

**NORTHERN TERRITORY BAR ASSOCIATION**

**MEDIA RELEASE**

The Northern Territory Bar Association has expressed its regret that the Attorney-General Mr John Elferink MLA has refused to hold an independent inquiry into the conduct of Darwin magistrate Mr Peter Maley.

In two detailed letters to the Attorney, the Bar Association has set out its concerns in relation to Mr Maley's conduct since his appointment in September 2013, including his apparent involvement with the Country Liberal Party as a director of Foundation 51 Pty Ltd and by handing out how to vote cards at the recent Blain by-election.

"The established rules of judicial conduct require magistrates to cease involvement in politics after their appointment. It appears that Mr Maley has not done that," said Mr John Lawrence SC, the Bar Association's President.

"The public must have complete confidence in the independence of Territory magistrates. That confidence has been undermined by Mr Maley's conduct which suggests an on-going and close connection between Mr Maley and the Government. The need for an independent inquiry is reinforced by the Attorney's friendship with Mr Maley and the Attorney's public statements which appear to support Mr Maley's on-going involvement in politics."

"The only way to preserve that confidence is to hold an independent inquiry," Mr Lawrence stated. The Attorney confirmed to the Bar Association on Wednesday that he will not be holding an inquiry.

The correspondence between the NT Bar Association and the Attorney is on the NTBA's website [www.ntba.asn.au](http://www.ntba.asn.au). For further information please contact Mr John B Lawrence SC, the Bar Association's President on 0439 685 509.

7.8.14 1613 hrs



The Hon. John Elferink MLA  
 Attorney-General and Minister for Justice  
 GPO Box 3146  
 Darwin NT 0801

4 June 2014

Dear Attorney,

Paragraph 2.8 of the Constitution of the Northern Territory Bar Association provides that one of the objects and purposes of the Association is to promote and protect the independence of the judiciary. It is in pursuit of that object and purpose that I raise the following matters with you.

I refer to the recent press coverage in relation to the apparent involvement of Mr Peter Maley SM ("the Magistrate") in the Country Liberal Party after his appointment as a magistrate in September 2013.

In particular, I note that:

1. It was reported in the press that the Magistrate resigned from the Country Liberal Party on Friday 9 May 2014, which suggests that he had been a member for the whole of the period following his appointment until 9 May 2014.<sup>1</sup>
2. ASIC records reveal the Magistrate's appointment as a director of Foundation 51 Pty Ltd (ACN 135369569) on 2 January 2014. A search of ASIC records on 27 May 2014 suggests that his appointment is still current.
3. The precise business being conducted by Foundation 51 Pty Ltd is not clear. However, it has been described by a former CLP Senior Advisor as "a mental and monetary creature of the Country Liberal Party"<sup>2</sup>. The press has referred to the company "as a CLP-aligned research company that 'contributed significantly' to the Blain by-election campaign"<sup>3</sup>. Mr Graeme Lewis, one of its directors, has described it as "a supporter of the CLP in political terms"<sup>4</sup>. Foundation 51 Pty Ltd also shares the same postal address as the Darwin Branch of the CLP.

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

<sup>2</sup> Article by Peter Murphy, Sunday Territorian, 9/5/2010, page 16

<sup>3</sup> <http://www.ntnews.com.au/news/northern-territory/just-what-lies-behind-foundation-51/story-fnk0b1zt-1226916337236>

<sup>4</sup> <http://www.theaustralian.com.au/news/latest-news/clp-linked-research-foundation-under-fire/story-fn3dxiwe-1226909313801>

4. A member of the Legislative Assembly, Ms Larissa Lee, stated in Parliament on 15 May 2014 that:

“Chief Minister, you are the chair of the Cabinet which appointed Peter Maley as a magistrate. You are aware that on Saturday 23 February 2014 he called me and offered me an inducement. He stated I would have my own cheque book. Further, there was also an implied threat that if I left the CLP I would no longer be protected. Shortly after that I was called by the Attorney-General, who also tried to stop me leaving the CLP and repeated I would no longer be protected if I left.”<sup>5</sup>

