Local Court
New South Wales

From Whence We Came: Justices of the Peace and the Birth of the Magistracy

Speech to the NSW Justices Association Conference

Saturday 19.11.2022

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Introduction

1. The birthplace of the modern magistracy finds its roots in the ancient office of Justice of the Peace. Today, I want to delve into those origins and highlight some interesting points from which the magistracy was born and at which our respective roles intersected.

History and evolution of the office of Justice of the Peace and the Australian Magistracy

History of JPs in the United Kingdom

2. The justices of the peace and magistrates of today share a common ancestor: the ancient, English office of Justice of the Peace, which was first formally recognised in the 14th century following the passage of the *Justices of the Peace Act 1361*.[2]

3. I should note that there is a semantic relationship between JPs and magistrates: the terms Justice of the Peace and magistrate were once used interchangeably. As early as the 14th century, the term 'magistrate' was the common denomination for those who were entrusted with the 'conservation' of the peace and the determination of charges against it.[3] To understand how JPs and magistrates came to exist today, it is instructive to examine how they evolved from these historic 'peacekeepers'.

4. Given that the traditional function of justices was to 'keep the King's peace', it should be no surprise that the office was originally known as the Keeper of the Peace from as early as 1195 when Richard I – who preferred to be known as 'Richard the Lionheart' – commissioned certain knights to ensure the law was upheld and to guard the peace.[4] The appointment of these peace keepers was pursuant to the King's prerogative powers and was by way of royal commission. Their initial functions included policing the kingdom 'against thieves, receivers and concealers of malefactors, about setting country and townships and cities and cutting away of woods by the king's highways'.[5]

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[1] Deputy Chief Magistrate, Local Court of NSW. The author also acknowledges the assistance of Jackson Cook, law student and project officer, Chief Magistrate's Office, in the preparation of this paper.
[2] *Justices of the Peace Act 1361*, 34 Edw 3, c 1.
[3] John Lowndes SM, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part I' (2000) 74 *Australian Law Journal* 509, 510.
[4] David Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers' (1988) 47(1) *Cambridge Law Journal* 101, 112.
[5] Statute of Winchester, 13 Edw 1, c 1.

5. A statute in 1344, during the reign of Edward III, provided that:

> Two or three persons of the best reputation in the Counties should be assigned by the King's commission as Keepers of the Peace and they, with others learned in law, should hear and determine charges of felonies and trespasses against the peace.[6]

6. This statute also empowered justices to inflict 'punishment reasonably according to law and reason, and the manner of the deed'. The Statute thus marked a historic transformation of the office of Keeper of the Peace from one that bore only executive functions to justices with judicial power.[7] Their unprecedented authority enabled them to hear and determine all offences, except treason, without a jury.

7. A distinct feature of the office of Justice of the Peace was its dualistic function: the JP exercised both executive and judicial power.[8] Their executive powers included responsibility for keeping the peace, apprehending offenders as well as performing 'constabulary duties'. Their judicial functions, as indicated earlier, involved the hearing and determination of cases brought before the courts. However, there was no clear delineation between their executive and judicial functions.

8. In the centuries following the 1344 statute, justices saw an exponential increase in power.[9] In 1691, justices were given authority to review decisions of 'overseers of the poor', who were tasked with the administration of the Poor Laws.[10] These laws made provision dealing with the impotent poor and with vagrants and beggars, through a system which later encouraged the large-scale development of workhouses where those unable to support themselves financially were offered accommodation and employment. They included laws against vagrancy, betting, the possession of housebreaking implements and offensive weapons. As part of their accumulation of administrative functions, justices also assumed responsibility for licensing laws: they were given the authority to license and delicense 'ale houses'. There were also a suite of other miscellaneous duties performed by Justices of the Peace, including the administration of gaming laws, the making of regulations in times of plague, as well as the supervision of the cloth trade.[11]

9. The power of JPs reached its peak in the 18th and 19th centuries, so much so that it has been said that 'they were often able to control the entire administration of a county'.[12] It is important to

[6] See Lowndes (n 3) 510.
[7] Ibid.
[8] Ibid.
[9] Ibid 511.
[10] Ibid.
[11] Ibid.
[12] Ibid.

remember that although the office of Justice of the Peace was honorary and confined to members of the landowning class,[13] they were also laymen with little to no legal knowledge or expertise. This was said to have contributed to rising levels of corruption among JPs during the 18th century, resulting in the establishment of a body of *professional* magistrates in the metropolitan region. This body was comprised of 24 stipendiary magistrates who dealt exclusively with criminal matters and, by 1825, only four of these magistrates were not barristers. By the mid-19th century, the *Metropolitan Police Courts Act 1839*[14] established the first 'police courts' as well as a professional magistracy. All appointments to the police court bench had to be barristers.

