HIGH COURT OF AUSTRALIA

Attorney-General (N.S.W.)

Vs.

Quin

Mason C.J.(1), Brennan(2), Deane(3), Dawson(4) and Toohey(5) JJ.

7 June 1990

MASON C.J.

1. This is an appeal by the Attorney-General for New South Wales against a declaration made on 23 December 1988 by the New South Wales Court of Appeal (Kirby P. and Hope J.A.; Mahoney J.A. dissenting) requiring him to consider according to law an application dated 12 December 1983 by the respondent, Mr Quin, for appointment as a magistrate. The effect of that declaration was to require the Attorney-General to consider the respondent's application for appointment on its own merits and not in competition with applications from other applicants. The declaration was made in proceedings brought by the respondent which were a sequel to an earlier decision of the Court of Appeal (Kirby P., Mahoney and Priestley JJ.A.) given on 24 June 1987 whereby the Court declared void a decision of the Attorney-General on or before 12 December 1984 not to recommend the appointment of the respondent and four other persons as magistrates under the Local Courts Act 1982(N.S.W.) ("the Act"): Macrae v. Attorney-General for N.S.W. (1987) 9 NSWLR 268.

2. In order to identify the issues which arise for decision in the present appeal, it is necessary to state in some detail the complex history of this matter. The proceedings which gave rise to the two decisions of the Court of Appeal have their genesis in the reorganization of the magistracy in New South Wales in 1985. At that time, six persons, including Mr Quin, who formerly held office as stipendiary magistrates under the Justices Act 1902 (N.S.W.) were not appointed magistrates under the new Act, which came into operation on 1 January 1985. Ninety-five magistrates who had held office under theJustices Act

were reappointed under the new Act.

3. Before the Act came into operation, magistrates holding office under the Justices Act sat in Courts of Petty Sessions. The office of magistrate which they held ceased to exist when the new Act came into force. However, they were given an opportunity to apply to be appointed magistrates under the new Act. Section 12 of the Act makes provision for the appointment of new magistrates by the Governor. Appointment under the Act is by way of recommendation by the Attorney-General to Cabinet and then, on his recommendation, to the Executive Council. Schedule 1 to the Act is entitled "Savings and Transitional Provisions" and cl.5 is headed "Savings relating to stipendiary magistrates". The clause has been amended, but in respects which do not affect the present case. In its amended form cl.5 provides:

"(1) In this clause, 'former Magistrate' means a person who, immediately before the appointed day, was employed under the Public Service Act 1979, in the position of stipendiary magistrate.
(2) A former Magistrate who -
(a) accedes to the office of a Magistrate on the appointed day; and
(b) immediately before the appointed day, held another office under any other Act (other than the office of chairman of the bench of stipendiary magistrates) by reason of his having been a stipendiary magistrate when he was appointed to, or nominated for, that other office,
shall not vacate that other office by reason only of his not having been a Magistrate when he was appointed to, or nominated for, that other office.
(3) A former Magistrate who does not accede to the office of a Magistrate on the appointed day is, if the former Magistrate has not attained the age of 60 years, entitled to be appointed to some position in the Public Service and is, until -
(a) attaining that age; or
(b) ceasing to be a public servant,
whichever first occurs, entitled to be paid salary at a rate not lower than the rate of salary for the time being payable to a Magistrate of the rank or grading that is the equivalent (or the nearest equivalent) of the rank or grading held by the former Magistrate immediately before the appointed day.
(4) Neither the enactment of nor the provisions of subclause (3) shall be treated by any court or tribunal, or in any other way, as a precedent for the manner in which other persons may be dealt with."

4. Before 1 January 1985 all magistrates who held office under the Justices Act were invited on behalf of the Attorney-General to make application for appointment under the Act. A form was provided to them for this purpose. The letter written to them, which reflected the provisions of cl.5(3) of Sched.1, contemplated that former magistrates might not "accede" to the office of magistrate under the new Act. All but one of the magistrates holding office under the Justices Act applied. Of those who applied, all but five were appointed. The five former magistrates who applied and were not appointed became plaintiffs in the first proceedings against the Attorney-General. Two of those five have since retired, and a further two chose not to proceed in the present action, leaving only the respondent in this case.

5. The history of the matter was reviewed by Priestley J.A. in his reasons for judgment in the first proceedings: see Macrae, at pp 287-301. It seems that in early 1983 stipendiary magistrates generally had the impression that they would all be appointed to the office of magistrate under the Act. This impression was no doubt reinforced by a circular dated 21 April 1983 sent to magistrates by Mr Briese, the Chairman of the Bench of Stipendiary Magistrates, which stated:

"All persons who are now magistrates are to accede to the office of magistrate under the Local Courts Act."

The circular evidently reflected Mr Briese's then understanding of the attitude of the Attorney-General (Mr Landa) to the appointment of magistrates to the new courts. However, in the course of subsequent correspondence, Mr Briese made it clear to the Attorney-General that he did not favour the appointment of the five plaintiffs on the ground that their past performance had raised questions as to their suitability in point of ability and temperament. In the result, the Attorney-General made a reference to the New South Wales Law Reform Commission requesting the Commission to inquire into and report on the procedures and criteria which should be followed and applied in the selection of the persons first to be appointed as magistrates under s.12(1) of the Act.

6. The Commission delivered an interim report on 16 September 1983. This report recommended as follows:

"1. Stipendiary magistrates should not be automatically appointed as Magistrates under the ... Act.
2. The first appointments of Magistrates should be undertaken by means of a process which we call 'phased selection'. Under this process:
. applications for appointment would first be invited from all stipendiary magistrates;
. the applications would be assessed by an appointments committee which would advise the Minister as to the applicants who are recommended for appointment;
. any vacancies arising after consideration of the applications from stipendiary magistrates would be filled, after open advertisement, by the Minister on the recommendation of the committee ..."

The report went on to recommend (recommendation 11) that the Act and, if necessary, the Public Service Act 1979 (N.S.W.) be amended to ensure that any stipendiary magistrate who did not accede to the office of magistrate should enjoy continuity of service and salary within the Public Service until the date of his or her retirement, subject to the discipline and conduct provisions of the Public Service Act. The report mentioned that "some well-informed participants in, and observers of, the system" had serious concerns about the suitability of some magistrates for appointment to the new courts. The existence of these concerns prompted the Commission to recommend that all serving magistrates should not be automatically appointed to the new courts and, along with other considerations, to make recommendation 11.

7. In November 1983, the Attorney-General constituted a selection committee as recommended by the Commission, with authority to make selections "in the terms and under the circumstances proposed in the (Commission's) report". A copy of the Commission's report was sent to every stipendiary magistrate along with an invitation to apply for appointment under the Act. The selection committee presented its report on 2 May 1984. The committee in its report referred to the opinions expressed by Mr Briese about the five plaintiffs and stated that as "a result of its inquiries and deliberations" it shared the view of Mr Briese and his deputies. However, the committee had been informed by the Attorney-General by letter dated 19 April 1984 that the Government had decided not to adopt the Commission's recommendation 11. This meant that the basis upon which

the committee had proceeded was no longer appropriate. As a result, the committee recommended the appointment of all serving magistrates, subject to medical examinations and disciplinary proceedings; this included the five plaintiffs, on the footing that the committee could not conduct a formal disciplinary inquiry into complaints about the five plaintiffs and that their non-appointment, without security in terms of service and salary, would violate the constitutional convention of security of judicial tenure. The report did, however, recommend that the complaints against the five plaintiffs be investigated in disciplinary proceedings.

8. On 11 September 1984 the Attorney-General tabled the report of the selection committee in Parliament and made a statement in the course of which he asserted that the Government would not institute disciplinary proceedings against the plaintiffs, that he had been advised that there was no prospect that such proceedings would result in punishment of the plaintiffs such as to disentitle them from appointment pursuant to the committee's recommendations and that the Government would now implement the Commission's recommendation 11. This was subsequently achieved by enacting cl.5(3) of Sched.1 to the Act in its present form. Ultimately, on 12 December 1984, the Premier and Attorney-General (Mr Wran) announced that all serving magistrates, other than the plaintiffs, would be appointed to the new courts. It seems that the Government acted on the adverse comments made by the selection committee about the plaintiffs without giving them any opportunity of responding.

9. In the first proceedings, brought by summons on 24 December 1984, the plaintiffs sought declarations and consequential orders on the ground that they had been denied natural justice by the refusal of the Attorney-General to submit their names for appointment under the Act and by his refusal to accept the recommendations of the selection committee. At first instance Lee J. dismissed the summons. Before the Court of Appeal the five former magistrates sought the following declarations in lieu of the declarations sought at first instance:

"1. That the decision of the Attorney-General on or before 12 December 1984 not to recommend the appellants' (plaintiffs') appointment as magistrates under the Local Courts Act 1982 was and is void; and
2. That the Attorney-General in considering each of the appellants' (plaintiffs') applications for appointment as magistrates under the Local Courts Act is not entitled to take into account or otherwise act upon any matter or material adverse or thought to be adverse to any of the appellants (plaintiffs) without notifying the person concerned of the existence and content of such matter or material and giving the person concerned a full and fair opportunity to be heard in relation thereto."

10. It was established that the material adverse to the five had been considered, that no notice of it had been given to them and that they had no opportunity of answering it, and that it was for this reason that they did not "accede" to the new position of magistrate. In the result, on 24 June 1987, the Court of Appeal made the first declaration sought by the plaintiffs, namely, that the decision of the Attorney-General made on or before 12 December 1984 not to recommend their appointments as magistrates under the Act was and is void. Leave was reserved to any party, to be exercised within twenty-one days, if thought fit, to make application in regard to further consideration of the second declaration which the plaintiffs had asked the court to make: Macrae, at p 309. The plaintiffs took advantage of this reservation and brought the matter back to the Court of Appeal. In the event they

did not pursue the matter, save to seek and obtain an order that the costs of the abortive restoration be included in the costs of the proceedings which they had been awarded.

11. The case made by the plaintiffs in those proceedings was that they had been denied procedural fairness. They claimed that in the circumstances of the case they had a legitimate expectation that they would be treated fairly in the consideration of their applications for appointment to the new courts, that without their knowledge allegations were made concerning their unfitness to be appointed and that they were never given an opportunity properly to answer those allegations. They did not claim that, if all that had happened was that a new court was created and the Attorney-General was considering the first appointments to it, he would have to give notice to any persons whose appointment he was considering of any adverse matters concerning them coming to his attention before he decided not to appoint them. They relied very much upon the history of the matter. It was in these special circumstances that it was held by all members of the court in Macrae that the plaintiffs had a legitimate expectation of procedural fairness which had not been met. An application by the Attorney-General for special leave to appeal to the High Court from this decision was refused in 1988.

12. The Solicitor-General in the first proceedings had lodged with the Court of Appeal written submissions by way of response to the plaintiffs' restoration of the matter to the list when it was expected that the plaintiffs would seek the making of the second declaration. In those written submissions it was said on behalf of the Attorney-General (Mr Dowd) that he had decided in 1987 to depart from the course previously adopted in recommending former magistrates for appointment to the Local Courts. Previously the Attorney had recommended former magistrates who were not unfit. In 1987 he decided to select entirely on merit and that required an assessment of competing applicants. Consequently, he did not wish in 1987 to treat applications from any of the plaintiffs differently from those of any member of the public. One specific reason assigned for this course was the desire to appoint the most suitable persons. A second contention made by the Solicitor-General in his submissions was that the setting aside of the selection committee's recommendation in 1984 did not and could not restore the situation as it had existed at that time. This led to a further submission that the plaintiffs did not have "current applications for appointment".

13. On 12 April 1988 the solicitor for the plaintiffs in the initial proceedings wrote to the Attorney-General describing the history of the matter and asking that he take all steps to recommend to the Governor the immediate appointment of the three remaining plaintiffs. The Attorney replied on 11 May 1988 stating that he did not intend to depart from the usual selection procedure by recommending the appointment of the three plaintiffs. He said that they would be at liberty to apply in response to advertisements to be placed in the press. If they applied, the Attorney stated that he would regard himself as bound by the declaration made by the court and that he would ensure that the adverse material would not be taken into account unless the three plaintiffs were given an opportunity to respond. After observing that two members of the earlier selection committee would not sit on the committee in view of their previous involvement, the Attorney added:

"An application lodged by any of your clients will
therefore be dealt with in the usual way and assessed
alongside applications received from other people seeking
appointment."

14. Since 1 January 1985 the Attorney-General has caused positions as magistrates in the Local Courts to be advertised and the Governor has appointed forty-one further magistrates to those

Courts. On 21 May 1988 he again advertised for further applications for appointment as magistrates and received ninety-four applications in response. Following interviews of the applicants, an eligibility list of fifteen was created and thirteen persons were appointed as magistrates from that list. It is said that there are now no vacant positions as Local Court magistrates. However, it was not suggested that the Governor could not make additional appointments in the future.

15. After the advertisements had been published, the solicitors wrote to the Attorney on 30 June 1988 stating that the plaintiffs' applications had never been considered properly or at all, that the plaintiffs had a legal right to have their applications, which they claimed were still pending, considered according to law and that they did not propose to make fresh applications. The letter requested the Attorney to appoint the plaintiffs as magistrates or consider their applications according to law. The Attorney responded by letter dated 14 July stating that there was no provision in the Act which would facilitate a retrospective accession to the office of magistrate and that the plaintiffs would not be considered for appointment unless they made application for it. The Attorney's response proceeded on the footing that, since the Court of Appeal's declaration on 24 June 1987, no further consideration had been given to the plaintiffs' applications because the view was taken that the applications ceased to be effective on 1 January 1985 for the reason that they were for appointment at that date.

16. It was in these circumstances that the three plaintiffs commenced the present proceedings in the Supreme Court in which they sought an order restraining the Attorney-General from filling current vacancies in the position of magistrate under the Act unless he left three unfilled positions, a declaration that the plaintiffs were entitled to have their applications considered according to law and an order that the Attorney hear the applications according to law. At the hearing, the plaintiffs other than the respondent withdrew their claims with the result that the respondent proceeded as the sole plaintiff. However, he abandoned his claim for an injunction.

17. All the members of the Court of Appeal were of opinion that the respondent's entitlement to have his application considered according to law, pursuant to the declaration made on 24 June 1987, was unaffected by his refusal to make a further application for appointment in response to the later advertisements. In this Court the Solicitor-General accepted the correctness of the Court of Appeal's decision upon this point and did not press the contrary view.

