. Moreover, the provision of reasons for decision affecting persons’ rights and liabilities is usually desirable, serving objectives such as candour in decision-making, the accountability of decision-makers, the reconciliation of the parties to the results of the litigation and promoting the drawing of conclusions which are rational and soundly based on legal principles. Nevertheless, the general desirability of reasons, and in certain cases their necessity, in my view are not sufficient considerations to found an all-embracing principle that failure to state reasons or adequate reasons for a judicial decision constitutes an error of law vitiating the decision.

His Honour went to further observe [at 64] that the requirement to give adequate reasons for decision is of variable nature and depends upon the circumstances or context in which the decision is being made:

The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.

Buchanan JA concluded that the County Court judge had “expressed adequately the basis of his finding”.

The extent of the requirement to give adequate reasons for decision was subsequently considered by Osborn JA in Ta v Thompson:

In the present case the County Court was deciding by way of hearing de novo a summary prosecution. There was no further right of appeal. Moreover, the proceedings were unusual in the sense that the prosecution case was sufficient to place an evidentiary onus on the appellant to establish on the balance of
probabilities that he did not know of the presence of the heroin within the wardrobe.

There remains some uncertainty as to the extent of the judicial obligation to give reasons in the absence of a right of appeal. 28

Nevertheless, this was a final decision of the type which attracted the obligation to state reasons, and in order to be meaningful the obligation must at least have extended to a requirement that the court state the grounds of its decision. If this were not done the reasons would not be reasons in any real sense and the purposes identified in [Fletcher Constructions Australia Ltd v MacFarlane & Marshall Pty Ltd (No 2) (2002) 6 VR 1, 32[101] would be unlikely to be fulfilled.

Further the statement of the grounds of a decision of this type facilitates effective judicial review and the protection of a party’s rights to see whether the decision was made in accordance with law.

Conversely, there are good reasons for concluding that the obligation did not go so far as that which is imposed where a decision is subject to an appeal by way of rehearing but was limited to that ordinarily imposed when a decision is subject to an appeal on questions of law only.

Most obviously, the very fact that there is no right of appeal from the County Court decision supports this limitation. Secondly, the fact that the proceeding constituted a rehearing of a summary prosecution also lends support to this view. Thirdly, there is no authority requiring the imposition of a higher standard.

For present purposes it may thus be accepted that the County Court judge’s obligation extended to identifying the grounds or basis of her decision in the same way as such an obligation is regarded as a necessary corollary to a right of appeal on questions of law.

In Makeham v Sheppard [2020] VSCA 242 the Court of Appeal of the Supreme Court of Appeal considered the adequacy of a magistrate’s reasons for decision in relation to an appeal on a question of law.

The appellant was convicted of committing an indecent act with a child under the age of 16 years in the Magistrates’ Court. Dissatisfied with the magistrate’s decision, the appellant appealed to the Supreme Court on a question of law. In the appeal before the primary judge the appellant asserted, inter alia, that the magistrate erred in law by “failing to direct herself as required, either adequately or at all” and “failing to give adequate reasons for her decision”. 29 The primary judge dismissed the appeal. The appellant appealed the primary judge’s decision. One of the grounds of appeal was that the learned trial judge had “erred by holding the absence of an express path of reasoning demonstrating compliance with s 4A of the Jury Directions Act 2015 was not an error of law because the appellant had a right of appeal to the County Court”. 30
Priest JA (with whom Kyrou JA and Weinberg J A agreed) found that the primary judge had erred in finding that because the appellant had a right of appeal de novo to the County Court the absence of an express path of reasoning by the magistrate was not an error of law.

His Honour repeated the view that he had expressed in *Bookless v Smith* [2020] VSCA 56:31

I am not much attracted to the notion that, in some circumstances, the availability of a de novo appeal may to some extent excuse a magistrate’s insufficient reasons. The logic of that view escapes me. To my mind the availability of an appeal to the Supreme Court on a question of law seems to point in the opposite direction. I need to say no more about it, however, since it was not submitted that the availability of a de novo appeal had any relevance to the resolution of the instant case.

Priest JA considered that the primary judge in the present case appeared to have misunderstood the effect of what Buchanan JA endeavoured to convey in *Perkins*:32

Buchanan JA (with whom JD Phillips and Charles JJA agreed) observed that there was no right of appeal from the County Court judge’s decision. It was in that context that his Honour remarked that, ‘where an appeal is de novo, an absence of reasons for the decision below can have no effect’. So much must be true. If a tribunal is conducting a de novo appeal — where the appellate tribunal retries the issues, without being limited to the evidence and submissions before the initial tribunal — the absence of (or inadequacy in) the reasons of the tribunal from which the appeal is brought can be of no relevance. The appellate tribunal decides the matter afresh, unfettered by the process of decision-making in the tribunal appealed from. That being so, the adequacy or otherwise of the reasons of the initial tribunal can have no bearing on whether the appellate tribunal’s decision is vitiates by error.

Describing the ‘reasoning’ of Buchanan JA as being ‘apposite’, however, the primary judge in this case expressed the view that, because the CPA provides for a de novo appeal to the County Court, any deficiencies in the magistrate’s reasoning ‘have no effect’. What that observation mistakes, however, is that it is the adequacy of the magistrate’s reasons which are in question, not those of an appellate court dealing with the matter de novo. Thus, rather than having ‘no effect’, the adequacy of the magistrate’s reasons in this case was of central relevance to the appeal before the primary judge. Insofar as the judge determined otherwise, he fell into error.

It follows that whether or not adequate reasons have been given will depend upon whether the decision given is one that is subject to:

(a) an appeal by way of rehearing de novo;

(b) an appeal in respect of matters of law only - even if, in the alternative, there is an appeal by way of rehearing de novo;
(c) an appeal in relation to matters of both fact and law; or

(d) judicial review by way of prerogative writ.

The requisite content of the reasons for decision will vary according to the scope of any appeal rights\textsuperscript{33} or rights of judicial review.

\textbf{9.3.2 The Fundamental Requirement that Reasons for Decision Must Disclose the Path of Reasoning}

As long ago as \textit{Carlson v The King} (1947) 64WN (NSW) 65 Sir Frederick, whilst emphasising “the need for all courts, even those exercising summary jurisdiction, to provide reasons” – though “the reasons need not be elaborately stated” - referred to the minimum content, or sufficiency, for reasons for decision: reasons should not merely contain a summary of “the evidence and a statement of the decision reached but also disclose the actual process of reasoning adopted in arriving at the decision”.\textsuperscript{34} This reflects the requirement that the reasons disclose the “path of reasoning”.

Although there is no requirement for reasons for decision to be elaborately stated, it is clear from the judgment of Asprey JA in \textit{Pettit v Dunkley} [1971] 1 NSWLR 376 at 381 that a bald statement made by a District Court judge in a negligence action to the effect of “it would not help in view of this lady’s condition of health, psychomatic [sic] or otherwise, for me to give any other reasons. I simply enter my verdict. I return a verdict for the defendant” does not meet the requirement that in order for reasons to be adequate they must disclose “the path of reasoning” – even where the right of appeal is on a point of law only.

In disposing of the appeal, Asprey JA stated [at 382]:\textsuperscript{35}

\begin{quote}
For a magistrate to content himself saying “I have reached my decision after having considered all the matters which the statute requires me to consider” is not a proper fulfilment of the obligation which rests upon him as a judicial officer to see that his reasons are explicitly stated to use the language of Sir Frederick Jordan…\textsuperscript{36}
\end{quote}

where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved then in the absence of some strong compelling reason the case is such that the judge’s findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case...
not to do so, he has made an error of law in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law”.

In *Sun Alliance Insurance v Massoud* [1989] VR 8 Gray J noted that while the “the sufficiency of reasons would always depend on the particular circumstances of the case”, reasons would be considered to be inadequate where (1) “an appellate court is unable to ascertain the reasoning upon which the decision is based and (2) where justice is not seen to have been done”.

37

In *Hunter v Transport Accident Commission* [2005] VSCA 1 at [21], [28] Nettle JA stated the extent of the obligation to give adequate or sufficient reasons for decision in these terms:

…while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear heavily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion express. Failure to expose the path of reasoning is an error of law...

The requirement to refer to the evidence upon which findings are based is a requirement to analyse the evidence and to explain why some parts of it and others do not lead to the ultimate conclusion. And that analysis must be recorded in the reasons. In general, and in this case in particular, the mere recitation of evidence followed by a statement of findings, without commentary as to why the evidence is said to lead to the findings, is about as good as useless.
The requirement that reasons for decision must address substantial or significant arguments or issues, and disclose a clear path of reasoning, was subsequently discussed in *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317 at [38]:

But one thing is clear. Reasons must be such as reveal – although in a particular case it may be by necessary inference – the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.38

As to the “path of reasoning”, Ashley JA said in *Dressing v Porter* ([2006] VSCA 215 [26]:

The issue of sufficiency of reasons has been very often addressed in recent years. The principles are clear enough: It is necessary that a judge’s reasons sufficiently explain the path of reasoning which led to the outcome in the proceeding. Failure to provide such reasons constitutes an error of law.

Perfection is not required. An appeal court should not examine a trial judge’s reasons too critically, seeking, as it were, to discern a want of explanation. Further, what will be sufficient in a particular case will be influenced by the ambit of dispute at trial. Nonetheless, an examination of the reasons should enable the losing party to know why he or she lost.

In *AK v The State of Western Australia* (2008) 232 CLR 438, 451 Gummow and Hayne JJ stated that “the reasoning which led to the conclusion must be stated”. Heydon J (at 468) elaborated thus:

Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law to the facts found, and to explain how the verdict followed.

In *Transport Accident Commission v Kamel* [2011] VSCA 110 [70] it was stated that the reasons for decision must disclose “the route that led to the answer” and “how and why the conclusion was reached”; and “the process of reasoning” or “the path”. It was further stated “the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings” did not sufficiently reveal “the path of reasoning”.39

Subsequently in *Brookes v Smith* [2020] VSC 56 [24] it was repeated that the obligation to give reasons “requires more than reciting the evidence presented by one party and announcing that, having considered the evidence, the magistrate finds the charges proved: *Brookes v Smith* [2020] VSC 56 [24]”.40 A similar view had been taken in *Pettitt v Dunkley* [1971] 1 NSWLR 376: “A statement that the court has considered...
all relevant matters and discarded all irrelevant matters does not satisfy the obligation
to give reasons.

As stated by Justice Weinberg, “the reasons should trace the major steps in the
reasoning process so that anyone reading them can understand exactly how the
decision-maker reached his or her conclusion”. His Honour goes on to point out:

Reasons may be lengthy, and even prolix, without being adequate. A global, or
general pronouncement, on the part of a judge that he or she has considered all
the relevant evidence and reached a conclusion based thereon is not an adequate
statement of reasons. Nor is it normally sufficient to set out the arguments of both
sides and state simply that the contentions of one party are to be preferred to those
of the other.

The Judicial College of Victoria has usefully summed up the circumstances in which
reasons for decision will be considered to be inadequate:

Reasons for decision will be inadequate if:

- an appellate court would be unable to ascertain the process of reasoning
  employed by the judge;

- where an appeal is limited to a question of law, the appellate court is unable to see
  whether the decision involved is an error of law;

- the community is unable to see whether the judge has engaged in transparent
decision-making: Sun Alliance Insurance v Massoud [1989] VR 8; Hajdu v Breguet
NSWLR 247; Bookless v Smith [2020] VSC 56 [24].

As further pointed out by the Judicial College of Victoria:

…the judge cannot limit his or her judgment to a statement of conclusions which
address the relevant legislative tests. The reasons must also identify the primary
facts which support those conclusions: Barwon Spinners v Podolak (2005) 14 VR
622, [76].

In some cases, it may be sufficient to expressly state the findings of fact, as the
inferences arising from those findings will be implicit, or the consequences will
speak for themselves: Murray Goulburn Co Ltd v Filiponi [2012] VSCA 230, [28;
Woolworths Ltd v Warfe [2013] VSCA 22, [131]; ACN 005 565 926 Pty Ltd v
Meat Co Pty Ltd (2007) 17 VR 592, [192].

However, in other cases, this will not be sufficient, where there is a “dissonance”
between the factual findings and the conclusion: Kelso v Tatiara Meat Co Pty Ltd
(2007) 17 VR 592, [194].
It is important to bear in mind that the requirement that the path of reasoning be disclosed applies not only to cases where “factual issues are in dispute”, but also to cases where “legal principles are in dispute”. 45

As regards rulings during the course of a trial: 46

The obligation to give reasons applies to both final decisions and rulings in the course of a trial on matters such as admissibility of evidence.

As with final orders, reasons for a ruling must disclose the process of reasoning and allow a party to assess whether the judge has made an error of law:  R v McCullagh [2007] VSCA 293; Webb v R (1994) 12 WAR 257.

Although there is “generally no need to give detailed reasons in relation to exercising a procedural discretion or the making of an order for costs, the need for detailed reasons in either of these circumstances must be determined by the issues in the case:  R v Power [2003] SASC 77; DW v R [2004] ACTCA 22; Perkins v County Court of Victoria (2000) 2 VR 246”. 47 It would also seem that, as a matter of principle and practice, the reasons should disclose the process of reasoning leading to the decision.

It follows from an overview of the relevant case law that a common-sense approach is to be taken to assessing whether adequate reasons for decision have been given: is it “possible to understand from the reasons given how the conclusion was reached”. 48 If the answer is in the negative, then “plainly those reasons will be inadequate”. 49 Furthermore, “if the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail” 50 and be found to be inadequate.

9.3.3 Further Analysis of the Content and Extent of “Adequate Reasons”

In Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430 at [442-4] Meagher JA stated that although “reasons need not necessarily be lengthy or elaborate: Ex parte Powter; Re Powter [1945] NSW St Rp 35; (1945) 46 SR (NSW) 1 at 5; [1945] NSW St Rp 35; 63 WN (NSW) 34 at [36]”:

...there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it: North Sydney Council v Ligon 302 Pty Ltd (1995) 87 LGERA 435. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.

Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached. The obvious extension of the principle in North
Sydney Council is that, where findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. But that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear: Selvanayagam v University of the West Indies [1983] 1 WLR 585; [1983] 1 All ER 824. Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance: Rajski v Bainton (Court of Appeal, 6 September 1991, unreported).

Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well.

If a judicial decision contains a statement of reasons incorporating these core elements it will satisfy the requirement that the “path of reasoning” leading to the decision be disclosed.

However, as pointed out by Kirby J in Soulemezis v Dudley (Holding) Pty Ltd (1987) 10 NSWLR 247 at 259, when preparing to give reasons for decision, a judicial officer is not required to undertake a microscopic examination of the evidence. Nor is the judicial officer required to undertake “a tedious examination of detailed evidence or a minute explanation of every step in the reasoning process that leads to the judge’s decision”:

But the judicial obligation to give reasons, and not to frustrate the legislative facility of appeal on questions of law, at least obliges a judge to state generally and briefly the grounds which have led him or her to conclusions reached concerning disputed factual questions and to list the findings on the principal contested issues. Only if this is done can this Court discharge its functions, if an appeal is brought to it. Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged.

There are further limitations on the obligation to give adequate reasons:

A judge, though obliged to give reasons, is not required to address every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster.

Plainly, judges are not expected to deal specifically with every consideration that passes through their minds as they proceed to their conclusion. However, any submission that is worthy of serious consideration should, ordinarily, receive some attention in the reasons provided.
Soulemezis v Dudley Holdings Pty Ltd (1987) 10 NSWLR 247 is “a seminal case on the adequacy of reasons”. It is important in two respects. First, it revealed a difference of opinion about what constituted adequate reasons in the matter at hand; and secondly, it demonstrated the fact that the nature of the appeal influenced the standard of the reasons that were required.

By way of background, an injured worker was partially successful in a compensation claim brought in the District Court of NSW. The worker appealed that decision to the Supreme Court on a point of law maintaining that she continued to be incapacitated. She argued that the District Court judge had no basis for his decision and had failed to provide adequate reasons for his decision.

On appeal two members of the Supreme Court formed different views as to whether the judge had given adequate reasons:

Kirby J, who dissented, held that both the grounds which led the judge to a conclusion on disputed factual questions, and the findings on the principal contested issues had to be set out. Mahoney JA took a more flexible approach. His Honour observed that the law did not require a judge to make an express finding in respect of every fact leading to, or relevant to, that judge’s final conclusion of fact. Nor did a judge have to reason, and be seen to reason, from one fact to the next, along the chain of inference leading to the ultimate conclusion.

Notwithstanding the inadequacy of reasons, Mahoney JA dismissed the appeal, concluding that “any error on the part of the judge in that respect did not, in the particular circumstances of that case, give rise to a point of law”.

McHugh JA joined Mahoney JA in dismissing the appeal. His Honour was of the view that the adequacy of reasons for decision depends “on the importance of the point involved and its likely effect on the outcome of the case”. Although the finding that that the appellant was fit for work from the date of the CAT scan was a crucial fact, and the judge had not given specific reasons for that finding, his Honour considered that “it could be inferred that [the judge] considered the plaintiff to be fit for work because the CAT scan did not reveal any abnormality.” McHugh JA went on to say:

An erroneous or perverse finding of fact raises no question of law and cannot be challenged by way of appeal. What is decisive is that his Honour’s judgment reveals the ground, although not the detailed reasoning in support of his finding of fact. But that is enough in a case where no appeal lies against the finding of fact.

The effect of the majority view in Soulemezis was that the reasons for decision given by the District Court judge were adequate in a case where no appeal lied against a finding of fact.
In *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317 the Court of Appeal was called upon to consider what constituted adequate reasons in relation to an application for compensation under the *Accident Compensation Act* 1995 which had been dismissed by a County Court judge. The adequacy of reasons was to be considered by reference to s 134AE of the Act, which at the time provided that reasons for decision should not be “summary reasons but shall be detailed reasons which are extensive and complete as the court would give on the trial of an action”.

In finding the County Court judge’s reasons for decision to be inadequate because they did not satisfy the “path of reasoning” requirement, Ashley JA ([48] – [52]) identified a number of errors on the part of the judge. These included:

1. Failing to state whether the appellant’s evidence as to material events was accepted or rejected;

2. In the event that his Honour was minded to reject the appellant’s evidence, failing to address objective circumstances that support that evidence;

3. In the event that his Honour was inclined to reject the appellant’s evidence (on the basis that his evidence sat uncomfortably with histories given to doctors), failing to state so: “simply to recount the various histories, and the appellant’s response when faced with them in cross examination, left their significance, as the judge perceived it, unexplained”;

4. In the event that his Honour rejected the appellant’s evidence on the basis that he “generally was not a creditworthy witness”, failing to make a finding to that effect;

5. His Honour’s expressed satisfaction that “from one source or another the appellant had been made aware that unless he could demonstrate an injury… after 29 October 1999, then his present application would fail was probably unsound. Certainly, it did not meet some of the objective circumstances revealed by the evidence upon which the appellant could rely”;

6. The judge’s conclusion that the appellant had chosen to “press on with employment and it was only after he had formally given notice of intention to resign by letter dated 14 October 1999 that for the first time he consulted a doctor in respect of what he now describes as “severe pain in his low back” left some uncertainty as to what the judge intended to convey. If the judge meant to convey that the appellant had fabricated an injury only after giving notice of his intention to resign, then this would stand opposed to the judge’s conclusion that the appellant had in fact suffered a compensable low back injury. In the event “the judge meant to convey, alternatively, that it was only after the...
appellant had resigned that he felt free to consult a doctor, and that such attendance was not supportive of the appellant’s evidence that his symptoms had worsened on 29 October, then his Honour did not say so”; and

7. In the event that the judge considered the appellant to be unreliable or uncreditworthy, failing to consider certain objective evidence pointing to the contrary.

Asprey JA’s judgment is both illuminating and instructive in that it dissects the County Court judge’s reasons for decision, and identifies the various gaps, omissions and silences in the judge’s reasons, leading to the conclusion that the judge’s decision failed to adequately disclose “the route” by which he had reached his decision.

_Ta v Thompson_ [2013] VSCA 344 is a “useful illustration of the extent of the duty to provide reasons, at the Magistrates’ Court level” (and it might be said, at the level of the County Court hearing an appeal de novo)

By way of background, the appellant appealed to the County Court of Victoria in relation to a conviction in the Magistrates’ Court for possessing heroin. The facts were that police had found heroin in the bedroom of a residence solely occupied by the appellant. The appellant claimed that he had no knowledge of the presence of the heroin and claimed it must have been left in the bedroom by someone else, following a New Year’s party at the appellant’s house. The appeal, which was by way of a rehearing de novo, was dismissed and the conviction was upheld.

The County Court Judge gave brief reasons for decision stating that “she had heard the evidence about a party at the appellant’s house and other matters surrounding the state of the premises” and there was “no other evidence upon which to rely apart from that given by the appellant”, whose evidence she did not accept.

The appellant then sought judicial review of the County Court’s decision by way of the prerogative writ of certiorari on the grounds that the judge had failed to give adequate reasons for her decision and in particular failed to explain why she had not accepted the appellant’s account. The application for judicial review was dismissed, whereupon the appellant appealed that decision.

Osborn JA (with whom Beach JA agreed) undertook a detailed examination of the County Court judge’s assessment of the appellant’s evidence, and concluded that as the appellant bore the onus of proving that he did not know of the presence of the heroin the case depended upon the judge accepting the appellant’s evidence. His Honour noted that the County Court judge did not find his evidence to be credible. His Honour further noted that “little more needed to be said”.

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His Honour rejected the appellant’s submission that the County Court’s reasons for decision were inadequate because they did not “indicate whether the judge’s decision was based on assessment of the appellant’s demeanour when giving evidence, or inconsistency with other evidence or improbability for other reasons: in other words the reasons did not state the grounds or factual basis of the decision”. In his Honour’s view the judge was “simply not satisfied of the truth of the appellant’s evidence on the balance of probabilities in the circumstances of the case”. It was sufficient that in her reasons the judge had made clear that she was not persuaded by the appellant’s evidence.

As noted by Justice Weinberg, Osborn JA considered that there were two major impediments to the appeal succeeding: first, “it would have to be shown that the County Court judge’s reasons were so inadequate to give rise to an error of law”; and secondly, even if there were found to be an error of law there would need to be jurisdictional error in order to “justify the grant of certiorari”. This demonstrates that where there is “no right of appeal in relation to factual findings the requirement for the provision of reasons as to factual findings is less rigorous.

Furthermore, it is important to put the judgment of Osborn JA in proper context. As commented on by Justice Weinberg, the “judgment seems to have been influenced to some degree by the fact that the appellant bore the onus of satisfying the Court that the heroin found in his wardrobe was not his, and that he knew nothing about it”. His Honour also adverts to the possibility that Osborn JA may have reached a different conclusion had it not been (a) for “the absence of any appeal from the County Court on a hearing de novo” and (b) “the fact that the appellant bore the onus of establishing his innocence”. It is helpful to examine the recent decisions of *Bookless v Smith* [2020] VSCA 56 [36] and *Makeham v Sheppard* [2020] VSCA 242, both of which considered in detail the requirement to give adequate reasons.

*Bookless v Smith* concerned an appeal (on a question of law) against a decision of the Magistrates Court to the Supreme Court. The appellant contended that the magistrate had erred in law by failing to provide adequate reasons.

Priest JA, who heard the appeal and upheld the ground of appeal that the magistrate had not provided adequate reasons, began by stating that “there can be no doubt that magistrates have a duty to give adequate reasons for their decisions – so much is an ordinary incident of the judicial function – the nature and content of those reasons being dictated by the evidence and issues raised in the particular case”. His Honour went on to say: In a proceeding such as the present, however, it is not sufficient for a magistrate simply to set out the evidence adduced by one party, and then assert that, having...
considered the evidence, he or she finds the charges proven, let alone wholly fail to refer to and consider the evidence adduced by the defence on critical issues.