10. A few years later, the passing of the *Summary Jurisdiction Act 1848*[15] and the *Stipendiary Magistrates Act 1858*[16] each resulted in a significant curtailment of the powers and duties of justices, as stipendiary magistrates were vested with the powers that could only be exercised by two justices of the peace.[17] However, JPs – or as they are now known, 'lay magistrates' – continued to be in the majority in regional areas, a trend which continues in the UK today.

Transplantation to colonial New South Wales

11. With the context of the English office of Justice of the Peace in mind, I now turn to the transplantation of this office to colonial New South Wales. The existing legal institutions of England were transported to the colony of New South Wales with the First Fleet. In 1788, Governor Arthur Phillip was granted a commission as a justice of the peace, along with the power to appoint other justices. However, in the absence of free settlers, he did not have the luxury of choice when it came to appointment and was restricted to a small circle of civil and military officers. Interestingly, during the early years, the nascent magistracy in New South Wales has been referred to as the 'Convict Magistracy'.[18] For clarity, I will be referring to these colonial justices of the peace as 'magistrates'.

12. During the early years of British occupation, JPs exercised the same powers and functions as their imperial counterparts. However, it did not take long for these similarities to diminish. The crystallised functions of JPs in 18th century England could not be replicated in a penal colony such as New South Wales. Magistrates, sitting as a bench, exercised a summary criminal jurisdiction as well as a civil jurisdiction. However, they also performed a number of onerous extra-judicial functions which bore little comparison to justices in the UK.

[13] The reference to being 'of the best reputation' generally meant that they were wealthy. Thus, the Keepers of the Peace were typically knights, squires or other landowners.
[14] *Metropolitan Police Courts Act 1839*, 2 & 3 Vict, c 47.
[15] *Summary Jurisdiction Act 1848*, 11 & 12 Vict, c 42.
[16] *Stipendiary Magistrates Act 1858*, 21 & 22 Vict, c 73.
[17] Lowndes (n 3) 511.
[18] Ibid 512.

13. As an office which straddled the division of powers, the magistracy was a crucial element in the governance of colonial New South Wales. The magistrates were heavily involved in the administration of districts over which they had control, possessing expansive responsibilities for the discipline, conditions and productivity of convict workers. This also included the granting of 'tickets of leave', which has been described as the precursor to today's parole system.[19] In this space, magistrates enjoyed near unfettered jurisdiction over convicts.[20] Indeed, the power exercisable by early magistrates was phenomenal. In stark contrast to the clear jurisdictional limits exercised by magistrates today, in colonial New South Wales, magistrates' powers of punishment were never defined in the legislation or letters patent which established the colony's judicial system.[21] Additionally, early Governors, who acted without the assistance of any executive council, sought to buttress their decisions by consulting magistrates.[22]

14. It is clear that the military and public officers who formed part of this Convict Magistracy were not the 'leisured, established gentlemen' of the English ideal.[23] There was a notable trend in magistrates exercising discretion in pursuit of their own private aims. Magistrates were 'paid' in convict labour: they were allowed four extra convict servants and did not have to supply their rations.[24] Owing to their control over the convict system, they were capable of manipulating assignment so as to reserve skilled workers for themselves. It was this tension between public service and private gain that gave the early magistracy its peculiar character.[25] In contrast to the English system, early Governors of New South Wales exercised far greater control over the magistracy.

