



**Royal Australian Justices of Western
Australia (Inc)**

*The role of a Justice of the Peace in
Western Australia's justice system*

address

by

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Introduction

I am honoured to have been invited to address the Centenary Conference of the Royal Association of Justices of Western Australia (Inc). It seems entirely appropriate to mark this important milestone in the life of the Association with a conference aimed at exchanging information and ideas, given that the focus of the Association over its century of existence has been upon the provision of information and education to Justices in order that they might better serve the community.

Acknowledgement of traditional owners

I would like to commence, as I always do, by acknowledging the traditional owners of the lands on which we meet, the Wadjuk people who form part of the great Noongar clan of south-western Australia, and by paying my respects to their Elders past and present and acknowledging their continuing stewardship of these lands.

A short history

Given that we are today celebrating an important milestone in the history of the Association, it is appropriate to commence my consideration of the current role of a Justice of the Peace in Western Australia with a short review of the history of that office in this State, which commences with the establishment of the Swan River colony.

On 31 May 1829, Lieutenant Governor Stirling arrived at the area off the coast of the point at which the river known to the Wadjuk as Derbarl Yerrigan, and which he renamed as the Swan River, enters the sea. He made an inauspicious start. Before he could make landfall, on 1 June 1829, the vessel in which he and other settlers were sailing - the *Parmelia*, ran aground on a bank between Carnac Island and the mainland. The vessel stuck fast in stormy weather for some days, although eventually Stirling and his party were able to land on Garden Island on 8 June. There they erected some makeshift buildings in order to protect the stores. After the stormy weather abated, Stirling and others were able to land at Arthur's Head at Fremantle, on 16 June 1829, and two days later a parade was assembled at which Stirling read the letter of his appointment as Lieutenant Governor of the settlement, together with his first executive action, in the form of a Proclamation.¹

Although an Act to provide for "the Government of His Majesty's settlements in *Western Australia* on the Western Coast of New Holland" had been passed by the Parliament at Westminster on 14 May 1829, Stirling was unaware of this legislation, having left England before its passage. The letter of instruction he had been given by the Colonial Office gave him limited powers and authority because no law had been passed authorising the monarch's representative in the colony to exercise delegated power. His letter of instruction advised him that:

¹ This material is generally taken from Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979*(1980) 8, 9 and Appendix I.

Until provision can be made in due form of law for the government of the projected colony, the difficulties to which I refer must be combatted, and will, I trust, be overcome by your own firmness and discretion.²

However, it seems clear that Stirling did not consider that firmness and discretion would be enough. That inference can be drawn from the fact that the Proclamation which he read to the troops assembled at Fremantle on 18 June 1829 went well beyond the instructions he had been given by the Colonial Office in a number of significant respects.

Those respects included his declaration that:

the Laws of the United Kingdom as far as they are applicable to the Circumstances of the Case, do therein immediately prevail ...

as a result of which he did:

hereby caution all to abstain from the commission of Offences against the King's Peace or the Laws of the Realm upon pain of being arrested, prosecuted, convicted and punished ...³

In the Proclamation Stirling went on to foreshadow the appointment of a Sheriff who would have under his direction constables and bailiffs "for the aids of Justice and the preservation of Peace" and for the same purposes:

... to issue a Commission to certain discreet Persons to proceed to the Cognizance of Offences against the Laws; to hear and determine Complaints of Injury; to commit Offenders for further trial to the Custody of the Sheriff; and to conduct themselves in the execution of their Office according to such mode of proceeding as Justices of the Peace may lawfully adopt; I here command and require that due obedience and

² Instructions to Captain Stirling from Sir George Murray, Secretary of State for the Colonies, 30 December 1828, reproduced at Note 1 above, Appendix II.

³ Captain Stirling's Proclamation of 18 June 1829, reproduced at Note 1 above, Appendix III.

respect be shewn to all such Persons in their several Places and Jurisdictions.⁴

In the Proclamation Stirling went on to make specific reference to the original inhabitants of the land over which he was asserting dominion.⁵ After asserting that the protection of the law would belong to all people whatsoever who may be found within the territory of the colony, he gave express notice:

... that if any Person or Persons shall be convicted of behaving in a fraudulent, cruel, or felonious Manner towards the Aborigines of the Country, such Person or Persons will be liable to be prosecuted and tried for the Offence, as if the same had been committed against any other of His Majesty's subjects.⁶

Unfortunately those lofty sentiments do not appear to be matched by subsequent actions in the colony. These included the outlawing of Yagan and his father Midgegooroo, with a reward offered for the production of their bodies "dead or alive",⁷ authorising the execution of Midgegooroo⁸ and the payment of a reward to a civilian who shot and killed Yagan on the banks of the river not far from where we meet, and Stirling's own leadership of the militia which attacked a group of Aboriginal men, women and children on the banks of a tributary of the Murray River near Pinjarra⁹ in an incident described by the colonists as a battle, and by Aboriginal people as a massacre.