His Honour (at [27]) found that the magistrate’s reasons did not meet the requirement to give adequate reasons. Although the magistrate “referred to much of the evidence in the prosecution case and the issues raised by it, the magistrate failed altogether to identify the basis of her ultimate conclusions by reference to relevant considerations flowing from the evidence”. Moreover, the magistrate wholly failed to refer to the evidence adduced by the appellant — including as to his good character — and explain how she was seemingly able to discount it completely. As was observed by Sholl J in Sandhurst and Northern District Trustees Executors & Agency Co Ltd v Auldridge:

The true principle, I think, must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to the matter not having been considered as it should have been, the appellate tribunal may properly draw that inference, and the magistrate will have no cause to complain if it does so.

His Honour considered the magistrates’ reasons to be “tissue” or “wafer thin”; and when “considered in full — against the issues raised by the evidence — their inadequacy is plain” [ at 28]. His Honour went on to observe at [33]:

The closest that the magistrate came to any analysis is to be found immediately before she announced her satisfaction beyond reasonable doubt, when she said, “I’ve looked at all of the evidence together and I’ve directed myself based on the very helpful submissions”. This bald assertion, however, cannot substitute for proper analysis. At the risk of repetition, nowhere does the magistrate expose the path of reasoning which enabled her to accept the identification evidence despite its apparent lack of probative value.

Priest JA [at 34] then addressed the significance in this case of the good character evidence adduced in defence of the appellant’s denial of the conduct alleged against him. His Honour noted that the “evidence of good character went not only on the unlikelihood of the appellant’s guilt, but also the credibility of his denial of guilt”. His Honour further that the appellant was “entitled to have his good character properly weighed and assessed by the magistrate; and, if the credibility of his denials was capable of being put to one side despite his good character, so that the magistrate was capable of finding the charges proven despite that good character, the magistrate was required to provide sound reasons explaining how she was able to find the charges proven in the face of that evidence (particularly given the obvious flaws in the prosecution’s case)”. The magistrate had failed to provide such reasons.

Makeham v Sheppard concerned an appeal from the decision of a single judge of the Supreme Court of Victoria to the Court of Appeal.

By way of background the appellant was convicted in the Magistrates Court of committing an indecent act on a child under the age of 16. The appellant appealed to

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the Supreme Court on a question of law. The conviction was challenged on the following grounds:

(a) The magistrate erred in law by failing to direct herself as required either adequately or at all (ground one);

(b) The magistrate erred in law by failing to give adequate reasons for her decision (ground two);

(c) The magistrate erred in law by denying the appellant procedural fairness when refusing to allow his counsel to seek adequate reasons for her decision (ground three); and

(d) The findings of the magistrate were unsafe and unsatisfactory (ground four).

The primary judge dismissed the appeal, whereupon the appellant appealed against that decision on two grounds as follows:

(a) the learned trial judge erred by holding the absence of an express path of reasoning demonstrating compliance by the magistrate with s 4A of the *Jury Directions Act 2015* was not an error of law because the appellant had a right of appeal to the County Court.

(b) the learned trial judge erred by holding that the question whether a finding by a tribunal of fact was unreasonable or unable to be supported having regard to the evidence (the “unsafe or unsatisfactory” ground) was a question of fact rather than a question of law.

Priest JA (with whom Kyrou and Weinberg JJ agreed) upheld the first ground for the following reasons.

Although his Honour considered [at 30] that “the magistrate’s reasons were adequate to deal with most of the matters urged on her by counsel, they were not adequate to explain whether – and, if so, how – the magistrate took into account evidence of the applicant’s good character…”. His Honour went on to note that “the primary judge gave this aspect of the magistrate’s reasons scant (if any) attention” and that “the primary judge did not descend into any analysis of whether the magistrate’s reasons were (or were not) adequate to deal with the character evidence”.

Priest JA went on to observe [at 32] that the magistrate’s reasons were silent as “to whether she used the complaint evidence for any hearsay purpose, or gave any consideration to whether it was potentially unreliable…”

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In relation to the appellant’s denials, his Honour noted [at 33] that “the magistrate said that she was conscious that the applicant who neither gave evidence nor called any on his behalf was under no obligation to do so”; however, “somewhat paradoxically, the magistrate also said that in considering the applicant’s position in relation to the allegations the court has received little relevant evidence, whilst in almost the same breath she acknowledged that during the interview the applicant denies categorically any wrongdoing”.

His Honour [at 34] then returned to the failure of the magistrate to “articulate how- if at all- she had used the evidence of the applicant’s good character”. His Honour went on to say:

Despite a mere recitation of the evidence going to the applicant’s good character, however, the magistrate gave no indication whatsoever as to whether she took it into account when considering the credibility of the applicant’s categorical denials of wrongdoing – somewhat curiously, as I have indicated, despite his lengthy interview, she thought there was little evidence of the applicant’s position – or as bearing on the unlikelihood of the applicant’s guilt. In my view the reasons were in that respect inadequate.

Priest JA [at 36] then proceeded to discuss what was required in terms of reasons for decision:

Of necessity the content and extent of a magistrate’s reasons will be dictated by the nature of the matter under consideration, and the evidence and the issues raised. In a case such as the present, a magistrate must consider all of the relevant evidence; although depending upon its importance to the ultimate resolution of the case, it may not be necessary for the magistrate to refer to every piece of it, or to indicate whether it is accepted or rejected.81 But a magistrate should refer to any evidence that is important or critical to the proper determination of the matter.82 And where there is conflicting evidence of a significant nature, each set of evidence should be referred to.

His Honour further stated at [38]:

In any disputed case, a magistrate should set out the material findings of fact, together with any ultimate conclusions or findings reached. He or she should provide reasons for arriving at the relevant findings of fact and the conclusions based on those findings and should give reasons applying the law to the facts as so found.83 That is not to say that a magistrate necessarily must make explicit findings on each disputed piece of evidence or make findings on every argument of submission made- particularly where they are numerous and of varying significance – but those that are important to the ultimate decision must be set out.84

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Priest JA [at 39] considered the judgment of Roberts-Smith J in *Betts v Hardcastle* (2001) 23 WAR 559 to be instructive, “since it involved an examination of the adequacy of a magistrate’s reasons in a summary criminal hearing”. Roberts-Smith J observed at [39] – [41]:

In *Lam v Beesley* (1992) 7 WAR 88 at 93 Owen J said that the question of depriving a litigant of the opportunity he may have had on appeal extends beyond a complete absence of reasons and included a situation where there is uncertainty as to the reasons upon which the finding is based. But the realities of pressure of work, particularly in Courts of Petty Sessions must be acknowledged. So too, less detail is to be expected where reasons are delivered ex tempore: see *Pallot v Harrison* (unreported Supreme Court WA Owen J Library No 950261, 13 May 1995). In *Fleming v, The Queen* (1998) 197 CLR 250 the High Court had to consider the obligation on a trial judge sitting without a jury to give reasons for a verdict. The accused had been indicted on three charges of aggravated indecent assault upon a 15 year old girl and one charge of sexual intercourse with that girl as a person under his authority. The case against the accused depended upon the evidence of the complainant. Had the trial been before a jury, the trial judge would have been required to direct the jury that the evidence of the complainant had to be scrutinised with great care before a conclusion was arrived at and a verdict of guilty returned, in accordance with *Longman v The Queen* [1989] HCA 60; (1989) 168 CLR 79 at 107. The only reference in his Honour’s reasons for decision to this was a statement that (at 264): ‘The Crown case relies solely upon the complainant. If I am unable to accept her evidence beyond reasonable doubt I must acquit the accused.’

In a joint judgment, their Honours held that statement not to in any way satisfy the relevant requirement (at 265) and that although consciousness of the importance of such a warning would no doubt be of second nature to many judges, the animating principle behind the requirements of the *Criminal Appeal Act 1912* (NSW) was that criminal justice not only be done but also be seen to be done. For that reason the judgment must show expressly or by necessary implication that the warning was taken into account. It would be no answer that the trial judge is an experienced judge who was well aware of the requirement of a warning and that he or she must have taken the warning into account.

Although his Honour acknowledged [at 41] that the obligation resting upon a magistrate in a busy court will be less onerous than that which rests upon a judge of a higher court and that “it will be practical for a magistrate only to give relatively brief reasons”, he said [at 42]:

Of some significance, however, the magistrate in the present case had a greater opportunity for mature reflection, and for the formulation of moderately comprehensive reasons, than might often be the case. Hence, the magistrate heard evidence over three days (on 10, 11 and 16 October 2018), and counsel for the applicant (and the police prosecutor) made submissions of law on the third day (16 October 2018). A week then expired before the magistrate delivered the impugned reasons (on 23 October 2018). In the course of delivering her reasons,
the magistrate made clear that she had “considered all of the evidence very carefully in this case and [had] taken considerable time too to do it”.

Turning to the adequacy of reasons, Priest JA [at 56] considered “good character was central to the resolution of the disputed issues in the case” and that the magistrate’s reasons were inadequate to explain whether - and, if so, how - she took into account the applicant’s good character. His Honour said:

The prosecution relied on the evidence of SB - the credibility of which was supported by the complaint evidence - to support the charge. Against that, the applicant’s ‘defence’ revolved very significantly (if not solely) around his denials in his record of interview, including his explanation as to how his innocent actions might have been misinterpreted. He was entitled to have the evidence of his good character weighed in the balance by the magistrate when she came to consider his denials. This was, after all, as counsel for the applicant tried to make clear, a case of ‘word against word’. Moreover, the applicant was entitled to expect that the magistrate would take his good character into account when considering the unlikelihood of his guilt. Yet, beyond reciting the evidence establishing that he was a man of good character, the magistrate gave no clue as to how she may have used the evidence (if at all). In that respect, the reasons were wholly inadequate, and the primary judge should have so found.

Priest JA made reference [at 57] to the similar case of Bookless v Smith which was discussed above. His Honour [at 58] also referred to Grabski v Beier [2020] VSC 156 where Ginnane J held, in the context of judicial review, that the reasons of a judge of the County Court on a de novo appeal were inadequate on a number of bases, “including that the judge made no reference to the character evidence that formed part of the plaintiff’s case and was relevant to the plaintiff’s defence of both charges, both as to the unlikelihood of guilt and as to the credibility of the accused who denies his guilt”.86

Priest JA [at 59] concluded that the primary judge’s reasons were inadequate:

As I have endeavoured to make clear, the level of detail required for reasons to be adequate in any given case will include the issues in the case and their complexity. In the present case, the credibility of SB’s account was pitched directly against the credibility of the applicant’s denial. The prosecution relied on the complaint evidence to bolster SB’s credit, and the applicant relied on the evidence of good character to tip the scales in favour of the defence case. Failure adequately to deal with that pivotal issue vitiates the magistrate’s decision. The primary judge should have so found.

9.3.4 Further Analysis of Findings in Relation to the Credibility and Reliability of Witnesses

Assessments of the credibility and reliability of witnesses are commonplace in magistrates’ courts and intermediate courts, and are an ordinary incident of the fact-finding process in both criminal and civil cases. So much is evident from some of the cases discussed above.
As pointed out by Justice Weinberg, one of the most difficult aspects of giving reasons for decision is determining the extent to which findings in relation to credibility and reliability of witnesses must be expressed in order to meet the requirement to give adequate reasons. The recurring question is: “how much detail is required?”

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

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

This observation highlights the importance of judicial integrity in relation to assessments of credit and choices between conflicting evidence, and in turn the relationship between judicial integrity and public confidence in the ability of the judiciary to make fair and sound decisions.

- **Findings of Credibility or Reliability in Civil Proceedings**

Earlier in this chapter, reference was made to the need for a judicial officer, in reasons for decision, to not only refer to evidence that has been accepted and acted upon, but also to evidence (upon which a party has relied) which has been rejected: *Hunter v Transport Accident Commission* [2005] VSCA 1 at [21] and [28] per Nettle J. The acceptance or rejection of evidence invariably involves a choice between conflicting evidence based on an assessment of the credibility of witnesses. The importance of articulating the basis on which evidence is accepted or rejected and making appropriate findings of credibility was made clear in *Franklin v Ubaldi Foods Pty Ltd*. Findings of credibility “can provide a key part of a judge’s path of reasoning, as they explain why one part of the evidence is preferred over another [in a civil proceeding]”.

In his article “Judgment Writing” (1993) 67 ALJ 494 at 497 Sir Harry Gibbs deals with the need for judicial officers to adequately explain credit assessment as part of the fact-finding process:
It is of critical importance for the judge of first instance to make a clear finding on any disputed issue of fact... If a finding of fact depends on an issue of credibility the judge should resolve that issue and in fairness to the parties should reveal why he prefers one witness to another...

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


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

*Franklin v Ubaldi Foods Pty Ltd* illustrates the role that objective circumstances can play in determining the creditworthiness of a witness and whether the evidence of a witness is accepted or rejected. As pointed out by Forbes, one such objective circumstance is the inherent probability or improbability of the evidence given by a witness. Hence, his Honour Judge J.P.O Barry says that it is desirable for judicial officers when rejecting the evidence of a witness on the basis of the evidence being inherently implausible to explain why the evidence was found to be inherently implausible.91

As pointed out by Bell, “accounts that are inherently improbable can nonetheless be true” and it is therefore important for the trier of fact to explain why it has found an inherently improbable account to be true.92

The following extract from the judgment of Mahoney JA in *Soulemezis v Dudley Holdings Pty Ltd* (1987) 10 NSWLR 247 at 273-274 addresses the subjective element in the fact-finding process – in particular the role of intuition in assessing the creditworthiness of a witness - and the legitimacy of explaining a finding of credibility in terms of an intuitive response (based on personal experience) to the evidence given by a witness:

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

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

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

More recently, in Woolworths Ltd v Warfe [2013] VSCA 22 at [139] to [140] and [142] Kaye AJA pointed out the generally subjective and impressionistic nature of assessments of credit, though observed that in the present case the trial judge failed to consider the objective circumstances in assessing the respondent’s credit, thereby failing to provide adequate reasons for decision:

I accept that, generally, an assessment of the credibility of a witness is largely a matter of value judgment and impression. Such an assessment does not readily admit of lengthy exposition in reasons for judgment. However, in this case a large part of the trial was occupied by the attack on the respondent’s credit, by reference to video footage. Two major points made by the appellant, on a number of occasions, were that the respondent had exaggerated his disabilities when describing them in his affidavit and to medical practitioners, and that he had deliberately concealed the extent of his involvement in the boat hire business at Lake Nagambie. In order to provide adequate reasons, the trial judge was required to address activities and actions depicted on the video, and to address the question whether these activities and actions undermined the credibility of the respondent in the manner contended by the appellant. It was necessary for the trial judge to analyse the answers given by the respondent in cross-examination, and to indicate whether she accepted those answers, and whether they accounted for the apparent discrepancies between the video surveillance film and the previous accounts given by the respondent as to his limitations and to his activities.

Unfortunately, the reasons of the trial judge do not fulfil these requirements. In particular, the parts of her Honour’s reasons, to which I have referred, do not address the matters to which I have referred. It follows that, in my view, the reasons given by the trial judge for her acceptance of the respondent’s credibility were not adequate…

For those reasons, I am persuaded that the trial judge did fail to give adequate reasons for her conclusion that the respondent was a credible witness in light of
the apparent contrast between the respondent’s activities as shown on the video surveillance evidence and the account given by the respondent of his level of activity in his affidavit and in the histories which he gave to medical practitioners.

However, Kaye AJA [at 141] went on to put this important rider on his conclusion about the inadequacy of the trial judge’s reasons for decision:

…I should emphasise that the observations which I have made, concerning the matters which were required to be addressed by the trial judge, are particular to the circumstances and facts of this case. I am conscious of the burden on County Court judges, day after day, in hearing and determining serious injury applications. What I have written does not require, in each case in which video surveillance footage is shown, the extent of analysis which, I consider, was required in this case. However, this case, in some respects, was somewhat unusual. The amount of video footage, and the varying types of activities depicted on them, was substantially greater than that normally available in a common law trial. Further, the cross examination, and indeed the final address by counsel, on the video footage occupied a substantially greater proportion of the hearing time of the case than that which is ordinarily so. It was those matters which required the kind of analysis, in the reasons for judgment, to which I have just referred.

In Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430, 442 – 444 it was stressed that in cases where there is a significant body of conflicting evidence (involving matters of credit) it is necessary for a court to disclose why it chose to “accept one body of evidence over the other”.

When considering competing evidence it is incumbent upon the presiding judicial officer to turn his or her mind to inconsistencies in not only a witness’ evidence (internal inconsistency), but also to inconsistencies between that witness’ evidence and the evidence of other witnesses (external inconsistency). The judicial officer must outline both types of inconsistency and where the judicial officer accepts one witness over another witness or witnesses, he or she should explain why, notwithstanding the inconsistencies, they find in favour of the first mentioned witness’ credibility: Woolworths Ltd v Warfe [2013] VSCA 22 [134]; TAC v Campbell [2015] VSCA 7.

It is best practice for a judicial officer to make explicit findings of credit in reasons for decision and not to leave such matters to inference. Where there is a direct attack on a witness’s credit, and the court accepts that the witness’s credit has been compromised, reasons should be given for reaching that conclusion.

The duty to give adequate reasons applies equally in cases involving conflicting expert evidence.

It is not sufficient for a judge to refer to the existence of competing medical opinions and then to prefer one position over the other. The obligation to give reasons requires judges to refer to the contradictory evidence and explain why the judge
prefers one view. This obligation is especially significant where the disagreement between the experts relates to questions of degree, rather than offering competing views on the cause of the injury or the prognosis of the injury (see Mutual Cleaning and Maintenance Pty Ltd v Stamboulakis (2007) 15 VR 649, [51]-[52]).

- **Findings of Credibility and Reliability in Criminal Proceedings**

  The duty to give adequate reasons applies equally to findings of credibility or reliability in summary criminal trials or hearings presided over by a judicial officer. Clearly, findings in relation to the creditworthiness or reliability of witnesses who give evidence in a criminal proceeding need to be explained to the same extent that is required in a civil proceeding. However, the difference is that in a criminal proceeding the standard of proof is the criminal standard of “beyond reasonable doubt”, and not the civil standard of “the balance of probabilities”. This means that in assessing the credibility or reliability of witnesses, it is not a matter of preferring the complainant or other witnesses called in the prosecution over the defendant or witnesses called in the defence case, but of accepting the evidence (according to the criminal standard of proof) of witnesses for the prosecution and rejecting the evidence of the defendant and witnesses in the defence case.

  If the judicial officer accepts the complainant’s evidence, then he or she must do more than simply say that the complainant is believed over the defendant.97 It is imperative that the judicial officer not only address those aspects that favour the credibility of the complainant, but also refer to those matters that tend to undermine the complainant’s credibility.98 However, by way of contrast, should the complainant not be believed, then the judicial officer, in his or her reasons for decision, “may not need to say much more than stating that the complainant was not believed”.99

**9.3.5 Adequate Reasons for Sentence**

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

  A sentencing court must give reasons for its decision as to an appropriate sentence. The matters of significance in determining sentence must be identified, including the facts giving rise to the offence, the findings in relation to all matters taken into in mitigation or aggravation of sentence and the reasoning that leads to the sentence imposed. Various statutory provisions require reasons to be given in respect of specified matters. Absent exceptional circumstances there must be contemporaneity between the handing down of the sentence and the expression of the reasons for the sentence. Statutory provisions require certain specific matters to be explained to the offender where a sentencing court makes a particular order when imposing sentence.
Similarly, in Koumis v R [2008] 18 VR 434 at [63] the Court of Appeal indicated what should be contained in reasons for sentence:

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

As pointed out by Odgers, the amount of detail in the reasons for decision will depend upon the facts and circumstances of the case. This aspect was dealt with in Hamieh v R [2010] NSWCCA 189 at [32] where the NSW Court of Criminal Appeal made this observation:

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

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

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

[the] judge’s remarks should provide a succinct statement of the relevant facts in order to place the sentence in an “intelligible context” in order to inform the prisoner and to record them as the basis for formulating the sentence. The sentence does not have to account for every single issue raised on the plea, nor reveal every step taken in arriving at the sentence. However, where there is a factor that may be
unusual and carry weight in sentencing, a failure to explain how it has been taken into account may amount to a sentencing error. The degree of detail must be that which is practicable in the light of the business of the court\(^{104}\)… But it must cover all important considerations so that to be sufficient to meet both the offenders right to know they have received the particular sentence and the public’s right to understand the process of sentencing.

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1 For example, with particular reference to magistrates, see Re Merceron (1877) 7 Ch D 194 at p 187 per Jessel MR; Romilly v Romilly 50 TLR 386 per Langton J; Barker v Barker (1905) 21 TLR 253; Cobb v Cobb [1900] p 145; Robinson v Robinson [1898], 153.
4 Judicial College of Victoria n 3, 6.2.2.
5 R v Thomson v R [2000] 49 NSWLR 383, [42].
6 Markarian v R [2005] 228 CLR 357, [39].
7 Judicial College of Victoria n 3, 6.2.3.
9 Justice Murray Gleeson n 8, 122.
10 S Odgers Sentence 2\(^{nd}\) edition, [2.48].
11 Judicial College of Victoria n 3, 6.2.3.
12 A Freiberg Fox and Freiberg’s Sentencing State and Federal Law in Victoria 3\(^{rd}\) edition at [2.260] where the learned author cites a number of Australian legal authorities in support of the proposition.
13 G MacKenzie and N Stobbs Principles of Sentencing 2010, 27 where the learned authors make these observations:

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

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

“The appellate courts have indicated on numerous occasions that they will be less likely to interfere with a sentence when reasons have been given by the sentencing court to justify a sentence which is otherwise outside the normal range”.
15 Justice Kirby n 2, 17.
16 Justice Kirby n 2, 16.
17 Justice Gleeson n 8, 122.
18 Odgers n 10, [2.48].
19 Odgers n 10, [2.48].
21 Justice Weinberg n 2, p 4. See for example Ta v Thompson [2013] VSCA 344 where the Court was divided on the question of whether adequate reasons had been provided by a magistrate who recorded a conviction for possession of heroin. See also Justice Alan Goldberg “When are Reasons for Decision Considered to be
Inadequate?” edited version of an address to a seminar titled “Natural Justice Update” held by the Victorian Chapter of the AIAL on 1 October 1999, p 2: “There is no succinct answer to the question what are adequate reasons: it is a matter of degree and judges differ on the issue”.  

22 Judicial College of Victoria n 3, 6.2.6 and 6.2.8.  
23 (2000) 2 VR 246 at [52]  
26 Justice Weinberg n 2, p 13.  
27 [2013] VSCA 344 at [30]-[36]. This case is also cited and discussed by Justice Weinberg n 2 [32]-[48].  
28 Perkins v County Court of Victoria [2000] VSCA 171.  
29 [2020] VSCA 242 at [18] per Priest JA.  
31 [2020] VSCA 242 at [44].  
32 [2020] VSCA 242 at [45]-[48].  
33 Judicial College of Victoria n 3, 6.2.14.  
34 Justice Weinberg n 2, p 14.  
35 Cited by Justice Weinberg n 2, p 15.  
37 Justice Weinberg n 2, p 16.  
39 Beck n 2, p 5. As pointed out by the author, Nettle J made the same observation in Hunter v Transport Accident Commission [2005] VSCA 1 and Kiefel J made a similar observation in Singh [1999] FCA 1322 [9]. See also Roy Morgan (2001) 207 CLR 72, 84[26] and AK v Western Australia (2008) 232 CLR 438, 453 [45] also cited by Beck n 2, p 5; and Justice Weinberg n 2, p 5: “What seems to be clear is that the bald statement of an ultimate conclusion, even by reference to the evidence said to support it, is unlikely, in many cases, to be sufficient. There must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed”.  
40 Judicial College of Victoria n 3, 6.2.10.  
41 Justice Weinberg n 2, p 6.  
42 Justice Weinberg n 2, p 5.  
43 Judicial College of Victoria n 3, 6.2.18.  
44 Judicial College of Victoria “Findings of Fact” 10.3.2 – 10.3.4.  
46 Judicial College of Victoria n 3, 6.2.20 and 6.2.21.  
47 Judicial College of Victoria n 3, 6.2.13.  
48 Justice Weinberg n 2, p 6.  
49 Justice Weinberg n 2, p 6.  
50 Justice Weinberg n 2, p 6.  
51 Justice Weinberg n 2, p 5.  
52 Justice Weinberg n 2, p 8.  
53 Justice Weinberg n 2, p 16.  
54 The worker was awarded only limited benefits terminating on a particular date that corresponded with the date of a ACT scan report.  
55 The right of appeal was only in relation to question of law.  
56 Justice Weinberg n 2, pp 4-5.  
57 However, see Justice Goldberg n 21, p 3 who adds that it does not follow from the judgment of Mahoney JA that “a simple statement of an ultimate conclusion bearing the evidence in mind is sufficient. There must be some process of reasoning involved”.  
58 Justice Weinberg n 2, p 17. Mahoney JA did not consider the failure of the judge to explain why he made an order for a closed period to give rise to a point of law.  