5. In a subsequent media report, whilst he was reported as denying Ms Lee’s “characterisation of the conversation” as an attempt to bribe her, the Magistrate is reported as having admitted that he had telephoned her and, it appears (by disputing only the “characterisation” of the conversation), that he was doing so on behalf of or in order to promote the interests of the Country Liberal Party.<sup>6</sup>
6. It has also been reported that the Magistrate was handing out “how to vote” cards for the Country Liberal Party at the Blain by-election on 12 April 2014. A photograph has been published which appears to support this suggestion.<sup>7</sup>
7. Questions have been raised in Parliament about the circumstances which apparently saw the current Government grant two water licenses on a property in the Douglas Daly region which is owned by a company in which the Magistrate is a shareholder.<sup>8</sup>

The Northern Territory Bar Council is extremely concerned about the implications of these matters for both the fact and appearance of the independence of the Magistrate as a Territory Magistrate and the Territory Magistracy generally. This concern applies to the cases the Magistrate has dealt with since his appointment and those the Magistrate will deal with in the future. These allegations also may impact on his suitability to hold the office of a magistrate.

In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, Gleeson CJ, McHugh, Gummow and Hayne JJ stated at [3] (footnotes omitted):

“Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta (with its declaration that right and justice shall not be sold) and the Act of Settlement 1700 (UK) (with its provisions for the better securing in England of judicial

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<sup>5</sup> <http://notes.nt.gov.au/lant/hansard/hansar.dd.nsf/WebFullTextTranscript/860CF15D7F74B6FF69257CD900525C33?opendocument>

<sup>6</sup> <http://www.ntnews.com.au/news/northern-territory/clp-figure-and-nt-magistrate-hit-with-bribery-allegations-by-larisa-lee-in-parliament/story-fnk0b1zt-1226918974091>

<sup>7</sup> [www.justinian.com.au/news/pillars-of-justice.html](http://www.justinian.com.au/news/pillars-of-justice.html)

<sup>8</sup> <http://notes.nt.gov.au/lant/hansard/hansar.dd.nsf/WebFullTextTranscript/860CF15D7F74B6FF69257CD900525C33?opendocument>

independence). It is a principle which could be seen to be behind the confrontation in 1607 between Coke CJ and King James about the supremacy of law. It could be seen to be applied when Bacon was stripped of office and punished for taking bribes from litigants. Many other examples could be drawn from history. It is unnecessary, however, to explore the historical origins of the principle. It is fundamental to the Australian judicial system.”

That principle applies to Territory Magistrates. In *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ said at [35] (footnotes omitted):

“The Magistrates Act is to be construed with several matters in mind. One, already indicated in these reasons, is the statement in the joint judgment in *Ebner* that “fundamental to the Australian judicial system” is the conduct of adversarial trials by an independent and impartial tribunal. Another is the application of that principle in the development of the courts of summary jurisdiction in this country. In 1958, the New South Wales Full Court observed in *Ex parte Blume; Re Osborn* (1958) 75 WN (NSW) 411 at 415:

“It is a Departmental rule of long standing that the judicial functions of magistrates are not interfered with by the Department and that it is not competent for the Minister or any member of the Executive to give any direction affecting his judicial functions to a judicial officer.””

Earlier in the same judgment at [30], their Honours referred to “the discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides.”

Their Honours said:

“No exhaustive statement of what constitutes that minimum in all cases is possible. However, the Legal Aid Service refers in particular to the statement by McHugh J in *Kable* that the boundary of legislative power, in the present case that of the Territory:

“is crossed when the vesting of those functions or duties might lead **ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court.”**” (emphasis added)

These principles necessarily require a Magistrate upon appointment to cease all involvement in political life. Justice Thomas in the 3<sup>rd</sup> edition of *Judicial Ethics in Australia* makes it clear that “Apolitical conduct (is) now expected” of any person holding judicial office.

He says at paragraph 11.15 (footnotes omitted):

“After appointment a judge should not be an active member of any political party, should not fraternise with those in the echelons of political power, and

should not actively support causes which produce partisan reaction in the community. It would be improper for a judge to participate in a political party convention. As the divorce from political partisanship needs to be complete, a judge should resign from membership of any party. Continued silent membership could be seen as clandestine support.

"Political cronyism is a more serious problem than it looks on both sides of politics. As a counsel of prudence, judges should immediately on appointment take steps strictly to limit any political connections they may have. This is not just an abstract dissociation. Quite bluntly, if a judge is friendly with people who are active in politics, steps should be taken to minimise future contacts with them.