⁴ Ibid.

⁵ The debate about whether the colonists' acts are properly described as actions of occupation or "invasion" is a matter for others.

⁶ Ibid.

⁷ "Proclamation", *Perth Gazette and Western Australian Journal* 4 May 1833, accessed via Trove (<http://trove.nla.gov.au>).

⁸ "Execution", *Perth Gazette and Western Australian Journal* 25 May 1833, accessed via Trove (<http://trove.nla.gov.au>).

⁹ "Encounter with the Natives in the Pinjarra District on the Banks of the Murray" *Perth Gazette and Western Australian Journal* 1 November 1834, accessed via Trove (<http://trove.nla.gov.au>),.

The creation of a justice system

It is clear from the terms of Stirling's first Proclamation, that he immediately recognised the need for the creation of a system for the administration of justice in the new colony. That view is underscored by a letter which he wrote to the Parliamentary Undersecretary for the Colonies on 25 August 1829 in which he wrote:

I must urge upon you the necessity of making early provision for the punishment of crime as well as for the due administration of Justice in Civil Cases.

while noting that:

no instance has yet occurred of offences against order and Law of sufficient audacity to make me feel the want of authority to punish criminally.¹⁰

There was a rapid influx of settlers between August and December 1829. Clearly Stirling did not hold some of the new settlers in high esteem - he described them as persons "whose Habits were of the loosest description".¹¹ Notwithstanding the lack of a Commission and full instructions from the Colonial Office, Stirling reported to that office that he had been:

obliged before the Conclusion of the Year, to appoint a Magistracy and a Body of Constables; the first from among the most wealthy and prudent of the Settlers, the latter including the steady and most respectable Part of the working Class. To render the Decisions of the Magistrates more formal, I selected a Gentleman bred to the Law, and of moderate Temper, to act at their Chairman and as Advisor to the Government in Matters of Law.¹²

¹⁰ Note 1 above, 11.

¹¹ Ibid.

¹² 4 Swan River Papers 74, 20 January 1830 as cited *ibid.*

It is interesting to note that the first Justices of the Peace appointed in Western Australia were appointed from "among the most wealthy and prudent" of the new settlers.

Lieutenant Governor Stirling made these appointments by a Government Notice he issued on 9 December 1829. The "Gentleman bred to the Law, and of Moderate Temper" appointed as a Justice of the Peace and also to act as Chairman of the Quarter Sessions was Mr William Mackie, who later became the Commissioner of the Civil Court. He was legally trained, and was the first judicial officer in Western Australia, receiving a salary of £290 per annum for his services.¹³

By the same Notice, Stirling appointed seven other Justices of the Peace, two usually resident at or near Fremantle, two usually resident at or near Perth, and three usually resident on the Canning. By the same notice he also appointed four constables for Fremantle, five for Perth, one for Canning and four for Swan.

The Commissions issued by Stirling to the inaugural Justices generally followed the form used in England, and required those Justices to inquire into the truth of:

Felonies, Poisonings, Enchantments, Sorceries, Arts-Magic, Trespassers, Forestallings, Regratings, Ingrossings, and extortions whatsoever.

It seems clear that Stirling had no express authority to issue these Commissions, although it also seems that nobody took the point.

¹³ Ibid, 14, 80, 81.

Apart from Mackie, the only other person appointed a Justice of the Peace who had legal qualifications was Mr Alfred Hawes Stone, a solicitor who was appointed Clerk of the Peace on 24 March 1830, although he retained a right of private practice. Later, when the Civil Court was created, Stone became the Registrar/Clerk which eventually became a salaried position, which he held until the time of his retirement in 1870. He held a number of other government offices from time to time but continued to retain his right of private practice. With his brother, he founded the firm of AH and GF Stone, which later became Stone & Burt, when Septimus Burt QC joined the firm - he being the son of the inaugural Chief Justice of Western Australia, Sir Archibald Burt.¹⁴ In 1923 the name of the firm was changed to Stone James & Co, when Sir Walter James KC, former Premier, joined. That firm was very prominent in Perth for most of the last century when it went through various iterations of name change and is now known as King & Wood Mallesons, and retains its prominence.

Alfred Stone's brother, George, served as Advocate General and Attorney General,¹⁵ and his son, Edward Albert Stone, was appointed an Acting Judge of the Supreme Court in the absence of the Chief Justice in 1880 and 1881, and eventually replaced Onslow as Chief Justice in 1900, serving in that capacity for six years prior to his retirement.¹⁶ But I digress.

Another of the inaugural Justices of the Peace appointed by Stirling in 1829 was Mr George Leake.¹⁷ He was not legally qualified, but his

¹⁴ Ibid, 14, 97.