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59 Justice Weinberg n 2, p 17.
60 Justice Weinberg n 2, p 17. This is consistent with the following commentary in “10.3.3 Findings of Fact” published by the Judicial College of Victoria:

In some cases it may be sufficient to expressly state the findings of fact, as the inferences arising from those facts will be implicit, or the consequences will speak for themselves: Murray v Goulburn Co Ltd v Filiponi [2012] VSCA 230 [28]; Woolworths Ltd v Warfe [2013] VSCA 22, [131]; CAN 005 565 926 Pty Ltd v Snibson [2012] VSCA 31; TAC v Kamel [2011] VSCA 110, [86], Kelso v Tatiara Meat Co Pty Ltd (2007) 17 VR 592, [192].

61 Justice Weinberg n 2, pp 17-18.

62 See the judgment of Osborn JA in Ta v Thompson [2013] VSCA 344 at [42] where his Honour concluded that Whelan J had been correct in holding that: “Where there is no right of appeal in relation to factual findings, the requirement for the provision of reasons as to factual findings is less rigorous”: cited by Justice Weinberg n 2, p 10.

63 This case is referred to and extensively discussed by Justice Weinberg n 2, pp 18-20.

64 Justice Weinberg n 2 pp 19-20.

65 Justice Weinberg n 2 p 8. Note the following commentary by Justice Weinberg n 2, p 8:

Magistrates generally give only the most cursory reasons, particularly in summary criminal matters. This perhaps, in part, because appeals to the County Court from their decisions in such matters are by way of rehearing de novo. It is obvious that reasons are likely to be of less importance in such circumstances. An appeal lies to the Supreme Court from a magistrate’s decision, but only on a point of law. While the prerogative writs are available, the conditions under which they will be granted are so narrowly circumscribed as to make their use a rare occurrence.

66 Justice Weinberg n 2, pp 8 and 9.

67 For a discussion of the dissenting judgment of Priest JA see Justice Weinberg n 2, pp 11 -12.

68 Justice Weinberg n 2, p 9.

69 Ta v Thompson [2013] VSCA 344 at [46] and [47]

70 Ta v Thompson [2013] VSCA 344 at [47].

71 Justice Weinberg n 2, p 11.

72 Justice Weinberg n 2, p 9. In the present case there was not a failure to provide adequate reasons amounting to an error of law that vitiates the County Court Judge’s decision.

73 Justice Weinberg n 2, p 9.


75 Justice Weinberg n 2, p 11.

76 Justice Weinberg n 2, p 11.

77 [2020] VSCA 56 at [24].

78 [2020] VSCA 56 at [24].

79 The alternative open to the appellant was an appeal to the County Court by way of a rehearing de novo.

80 These included directing herself on (1) the applicant’s good character, bearing both on the credibility of his denials in the police interview, and on the likelihood of guilt; (2) complaint and prior consistent statements, including potential unreliability of hearsay statements; (3) prior inconsistent statements, including the potential unreliability of hearsay statements; (4) the proper approach where the case is “word against word”, the proper approach to differences in the complainant’s account and credibility; the burden of proof ( and other general directions).


85 The issue in Betts v Hardcastle was whether the magistrate in considering a charge of stealing had adequately warned himself of the dangers of acting upon the evidence of an accomplice and had wrongly treated certain evidence as being corroborative.


87 Justice Weinberg n 2, p 5.

88 Justice Weinberg n 2, p 5.


91 Judge JPO Barry “The Methodology of Judging” 1JCULR 135 n 2, 144.


93 Cited by the Judicial College of Victoria, “Reasons in Credibility Cases” 10.6.3.

94 Judicial College of Victoria n 91, 10.6.6.

95 Judicial College of Victoria n 91, 10.6.5.


97 Judicial College of Victoria n 3, 6.2.11.

98 Judicial College of Victoria n 3, 6.2.11: Douglass v The Queen (2012) 290 ALR 699; [54] – [57] and Bookless v Smith [2020] VSC 56, [24]. There is no reason why in principle this should not also apply to a key prosecution witness or witnesses.

99 Judicial College of Victoria n 3, 6.2.11: Ta v Thompson (2013) 46 VR 10, [52]. Again, there is no reason why in principle this should not also apply to a key prosecution witness or witnesses.

100 S Odgers n 10, [2.51].

101 S Odgers n 10, [2.51] citing various Australian authorities.


103 A Freiberg n 12, [2.260].

104 It is accepted by appellate courts that Magistrates’ Courts are busy jurisdictions.
10.1 Introduction

Oral decision making is the “bread and butter” business of courts across the Commonwealth, especially in magistrates’ courts and other courts of limited jurisdiction. The purpose of this chapter is to guide magistrates in giving oral decisions.

Perhaps the best working definition of “oral decision making” is the definition formulated by the Honourable David Lloyd QC and His Honour Tom Wodak:

An oral decision [or oral judgment] is one that is delivered contemporaneously with a trial or hearing – one delivered immediately after the completion of the trial or hearing, or later that day or the following day.

This is the generally accepted view of an oral decision and is commonly referred to as “an ex tempore judgment”. However, an oral decision includes decisions which are “in truth reserved, but the urgency of the matter makes it necessary to give oral reasons, which obviously can be prepared more quickly”. Such oral decisions may be delivered days or weeks after the conclusion of a trial or hearing.

The distinctive feature of an oral decision (as its name implies) is that it is not written. An oral decision is to be contrasted with a “reserved decision” which is one that is postponed until a date after the trial or hearing and handed down at an appointed date (of which the parties have been notified) and reduced to writing. This is because the judicial officer needs time to consider the matter, usually due to the complexity of issues raised at the trial or hearing and to “reflect upon a difficult question of law” and/or to resolve difficult questions of fact in cases involving conflicting evidence.

This chapter is not intended to be prescriptive, but designed to provide practical guidance as to when it is appropriate to give an oral decision and as to how a judicial officer should go about the following tasks:

- preparing and planning to deliver an oral decision, both before, and during, a trial or hearing;
- structuring the decision (including its content);
- fact-finding as an integral part of oral decision-making;
- providing adequate or sufficient reasons for the decision; and
- delivering the decision in the court room.

The chapter also deals with the extent to which an oral judgment may be later revised.

The material contained in this chapter is largely based on contributions made to the NJCA publication “Oral -Decisions- Delivering Clear Reasons” 2011 by a number of very experienced judges and magistrates, which the NJCA has kindly granted permission to use in this chapter of the Guide.

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10.2 Deciding Whether To Deliver An Oral Judgment

The most important decision that a judicial officer is required to make prior to making an adjudicative decision is deciding whether to deliver an oral judgment. Experienced judicial decision-makers and commentators have identified a number of factors that influence the making of this important threshold decision.

As pointed out by Justice Michael Kirby, “much depends…upon the opportunity which the judicial officer has had to anticipate the issue under decision and to prepare for it” as “at trial, there may be little or no opportunity” to do so. Reading and studying, in advance of the trial or hearing, the pleadings in a civil case or the charge in a criminal matter, or other documents (including written submissions) in the proceedings before the court, may assist the judicial officer in anticipating the relevant issues and preparing for them so as to facilitate the delivery of an extempore decision. However, the opportunity to anticipate issues and prepare for them will depend upon the quality of the pleadings and the adequacy of the information disclosed in the criminal charge and other documents, as well as the quality of the written submissions. Often the pleadings will be of a poor quality, and even in the case of well drafted pleadings it is not uncommon for the pleadings to be amended with the leave of the court at the commencement of the trial or hearing – or mid-trial or hearing - which may throw quite a different light on the issues to be adjudicated upon. The judicial officer may then have little to time to reflect upon new issues which may raise difficult questions of law.

Therefore, although the opportunity to anticipate the issues under decision and prepare for them may assist the judicial officer in giving an extempore decision it has the above practical limitations.

Another factor that may bear upon the ability to give an extempore decision is the “quality of legal practitioners appearing for the parties” which varies particularly in magistrates’ courts. Often the practitioners are junior and inexperienced, leaving it to the judicial officer to conduct their own research before arriving at a decision, thereby necessitating the matter being reserved for decision.

As also pointed out by Justice Kirby, often in magistrates’ courts one or both parties may be self – represented and “unfamiliar with the law”. In such circumstances the judicial officer may have to conduct his or her own research and reflect upon the matter, thereby impeding the delivery of an extempore decision.

As also pointed out by his Honour Justice Wayne Haylen, “in deciding whether or not to deliver an ex tempore decision, it is useful to consider the present caseload and, having regard to the issues involved in the matter, to assess whether there is a risk of having to wait too long before a reserved judgment can be delivered”.

According to a number of experienced judicial officers and commentators the following types of cases lend themselves to the giving of an oral decision:

- “simple procedural and costs matters”, “urgent matters where an interlocutory injunction is sought and delay might cause irremediable prejudice” and cases...
“where the facts, issues, arguments and law are clear enough” and the judicial officer has “reached a decision and formulated reasons and [does] not think there is anything to be gained by reflecting on either”;12

- “interlocutory applications and simple appeals from magistrates” that consume “minutes or hours rather than days”;13
- “pre-trial applications (whether civil or criminal), “urgent matters” and “short hearings where there is no factual dispute (e.g. appeals)”;14
- sentencing cases in criminal matters – even of a complex nature – in magistrates’ courts and intermediate courts’;15
- “short, non-complex matters” whether “the issues are of fact or of law”;16
- cases where “an extempore judgment is virtually a necessity, for example rulings on objections or on a ‘no case’ submission in a criminal trial”;17
- “bail, interlocutory and summary applications (using those terms expansively)”;18
- “interlocutory applications…where the facts are not largely in contest or where the argument is confined to whether or not a particular principle applies in the circumstances of the case” as well as “cases where the facts may be lengthy but once established, the applicable legal principle is not in doubt”;19
- cases where the judicial officer “is confident of the result and confident that one can give acceptable reasons for that result either immediately or after a short preparatory period (say, an hour or two, or perhaps a little more)”;20
- cases where “reflection on [the] evidence [does not] assist on matters of credit” and “when the facts are fresh in [one’s] memory and witness accounts and demeanours are fresh in [one’s] mind [such that] delay inhibits rather than enhances the judgment writing process”.21

It follows from the above list of examples that a decision should not be delivered orally, but reserved “if the factual issues or legal principles are complex, there has been a lengthy trial or there are serious credibility issues to be determined”.22 Cases with “a large volume of evidence or complex evidence [also] tend to be unsuitable for ex tempore judgments”.23 If the judicial officer does not “have a firm view as to the outcome (albeit, perhaps, subject to working out matters of detail and calculation)...the case is not suitable for an ex tempore judgment”.24

One commentator has recommended that it may be wise not to attempt to give an oral decision in an area of the law with which the judicial officer lacks familiarity or sufficient expertise.25

For reasons that are self - evident it is imprudent to give an oral decision “where the case is a novel one or is a test case”.26

Although most interlocutory applications are suitable for oral decisions, some interlocutory applications “are of a similar substance and complexity to a final hearing, and of similar importance to the rights of the parties; in which case they may need to be addressed similarly to final hearings”27 and made the subject of a reserved written decision.

The Honourable Justice Peter Young AO offers the very sound advice that if “the hearing has been emotionally charged it may be better to reserve the decision until

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the parties or their lawyers have calmed down”. Similarly, his Honour suggests that it is “unwise to give an ex tempore judgment where there has been unequal representation of the litigants” or “where the judge feels that both counsel performed inadequately”. The decision as when to deliver an oral decision requires a considerable degree of judgment and emotional intelligence.

It is extremely helpful for a judicial officer to bring a positive mindset to every matter that he or she is due to hear and determine. Describing that mindset, Dr Elms recommends approaching “each case, no matter its complexities, idiosyncrasies and length, as if one were intending to deliver an unreserved judgment at its conclusion”. However, it follows that if at the end of trial or hearing the judicial officer does not have a comfortable satisfaction or a sufficient level of confidence to deliver an extempore decision he or she should revert to the default position of reserving his or her decision.

One commentator has observed that “it is best to keep an open mind as to whether the matter is suitable for ex tempore decision” and “in circumstances where the case, on first reading appears suitable, but at the hearing turns out to have unexpected complexities [one] can always change [their] mind and reserve judgment”.

When deciding whether to deliver an oral decision it is important not to be caught up in the perfectionist trap. It may be difficult to escape the trap of perfectionism, but an extempore decision does not have to be “word perfect”, and to attain the standards of excellence expected of a written judgment of a superior court. It does not need to contain elaborate reasons for decision. It is important not to allow an urge to give the perfect decision to stand in the way of delivering an oral judgment. As will be explained later, an oral decision only has to meet certain minimum requirements. It is important to bear that in mind when deciding whether to give an oral decision.

10.3 Preparing For An Oral Decision.

As observed by a number of commentators, the key to being able to deliver an oral decision is preparedness, the prerequisite for which is preparation both before and during the trial or hearing.

- Preparation Prior to the Hearing or Trial

As pointed out by a very experienced judicial officer, “the more preparation before the hearing the easier it is to deliver oral judgments”.

A good starting point is to acquaint oneself with the nature of the case and the issues that are to be determined at the hearing or trial. This entails reading all the documentation and materials that are available before the hearing or trial commences and analysing the material.

In a civil case, it is helpful, with a view to defining the issues, to read “the entirety of the court file” and in particular to look at “the pleadings and/or application and response, although on many occasions the issues will either have modified from the

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documentation or simply reflect oral applications”. 40 Similarly, as recommended by her Honour Judge Felicity Davis: 41

Read ahead - read all the affidavits (if they are to be tendered), statements and submissions (if filed).

Such pre-trial reading will assist in identifying the issues that the court is required to determine. Once the issues have been identified, “confirm the issues with counsel at the outset of the hearing”. 42 This is very sound advice as the court and the parties must be “ad idem” in relation to the matters in dispute – otherwise the judicial officer will not be adequately equipped to deliver an oral decision at the conclusion of the case, and may have to postpone his or her decision to clarify the issues that are to be determined. 43

It is important for the judicial officer to be armed with a working copy of the pleadings in a civil proceeding so that the state of the pleadings can be confirmed before the hearing commences, and to deal with any amendments to the pleadings sought by a party or both parties. 44

It is also helpful, in advance of the trial, to glean from the available material those facts which are not in dispute so as to narrow the facts that are required to be determined. 45

Pre-trial research also has its benefits: 46

Research any legal issues which have been identified. Read in advance any authority which either counsel or you identify as being relevant. Have that case with you for the hearing so that you can refer to it when counsel raises it, or you can raise the case with counsel if they have not identified it in their submissions. Mark up any relevant passages for reference during the hearing or when giving your reasons.

In a similar vein, if the judicial officer is not familiar with the particular jurisdiction or specific area of law or legislation to which the case relates 47 it is essential to research that particular jurisdiction, area of law or legislation before embarking upon the hearing in order to be adequately acquainted with the subject matter of the case. 48

His Honour Judge Richard Keen suggests that it may be helpful in most cases to prepare before the hearing a chronology, which can always be “added to during the course of the hearing”. 49

Prior to the trial, it may also be “useful to make a list of headings indicating matters essential for the decision” including “the legislation under consideration, the issues to be decided, the legal principles applicable, the principles upon which a discretion might be exercised and the orders to be made, especially if there is a possibility of some significant departure from the orders sought”. 50

It is also recommended that the judicial officer, if possible, “draft some reasons in writing before the hearing, leaving gaps for details on issues about which [findings are required to be made]”. 51 Furthermore, “it is a good idea to make a list of potential
findings”; though “this will usually only be possible where there is evidence on the papers provided …before the hearing, for example on an appeal or for a sentencing”.52

The Honourable Justice David Hodgson AO recommends that if the judicial officer has time before the hearing in a civil case to make notes in relation to the following matters:53

- the identity of the parties and the nature of the relief that is sought;
- a “concise narrative of facts relevant to the issues to be determined which are not in dispute”;
- relevant statutory provisions and other written instruments; and
- a “list of issues to be determined” and the order in which they are to be determined.

The Honourable Justice Arthur Emmett offers the following helpful advice in terms of facilitating the oral decision-making process:54

One should educate practitioners who appear regularly before the court to ensure that they make one’s life easier by providing the court in advance with the materials that you want, in a logical form. One’s task will be easier if a brief outline of the submissions has been provided in advance, even if the outline is no more than a list of the topics that are to be addressed by counsel.

His Honour Judge Richard Keen suggests that it might be helpful to write down in separate sections of a notebook the issues that have to be determined so that comments may be added (to those sections) “dealing with any questions that may arise so that these may be ventilated with counsel at the hearing”.55 His Honour also recommends inserting appropriate headings and allocating sufficient space to each issue in order “to note the evidence relevant to that issue, observations on the evidence (including on witnesses and credibility), the submissions made at the hearing and analysis and conclusions”.56 His Honour says that “the value of headings is that they minimise the risk of overlooking or omitting to address an essential issue at the hearing”.57

It is also recommended by his Honour that the nature of the relief being sought be identified prior to the hearing.58 If more than one form of relief is being sought, then each form of relief should be noted on a separate sheet of paper and any other alternatives that may be open should be considered.59 His Honour recommends that in relation to each form of relief being sought comments should be made about matters to be raised at the hearing, leaving enough space to note the parties’ submissions.60

- **Preparation During the Course of the Trial or Hearing**

Preparing for an oral decision is an ongoing process and continues during the course of a hearing or trial.

Even if there are pleadings in a civil matter, it will not always be apparent on the face of those pleadings what the issues are. This is commonly the case in magistrates’
courts where one or both parties are not legally represented; but the issues may also not be readily identifiable where both parties have legal representation.

In some instances, the manner in which the parties intend to conduct their respective cases – including the witnesses who are to be called to give evidence and the substance of their evidence and which party is to call evidence first - will not be known to the presiding judicial officer in advance of the hearing or trial.

Finally, but of no less significance, much of the information that is needed for the court to deliver an oral decision will only become available after the trial has begun, and will continue to unfold until its completion. It is imperative to “keep one’s eye on the ball”, which means focusing on the evidence as it is presented to the court, and digesting the evidence in light of the issues that need to be determined.

His Honour Deputy Chief Magistrate Peter Lauritsen stresses the need to identify the issues – whether factual or legal at the start of the hearing or trial – if there is any doubt as to the issues; and in the event of uncertainty to require the parties to identify or clarify the issues. Identifying and understanding the issues “helps to manage the case” and “creates reference points” that enable the presiding judicial officer to “see the significance of pieces of evidence” and to “understand why a piece of evidence is given or a witness is called”. Understanding the issues is thus “fundamental to giving an oral decision”.

The start of the trial or hearing is also the opportune time to ascertain whether there is any common ground between the parties in terms of any of the factual or legal issues that are to be determined by the court that may not have been manifest prior to the commencement of the trial or hearing.

If it is not already known, the presiding judicial officer at the commencement of the hearing or trial should “investigate how the parties intend to conduct their respective cases” and to establish which party will give evidence first and “which witnesses are to be called and what they will say”. This not only assists in managing the case, but foreshadows the evidence the court is about to hear and its relevance to the issues that the court must determine.

His Honour Deputy Chief Magistrate Peter Lauritsen emphasises the importance of understanding the evidence and appreciating a particular piece of evidence in civil trials; and hence the need on occasions to seek “clarification in that regard”. His Honour goes on to say that it is “permissible to ask counsel why he or she is asking certain questions” and necessary to read each exhibit when it is tendered and inquire as to “its significance if that is not apparent.”

As a number of experienced judicial officers have observed, good notetaking during the course of the hearing is essential if the judicial officer is to give an oral decision either at, or shortly after, the conclusion of the hearing.

Experienced judicial officers provide the following guidance as to how detailed one’s notes should be and the uses to which those notes are put in the oral decision – making process:

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• It is essential to make “careful notes during the course of the evidence and argument so that the evidence and contentions can be fairly reproduced”;

• Try to take verbatim notes during the hearing, making notes on, or amendments to, draft reasons (addressing the relevant issues) that one has prepared prior to the hearing;

• It is necessary to have “fairly complete notes at the end of the hearing or shortly thereafter in order to give an oral judgment”;

• “Take a very detailed note of evidence and submissions largely as an aid to [one’s] concentration and to assist in the process of implanting them in [one’s] short term memory”;

• Make a point of “noting important answers by a witness word for word so that [one] can quote them verbatim in the decision”;

• Note taking should be structured as that will make “the formulation of [reasons for decision] much easier and will aid counsel and the parties to understand them”;

• Even if counsel does not take a structured approach to “the issues through a logical sequence” notetaking of the arguments should be ordered so as to be easily recalled “when the time comes to deliver the decision”;

• “In a practical sense it is a good idea during the hearing to make notes which will be at least a key to the outline of the reasons which [are to be delivered] so as to give them some structure”;

• Make “rough notes to be used as the outline of the decision” during the hearing in addition to those made prior to the hearing;

The following suggestions have been made by a number of experienced judicial officers concerning the methodology of note-taking:

• Divide a notebook into two columns: “on the left summarise (and quote where necessary) the evidence and on the right make comments opposite the relevant piece of evidence such as ‘this count two but see the evidence of X at Y contesting this’; ‘primary evidence is here’; ‘defence of Z raised here’; ‘good witness – confident unshaken’;

• “Keep two notebooks on the bench. In one, take detailed notes as each witness gives evidence. Use double spacing so that one can add any comments as the evidence is adduced or when organising notes to prepare a decision. Keep the parties’ submissions on a separate sheet to notes, again using double spacing so that additional notes may be added. The second notebook is reserved for decision writing, which may begin during the hearing if the issues crystallise quickly and it becomes clear that one will be able to give an extempore decision”;

• As documentary evidence can have substantial probative value in a trial or hearing make notes in relation to such evidence;

• Mark working copies of documentary evidence with observations and “highlight passages referred to and relied upon by counsel using a different colour for each party” so as to be able “readily identify the relevant passages for later recall”;

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• “On sheets headed ‘Facts’ and ‘Law’ respectively, progressively note essential matters which must be addressed as you listen to the evidence and submissions. Progressively place in a hierarchy of relevance the items noted on your sheets by numbering them. Prepare brief draft answers to the questions: why do I prefer one view over another, why do I reject or accept a piece of evidence, why do I reject or accept a submission. Annotate your notes with your immediate reactions and comments. This is a crucial internal commentary which will help you to frame your decision when you review the notes.”

