

150 YEARS OF JUSTICES OF THE PEACE IN QUEENSLAND

A speech given by The Hon Justice Peter Applegarth at the Queensland Justice Association 2009 Annual Conference at the Cleveland on Saturday 3 October 2009

You may be expecting something of a history lecture. But this may sound more like a talk about geography, or even geometry, as I map out three points on a triangle across Moreton Bay.

The first point is across at Redcliffe Point or Humpy Bong, where a British penal outpost was established in 1824. In 1820 Lieutenant John Oxley had recommended Port Macquarie as a secondary punishment centre for recidivists "of the very worst description". In 1824 when the first party of convicts arrived at Redcliffe Point, Moreton Bay assumed that mantle.¹ Almost 80 years later the great American criminal lawyer, Clarence Darrow, addressed prisoners in the Cook County Jail in Chicago about the idea of a criminal class and evolution. He said this about convicts in Australia:

“The English people once punished criminals by sending them away. They would load them on a ship and export them to Australia. England was owned by lords and nobles and rich people. They owned the whole earth over there, and the other people had to stay in the streets. They could not get a decent living. They used to take their criminals and send them to Australia – I mean the class of criminals who got caught. When these criminals got over there, and nobody else had come, they had the whole continent to run over, and so they could raise sheep and furnish their own meat, which is easier than stealing it. These criminals then became decent, respectable people because they had a chance to live. They did not commit any crimes. They were just like the English people who sent them there, only better. And in the second generation the descendants of those criminals were as good and respectable a class of people as there were on the face of the earth...”²

¹ Evans, *A History of Queensland* (2007) Cambridge University Press, Melbourne at 28-29.
² Weinberg (ed), *Attorney for the Damned* (1957) Simon & Schuster Inc, New York at 10.

The ships that transported convicts to these shores also transported a constitutional and legal system that dated back centuries. That system included the ancient office of Justice of the Peace.

Origins of the Office of Justice of the Peace

In England as early as 1200 the practice had begun of appointing a number of knights in each county to “keep the peace”, a phrase that imported a police or militia function.³ These protectors of the peace acquired judicial functions by a series of statutes in the reign of Edward III, so they became “justices of the peace”.⁴ *O’Kane v Sellheim* (1882) 1 QJL 85 sets out the principal part of the statute 34 Edw III c 1. It was passed soon after the Treaty of Brétigny (1360), when bands of soldiers discharged after the ‘French War’, wandered about the country and rather than work “were inclined to live upon rapine and spoil”.⁵ It provided:

“In every county shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the country, with some learned in the law, and they shall have power to restrain offenders, rioters, and all other barraters, and to pursue, arrest, take, and chastise them according to their trespasses and offences, and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform and inquire of all those who have been pillors and robbers in the parts beyond the sea, and be now come again and go wandering, and will not labour as they were wont in times past, and to take and to arrest all those that they find by indictment or by suspicions, and to put them in prison; and to take of all of them that be not of good fame where they shall be found sufficient as surety and mainprize of their good behaviour towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters and rebels troubled nor endangered, nor the peace blemished, nor merchants nor

³ Baker, *English Legal History* (4th ed, 2002) Oxford University Press, London at 24.

⁴ Baker (supra) at 24-25.

⁵ Allen (ed), *The Justices Acts of Queensland: 1886 to 1949* (3rd ed, 1956) The Law Book Company Ltd, Australia at 17-18. Rapine is a Middle English word, derived from Anglo-French, and means the violent seizure of another’s property.

others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offences.”⁶

Commissions of the peace were issued at intervals charging a list of the substantial knights and gentry of an area, including men who were wise and learned in the law, to keep the peace and to “enquire into, hear and determine” a long list of crimes, ranging from felonies to economic offences to sorcery.⁷ The first part of these commissions involved a police function: justices could arrest suspects and commit them to jail, and could require a surety to keep the peace. The second part was a general commission to two or more of the justices (with a quorum of lawyers) to hold sessions of the peace, which were directed to be held at four seasons of the year (Michaelmas, Epiphany, Easter and the Translation of St Thomas), and these were known as the general quarter sessions of the peace. For the next six centuries these courts of quarter sessions provided a mixed tribunal of lawyers and laymen to deal with cases that were not reserved for the assize judge.⁸ In effect, justices of the peace without legal qualifications dispensed justice with the assistance of a clerk who assisted them with their judicial work. Over time justices also came to hear matters outside quarter sessions, known as petty sessions.