"It may be tempting to some judges to keep up friendships of this kind actively, with at least the subconscious thought that they may improve their own career prospects. Whatever the motive, these connections are extremely dangerous. There is nothing more damaging to the standing of courts than the suspicion that judges may be actively cultivating political connections, and thereby compromising not only their appearance, but also their very independence. These things do not go unnoticed by other judges or by the many judge-watchers in the community."

These passages I consider fairly set out the reasons for our concerns. Further, these passages reflect long established and uncontroversial propositions recognised by the Australian judiciary as applying to all judicial officers and certainly observed by all other judges and magistrates in the Territory.

All of the above principles are summarised in the *Guide to Judicial Conduct* 2<sup>nd</sup>ed., published by the Australasian Institute of Judicial Administration Incorporated. This guide applies to judges and magistrates and indeed received input from the NT Magistrates Court. The following statements should be noted:

"The principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government... An appropriate distance should be maintained between the Judiciary and the Executive, bearing in mind the frequency with which the Executive is a litigant before the courts (paragraph 2.2.1(a)).

"Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence... Judges should bear in mind that the principle of judicial independence extends well beyond the traditional separation of powers and requires that a judge be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests (paragraph 2.2.2(a)).

"... it is expected that, on appointment, a judge will sever all ties with political parties. An appearance of continuing ties, such as might occur by attendance at political gatherings, political fund raising events or through

contributions to a political party, should be avoided... The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit." (paragraph 3.2)

Mildren ACJ and Blokland J referred and endorsed these guidelines in *Attorney-General (NT) v DPP & Ors* (2013) 275 FLR 129 at [25].

It is the opinion of the Bar Council that, when these facts and the allegations in relation to the Magistrate are considered in the context of these principles, an independent investigation and report is warranted. We would suggest this investigation be conducted by a retired judge, which is usual in such circumstances. We believe this is necessary in order to reassure the public as to the independence and judgment of the Magistrate and as to the independence of the Territory Magistracy generally. The responsibility for establishing such an inquiry would seem to fall to you as Attorney-General.

Further, pending the outcome of this investigation, it would seem necessary to consider what judicial functions it is appropriate for the Magistrate to undertake in the meantime. That would seem to be a matter best undertaken by consultation between yourself and the Chief Magistrate and, perhaps, the independent person or persons appointed to undertake the inquiry.

It would seem likely if not inevitable that, if steps like those suggested above are not taken, the issues to which I refer may well be raised by parties appearing before the Magistrate at some stage in the future in applications to disqualify him from hearing a matter. As these issues raise general concerns, this could see applications made in several cases.

The outcome of such litigation is difficult to predict. However, the not dissimilar litigation which led to the decision of the High Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 suggests that it could well be expensive, drawn out, highly divisive and damaging to the reputation of the Territory's justice system generally.

I look forward to hearing from you.

Yours sincerely,



John B. Lawrence SC  
President  
Northern Territory Bar Association



**ATTORNEY-GENERAL  
MINISTER FOR JUSTICE**

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**Mr. John Lawrence SC  
President  
Northern Territory Bar Association  
GPO Box 4369  
DARWIN NT 0801**

Dear Mr Lawrence

Thank you for your letter dated 4 June 2014 raising concerns about the independence of a member of the Northern Territory judiciary.

You have asked that I initiate an independent investigation into the matters you have raised. I am obliged to consider your request in the context of my role as Attorney General.

I am mindful of the importance of the separation of powers as well as the fact that the Court is well equipped to deal with challenges to the independence and impartiality of a judicial officer.

This Government is confident that the Court and Officers of the Court like the members of your Association are more than capable of promoting and protecting the independence of the judiciary from within.

Accordingly, I will not involve myself as Attorney General in this matter nor will I commence any investigation.

Yours sincerely

JOHN EFERINK

08:52  
12/16/14

Northern Territory  
Government



The Hon. John Elferink MLA  
Attorney-General and Minister for Justice  
GPO Box 3146  
Darwin NT 0801

By post and by email to [Minister.Elfink@nt.gov.au](mailto:Minister.Elfink@nt.gov.au)

25 June 2014

Dear Attorney,

Thank you for your letter in reply dated 12 June 2014, which was discussed at a meeting of the Bar Council on 24 June 2014. The Council responds in the following terms.

We note that you have indicated your confidence that the court (in this case, the Magistrates Court) is more than capable of promoting and protecting the independence of the judiciary from within.