• During the trial or hearing make notes of evidence and submissions considered to be significant and that may feature in an oral judgment; and “prepare a numbered list of issues and note in the margin the number of the issue to which particular evidence and particular submissions relate”;

• If the case raises multiple issues, “make notes on a separate sheet of paper for each issue” – resulting in “several pages of thorough notes” which can be “arranged in an appropriate order” prior to delivering an oral judgment;

• In relation to trials or hearings that take place over more than one day, “at the end of each day’s hearing review your notes and distil/summarise, in short and precise sentences, the matters which are vital to address”;

• In relation to part heard trials or hearings make “use of the intervening period to prepare notes for an oral decision.”

It will be seen from these suggested methodologies that notetaking during the course of a trial or hearing may serve the purpose of not only recording the evidence and assisting in the fact-finding process, but also providing a framework for the delivery of an oral decision. With that dual purpose in mind, it is recommended that notes taken of the evidence and submissions be kept separate from “notes which are the framework of oral reasons.”

There are other important matters that a judicial officer should attend to, or address, during the course of a trial or hearing in anticipation of giving an oral decision.

As pointed out by His Honour Judge John McGill, the judicial officer should always be alert, keeping one’s “eye on the ball.”

If you spot a point which everyone else seems to have missed the important thing is to say so during the hearing. There may be a good reason why the point has not been raised, or the parties may want the opportunity to make submissions on it, or to give the point fuller consideration themselves before finalising the hearing. Do not save the point for exposure for the first time in your reasons or that will create problems of procedural fairness.

Of equal importance is the need for the judicial officer to take control of the proceedings.

Whilst counsel should be left to argue the case as he or she decides is forensically most favourable, generally I find it helpful to confine counsel’s argument to one issue at a time before moving on to the next recognising that there may be some overlap or it may not be possible in a trial where the evidence is to be lead. By requiring each counsel to do this, I am able to bring together in one place all of the

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relevant material on a particular issue and have a better chance of keeping them
on track.

His Honour Magistrate Matt McLaughlin stresses the need for the judicial officer to

interact with counsel during the making of submissions:

Get involved in the closing address of each party. If the issues which are troubling

you and which counsel is not mentioning, then ask counsel to submit on the point.

If counsel makes a submission you disagree with or do not follow, tell them you

are having difficulty accepting their submission and invite further comments. The

closing addresses are an excellent opportunity to be reminded of the strengths

and weaknesses of a case; important pieces of evidence; relevant case law, and

so on. To listen in silence to addresses is often to miss an opportunity to thrash

out the real issues.

- Preparing for an Oral Decision at the Conclusion of a Trial or Hearing

A critical stage in the oral decision-making process is reached at the end of a trial or

hearing.

The Honourable Justice Peter Briscoe Land makes this recommendation:

Before delivering an oral judgment I often adjourn for an hour or more or overnight
to reflect on what decision should be made and on the reasons. I also write or
refine a skeleton outline of the judgment.

His Honour says that “it is useful to have a working copy of any written submissions
and important exhibits that can be freely marked”. Prior to delivering an oral
decision, his Honour places before him the following:

• “a list of the written evidence (exhibits and affidavits)
• the written evidence
• any written submissions
• the transcript (if available) or his notes of oral evidence and submissions
• where time permits a written skeleton outline of the judgment.”

By way of further preparation, his Honour marks numbers on parts of his notes
indicating the order in which it is proposed to address the relevant issues. For example
“number 1 may signify issue 1 and the evidence and submissions relating to issue 1”. Ready access to relevant documents and legal authorities is critical. His Honour
recommends placing coloured postal notes on “significant parts of the documents and
cases” to which reference is to be made and highlighting or otherwise marking
important parts of notes or working copies of documents” to which reference is to be
made. Finally, his Honour suggests placing “documents and cases on the bench in
such a position that are accessible” for the purpose of reference.

His Honour Judge Richard Cogswell makes the following additional suggestions:

It can be helpful either on the bench or during a short adjournment to take a fresh
page and write the headings that you need to address during the course of the
judgment. These might be quite fundamental for a new judge: issues; oral

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evidence and exhibits; legislation and case law; competing arguments; findings of fact; conclusions of law on each issue. It’s a helpful discipline to do such a list to ensure that you don’t overlook something obvious.

His Honour goes on to say: 101

In the quiet process of reviewing the arguments and reaching a conclusion about them, I usually note my conclusion in a different coloured pen and in the margin, supported by my reasons.

The Honourable Justice Arthur Emmett gives the following helpful advice in relation to document cases: 102

Where an issue depends upon a series of written communications, whether they be letters, emails, diary notes or whatever, it will clearly be essential to ensure that, before you commence giving your reasons, you have all of the documentary material in an appropriate order, preferably chronological or at least in the order in which you are going to refer to the documents in the course of your reasons. Where you have the luxury of having the material in advance, it is essential that you organise the material into a logical form so that you know where it all is when you come to deliver your reasons. That may require preparatory work in advance, particularly where there are considerable numbers of documents involved.

His Honour Justice Wayne Haylen recommends taking a short adjournment or, if possible, overnight prior to delivering the judgment in order to satisfy the parties that you have given proper consideration to the matter and to give yourself the opportunity to revise and improve the judgment. 103

Finally, but not least, the Honourable Justice Peter Young AO, Supreme Court of NSW, gives this very important advice: 104

What one should never do, except in the most obvious case or in the most exceptional circumstances, is to announce the result and say that you will give reasons later. This removes your ability to change your decision if you later think of some fresh point that might affect the result.

10.4 Structuring An Oral Decision

A number of experienced judicial officers have made very sound recommendations as to how one should organise and structure an oral decision.

Firstly, many judicial officers have found it helpful to use templates and precedents to structure their oral decisions in relation to both civil and criminal matters.

The Honourable Justice Catherine Holmes recommends that “if you are in a position where you often have to produce a particular type of oral decision think about preparing a format for regular use with headings to give structure and perhaps incorporating any legal principles or statutory provisions that ordinarily require reference”. 105

Similarly, her Honour Judge Felicity Davis says: 106

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It is a good idea to make use of templates and precedents. You may find that you are often dealing with similar applications and you are able to develop a template dealing with the legal principles applicable to a particular topic, for instance, the principles relevant to sentencing for a particular type of offence.

However, notwithstanding the advantages using an oral judgment template, a judicial officer should avoid an overly prescriptive or rigid template as one might lose sight of the issues that need to be determined in a specific case. As pointed out by his Honour Magistrate Martin Flynn, the Honourable Justice Peter Briscoe NJCA recommends the following structure (or template) for an oral decision in a civil case:

- An introduction explaining what the proceedings are about and contextualising the issues to be determined by the court;
- Formulate the issues to be determined in a logical sequence;
- Headings for each issue and under each heading a brief reference to the relevant evidence and law, the unsuccessful party’s position and the flaw in that position and determination of the issue. In relation to questions of fact refer to significant evidence of the party (either by way of affidavit or oral evidence) who carries the onus of proof followed by the opposing party’s evidence. State which evidence is to be preferred and why and try to find “objective documentary evidence for the determination”.
- Conclusion and orders.

His Honour Justice Wayne Haylen stresses the importance of stating at the beginning of an oral decision “the issues” and ensuring that “the factual and legal issues disputed by the parties are resolved at the conclusion of the decision.”

His Honour Federal Magistrate Philip Burchardt suggests setting out “enough facts, if possible, that are not in dispute which indicate the nature of the dispute” and referring to “as much of the parties’ arguments as are necessary to determine the dispute” and finally expressing one’s view as to “the merit of the competing arguments” before announcing the decision.

The starting point for her Honour Judge Felicity Davis is AK v The State of Western Australia (2008) 232 CLR 438 at 468 where Heydon J discussed the essential requirements of an oral decision:

Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law to the facts found, and to explain how the verdict followed.

As to the format of the decision, her Honour suggests that one refer to the matter or application before the court, setting out “who did what to whom, the issues and the
applicable legal principles”. When making factual findings, her Honour says that there is no need to elaborately recite the facts. One should commence with the undisputed facts and then when dealing with each piece of evidence make other findings of fact on disputed issues. Her Honour then says that the judicial officer should then apply the law to those factual findings. Finally, her Honour goes on to stress the importance of addressing the unsuccessful party’s position, providing a clear explanation as to why that position was not accepted and the reason for arriving at one’s decision.

The Honourable Justice George Fryberg recommends keeping the structure of an oral decision “simple and standard”, and suggests the following structure, which judicial officers may find helpful when delivering an oral decision:

- Nature of proceedings
- Statement of undisputed facts
- Findings on any disputed facts
- Statement of relevant law
- Findings on disputed points of law
- Application of law to facts
- Disposition of the proceedings

Within this framework, his Honour recommends deciding no more than is necessary for the resolution of the case” and identifying “specifically the relevance of any statements of law and [expressing] them with no more generality that is necessary for the case”.

The Honourable Justice David Hodgson AO says that “ex tempore judgments should be organised in the same way as reserved judgments”, and in relation to a civil matter should include:

- “a brief statement explaining what relief is sought”;
- “a concise narrative of facts relevant to the issues to be determined, which are not in dispute”;
- “statutory provisions and other written instruments” which are to be discussed;
- “a list of the issues to be determined” and a determination of each issue in turn (by referring to relevant evidence, commenting on the credibility of witnesses and noting “the contentions of the parties or of least of the party against whom the issue is to be resolved”, followed by one’s decision and reasons; and
- a conclusion, drawing “together the result from the resolution of issues and [dealing] with the orders to be made and associated questions such as costs”.

The recommended structure for an oral decision in criminal matters is broadly the same as for civil cases with some modifications that are appropriate to the adversarial criminal justice system.

His Honour Magistrate Matt McLaughlin says that in framing an oral decision at the end of a trial or hearing in a criminal matter “the most important aspect of [the] decision is its structure” and a judicial officer should address the following:

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• the facts which are agreed;
• the facts in dispute and the different versions;
• which disputed facts are accepted or rejected and why;
• the applicable law
• applying the accepted facts to the law; and
• the decision itself.

However, he says that there is no need to address the topic in this order as long as all topics are dealt with in the decision.122

Finally, his Honour stresses the need for the judicial officer, performing the hybrid function of judge and jury, to reflect in an oral decision that he or she has given themselves the directions that a judge is required to give in a jury trial and to refer to relevant aspects such as defences raised on the evidence.123

His Honour Magistrate Robert Pearce suggests structuring an oral decision in the same way as one would structure a written judgment:124

• explain what the case is about;
• identify the elements the prosecution must prove;
• identify and state the facts that are not in dispute and find those facts;
• state the issues and facts that are in dispute;
• refer to the evidence relevant to the disputed issues;
• state why evidence is accepted or rejected and make findings of fact;
• apply those facts to the law, whether it be statute or case law;
• refer to any arguments advanced by the unsuccessful party and why those arguments not accepted;
• announce the result.

Her Honour Magistrate Tina Previtera recommends the following series of headings for framing an oral decision at the conclusion of a trial or hearing in a criminal matter:125

• the criminal charge;
• onus of proof;
• standard of proof;
• witnesses;
• issues not in dispute;
• issues in dispute;
• credit;
• findings of fact;
• the law;
• application of the law to the facts;
• conclusion.

In addition to conducting criminal trial or hearings, judicial officers sentence offenders.

His Honour Magistrate Peter Dare uses a “sentencing template” as follows to assist him in delivering oral decisions in criminal matters:126

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• the charges and the plea;
• stage at which plea entered;
• quantification of discount (if any) for the plea;
• recital of relevant facts in relation to the offending;
• maximum penalty;
• assessment of criminality;
• criminal history of the offender;
• reference to pre-sentence report (if one) or any other relevant report;
• plea in mitigation and submissions from defence counsel and prosecutor;
• imposition of the sentence having regard to legislative requirements and relevant sentencing principles.

His Honour Judge Roy Ellis adopts a similar approach, using “templates or short cheat sheets” that provide the structure for an oral decision in sentencing cases.127 His Honour also finds it helpful in cases where psychological, psychiatric or pre-sentence reports have been obtained to use certain headings such as “Background”, “Attitude to Offence”, “Psychological Testing” and “Mental Health Issues” in order to ensure that all the information under those headings has been considered as part of the sentencing process and to give structure to the oral sentencing decision.128

His Honour Magistrate Robert Pearce says that in relation to sentencing decisions “the amount of detail will vary according to the circumstances”. His Honour recommends the following general structure for sentencing comments:129

• state the charge/s and whether the defendant has pleaded guilty or been found guilty following a hearing;
• outline mitigating factors: plea of guilty, remorse, amends, good character and prospects of rehabilitation;
• refer to relevant personal factors such as age, employment and family;
• state the existence or absence of prior convictions;
• state any need for specific or general deterrence;
• comment on minimum or maximum penalties; and
• announce sentencing orders.

The salient point that can be taken away from the above recommended structures for an oral decision in both civil and criminal cases is that there is no fixed single format for an oral judgment – though it must possess some essential characteristics. However, each of the structures recommended by the various judicial officers is based on their own experience and what has worked best for them when delivering an oral decision. At the end of the day, it is for the individual judicial officer to decide upon what structure he or she feels comfortable with – of course, guided by the experience and acquired wisdom of experienced colleagues and the essential requirements of an oral decision.

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10.5 Fact-Finding As The Foundation Of An Oral Decision

As observed by a number of commentators in the previous section of this chapter factual findings are an important part of the structure of an oral judgment. It is equally apparent that in many cases the process of judicial decision – making consists of two stages: “fact finding and the application of law”, with “fact – finding [being] the foundation of the application of law”. Therefore, in cases involving legal issues the application of the law to the facts found will also form an important part of the structure of an oral decision as also observed by the various commentators.

The dynamics and methods of fact finding and judicial evaluation of evidence presented during a trial or hearing (including the assessment of the credibility of witnesses) were discussed in Chapter Seven of the Guide. The practical guidance provided in that chapter is designed to assist judicial officers in arriving at factual conclusions for the purpose of giving an oral decision at the end of a trial or hearing.

10.6 The Need To Give Adequate Reasons For Decision

When giving either an oral or written judgment it is not only necessary – as an incident of the judicial process – for the judicial officer to give reasons for his or her decision, but to also give adequate reasons.

What are considered to be “adequate reasons” was discussed in Chapter Nine of the Guide. The practical guidance contained in that chapter is intended to assist judicial officers in determining the extent to which it is necessary in both oral and written judgments to give reasons for findings in relation to matters of fact and law as well as the credibility of witnesses – all of which form part of the structure of an oral decision as noted by the various commentators.

10.7 Delivering An Oral Decision

Having discussed the various steps in preparing to give an oral decision what remains to be considered is the manner in which an oral decision should be delivered.

His Honour Magistrate Martin Flynn suggests that in cases where a party is not legally represented a judicial officer might at the start of delivering an oral decision explain his or her role, which is to make a decision by applying the law to findings of facts based on the evidence. The judicial officer might then tell the parties that having reached a decision he or she will explain the reasons for having reached that decision, and request the parties not to interrupt while those reasons for decision are being given. His Honour also stresses the need for a judicial officer not to lose sight of the fact that he or she has an audience and to try to maintain “eye contact with the people in court”.

In relation to an oral decision where the litigants are present in court, the Honourable Justice Peter Briscoe prefers to “state the result at the end ( rather than at the start as
in a written judgment) because the loser might get the impression of pre-judgment or be stressed by the result yet have to sit patiently in court for a considerable time while the rest of the judgment is delivered; and there is a risk that the winner may not behave altogether appropriately while the rest of the judgment is delivered”.134 This is a very important aspect of the psychology surrounding the delivery of an oral decision and the level of acceptance it receives by the litigants.

The pace at which an oral decision is delivered and the tone in which it is delivered are also of paramount importance. The Honourable Justice Peter Briscoe says that he speaks slowly as this helps him to express himself “better in the more challenging parts of the judgment”.135

Her Honour Judge Felicity Davis says that when delivering an oral decision “it is important to use plain English” and reasons for decision “should reflect the way you would normally speak to the parties in court, as the parties “need to be able to understand your decision”.136 Her Honour recommends that one “avoid adjectival or emotionally language, as this may raise tension levels in the court room and distract you”; and “keep your descriptions as neutral as possible”.137

His Honour Magistrate Robert Pearce says that it is important to use language that the audience of on oral decision can understand, and “the parties should leave the courtroom understanding what the decision is and why it was made”.138 The decision should be as “short as possible”.139

His Honour Judge Richard Keen recommends putting oneself in “the listener’s shoes” and speaking in one’s “own style”- that is “what come [s] naturally (but appropriately) – with no affectation or legalese, but using plain English to achieve clarity”.140 His Honour says “keep it simple, but adhering to the rules of grammar and syntax”.141

The use of short sentences avoiding double negatives is recommended by His Honour Justice Wayne Haylen.142 His Honour says that a judicial officer should try to “think and speak in paragraphs, as this will have the added advantage of allowing later editing of the transcript so that the judgment will be set out and formatted in the same way as a reserved judgment”.143

It is recommended by the Honourable Justice Arthur Emmett that one avoid “long and complicated parenthetical sentences” that might result in one losing their train of thought.144 As his Honour points out, there is no need to rush the delivery of the decision: “it is preferable to formulate each proposition in one’s mind before articulating it”. 145

The wisdom of keeping sentences short is explained by her Honour Judge Felicity Davis thus:146

I have on occasions found myself during lengthy oral reasons wondering if I am making sense and worse of all, trying to remember how I started a sentence. If
you think you are not making sense, stop, withdraw what you have said and start
the sentence or section of your reasons again, telling the parties that is what you
are doing. Do not be embarrassed if you have to do that – you are doing your job
as best as you can. Do not hesitate to clarify or explain something that you said
erlier, or add to what you said earlier, if you find that there is something you have
overlooked.

The Honourable Justice Lex Lasry says that having embarked upon delivering an oral
decision if one has reservations about the correctness of the decision do not “sail on
regardless”.147 His Honour goes on to say, as Justice Michael Kirby points out, “an
honest judicial officer will pause, may request further submissions and perhaps
adjourn to consider it”.148

The importance of taking one’s time when delivering an oral decision is also stressed
by his Honour Justice Wayne Haylen who says never “to feel the need to rush”, as the
parties “will understand the difficult nature of the task”.149

A number of experienced judicial officers have stressed the importance of delivering
an oral decision in an appropriate manner and tone.

The Honourable Justice Lex Lasry recommends the use of “the active voice and the
first person”.150

His Honour Deputy Chief Magistrate Peter Lauritsen considers the style of Lord
Denning to be a good model for stating oral reasons for decision, and says that
reasons for decision should be “conversational in tone, speaking to the parties” and
adopt an “oral narrative style”.151

Delivering an oral decision efficiently and effectively in a professional and judicial
manner requires practice and experience. In that regard, his Honour Judge Frank
Gucciardo recommends developing a number of techniques in order to improve the
delivery of an oral decision, such as learning the “best ways to manage confidence
and anxiety issues”, doing “breathing exercises” and taking “moments to silently
concentrate”.152

10.8 What Is Not Part Of An Oral Decision

The preceding discussion focused on the structural elements of an oral decision, and
what should be included in the decision. It remains to consider what is not included in
– and generally forms no part of - an oral decision.

As pointed out by Luke Beck, “in assessing whether a judicial officer has complied with
the duty to give adequate reasons, judicial comments during argument are not
considered”, as such comments “do not form part of a statement of the reasons for
decision”.153

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However, as pointed out by her Honour Judge Felicity Davis “statements made or views expressed during submissions” are capable of comprising part of the reasons for decision if they are subsequently adopted in the reasons for decision: see *AK v The State of Western Australia* [2008] 232 CLR 438 at 446, 468 and 483. Her Honour goes on to say:

If the matters you have stated to counsel in the course of argument form part of your reasoning, you will need to include these in your reasons for decision. However, there can be occasions when it is appropriate to expressly adopt what you said during an exchange with counsel in order to save time and repetition. In that case it is essential to state in your reasons that you have made the relevant finding for the reasons which you outlined during submissions, preferably with a little elaboration so there is no doubt what the reasoning was. This should never be done in respect of significant findings.

### 10.9 Amending An Oral Decision

His Honour Justice Wayne Haylen suggests taking “the opportunity to read the transcript version of the decision”, noting that “often the transcript does not totally reflect all that was said and sometimes there are sections that may not be well expressed”. His Honour says that “it is entirely proper to correct an ex tempore judgment to clarify its terms, but there can be no alteration to the thrust and substance of the judgment”.

In a similar vein, the Honourable Justice Lex Lasry says that ex tempore rulings can be revised without altering the pith and substance of the decision, citing *Bar-Moordecai v Rotman* (2000) NSWCA 123 at [195]:

After all, an ex temporary [sic] judgment is not always easy to deliver perfectly in all respects on the spur of the moment; there must be corrections which need to be made so as to give the real meaning of the judge, and he or she is perfectly entitled, it seems to me, not only to correct mistakes but to alter words which do not express his intended meaning at the time when he uttered them.

However, this is to be compared with what the Honourable Justice Peter Young AO says about the scope to amend an oral judgment:

…once you have given a judgment in court, you cannot alter it. When revising the transcript of an ex tempore judgment you can add an authority or two and correct minor grammatical errors like split infinitives, but that is really as far as you can go even though, with hindsight, some concepts could have been better expressed.

On a different but related aspect, his Honour Magistrate Kym Millard gives the following advice:

Where an urgent ruling is required I find it helpful to give the parties a brief analysis of my decision and a synopsis of the reasons, and then reserve the right to publish more detailed reasons. This is particularly relevant if the parties need an
interlocutory order such as an injunction or a restraining order where delay in giving a decision will only create difficulties. It is possible to then go away and give more detailed analysis after looking at all the material and in particular authorities that have been considered in the ex tempore process, but not referred to in any detail in the ex tempore remarks.

3 His Honour Magistrate Philip Burchardt NJCA “Oral Decisions”, p 9
4 The Honourable David Lloyd and his Honour Tom Wodak NJCA “Oral Decisions”, p 2.
6 Dr Elms says that “one of the most difficult decisions a judicial officer will ever be required to make is whether or not to reserve, and this is at least one decision which does have to be made ex tempore”: Dr Elwyn Elms “Ex Tempore Judgments” A Matter of Judgment: Judicial Decision- Making and Judgment Writing” Judicial Commission of NSW Editor Ruth Sheard. See also His Honour Magistrate Robert Pearce NJCA “Oral Decisions”, p 82: “The first decision is whether there should be an oral decision at all”.
7 Justice Michael Kirby n 5 at 225 – 226.
8 Justice Michael Kirby n 5 at 226.
9 Justice Michael Kirby n 5 at 226.
10 Justice Michael Kirby n 5 at 226.
12 The Honourable Justice Peter Biscoe NJCA “Oral Decisions”, p 3. For a similar view see the Honourable Justice Arthur Emmett NJCA “Oral Decisions”, p 31 where his Honour says that in cases where the issues are readily discerned and the judicial officer has formed a firm view, it would be better for all, including the judicial officer, to give a decision with reasons straight away, while the argument and the reasons for the conclusion are still in the mind of the judicial officer”.
20 The Honourable Justice David Hodgson AO NJCA “Oral Decisions”, p 49. See also the Honourable Justice Lex Lasry NJCA “Oral Decisions”, p 60 whose advice is that a judicial officer should deliver an ex tempore decision when he or she is “sufficiently confident of the result”. See also his Honour Magistrate Kym Millard NJCA “Oral Decisions”, p 77.
26 The Honourable Justice Peter Young AO NJCA “Oral Decisions”, p 98.
28 The Honourable Justice Peter Young AO NJCA “Oral Decisions”, p 98.
29 The Honourable Justice Peter Young AO NJCA “Oral Decisions”, p 98.
30 Dr Elwyn Elms “Ex Tempore Judgments” n 6.
31 As pointed out by his Honour Justice Wayne Haylen NJCA “Oral Decisions”, p 45, deciding to deliver an oral decision “is a personal decision and one with which the judicial officer must feel comfortable”. See also his Honour Judge John McGill NJCA
“Oral Decisions”, p 69 where the author says that a judicial officer “should not embark on an immediate decision unless [he or she is] confident at the beginning that [they] know what the decision will be”.