In addition to these judicial functions, justices of the peace were charged with a variety of administrative functions including the administration of the Poor Laws, including laws against vagrancy and consorting. They licensed ale houses, and had power to remove their licenses for breaches of the peace.⁹ Other duties included the “administration of the game laws, providing testimonials to dismissed servants... making regulations in time of plague, the supervision of accounts at hospitals, the inspection of decayed bridges, the supervision of the manufacture of malt, supervision

⁶ This fourteenth century Act was the subject of argument five centuries later in the Queensland Supreme Court, with Griffith QC appearing as counsel in *O’Kane v Sellheim*.

⁷ Baker (supra) at 25.

⁸ Assize Judges were given a commission to perform judicial functions in the country. A commission was issued for each Judge for each circuit, and judges could be regularly interchanged: see Baker (supra) at 19-22.

⁹ Lowndes, “The Australian Magistracy: From Justices of the Peace to Judges and Beyond” (2000) 74 *Australian Law Journal* 509 at 511.

of the cloth trade, weights and measures, searching for popish books and the reading of gas meters”.¹⁰

Justices of the Peace reached the zenith of their power in the 18th and 19th centuries, when a JP could control an entire county’s administration. However, some of the roles of Justices of the Peace were replaced by professional Magistrates.

In 1848, the Jervis Acts were passed, which were an extensive codification of the powers and responsibilities of justices of the peace, and provided powers for the justices to conduct committal proceedings and hear cases tried summarily. The powers of stipendiary magistrates were also strengthened in 1858, with magistrates able to exercise powers which normally required two justices of the peace.¹¹

Justices of the Peace in Australia

The first appointed Justice of the Peace in Australia occurred at the very beginning of the colony of New South Wales. Governor Phillip in 1788 was appointed to the Justices of the Peace position, and was empowered to appoint other justices by commission. They ran the convict system, which included duties such as assigning a position, disciplining convicts, providing an early form of parole known as ‘tickets of leave’ and administered local laws.¹² The position was an important part of government, as David Neal stated:

“The office of justice of the peace (or magistrate) offered prized symbolic, practical and strategic advantages to those who could secure it. Moreover, it was an office which conferred state power on prestigious, wealthy, private individuals who acted in an honorary capacity. Prestige, financial independence and the traditional associations of the office offered secure footholds for the contest over power in the colony. But these footholds provided no guaranteed outcome. Although traditionally justices of the peace stood at the pinnacle of local authority in England, the economic, political and class patterns of England found no counterparts in New South Wales.

¹⁰ Lowndes (supra) at 511, quoting Kelly, *War & Kelly – Summary Justice South Australia* (Looseleaf, LBC, Sydney) at 603 [1.410].

¹¹ Lowndes (supra) at 511.

¹² Lowndes (supra) at 512.

The new order had to be negotiated – admittedly with familiar tools – over unknown terrain. As an office which straddled Montesquieu’s division of powers, the magistracy was a crucial element in the governance of New South Wales.”¹³

It was recognised that police (or paid) magistrates needed to be appointed, as there were several problems caused by lay magistrates to the administration of justice. Lay magistrates were sitting by themselves (rather than in the required groups of two or more), some of the sentences were considered to be too harsh or too lenient. There was a conflict between the police and lay magistrates. The *Justices Act* 1850 allowed police magistrates to sit alone, and adopted the provisions of the *Jervis Acts*.

Captain John Clements Wickham was appointed on 14 November 1842 as Brisbane’s first police magistrate. Captain Wickham eventually became Chairman of Magistrates and the Governor’s representative in Brisbane (called ‘Government Resident’), and retired when Queensland became a separate colony. Wickham Terrace is one of the many Queensland landmarks that bears Captain Wickham’s name.

Between 1857 and 1859, 31 Justices of the Peace were appointed, and include John Petrie after whom Petrie Bight and Petrie Terrace are named. I gratefully acknowledge the research of Mr Ray Burrows and other members of your Association about the identity of JPs in the nineteenth century. The following table is based on their research:

Appointment of Justices:

No.	Name	Date of Oath
1.	BROWN, William Anthony	15 April 1857
2.	FORSTER, Brooks	27 July 1857
3.	LETHBRIDGE, Chris	3 August 1857
4.	HALY, Charles Robert	15 August 1857
5.	FITZ, Henry Bates	15 August 1857

¹³ Neal, “Law and Authority: The Magistracy in New South Wales 1788-1840” (1985) 3 *Law in Context* 45 at 45-6 (citations omitted).