18. The point of departure between the majority and Mahoney J.A. was that the majority considered that inherent in the decision in Macrae was the proposition that the Attorney-General had placed all former magistrates in a special position whereby their applications were not to be considered in competition with other applicants; each was to be considered on his or her own merits and without regard to the merit of applicants who were not former magistrates. On the other hand, Mahoney J.A. thought that no such proposition was embedded in the judgments in Macrae. In his Honour's view, the three judgments in that case identified the issue as one of procedural unfairness and granted relief in that respect. His Honour's view of the judgments in Macrae is, in my opinion, correct: see per Kirby P. at pp 271, 273-274, 283; per Mahoney J.A. at pp 285-287; per Priestley J.A. at pp 304, 307-309.

19. The respondent's contention that the decision in Macrae went beyond the issue of procedural unfairness is partly based on the references in the judgments of the Court of Appeal to the plaintiffs' legitimate expectations. The plaintiffs did not argue in Macrae, nor does the respondent argue in the present case, that the plaintiffs had a legal right, or even a legitimate expectation, that they would be appointed to the Local Courts. It seems that what they asserted then, and what the respondent now

asserts, is that they had a legitimate expectation that the Attorney-General, in considering whether or not to recommend their appointment, would accord them procedural fairness, that is, the opportunity to answer material which was adverse to them. It was that legitimate expectation, no more and no less, that attracted the duty to accord procedural fairness. Thus, Kirby P. held that the plaintiffs had a legitimate expectation, before the Attorney-General made a decision that they, alone of all their colleagues, would not be recommended for appointment, that they would have an opportunity of being acquainted with and of answering the adverse materials drawn to the attention of the Attorney: see at p 281. Similarly, Mahoney J.A. concluded (at pp 285-286) that the legitimate expectations of the plaintiffs would involve two things: that each would have the right to put his or her case in respect of such material; and that each would have the right to know of such material as was to be relied upon against him or her. Priestley J.A. concluded (at p 308) that the plaintiffs had legitimate expectations which would be affected by the Attorney-General's recommendation. His Honour seems to have thought that the plaintiffs' applications were more akin to renewal than to original applications. Indeed, he seems to have thought that "the substance of what was happening was removal" rather than original application or renewal: see at pp 305-306. However that may be, I do not read their Honours' references to legitimate expectations as amounting to any more than findings that attracted the duty of procedural fairness. I do not read the references as importing a duty to consider the plaintiffs' applications apart from and independently of applications by other applicants. Their Honours' reservation of the making of the second declaration sought indicates that this question had not been resolved by the reasons for judgment.

20. The respondent's principal submission in this Court is that the declaration made by the Court of Appeal on 23 December 1988 did no more than enforce the duty of fairness held to exist in Macrae. According to the respondent's argument, had the Attorney-General not improperly taken into consideration the adverse material in considering the respondent's application, in breach of the rules of natural justice, he would have appointed the respondent as a Local Court magistrate, along with the ninety-five other former magistrates who were appointed under the Act. The Attorney would then have had regard only to the question whether the respondent was fit for appointment, that being the only question to which he directed his mind when considering the applications of the ninety-five magistrates who were appointed. He would not have considered the respondent in competition with applicants who were not magistrates, as he now proposes to do. The next step in the argument is to say that the Court will grant relief in respect of the breach of the duty of fairness so as to ensure that his original application, which has not yet been dealt with, is considered as it would have been considered but for that breach of duty. Otherwise, so the argument runs, the respondent will be singled out for discriminatory treatment in comparison with the ninety-five former magistrates appointed to the Local Courts in such a way that his former status as a magistrate would be ignored. Moreover, the respondent submits that if the Attorney-General were to banish the adverse material entirely from his mind, as he should do, in order to comply with the declaration made in Macrae, then he should deal with the respondent as the ninety-five former magistrates were dealt with, by considering his application alone on its merits, not in competition with other applicants. The Attorney's refusal to take this course is, according to the argument, an indication that the adverse material is continuing to have a prejudicial effect.

21. There are two answers to the respondent's case. The first is that, according to the statement made by the Solicitor-General to the Court of Appeal, the Attorney-General decided in 1987 to depart from the course previously adopted in recommending former magistrates for appointment to the Local Courts. Previously he had recommended former magistrates who were not unfit. In 1987 he decided to select entirely on merit and that required an assessment of competing applicants. The respondent does not contend that such a change of policy did not take place in 1987 and there is

nothing in the materials which would support any suggestion that the change of policy was motivated by a desire to take into account the adverse materials regard to which gave rise to the decision in Macrae. Accordingly, we must proceed on the footing that the Attorney-General changed his policy in making recommendations because he considered that the new policy would better serve the interests of the administration of justice in New South Wales by securing the appointment as magistrates of those persons who were best qualified and willing to serve.

22. Section 12 of the Act is expressed in very general terms. Sub-section (1) provides:

"The Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate."

Sub-section (2) prescribes the qualifications for eligibility for appointment. The section makes no attempt to prescribe the procedures to be followed or the criteria to be applied in making such an appointment, except in so far as s.12(1) requires appointment by commission under the public seal of the State. In all other respects the section leaves it to the Governor and to those responsible for advising him to adopt such procedures and apply such criteria as may be considered appropriate. In view of the practice followed in New South Wales in relation to the appointment of judicial officers, it was for the Attorney-General and Cabinet to decide what procedures, if any, should be followed and what criteria, if any, should be applied in selecting and recommending magistrates for appointment. After all, the Attorney-General may, without adopting any procedure or applying any set criteria, decide to recommend a particular person for appointment and that recommendation may be accepted by Cabinet, resulting in appointment by the Governor. Accordingly, the decision taken by the Attorney-General in 1987 to consider applications by former magistrates in competition with applications by other persons was in conformity with s.12. Moreover, it was an approach which the Attorney-General was at liberty to adopt as an element in the traditional process by which the Crown or the Executive appoints judicial officers.

23. Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. The Executive cannot by representation or promise disable itself from, or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power: see Watson's Bay and South Shore Ferry Co. Ltd. v. Whitfeld [1919] HCA 69; (1919) 27 CLR 268, at p 277; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54, at pp 74-76; Malvaso v. The Queen [1989] HCA 58; (1989) 64 ALJR 44, at p 47[1989] HCA 58[1989] HCA 58; ; ; 89 ALR 34, at p 37; Birkdale District Electric Supply Co. v. Southport Corporation (1926) AC 355, at p 364; Cudgen Rutile (No. 2) Ltd. v. Chalk (1975) AC 520, at pp 533-534; Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. (1962) 1 QB 416, at pp 423-425; Western Fish Products Ltd. v. Penwith District Council [1978] EWCA Civ 6; (1981) 2 All ER 204. Accordingly, it has been said that "a public authority ... cannot be estopped from doing its public duty", to use the words of Lord Denning M.R. in Lever Finance v. Westminster London Borough Council (1971) 1 QB 222, at p 230. See also Rootkin v. Kent County Council (1981) 1 WLR 1186;(1981) 2 All ER 227. As Gummow J. observed in Minister for Immigration v. Kurtovic (1990) 92 ALR 93, at p 111, the principle has been explained on the

footing that:

"in a case of a discretion, there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised (any more than a contract might be relied upon) to prevent or hinder the exercise of the discretion; the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding".

cf. Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] UKPC 2; (1983) 2 AC 629, at p 638.

24. No doubt the principle gains some of its force from the circumstance that the discretion has a legislative foundation and it is not readily to be supposed that the legislature intended that a proper exercise of the discretion in the public interest was to be frustrated, hindered or circumvented by executive action. Nonetheless there is no reason why the same principle should not apply to common law powers and functions of the Crown or the Executive when they involve the making of decisions in the public interest.

25. What I have just said does not deny the availability of estoppel against the Executive, arising from conduct amounting to a representation, when holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest. And, as the public interest necessarily comprehends an element of justice to the individual, one cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of the discretion: see the observations of Lord Denning M.R. in Laker Airways v. Department of Trade (1977) QB 643, at p 707; but see also the criticism of this approach by Gummow J. in Kurtovic, at pp 121-122.

26. However, in the present case there is no justification for granting relief in a form which would compel the Executive to adhere to an approach to judicial appointment which it has discarded in favour of a different approach which, in the opinion of the Executive, is better calculated to serve the administration of justice and make it more effective. Generally speaking, the judicial branch of government should be extremely reluctant to intervene in the Executive process of appointing judicial officers. Apart from s.12, under the constitutional arrangements which prevail in New South Wales and the doctrine of separation of powers, to the extent to which it applies in that State, the function of making appointments to the Judiciary lies within the exclusive province of the Executive. According to tradition, it is not a function over which the courts exercise supervisory control. In the present case those considerations are necessarily reinforced by the fact that here the respondent invites the courts to compel the Executive to depart from a method of selecting persons for appointment as magistrates which, in the view of the Executive, is calculated to result in the appointment of those who are best fitted for appointment.

27. Underlying the respondent's argument and the majority judgments in the Court of Appeal are the importance of the doctrine of judicial independence and the need to protect the security of tenure of

judicial officers. The importance of these matters requires no emphasis. These considerations are relevant to removal from judicial office rather than to appointment to judicial office, except in so far as they bear upon the terms of appointment. For my part I am unable to equate the failure to appoint magistrates to the Local Courts with removal from their previous office. It was not suggested that the reorganization of the court structure involving the creation of the Local Courts was other than a genuine reorganization. It was not suggested that its object was to enable the removal from office by covert means of the respondent and the former magistrates who did not accede under s.12.

28. The second answer to the respondent's case is directed to his reliance on the procedure which was adopted by the present Attorney-General's predecessor in recommending the ninety-five former magistrates for appointment to the Local Courts as the measure of his entitlement to natural justice. Mr Handley Q.C. for the respondent went so far as to suggest that he had a legitimate expectation that he would be treated in the same way as his former colleagues and that any failure to accord that treatment would necessarily entail a denial of natural justice. That was not the legitimate expectation found by the Court of Appeal. As I have already noted, their Honours found that there was an expectation that the plaintiffs would be given an opportunity to answer adverse material and that this attracted an enforceable duty of procedural fairness. Some features of the unusual history of the proposals to restructure the magistracy and of the circumstances in which they came to be finalized and implemented might suggest that, if the plaintiffs had an expectation at all, it was an expectation, whether legitimate or not, that they would be appointed. But there is material which would justify the more limited conclusion that the plaintiffs had an expectation, whether legitimate or not, that they would be treated in the same way as the ninety-five magistrates were treated. In saying this, I am conscious that, in ordinary circumstances, the making of an appointment under s.12 would not attract the rules of natural justice. The section makes no provision for applications or for their consideration and determination. The case for holding that there was a duty to act fairly arising from the existence of a legitimate expectation depends entirely on the history and circumstances of this case, including the position of the plaintiffs as magistrates of the old courts.

29. Notwithstanding the criticism that has been levelled at the concept of "legitimate expectation" since it was first introduced by Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs(1969) 2 Ch 149, as a foundation for attracting a duty of procedural fairness, the concept has been accepted and adopted by this Court as denoting expectations which go beyond enforceable legal rights: Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396; Reg. v. MacKellar; Ex parte Ratu [1977] HCA 35[1977] HCA 35; ; (1977) 137 CLR 461; Heatley v. Tasmanian Racing and Gaming Commission [1977] HCA 39; (1977) 137 CLR 487; F.A.I. Insurances Ltd. v. Winneke [1982] HCA 26; (1982) 151 CLR 342; see also Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, at pp 563, 582-583, but cf. pp 616-618. The same development has taken place in the Privy Council (Ng Yuen Shiu, at p 636) and in the House of Lords: O'Reilly v. Mackman [1983] UKHL 1[1983] UKHL 1; ; (1983) 2 AC 237, at p 275; In re Findlay (1985) AC 318; Council of Civil Service Unions v. Minister for the Civil Service [1983] UKHL 6; (1985) AC 374.

30. It is the presence of a legitimate expectation which conditions the existence of a claimant's right to procedural fairness and the corresponding duty of the decision-maker to observe procedural fairness in the treatment of the claimant's case. The content of that duty is dependent upon the circumstances of the particular case, but its existence is determined by reference to legal principle. So, a legitimate expectation may be created by the giving of assurances (Salemi, at p 440; Kioa, at p 583; C.C.S.U., at p 401), the existence of a regular practice (Heatley, at pp 508-509; Kioa, at p 583; C.C.S.U., at p 401), the consequences of denial of the benefit to which the expectation relates (F.A.I. v. Winneke; Kioa, at p 583) or the satisfaction of statutory conditions (In re H.K. (An Infant)

(1967) 2 QB 617). The list is not exhaustive, but provides indications of the kinds of factors which a court will take into account in deciding whether or not an expectation is legitimate.

31. The duty to accord procedural fairness in connection with a claimant's legitimate expectation is sometimes said to be referable to a general duty of good administration: Ng Yuen Shiu, at p 638; C.C.S.U., at p 401; In re H.K., at p 630. But the content of that broader duty is still defined by reference to the claimant's legitimate expectation. In the absence of such an expectation, there is no corresponding duty to accord fairness. For that reason, although in one sense it means nothing to say that a person entitled to fair procedures or good administration has a legitimate expectation of being accorded such treatment, it is still necessary to identify a relevant legitimate expectation, and that legitimate expectation may consist of an expectation of a procedural right, advantage or opportunity: Kioa, at p 583; C.C.S.U., at p 408. The procedural right which forms the subject-matter of the legitimate expectation will not necessarily be the same as the procedure which procedural fairness or good administration, the duty to accord which is enlivened by the expectation, will demand. For example, in C.C.S.U., the expectation of consultation with management through trade unions, which but for issues of national security would have been a legitimate expectation, may not necessarily have sufficed to require that the procedures of consultation be maintained; procedural fairness or good administration may simply have demanded that there be a hearing before the practice of consultation was abandoned. In other cases, the procedural benefit which is legitimately expected will in fact be that which fairness or good administration demands should be accorded. So, in Ng Yuen Shiu, the claimant expected, and was entitled to, the procedure which had been publicly promised: at pp 637, 638.

32. Although a legitimate expectation may take the form of an expectation of a substantive right, privilege or benefit or of a procedural right, advantage or opportunity, it is helpful to avoid confusion between the content of the expectation and the resulting right to procedural fairness. Perhaps in pursuit of clarity of expression, courts have referred to a legitimate expectation that some benefit will not be denied or taken away without an opportunity of being heard; see Aickin J.'s discussion of the concept of "reasonable" expectation in Heatley, at p 508. In truth, the legitimate expectation in such cases is often simply that the benefit will not be denied or taken away. The "expectation" that the claimant will be heard ordinarily flows of itself from the primary legitimate expectation.