33 His Honour Judge Richard Cogswell NJCA “Oral Decisions”, p 12. Nor does an oral decision have to be a “work of art”: her Honour Judge Felicity Davis NJCA “Oral Decisions”, 20. See also the Honourable Catherine Holmes Supreme Court of Queensland NJCA “Oral Decisions”, p 55: “Remember that you are not producing a work of art”. See also Justice Lex Lasry NJCA “Oral Decisions”, p 60 who says: “The best advice I was given when I began as a judge was that I was a trial judge and I was not writing for posterity. For some of our colleagues that is a difficult concept to accept, but to accept it aids the efficiency of delivering ex tempore rulings”.


35 Indeed, oral decisions can be an antidote to perfectionism as experienced by his Honour Judge Richard Cogswell NJCA “Oral Decisions”, p 12.

“I have to confess that one reason I usually (but not exclusively) favour delivering oral judgments is because of my personality. I found early in my judicial career (which readers should bear in mind is less that four years) that if I was preparing written reasons to hand down then I kept modifying the document until it was presentable and read well. This perfectionist streak in me is not a good practice to encourage: I am sitting in the District Court, not the High Court”.

36 Primarily the decision should be well-reasoned and well structured: Chief Justice Robert French AC NJCA “Oral Decisions”, p 1.


38 His Honour Magistrate Martin Flynn NJCA “Oral Decisions”, p 36.

39 The Honourable Justice Alan Blow NJCA “Oral Decisions”, p 7. See also his Honour Richard Keen NJCA “Oral Decisions”, p 57. His Honour also suggests preparing a bundle of documents that the judicial officer may mark with “any comments that arise in preparation and with counsel’s submissions” and his or her “observations at the hearing” ( p 57).


41 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 21. See also his Honour Federal Magistrate Warren Donald NJCA “Oral Decisions”, p 26: “In many jurisdictions it is possible, prior to a hearing, to access affidavits detailing the intended evidence of the parties and often listed on an “agreed list of documents”. After reading those documents, it should be possible to anticipate most issues likely to arise in the course of the hearing”. See also the Honourable Justice Arthur Emmett NJCA “Oral Decisions”, p 32 as to recourse to pleadings, affidavits and written submissions in advance of a trial or hearing; His Honour Justice Wayne Haylen NJCA “Oral Decisions”, p 46 as to the assistance provided by reading affidavits and other material prior to the hearing in order to identify the essential factual and legal issues. If the factual and legal issues are “not apparent from the papers”, then “the parties should be asked to articulate what they are”: His Honour Judge Richard Keen NJCA “Oral Decisions” pp 56-57. For possible limitations on the use of affidavits as a source for identifying the issues see the Honourable Justice David Hodgson AO NJCA “Oral Decisions, pp 51-52:

“if one doesn’t have affidavits or witness’ statements, but only pleadings, it may not be possible to get very far with the framework of facts that are common ground or clearly established; but if one has affidavits or witness’ statements one can progress a fair way to doing this”.

See also his Honour Judge Michael Shanahan NJCA “Oral Decisions”, p 93 who also recommends reading agreed statements of facts and medical and psychiatric reports which are to be tendered at a sentencing hearing.

42 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 21. As pointed out by the Honourable Catherine Holmes NJCA “Oral Decisions”, p 53: “Don’t count on the legal representatives not deviating from [the pleadings], which may present its own problems”.

43 Furthermore, it is not unknown for cases to be decided on the basis of a misunderstanding of the issues, resulting in unnecessary appeals.


45 His Honour Federal Magistrate Burchardt NJCA “Oral Decisions”, p 9. See also his Honour Judge Richard Keen NJCA “Oral Decisions”, p 56: “If there is a dispute as to the facts then those that are not in dispute I note in a notebook for use at the hearing. So it should be possible before embarking on the hearing to set out the story and, if necessary, how the matter has got to the stage where it is”.


47 This is not uncommon in multi-jurisdictional courts such as magistrates’ courts.

48 His Honour Magistrate Kym Millard NJCA “Oral Decisions”, p 76 who recommends familiarising oneself with the relevant legislation and recent authorities in order to discuss both with the parties. See also his Honour Richard Keen NJCA “Oral Decisions”, p 57 who stresses the need to have in advance of the hearing “copies or extracts of relevant legislation and rulings of cases prepared”.

I have the opportunity to look at affidavit material and, even better, submissions, in advance, prepare a draft, at least of the facts, and perhaps of some tentative conclusions. To do so will not only be of assistance in delivering a quick judgment, it will clarify in your mind the things you need to ask...if you are able to produce a draft decision in advance on the strength of the written submissions and material that you have already received, leave enough space on the page to incorporate points you need to add as a result of counsel’s submissions.

Kym Millard NJCA “Oral Decisions”, p 21. Her Honour also suggests that “if for any reason you are not able to prepare draft reasons in advance of the hearing, then at the very least you should have a list of headings or a checklist of the matters you need to cover – a ‘road map’ of what you must deal with when delivering your decision” (p 22).


Her Honour Justice Felicity Davis NJCA “Oral Decisions”, p 21. See also the Honourable Justice Catherine Holmes NJCA “Oral Decisions”, pp 54 and 55: “…if you have the opportunity to look at affidavit material and, even better, submissions, in advance, prepare a draft, at least of the facts, and perhaps of some tentative conclusions. To do so will not only be of assistance in delivering a quick judgment, it will clarify in your mind the things you need to ask...if you are able to produce a draft decision in advance on the strength of the written submissions and material that you have already received, leave enough space on the page to incorporate points you need to add as a result of counsel’s submissions”.

Notes can be made about the contents of documentary evidence. I can even use a single word or a few words will be a sufficient reminder of a particular topic on which you can enlarge without reference to detailed notes” (p 22).

Robert Pearce NJCA “Oral Decisions”, p 83: "I keep notes in a hard cover book with numbered pages. I note the evidence and submissions on the right hand page only, leaving the left hand side clear. I find it helpful to use this space to make running notes and comments to myself. In a defended matter the notes are about the issues and evidence as the case proceeds. It may be that a piece of evidence corroborates or is in conflict with another witness. I can make side notes about the credibility of a witness and why I have formed a particular view about him or her. Notes can be made about the contents of documentary evidence. I can even use the space to write bits and pieces as I go that may form part of the reasons later on. These can be helpful prompts in the giving of a decision particularly if there is an adjournment without the case being completed” for forming a particular view about the witness. Also make notes in relation to documentary evidence”. The author’s recommended method can assist in indentifying conflicting evidence and the assessment of credibility and reliability of witnesses. This is consistent with the recommendation made by her Honour Magistrate Tina Privitera NJCA “Oral Decisions”, p 87:

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“Clearly mark in [your] notes inconsistencieis in a witness’ evidence, any inconsistencies between the evidence of a witness and other witnesses, undisputed facts, prior statements, the reliability or probability of the evidence, any relevant demeanour or characteristics of a particular witness which bears upon the issue or reliability of their evidence”.


His Honour Magistrate Robert Pearce NJCA “Oral Decisions”, p 82.


His Honour Judge Frank Gucchiardo NJCA “Oral Decisions”, p 42.


His Honour Judge Frank Gucchiardo NJCA “Oral Decisions”, p 42. See also his Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 74: “If the hearing lasts more than a day it is a mistake to just stop work at the end of the day’s evidence. Before going home I make a point of returning to chambers and putting down some thoughts, sometimes only 10 or 15 lines. Comments about important inconsistencies between witnesses save trawling back through your notes to find that part you vaguely remember. Dot points about things such as strengths and weaknesses in a case; which elements of an offence are not proved etc are often quite plain just after hearing the evidence, but even a day or two later can be difficult to reassemble from many pages of notes. Put your thoughts down while they are fresh and resist the temptation to just go home after all day in court”. See also his Honour Magistrate Martin Flynn NJCA “Oral Decisions”, p 76 who recommends note-taking and summarising at the end of each day in preparation for delivering an oral judgment.


As pointed out by His Honour Judge John McGill, NJCA “Oral Decisions, p 72,” the advantage of prepping a framework as you go is that helps you to ensure that you have covered everything that has come up in the course of the hearing”.


His Honour Judge Richard Keen NJCA “Oral Decisions”, p 58


See also the advice given by her Honour Judge Felicity Davis NJCA “Oral Reasons”, p 22 to the effect that one should take whatever time is needed at the end of the hearing to collect one’s thoughts and make a decision, especially if the hearing has been lengthy or emotionally charged. Her Honour makes the important point that the presiding judicial officer is in charge; and “if you need more time to consider a point, write something out, undertake some further research, or even run something past a colleague, then adjourn so that you can do whatever you need to do”. See also his Honour Magistrate Martin Flynn NJCA “Oral Decisions”, p 36 who says never “feel rushed” and recommends, regardless of how confident one is about the result, “rough out an outline of what you want to say” and “test your reasoning before you deliver your decision”. His Honour says always “consider the alternatives in order to test your reasoning”.


The Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 4. See also his Honour Judge Richard Cogswell NJCA “Oral Reasons, p 12: “I find it helpful to use tabs and highlighters. ... you should mark your notes of the oral evidence and those parts of the evidence that you want to refer to”.


His Honour Justice Wayne Haylen NJCA “Oral Decisions”, p 47. See also the Honourable Justice Catherine Holmes NJCA “Oral Decisions”, p 55 who, in a similar vein, recommends adjourning for a short period. “even if one is completely confident of the decision to be delivered” so as to avoid the impression that the judgment is based on “a prepared set of reasons”. Her Honour Tina Preivetera NJCA “Oral Reasons”, p 87 says that delivering an oral decision immediately may create a perception on the part of the parties and their counsel that the decision was made prior to considering the whole of the evidence.

The Honourable Justice Peter Young AO NJCA “Oral Decisions”, p 98.


Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 21. See also his Honour Magistrate Martin Flynn NJCA “Oral Decisions”, p 36 who says that written templates can be used as “prompts to structure the delivery” of oral decisions. His Honour Magistrate Martin Flynn NJCA “Oral Decisions”, p 36 refers to “many magistrates [suggesting] compiling a file of frequently used quotations” and containing extracts from established authorities.


The Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 5. See also the Honourable Justice Arthur Emmett NJCA “Oral Decisions”, p 33 who says that the structure of an oral decision should commence with an introduction containing “a statement of the question [to be decided] and the background circumstances against which the question has to be decided”. His Honour says that in describing “the factual background against which the decision is being given” it is best to “begin with uncontroversial background material to set the stage for the story that is to be told”. See also his Honour Judge Gucciardo NJCA “Oral Decisions”, p 43 who stresses the importance of ensuring the introduction is “issue driven and foreshadows [the] structure [of the decision]”.


113 His Honour Judge Felicity Davis NJCA “Oral Decisions”, p 22.
114 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 22. See also the Honourable Justice Catherine Holmes NJCA “Oral Decisions”, pp 54-55 who points out that there is no need to “reprise the evidence”: it is sufficient to “set out the issues”, make “essential findings of fact” and state the reasons for arriving at those findings and one’s conclusions on the issues. As also pointed out by her Honour, there may be no need to “refer to all of the submissions but wise to address the loser’s arguments”.

Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 22
117 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 23. See also his Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 73: “While the winner in any dispute is quite happy to simply know he or she is the winner the loser inevitably wants to know why he or she lost”.

The Honourable Justice George Fryberg NJCA “Oral Decisions”, p 40. As to the need for an oral decision to be kept simple see also his Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 73 who says that a “good decision should not be correct in its conclusions”, but it “should be able to be easily followed and understood” and “follow a logical progression”.

The Honourable George Fryberg NJCA “Oral Decisions”, p 40. See also his Honour Judge Frank Gucciardo NJCA “Oral Decisions”, p 43 who says it is important to only relate the facts that are necessary to arrive at a decision and refrain from restating settled law. See also his Honour Kym Millard NJCA “Oral Decisions”, p 77: “Where I rely on texts or case law, I refrain from giving lengthy quotations. I refer to the relevant texts or judgments and endeavour only to address pertinent issues”.

The Honourable Justice David Hodgson AO NJCA “Oral Decisions” p 49. See also his Honour Deputy Chief Magistrate Peter Lauritsen NJCA “Oral Decisions”, p 66 who says: “the structure of [an] oral decision is the same as a written decision” and recommends a similar structure: overview (or introduction); the issues in dispute (the parties’ claims and defences); facts in chronological order (including agreed matters); factual findings; the relevant law and discussion (conclusion based on applying the law to the facts).

118 The Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 75.
119 His Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 75.
120 His Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 75.
121 His Honour Magistrate Matt McLaughlin NJCA “Oral Decisions”, p 85.
123 His Honour Peter Dare NJCA “Oral Decisions”, pp 15-16.
126 His Honour Magistrate Robert Pearce NJCA “Oral Decisions”, p 83

In relation to sentencing matters, his Honour Magistrate Robert Pearce NJCA “Oral Decisions”, p 85 emphasises the importance of engaging the person being sentenced and ensuring sentencing remarks are addressed directly to that person.

130 The Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 5. See also his Honour Federal Magistrate Philip Burchardt NJCA “Oral Decisions”, p 10: “...announcing the result at the beginning may cause an emotional outpouring from a disappointed applicant and impair my delivery of the judgment. It is better in oral reasons for judgment generally to announce the result only at the end”.

The Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 5. See also her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 23 where her Honour who recommends pausing “between each paragraph and whenever you need to find your papers and gather your thoughts, no matter how long this takes”; and if dissatisfied with any words that she has spoken she promptly says she “will start that sentence again”.

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136 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 22. See also his Honour Warren Donald NJCA “Oral Decisions”, p 27 who says that it is important that the parties and counsel can clearly understand the reasoning behind the decision and this understanding can only be achieved by the use of plain language and clear and uncomplicated style.


139 His Honour Magistrate Robert Pearce NJCA “Oral Decisions”, p 85. As pointed out by the Honourable Justice Catherine Holmes NJCA “Oral Decisions”, p 55, it is important not to “say anything you do not need to and try not to repeat yourself” when delivering an oral decision. See the Honourable Justice George Fryberg NJCA “Oral Decisions”, p 40 who recommends that during the course of delivering an oral decision one should avoid quoting at length from affidavits, exhibits, legislation and cases, and only “read aloud the essential bits, not the context”.

140 His Honour Judge Richard Keen NJCA “Oral Decisions”, pp 58-59. See also his Honour Deputy Chief Magistrate Peter Lauritzen NJCA “Oral Decisions” p 67 who advises against the use of legal jargon and encourages the use of clear idioms and metaphors. See also Justice Michael Kirby n 5 , p 213 who says that humour, allusions to literature and offensive or condescending language should be avoided. His Honour Magistrate Kym Millard NJCA “Oral Decisions”, p 77, in addressing an important facet of the psychology surrounding the delivering of an oral decision, says that “where credit of the parties is an issue I try to temper my language to ensure that, so far as possible, I do not belittle a party or a witness”.


142 His Honour Justice Wayne Haylen NJCA “Oral Decisions” p 46. His Honour Deputy Chief Magistrate Peter Lauritzen NJCA “Oral Decisions”, p 67 also recommends “the use of short simple sentences usually containing a statement of a single fact”. His Honour also recommends avoiding “excessive use of confusing negatives” (p 67).


144 The Honourable Justice Arthur Emmett NJCA “Oral Decisions”, p 34. See also the Honourable Justice George Fryberg NJCA “Oral Decisions”, p 40 who says keep sentences short so as to avoid losing track of one’s train of thought and omitting to state “a necessary step in the reasoning”.


146 Her Honour Judge Felicity Davis NJCA “Oral Decisions”, p 23. See also the Honourable Justice Arthur Emmett NJCA “Oral Decisions”, p 34 who says there is “no reason why one cannot say I withdraw that and start again”.


151 His Honour Deputy Chief Magistrate Peter Lauritzen NJCA “Oral Decisions”, p 67. His Honour Judge Frank Giacciardo NJCA “Oral Decisions”, p 43 recommends the use of “a muscular credible voice”. See also the Honourable Justice Peter Briscoe NJCA “Oral Decisions”, p 5 who says he tries to keep his “words and tone of voice judicious”. Tone of voice also helps to lend authority and legitimacy to the decision being delivered.

152 His Honour Judge Frank Giacciardo NJCA “Oral Decisions”, p 43.


156 His Honour Justice Wayne Haylen NJCA “Oral Decisions”, p 47. As pointed out by the Honourable Justice David Hodgson AO NJCA “Oral Decisions”, p 52 “it is legitimate to make minor revisions to oral judgments after reading the transcript, provided no alteration is made to the substance of the judgment”. It is entirely permissible to correct grammar, improve syntax and add case references (p 52). As a precaution, his Honour Kym Millard NJCA “Oral Decisions”, p 78 says that when he gives an ext tempore judgment he reserves “the right to later make minor amendments in relation to grammar and syntax to ensure that the final product is as close as possible to the original and does not explore issues that have later come to mind”.


159 The Honourable Peter Young AO NJCA “Oral Decisions”, p 98.


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CHAPTER ELEVEN
WRITING JUDGMENTS

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

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

As expressed by Lord Hope of Craighead:¹

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

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

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

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

- Preparing to write a judgment;
- Embarking upon the judgment writing process;
- Structuring the judgment;
- Determining the style in which the judgment is to be written;
- Other useful hints for effective judgment writing
11.1 Preparing to Write a Judgment

As a written judgment encapsulates the decision of a judicial officer following a hearing, whether it be in a criminal or civil matter, it is essential that he or she be organised prior to the commencement of the hearing and during the hearing so as to alleviate the inherent stresses of writing a judgment. As discussed in Chapter Ten, such organisation is equally important in relation to the delivery of an oral decision.

The level of preparation that is required to deliver an oral judgment is also required in order to enable a judicial officer to efficiently undertake the task of writing a judgment. Prior to the hearing commencing, the judicial officer should research the law relating to the charge in a criminal matter or the matters in dispute in a civil case. This will ensure that he or she is aware of any relevant statutory provisions or recent case law. This will also assist the judicial officer in clearly focusing on the real issues in dispute and adopting an organised approach to the evidence, paying attention to the relationship between the critical issues and the relevant evidence. This approach will also put the judicial officer in a better position to control the proceedings and ensure that counsel do not go off on an unnecessary tangent.

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

As discussed in Chapter Ten, there are a number of approaches to note-taking during the course of a hearing. Note taking will be the most helpful where the real issues have been identified prior to the commencement of the hearing. The use of headings in bench books, as well as the use of different coloured pens and markers to remind the judicial officer of critical concessions or observations has been recommended. Another useful method for long hearings is to prepare a summary of the evidence heard on each day of the hearing. It may also be useful to prepare a sheet for each witness that identifies their key evidence and it relationship to the issues in the case. Other commentators have recommended assembling a dot point summary of the judgment during the course of the hearing that can be amended from time to time as the evidence proceeds to be given.
Regardless of the method that is adopted it is necessary as part of the note taking process to make a written note of the following:14

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

For further practical guidance as to the amount of preparation that is required prior to writing a judgment, judicial officers are encouraged to also refer to the recommendations in Chapter Ten concerning the level of preparation required to give an oral decision. It was recommended that a judicial officer should approach each contested hearing with the intention of delivering an oral decision at the conclusion of the hearing and prepare accordingly. In the event that the judicial officer feels uncomfortable or is otherwise unable to give an oral decision, then by reason of the preparatory work already done he or she will be well-equipped to commence writing their decision.

10.2 Embarking Upon the Judgment Writing Process

Justice McFarlane of the British Columbia Court of Appeal had this to say about the judgment writing process:16

The first requisite must surely be clarity of thought. We should understand clearly what we intend to say before we start to say it, whether orally or in writing.

Although it is important that a judicial officer think before he or she writes a judgment “it is best to get your thoughts, tentative as they may be at first, on paper as soon as you can because nothing better exposes any fallacies in your ideas then reading them in cold type – what appeared at midnight to be inspiration may, when read in the clear light of the morning, disclose itself as error”.17

As pointed out Justice Kenneth Hayne, it is critical to begin writing a judgment as early as possible:18

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

The sooner a judgment is started the better, while the issues and impressions of witnesses are still fresh in the mind of the judicial officer, assisted by adequate notetaking. As with the preparation of an oral decision, the process of a writing a judgment should commence even before the trial or hearing ends.19
11.3 Structuring the Judgment

It is important that a written judgment have a clear structure. As pointed out by Lord MacMillan in *The Writing of Judgments* (1948) 26 *Canadian Bar Review* 491, 499:

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

What follows is a guide as to the structure of written judgments in civil and criminal cases.

- **Civil Cases**

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

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

  **Introduction**  
  The Facts to be Determined  
  The Relevant Principles of Law  
  The Application of the Law to the Facts  
  Conclusion

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

  - The “Introduction” should contain a brief summary or review of the issue or principal issues in the case, with the length of the introduction being appropriate to and commensurate with the overall length and complexity of the judgment.

  - The section dealing with the “Facts to be Determined” should state the uncontroverted facts and dispose of each of the relevant facts in issue. The disposition of each factual issue may require a discussion of and findings as to the credibility of witnesses and/ or inferences to be drawn from non-contentious facts and documents. There may be a need for a number of sub-headings within this section.
• As regards the “Relevant Principles of Law”, this part of the judgment should state the applicable legal principles but only to the extent that is necessary in the circumstances of the case.

• In relation to the “Application of the Law to the Facts”, a laborious repetition of the parties’ arguments or submissions should be avoided. Occasional reference to some aspect of the argument may be made if appropriate; however, what is of the most importance to the reader of a judgment is the line of reasoning that led to the ultimate decision contained in the judgment. Furthermore, a good outline or written submission from counsel can provide the basis for the text of the decision in part, if not in whole.

• With respect to the “Conclusion”, this need only be relatively brief as the conclusion will generally be apparent from the discussion appearing in the earlier sections of the judgment.

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

His Honour Magistrate Guiseppe Cicchini recommends a similar structure, which is as follows: 23

1. Introductory statement concerning what the case is about.
2. Identification of the issues.
3. Identification of the facts not in dispute and those which are.
4. Determination of the issues by making findings of fact in relation to the disputed facts, referring to the losing party’s argument in relation to each issue and stating why that argument was rejected by reference to the findings of fact and/or the case law and/or statutory provisions.
5. Announcement of the result (i.e. the ultimate decision).

His Honour Magistrate Michael Baumann suggests a similar format: 24

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

Finally, but not least, there is “the shotgun house” structure propounded by Professor Jim Raymond. 25 This structure is based on the design of a “shotgun house”, which is a simple house found in the southern states of the United States, in which each room follows the other in a straight line leading from a front porch to a back porch. 26 According to his Honour Magistrate Hugh Dillon a “shotgun house” structured

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judgment “begins with a short overview of the case, and then sets out the issues to be
determined”, with each issue being “dealt with to its conclusion in a separate
compartment of the judgment, with all the relevant evidence and arguments drawn
together under one heading”.27

- **Criminal Cases**

A similar structure is recommended for judgments in criminal cases. By way of
example, her Honour Theresa Anderson generally structures her judgment this way:28

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

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

The above recommended structures for written judgments in civil and criminal cases
is consistent with the structure for oral decisions which was discussed in Chapter
Ten.29 Therefore, judicial officers may find it helpful to refer back to Chapter Ten for
additional tips on how to structure a written judgment.

11.4 The Style of the Judgment

Judgment writing style is “a very individual thing”30 and although there is no single
ideal writing style for judgments, judicial officers should consider methods for
improving the clarity and precision of their judgments. It is important to bear in mind a
number of aspects.