6.	BARKER, Bryce Thomson	15 August 1857
7.	GREGORY, Henry Churchman	29 August 1857
8.	BROWN, William Anthony	1 September 1857
9.	not known	
10.	RAFF, George	4 September 1857
11.	BIRCH, Gustavus	30 September 1857
12.	not known	
13.	COXEN, Charles	16 October 1857
14.	COMPIGNE, Alfred William	29 December 1857
15.	SHERIDAN, Richard Bingham	29 December 1857
16.	PALMER, Edward Fielding	15 January 1858
17.	CHALLINOR, Henry	28 September 1858
18.	COXEN, Henry William	18 October 1858
19.	TURNER, William	22 December 1858
20.	HUNTER, William	24 January 1859
21.	CRIBB, Benjamin	1 February 1859
22.	THORNTON, William	10 June 1859
23.	GEARY, Edward Montague	13 June 1859
24.	GALLOWAY, John James	11 July 1859
25.	SCOTT, James Hall	13 July 1859
26.	DARVALL, Frederick Orme	26 July 1859
27.	PETRIE, John	24 October 1859
28.	BAKER, John	26 October 1859
29.	FLEMING, Joseph	5 November 1859
30.	CHALLINOR, Henry	23 November 1859
31.	CRIBB, Robert	15 December 1859

1859 – Queensland Separation

Queensland separated from New South Wales by letters patent signed by Queen Victoria on 6 June 1859. Queensland's first Governor, Sir George Ferguson Bowen, was appointed by the same letters patent, and took the oath of office on 10 December 1859. In 1859, twelve Justices of the Peace were appointed.

Let me mention one of them, William Thornton who was appointed as a Justice of the Peace on 10 June 1859: a few days after Queen Victoria signed the letters patent. He brings me to the second point on the triangle: St Helena Island. The first prisoners were confined there on 20 May 1867. Its first superintendent, John McDonald, wanted the inmates fully occupied in productive labour, and it was Thornton, the visiting justice, who suggested to the Colonial Secretary a sugar cane plantation.¹⁴ The penal establishment on St Helena was amongst the earliest cane farms in Queensland, and, of course, the sugar industry became one of the State's major industries, and stimulated secondary industries. Sugar production was labour intensive, and, one might reflect on the fact that inmates were at St Helena courtesy of the sentences imposed on them by Justices of the Peace and Police Magistrates. Dr Yvonne Reynolds observes:

“Thornton and McDonald, by recommending sugar production on St Helena, were in fact introducing an innovative program which would help support the prison expenses as well as giving the men skills which were in great demand in the fledgling industry. Rehabilitation into society was a decided possibility within the grasp of discharged prisoners from St Helena who had gained experience in cultivation, mill and sugar house.”¹⁵

Sir Samuel Griffith and the Justices Act 1886

Another remarkable Justice of the Peace was Samuel Walker Griffith, who was born on 12 June 1845, at Merthyr Tydfil in South Wales. He was an infant prodigy.¹⁶ Over time he became a barrister, Member of the Legislative Assembly, Attorney-General, Premier and Chief Justice of Queensland and the first Chief Justice of the High Court of Australia.

Griffith was a large figure in Queensland colonial politics. As a member of the loosely-affiliated Queensland Liberals, he was in a constant battle with his rival, Thomas McIlwraith. He was said to be “aloof, compulsive, fastidious and vain” while

¹⁴ Reynolds “‘Sweet Surrender’: Sugar production at St Helena penal establishment 1867-89” in Johnson (ed), *Moreton Bay Matters* (2002) Brisbane History Group at 21.

¹⁵ Reynolds (supra) at 21.

¹⁶ Clark, *A History of Australia* (1962-1987) Melbourne University Press, Melbourne at 70.

also being “nevertheless outstanding, with the charisma and intellectual power of a statesman”.¹⁷ He also had a remarkable capacity for drink. Manning Clark wrote:

“Yet no man ever detected the slightest aberration in his talk or unsteadiness in his walk as evidence of the huge liberties he allowed himself with strong drink. Amongst drinkers and their admirers he was the legendary figure who could drink any bushman or city toper under the table. The champion drinker of Burketown was to find him more than a match.”¹⁸

Griffith became a Justice of the Peace on 5 June 1878. His major contribution to the story of Justices of the Peace was his role in the drafting of the *Justices Act* 1886.