We respectfully disagree with your characterisation of the concerns raised about Mr Maley SM as being entirely a matter for the judiciary. The issues which we have raised go to:

1. the fact and appearance of the independence of the magistracy in general and Mr Maley SM in particular;

and further

2. the suitability of Mr Maley SM to continue to hold the office of a magistrate.

As such, these concerns go beyond whether, in any particular case, Mr Maley SM should disqualify himself on the basis of an appearance of bias. They are incapable of being resolved by an application in any particular case, whether to Mr Maley SM or to another court.

Within the Executive, responsibility for ensuring the independence and standing of the judiciary and for supervising the conduct of judges and magistrates with this end in mind lies primarily with you as Attorney-General. The special position of the Attorney-General requires that this duty is treated as paramount even if in a particular instance it conflicts with the political interests of the Government or your personal interests or affections.

In Taylor's, *The Constitution of Victoria* (Federation Press, 2006) at p.178, the learned author makes the following statement in relation to the role of State Attorneys-General, which applies equally to Territory Attorneys-General:

It need hardly be said that all the Attorney-General's functions relating to the Judiciary are extremely sensitive and must be performed with an absolute and unbending adherence to the principles of judicial independence, the separation of powers and the rule of law.

We know we do not need to elaborate on these special functions any further as, shortly after your appointment, you made a point of stating to the legal profession that you fully appreciated your special constitutional responsibilities and would honour your duties in this respect.

We note further that, if this sort of issue arose in some of the States of the Commonwealth, the appropriate reference would be to the relevant Judicial Commission, or similar body - in each case a body independent of the Executive - to inquire into the behaviour or suitability for office of judges or magistrates. But, as you would be well aware, the Northern Territory does not have such an independent body to inquire into the behaviour or suitability for office of judges or magistrates.

In the absence of such a body, the proper and appropriate avenue for investigation of genuine concerns as to the independence and suitability of a magistrate is at the direction of the Attorney-General. In due course, the Attorney General having caused such an investigation to be undertaken would inform the members of the Executive, who can then exercise their duties accordingly. We understand that this was the course adopted in relation to an investigation, some years ago, in to the suitability for office of a former magistrate, Mr John Anthony Gillies SM.

To further illustrate our point that the issues which have been raised are incapable of being dealt with by an application to the magistrate in an appropriate case, we observe that it is a known fact that Mr Maley SM only became a director of Foundation 51 Pty Ltd after he became a magistrate. It is a known fact that Foundation 51 receives donations from members of the public and that it has substantial links to the Country Liberal Party. The donations that Foundation 51 receive would be readily understood by members of the public as being for the purposes of supporting the political activities of the Country Liberal Party.

What is not known is who has donated what amounts to Foundation 51 during the time that Mr Maley SM was a director. That information is not publicly available. It is impossible therefore for any person appearing in a matter before Mr Maley SM to know whether Mr Maley SM has, by virtue of his directorship of Foundation 51, an interest in the subject matter of the proceeding or a relationship with one or other of the parties or any of the witnesses in the proceeding.

Importantly, the nature of the activities of Foundation 51 is unique. The fact that the company has the political connections that it does and that it collects donations for political purposes are the features that create the apprehension that Mr Maley's connection with that company might compromise his independence from government

and, further, of the existence of interests or relationships which might compromise his impartiality but about which nothing more is or can be known.

Accordingly, any person appearing in a matter in which Mr Maley SM presides might reasonably apprehend an absence of impartiality on the part of the learned Magistrate. There is no practical way that a party could be satisfied that no interest or relationship exists in the course of individual matters as you have suggested.

Further, since we wrote to you on 4 June 2014, the following additional matters have come to light:

1. At the proceedings before the Estimates Committee on 17 June 2014 the following exchange occurred between Ms Walker, a member of the opposition, and Mr Westra van Holthe, the Minister for Mines and Energy:

Ms WALKER: Thanks, minister. Have you or any member of your staff or employees of your department had any communications, formal or informal, with Mr Peter Maley or his representatives concerning water extraction licences for Blackbull Station?

Mr WESTRA van HOLTHE: I have had one meeting, I think, with Peter Maley. I do not recall when that meeting was. It was only a few months ago. It was not so much around the water licence but in relation to the proposed forestry activities he and Tropical Forestry Services had planned for that block.

Ms WALKER: Are you able to provide more details or documentation to the committee about this meeting you had with Mr Maley?