Foremost, the judicial officer should consider for whom the judgment is written and the
audience to which it is directed. Lord Hope of Craighead addresses this aspect thus:31

Who do we think we are speaking to when we write our judgments? This is not an
idle question. For, if we are unclear about this, how can we be sure that we are
framing them in the right way? A judicial opinion is, of course, addressed to the
parties in whose favour, or against whom, the judge is pronouncing judgment.
Unless it is a decision taken in a court of last instance, a careful judge will ensure
that the judgment will give a sufficient explanation of the reasons for use by the
appeal court. But there is a wider audience. Obviously, it includes the legal
profession, including other members of the judiciary who may be seeking guidance
about what to do in similar cases. Then there are the academics, whose interest
is not just to comment and to criticise. They have a teaching function too, so a

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judgment which explains or develops the law ought to be capable of being used for that purpose. An extempore judgment in a matter which is of no general importance and which is addressed to those in court who know what the point is can be quite brief. But in a reserved judgment, written with an eye on the wider public, you may have to set out the facts and the contentions in some detail to make it intelligible, and you may have to set your decision of the legal issue into the context of previous decisions on the same point.

However, it is also essential that the judgment be sufficiently clear and comprehensible to the unsuccessful litigant or litigants so that, on reading the judgment, they are able to know why have lost the case.

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

- Use plain language, and avoid Latin phrases as their use looks pretentious;\(^{32}\)
- Try to minimise the use of long sentences.\(^{33}\) As pointed out by Justice Bleby, “the reader’s attention is more likely to be retained by short descriptive sentences;\(^ {34}\)
- Keep paragraphs short;\(^{35}\)
- Write sparingly;\(^ {36}\)
- Avoid hyperbole and cliches;\(^ {37}\)
- Avoid double negatives;\(^ {38}\)
- Limit the use of italics for the purpose of emphasis as their frequent use implies that the reader of the judgment is not sufficiently alert to catch the point without assistance;\(^ {39}\)
- Avoid phrases such as “I have carefully considered” because it implies that some judicial opinions as not the product of careful consideration;\(^ {40}\)
- Avoid phrases like “the question would seem to be…” as they inconclusive and indicate lack of readiness to deliver a judgment;\(^ {41}\)
- Use the names of the parties rather than formal titles such as “the plaintiff”, “the defendant” or “the appellant” or “the respondent”\(^ {42}\)
- Use language with which you feel comfortable;\(^ {43}\)
- Ask yourself whether the reasons could be simpler and shorter;\(^ {44}\)
- Be selective about the use of block quotations. As raised by Justice Hayne, “Can you make the point in your own words? If not, would a shorter quotation make the same point? If you must use a quotation longer than 50 words, tell the reader in the lead-in what you say it shows”;\(^ {45}\)
- As to issue of when to quote and when not to quote extensively from the judgments of other judicial officers, Lord Hope of Craighead provides the following practical guidance:

  This is a distinct issue from the routine task of referring to previous authority. Quotations are useful where one wishes to trace the way the law has been...
developing or to explain the origins of a proposition which one wishes to adopt or must follow. They may be necessary where previous inconsistent authority has to be distinguished or departed from. But lengthy quotations can be very boring and they tend to interrupt the flow of the judgment. They should never be used as a substitute for explaining one’s own process of reasoning. It is perfectly in order to adopt the wording of a previous judgment as one’s own, so long as a reference is given to explain its origin.46

11.5 Other Useful Hints and References for Effective Judgment Writing

The following are useful hints for effective judgment writing:

- If possible try to write the judgment over a continuous period of time rather than in a piecemeal fashion;47
- It is preferable for someone else to proof-read the judgment;48
- It is important to be conscious of the fact that a judicial officer does not always have available time to re-edit and revise his or her judgment time and time again.49 If the judicial officer is satisfied that the judgment accurately captures what he or she is trying to say, and has been proof-read and edited, the judgment should be published.50
- If possible attend a judgment writing course and a follow-up course or seminar some years later.51

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

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1 Lord Hope of Craighead “Writing Judgments” 1.
3 Justice Murray Gleeson n 2, 1.
6 K Millard n 5, 76.
8 Holmes n 7, 56.
9 Anderson n 4, 4.
10 Baumann n 5, 13-14.
12 Cicchini n 11, 27. See also the recommendations in Chapter 10

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14 Anderson n 4, 4.
15 Holmes n 7, 56.
19 See Chapter Ten.
21 Justice Bleby n 20, 18-19.
22 Justice Bleby n 20, 18-19.
23 Cicchini n 20, 26.
24 His Honour Baumann n 5, 14.
26 Raymond n 25, 46
28 Anderson n 4, 6.
29 See Chapter Ten where it was recommended that an oral decision should be structured in the same way as a written judgment.
30 Holmes n 7, 55.
31 Lord Hope n 1, 4.
32 Justice Bleby n 20, 20. See also Hayne n 18, 53 and The Hon Justice Alan Blow OAM “Judgment Writing Tips” in G Briggs (ed) Judicial Decisions: Crafting Clear Decisions (The National Judicial College of Australia) 22, 23. See also the Second Edition of the Guide citing the American State Trial Judges Book (2nd ed) p 375. See also Ingram v United Automobile Services Ltd (1943) 2 ALLER 71 at 73 where Du Parc LJ deprecated the excessive use of latin:
   “I think the cases are comparatively few in which much light is obtained by a liberal use of Latin phrases. Nobody can derive any assistance from the phrase “novus actus interveniens” unless it is translated into English”.
33 Justice Bleby n 20, 20.
34 Justice Bleby n 20, 20.
35 The New Zealand Institute of Judicial Studies Judgment Writing Program.
36 The New Zealand Institute of Judicial Studies Judgment Writing Program.
41 Second edition of the Guide.
42 Justice Bleby n 20, 20.
43 The New Zealand Institute of Judicial Studies Judgment Writing Program.
44 Justice Hayne n 18, 53.
45 Justice Hayne n 18, 53.
46 Lord Hope n 1, 20.
47 Anderson n 4, 5-6.
48 Justice Bleby n 20, 21.
49 Anderson n 4, 7.
50 Anderson n 4, 7.
51 Justice Bleby n 20, 21.
As stated in the Preamble to the United Nations Office on Drugs and Crime (UNODC) Non-Binding Guidelines on the Use of Social Media by Judges:¹

Social media has become an important part of the social life of many people and communities, changing the way in which information about them is collected, communicated, and disseminated.² Given the nature of judicial office and the vital importance of public confidence in the integrity and impartiality of the courts, the use of social media by judges, both individually and collectively, raises specific questions and ethical risks that should be addressed.

The purpose of this chapter is to examine the legitimacy of the use of social media by members of the judiciary and the extent to which its use is considered to be acceptable according to the standards of conduct expected of members of the judiciary both in and out of court.

The chapter provides guidance to assist judicial officers when deciding to use social media and to avoid the ethical risks posed by its use – namely risks to judicial independence, impartiality and integrity.

**12.1 DEFINING SOCIAL MEDIA**

Social media is a term “commonly used to refer collectively to technologies that facilitate social interaction”.³ The different kinds of social media are conveniently summarised by Dr Marilyn Bromberg-Krawitz in “Challenges of Social Media for Courts and Tribunals, Issues Paper for a Symposium” (published in 2016 by the Australian Institute of Judicial Administration [AIJA] and the Judicial Conference of Australia [JCA]) at 2-3:⁴

Social media encompasses social interaction via technological means. These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information. Examples of popular media include: Facebook, Twitter, You tube, Instagram, LinkedIn and blogs. A person can use social media to share information, including comments, photographs and videos easily and is normally free to do so. A person merely needs internet access on a computer or a digital media device to use social media. A large number of people can see what a social media user shares, and the information shared may remain on the internet in perpetuity. A social media user can also add comments, photographs etc to an existing social media post. Social media has some similarities with the average website, but an important difference is that social media permit the public to post information immediately, and the average website generally does not.
12.2 THE RISKS ASSOCIATED WITH THE USE OF SOCIAL MEDIA BY JUDICIAL OFFICERS

Although the use of social media has its benefits, several risks associated with the personal use of social media by judicial officers have been identified.

In his article “Why Can’t We Be Friends” Should Judges be on Facebook” his Honour Justice John Vertes discusses the challenge of social networking and refers to the “some of the dangers specific to social networking sites” which were highlighted in an article from an American journal:7

This alluring new world has demonstrated many pitfalls. Initially, very few people used the privacy settings that were available to them. They simply left them at the default settings, meaning that everything they posted was wide open to anyone. And let’s face it, if your friend” on Facebook chooses to cut and paste elsewhere some very unseemly language you posted, your privacy settings are all for naught. Additionally, the terms of use, which most people do not read, give the sites enormous power over how your postings may be used. It is enough to give a cautious person a serious case of the willies.

As pointed out pointed out by his Honour, the use of social media has other dangers. First, “unlike traditional, written communications that provide an opportunity for reflection between the time a message is written and the time it is sent or published, electronic communication is instantaneous”, leaving “the opportunities for a judge to engage in spontaneous and ill-considered communications that may reflect badly on the judiciary …correspondingly greater”. Secondly, “information conveyed via the internet is potentially accessible by anyone around the world, including litigants, lawyers, jurors, witnesses and members of the public who may misapprehend the meaning of motives behind a judge’s communications”. Thirdly, “maintaining the privacy of internet communications is far more difficult than for traditional communications” which “increase the likelihood that seemingly secure information will become known”. Fourthly, “information published by a single website can quickly be disseminated across the internet, making the retraction of problematic communications next to impossible”.

Dr Marilyn Bromberg-Krawitz has identified a number of “potential risks if judicial officers use social media personally”: Those risks emanate from the public and sharing characteristics of social media and the visibility and ready accessibility of information posted on social media coupled with the ease and speed with which – as well as the extent to which - such information can be transmitted and the permanent public availability of the information:

If a judicial officer writes an inappropriate post on social media, the post can become public and many people can see it without the judicial officer knowing...
who wrote the post. People can easily and quickly inform others about the post. The post may be permanently available to the public, even if the judicial officer deletes it.\textsuperscript{16} This is because sharing is at the heart of social media. When a person posts on social media, they may erroneously assume that they control that information and who sees it. They may have set privacy settings so that only a chosen group of people can see their posts. The reality is that other people may be able to share what the original person posted and their post can potentially be seen around the world. Further, if a judicial officer posts on social media anonymously, the public can become aware of the judicial officer’s identity.\textsuperscript{17} Therefore, judicial officers should be careful about what they share on social media if they choose to use it.

As pointed out by Dr Bromberg-Krawitz, the primary concern with the inappropriate use of social media is that it “could negatively impact upon public confidence in the judiciary and the public may lose confidence in the judiciary: even an isolated incident by one individual judicial officer can reflect poorly on the judiciary as a whole”.\textsuperscript{18}

His Honour Judge Barry Clarke highlights significant privacy and security issues with the use of social media:\textsuperscript{19}

Using publicly available information from data aggregation websites, which “facilitates “jigsaw research” I can often locate a judge’s home address and year (or precise date) of birth. In one case I obtained the maiden name of a judge’s mother, the names of his wife and daughter and pictures of his extended family; this was a judge who did not use social media at all.

\section*{12.3 GUIDES TO JUDICIAL CONDUCT: THE USE OF SOCIAL MEDIA}

Guides to Judicial Conduct in the United Kingdom, Australia and New Zealand do not prohibit the use of social media by judicial officers. However, the guidelines in all three jurisdictions treat the use of social media as a matter of personal choice, either expressly or by necessary implication; but caution its use because of its inherent risks and potential to undermine the independence, impartiality and integrity of individual judicial officers and the judiciary as a whole.

As pointed out by his Honour Barry Clarke, “around the world, judicial codes of conduct or statements of judicial ethics draw from the Bangalore Principles, compiled in 2002 by a meeting of Chief Justices now known as the Judicial Integrity Group”.\textsuperscript{20} The Bangalore Principles are six in number: independence, integrity, propriety, equality and competence and diligence.
The UK Guide to Judicial Conduct

Although the UK (Courts and Tribunals Judiciary) Guide to Judicial Conduct (March 2020) states that the “use of social networking is a matter of personal choice”, the Guide draws the attention of judges to a number of security issues with the use of the medium:21

1. Judges are encouraged to be mindful that “the spread of information and use of technology means it is increasingly easy to undertake ‘jigsaw’ research which allows individuals to piece together information from various independent sources”;

2. Judges should take care to ensure that “information about their personal life and home address are not available online”;

3. Judges and close family members and friends take care “to avoid the judge’s personal details from entering the public domain through social networking systems such as Facebook or Twitter”;

4. Judges should be wary of:
   (a) “publishing more personal information than is necessary (particular with a view to the risk of fraud);”
   (b) posting information such as details of holiday plans and information about family “which could result in a risk to personal safety”;
   (c) “automatic privacy settings”, as it is often “possible to raise privacy settings within social media forums”;
   (d) “lack of control over data once posted”;
   (e) “posting photographs of themselves in casual settings whether alone or with family members and /or friends.

The Guide also draws the attention of judges to “the guidance on blogging by judicial office – holders issued on behalf of the Senior Presiding Judge and the Senior President of Tribunals on 8 August 2012”.

In short, the guidance states that whilst blogging by members of the judiciary is not prohibited, judicial office-holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general. This guidance also applies to blogs which purport to be anonymous. Failure to adhere to the guidance could ultimately result in disciplinary action.

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It will be readily apparent that the UK guide focuses on the practical aspects of using social media rather than its ethical aspects.

The Guide to Judicial Conduct published by the Australasian Institute of Judicial Administration for the Council of Chief Justices of Australia and New Zealand

While the Guide to Judicial Conduct published by the Australasian Institute of Judicial Administration for the Council of Chief Justices of Australia and New Zealand (AIJA Guide) sees no “reason in principle to deny judges the use of social media” it provides a set of guidelines to assist judicial officers as to its use.23

The Guide states that “a judge should be aware of the risks that go with the use of social media, and should act with care in light of those risks”.24

As with any other conduct engaged in by a judicial officer, the use of social media by a judicial officer is governed by the principles on which the Guide is based25 – namely judicial independence, impartiality and integrity. When choosing to use social media a judicial officer “must act in a manner that promotes public confidence in judicial impartiality, independence and integrity”.26 The Guide encourages judicial officers to exercise caution in the use of social media and to be always mindful of its pitfalls and risks to the independence, impartiality and integrity of the judiciary:27

A judge should be mindful of the risk that a judge’s use of social media might reveal material that emanates from the judge or that has been seen or received by the judge and compromises or appears to compromise the objectives identified above or standing and integrity of the judge.

The Guide implores judicial officers to “consider the content of any interaction using social media, the possible dissemination of the content without the knowledge of the judge and the possible disclosure of the judge’s connection with the material”.28 It is recommended that the “only safe course is to assume the material which the judge creates or receives, or with which the judge comes in contact, may become public without the judge knowing and contrary to the judge’s wishes.”29 The Guide goes onto point out that “the fact that a judge has accessed material can become public, even though the judge accessed the material anonymously”.30 Furthermore, the Guide notes that “material may be disseminated widely, and again without the judge’s knowledge”;31 and is capable of being spread rapidly and assumes a “practical permanence”32: once it is disseminated “it may prove impossible to remove the material from the sites to which it has been disseminated”.33

The Guide stresses the need for judicial officers to be mindful of to whom they have a social media connection and the implications of such a connection:34

An established connection between the judge and an individual, or between a judge and a lawyer, might be problematic if the person or lawyer comes before the
judge. It may be difficult for a judge to keep track of all the persons with whom the judge has had contact or connection using electronic media, but the record of that contact will always exist. To an outsider, the contact may seem significant, even though the judge has no memory of it.

Judicial officers need to be careful as to who views the material that they disseminate through the use of social media. One cannot rely completely on privacy settings because they may change. A judge should use the highest privacy setting available. But the operation of such settings may be affected by the controller or manager of the media used, and the judge may be unaware that in this way the privacy setting has been effectively altered. The use of a privacy setting does not prevent others from sharing material posted by a judge, and so does not prevent dissemination by and to others. A judge might create a social media page that does not contain the judge’s name or photograph. Despite such an attempt at anonymity the public might learn that the judge is the author of the page.

Given the complexity of privacy settings, the Guide recommends that before opening a social media account a judicial officer should obtain competent advice about the privacy aspects of using social media.

Needless to say, the Guide says that every judicial officer should “give careful consideration to the content of material disseminated through social media”, noting that relevant considerations “are much the same as apply to any communication by a judge”.

The Guide acknowledges “a variety of ways in which the content of a communication might appear to compromise the judge’s impartiality, independence of integrity” and warns that there is no way a judicial officer can be “certain how far, or to whom, the content [of a communication] created by the judge may go”.

The Guide goes on to warn judicial officers of the dangers of making remarks or comments via social media:

The ‘practical permanence’ of material disseminated through social media means that casual remarks or embarrassing comments are at risk of exposure long after they have been forgotten by the judge. Comments by a judge relating to litigation or litigants before the judge, or to lawyers before the judge, should be avoided. Generally, a judge should not use social media to disseminate material that would embarrass the judge if it became public.

However, the Guide does not only provides guidance to judicial officers: it also speaks to court staff and members of a judge’s family.
As the Guide points out, “a judge might be quite unaware of a family’s use of social media”. 43 Members of a judicial officer’s family and court personnel should be made aware that their “discussion of, or comment about, cases before the judge requires consideration”. 44 This is important because “members of the public may assume that material emanating from a member of a judge’s family or from court staff is attributable to the judge, or reflects the judge’s views”. 45

The Guide points out that family members of a judicial officer should also be “alert to the possibility of a connection through social media with someone involved in a case before the judge”. 46 Should this arise, the Guide states that the member of the family should “inform the judge, so that the judge can consider whether any action needs to be taken, and if so, what action is appropriate”. 47

Judicial officers are also urged to “consider the security risk that might arise out of the disclosure of information through social media”. 48

Finally, but not least, the Guide sounds the following caution: 49

These days, judges and their families need to be aware of the possibility that in any situation of the presence of a camera and of its use to take pictures and record sound at public or private functions and events.

In contrast to the UK Guide to Judicial Conduct, the AIJA Guide focuses more on the abstract and ethical implications and issues with the use of social media by judicial officers.

The New Zealand Guidelines for Judicial Conduct

The New Zealand Guidelines for Judicial Conduct also address the use of social media by judges and its potential risks. 50

A judge may participate in online social networking provided he or she acts in accordance with these Guidelines. Care is needed to avoid any compromise to judicial independence or impartiality through expressions of opinion or online activities. This could include links through social media such as for example friending a litigant that may give rise to conflicts of interest or a perception of bias.

As in the case of the AIJA Guide to Judicial Conduct, the New Zealand Guidelines on the use of social media are anchored to the guiding principles of independence, impartiality and integrity and governed by specific guidelines.

Again, these guidelines are more concerned with the ethical obligations imposed upon judicial officers when using social media.
The Canadian Judicial Council (CJC) Ethical Principles

Although the CJC Ethical Principles provide detailed guidance as to how judges should conduct themselves in and out of court, the Principles provide very little guidance on the use of social media by judges.51

However, the key ethical principles – judicial independence, impartiality, integrity, diligence and equality - provide “guidance as to how judges might limit their engagement with social media.52 This approach – in effect reasoning from first principles- is similar to that adopted by both the AIJA Guide and the New Zealand Guidelines to Judicial Conduct, except that, unlike the AIJA Guide, the CJC Ethical Principles do not set out any specific guidelines for the use of social media.

However, the Canadian Judicial Council is in the process of reviewing its Ethical Principles for Judges, and has identified the use of social media by judges as an important aspect of the review.53

Other Statements of Judicial Ethics and Advisory Opinions in Relation to the Use of Social Media

In the “Guidelines for Judges About Using Electronic Social Media” issued in 2013 by Chief Justice Allsop of the Federal Court of Australia, the Chief Justice states, as a guiding principle:54

[a] judge may use electronic social media, but in doing so he or she should have regard to the guiding principles of impartiality, judicial independence, and integrity and personal behaviour set out in the Council of Chief Justices' Guide to Judicial Conduct. Any conduct by a judge that would undermine these principles or create a perception of impropriety or bias should be avoided.

Specifically, the Guidelines state that “if a judicial officer has a connection with a lawyer on social media (especially if the lawyer works at a firm that is known to appear frequently in that judicial officer's court) then someone may raise an allegation of apprehended bias”.55

The Guidelines also provide that “if a judicial officer has a contact on social media who is a participant in a trial they may want to inform the court about this connection or consider recusing himself or herself”.56 In that regard Dr Bromberg-Krawitz provides the following helpful commentary:57

The test to decide whether a judicial officer should recuse himself or herself due to apprehended bias is ‘whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide”.58 This test is determined objectively and “is founded in the need for public confidence in the

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The judicial officer can inform the parties of the relevant facts that are part of a potential apprehended bias application. The judicial officer will decide himself or herself whether or not they will recuse himself or herself.

Dr Bromberg – Krawitz suggests a number of considerations the judicial officer may want to take into account when applying the “apprehended bias test”:

- when was “the connection made” and “the communication on social media since the connection was made”;
- the nature of the hearing before the judicial officer;

Dr Bromberg- Krawitz gives the following examples of inappropriate use of social media by American judicial officers:

- A judge in New York was transferred because “he posted comments and photographs on social media while he was in the courtroom” and “became the contact of many lawyers on Facebook”;
- A judge in Georgia “contacted a party who appeared before him on Facebook” and she borrowed money from him. The judge also gave her advice concerning her case. The judge resigned when the relationship became public;
- A Kentucky judge who “commented on social media that a prosecutor was racist” was not allowed to preside over a proceeding.

In the article referred to above, the Hon Justice John Vertes not only discusses advisory opinions given by several American States on the use of social networking sites by judicial officers and specific disciplinary findings in relation to the inappropriate use by judicial officers of social networking sites, but makes reference to the Ohio Guidelines issued by the Board of Commissioners on Grievances and Discipline, under the supervision of the Supreme Court of Ohio. Although these guidelines apply in a jurisdiction that is outside the Commonwealth of Nations they specifically relate to judicial use of social media and have relevance for countries within the Commonwealth. As noted by the Hon Justice John Vertes, they largely echo already existing guidelines as to traditional written communications engaged in by judicial officers which have been transposed to the social media context.

The Guidelines commence with the advice that “a judge’s participation on a social networking site must be done carefully” and compliance with the guidelines requires constant vigilance on the part of a judicial officer.

While not meant to be exhaustive, the guidelines make eight key points. A judicial officer:

1. must maintain at all times dignity in respect of any comment, photograph or other information shared on the social networking site, as anything that is
inconsistent with the dignity of judicial office would be imprudent as well as improper.73

2. must not have social networking interaction with individuals or entities which will erode “confidence in the independence of judicial decision-making”;74 and must “not convey the impression that any person or organisation is in a position to influence the judge and, just as important, must not permit others to convey that impression”.75

3. “should not make comments on a social networking site about any matters pending before a judge, not to a party, not to counsel, not to anyone”.76

4. “should avoid making comments on a social networking site about any matter in court”.77

5. “should not view a party’s or witness’ page on a social networking site and should not use social networking sites to obtain information regarding the case before the judge”.78

6. “should recuse himself or herself from a proceeding when the judge’s social networking relationship with a lawyer creates bias or prejudice, or the appearance of bias, in the case”.79

7. “should not give legal advice to others on a social networking site”.80

8. “a judge should be aware of the contents of his or her personal social networking page, be familiar with the site’s policies and privacy protocols and be prudent in all interactions on the site.”81

12.4 THE UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC) NON BINDING GUIDELINES ON THE USE OF SOCIAL MEDIA BY JUDGES

As reported in the CMJA News Volume 46 No 2 November 2019, the CMJA is a partner organisation of UNODC (United Nations Office of Drugs and Crime) and has worked with it on the Global Judicial Integrity Network (GJIN).