15. Questions of access and eligibility to the bench were brought sharply into focus with Governor Lachlan Macquarie's determination to promote successful ex-convicts – known as 'emancipists' – to the magistracy.[26] While Macquarie seems to have had a genuine sympathy for 'deserving convicts', it has been suggested that he also had a preference for working with men who were not his equals, but dependent on him.[27] To Macquarie, the authority of the magistrates was premised not on their own qualities or independence, but on their relationship to him. Consistent with his perception of magistrates as subordinate officials, Macquarie expanded the administrative duties

[19] Ibid.
[20] Hilary Golder, 'Origins of a Convict Magistracy', in Hilary Golder, *High and Responsible Office: A History of NSW Magistracy* (Sydney University Press, 1991) 8.
[21] Ibid 9.
[22] Ibid 10.
[23] Ibid.
[24] Ibid 13.
[25] Ibid 12.
[26] Ibid 14.
[27] Ibid 17.

and jurisdiction of the magistracy. It has been said that Macquarie saw this as an opportunity to cultivate a circle of grateful, emancipist magistrates.[28]

16. This promotion of emancipist talent brought Macquarie into conflict with the existing magistracy and a group known as the 'exclusives', who were wealthy, land-owning free-settlers. This group erected a barrier against the success of ex-convicts and insisted on their superior eligibility as magistrates. This conflict eventually resulted in intervention by imperial authorities, who held that ex-convicts could not judge or administer serving convicts with the requisite objectivity. Macquarie was investigated by an English judge, John Bigge, who subsequently depicted Macquarie as 'having an error of conduct in making New South Wales a place for convicts to reform' and indicated that his policies toward the emancipated were 'an act of violence' toward the established colonists. The British government had a vested interest in ensuring that transportation to the penal colony was an effective deterrent for domestic crime. It has been suggested that this formed the basis of Bigge's condemnation of Macquarie's governance: it reduced the fear of transportation among the British population.[29] By 1820, Macquarie had resigned.

The birth of the modern magistracy in Australia

17. A distinctive feature of the Australian magistracy is the early use of paid, stipendiary magistrates. By 1850, paid magistrates were beginning to be regarded as 'judicial functionaries' and were expected to be more like judges than in previous years. Section 13 of the *Justices Act 1902* (NSW), which prohibited lay justices from sitting in certain courts of summary jurisdiction, marked the decline of the 'honorary' magistracy. In its place, a recognisably modern magistracy started to emerge and questions of 'judicial independence' began to bubble to the surface.

18. Although the history of executive control over the magistracy was becoming increasingly problematic, in 1895 the magistracy was incorporated into the New South Wales public service institution.[30] Between 1900 and 1975, no external appointments to the bench were made. However, given that magistrates were ultimately accountable to the executive government, it became clear that magisterial independence was a fallacy. The magistracy was growing tired of being reminded that they were, strictly speaking, 'public servants performing judicial duties'.[31]

19. By the early 1980s, magistrates in New South Wales were united behind the demand that they be divorced from the public service. Structural independence was finally achieved following the passage of the *Local Courts Act 1982* (NSW), which exempted magistrates from the provisions of

[28] Ibid.
[29] Ibid 27.
[30] Lowndes (n 3) 517.
[31] Ibid.

public service legislation.[32] Security of tenure was also assured following the *Judicial Officers Act 1986* (NSW), which provided that no judicial officer, including magistrates, could be removed from office except by Parliament.

20. In just under 200 years, the lay justice in New South Wales – a creature of Edward III – became a judge in all but name, possessing professional qualifications, judicial independence and tenure. The expanding jurisdiction of magistrates, which shed them of their administrative duties, as well as their severance from the public service, represented a landmark in the emergence of the modern magistracy. Meanwhile, the office of Justice of the Peace remains a hallmark in the administration of justice in this jurisdiction.

Modern day role and functions of JPs

21. To this day, the appointment of Justices of the Peace vests in the Governor[33] and it would be remiss of me not to mention that Her Excellency the Honourable Margaret Beazley AC KC, the 39th Governor of New South Wales, is the patron of your esteemed association.

22. Once a JP has taken their oaths of office and allegiance, their appointment is for a period of five years.[34] In New South Wales, JPs still perform a number of crucial functions, including witnessing statutory declarations, witnessing affidavits, and certifying documents for use in government and non-government sectors.