There was need for reform to the laws relating to the powers and duties of justices of the peace because the powers were spelt out in diverse laws inherited from New South Wales, and the United Kingdom. Sir James Cockle, Queensland’s Chief Justice at the time, provided several bills in 1879. Griffith later embodied the bills into one form and revised them. Griffith redrafted the legislation, which has stood the test of time.

Griffith later drafted the Queensland Criminal Code, which has been used as an example around the world. It remains in force today, largely unamended from Griffith’s draft: a testament to his legal skill.

Griffith was responsible with others for much of the drafting of the Australian Constitution on the Queensland Government Steam Ship *Lucinda* in Easter 1891.¹⁹ A beautiful replica of the smoking room of the *Lucinda* in which our Constitution was substantially re-drafted in 1891 is on the second floor of the Supreme Court in George Street, and I would invite you to visit it, when next you are in the city. But where is the *Lucinda* itself? If this was the United States, and if its Constitution had been drafted on board a ship, then you can guarantee that a perfectly restored vessel would

¹⁷ Evans (supra) at 115.

¹⁸ Clark (supra) at 70.

¹⁹ Dr White QC, “QGSY *Lucinda* and its significance to the Australian Constitution” in White and Rahemtula (eds) *Sir Samuel Griffith: the law and the Constitution* (2002) Lawbook, New South Wales at 136.

be housed in a great museum in hermetically sealed conditions. But where is the *Lucinda*? Dr Michael White writes that a coal company converted it to a “dumb barge” which carried coal from Ipswich to Brisbane down the river.

“After being cut down to the waterline for its wood and metal scrap, the *Lucinda* was finally beached on Bishop Island in 1937, near the mouth of the Brisbane River. The fine old vessel, together with other hulks, it served as a breakwater for the man-made island... As the hulk steadily rusted away, it became partly covered by mud and sand.”²⁰

This brings me to the third point on the triangle: the mouth of the Brisbane River, and the Port of Brisbane. Somewhere in the mud lies the remnants of the ship on which our most brilliant JP of the nineteenth century wrote our nation’s Constitution. Just as the Constitution remains a living document more than a century later, the *Justices Act* that Griffith drafted remains a living document, administered in courts across our vast State.

Despite the appointment of “police magistrates” in the nineteenth century, and the evolution of professional magistrates in the last century,²¹ Justices of the Peace have played an indispensable role in the administration of justice in Queensland over its 150 year history. By 1882 1479 Justices of the Peace had been appointed in Queensland. They have constituted courts in our decentralised State. They have fulfilled other important roles, such as acting as coroners. They have played a vital role in public administration.

Justices of the Peace in the Modern Era

Throughout the 20th century Justices of the Peace performed non-judicial duties, such as witnessing documents, conducted non-bench duties, such as issuing warrants and summonses, and some duties on the bench, often with very limited training. Instruction came early in the twentieth century via the *Queensland Justice of the Peace and Local Authorities Journal*. As if to disprove Clarence Darrow's vision that the descendants of convicts in Australia would live free of crime because they had a

²⁰ Dr White QC (supra) at 168.

²¹ For a history of Queensland’s Magistrates see Dean *Here Comes the Judge: The Queensland Magistrate* (2008) Print Systems Australia.

"chance to live" in the wide open spaces, and would not steal livestock the first article in the first edition of the *QJP and Reports* was a useful guide on s 446 of *The Criminal Code* titled "Suspicion of Cattle-Stealing - Possession of Skin or Carcass". In addition to carrying letters about cattle stealing being "rife and rampant", this first edition provided valuable instruction about the law and recent cases and legislation. However, training for JPs in Queensland during most of the twentieth century remained very limited.

In the main, Justices of the Peace would spend their time authorising documents for the ease of commerce.²² This was what the bulk of JPs did, as opposed to either the bench or non-bench judicial work. As Justices were trusted, the documents would be accepted and correspondingly, commerce and other institutions where 'true copies' were required would be assisted by their work.²³

There was scarce training for JPs before the 1990s. The lack of training makes it unsurprising, then, that there were several instances where the proper procedures were not followed by JPs undertaking their duties. For example, in certain instances, this meant that a dictionary was substituted for a bible when seeking to get an oath.²⁴ There were other concerns over how JPs would undertake their roles. Police asserted that JPs were generally unavailable when they needed them, or alternatively, would be unwilling to fulfil their duties because they were concerned that they would make mistakes.²⁵ There were other criticisms that some JPs would not undertake their duties with sufficient care. The Queensland Council of Civil Liberties alleged that there were certain Justices of the Peace who the police would rely on to sign the requests for warrants.²⁶ Other concerns were that certain police would avoid or threaten JPs if they did not grant warrants.