The topic of the use of social media by judges was identified as one of the priority areas for the Network under its 2018-2019 plan. As a result of the efforts of the GJIN to develop a recommended set of guidelines for the use of social media by judges based upon existing regional and national standards and other sources, including the Bangalore Principles of Judicial Conduct and its Commentary, the “UNODC Non-Binding Guidelines on the Use of Social Media by Judges” were drafted at an Expert Group Meeting hosted by UNODC on 5-6 November in Vienna, Austria that brought together judicial and legal experts from across the world to discuss the emerging topic.
The Guidelines were then disseminated to all participants of GJIN for further consideration and comment.

The final version of the UNODC Non-Binding Guidelines on the Use of Social Media by Judges can be found at: https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf

12.5 PRACTICAL TIPS AND OTHER GUIDANCE FOR USE OF SOCIAL MEDIA BY JUDGES

Dr Marilyn Bromberg-Krawitz provides the following important tips for judicial officers using social media in a personal capacity, which are largely reflected or embodied in the AIJA Guide to Judicial Conduct and the UK Guide to Judicial Conduct:

- “Judicial officers should be aware of important security issues when they use social media”;  
- “They should not post their home address when they go on holidays or information about their personal life”;  
- “They should also check their privacy settings to be careful about who sees what they post although they should not rely on social media’s privacy settings because they may change”;  
- “Judicial officers should be careful about who they give the passwords to their social media accounts to. If they give their social media account passwords to another person they may want to provide detailed instructions about what communication they permit the other person to make if they log into the judicial officer’s social media accounts. Judicial officers may also want to be careful that they do not store the passwords to their social media accounts in locations that others can access. If another person logs into a judicial officer’s social media accounts and posts inappropriate comments, this could receive a significant amount of publicity. In turn, this could negatively impact upon the public’s confidence in the judiciary”;  
- “Judicial officers should also be mindful of their social media contacts generally. If the contacts are not someone a judicial officer would want to have a connection within real life, they should carefully consider whether they should maintain their social media contact. In particular they should be careful about having social media connections with people or organisations that have controversial views”;  
- “Judicial officers should ensure that they do not comment about the cases that they preside over on social media. They should assume that anything that they post on social media could become public. If a judicial officer posts on social media anonymously, they should assume that the public can learn their identity”. 

Dr Bromberg-Krawitz also very helpfully discusses how judicial officers can prevent a situation where their family members use social media to discuss court proceedings.
or to post their “opinion on social media about a case before the judicial officer”, which can have detrimental consequences and “negatively impact upon the public’s confidence in the judiciary”.  

Dr Bromberg - Krawitz suggests that discussion by family members via social media about pending cases may be prevented as follows:

1. The courts can “provide training and /or guidelines to judicial officer’s families, in addition to training to judicial officers, regarding ‘ethical issues and potential security concerns’ associated with social media.”

2. Judicial officers should warn family members not to discuss court proceedings or to make comments on the courts and the judiciary on social media, bringing to their attention “the serious negative consequences that can arise if they discuss a case on social media” or the negative “impact upon the judicial officer and the public’s confidence in the judiciary” if they comment on the courts and the judiciary generally.

His Honour Judge Barry Clarke provides these practical tips in relation to maximising privacy and security through the use of social media:

- Discover what personal information is available online and “remove/amend it where you can”;
- Try to ensure that your residential address and telephone number are not available online;
- When subscribing to online services “enter the minimum amount of authentic information possible”;
- If you do not use social media “protect yourself by speaking to and educating those who do”;
- Should you use social media, “use common sense”, “take care of our privacy; check who can see what you post: friends, friends of friends, everyone”, “don’t announce online holiday plans or a house move, except perhaps to a limited circle of trusted families”, Be careful of the photographs you share” and “ask friends not to ‘tag’ you in photographs”;
- “Consider using a pseudonym as your social media handle”;
- “Check the default settings of websites and browsers you use” and increase the privacy settings if possible;
- “Be wary of signing up to websites using your social media profiles” and “turn on two-step verification where it is available”;
- Regularly change your passwords and do not use “the same password for everything”;  
- “Maximise privacy settings on your smartphones” and “turn off location services”;
- “Don’t allow apps to access all your contacts”, “back up data”, “use encryption services”, “use anti-virus and anti-spyware software”, “keep software up to date (since that is how weaknesses are identified and repaired)”.

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• “Be wary of using free public Wi-Fi, which is not encrypted, for work use”;
• “Use a shredder for disposing of personal mail”;
• “Consider using more than one email address: for personal use, consider using an email address that does not contain your name”;
• “Treat unsolicited text messages and emails warily: do not reply and do not open attachments if you are not confident that the source is safe”.

Judge Barry Clarke leaves us with this advice:

Given the sensitive, confidential and sometimes life-changing nature of the work judges do, they need to learn how to protect themselves. They need to develop wisdom about the way they interact with new technology. They need to educate their friends and family members too, since their use of technology and social media also creates a digital footprint that captures their judicial relatives.

His Honour emphasises that the use of social media by judicial officers should be “consistent with accepted norms around judicial ethics” and suggests that “the following guidelines be developed from the Bangalore Principles and offer a sound basis for future discussion”:

First and foremost, avoid expressing views online that, were it to become known you hold judicial office, could damage public confidence in your own impartiality or in the impartiality of the judiciary in general.

Unless running an authorised blog (intended, for example, to demystify the judiciary), do not use your personal social media networks to publicise your appointment or your work as a judge or to identify yourself in a judicial capacity.

Be wary of “following” or “liking” particular advocacy groups, campaigners or commentators if association with their views could damage public confidence in your impartiality. If you wish to follow certain political commentators, avoid creating your own echo chamber by ensuring a breath and diversity of views.

Avoid expressing views that are indicative of prejudgment of an issue of fact or law. Do not comment on actual or pending cases, whether your case or another judge’s case. Do not engage in private exchanges over social media sites or messaging services in respect of such cases. Do not post comments on websites in support of your own decisions.

Avoid looking up the parties online or engaging in private research in respect of their digital lives; this is an extension of the rule that a judge should not engage in independent investigation of the case. Do not indulge idle curiosity.

Be circumspect in tone and language and professional and prudent in respect of all interactions on social media. Consider in respect of each comment or
photograph: what might its impact on judicial dignity be? Treat others with dignity and respect too; do not use social media content to trivialise the concerns of others. Behave in a manner that promotes a safe and healthy work environment.

Consider whether any pre-appointment digital content might damage public confidence in your impartiality. If it does, remove it (it may be necessary to take advice on how to do so).

Be wary about extending or accepting “friend requests” to and from lawyers or representatives that may appear before you. The risk is that the connection might suggest a degree of leverage that a lawyer has over a judge, in the sense of being in a privileged position to influence the judge. Such an online friendship will not always be a disqualifying factor, but it will be a matter of degree and perception.

If you have been insulted or abused online, seek advice from senior judicial colleagues. Do not respond directly.

His Honour Judge Barry Clarke concludes with this very prudent advice:

If ‘judges’ choose to engage [in social media] they should do with their eyes open and they should proceed with caution, aware of the security risks arising from their digital footprints and with the benefit of guidelines about appropriate online behaviour.

12.6 CONCLUSION

As noted by various commentators the use of social media poses real challenges for judicial officers as well as the judiciary as a whole and, in particular, poses challenges for “the maintenance of public confidence in the independence and integrity of the judiciary.” That is obvious from the literature contained in this chapter.

The purpose of this chapter has been to provide practical guidance to judicial officers on the use of social media based on a wealth of material, either mandating or indicating how particular aspects of using social media are to be handled. However, it is important to stress that the material is not intended to be prescriptive nor binding, unless otherwise stated. The primary responsibility of deciding whether or not the use of social media or a particular aspect of social media is appropriate – in accordance with the well – established principles of independence, impartiality and integrity - remains with the judicial officer.

Finally, this chapter does not purport to be exhaustive and judicial officers around the Commonwealth need to be aware that circumstances requiring guidance can rapidly change over time in the context of social media and its use.

1 See www.unodc.org>res>import.international_standards p 2.
“New technologies have transformed the manner in which users interact with each other and in particular give, receive, exchange and display information about themselves and others. These technologies are used widely including judges, their families and the courts in which judges work”.

See also the Guide to Judicial Conduct published by the Australasian Institute of Judicial Administration for the Council of Chief Justices of Australia and New Zealand (hereinafter referred to as the “AIJA Guide to Judicial Conduct”) 3rd ed Chapter 9, p 43:

3 AIJA Guide to Judicial Conduct n 2, p 43.

For an explanation of the most popular forms of social media see Dr Marilyn Bromberg -Krawitz “Challenges of Social Media for Courts and Tribunals, Issues Paper for a Symposium” (published in 2016 by the AIJA and the Judicial Conference of Australia (JCA) pp 3-6.

5 See for example Dr Bromberg -Krawitz n 4, p 6 who lists the various benefits: using social media in a personal capacity helps judicial officers to be, and to remain, “in touch with the community”; the use of social media “can improve the image” of judicial officers and make them “more approachable and relatable”; the use of social media enables judicial officers to become aware of judgments around the world quickly and with a minimum of effort (see ABC Radio National “Justice Tweeted is Justice Done”, The Law Report , 9 July 2013 (Judge Judith Gibson) and to “keep up to date with current events”; its use can also enable judicial officers to become aware of the public’s views on important matters; and, at a personal level , the use of social media is a medium by which judicial officers can keep in touch with family and friends and to listen to new music.

6 Justice John Vertes “Why Can’t We Be Friends? Should Judges be on Facebook” (an article based on a paper from the CMJA Conference in Kuala Lumpur July 2011) Commonwealth Judicial Journal Vol 19 No 2 December 2011, p 3

7 Justice Vertes n 6, p 4.
8 Justice Vertes n 6, p 4.
9 Justice Vertes n 6, p 4.
10 Justice Vertes n 6, p 4.
11 Justice Vertes n 6, p 4.
12 Justice Vertes n 6, p 4.
13 Dr Bromberg-Krawitz n 4, pp 7 and 9.
14 Dr Bromberg- Krawitz n 4, p 7.
16 American Bar Association Formal Opinion 462 Judge’s Use of Electronic Social Media Networking Media (21 February 2013) 1-2.
18 Dr Bromberg-Krawitz n 4, p 9.
20 Judge Barry Clarke n 19, p 22.
22 UK Guide to Judicial Conduct n 21, p 18.
23 AIJA Guide to Judicial Conduct n 2, 43. This is consistent with the view taken by Dimitra Blitsa, Ioannis Papathanasiou and Maria Salmanli: “Judges , Social Media: Managing the Risks” – paper submitted to the 4th Semi-Final of the European Judicial Training Network 2015: Judicial Ethics and Professional Conduct, pp 6-7: “...members of the judiciary should be able to participate in social media, provided they exercise an appropriate degree of caution and discretion so as not to infringe upon their duties of impartiality, integrity and propriety. In other words, although the use of social media by judges should not be prohibited their use must adhere to certain limitations essential to the judicial profession...”.
24 AIJA Guide to Judicial Conduct n 2, p 43.

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25 AIJA Guide to Judicial Conduct n 2, p 43.
26 AIJA Guide to Judicial Conduct n 2, p 43.
27 AIJA Guide to Judicial Conduct n 2, p 43.
28 AIJA Guide to Judicial Conduct n 2, p 43.
29 AIJA Guide to Judicial Conduct n 2, pp 43-44.
30 AIJA Guide to Judicial Conduct n 2, p 44.
31 AIJA Guide to Judicial Conduct n 2, p 44.
32 AIJA Guide to Judicial Conduct n 2, p 44.
33 AIJA Guide to Judicial Conduct n 2, p 44.
34 AIJA Guide to Judicial Conduct n 2, p 44.
35 AIJA Guide to Judicial Conduct n 2, p 44.
36 AIJA Guide to Judicial Conduct n 2, p 44.
37 AIJA Guide to Judicial Conduct n 2, p 44.
38 AIJA Guide to Judicial Conduct n 2, p 44.
39 AIJA Guide to Judicial Conduct n 2, p 44.
40 AIJA Guide to Judicial Conduct n 2, p 44.
41 AIJA Guide to Judicial Conduct n 2, p 44.
42 AIJA Guide to Judicial Conduct n 2, p 44.
43 AIJA Guide to Judicial Conduct n 2, p 44.
44 AIJA Guide to Judicial Conduct n 2, p 44.
45 AIJA Guide to Judicial Conduct n 2, p 44.
46 AIJA Guide to Judicial Conduct n 2, pp 44-45.
47 AIJA Guide to Judicial Conduct n 2, p 45.
48 AIJA Guide to Judicial Conduct n 2, p 45.
49 AIJA Guide to Judicial Conduct n 2, p 45.
50 New Zealand Guidelines for Judicial Conduct [88].
51 Discussion paper of the Canadian Centre for Court Technology May 2015: “The Use of Social Media by Canadian Judicial Officers”, p 16. There are, however, on the CJC’s website “papers on Skype, Facebook and Social Networking Security and other ‘technology issues’”; but the website “provides little or no guidance as to what the Council considers to be acceptable use”: Lorne Sossin & Meredith Bacal “Judicial Ethics in a Digital Age” (2013) 46.3 UBC L Rev 629 at 622-23 cited by the Discussion Paper, pp 16-17. See also Justice Vertes n 6, p 5.
52 Discussion paper of the Canadian Centre for Court Technology n 52, p 17
53 Cjc-com.ca>news>>update- ethical-principles-judges.
54 Dr Bromberg-Krawitz n 4, pp 9-10; see also Justice Steven Rares “Social Media – Challenges for Lawyers and the Courts” (FCA) [2017] FedJSchol 19 at [28].
56 Dr Bromberg – Krawitz n 4, p 12.
57 Dr Bromberg – Krawitz n 4, pp 12-13.
58 Johnson v Johnson (2000) 201 CLR 488, 492
61 Dr Bromberg – Krawitz n 4, p 13.
62 Dr Bromberg – Krawitz n 4, p 13. By way of example, “if the connection was made five years ago, the judicial officer and the other person did not exchange a single message on social media since, and the judicial officer and the other person never met in public, then this would support the judicial officer not recusing himself or herself”.
63 Dr Bromberg – Krawitz n 4, p 13. By way of example, if the hearing is of merely an administrative nature (such as fixing a trial date) and does not involve the exercise of any discretion then the judicial officer may want
to preside over the hearing. However, if the hearing involves the exercise of discretion then that may favour the judicial officer recusing himself or herself.


66 Dr Bromberg – Krawitz n 4, p 8. See Matthew Glowicki “Judge Olu Stevens Again Removed fro Case” Courier –Journal (online) 12 January 2016. For a further commentary on this case see Justice Steven Rares n 5 at [35].

67 Justice Vertes n 6, pp 5-7.

68 Justice Vertes n 6, p 8.

69 Justice Vertes n 6, p 8.

70 Justice Vertes n 6, p 8.

71 Justice Vertes n 6, p 8.

72 Justice Vertes n 6, pp 8-9.

73 Justice Vertes n 6, p 8.

74 Justice Vertes n 6, p 8.

75 Justice Vertes n 6, p 8. The guidelines give as an example a judicial officer’s “frequent and specific social networking communications with advocacy groups interested in matters before the court.”

76 Justice Vertes n 6, p 8.

77 Justice Vertes n 6, p 8.

78 Justice Vertes n 6, p 8.

79 Justice Vertes n 6, p 8.

80 Justice Vertes n 6, p 8.

81 Justice Vertes n 6, p 9.

82 Dr Bromberg – Krawitz n 4, p 14.

83 Dr Bromberg-Krawitz n 4, p 14.


87 Dr Bromberg – Krawitz n 4, p 16.

88 Dr Bromberg - Krawitz n 4, p 14.

89 Dr Bromberg - Krawitz n 4, p 14. See County Court of Victoria Guidelines for the Media (21 November 2013).

90 Dr Bromberg -Krawitz n 4, p 14. See G Maher and S McCarthy “ Social Media Friends without Privileges” The Australian (online) 27 September 2013.


92 Dr Bromberg – Krawitz n 4, pp 14-15. As pointed out by the author: “While the family member may assume that their comments were clearly their own opinion and have nothing to do with the judicial officer who they are related to, the public may query whether the family member’s social media post is a reflection of the judicial officer’s opinion or possible bias”.

93 Dr Bromberg-Krawitz n 4, p 16.

94 Dr Bromberg – Krawitz n 4, p 16. See Utah State Courts “Social Media Subcommittee of the Judicial Outreach Committee Report and Recommendations for Judges Using Social Media” (18 October 2011).

95 Dr Bromberg - Krawitz n 4, p 16.

96 Dr Bromberg- Krawitz n 4, p 16.

97 Judge Barry Clarke n 19, p 21.

98 Judge Barry Clarke n 19, p 21. His Honour gives an example registered information as a result of holding a company directorship.

99 Judge Barry Clarke n 19, p 21. His Honour suggests providing an unusual rather than a truthful answer to a security question.
This aspect is dealt with in Chapter Thirteen of this Guide which deals with “Judicial Well-Being”.

See Chapter Thirteen of this Guide.
The wellbeing or welfare of judicial officers is of paramount importance:¹

Given the impact of judicial decisions in people’s lives, and the pivotal role they play in our democratic system, courts arguably have a duty, not only to individual judges but to the community more generally, to investigate and promote judicial wellbeing.

The promotion of the judicial wellbeing of judicial officers should be a core value of a well-functioning court – indeed the hallmark of an “excellent court” in the same way that other court values such as equality before the law, independence, impartiality, fairness, integrity, competence, transparency, accessibility, timeliness and certainty characterise an “excellent court” in the sense discussed in the International Framework for Court Excellence (IFCE). This is so because unless judicial officers enjoy good physical and mental health their ill health can adversely affect the performance of their judicial duties and functions.

However, the personal welfare of judicial officers should not be the only aspiration of an excellent court. The wellbeing of court staff should also be a primary objective of a court that aspires to excellence.

The purpose of this chapter is to outline the phenomenon of judicial stress and how it can impact on both the personal and working life of judicial officers and the means by which its impact can be minimised, particularly in the wake of the Covid Pandemic.

This chapter also discusses the imperative to ensure not only the wellbeing of court staff, but also of all court users, by promoting appropriate codes of conduct on the part of judicial officers towards court staff and all those who access the court system.

It is hoped that the material contained in this chapter will assist judicial officers around the Commonwealth in managing judicial stress in ever-increasing difficult times, and to guide their behaviour towards both court staff and courts users who are equally prone to the non-discriminatory phenomenon of stress.

13.1 THE REALITIES OF JUDICIAL STRESS

The emerging evidence shows that judicial officers are prone to stress such that “judicial stress” is a recognised condition from which members of the judiciary suffer. By way of example, a recent study has revealed that Australian judges and...
magistrates “experience high rates of stress and are at risk of burnout or trauma from having to constantly deal with high workloads and the harrowing details of serious crimes”. ²

Carly Schrever (then University of Melbourne PhD candidate) conducted the research with “in principle and in-kind support from the Judicial College of Victoria where she is the Judicial Wellbeing Adviser”. ³ The study which was based on an Australian first-survey “psychological survey of over 150 judges, magistrates and other judicial officers found that the judiciary was generally coping well with the stresses of their work, with levels of mental health problems like depression and anxiety similar to the general population, which is well below the rest of the legal profession”. ⁴

The study found that one third of the judicial officers surveyed were experiencing “moderate to severe symptoms of secondary traumatic stress”. ⁵ The study also revealed that the rates of psychological distress among those surveyed were “significantly higher than that among barristers and the general population”. ⁶

The key findings of the research were: ⁷

• “judges and magistrates are human beings and are affected in a very human way by the difficult and complex work they do”;
• “constant exposure to human misery, conflict and violence, coupled with very high workloads, has an impact on judges and magistrates”;
• “judges and magistrates are stressed and under pressure, but so far it is not generally impacting their ability to perform their roles to the standard expected by the community” and the public can continue to have “confidence in the court and in judicial decisions”;
• “there isn’t a mental health crisis in the judiciary, but this study has confirmed that there are high rates of distress among judges and magistrates, and that is concerning”.

As a result of this study, “many courts around Australia have implemented a number of initiatives and programs to address judicial stress and support judges and magistrates in their work”. ⁸

Commenting on the research and its results, the Chief Executive Officer of the Judicial College of Victoria, Samantha Burchell, said: ⁹

The vicissitudes of a judicial life are inevitably stressful. Ms Shrever’s research reinforces in a rigorous way the absolute need for judicial education to build and support a resilient workforce of judges and magistrates.

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The Judicial College of Victoria is leading this work through innovative education programs for the judiciary that address both individual and systemic considerations.

13.2 THE IMPORTANCE OF RESEARCHING AND MANAGING JUDICIAL STRESS

It is important to research judicial wellbeing because “as senior members of a stress-prone profession, managing workloads bordering on the oppressive, in the context of professional isolation, intense scrutiny, and often highly traumatic material, there is good reason to expect that judicial officers are at particular risk of work-related stress.” This is borne out by the groundbreaking research referred to above. Furthermore, it is crucial to continue researching judicial wellbeing because as stated at the beginning of this chapter it is not only in the interest of individual judges, but in the public interest to ensure the wellbeing of all judicial officers.

Putting this in context, in 2016 the Rt Hon Lady Justice Sharp DBE, Vice President of the Queen’s Bench Division, spoke about judicial welfare in England and Wales, and correctly observed that “the welfare of judges matters on a human level, it matters to the judicial system, and it matters to the public at large”. The Vice President identified the following reasons for focusing on judicial wellbeing, some of which are “obvious and some which are not”:

- “we owe it to ourselves, as colleagues, to support judges who are ill, or under stress, in a way which may affect their judicial performance”;
- “a great deal of time and public money is invested in appointing the most skilful and suitable judges through a rigorous public process; and it is in everyone’s interests to keep judges in good health, where possible, and in post. We are an invaluable resource. Judicial skills are not readily replaceable and a premium should be placed on retaining judges for the full period of their appointment, provided they can carry out the functions which their posts require of them”;
- “there is the vexed question of age. Judicial appointments in England and Wales, particularly at the more senior level, tend to be taken up by people who have pursued a professional career for many years and who would normally expect to continue in post until retirement at 70. Age does not merely bring wisdom, we hope, and a free bus pass; it carries with it unfortunately, an increased risk of ill health”;
- “judges are not readily replaceable, whether for statutory or economic reasons or because of the time that the appointment process itself can take. And temporary appointments are not a serious or realistic option… and if Judge X is absent intermittently, or for a long and sometimes indeterminate period, it can make it difficult to sort out judicial deployment and the allocation of work”;
- “quite apart from the administrative side of things, the fifth reason is one that is often unacknowledged; it is that the absence of a judge, or the fact that he or she may not be firing on all four cylinders, can put real pressure on colleagues who are left behind, and who may be expected to pick up the slack, particularly if they are in a small court centre”.

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It follows, as urged by the Vice President, “that we should pay attention to maintaining judicial health, as best we can, as well as to addressing the problems which arise when someone is ill”. But more fundamentally, judicial wellbeing is the cornerstone of a well-functioning court, performing its vital function in society.

In a Keynote Address delivered by the Honourable Anne Ferguson, Chief Justice of the Supreme Court of Victoria, at the Wellness for Law Forum 2019 - “Making Wellness Core Business” - the Chief Justice said that “it was clear that wellness must play a central part in everyday and strategic planning at tertiary institutions and in workplaces, including the courts”.

Her Honour says that best practice points to the need for there to be “the flexibility and deliberate planning to integrate wellbeing strategies into working life”; and “best practice would see us structuring our systems for work with an eye to reducing unnecessary sources of stress”. By way of example, “there may be two ways of doing a piece of work” and “the method which produces the least stress should be preferred”. Therefore, for institutions like the courts and the legal profession, we need to prioritise the implementation of research into the minimisation of stress and wellbeing in the workplace.