Mr WESTRA van HOLTHE: No, I am not able to provide any further details other than my recollection of the broad issue we discussed. As I said, I am not in the habit of disclosing the details of conversations that occur either in my electorate office or in my ministerial offices.

We note that the Minister's recollection suggests that this conversation took place with Mr Maley SM after his appointment as a magistrate. This conversation might be seen as suggesting:

- a. the active pursuit by Mr Maley SM of his private commercial interests, personally, with a Minister of the Crown;
- b. that the scale of these commercial activities are substantial. As they are being undertaken by the magistrate while a serving judicial officer, their appropriateness is open to question: see section 6.2 of the Australasian Institute of Judicial Administration Incorporated's Guide to Judicial Conduct, 2<sup>nd</sup> ed.; and
- c. the continued close association by Mr Maley SM with senior members of the Executive.

2. Mr Maley SM attended a dinner on 14 June 2014 at the Darwin Casino with a large number of other guests to celebrate the 40th Anniversary of the founding of the Country Liberal Party. This occurred after Mr Maley SM issued a statement on 8 May 2014 which we understand advised that he had resigned from the CLP and his directorship of Foundation 51 Pty Ltd and acknowledged that his relationship with the CLP in the past had been inappropriate given his position as a magistrate.

The combined effect of these matters and those referred to in our previous letter goes beyond any question of apprehended bias in any individual matter. They put in question the fact and appearance of the independence of the magistracy in general and Mr Maley SM in particular, as well as raising the suitability of Mr Maley SM to continue to hold the office of magistrate.

Finally, we would respectfully remind you that your relationship with Mr Maley SM and previous public statements you have made in relation to these matters appear to exclude you making your own assessment of these matters and require that they be assessed by a suitably qualified and independent person (we suggest a retired judge). You said in Parliament on 7 May 2014:

The good thing about this is democracy and freedom of speech. A magistrate in the Northern Territory is allowed to have a political opinion. What sort of a society are we living in? It is a fantastic society where a magistrate can have a political opinion, where he can be a member of a political party...

It is fantastic he has rights and freedoms in a democratic society, such as the Northern Territory, to be a member of a political party. Good on him if he wants to make a donation to the member for Port Darwin...

Thank you very much, Peter Maley, the magistrate who has shown an interest in the Country Liberals...

Mr Maley is a personal friend of mine, and for that reason I removed myself from his selection process in the way that I did. Nevertheless he remains a personal friend...

The Association does not raise such matters lightly. For the reasons we have given, we respectfully urge you to appoint a retired judge to inquire into these matters and to report to you with his or her recommendations as to the appropriate response. We consider this essential in order to maintain public confidence in the administration of justice. In our view, "an absolute and unbending adherence to the principles of judicial independence, the separation of powers and the rule of law" requires nothing less.

Finally, we would make reference to three matters:

- (a) we have made inquiries and can confirm that the Bar Council was not the source of the information which led to the recent media reports about our correspondence;

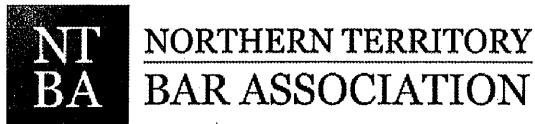
- (b) we intend keeping the content of our correspondence confidential, at least until we have exhausted all options for resolving these concerns with you on a consensual basis. Recent events in Queensland highlight the importance of this;
- (c) our President and Vice-president would welcome the opportunity to meet with you to discuss how our concerns might be resolved.

I look forward to hearing from you.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Alistair Wyvill".

Alistair Wyvill SC  
Acting President  
Northern Territory Bar Association



28 July 2014

The Hon. John Elferink MLA  
Attorney – General and Minister for Justice  
GPO Box 3146  
Darwin NT 0801

Dear Attorney

I write again concerning the apparent post appointment involvement with the CLP by Mr Maley SM.

The NTBA has received, as yet, no response from you to our second letter, dated 25 June 2014. That letter reiterated our concerns as to this serious situation and again called for you to establish an independent judicial investigation and report.

The NTBA would appreciate receiving your response, if there is to be any, by C.O.B on 31/07/2014.

Yours sincerely

A handwritten signature in black ink, appearing to read "John B. Lawrence SC".

John B. Lawrence SC  
President  
Northern Territory Bar Association