33. Although the legitimate expectation found by the Court of Appeal was of a procedural kind, the alternative expectation now contended for by Mr Handley has more of a substantive character about it. The notion seems to be that the plaintiffs were entitled to assume that they would be appointed along with their colleagues unless, perhaps, adverse material was raised against them, in which event they should have the opportunity of responding to it. In this respect the suggested expectation is substantive in character rather than procedural because it contemplates that the former magistrates would be considered in priority to other applicants for appointment.

34. In the cases in this Court in which a legitimate expectation has been held entitled to protection, protection has taken the form of procedural protection, by insisting that the decision-maker apply the rules of natural justice. In none of the cases was the individual held to be entitled to substantive protection in the form of an order requiring the decision-maker to exercise his or her discretion in a particular way. The prevailing view in this Court has been, as Stephen J. observed in Salemi (at p 442), that:

"(t)he rules of natural justice are 'in a broad sense a

procedural matter'",

echoing the words of Dixon C.J. and Webb J. in The Commissioner of Police v. Tanos (1958) 98 CLR 383, at p 396.

35. However, it has been suggested that legitimate expectations are entitled to substantive protection: see Forsyth, "The Provenance and Protection of Legitimate Expectations", (1988) 47 Cambridge Law Journal 238. The argument is that, when the expectation created is not that a proper hearing will be given but that the decision-maker will decide the case favourably or grant a benefit, the courts should by order ensure that the expectation is fulfilled. It is said that support for this view is to be found in Reg. v. Secretary of State for the Home Department; Ex parte Khan [1984] EWCA Civ 8; (1984) 1 WLR 1337; (1985) 1 All ER 40 and Reg. v. Secretary of State for the Home Department; Ex parte Ruddock (1987) 1 WLR 1482; (1987) 2 All ER 518. The first of the two cases is by no means persuasive. The reasons given by Parker L.J. and Dunn L.J., as the majority, for allowing the appeal were different. Parker L.J. considered that there was a denial of natural justice and quashed the decision on the footing that the Secretary of State could give effect to his previous representation which created the legitimate expectation or, if he considered it desirable to apply his new and altered policy, give the applicant an opportunity to make representations why it should not be followed: see at p 1348; p 49 of All E.R. Dunn L.J. held the decision to be unreasonable on the principles stated by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] EWCA Civ 1; (1948) 1 KB 223, at p 228, and quashed the decision. Either way the decision does not support the argument now under consideration.

36. The second case, Ex parte Ruddock, does provide qualified support for the argument. There Taylor J. referred to the observations of Lord Diplock and Lord Roskill in C.C.S.U. (at pp 408, 413, 415), supporting the view that the protection afforded legitimate expectations was procedural, and to the comment of Lord Fraser (at p 401) that where a person has a legitimate expectation of receiving a benefit or privilege "the courts will protect his expectation by judicial review as a matter of public law". Taylor J. went on to say (at p 1497; p 531 of All ER):

"Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power. I accept ... that the Secretary of State cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it."

37. However, the view that legitimate expectations may attract substantive, as distinct from procedural, protection encounters the objection that it will entail curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances. It is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the court, without detriment to the public interest intended to be served by the exercise of the relevant

statutory or prerogative power. Granted this possibility, the grant of substantive relief in the present case would nonetheless effectively prevent the Executive from giving effect to the new policy which it wishes to pursue in relation to the appointment of magistrates.

38. I acknowledge that, had the selection committee and the Attorney-General been aware in 1984 of the need to comply with the duty of fairness, in all probability they would not have relied on the adverse material, just as the Attorney-General now recognizes that it should not be taken into account, and so the respondent might well have been appointed as a Local Court magistrate on 1 January 1985, along with his ninety-five former colleagues. I also acknowledge that the breach of duty has generated a delay that has made it possible for the Attorney-General to adopt a new approach to the making of appointments with adverse consequences for the respondent. But the respondent does not argue that this new approach or procedure is ultra vires the statute. This, so it seems to me, is a fundamental flaw in his case for relief.

39. In the end the respondent's case depends upon the assertions that there was a breach of the duty of fairness when the Executive excluded him from the appointment process applied to former magistrates by taking into account the adverse material and that relief in respect of that denial requires reinstatement of that process to his application. That case fails because it would require the court to compel the Attorney-General to depart from a method of appointing judicial officers which conforms to the relevant statutory provision, is within the discretionary power of the Executive and is calculated to advance the administration of justice.

40. It remains for me to consider the suggestion that, assuming that the respondent had a legitimate expectation that his application would be treated on its merits and not in competition with applications from persons who have not been magistrates, then the Executive should not have disappointed his expectation without affording him natural justice by giving him an opportunity to make representations that there should be no change of policy.

41. It has been said that there is a conflict of authority upon the question whether a person who is adversely affected by a change of policy has a legitimate expectation which entitles him to make representations: see Ganz, "Legitimate Expectation: A Confusion of Concepts", in Harlow ed., Public Law and Politics, (1986), at p 161; see also South Australia v. O'Shea [1987] HCA 39; (1987) 163 CLR 378, at p 386; Ex parte Khan, at p 1347; p 48 of All ER; Ex parte Ruddock, at pp 1495-1497; pp 530-531 of All ER. That is a matter that requires examination on an appropriate occasion. However, in the circumstances of the present case, it would be unprofitable to undertake such an examination. The suggested basis for relief was not argued in the Court of Appeal and, even if it were well founded, it would not sustain the conclusion reached by the majority in the Court of Appeal. What the respondent sought and obtained in that Court and seeks here is a decision that the Attorney-General and Cabinet are bound as a matter of law to consider his application on its own; he has never sought an opportunity to make representations in relation to the change of policy in 1987. The respondent's reluctance to do so is understandable. In the light of all that we have heard it is not to be credited that the Executive would revoke a policy concerning the administration of justice generally in order to accommodate the individual interest of the respondent. It would be futile to grant relief on this basis.

42. Although I have come to the conclusion that the case presented by the Attorney-General must succeed, the making of an appropriate order presents a problem. Ordinarily the allowance of the appeal would entail the setting aside of the declaration made by the Court of Appeal. The declaration was in a form appropriate to mandamus and relied for its legal effect on the exposition

of the law contained in the majority judgments. That exposition, in my view, was flawed, but not wholly so because it reflected in part the view, now conceded as correct by the Solicitor-General, that the respondent's application for appointment was still on foot and so there was no occasion for him to make a further application. The Solicitor-General, in argument, conceded that he could not challenge the declaration. However, it seems to me that it would be more appropriate if this Court substituted its own declaration for that made by the Court of Appeal. That declaration will more accurately reflect the judgment of this Court.

43. In the result I would allow the appeal with costs. I would set aside the declaration made by the Court of Appeal and in lieu thereof declare that the appellant is bound to consider in accordance with the judgment of this Court the respondent's application dated 12 December 1983 for appointment as a magistrate.

BRENNAN J. The Chief Justice has stated the circumstances out of which this appeal arises. I agree with his Honour's conclusion that the appeal must be allowed, but I reach that conclusion by a different path.

2. This appeal is against an order of the Court of Appeal of New South Wales requiring the Attorney-General to consider Mr Quin's application for appointment as a magistrate under the Local Courts Act 1982 (N.S.W.) "according to law". To ascertain what the Court of Appeal understood the law to require, it is necessary to refer to the reasons for judgment of the majority (Kirby P. and Hope J.A.). Hope J.A. held that the law requires the Attorney-General to consider Mr Quin "on his own merits and without regard to the merit of non-magisterial applicants" and requires Mr Quin's application to be considered "as an application by a former magistrate and not as one of a number of general applicants for appointment". Kirby P. was of a similar view, holding that there was no "warrant in treating Mr Quin and his colleagues merely as fresh applicants, in competition with other new applicants, when a principal basis of the previous decision (that is, Macrae v. Attorney-General for NSW (1987) 9 NSWLR 268) was their special position, from which only was derived their special entitlement". In substance, their Honours held that the Attorney-General is required to decide whether or not to recommend Mr Quin's appointment by considering whether he is a suitable applicant for appointment and not by considering whether he is the most suitable of the applicants for appointment.

3. The order of the Court of Appeal is said to have been made by way of judicial review, a term which conveniently describes the jurisdiction of the Supreme Court of New South Wales to make orders relating to the exercise of executive or administrative power conferred on or vested in the Executive Government or some other instrumentality of that State. The power with which this case is concerned is the power to appoint magistrates under s.12(1) of the Local Courts Act 1982 (N.S.W.) ("the Act"). That power is conferred on the Governor, and it is a novelty for a court to review judicially a Minister's advice to the Governor as to the Governor's exercise of a statutory power. At common law judicial review does not consist in assessing the legal effect of the steps taken preliminary to the exercise of a power but in a determination of the legality of the exercise or purported exercise of the power. The preliminary steps may be relevant to the legality of the exercise of the power but they are not themselves the subject of review. Where a power is conferred on the Governor, no act of the Minister amounts to an exercise, or a non-exercise, of the power. A court may examine - not review - what a Minister has done or failed to do if, but only if, the validity of the exercise of a power by the Governor depends on the Minister's reasons or on the procedure adopted by the Minister in deciding upon that advice. The court may be required to make that examination in order to determine whether a condition governing the exercise of the power has been

satisfied. Except in such a case, it would be a major intrusion by the court into the workings of the Executive Government to review judicially the advice given to the Governor by a Minister. In F.A.I. Insurances Ltd. v. Winneke [1982] HCA 26; (1982) 151 CLR 342, it was an exercise of statutory power by the Governor, not the conduct of the Minister or of his Department, that was reviewed: see the declaration made at p 421. There is much force in the observation of Mahoney J.A. in dissent in the present case that "constitutional practice of this kind is, as such, not enforceable in the courts." However, I do not found my judgment on consideration of this problem. Of more importance is the notion of legitimate expectation. That notion was central to the respondent's argument in this Court and it is the notion on which the majority of the Court of Appeal founded their respective judgments in the present case and on which Kirby P., Mahoney and Priestley JJ.A. had founded their respective judgments in Macrae. I turn to examine that notion.
The statutory context.

4. The Act provides the chief statutory context in which Mr Quin's supposed legitimate expectation arose. Section 9 of the Act abolishes Courts of Petty Sessions. Mr Quin had been a Stipendiary Magistrate appointed to constitute a Court of Petty Sessions. Section 6 of the Act provides for the establishment of Local Courts. Section 7 invests Local Courts with the same civil and criminal jurisdiction as the Courts of Petty Sessions which they replaced together with such other jurisdiction as any Act or other law might confer or impose on them. A Local Court is to be constituted by a magistrate appointed under s.12(1) of the Act or by two or more Justices of the Peace: s.8. Section 12 of the Act provides as follows:

"(1) The Governor may, by commission under the public seal of the State, appoint any qualified person to be a Magistrate.
(2) A person is qualified to be appointed as a Magistrate if he is, or is eligible to be admitted as -
(a) a barrister or solicitor of the Supreme Court of New South Wales; or
(b) a barrister or solicitor, or a barrister and solicitor, of -
(i) any Court of any other State, or of any Territory, of Australia; or
(ii) the High Court of Australia.
(3) A Magistrate shall, while he holds office as such, be deemed to have been appointed as a justice and a Stipendiary Magistrate.
(4) The provisions of the Public Service Act 1979 shall not apply to or in respect of the appointment of a Magistrate and a Magistrate shall not, in his capacity as a Magistrate, be subject to those provisions during his term of office as a Magistrate."

Sub-section (4) marks a radical departure from the provisions which had previously governed the employment of magistrates. Under the Public Service Act 1979 (N.S.W.), a Stipendiary Magistrate appointed under the Justices Act 1902 (N.S.W.) to constitute a Court of Petty Sessions (see Justices Act, ss.7 and 14) was an officer of the public service remunerated under the Public Service Act (see ss.81,82,117 of that Act). The relationship of Stipendiary Magistrates with the public service of the State was of long standing. In 1909 the Justices Act had been amended to prevent the appointment

as Stipendiary Magistrates within the metropolitan police district of persons who were not officers of the public service unless there were no person in the public service capable of performing the duties of the office: Justices Act, s.7A(4). In 1947, that provision was extended to apply to the appointment of all Stipendiary Magistrates: see Justices (Amendment) Act 1947 (N.S.W.), s.2(1)(c). Under the Act, however, the appointment and remuneration of magistrates of Local Courts were no longer to be affected by the Public Service Act. Section 12(1) gave no preference for appointment to officers in the public service and the terms and conditions of service of magistrates were to be determined by the Governor: s.22.

5. In these circumstances, it was necessary to make special provision for Stipendiary Magistrates of the Courts of Petty Sessions who might not be appointed as magistrates of Local Courts under the Act. Provision in that behalf was made by cl.5 of Sched.1 which read as follows:

"(1) In this clause, 'former Magistrate' means a person who, immediately before the appointed day, was employed under the Public Service Act 1979, in the position of stipendiary magistrate.
(2) A former Magistrate who -
(a) accedes to the office of a Magistrate on the appointed day; and
(b) immediately before the appointed day, held another office under any other Act (other than the office of chairman of the bench of stipendiary magistrates) by reason of his having been a stipendiary magistrate when he was appointed to, or nominated for, that other office,
shall not vacate that other office by reason only of his not having been a Magistrate when he was appointed to, or nominated for, that other office.
(3) Any former Magistrate who does not accede to the office of a Magistrate on the appointed day shall, if he has not attained the age of 60 years, be appointed to a position in the Public Service not lower in classification or salary than that which he held immediately before that day."

Clause 5 provided some safeguard as to the terms and conditions of employment of former magistrates who might not be appointed to the office of magistrate when the Act commenced. The provisions of cl.5 were considered by the New South Wales Law Reform Commission when, in response to a request by the Attorney-General, it reported to him on the procedures and criteria which ought to be followed in selecting magistrates under s.12(1) of the Act. In that Report, the Commission concluded that cl.5(3) did not go far enough in the protection it afforded to former magistrates. In par.5.30 of the Report, the Commission said:

"We said in paragraph 4.28 that it would be a serious matter to disturb the expectation that stipendiary magistrates will enjoy continuity of service and salary within the Public Service. We also said there that legislation should be amended, or other action taken, to

ensure that any stipendiary magistrate not appointed as a Magistrate will enjoy continuity of employment within the Public Service and will not be at risk of suffering a diminution of current salary, except in accordance with the conduct and discipline provisions of the Public Service Act, 1979. For reasons we have given, we do not think that stipendiary magistrates are entitled to automatic appointment as Magistrates. We do think, however, that they should not suffer loss of employment or reduction in salary as the result of the implementation of the Local Courts Act. This view is consistent with what we believe ought to have been the purpose of clause 5(3) of Schedule 1. Indeed, it may be consistent with a proper construction of that clause ..."