¹⁵ Ibid, 14, 92, 93.

¹⁶ Ibid, 212, 213.

¹⁷ Ibid, 13.

nephew, also George Leake, trained in the law in UK and after returning to Western Australia held various legal positions within the colony including Acting as Chief Justice for a time when Chief Justice Onslow was suspended following an acrimonious dispute with Governor Broome.¹⁸

Although the Commissions appointing the inaugural Justices generally followed the form used in England, Stirling conferred on those inaugural Justices significantly greater powers than those held by their equivalents in England. Their powers included the power to try offences liable to capital punishment, although it seems that such offences were generally dealt with by the Chairman of Quarter Sessions, Mr Mackie.¹⁹

Stirling was well pleased with the work of his Justices. In a despatch sent to the Mother Country in October 1830, he reported on their work in these terms:

the Turbulence of Indentured Servants and the Tendency to Crime, particularly among certain villainous personages who came here from the Penal Colonies in our vicinity, have made such Institutions indispensably necessary for the protection of Life and Property. I am happy in saying that the firm and temperate conduct of the Magistrates has had the most beneficial effect. Petty Thefts, Drunkenness and Insubordination are now rare, and Deference to the Decisions of Law as so administered has become a very general Feeling.²⁰

So, from the earliest days of the Colony, government has depended upon the valuable work performed by Justices of the Peace for the maintenance of law and order. Although the administration of justice

¹⁸ Ibid, 95.

¹⁹ Ibid, 13.

²⁰ Ibid, 14.

in Western Australia now depends to a much greater extent upon trained and salaried judicial officers than was the case in the early days of the Colony, the honorary work performed by Justices of the Peace continues to play a vital role in the administration of justice - a topic to which I will now turn after the indulgence of referring to one more significant historical development - the creation of the Royal Association of Justices of the Peace in 1916.

The Creation of the Royal Association of Justices

The Royal Association was formed in 1916. It is perhaps a little surprising that no such Association was formed until 87 years after the appointment of the first Justices in the Colony, especially given that there were, by 1916, 260 members of the recently founded Association. Membership has grown exponentially, and by 1917 there were 455 members, and although growth was a little slower, membership had risen to 1445 by 1970, hitting what seems to have been the high watermark of 2200 in 1990, before diminishing a little to the point where I am advised that membership last year, 2015, stood at approximately 1700 Justices.²¹

Membership levels of this magnitude can only reflect a general recognition of the importance of an Association serving the needs and interests of those who have volunteered to serve their community in the important and venerable office of Justice of the Peace.

²¹ Royal Association of Justices of Western Australia (Inc), (January 2016) *JP Journal* 62(1):5.

The Role of a Justice in Contemporary Western Australia

In my respectful view, a most significant aspect of the contemporary role of Justices of the Peace in the administration of justice in Western Australia is the opportunity which that role provides for community involvement in the administration of justice. The ultimate purpose of laws, and of the courts which enforce the laws in a community governed by the rule of law is the maintenance of peace and order within that community, for the benefit of the community as a whole. Although there are mechanisms which enable the use of force to compel obedience with the law, happily the need for resort to those mechanisms is very rare. Generally speaking, and with only occasional exceptions, the orders of the courts are obeyed by those subject to them, without the need for force or physical coercion. That is because governance according to the rule of law is generally accepted within our community.

In my view it is unlikely that the rule of law would enjoy that level of acceptance if the administration of the law was remote and distanced from the community generally. That is why widespread community engagement in the administration of justice is of such vital importance.

While we are all well aware that we are subject to the law, what is perhaps less well recognised are the opportunities to engage with the law afforded to all of us simply by reason of being citizens. In addition to the more indirect involvement in law making through our participation in a representative democracy, there are two significant opportunities for citizens of this State to engage with the justice

system. One is through jury service. The most important decisions ever made in our justice system - decisions as to whether or not a person is guilty of a serious offence - are made by representatives of the community. That is a very important mechanism to ensure ongoing participation in the systems for administration of justice by ordinary members of our community, selected at random.

The other important mechanism for continuing community engagement in the administration of justice is through the appointment of Justices of the Peace. Justices of the Peace in Western Australia outnumber judges and magistrates by a factor of more than 20 to 1. Unlike judges and magistrates, they are resident in all parts of our vast State, and are available to serve the interests of justice in small and remote communities. Indeed, the demography and geography of our State is such that, without the important contribution made by Justices of the Peace, the prompt and efficient administration of justice in many parts of our State would be simply impossible. Later I return to the nature of the work undertaken by Justices of the Peace, but I note that the work done for the courts and government agencies, and for the individuals who seek their services at signing centres, offices and even in JPs' own homes is a testament to the dedication of our volunteer Justices of the Peace.