The Chief Justice goes on to say:

As Chief Justice, my primary objective here today is delivering the message that wellbeing is a priority for me. This means the wellbeing of judicial officers, court staff, practitioners and all other court users.

In her address, the Chief Justice refers to four important strategies that have been implemented in the Supreme Court of Victoria in pursuit of this objective:

• “lead by example and communicate that wellbeing is a priority”;
• “examine and modify structures and processes”;
• “educate and support”;
• “address unfair criticism”.

13.3 JUDICIAL WELLBEING RESOURCES

The Judicial College of Victoria and the County Court of Victoria have created a valuable resource – “Judicial Wellbeing”- which “distils and curates leading national and international wellbeing resources to assist judicial officers to respond optimally to stress in themselves and others.”
The resource is divided into five areas:\(^{25}\)

- The phenomenon of judicial stress, with reference to relevant literature including “judicial wellbeing academic research; recent speeches and papers by Australian judicial officers; judicial wellbeing commentary; reports on lawyer wellbeing and mental illness; lawyer wellbeing academic research; best practice guidelines for the legal profession; and judicial wellbeing reference list”; a list of Australian and international judicial well-being organisations including the Judicial Research Project (Flinders University, South Australia); Judicial Stress Resource Guide (National Centre for State Courts USA); New Jersey Judges Assistance Program (New Jersey, USA); New York Judicial Assistance Program (New York USA); and Judicial Family Institute (A Committee of the Conference of Chief Justices, USA); relevant programs including initiatives with courts such as Reflective Practice: Supporting Judicial Resilience (County Court of Victoria); recent well-being programs conducted by the Judicial College of Victoria such as “Judicial Peer Support” (June 2019), “Judicial Well-being: The Self and the System” (August 2017); and various guidelines to support organisations in developing programs; and current research on judicial stress such as that conducted by Carly Schrever.

- Mental health resources such as “Depression and Anxiety” (Beyond Blue website); “Facts Sheet: Workplace & Personal Stress” (Law Institute of Victoria); Black Dog Institute; various publications on vicarious trauma, depression and anxiety, alcohol and drug addiction and stalking threats and safety concerns.

- Help for Victorian Judicial officers through the Judicial Officers Assistance Program.

- A list of various publications on well-being covering physical health and mindfulness.

Judicial officers around the Commonwealth are encouraged to access the Judicial College of Victoria website and read the invaluable material which is to be found there on judicial well-being.

13.4 THE CORONAVIRUS (COVID) AND JUDICIAL WELLBEING

The Coronavirus (COVID) Pandemic has brought to the forefront the importance of judicial wellbeing.

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In this ever changing and unpredictable world COVID represents another significant stressor to be added to the well documented existing stressors in the daily working and private lives of all individuals including judicial officers. Judicial officers have had to deal with the challenges of having to engage in the business of judges in different ways, as well as having to manage the risks of contracting the virus and transmitting it to family members, close friends and other members of the community which has involved varying degrees of social isolation.

Recognising the connection between the current Coronavirus pandemic and judicial well-being, the Judicial College of Victoria has “curated a careful selection of relevant and trusted resources for judicial officers and those working alongside them on the following topics:26

- masks and communication
- isolation
- managing the mental health of judicial officers
- staying in role
- screen fatigue
- grief
- supporting one’s family
- physical fitness
- self-care, compassion and mindfulness
- archived resources

In addition to this collection of resources and materials Victorian judicial officers have “24/7 access to free, confidential counselling and support through the Judicial Officers Assistance program”.27

13.5 THE PERSONAL WELFARE OF JUDICIAL OFFICERS: CODES OF CONDUCT, POLICIES, STRATEGIES, INITIATIVES AND PROGRAMMES

The Guide to Judicial Conduct published by the Australasian Institute of Judicial Administration for the Chief Justices of Australia and New Zealand AIJA Guide includes a section on judicial well-being.28

The Guide acknowledges the need to ensure the welfare of fellow judicial officers within a court.29

A court is a collegial institution. Members of a court can be expected to care about the welfare of their colleagues, particularly if a colleague’s health or well-being might affect the discharge of his or her duties.
As pointed out in the Guide, this expectation is born out of “appropriate care and concern” for one’s colleague; although it does not give rise to a legal responsibility it is rooted in a moral responsibility. It will usually be appropriate to inform the head of jurisdiction if there is cause for concern about the welfare of a colleague. There may be situations in which, before doing so or as well as doing so, it will be appropriate to offer assistance to the colleague in question.

Finally, the Guide concludes with the statement that “a judge should treat judicial colleagues with courtesy and consideration.”

The New Zealand Guidelines for Judicial Conduct also recognise the need for members of a court to support their colleagues and to be concerned about their well-being.

These Guidelines echo the AIJA Guide to Judicial Conduct by recognising that “a court is a collegial institution”, the members of which are expected to “care about the well-being of their colleagues, particularly if a colleague’s health or wellbeing might affect the discharge of his or her duties.” The Guidelines also address the appropriateness of informing the head of jurisdiction whenever there is cause for concern about a colleague’s welfare.

On a related matter, the New Zealand Guidelines state that “in addition to judges observing high standards of conduct personally, they should also encourage and support their judicial colleagues to do the same, as questionable conduct by one judge reflects on the judiciary as a whole.”

It is implicit in the Australian and New Zealand codes of judicial conduct that, as pointed out by The Rt Hon. Lady Justice Sharp (and referred to above), the wellbeing of judicial officers matters not only at a human level, but is of importance to the judicial system and the community at large. The judiciary is a collegial institution and if a colleague’s health or well-being may be affecting his or her ability to perform their role to the standard expected by the community that may have a tendency to undermine public confidence in the judiciary and its decisions.

As explained by the Rt Hon Lady Justice Sharp the responsibility to maintain or preserve judicial health lies with the judiciary - as is consistent with the principle of judicial independence:

When we think of judicial independence we think first and foremost about the independence to do our judicial work, to hear and decide cases and to write judgments, without external pressure or interference from the Executive or anyone else.

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It has long been recognised that judicial independence also involves the ability of
the judiciary to have some control or influence over what has been described as
“the administrative penumbra surrounding the judicial process”. But there is more
to judicial independence than that. The independence of each judge which is
necessary to uphold the rule of law is founded on the broader institutional
independence of the judiciary as a body, and its freedom from executive
interference, in relation to matters which are properly the subject of internal judicial
governance.

And health and welfare is one such area.\textsuperscript{38} I would add that how we deal with these
matters is not simply a matter of internal concern; public trust in the judiciary rests
in part on the confidence that the internal structures in relation to judicial
governance, work and work well.

It is implicit in this explanation that under no circumstances should the matter of judicial
welfare be left to the executive branch of government and its public servants and
administrators.\textsuperscript{39} The responsibility for ensuring the wellbeing of judicial officers lies
within the judiciary – in particular those in leadership roles.

Although both the AIJA Guide to Judicial Conduct and the New Zealand Guidelines to
Judicial Conduct make it clear where the responsibility for maintaining and preserving
judicial health and wellbeing lies, the so-called “nuts and bolts”\textsuperscript{40} – or “formal
processes” or “internal structures”\textsuperscript{41} - for achieving that aim are left to individual courts
to develop and implement. This is not to suggest that the Guide should include such
machinery, but to point out the absolute need for courts to put in place appropriate
processes and procedures to maintain and preserve the personal welfare of its judicial
officers, as stressed by Lady Justice Sharp.\textsuperscript{42}

A prime example of such a formal process or internal structure for maintaining and
preserving judicial wellbeing is the policy created by the HR Committee- with the
encouragement of the Judicial Executive Board and the Judges’ Council – in the
United Kingdom.\textsuperscript{43}

This is a Health and Welfare Policy which goes beyond being merely aspirational\textsuperscript{44}and
“provides a structure and a clear process to be followed when ill health arises”.\textsuperscript{45} It is
a policy which provides a “clear and consistent framework for managing sick
absence”.\textsuperscript{46}

Its essential features are:

\begin{itemize}
  \item an emphasis on early intervention as this “often prevent problems becoming
        intractable”\textsuperscript{47}
  \item the bringing together in one place “sources of advice and guidance that are
        available to the judiciary when a problem comes up”\textsuperscript{48}
\end{itemize}
• the establishment of “clear timelines for every stage” of the process and the clear articulation of the responsibilities of those concerned with the implementation of the policy;\(^4^9\)
• a policy that is “written in language suitable for the judiciary” and which “avoids as far as possible, what might be termed, ‘HR speak’”;\(^5^0\) and
• “sections on managing sick absence; on roles and responsibilities on procedures; on who to contact” and “a pictorial process... and sections on reasonable adjustments; occupational health referral, medical retirement and disability leave”\(^5^1\) and
• its recognition of the need for medical confidentiality.\(^5^2\)

Lady Justice Sharp touches on the various roles and responsibilities created under the policy:\(^5^3\)

The Policy identifies that judges who are ill should seek the support of their leadership judge when they are experiencing stress or any other problem which might be affecting their health or ability to work; likewise, if they have a health condition that could affect their judgement or performance, or if they are receiving treatment which could do so. They also have a responsibility not to return to work before they are well, for their own sake, and because they may not be able to perform their judicial duties properly.

As to the role and responsibilities of heads of jurisdiction, Lady Justice Sharp says:\(^5^4\)

Leadership judges for their part are expected to provide support to judges who are experiencing stress or other problems which might affect their health or ability to work, including by making appropriate adjustments to sitting patterns or other aspects of deployment. They are also expected to stay in contact with judges who are off sick; and to help them to return to work by talking to them, as appropriate, about any support they might need to do so.

As described by Lady Justice Sharp, the Policy “gathers information about the support available to the judiciary”.\(^5^5\) Lady Justice Sharp highlights two important sources.\(^5^6\) The first is the “Judicial Helpline” which provides members of the judiciary and their immediate families with a confidential telephone line that allows “immediate access to ‘practical and emotional support’ from trained personnel 24 hours a day, every day of the year, free of charge.”.\(^5^7\) Free face-to-face counselling is also available. The second source is “Law Care”, which is a charity that provides “health support and advice free of charge, for the judiciary and members of the legal profession, all year”.\(^5^8\) This website provides useful information and guidance, as well as providing “training courses on stress and vicarious trauma”.

With a view to making the Policy effective, the Judicial College, which is the body responsible for training judicial officers, has dedicated training courses to assist judicial leaders in relation to their role and responsibilities under the Policy. \(^5^9\) The College also offers all newly appointed leadership judges “a module on managing stress” which
includes strategies for identifying and responding to stress in other judges and managing the stresses of their own role.\textsuperscript{60}

Another important practical step taken to make the Policy effective has been the introduction of Judicial HR Regional advisers whose role is to provide advice and support for judicial leaders in relation to judicial wellbeing.\textsuperscript{61}

Finally, but not least, Lady Justice Sharp mentions the recently introduced program for the Canadian judiciary on judicial wellbeing.\textsuperscript{62} The program not only provides members of the judiciary with free confidential counselling but provides "a specialised counselling service for judges who have had stressful trials dealing with ‘toxic evidence’."\textsuperscript{63} The Canadian Judiciary also runs a course called “Survive and Thrive: Optimising Judicial Productivity and Well-Being”, covering a range of topics such as vicarious trauma, toxic evidence and managing high profile cases and including sessions on physical and psychological well-being and stress.\textsuperscript{64}

\textbf{13.6 THE WELLBEING OF COURT STAFF}

The well-being of court staff is as important as the wellbeing of judicial officers.

One area of court excellence is “Workforce Engagement and Wellbeing” which involves the development of “a conducive work environment that enhances the health and wellbeing of judges and court staff”.\textsuperscript{65} As stated in the second edition of the International Framework for Court Excellence (IFCE) the Framework takes “a whole of court approach to achieving court excellence”.\textsuperscript{66}

Consistent with that approach, the AIJA Guide to Judicial Conduct provides:\textsuperscript{67}

\begin{quote}
A judge should treat all court staff courteously and considerately. A judge should be mindful that court staff may feel unable to differ from the judge. In dealing with senior court staff an individual judge should respect their responsibility for the efficient administration of the court and the proper use of court resources.
\end{quote}

Furthermore, the Guide stresses the need for judges to “conform to the standard of conduct required by law and expected by the community” and to “treat others with civility and respect in their public life, social life and working relationships”.\textsuperscript{68} The Guide goes on to state:\textsuperscript{69}

\begin{quote}
It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying in relation to these matters. In relation to these matters. Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.
\end{quote}

In a similar vein, the UK Guide to Judicial Conduct prescribes the manner in which judicial officers should behave towards court staff: \textsuperscript{70}
Members of the judiciary should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. They should ensure that no one in court is exposed to any display of bias or prejudice on grounds which include but are not to be limited to “race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes”.

The New Zealand Guidelines for Judicial Conduct deal more comprehensively with the topic.

The Guidelines begin with harassment (including sexual harassment) generally:71

Comment conduct (including sexual comment or conduct) by a judge that is inappropriate, insulting, intimidating, degrading or offensive is incompatible with judicial office.

The Guidelines proceed to specifically address relationship with staff and harassment of staff (including sexual harassment):72

A judge must be professional and treat all court and judicial staff courteously and considerately. A judge must bear in mind the power imbalance which exists between them and staff. Court and judicial staff may feel unable to differ from the judge. Criticism by a judge may have greater impact than the judge intended.

A judge must not subject court or judicial staff to comment or conduct that is inappropriate, insulting, intimidating, degrading or offensive.

13.7 THE ROLE OF THE UNODC PAPER ON GENDER - RELATED INTEGRITY ISSUES IN ENSURING THE WELLBEING OF JUDICIAL PERSONNEL

It is clear from the sections contained in the various codes of judicial conduct that the well-being of court personnel is important as the wellbeing of judicial officers, and the health of such personnel is essential to maintaining the integrity of the judiciary.

As previously mentioned in the Guide, the United Nations on Drugs and Crime (UNODC) paper on Gender Related Integrity Issues (“The Paper”) amongst other things discussed the way in which gender-related integrity issues may arise in interaction between judicial officers and court personnel.73

The Paper emphasised that it is the responsibility of judicial officers to ensure that all those who use or are part of the justice system are treated with respect and their interactions with court users and court personnel conforms to judicial standards and their personal interactions do not undermine their integrity both professionally and personally. Furthermore, when carrying out their administrative duties, judicial officers must respect gender related issues and promote public confidence in the judiciary. It is essential that judicial officers adhere to these standards of conduct in order to

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ensure the well-being of court personnel because the wellbeing of court personnel must be a priority of any court that aspires to excellence.

With respect to the need to ensure the wellbeing of judicial personnel, the Paper discusses the incidence of “sexual harassment in the courthouse” directed at judicial colleagues and court personnel. Judges harassing other judges or court personnel is unacceptable because not only is it wrong as being contrary to the standards of integrity and propriety expected of judicial officers, but it can severely affect the well-being of judicial personnel. Similarly, uninvited sexual activity, touching and sexual comments on the part of a judicial officer towards a fellow judge or court personnel is wrong, and may impact upon the personal welfare of the recipient of such misconduct.

Furthermore, hostile, sexist or misogynistic statements made by judicial officers directed at another judicial officer or judicial personnel is equally wrong and can have a serious effect on them.

Finally, but not least, the Paper discusses inappropriate sexual conduct - even if consensual - in the workplace between judicial officers and other judicial officers or court personnel. The difficulty with such conduct is firstly “the power imbalance between judges and others may make it difficult to ascertain whether [the conduct] is truly consensual”; and secondly, “more importantly, even consensual conduct can raise integrity issues and undermine public confidence in the judiciary if the nature of the conduct or the manner in which it occurs is inappropriate”.

As pointed out in the Paper, although there has been an increase in the number of codes/guidelines of ethical conduct for judicial officers and judicial personnel, these codes rarely deal with gender specific issues. However, there are some exceptions, which were referred to above.

As mentioned in Chapter Two of this Guide, there is a need for clear and comprehensive guidance about gender-related integrity issues and that may be achieved by a number of strategies, including the incorporation of gender-specific provisions in codes of judicial conduct, the strengthening of the Bangalore Principles of Judicial Conduct and the implementation of gender-sensitive policies and other guidance such as gender protocols, bench books and sexual harassment policies.

13.8 RECENT GENDER RELATED INTEGRITY ISSUES IN AUSTRALIA

The recent investigation of allegations of sexual harassment against former Justice of the High Court of Australia, the Hon Dyson Heydon AC QC, has brought to the forefront gender related integrity issues in Australia and the need for effective judicial education and training within the judiciary in relation to such issues.
The investigation, which was conducted by Dr Vivienne Thom AM after the High Court commissioned an independent inquiry, found that six former staff members who were Judges’ Associates were harassed by the former Justice.

Following receipt of Dr Thom’s report, the Chief Justice of the High Court, the Honourable Susan Kiefel AC, issued the following statement:

The findings are of extreme concern to me, my fellow Justices, our Chief Executive Officer and the staff of the Court. We’re ashamed that this could have happened at the High Court of Australia.

We have made a sincere apology to the six women whose complaints were borne out. We know it would have been difficult to come forward. Their accounts of their experiences at the time have been believed. I have appreciated the opportunity to talk with a number of the women about their experiences and to apologise to them in person. I have also valued their insights and suggestions for change that they have shared with the Court.

The Court has not spoken about the investigation to this point. A number of women requested confidentiality. The Court now confirms that the subject of the investigation was the Hon Dyson Heydon AC QC. We ask that the media respect the privacy of the complainants.

The independent investigation made the following six recommendations, all of which we have adopted and acted upon:

- The Court should develop a supplementary HR policy relevant to the particular employment circumstances of the personal staff of Justices including associates.
- The Court should review the induction it provides to associates to make sure it covers material directly relevant to their specialised role.
- The Court should identify an appropriate person to form a closer working relationship with associates. This person would check in regularly with associates, fulfil some of the administrative advisory function of a supervisor, provide support if required, and act as a conduit to the Chief Executive and Principal Registrar where appropriate.
- The Court should clarify that the confidentiality requirements for associates relate only to the work of the Court.
- The Court should make clear to associates that their duties do not extend to an obligation to attend social functions.
- The Court should consider canvassing current associates to find out more about their experiences while working at the Court.

We have moved to do all that we can to make sure the experiences of these women will not be repeated. There is no place for sexual harassment in any workplace. We have strengthened our policies and training to make clear the importance of a respectful workplace at the Court and we have made sure there
is support and confidential avenues for complaint if anything like this were to happen again.

3 University of Melbourne article n 2. Carly Shrever has since been awarded a PhD for her research.
4 University of Melbourne article n 2.
5 University of Melbourne article n 2.
6 University of Melbourne article n 2.
7 University of Melbourne article n 2.
8 University of Melbourne article n 2.
9 University of Melbourne article n 2.
12 Lady Justice Sharp n 11, pp 2-3.
13 Lady Justice Sharp n 11, p 3.
14 Chief Justice Anne Ferguson Keynote Address ”Making Wellness Core Business” delivered at the Wellness for Law Forum 2019, p 2.
15 Chief Justice Ferguson n 14, p 2.
16 Chief Justice Ferguson n 14, p 2.
17 Chief Justice Ferguson n 14, p 2.
18 Chief Justice Ferguson n 14, p 2.
19 Chief Justice Ferguson n 14, p 4.
20 Chief Justice Ferguson n 14, p 4: “Leadership and visibility are important. People need to know that their employer or organisation has the competence to assist them and that sustained stress and poor mental health is not an acceptable and inevitable side effect of the practice of law”.
21 Chief Justice Ferguson n 14, p 4: “At the Supreme Court we look at how the work is done and whether structures, systems and procedures can be adapted to take away unnecessary sources of stress, without affecting the quality of the service provided by the Court”. Examples are case management reforms and “judge specialisation”.
22 Chief Justice Ferguson n 14, pp 5-6. The Chief Justice refers to the resources provided by the Judicial College of Victoria on judicial wellbeing covering judicial stress, mental health, getting help and wellbeing and including judicial speeches and articles, factsheets, podcasts and videos and links to external organisations and resources. Her Honour also refers to the introduction of mental health first aid training sessions at the Supreme Court for managerial staff and judicial leaders and access by judicial officers to “a confidential psychological wellbeing service with a 24/7 contact number, telephone and face to face counselling” as well as the availability of a “biannual confidential comprehensive medical assessment”.
23 Chief Justice Ferguson n 14, p 6. Her Honour points out that the “prominence of critical and at times ill-informed media commentary on court proceedings, and judges personally, is of deep concern” and it is not surprising that “this is a cause of judicial stress”. Strategies to address the problem include initiatives “to improve public understanding of the work of courts” and “media engagement improvements” which include a podcast series.
26 www.judicialcollege.vic.edu.au
33 New Zealand Guidelines for Judicial Conduct 2019 at [94]-[99].
34 New Zealand Guidelines for Judicial Conduct n 33 at [97].
35 New Zealand Guidelines for Judicial Conduct n 33 at [98].
36 New Zealand Guidelines for Judicial Conduct n 33 at [95]. See also [96] of the Guidelines which states: “Judges also have opportunities to be aware of the conduct of their judicial colleagues. If a judge is aware of evidence, which, in the judge’s view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to what action the judge should take, having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the Chief Justice or Head of Bench of the relevant court”.
37 Lady Justice Sharp n 11, pp 3-4.
38 See for example, how the matter was put by Lord Justice Thomas, as he was then, the Senior Presiding Judge of England and Wales in The Position of the Judiciaries of the United Kingdom in the Constitutional Changes: Address to the Scottish Sheriffs’ Association, 8 March 2008.
39 Lady Justice Sharp n 11, p 3.
40 Lady Justice Sharp n 11, p 4.
41 Lady Justice Sharp n 11, p 4.
42 Lord Justice Sharp n 11, pp 3-4.
43 This is discussed by Lady Justice Sharp n 11, pp 5-9.
44 Lady Justice Sharp n 11, p 7.
45 Lady Justice Sharp n 11, p 5.
46 Lady Justice Sharp n 11, p 5.
47 Lady Justice Sharp n 11, p 5.
48 Lady Justice Sharp n 11, p 5.
49 Lady Justice Sharp n 11, p 6.
50 Lady Justice Sharp n 11, p 6.
51 Lady Justice Sharp n 11, p 6.
52 Lady Justice Sharp n 11, p 7: “The Policy explains how medical confidentiality works. This provides reassurance for those who might be nervous about getting help when they need it, because of what their colleagues might think. The Policy explains the purpose of an occupational health referral and its limits. Contrary to what some believe, judges are not obliged to disclose to leadership judges the details of what their doctors say; and an occupational health assessment simply provides an opinion on a judge’s current state of health and a prognosis on his or her capacity to perform the duties of their office”.
53 Lady Justice Sharp n 11, p 6.
54 Lady Justice Sharp n 11, p 6.
55 Lady Justice Sharp n 11, p 7.
56 Lady Justice Sharp n 11, p 7.
57 Lady Justice Sharp n 11, p 7.
58 Lady Justice Sharp n 11, p 7.
59 Lady Justice Sharp n 11, p 7.
60 Lady Justice Sharp n 11, p 8.
61 Lady Justice Sharp n 11, p 8.
62 Lady Justice Sharp n 11, p 9.
63 Lady Justice Sharp n 11, p 9.
64 Lady Justice Sharp n 11, p 9.

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Sexual harassment ranges from sextortion to unwanted sexual attention and gender harassment. It also includes “quid pro quo sexual harassment” ie judicial officers making “sexual demands of court employees in exchange for employment opportunities”.

See Chapters 2 and 5.

United Nations on Drugs and Crime (UNODC) Paper on “Gender Related Integrity Issues”, p 18. Sexual harassment ranges from sextortion to unwanted sexual attention and gender harassment. It also includes “quid pro quo sexual harassment” ie judicial officers making “sexual demands of court employees in exchange for employment opportunities”.

See Chapters 2 and 5.