6. Thereafter, before the Act was proclaimed to come into force (on 1 January 1985) a new cl.5(3) was enacted by the Local Courts (Amendment) Act 1984 (N.S.W.) to read as follows:

"A former Magistrate who does not accede to the office of a Magistrate on the appointed day is, if the former Magistrate has not attained the age of 60 years, entitled to be appointed to some position in the Public Service and is, until -
(a) attaining that age; or
(b) ceasing to be a public servant,
whichever first occurs, entitled to be paid salary at a rate not lower than the rate of salary for the time being payable to a Magistrate of the rank or grading that is the equivalent (or the nearest equivalent) of the rank or grading held by the former Magistrate immediately before the appointed day."

The Parliament of New South Wales afforded no further protection to former magistrates who were not appointed to the office of magistrate under s.12(1) of the Act on 1 January 1985. Whatever view one takes as to the sufficiency of the protection afforded by cl.5 to former magistrates, that clause makes it perfectly clear that the Governor had a discretion to appoint or to refuse to appoint a former magistrate to be a magistrate of Local Courts.

7. What, then, is the purpose of the Act? It was to ensure that, in the circumstances obtaining in New South Wales when the Act came into force, a fresh start should be made in the administration of justice in the lower courts. The Courts of Petty Sessions were abolished and the tenure of the former magistrates was destroyed by s.9; Local Courts, exercising at least the same jurisdiction but constituted by magistrates to be freshly appointed, took the place of the abolished courts. No vestige of the tenure of former magistrates was left. Whether the statutory scheme for making a fresh start was unjust to former magistrates is not a question for curial determination. Axiomatically, it is no function of the court to endeavour to resurrect and, by its order, to protect the tenure of the former magistrates which Parliament, by s.9 of the Act, destroyed.
The litigation.

8. When Mr Quin and several other former magistrates were not appointed as magistrates under s.12(1) of the Act, they sought and, on appeal to the Court of Appeal, obtained an order "that the decision of the Attorney-General on or before 12 December 1984 not to recommend the appellants' appointment as Magistrates under the Local Courts Act 1982 was and is void": Macrae, at p 309. The reason why the Court of Appeal made this order was that a selection committee, on whose recommendations the Attorney-General had acted in reaching his decision not to recommend the applicants in that case for appointment, had taken into account an adverse report by the Chief Stipendiary Magistrate on the suitability of the applicants without giving them notice of the contents of the adverse report. Kirby P. held that the plaintiffs, being former magistrates who had not been appointed under s.12(1) of the Act, had a "legitimate expectation of proper and fair attention to their application" and were "entitled to have the Attorney-General give his consideration to their appointment or non-appointment free from the influence of the information which, by inference, affected his initial decision not to recommend the appellants, when ninety-five of their colleagues were so recommended and later appointed": p 282. Mahoney J.A. was of the opinion that the plaintiffs "were entitled to expect that if particular instances falling within the kinds of matters to which their attention was directed were to be taken into account against them, the particular matters would be referred to their attention." His Honour did "not mean by this that they would have been entitled to expect a detailed examination of them or, a fortiori, a right of confrontation or cross-examination in respect of them. But they were ... entitled to know that particular matters of this kind were being held against them": p 286. And Priestley J.A. concluded that the applicants "had legitimate expectations that they would be fairly considered and given an opportunity of putting their case to the Attorney-General on matters he had in mind as adverse to their applications before deciding whether or not to recommend their appointment": p 308. An application for special leave to appeal to this Court from the order of the Court of Appeal was refused.

9. It may be noted in passing that the order in Macrae declared the invalidity of the Attorney-General's decision not to recommend the applicants for appointment, but the order did not purport to affect the Governor's decision not to appoint. There is a logical difficulty in declaring the invalidity of a non-exercise of power and in treating the steps leading to a non-appointment as a "decision" on an "application" when, in point of law (as distinct from the procedure which the Attorney-General chose to follow), no application was needed to enliven the power to appoint. Although these problems may now be regarded merely as part of the history of the case, they illustrate the need for caution in the making of declarations in administrative law when the availability of a substantive remedy is doubtful.

10. Of course, by the time Macrae was decided, the Local Courts had been established and the magistrates to constitute those courts had been appointed. Clause 5 of Sched.1 to the Act had taken effect. It was impossible at that time to appoint Mr Quin to one of the positions which were filled when the Local Courts were first constituted. However, occasional vacancies occur. The Attorney-General decided that he would on each occasion select and recommend for appointment the most suitable of the applicants qualified for appointment, whether or not a former magistrate was an applicant. Mr Quin, not having been appointed, brought the present proceedings. Kirby P., recalling that Mr Quin's legitimate expectation and the entitlement which flowed from it had arisen not from the experience of the former magistrates as judicial officers but from "the very fact that they had held such office", said that the vice of the course followed by the Attorney-General was that -

"The public interest in the security of judicial tenure upon
the reconstitution of a court was given no apparent weight
and was not acknowledged. The private interest of Mr Quin

to have his application considered according to law, as the Court intended, was ignored."

Hope J.A. said that Mr Quin was entitled to have his application considered "with procedural fairness, and this has not occurred." His Honour said that Mr Quin was entitled to have his application

"considered by the Attorney-General on the same basis as that on which the applications by the other existing magistrates were considered, that is, as an application by a former magistrate and not as one of a number of general applicants for appointment."

In dissent, Mahoney J.A. said:

"I do not see in the matters underlying the Macrae decision or that decision an entitlement or legitimate expectation that Mr Quin would be preferred to a person who, notwithstanding the other matters for consideration, would be better qualified for appointment. That, in my opinion, was never in contemplation at that time as binding the Attorney General. And I do not see that the fact that the Attorney General departed from the procedural fairness referred to places such an obligation upon his successor to ignore, when a vacancy arises, a then better appointee."

Thus the foundation for the making of orders directing the Attorney-General when considering his advice to the Governor to accord Mr Quin a measure of natural justice (in Macrae) and directing the Attorney-General not to consider Mr Quin's suitability for appointment comparatively with the suitability of other applicants (in the present case) was the protection of what was said to be Mr Quin's legitimate expectation. In both Macrae and the present case, the legitimate expectation which Mr Quin was held to have entertained or to have had - I confess I am unsure whether a legitimate expectation needs to be entertained or whether an applicant is simply invested with it - was held to confer some legal entitlement enforceable against the Attorney-General affecting his consideration of the advice to be tendered to the Governor on the making of appointments under s.12(1) of the Act.

The effect of Macrae.

11. The decision in Macrae stands as a final judicial determination that the Attorney-General was bound, in considering Mr Quin's application for appointment on or before 12 December 1984, not to have regard to the matters contained in the Chief Stipendiary Magistrate's adverse report without giving Mr Quin notice of it. Therefore it must be accepted that the Attorney-General did not then consider Mr Quin's application in accordance with law. Moreover, as the Act clearly contemplates that former magistrates may be appointed magistrates under s.12(1), it may be inferred that, in order to advise the Governor on the exercise of the power of appointment, the Attorney-General was bound to consider in accordance with law whether each of the former magistrates should be recommended for appointment. But the decision in Macrae carries Mr Quin's case no further. In particular, it does not purport to direct the Minister as to the criteria for selecting magistrates or to require that preference in appointment be accorded to former magistrates. It goes no further than

declaring that it was not in accordance with law to consider Mr Quin's application for appointment in the light of, or affected by, the adverse report unless Mr Quin had had notice of its contents. The decision in Macrae does not purport to limit the free choice of the Governor in exercising his power to appoint magistrates. The nature of a power to appoint to a public office.

12. Except where the power of appointment to a public office is governed by statute, the power must be at large if its exercise is to answer the purpose for which it is conferred, namely, to advance the interests of the public. If the power is conferred by statute but the statute prescribes no procedure for the making of appointments nor any criteria governing the exercise of the power, the power must be at large for the same reason. The Executive Government or other repository of the power is entrusted with authority to decide who is best fitted to fulfil the duties of the office. It is inconsistent with the public interest to postulate any preferential right to appointment in an individual. But that is not to say that the prior occupation of a similar office and the desirability of according a measure of security in tenure to the holders of such an office are not legitimate factors to take into account in making an appointment. A distinction must be drawn, however, between a factor which legitimately influences the making of an appointment and an enforceable right to some degree of priority. Of course, there are some statutes - notably Acts governing the public service - which protect career prospects by creating legal rights to preference in appointments, but statutes which simply confer a power to appoint to a public office do not import preferential rights. If it be said that unfettered executive discretion lays the way open to patronage or worse, the remedy must lie in the hands of the legislature which created, or which may prescribe the manner of exercise of, a power of appointment or which may call to account the Minister who advises on the exercise of the power. The remedy does not lie in an examination by the courts of appointments made by the Executive Government or an insistence on judicially-declared criteria affecting the exercise of the power. A fortiori, when the power is to appoint to a judicial office.

13. It is not the function of a court to direct or to affect the selection of judicial officers. A remedy (quo warranto) can be granted only in the exceptional case where the appointment is not authorized by law. It is not to the point that some appointments to judicial office have been made for unworthy purposes or of unworthy people; the responsibility for appointments to judicial office, by constitutional convention if not by constitutional law, belongs to the Executive Government. The courts are not responsible for their own constitution. The calibre of appointments to the judiciary depends solely on the Executive Government and that is a heavy responsibility which the Executive Government alone must bear. Therefore it is the criteria which appeal to the Executive Government, not the criteria which appeal to the courts, which necessarily prevail in the selection of judicial officers. The Crown's power to nominate to judicial office - by contrast with the power to remove from judicial office - has always been at the Crown's pleasure: see Blackstone's Commentaries, (1765), vol.1, p 259. As one would expect, the power to appoint magistrates in New South Wales has always been at large, except for the preference given by statute in 1909 and 1947 to officers of the public service: see Governor Phillip's Second Commission (1787), Historical Records of Australia, vol 1, p 4; 4 Will IV No.7, s.1; 45 Vict No.17, s.2; Justices Act 1902, s.7. As a matter of statutory construction, the power of appointment under s.12(1) of the Act is at large, to be exercised for the purpose of securing the proper administration of justice according to law by the Local Courts of New South Wales.

14. Yet, in the present case and in Macrae, the Court of Appeal sought to secure some preference in appointment for former magistrates whose judicial offices were abolished, pointing to the public importance of security in the tenure of judicial office which is critical to the impartial administration of justice. But the validity of the Act was not in question, and it was the Act which destroyed the

security of the tenure of stipendiary magistrates appointed under the Justices Act. That was the work of the Parliament of the State.

15. The judgments of the Court of Appeal sought to mollify the consequences of the law for Mr Quin by finding (1) that Mr Quin had a legitimate expectation, and (2) that protection of Mr Quin's legitimate expectation required the s.12(1) power of appointment to be so exercised in respect of Mr Quin's application that other applications, even from more suitable candidates, be disregarded. If this approach be correct, the protection of Mr Quin's legitimate expectation confines the exercise of a power of appointment although Parliament did not confine it.
"Legitimate expectations".

16. In Kioa v. West [1985] HCA 81; (1985) 159 CLR 550 (at pp 617-618, 626-627) I stated some reservations about the notion of legitimate expectations to which I refer without repetition. This case raises in an acute form the question whether the remedies of judicial review are available to protect a legitimate expectation against the exercise of an executive or administrative power which otherwise accords with law. (Hereafter I shall refer to such a power as an administrative power, albeit the power is vested in the Executive Government.) The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.

17. Judicial review has undoubtedly been invoked, and invoked beneficially, to set aside administrative acts and decisions which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful. To say that the doctrine of ultra vires defines the scope of judicial review is too restrictive, although Mr Beatson has pointed out that -

"Ultra vires is ... both a powerful constitutional
justification for judicial control and a useful organizing
principle for the creation of a coherent subject from what
has sometimes appeared to be a 'wilderness of single instances'."

("The Scope of Judicial Review for Error of Law", (1984) 4 Oxford Journal of Legal Studies, p 22.) The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. In Victoria v. The Commonwealth and Hayden [1975] HCA 52; (1975) 134 CLR 338, at p 380, Gibbs J. said that the duty of the courts extends to pronouncing on the validity of executive action when challenged on the ground that it exceeds constitutional power, but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law. The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall C.J. in Marbury v. Madison [1803] USSC 16; (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111):

"It is, emphatically, the province and duty of the

judicial department to say what the law is."

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

18. The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.

19. There is one limitation, "Wednesbury unreasonableness" (the nomenclature comes from Associated Provincial Picture Houses Ld. v. Wednesbury Corporation [1947] EWCA Civ 1; (1948) 1 KB 223), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: Nottinghamshire County Council v. Secretary of State for the Environment [1985] UKHL 8 [1985] UKHL 8; ;(1986) AC 240, at p 249. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined. As Professor Wade explains (Administrative Law, 6th ed (1988), p 407) in a passage cited with approval in Reg. v. Boundary Commission; Ex parte Foot (1983) QB 600, at p 626:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

20. If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the

interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered. Moreover, if the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious.

21. Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are "unfair" in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ: see Secretary of State for Education and Science v. Tameside Metropolitan B.C. [1976] UKHL 6; (1977) AC 1014, at p 1064, and Council of Civil Service Unions v. Minister for the Civil Service [1983] UKHL 6; (1985) AC 374, at pp 414-415. The absence of adequate machinery, such as an Administrative Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the function of the courts. The courts - above all other institutions of government - have a duty to uphold and apply the law which recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.

22. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. The risk must be acknowledged for a reason which Frankfurter J. stated in Trop v. Dulles [1958] USSC 55; (1958) 356 US 86, at p 119:

> "All power is, in Madison's phrase, 'of an encroaching nature.' ... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."

If the courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of the merits of its exercise, the function of the courts would be exceeded: cf. R. v. Nat Bell Liquors Ld. (1922) 2 AC 128, at p 156. If the courts were to define the content of legitimate expectations as something less than a legal right and were to protect what would be thus defined by striking down administrative acts or decisions which failed to fulfil the expectations, the courts would be truncating the powers which are naturally apt to affect those expectations. To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. The authority of the courts and their salutary capacity

judicially to review the exercise of administrative power depend in the last analysis on their fidelity to the rule of law, exhibited by the articulation of general principles.

23. To lie within the limits of judicial power, the notion of "legitimate expectation" must be restricted to the illumination of what is the legal limitation on the exercise of administrative power in a particular case. Of course, if a legitimate expectation were to amount to a legal right, the court would define the respective limits of the right and any power which might be exercised to infringe it so as to accommodate in part both the right and the power or so as to accord to one priority over the other. (That is a commonplace of curial declarations.) But a power which might be so exercised as to affect a legitimate expectation falling short of a legal right cannot be truncated to accommodate the expectation.