So, the first aspect of the contemporary role of a Justice of the Peace that I would identify involves not only the representation and participation of a significant sector of the community in the justice system, but also involves filling gaps in that system which could never be met by salaried officials in a State such as ours.

Authentication and Verification

Many, indeed most, aspects of the justice system rely upon the authenticity and veracity of actions and documents executed in the implementation of that system - in fact it is difficult to conjure to mind any significant aspect of the justice system which does not depend heavily upon the authenticity and veracity of documents and statements.

Justices of the Peace play a very significant role in the systems which we employ to provide confidence in the authenticity and veracity of documents, acts and statements. Documents are at the heart of contemporary systems for the administration of justice and come in an almost infinite variety of forms. If a document is to be acted upon, we need to be confident that it is what it purports to be, and that it has been executed by the person who has purported to execute it. Generally the systems we employ to increase confidence in these matters involve an independent third party in whom confidence can be reposed - namely, a Justice of the Peace. If a Justice of the Peace witnesses a person signing a particular document, and doubts are later cast on the question of whether the document was in fact signed by that person, the Justice of the Peace can provide independent and reliable evidence of the execution of the document. The fact that a document is required to be executed in the presence of a Justice of the Peace is itself a significant disincentive against forgery and fraud.

In addition to witnessing the execution of documents, Justices also perform important roles verifying that other actions have in fact taken

place - for example, witnessing and verifying the destruction of illicit drugs (but don't stand too close to the fire!).

Authorisation

There are various laws which confer power upon officials to take actions which would otherwise infringe the liberties and freedoms which we hold dear in a liberal democracy. Those laws endeavour to strike a balance between the preservation of those liberties and freedoms, and the maintenance of law and order. The proper striking of that balance is assisted by the engagement of independent and trustworthy members of the community to assess whether the requirements of the legislation have been met in any particular case and, if so, who can then issue an authority to the relevant official to undertake a particular action - such as, for example, to enter and search premises in which it is suspected there may be evidence of the commission of a crime. When performing a role of this character, Justices of the Peace carry the important responsibility of scrutinising the exercise of exceptional powers and ensuring that all the requirements for the exercise of those powers have been satisfied. In performing those duties, Justices provide an important safeguard against potential abuses of power and the infringement of civil liberties which, if unchecked, could lead to despotism and oppression.

Judicial Work

There are a number of reasons why it is simply impossible for salaried judges and magistrates to undertake all the judicial work which must be performed in Western Australia. The first of those reasons is that there is simply so much of it. Public resources are limited, and

providing a judicial officer with all appropriate support staff is expensive. By dealing with some cases that would otherwise be before the Magistrates Court, Justices of the Peace not only fill a gap which enables limited public resources to be redeployed elsewhere in the justice system, but also enhance that system by increasing the level of community engagement in the ways I have already described.

The second main reason why it is impracticable for all judicial work to be performed by salaried judicial officers in this State goes back to the considerations of demography and geography which I mentioned earlier. All the judges of the superior courts are resident in Perth, as are the vast majority of the salaried magistrates. Although circuits are done by the superior courts and there are salaried magistrates resident in major regional centres, who also travel on circuit to smaller towns and communities from time to time, the distances involved can be vast, and the methods of travel unreliable, particularly during the wet in the northern parts of our State.

Sometimes justice just cannot wait. Decisions have to be made with respect to bail, ideally before a prisoner is transported over a long distance. Minor cases can and should be dealt with promptly, rather than await the visit of a magistrate on circuit, which may be weeks or sometimes even months away. This is another area in which Justices of the Peace fill an important gap. By filling that gap, Justices of the Peace in our regional and remote communities significantly advance the interests of justice in those communities.

Summary and Conclusion

I commenced this review of the role of a Justice of the Peace in Western Australia by the observation that the vital importance of that role has been recognised since the first days of the Swan River Colony and is expressly reflected in the terms of the Proclamation which founded that Colony. Within a year of appointing the inaugural Justices, Stirling was able to report that their "firm and temperate conduct" had had "the most beneficial effect". Although the structures for the administration of justice have changed significantly since the early days of the Colony, my brief review of the contemporary role of a Justice of the Peace suggests that the importance of that role has not diminished since those early days.

Although the nature of the contemporary role is rather different to the quelling of "drunkenness and insubordination", the duties performed voluntarily and without reward by a large group of dedicated Justices make a most significant contribution to the administration of justice in this State in a number of important areas including:

- Community engagement and participation in the justice system
- Authentication and verification
- Authorisation
- Judicial work

It is therefore entirely fitting that I conclude these remarks with an expression of gratitude and appreciation for the important work performed by the members of the Royal Association of Justices, not only on behalf of the judicial officers of Western Australia, but also on

behalf of the community which is so well served by your diligent dedication.