23. When performing any of these functions, JPs are bound by a duty of care and have a legal obligation to take reasonable care to avoid causing harm to another person. This duty of care reflects the fact that JPs are expected to be inherently trustworthy, honest and careful when performing their obligations.

Adaptability

24. I also wish to acknowledge the resilience shown by JPs during the COVID-19 pandemic, as evidenced by their ability to adapt to widespread and unprecedented change. To highlight this adaptability, one need only look to the speed with which Parliament sought to address the changing landscape by amending legislation to permit JPs to continue to carry out their important community functions.

25. Before COVID-19, JPs could only witness documents face to face and on the same document. Once COVID-19 set in, arrangements for the witnessing of signatures or attestation of documents were

[32] Ibid 518.
[33] *Justices of the Peace Act 2002* (NSW) s 4(1).
[34] Ibid s 4(3).

able to be performed by audio visual link (AVL). The provisions were originally located in the *Electronic Transactions Regulation 2017* (NSW) which was amended by the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) and which commenced on 22 April 2020.

26. The *Electronic Transactions Act 2000* (NSW) originally provided that the Regulations would expire on 26 September 2020. The expiry date was then extended to 26 March 2021.[35] On 28 September 2020, the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* (NSW) incorporated the provisions into a new Part 2B of the *Electronic Transactions Act 2000* (NSW) entitled 'Remote witnessing pilot scheme' and extended their operation to 31 December 2021.

27. On 29 November 2021, the operation of Part 2B of the *Electronic Transactions Act 2000* (NSW) was extended indefinitely by the *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW).[36] In addition to making the temporary measures permanent, the 2021 Act clarified which document will be the original, the document's place of execution, and the law applicable to documents executed outside of New South Wales. The provisions, though, were not expressed to have retrospective operation.

Court Appointed Questioner (CAQ) function

28. Another crucial function which will soon be performed by selected JPs is that of a Court Appointed Questioner. Under New South Wales legislation, a complainant in domestic violence proceedings cannot be directly examined by a self-represented accused and must instead be examined by a Court Appointed Questioner.[37]

29. The role of a Court Appointed Questioner is to ask the complainant only the questions that the accused requests the questioner to put to the complainant. There is no requirement that an accused submit a written list of questions before the hearing. It is important to note that an accused has the ability to change, update or add questions during the examination of the complainant by informing the Court Appointed Questioner.

30. A Court Appointed Questioner must not independently give the accused person legal or other advice. If the accused seeks legal advice, you should suggest that they speak to a lawyer.

[35] *Electronic Transactions Regulation 2017* (NSW) reg 8B.
[36] *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW) Sch 1.
[37] *Criminal Procedure Act 1986* (NSW) s 289VA.

31. The Department of Communities and Justice (DCJ) is progressing the work required to operationalise a Court Appointed Questioner hybrid model. This model will comprise of trained DCJ staff and selected Justices of the Peace. To enable the role of JPs in the hybrid model, DCJ is working closely with the NSW Justices Association to develop and deliver Court Appointed Questioner training to JPs. I understand that a pool of eligible JPs is likely to be operational in early 2023.

32. In addition, the Regulation governing JPs – the *Justices of the Peace Regulation 2020* (NSW) – has been amended by the *Justices of the Peace Amendment (Court Appointed Questioner) Regulation 2022* (NSW). The amended Regulation will confer the function of being a Court Appointed Questioner, if appointed by the court, on JPs and will enable the JP to be paid a fee when exercising the function of a Court Appointed Questioner. In light of these developments, I expect that the role of JPs will continue to evolve over time and into the future. For those of you who undertake this additional role, your much respected and admired president, Dr John Brodie, together with others well-versed in these matters, will deliver appropriate training and support in the months to come.

Conclusion

33. Without the crucial functions performed by JPs, there is a risk that justice would come to a standstill. The historic relationship between Justices of the Peace and the magistracy cannot be overstated. On behalf of the Chief Magistrate, Judge Peter Johnstone, myself and the Local Court of NSW, I wish to thank the Association and its members for the invaluable role each of you play, particularly as volunteers at the various desks, in the multitude of court foyers across the state, every single day.