24. So long as the notion of legitimate expectation is seen merely as indicating "the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded" to accord procedural fairness to an applicant for the exercise of an administrative power (see per Mahoney J.A. in Macrae, at p 285), the notion can, with one important proviso, be useful. If, but only if, the power is so created that the according of natural justice conditions its exercise, the notion of legitimate expectation may usefully focus attention on the content of natural justice in a particular case; that is, on what must be done to give procedural fairness to a person whose interests might be affected by an exercise of the power. But if the according of natural justice does not condition the exercise of the power, the notion of legitimate expectation can have no role to play. If it were otherwise, the notion would become a stalking horse for excesses of judicial power.

25. One theory of judicial review would accord to individuals who entertain a legitimate expectation relief going beyond procedural protection so as to protect the substance of the expectation: see Forsyth, "The Provenance and Protection of Legitimate Expectations", (1988) 47 Cambridge Law Journal 238, at pp 257 et seq. Such a theory depends upon the source of the legitimate expectation being "either ... an express promise given on behalf of a public authority or ... the existence of a regular practice which the claimant can reasonably expect to continue": C.C.S.U. v. Minister for Civil Service, at p 401. Given such a source, it is argued that procedural protection of the legitimate expectation may not suffice to ensure fairness in the treatment of the person who holds the legitimate expectation and that it should be fulfilled by court order, if necessary, unless the court perceives some overriding public interest. But if the relevant power be such that it may lawfully be exercised according to the repository's view of what is appropriate, a court which orders the repository not to disappoint an expectation legitimately held by an individual would be assuming to direct the exercise of the power. That theory would effectively transfer to the judicature power which is vested in the repository, for the judicature would either compel an exercise of the power to fulfil the expectation or would strike down any exercise of the power which did not. A legitimate expectation not amounting to a legal right would be enforceable as though it were, and changes in government policy, even those sanctioned by the ballot box, could be sterilized by expectations which the superseded policy had enlivened.

26. The objects properly sought by invoking the notion of legitimate expectation can be attained in any event within the orthodox framework of administrative law. Generally speaking - for statute may otherwise provide - where an individual has standing to complain of the exercise of a power, the power will be such that its exercise is apt to impact differentially on individual interests and, on that account, the power will be validly exercised only by according natural justice to those whose interests will be especially affected. A person who entertains a legitimate expectation is, ex hypothesi, a person whose interests are so affected. Indeed, the notion of legitimate expectation was

introduced by Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch 149, at p 170, simply to widen the categories of interests which ought not to be adversely affected without according natural justice to the person having the interest. For that reason, I expressed the opinion in Kioa, at pp 618-619, that there is a presumption that any power which is apt to affect interests in a way that is substantially different from the way in which it is apt to affect the interests of the public at large is conditioned on the according of natural justice to persons whose interests are so affected. Again, when a court is deciding what must be done in order to accord procedural fairness in a particular case, it has regard to precisely the same circumstances as those to which the court might refer in considering whether the applicant entertains a legitimate expectation, but the enquiry whether the applicant entertains a legitimate expectation is superfluous. Again, if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether those factors give rise to a legitimate expectation. But the court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits. The notion of legitimate expectation was introduced at a time when the courts were developing the common law to suit modern conditions and were sweeping away the unnecessary archaisms of the prerogative writs, but it should not be used to subvert the principled justification for curial intervention in the exercise of administrative power.

27. In the present case, the Act contains nothing to prevent the Governor from appointing as a magistrate under s.12(1) the most suitable person available for appointment at the time when the power is exercised. The Act confers no preferential right to appointment on former magistrates: their interests were protected only to the extent which cl.5(3) of Sched.1 prescribed. It may be that the former magistrates entertained an expectation, whether by reason of their having occupied judicial office or by reason of the procedure in fact adopted in selecting magistrates for appointment under s.12(1), that their applications would be considered simply by reference to their suitability and not in competition with other applicants. In these circumstances, it is arguable (I put it no higher) that a valid exercise of the power of appointment required the Attorney-General to have regard to the fact that a former magistrate had occupied a judicial office and had made his application in accordance with the procedure adopted, but it was not suggested that those considerations had not been taken into account by the Attorney-General. Mr Quin's legitimate expectation affords no ground for an order requiring the Attorney-General, in considering Mr Quin's application, to disregard the comparative suitability of candidates who are not former magistrates. The order of the Court of Appeal in that respect impermissibly intruded into the merits of the advice to be tendered to the Governor.

28. The appeal must be allowed and the order of the Court of Appeal set aside. In the course of argument before this Court, the Solicitor-General for New South Wales conceded that, as Mr Quin's application for appointment as a magistrate had not been dealt with, it was appropriate to make a declaration that the Attorney-General is bound to consider that application according to law. By reason solely of that concession, I am prepared to join in the making of a declaration substantially in those terms, though the declaration should be framed not by employing the phrase "according to law" but by reference to the views of the majority in this Court. I agree with the order proposed by the Chief Justice.

DEANE J. The starting point of a consideration of this appeal lies in the judgment of the New South Wales Court of Appeal in Macrae v. Attorney-General for N.S.W. (1987) 9 NSWLR 268. The respondent, Mr. Quin, and the appellant, the Attorney-General for New South Wales, were parties to those earlier proceedings. They are bound by the declaratory order which the Court of Appeal made and by the resolution of any issues of fact and law upon which it was based (see, e.g., Blair v. Curran [1939] HCA 23; (1939) 62 CLR 464, at pp 531-533; Jackson v. Goldsmith (1950) 81 CLR 446, at pp 460-461 and 466-467; Chamberlain v. Deputy Commissioner of Taxation [1988] HCA 21; (1988) 164 CLR 502, at pp 507-508). As I followed the argument, it is common ground that that is so. It is not relevant in that regard that the current holder of the office of Attorney-General was not the holder of that office when Macrae was decided.

2. Mr. Quin was a serving stipendiary magistrate in New South Wales at the time of the commencement of the Local Courts Act 1982 (N.S.W.) ("the Act"). That was on 1 January 1985. The jurisdiction of the Courts of Petty Sessions, of which he was a member, was then transferred to the new Local Courts established by the Act (s.7(1)). The old Courts of Petty Sessions were abolished (s.9).

3. The approach to be adopted in the appointment of magistrates to the new courts necessarily involved the reconciliation of two basic tenets of the administration of justice in this country. The first is the convention that a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehaviour or incapacity. The rationale of that convention is to be found in the need for a strong and independent judiciary as the primary custodian of individual rights and liberty under the law. It is unnecessary to do more than point tos.72(ii) of the Constitution to demonstrate its importance under our system of government. In New South Wales, the convention is not entrenched in a written constitutional guarantee which controls and limits legislative and executive competence. That being so, there was no constitutional barrier which precluded the State Parliament and Executive from effectively removing, otherwise than for proved misbehaviour or incapacity, one or more of the serving stipendiary magistrates in New South Wales from the exercise of the former jurisdiction of the State's Courts of Petty Sessions by not including them among those appointed to the new Local Courts. The second of those two basic tenets of the administration of justice is a vital, albeit sometimes disregarded, norm of executive conduct. It is that appointment to judicial office should be unaffected by considerations which are likely to result in the appointment of other than the best available appointee. Even in a modern society recognizing the ideal of the rule of settled, standing laws as distinct from the rule "of men", it is unavoidable that some individuals be entrusted with legal authority to sit in judgment upon others. Obviously, the citizen whose person and property are potentially subjected to such judgment of other individuals should enjoy the safeguard that appointment to judicial office will not be affected by ulterior considerations such as political patronage or personal reward or entitlement.

4. In the special circumstances which exist when the jurisdiction of an existing court is transferred to a new court, the reconciliation of those two tenets of the administration of justice has ordinarily been found in seeing the second of them as qualified by the first to the extent necessary to ensure that all willing members of the existing court are, in the absence of proved misbehaviour or incapacity, appointed to the new court (see, e.g., Macrae, at pp 278-281, 287). That precise reconciliation was not, however, accepted by the New South Wales Parliament or Executive in relation to the establishment of the new Local Courts. In that regard, the State Parliament and Executive would seem to have been influenced by a view that the magistrates of the new Local Courts would "have higher status and greater freedom from governmental direction or supervision

than (was) ... enjoyed by stipendiary magistrates" (see New South Wales Law Reform Commission, First Appointments as Magistrates under the Local Courts Act, 1982, (September 1983), pars.4.13, 4.30). Rightly or wrongly, the approach which was finally adopted was to substitute an adverse view of the Attorney-General for the traditional removal test of proved misbehaviour or incapacity. Serving stipendiary magistrates of the existing Courts of Petty Sessions who desired to be appointed to the new Local Courts would, to use the word used in the Schedule to the Act, "accede" to the office of a Local Court magistrate unless the Attorney-General decided that the particular magistrate was unfit or unsuited for such appointment. The serving stipendiary magistrates were all invited to apply for appointment. Approximately one hundred applied. Mr. Quin was among their number. All but five were appointed by the Governor on the advice of the Attorney-General. Mr. Quin was one of the five whose appointment was not recommended by the Attorney-General and who were consequently not appointed.

5. The five magistrates who were not appointed brought proceedings against the Attorney-General in the Supreme Court of New South Wales. The results of those proceedings were the judgment and declaratory order of the Court of Appeal in Macrae. At the heart of the decision in Macrae was the conclusion, reached by all members of the Court of Appeal, to the effect that the common law rules of procedural fairness had been applicable with the result that each of the five magistrates had been entitled to be accorded an appropriate opportunity of being heard before the Attorney-General concluded that he or she was unsuited for appointment to the new Local Courts. Obviously, a candidate for judicial office has no such entitlement in ordinary circumstances. The circumstances which existed in relation to the failure to appoint the five magistrates to the new Local Courts were, however, in the context of the abolition of the Courts of Petty Sessions and the transfer of their jurisdiction, far from ordinary. To the contrary, the exclusion of those five magistrates from the great majority of serving magistrates who acceded to the Local Courts was more akin to the premature removal of a serving judicial officer from the jurisdiction which he or she had been appointed to exercise. Clearly, no adequate opportunity of being heard had been accorded to any of the five. In the case of Mr. Quin, the conclusion that he was unsuited for such appointment had been reached on the basis of grave hearsay allegations about his conduct as a magistrate ("Rude, flippant, arrogant and authoritarian on the bench." "Bullies litigants and others in court." "Lacks judicial temperament.") in respect of which he was denied any real hearing at all since the existence of the allegations had not even been disclosed to him. The Court of Appeal declared that "the decision of the Attorney-General ... not to recommend the ... appointment (of the five magistrates) ... was and is void" (Macrae, at p 309).

6. Mr. Quin no doubt expected that the result of the declaratory order of the Court of Appeal would be that he would either be appointed as a magistrate of a Local Court or be given an opportunity of being heard in relation to any continued suggestion or allegation of lack of fitness or suitability for such appointment. In fact, he was given no opportunity of being heard in relation to any such suggestion or allegation. Nor was he appointed a magistrate of a Local Court. Instead, the five magistrates were advised that they could apply for appointment to the Local Courts like any fresh applicant for appointment. If, but only if, they were the best of all the applicants for such appointment, they would be appointed. Otherwise, they would not. In other words, the approach that serving magistrates at the commencement of the Act would be appointed to the Local Courts (to which the jurisdiction of their courts had been transferred) unless they were considered by the Attorney-General to be unfit or unsuited for appointment was abandoned in relation to them. It was only if it became necessary to pay regard to earlier suggested disqualifying factors, that any need for a hearing would arise.

7. Three of the five magistrates again instituted proceedings in the Supreme Court. Of those three, a further two dropped out along the way. When the matter came on for hearing before the Court of Appeal, upon reference by a single judge, Mr. Quin alone remained to complain. Putting to one side some technical questions which are no longer in dispute, the issue in the case was, in effect, whether it was open to the Attorney-General to act on the basis that Mr. Quin should now be treated merely like any fresh applicant for appointment as a magistrate of a Local Court. By majority, the Court of Appeal resolved that issue in Mr. Quin's favour. It was declared that the Attorney-General was required to consider Mr. Quin's initial application for appointment as a magistrate of the Local Courts according to law. As I read the judgments of Kirby P. and Hope J.A., who constituted the majority of the Court of Appeal, their Honours intended that the effect of that declaratory order would be that Mr. Quin's application would be dealt with on the same basis as it would have been but for the denial of procedural fairness, that is to say, that he would "accede" to office as a magistrate of a Local Court unless the Attorney-General, having accorded procedural fairness to him, was satisfied that he was unsuited or unfit for such office. It can be said at once that I am in agreement with the order made by the Court of Appeal and with the view indicated by Kirby P. and Hope J.A. about what the effect of that order should be. I turn to explain why that is so.

8. The law has not recognized a cause of action for damages for denial of procedural fairness in the exercise of statutory or prerogative powers. Curial relief, in the case of a denial of procedural fairness, is ordinarily confined to a declaratory order that the relevant exercise of power or authority is invalid and to ancillary relief to prevent effect being given to it. That is not, however, to say that the courts are powerless to pay regard to matters of substance in moulding the relief appropriate to prevent a successful plaintiff from being subjected to the consequences of a wrongful denial of procedural fairness. In particular, the general power of most modern courts, including State Supreme Courts, to grant relief appropriate to the circumstances of the particular case encompasses the power to mould relief in a way which will prevent the consequences of a denial of procedural fairness becoming entrenched by the unavoidable delays of litigation or by the statutory decision-maker seeking unilaterally to change the rules of the game. The point is illustrated by F.A.I. Insurances Ltd. v. Winneke [1982] HCA 26; (1982) 151 CLR 342.