Because of these and other problems, reform occurred in 1991 with the passing of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld). This legislation broke the position of the Justices of the Peace up into three categories:

²² Tronc, *Powers and Duties of Lay Justices of the Peace in Queensland* (1994, 8th edition) The Law Book Company Limited at 9.

²³ Tronc (supra) at 14.

²⁴ Tronc (supra) at 9.

²⁵ Tronc (supra) at 5 and 17.

²⁶ Tronc (supra) at 18.

1. Commissioner for Declarations;
2. Justice of the Peace (Qualified); and
3. Justices of the Peace (Magistrate's Court).

Justices of the Peace play a vital role in our modern world. They play an indispensable role in connection with documents and transactions that affect people's lives in the most profound ways. They bear witness to documents that affect individual's lives: documents like mortgages that put people's homes on the line, documents that invest others with extraordinary powers, such as an Enduring Power of Attorney, and Advanced Health Directives. These are not simple signing ceremonies. Some of the most personal decisions affecting individuals' lives are contained in documents witnessed by Justices of the Peace. They are important to the life and livelihood of individuals. Our economy, and the flow of credit, depends upon the assurance that documents like mortgages are properly entered into. Courts rely on affidavits, confident that they have been properly witnessed. Individuals rely on the authenticity of documents witnessed by JPs.

Warrants and orders issued by Justices affect the liberty of people and their property. Granting warrants and orders without a proper basis deprives individuals of their liberty. Failing to grant orders in a proper case may also have serious consequences for the safety and welfare of individuals and our communities. These are onerous responsibilities. Domestic Violence and similar orders involve a difficult assessment. They should not be thrown around like confetti, but the failure to make an order in a proper case literally can make the difference between life and death.

The important contributions to the community's welfare by Justices of the Peace are all the more remarkable because you undertake this demanding work voluntarily.

The Inheritance

Our modern world is almost a millennium away from the first protectors of the peace. However, we do well to remember our inheritance. Last week, and this week, I have been on circuit in Maryborough. This system of circuits dates back to the thirteenth century, when the centralisation of royal justice was reconciled with the need for local investigation and trial. Commissions were issued to perform judicial functions in the

country. Magna Carta provided that justices of assize should visit each county twice a year “so that assizes should not be taken in the king’s court.”²⁷ Two Judges or ‘serjeants’ would go out to each of the six circuits twice a year. The Judges went out during the Lent and the Summer vacations, and travelled with a retinue including their servants and clerks

It is inspiring to think that you are part of a legal system that has been around for centuries. In being proud of the constitutional and legal traditions that were transported by the English to these shores, we should never forget that another, complex legal system predated their arrival: that of the traditional owners of the land on which we gather today. That is a different story, and it should be told by others.

The story that I have tried to tell today is about Justices of the Peace. It is not a story of 150 years, because the 150 years of JPs in Queensland, is about a quarter of the story of an office that has its origins more than 700 years ago. The system transplanted to these shores formed part of a constitutional settlement that places everyone, including the monarch, under the rule of law. We have inherited a system of freedom under the law. The rule of law makes ours a well-ordered and prosperous society. Trade and commerce, including the cargo ships that sail past the remnants of *The Lucinda*, depend on the certainty that the law provides, and on people like you to witness commercial documents.

In this country we have inherited constitutional principles that do not tolerate arbitrary detention. People cannot be detained without lawful justification. Legal authority is required for officials to enter homes, and to seize property. These things are so familiar to us that we take them for granted. However, most people on the globe do not enjoy such freedom, and we should treat our inheritance as a precious thing.

There are many countries where there is peace in the streets. More often than not it is peace courtesy of the secret police, oppression and arbitrary detention. Ours is a different system, and over the centuries justices of the peace have played a part in preserving peace in our communities, and administering justice. In the last 150 years

²⁷ Baker (supra) at 20.

they have done so in our vast State, and played a constructive role in our State's development. Sugar production on St Helena is a good example. It produced more than sugar. It qualified prisoners to rehabilitate themselves, and gain employment on release. One example of what a clever JP can achieve.

JPs today may not have to deal with bands of discharged soldiers and camp-followers returning from France, as JPs had to in the fourteenth century. But under modern laws, they play a role in keeping the peace in our communities, and, at the same time, in preserving our liberties. The last 150 years of Justices of the Peace in part of a longer story. You should be inspired by the Justices of the Peace who have gone before you to write the next chapter in that story.