9. In the F.A.I. Case, F.A.I. Insurances Limited had been an applicant for renewal of an annual licence, in the form of an annual approval of the Governor in Council, to carry on the business of workers' compensation insurance in Victoria. The renewal of the licence had been purportedly refused in circumstances where the refusal was vitiated by a denial of procedural fairness. F.A.I.'s entitlement to be accorded procedural fairness was held, by the majority of the Court, to have arisen from a "legitimate expectation" that the licence would be renewed. By the time the matter came before this Court, an order that the application for renewal be reconsidered in accordance with the requirements of procedural fairness would have been pointless since the period of any renewed licence had already expired. That being so, F.A.I. was, by then, in the position where all it could do was apply for "the grant of an approval de novo" (see at pp 386-387). Aickin J., in comments with which Mason J. agreed (see at pp 372-373), made plain that the relief to which F.A.I. was entitled should be determined by reference to substance rather than any "artificial and arbitrary distinction" and that F.A.I. should, on its application for the grant of a new approval, be entitled to the hearing which it had been denied on its application for renewal of the expired approval. His Honour said (at p 387):

"It may be regarded as a substantial extension of the present law as to the requirements of natural justice and the consequence of failure to observe them to require

something in the nature of a hearing or an opportunity to reply to a licensing authority's reasons for refusing to grant a fresh licence de novo as distinct from refusing to grant a renewal where the circumstances are such as to produce a 'legitimate expectation' that a renewal will be approved in the absence of some adequate reason for refusal. In the present case however I would regard that as an artificial and arbitrary distinction. The nature of the legislation and the timing of the Minister's action produce the result that the opportunity to answer the Minister's reasons for recommending that approval be refused did not arise until the old approval had expired. ...
It appears to me that it would involve no extension of existing principles to hold that in these particular and unusual circumstances an application by the appellant to the Minister for the approval of the appellant so as to enable it to carry on the business of workers' compensation insurance would be one in respect of which the Minister would be obliged to give the appellant an opportunity to answer what had been the case against it in relation to its application for renewal, as well as to answer any further considerations which the Minister may regard as reasons for refusing a new approval."

In other words, his Honour was of the view that the effect of the Court's declaratory order that the decision refusing renewal of approval was void would, in the circumstances, be that F.A.I. was entitled to be individually treated, on its application de novo, in a way which would avoid the effects of the earlier denial of procedural fairness becoming entrenched, that is to say, by effectively carrying forward to the consideration of the new application the benefits of the individual standing it had enjoyed on the lapsed application for renewal. Plainly, his Honour envisaged that the approval would be granted if the circumstances, including intervening events, would not have justified a refusal of renewal.

10. In the present case, the then Attorney-General's decision not to recommend Mr. Quin for appointment set him apart from the great body of serving magistrates who acceded to office as magistrates of the new courts. That decision flowed from a conclusion that Mr. Quin was unfit or unsuited for the office. Macrae establishes, as between the present parties, that that decision and the conclusion upon which it was based were vitiated by a denial of procedural fairness. But for that conclusion and decision, Mr. Quin would have "acceded" to office as a magistrate of the Local Courts together with his former colleagues. That being so, to move back (or, as would seem probable, to remove) the goal posts at this stage of the game would effectively entrench the consequences of the vitiated decision and conclusion. On the assumption, which would not seem an unreasonable one in view of the passage of time, that Mr. Quin would not be appointed a magistrate of a Local Court if he were treated on the same basis as if he were a fresh applicant, it would mean that the injustice of the denial of procedural fairness would persist and become entrenched in that the vitiated conclusion and decision would remain as the effective reason for, and the explanation of, the discriminatory treatment to which Mr. Quin remained subjected in being denied appointment to the new court to which the jurisdiction which he had been appointed to exercise had been transferred.

11. It is, of course, inevitable that circumstances will sometimes arise in which a court is unable to grant appropriate substantive relief to prevent the persistence of the injustice involved in a wrongful denial of procedural fairness. If, for example, there was some operative statutory bar (e.g. as to numbers or age) which now precluded either further appointments generally or the appointment of Mr. Quin in particular, that statutory bar would, in the absence of any applicable constitutional guarantee, preclude the grant of effective relief in the circumstances of the present case. There is, however, no statutory bar having such an effect. It is common ground that it is open to the Attorney-General to recommend that Mr. Quin be appointed as a magistrate of a Local Court and that it would be open to the Governor in Council to act upon such a recommendation. Again, there may be circumstances in which intervening events and the passage of time effectively prevent the moulding of relief which will protect a plaintiff who has been wrongly denied procedural fairness from all the continuing consequences of the denial. To some extent, the present is such a case. The passage of time has made it impossible for Mr. Quin to "accede" to the Local Courts at the time of the commencement of the Act or to preserve the seniority to which he would have been entitled if he had been accorded procedural fairness and had succeeded in persuading the Attorney-General that he was not unfit or unsuited for appointment. On the other hand, as the F.A.I. Case demonstrates, the fact that the courts cannot turn back time or rewrite the past does not, in an appropriate case, preclude the moulding of relief in a way which will provide partial protection from the continuing injustice of a denial of procedural fairness. In the present case, the appropriate relief which will provide that partial protection is, in my view, the declaratory relief granted by Kirby P. and Hope J.A. in the Court of Appeal understood in the context of their Honours' reasons for judgment. The effect of that declaratory relief is that Mr. Quin is entitled to have his application for appointment to the Local Courts dealt with individually and on the basis that, if he is not found to be unfit or unsuited for such appointment after a fair hearing, his appointment to a Local Court should be recommended by the Attorney-General and made by the Governor. It is true that a declaratory order having that effect has the disadvantage, from the point of view of public policy, of fettering the freedom of the Attorney-General to appoint only the best available candidates as magistrates of the Local Courts. As has been seen, however, that disadvantage, from the point of view of public policy, is ordinarily seen, in the case of the abolition of an existing court and the transfer of its jurisdiction to a new court, as qualified by the public benefit involved in observance of the spirit of the convention that a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehaviour or misconduct. Indeed, it was the denial of procedural fairness in the present case which alone prevented Mr. Quin's application for appointment to the Local Courts from being lawfully disposed of in accordance with the qualified observance of the spirit of that convention which was adopted at the time when those courts were established. In those circumstances, it appears to me to be plain that considerations of public policy did not preclude the grant of appropriate relief in the particular circumstances of this case.

12. I would dismiss the appeal.

DAWSON J. The respondent held the position of a stipendiary magistrate under the Justices Act 1902 (N.S.W.) and sat in a Court of Petty Sessions. The provisions of the Public Service Act 1979 (N.S.W.) applied to him. That position disappeared when Courts of Petty Sessions were abolished by s.9 of the Local Courts Act 1982 (N.S.W.). Courts of Petty Sessions were replaced by Local Courts which are constituted by a magistrate sitting alone or by two or more justices. A magistrate under the Local Courts Act is, however, not a stipendiary magistrate, but a person appointed unders.12(1) to be a magistrate. Section 12(1) provides that the Governor may appoint any qualified person to be a magistrate and sub-s.(4) of the same section provides that the provisions of the Public

Service Act shall not apply to a person so appointed.

2. Section 5 of the Local Courts Act gives effect to a schedule which clearly contemplates that some former stipendiary magistrates may be appointed magistrates under the Local Courts Act and some may not. Clause 5(3) of the Schedule provides for a former magistrate who does not accede to the office of magistrate under the Local Courts Act to be appointed to some position in the public service and to retain that appointment until the age of 60 or until retirement from the public service, whichever first occurs, to ensure continuity of salary and service.

3. Ninety-five of the one hundred former stipendiary magistrates who applied for appointment as magistrates under the Local Courts Act were successful in their applications. Five, of whom the respondent was one, were unsuccessful. Those five brought proceedings in 1984 against the Attorney-General in which it was established that prejudicial allegations had been made about them which were taken into account in the selection process. The allegations were made in 1983 in a series of letters to the Attorney-General by the then Chairman of the Bench of Stipendiary Magistrates, Mr Briese. In relation to the respondent they were that he was "(r)ude, flippant, arrogant and authoritarian on the bench", that he "(b)ullies litigants and others in court" and that he "(l)acks judicial temperament". Relief was refused at first instance, but on appeal to the Court of Appeal it was held that the five who were not appointed as magistrates had been denied natural justice by reason of the Attorney-General's failure to give them any opportunity to respond to the allegations made against them: Macrae v. Attorney-General for N.S.W. (1987) 9 NSWLR 268.

4. The Court confined itself to making a declaration that the decision of the Attorney-General not to recommend the appointment of the five persons as magistrates under the Local Courts Act was void. Liberty to apply within twenty-one days was reserved to all parties to make, if thought fit, application with regard to further consideration of a second declaration which had been sought. That was a declaration that the Attorney-General, in considering the applications of the five persons for appointment, was not entitled to take into account, or otherwise act upon, any matter or material adverse or thought to be adverse to any of those five persons without notifying the person concerned of the existence and content of such matter or material and giving the person concerned a full and fair opportunity to be heard in relation thereto. The Attorney-General sought special leave to appeal to this Court and the parties did not ultimately avail themselves of the liberty to apply which was reserved. Special leave to appeal was refused.

5. In the meantime, the Attorney-General took up an attitude which resulted in the commencement of these proceedings by the respondent and two others, they being the only ones left of the five originally concerned who wished to pursue their claim. Only the respondent now remains. The fresh matter was removed into the Court of Appeal pursuant to Pt 12, r.2 of the New South Wales Supreme Court Rules. The attitude of the Attorney-General is best summarized by a statement made on his behalf by the Solicitor-General when the parties in Macrae were before the Court of Appeal indicating to that Court that they did not intend to exercise their liberty to apply. Upon that occasion he said:

"For a number of reasons the Attorney General does not wish in 1987 to treat applications from any of the appellants any differently from those of any member of the public. These reasons include the public interest in appointing the most suitable persons to fill any vacancies and fairness to those who have been accepted and notified

already; or who might respond to an advertisement calling for fresh applications.
... the Attorney General therefore submits that the reasoning of this Court's judgment and the declaration which it has already made do not compel him to act in relation to the appellants in or after 1987 in any way differently from any member of the public seeking appointment save that the matters referred to in Mr Briese's letters of 1983 are not to be taken into account in any future application by the appellants for appointment as magistrates unless and until the appellants have been given a proper opportunity to meet those allegations ..."

6. At the time that statement was made, the Attorney-General required the respondent to submit a fresh application for appointment as a magistrate and declined to reconsider the application previously made by him which was the subject of the proceedings in Macrae. The Attorney-General maintained this attitude before the Court of Appeal in these proceedings, but before us he indicated that he no longer did so. In a practical sense, therefore, the issue which the parties now seek to have determined is whether the Attorney-General in reconsidering the respondent's application for appointment as a magistrate under the Local Courts Act is bound to do so in isolation, that is to say, free from competition from other applications made in the meantime. That is the manner in which the applications by former stipendiary magistrates for appointment as magistrates were considered originally. At that stage, the Attorney-General considered each application of a former stipendiary magistrate by determining only whether or not the applicant was unfit for appointment. The decision of the Attorney-General not to recommend the appointment of the respondent on that occasion having been declared void, the respondent contends that his application is to be reconsidered upon the basis that he be afforded natural justice and that that can only be done if it is considered without reference to other applications which have since been made.

7. The Court of Appeal in this case merely made a further declaration that the Attorney-General is required to consider the original application of the respondent according to law, but it is plain from the reasons of the majority that it intended that the respondent's application should be considered free from competition from other applications. Special leave was granted to the Attorney-General to appeal to this Court against the decision of the Court of Appeal and the relevant grounds of appeal identify those aspects of the decision, as distinct from the order made by the Court of Appeal, of which the respondent complains. Those grounds are as follows:

"1. That the Court of Appeal erred in deciding that in considering the respondent's application for appointment as a Magistrate to the Local Court the appellant was bound to give special weight to the respondent's prior status as a Magistrate and precluded from choosing to consider the respondent's application on its merits and in competition with other applicants.
2. That the Court of Appeal erred in holding that the appellant was bound by virtue of the respondent's previous status as a Magistrate and the procedure devised in 1983-84 for selection of new Magistrates for the Local Court, to accord special weight to

the respondent's former status as Magistrate in considering his application in 1988-89."

The reference to the procedure devised in 1983-84 is, apparently, a reference to the procedure which I have already mentioned whereby the former stipendiary magistrates who applied for appointment as magistrates under the Local Courts Act had their applications considered simply on the basis of fitness, before the consideration of, and without competition from, other applications.

8. The judgment of the Court of Appeal (Kirby P. and Hope J.A.; Mahoney J.A. dissenting) was, of course, based upon what the members of the Court of Appeal conceived to be the effect of the decision in Macrae. There having been no appeal to this Court from that decision, the respondent is entitled to the benefit of the judgment of the Court of Appeal in that case and the determination in his favour of any issue which arose in those proceedings. But the refusal of this Court to grant special leave to appeal in Macrae does not necessarily involve acceptance of the reasoning of the Court of Appeal in that case and it is convenient in the first place to consider whether the respondent is entitled to relief without reference to any entitlement which he might have by virtue of that decision.

9. It is clear that both in Macrae and in the present proceedings the respondent ultimately relied upon a legitimate expectation as the source of the obligation to afford him natural justice in the consideration of his application for appointment as a magistrate under the Local Courts Act. Initially the legitimate expectation relied upon appears to have been an expectation that he would be appointed a magistrate under that Act. But by the time his claim had reached the Court of Appeal in Macrae the expectation was said to be, not that he would be appointed, but "an expectation that, in considering appointments the Attorney-General ... would not take into account or otherwise act upon material adverse to (him), without first notifying (him) and giving (him) a fair opportunity to respond" (at p 274).

10. This legitimate expectation was said to have arisen for a number of reasons. It was said that the respondent's years of experience as a stipendiary magistrate placed him in a different position from an applicant who had not previously been a stipendiary magistrate. The Law Reform Commission of New South Wales had, when the problem of the procedures and criteria to be followed for the selection of magistrates was referred to it, suggested that an appointments committee be formed which recommended that existing magistrates should only be removed following disciplinary procedures which established any allegation against them. In addition, the Chairman of the Bench of Stipendiary Magistrates had at one time represented to the other stipendiary magistrates that they would all be appointed under the Local Courts Act. There was said to be a convention, applicable to a magistrate as a judicial officer, that he should not be removed from office without at least a hearing and that the abolition of the court in which he sat and the failure to appoint him to the court which replaced it amounted to such a removal.

11. Whilst the respondent argues before this Court that the natural justice to which he claims to be entitled involves no more than procedural fairness, the Attorney-General contends that this argument in effect asserts not a right to the observance of a particular procedure but a substantive right to appointment. It is now generally accepted that "(t)he rules of natural justice are 'in a broad sense a procedural matter'": Salemi v. MacKellar (No.2) [1977] HCA 26; (1977) 137 CLR 396, per Stephen J. at p 442, quoting Dixon C.J. and Webb J. in The Commissioner of Police v. Tanos (1958) 98 CLR 383, at p 396. In recent years the trend has been to speak of procedural fairness rather than natural justice in order to give greater flexibility to the extent of the duty than is possible

merely by reference to a curial model: Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, per Mason J. at pp 583-584; per Wilson J. at p 601; and per Deane J. at p 631. Indeed, in England judges now speak of a "duty to act fairly" and natural justice becomes "fair play in action": see, e.g., In re H.K. (An Infant) (1967) 2 QB 617, per Lord Parker C.J. at p 630; per Salmon L.J. at p 633; Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch 149, per Lord Denning M.R. at p 171; Wiseman v. Borneman (1971) AC 297, per Lord Morris at p 309. See also Kioa v. West, per Mason J. at p 585. But in speaking of a duty to act fairly, care must be exercised that it is identified only with procedural obligations. There is a danger that the duty formulated in this way may prove elastic. As Lord Roskill warned in Council of Civil Service Unions v. Minister for the Civil Service [1983] UKHL 6; (1985) AC 374, at pp 414-415:

> "... the use of this phrase (natural justice) is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair."

Whilst there is obviously more than a hint of policy in what the respondent contends is mere procedure, it is necessary to ask first whether any duty to act in a particular way is imposed upon the Attorney-General in the consideration of the respondent's application.

12. The duty which was said to arise in Macrae and which is now said to require consideration of the respondent's application without competition from other applications is, as I have said, based upon a legitimate expectation. The concept of a legitimate expectation as the basis of a duty to observe procedural fairness has, since it was first suggested by Lord Denning in Schmidt v. Secretary of State for Home Affairs, been so extended in its application that in many cases it is apt to mislead. The phrase was never a term of art and was meant merely to indicate that to deal administratively with something not amounting to an actual right might nevertheless require the adoption of a fair procedure. It was perfectly understandable that the law should say that a person should not be deprived of a benefit, such as the renewal of a licence or permission to remain in the country as an alien, without being heard, provided that his expectation of that benefit was sufficiently based in reason to make it legitimate. But it is now said that a legitimate expectation as the basis of a duty to afford procedural fairness may be no more than an expectation of the procedure itself, regardless of whether there be any legitimate expectation of the ultimate benefit to be sought by means of the procedure.

13. Indeed, that is what is said in this case. The respondent does not, and could not, for reasons which will appear later, contend that he has any legitimate expectation of appointment as a magistrate under the Local Courts Act. What he says is that he has a legitimate expectation that a fair procedure will be adopted in the consideration of his application and that from that expectation flows the obligation to afford him that procedure. He contends, of course, that the only fair procedure in the circumstances is for the Attorney-General to treat his application in the same way as he treated the applications of the other ninety-five former magistrates; that is, to appoint him unless he is thought to be unfit. That is to go much further than to seek a hearing; it is to seek a

consideration of his application in a particular manner.

14. It is when the expectation is of a fair procedure itself that the concept of a legitimate expectation is superfluous and confusing. That is not to say that where the legitimate expectation is of an ultimate benefit the concept is not a useful one to assist in establishing whether a particular procedure is in fairness required. But whenever a duty is imposed to accord a particular procedure, it is because the circumstances make it fair to do so and for no other reason. No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.

15. This view is, I think, consistent with the approach previously adopted in identifying the duty to observe the principles of natural justice before that approach became subsumed, in cases which involved no actual right, under the notion of a legitimate expectation. That is to be seen in the well-known passage from Durayappah v. Fernando (1967) 2 AC 337, at p 349, where Lord Upjohn speaking on behalf of the Privy Council said:

> "In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

That passage may no longer be wholly apt to describe the considerations which give rise to a duty to observe the principles of natural justice or procedural fairness. It is now clear that the first of the matters mentioned must be taken to include something less than a right - a legitimate expectation. What the passage does make plain is that, if a legitimate expectation is the basis of the duty to observe a fair procedure, it is because that legitimate expectation is of an ultimate benefit which is, in all the circumstances, entitled to the protection of that procedure and not because the procedure itself is legitimately expected.

16. Nevertheless, recent cases do speak of a legitimate expectation of a particular procedure giving rise to a duty in law to accord that procedure. A good illustration is Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] UKPC 2; (1983) 2 AC 629 in which the Privy Council appears to have accepted the proposition that "a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has 'a legitimate expectation' of being accorded such a hearing" (at p 636). However, the justification for the proposition was said to be "primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as

implementation does not interfere with its statutory duty" (at p 638). Good administration cannot of itself offer a sufficient reason for the imposition of a duty to observe fair procedures and the justification must ultimately rest upon fairness itself in all the circumstances. It adds nothing to say that there was a legitimate expectation, engendered by a promise made to follow a particular procedure, that the promise would be fulfilled. It is sufficient to say that, the promise to follow a certain procedure having been made, it was fair that the public authority should be held to it.

17. The distinction is drawn by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service, at p 408:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

It is the legitimate expectation of the continuation of the benefit or advantage in class (b)(i) which may make it unfair to deprive a person of a benefit or advantage which he has enjoyed without an adequate hearing. It is the assurance of a hearing - not the expectation of the ultimate benefit or advantage - which may make it unfair to withdraw the benefit or privilege in class (b)(ii) without a hearing. This passage shows that the deprivation of a benefit, even where there is no legitimate expectation of its continuation, may require a hearing merely because of an assurance previously given.

18. Even where there is no legitimate expectation, and no promise or assurance has been given, fairness may require there to be a hearing. In Kioa v. West the adult appellants were entitled to be heard before deportation orders were made against them, not because they had any legitimate expectation that they would be allowed to remain in Australia, but because it was only fair that they should have the opportunity to deal with matters prejudicial to them which had been put to the Minister's delegate. Only Mason J. really appears to suggest that the appellants had a legitimate expectation. If they did, it must have been an expectation of being accorded the procedure to which they were eventually held to be entitled and it must have been an expectation which arose from "the very nature of the application", a category recognized by Mason J. at p 583. To speak of a legitimate expectation in those circumstances is, as I have suggested, not helpful and Mason J. did not pursue the question, preferring in the end to base his judgment upon fairness. The same approach was adopted by Wilson and Deane JJ.

19. It follows, I think, from the acceptance of the notion that the duty to observe procedural fairness may arise in the circumstances of the individual case that it stems from the common law itself, not as the result of an implied legislative intent. In Cooper v. The Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB(NS) 180, at p 194 [1863] EngR 424; (143 ER 414, at p 420), Byles J. said:

"although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature".

That much quoted observation must now be taken to mean that the right to procedural fairness is the product of the common law and not the construction of a statute, although a statute may exclude the right if the intention to do so appears sufficiently clearly. As Mason J. said in Kioa v. West, at p 584:

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."

It also follows that the required procedure may vary according to the dictates of fairness in the particular case.

20. Thus, in order to succeed, the respondent must be able to point to something in the circumstances of the case which would make it unfair not to extend to him the procedure which he seeks. There is no doubt that the respondent had a legitimate expectation of continuing in his position as a stipendiary magistrate such that it would, apart from statute, have been unfair to remove him from that position without according him a hearing. If the principle of judicial independence extended to a stipendiary magistrate, then, no doubt, that would have strengthened his expectation. But the respondent was not removed from his position of stipendiary magistrate by administrative decision. He was removed by a statute which abolished the position of stipendiary magistrate and established the new position of magistrate. Not only that, the statute, the Local Courts Act, clearly contemplated that not all the former stipendiary magistrates would be appointed as magistrates pursuant to its terms. Accordingly it made provision for those who were not so appointed. It may be possible to deprecate the manner in which the statute removed the respondent from office, but it is not possible to deny its effect. Any unfairness was the product of the legislation which conferred no right upon the respondent to a procedure other than that which it laid down.

21. As I have said, the respondent did not argue before us that he had any legitimate expectation of appointment as a magistrate under the Local Courts Act. Clearly he had no right to appointment nor was there any foundation for regarding as legitimate any expectation which he might have entertained. It is one thing to expect to continue in a position; it is another to expect to be appointed to it. That distinction was drawn in F.A.I. Insurances Ltd. v. Winneke (1982) 151 CLR 342, at p 377, between the initial application for a licence and an application for its renewal. No doubt even with an application for appointment to a position there may be special circumstances which make it only fair to accord some sort of a hearing. Cole v. Cunningham (1983) 49 ALR 123; 81 FLR 158 is an example. There an applicant for re-appointment to the public service had resigned under threat of prosecution and had unsuccessfully attempted to withdraw his resignation. However, in the absence

of special circumstances, the situation is as described by Lord Denning M.R. in Breen v. Amalgamated Engineering Union (1971) 2 QB 175, at p 191:

"If a man seeks a privilege to which he has no particular
claim - such as an appointment to some post or other - then
he can be turned away without a word. He need not be heard.
No explanation need be given ..."

See also McInnes v. Onslow-Fane (1978) 1 WLR 1520; (1978) 3 All ER 211.

22. In this case I am unable to see any special circumstances which would entitle the respondent to anything more than the consideration of his application. It may have been only fair to allow the respondent to reply to the allegations made by the former Chairman of the Bench of Stipendiary Magistrates if those allegations were any longer in issue. But they are not. The Attorney-General is prepared to ensure that the allegations will not be taken into account without the respondent being given an opportunity to reply to them.

23. The statute which removed the respondent from the position of stipendiary magistrate affords no basis for saying that, as a matter of fairness, the respondent's application for appointment as a magistrate under the Local Courts Act should be assessed in a particular way. As I have said, the Act clearly contemplates that some former stipendiary magistrates will not be appointed as magistrates under its provisions and it has been and is a matter for the Attorney-General in the first instance to determine those who are to be appointed and to determine the method by which he will assess their applications.

24. It is at this point that procedure may run into policy, for the procedure which the respondent seeks may, if it is adopted, result in the appointment as a magistrate of a person who is not the best person for the position. The discretion to select persons for the position of magistrate under the Local Courts Act is unfettered. The respondent had no entitlement to the adoption of a particular procedure in the consideration of his application when it was originally considered, save perhaps that he was entitled to an opportunity to reply to the allegations made against him. He had no right to appointment nor any legitimate expectation of it which would give rise to any such entitlement.

25. Nor can the respondent now claim entitlement to a particular procedure because of the manner in which the application of the other ninety-five former magistrates were dealt with. If fairness ever requires an individual to be given a hearing before a departure from administrative policy is made, it must only be in circumstances of a special kind. And in this case the respondent does not ask for a hearing. He asks for his application to be dealt with in a particular way which will probably, if not inevitably, result in his appointment as a magistrate. To deal with it in that way would be contrary to the policy now adopted by the Attorney-General. That is to say, although the Attorney-General now wishes to appoint the best persons available to the position, the respondent seeks to have him adopt an approach which may well achieve a contrary result. In my view, what the respondent seeks would exceed the bounds of procedural fairness and would intrude upon the policy which is otherwise left entirely to those entrusted with the responsibility of determining who is to be appointed a magistrate under the Local Courts Act. It would exceed those bounds because it would effectively prevent the Attorney-General from pursuing the change in policy which he has made for the selection of magistrates. Fairness cannot dictate the policy which a Minister must adopt, nor can it preclude him from adopting and giving effect to a change in policy which he considers to be necessary: In re Findlay (1985) AC 318, at p 338; Hughes v. Department of Health and Social Security (1985) AC

776, at p 788. It may well be different when a particular decision involves, not a change in policy brought about by the normal processes of government decision making, but merely the selective application of an existing policy in an individual case: see, e.g., Reg. v. Secretary of State for the Home Department; Ex parte Khan [1984] EWCA Civ 8; (1984) 1 WLR 1337; (1985) 1 All ER 40. That is not a question in this case, notwithstanding that the respondent is the only one remaining to challenge the Attorney-General's decision.

26. Nor is the remedy now sought by the respondent necessary to make effective any relief which he was granted in Macrae or to give him the benefit of any issue which was determined in his favour in that case. In Macrae the respondent established his entitlement to a hearing for the purpose of consideration of the allegations made against him. It is now common ground that the allegations will not be taken into account without a proper hearing being provided. To require the Attorney-General to adopt a particular method of considering the respondent's application would be to do much more than make effective what has already been decided in his favour.

27. In F.A.I. Insurances Ltd. v. Winneke this Court determined that the refusal to renew a licence was void because of the failure to give the applicant a hearing. However, the term of any licence which might have been granted after a hearing had expired before the Court came to make its order. In these circumstances, Aickin J. (and Mason J. agreed with him on this point) thought that a hearing should be required upon any fresh application for a licence in order that the applicant might yet answer the case against him. There is much to be said for the view of Aickin J. upon the basis that consideration of the fresh application would, in the particular circumstances, be otherwise unfair. However, this is a different case. Here the respondent seeks to have his application treated in a particular way, something to which he was never previously entitled. He seeks to have it considered in a manner which would fetter the discretion of the Attorney-General and in all likelihood effectively determine the outcome in his favour. That is more than procedural fairness demands and the appeal should be allowed. I agree with the order proposed by the Chief Justice.

TOOHEY J. The circumstances giving rise to this appeal appear in the judgment of the Chief Justice.

2. In Macrae v. Attorney-General for N.S.W. (1987) 9 NSWLR 268, the Court of Appeal (Kirby P., Mahoney and Priestley JJ.A) made a declaration "that the decision of the Attorney-General on or before 12 December 1984 not to recommend the appellants' appointment as Magistrates under the Local Courts Act 1982 was and is void". Mr Quin was one of those appellants. Liberty was reserved to any party "to make, if thought fit, application in regard to further consideration of the second declaration", being the second declaration sought in the appellants' summons. That declaration, paraphrased, was that in considering the appellants' applications for appointment under the Local Courts Act 1982 (N.S.W.) ("the Act"), the Attorney-General should not act upon any matter or material adverse to the appellants without giving them the opportunity to be heard in regard thereto. Subsequently, some action was taken in regard to the second declaration but, in the end, it was not pursued. The reason appears to have been the wish of all parties to have a final order which was capable of being tested by application for special leave to appeal to this Court.

3. In 1988 this Court refused an application by the Attorney-General for special leave to appeal against the decision of the Court of Appeal. In consequence, the appellants had a declaration in their favour. But it was a declaration that, in its terms, went no further than to strike down the Attorney-General's decision not to recommend those persons for appointment as Magistrates under the Act, the relevant sections of which had been proclaimed on 1 January 1985. The Act is said to have

"reorganized" the magistracy in New South Wales. No doubt, that is a convenient description of what happened. But more precision is required for the disposition of this appeal.

4. The Act abolished Courts of Petty Sessions (s.9), provided for the establishment of Local Courts (s.6) and invested the Local Courts with the jurisdiction hitherto exercised by Courts of Petty Sessions, together with such jurisdiction as might be vested in them by any Act or other law: s.7. The Act further provided that the Governor might, "by commission under the public seal of the State, appoint any qualified person to be a Magistrate": s.12(1). The judgment of the Chief Justice sets out cl.5 of the Savings and Transitional Provisions contained in Schedule 1 to the Act. (Clause 5 had been amended by the Local Courts (Amendment) Act 1984 (N.S.W.) before the Act came into operation.) The Act clearly contemplated that some Stipendiary Magistrates might not "accede" to the office of Magistrate under the Act, and in fact Mr Quin did not so "accede". Any Stipendiary Magistrate who did not "accede" was, in lieu, entitled to be appointed to a position in the Public Service, as described in cl.5, until he or she reached sixty years of age.

5. The Court of Appeal made the declaration it did because, in its view, the decision of the Attorney-General not to recommend the appointment of the appellants was made in such a way as to deny them their legitimate expectation of procedural fairness. Nevertheless, the declaration did not of itself ensure the appointment of any of the appellants as Magistrates under the Act. Any such appointment can be made only by the Governor. The practical situation is as described by Hope J.A. in the present proceedings:

"However, although not mentioned in the Act, the Minister administering the Act is the Attorney-General. Appointment initially flows from his recommendation to Cabinet, and then to the Executive Council."

6. The proceedings the subject of this appeal were brought following a statement on behalf of the Attorney-General to the Court of Appeal on 16 November 1987, that he "does not wish in 1987 to treat applications from any of the appellants any differently from those of any member of the public". This was a departure from the policy that had hitherto prevailed, that the Attorney-General would deal with an application for appointment by a former Stipendiary Magistrate on its own merits and that such a person would accede to the new office unless considered to be unfit or unsuitable for appointment.

7. In the events that happened, of the original appellants in Macrae, only Mr Quin remained by the time the proceedings the subject of this appeal reached the Court of Appeal. The decision of the Court of Appeal on this occasion (Kirby P. and Hope J.A., with Mahoney J.A. dissenting) was in effect that the obligation on the Attorney-General was to consider Mr Quin's application for appointment as Magistrate on its own merits and not in competition with other applicants for appointment. The order against which the present appeal is brought is an order that the Attorney-General consider his application "according to law". The traditional language of mandamus sometimes conceals almost as much as it reveals and, in this case, it is necessary to determine what the Court of Appeal took the law to require and whether that is what the law does require. To do this requires a step beyond narrow questions of statutory construction into the wider area of the relationship between the courts and the Parliament and between the courts and the Executive.

8. But, in so doing, it should be made clear that Mr Quin makes no attack upon the validity of the Act itself. In particular, he does not contend that the Act was ineffective to abolish Courts of Petty

Sessions and thereby to eliminate the office he held. No question of unconstitutionality arises in this appeal. Likewise, he does not contend that cl.5 of Schedule 1 does not operate according to its tenor, so that those who had hitherto been Stipendiary Magistrates would either accede to the position of Magistrate or be appointed to a position in the Public Service without loss of salary. Nor does he contend that the Act itself confers preferential treatment on former Stipendiary Magistrates. While there are important juridical questions at play, the argument before us was formulated in more specific terms, namely, that the decision in Macrae required that the Attorney-General consider Mr Quin's application on its own merits and without regard to the merits of applications by others.

9. Stipendiary Magistrates were appointed by the Governor in accordance with s.7 of the Justices Act 1902 (N.S.W.). Every Stipendiary Magistrate was "deemed to be a Court of Petty Sessions": s.14. The Justices Act was silent as to the duration and terms of their appointment. That is because they were officers of the Public Service: see Public Service Act 1979 (N.S.W.). Therefore, although Stipendiary Magistrates may properly be considered judicial officers, there was no statutory assurance that they hold office during good behaviour. In any event, as I have said, Mr Quin does not complain that he ceased to be a Stipendiary Magistrate; his complaint relates to the circumstances of his non-appointment as a Magistrate. And so, while the need for an independent judiciary can hardly be overstated, it would not be right to approach this appeal on the basis that the principle has been breached; Mr Quin does not complain that it has been, though underlying his case is the notion that it has not been adequately recognized by the Attorney-General.

10. Again, Mr Quin does not quarrel with the general proposition that, in making appointments to judicial office, the Executive may make such appointments as it pleases. The argument in Macrae that the decision to appoint or not appoint the appellants was an exercise of the royal prerogative, hence immune from judicial review, does not arise here. The position is made clear by Mahoney J.A., when he said:

> "It is proper to recognise that the argument in the present proceeding has been directed, in its terms, to what can or should be done by the Attorney General. There has been no submission made as to the right of the court, by declaratory judgment or otherwise, to stipulate what can or should be done by the Governor in the exercise of, as it is in this case, his statutory power of appointment."

The appointment of judicial officers for reasons other than merit would rightly attract the wrath of the community as did President Roosevelt's plan to "pack" the Supreme Court of the United States in 1937. But the appointments would not thereby be invalid. In ordinary circumstances, the courts have no role to play when it is suggested that a person appointed to judicial office was not appointed by reason of merit or even that the person was wholly unsuitable for judicial appointment. A court might, in an extreme case, make its views known but it would have no jurisdiction to interfere with the appointment.

11. All this, I think, is taken for granted by Mr Quin. But he seeks to take his situation out of the ordinary by contending, not that he had a subjective hope of being appointed, but that, in all the circumstances, he had a legitimate expectation that his application to be appointed a Magistrate under the Act would be treated in the same way as those of other former Stipendiary Magistrates, that is, considered on its own merits and not in competition with applications made by other persons.

12. To put the matter that way does not identify with any precision the basis of the expectation. Nor does it come to grips with the difficulties implicit in the notion of legitimate expectation. As to the former, to say that Mr Quin expected to be treated as the other Stipendiary Magistrates were treated says little. Why did he so expect? The answer lies, in large part, in the unusual circumstance that the legislature was abolishing one court and effectively transferring its jurisdiction to a newly created one. In Macrae, at pp 278-281, Kirby P. pointed to the approach generally taken by the legislature in this country, and in England and elsewhere, when a court is abolished and its functions transferred to a new court - judicial independence and tenure are preserved by appointing the judicial officers exercising the jurisdiction of the abolished court to the new court or by retaining their office in some way. The President offered instances that "demonstrate that the convention of respecting the continuance of persons who enjoy judicial office has also been extended to the magistracy": at p 279. I do not wish to add to what is said by Kirby P. regarding the continuance of persons in judicial office; it is important, though, to stress, as his Honour has stressed, that the various instances referred to have not always depended upon some constitutional requirement or convention. And, as Mahoney J.A. suggested in Macrae, at p 287, "where what is involved is the abolition of one judicial office and the substitution of another, that fact is of importance in determining what may be expected by the holder of the office which is being abolished."

13. To approach the present appeal by reference only to the unquestioned (in this case) power of the legislature to abolish a court and the unquestioned (in this case) power of the Executive to make judicial appointments in its discretion, is to give insufficient recognition to an important step in between. What is at issue in the present appeal is not a decision by the Governor pursuant to s.12(1) of the Act. It is not even a decision of the Attorney-General not to recommend the respondent for appointment. It is no more and no less than the decision of the Attorney-General that he will now not consider Mr Quin's application in the same manner as he considered the applications of other former Stipendiary Magistrates, but that he will consider it only in conjunction with all other applications for the position of Magistrate. To treat the decision of the Court of Appeal as involving an intrusion by the courts into the power of the Executive and as a threat to the notion of separation of powers is to give the appeal a scope which it does not have and does not purport to have.

14. We must take as unchallengeable the decision in Macrae as it is a final order of the Court of Appeal and leave to appeal to this Court was refused. As Deane J. points out in his reasons for judgment, the present parties were parties to those proceedings and are bound "by the declaratory order which the Court of Appeal made and by the resolution of any issues of fact and law upon which it was based". There can be no dispute that the decision of the Court of Appeal was based on the proposition that rules of procedural fairness required that each of the appellants be given an opportunity of being heard before the Attorney-General decided that he or she was not suited for appointment to the new office. But underlying the decision was the assumption that the Attorney-General would recommend the appellants for appointment unless they were unfit or unsuitable. Notwithstanding the decision of the Court of Appeal, Mr Quin was not recommended for appointment to the new office nor was his application to be dealt with in terms of his fitness or suitability. The reason then offered was that the Attorney-General had altered his previous policy and intended to make recommendations for future appointments on the basis of merit as between all who applied.

15. As mentioned earlier in these reasons, there could, in ordinary circumstances, be no quarrel with the new policy announced by the Attorney-General. It is no more than would be expected of an Attorney-General who was properly carrying out his functions. In particular, there could be no complaint by anyone who had not been a former Stipendiary Magistrate. It is important, I think, to

stress again that Mr Quin's case does not strike at the power of the Executive. It does not seek to carry the area of judicial review beyond existing or permissible limits; it does not ask to have evaluated the fairness of the new policy.

16. Although this litigation may be thought to have important overtones for the relationship of the courts to the Executive, it must be determined within the parameters set by the parties and in the light of Macrae. If Macrae has the consequences contended for by Mr Quin, his application should have been considered and determined as if he had been accorded procedural fairness, that is, the Attorney-General would have recommended his appointment unless satisfied that he, Quin, was unsuited or unfit for office. In that event the appeal should be dismissed. It is no answer to point to the undoubted power of the Attorney-General to recommend for appointment whom he chooses and, it may be added, according to the criteria he chooses. Nor is it an answer to point to the limitations fairly imposed on the power of courts to review administrative action. The issue for resolution is a narrower one, which involves giving full effect to the decision in Macrae.

17. The concept of legitimate expectation continues to prove troublesome as its parameters are explored by the courts. The expression itself has been in use in this Court at least since Salemi v. MacKellar (No.2) [1977] HCA 26; (1977) 137 CLR 396, though "reasonable expectation" has also been used from time to time, as in Salemi, at p 436, and in Heatley v. Tasmanian Racing and Gaming Commission[1977] HCA 39; (1977) 137 CLR 487, at p 508. Whatever the appropriate terminology, I am content to approach the question in the present appeal as one involving no more than the application of the rules of natural justice, in particular that Mr Quin should be accorded procedural fairness in the consideration of his application. That much is implicit in the decision in Macrae and is implicit in the order of the Court of Appeal that the Attorney-General consider the application according to law.

18. Because the Act abolished Courts of Petty Sessions and thereby the positions held by some 100 Stipendiary Magistrates, the Attorney-General adopted a special procedure which was designed to give recognition to the office held by those Stipendiary Magistrates who wished to be considered for the position of Magistrate; it did so by treating each applicant on his or her own merits and not in competition with other applicants. In that way some recognition was accorded to the security of tenure that is essential to the independence of the judiciary, though the recognition was not complete. The legitimate expectation thereby created was that Mr Quin (and others) would have his application considered and that the Attorney-General would recommend his appointment unless satisfied that he was unfit or unsuited for the new office. The matters alleged against Mr Quin do not negate that expectation; the opportunity to be heard in regard to any such allegations is part of the procedural fairness to which he is entitled.

19. By reason of the decision in Macrae, it must be taken as established that, in deciding not to recommend Mr Quin, the Attorney-General failed to give him an opportunity to be heard in response to matters bearing upon his fitness or suitability for the new office. The procedure adopted by the Attorney-General, in recognition of the unusual circumstance of the abolition of one court and the creation of another, would have resulted in the accession of Mr Quin to the new office unless he was unfit or unsuitable. To focus unduly on the formal order of the Court of Appeal in Macrae, without an appreciation of the circumstances which led to the making of the order, is to view the matter too narrowly. It gives inadequate emphasis to the particular circumstances in which the order was made: see Kioa v. West[1985] HCA 81; (1985) 159 CLR 550, at p 626. It fails to pay sufficient regard to those circumstances, from which sprang Mr Quin's legitimate expectation to have his application dealt with in a particular way. It is not inappropriate to borrow the language of

the Privy Council in A.-G. of Hong Kong v. Ng Yuen Shiu [1983] UKPC 2; (1983) 2 AC 629, at p 638, that:

"when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

Implementation of the procedure adopted by the Attorney-General does not interfere with his statutory duty, for it was an entirely apt procedure to follow in the special circumstances prevailing.

20. In the present case we have a declaration of the Court of Appeal in Macrae, based on the view that Mr Quin was entitled to have his application for appointment as a Magistrate dealt with in a particular way. It is not to the point that his position as a Stipendiary Magistrate was terminated by legislative action for he does not complain about that termination. His complaint is about the manner in which his application for appointment as a Magistrate has been dealt with. He says that he had a legitimate expectation that it would be dealt with in a certain way. The basis for his expectation was the office of Stipendiary Magistrate he previously held and the policy adopted by the Attorney-General in regard to the making of recommendations for appointment, a policy which gave recognition to the unusual circumstance in which a judicial office had been abolished and its functions transferred to another court. In those circumstances, it is but a short and inevitable step to say, as the majority in the Court of Appeal said, that Mr Quin had a legitimate expectation that his application would be dealt with as the applications of other former Stipendiary Magistrates had been dealt with, namely, on its merits. To say, as was said in the Attorney-General's statement to the Court of Appeal on 16 November 1987, that he will not take into account the allegations which led to the making of the order in Macrae, without giving Mr Quin a proper opportunity to meet those allegations, is to comply formally with the order of that Court. But it does not meet the gravamen of Mr Quin's present complaint.

21. I do not accept the view of Mahoney J.A. that Mr Quin's submission requires that the Attorney-General must consider his, Quin's, appointment before he considers the appointment of any other person, though that may have been the way in which the argument was put to the Court of Appeal. What the Attorney-General does in regard to the appointment of other persons is a matter for him. It is consideration and determination of a particular application with which this Court is concerned. It is an application that was made on 12 December 1983 and is still on foot.

22. In the circumstances described, there is no restriction on the exercise of executive power to require the Attorney-General to give effect to the previous policy, on the expectation of which Mr Quin made application for appointment as a Magistrate. It is true that circumstances have changed but, as Deane J. has pointed out, there is no insuperable obstacle to giving effect to that policy. The Court's hands are not tied, as F.A.I. Insurances Ltd. v. Winneke [1982] HCA 26; (1982) 151 CLR 342 demonstrates. In particular, there is no statutory bar to the Attorney-General making a recommendation that Mr Quin be appointed a Magistrate, once his application has been considered on its merits. This approach by no means ensures Mr Quin's appointment as a Magistrate. Proper consideration of his application by the Attorney-General may lead to a decision not to make the necessary recommendation. But it does ensure that he receives the treatment to which he is entitled by law.

23. The appeal should be dismissed.

ORDER

Appeal allowed with costs.

Set aside the declaration of the Court of Appeal and in lieu thereof declare that the appellant is bound to consider the respondent's application for appointment as a magistrate dated 12 December 1983 in accordance with the judgment of this Court.

Reserve the question what order should be made with respect to costs in the courts below.

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