Justices of the Peace: Old Ideas for a 'Modern' Age

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The title of this speech is "Justices of the Peace: Old Ideas for a 'Modern' Age". Much of the speech draws on history, specifically the history of your office of Justice of the Peace and what light that history sheds on the contemporary importance of that role.

Although I have to start a long way back, please rest assured that the first part of the speech will only be a potted history of Justices of the Peace with what I hope are the interesting bits. I will save you the full Dennis Lillee length run up, although I will drift back in time later in the speech.

What's in a name?

Where did the name Justice of the Peace come from? Well as it turns out peace came before justice and that peace bit was really not that peaceful.

The first step was taken in 1195 under the reign of Richard I, or Richard the Lionheart as he is more popularly known. A proclamation was issued that four knights in every hundred were to take oaths from all men over the age of 15 to aid in keeping the peace.[1] There were a few events in between,[2] but things really got heated under King Edward II. Edward II was apparently hated by all, especially by his wife Queen Isabella. In 1325 she landed from France along with her son, the future Edward III, and a small army that grew larger after she arrived.[3] They had the King's alleged lover hung, drawn and quartered.[4] Edward II was locked up in a castle, "persuaded" to abdicate and then never heard from again.[5] And you thought politics today was brutal.

Anticipating that some parts of the population might raise an eyebrow about how he came to be King, the newly crowned Edward III had writs sent to each sheriff

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[1] The proclamation for the preservation of the peace was issued by Hubert Walter the Justiciar: Holdsworth, *A History of English Law* (1923), vol 3 at 286; see also Skryme, *History of the Justices of Peace* (1991), vol 1 at 1-7.

[2] See Holdsworth, *A History of English Law* (1923) vol 1 at 287.

[3] Doherty, *Isabella and the Strange Death of Edward II* (2003) at 90-92.

[4] Mortimer, *The Greatest Traitor: The Life of Sir Roger Mortimer, 1st Earl of March, Ruler of England, 1327–1330* (2006) at 162.

[5] See, eg, Valente, 'The deposition and abdication of Edward II', *The English Historical Review* (1998) vol 113 no 453 at 852.

reassuring them that Edward II really had agreed to step down and commanding them to keep the peace or lose their inheritance, as well as life and limb.[6] A few weeks later Parliament stepped in and ordained that certain men should be assigned to "keep the peace". These keepers of the peace had to be "good men and lawful" and could not be "maintainers of evil" or barretors, an old word for vexatious litigants.[7] They had vexatious litigants and so do we (the more things change the more they stay the same). These keepers of the peace were answerable to the new King and operated as a type of police force.

The King had great plans for this new institution. In 1328, the keepers of the peace were given power to punish offenders, and those powers gradually enlarged over the following decades.[8] In 1344 a statute was passed conferring on two or more of these keepers of the peace authority, along with others learned in the law, to "hear and determine charges of felonies and trespasses against the peace".[9] I will come back to address this judicial role.

About five years later the ravages of the Black Death were causing drastic labour shortages, so these keepers of the peace were conferred with power to determine the place that labourers would work, the rate of labourers' wages and the price of commodities.[10] Then in 1362 these keepers of the peace were given the official title, by statute, of 'Justices of the Peace'.[11] It was decreed that three or four of the "most worthy" in the county were assigned to be Justices of the Peace, with powers to arrest and punish offenders.[12] That power of punishment included the power to impose the death sentence. I am sure that a reform to that effect was not announced by the Attorney-General this morning.

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[6] Blackstone, *Blackstone's Commentaries* (2016) vol 1, ch 9 at 225.
[7] Blackstone, *Blackstone's Commentaries* (2016), vol 1, ch 9 at 225, citing Stat 1 Edw III cl 16; Skryme *History of the Justices of Peace* (1991), vol 1 at 1-7.
[8] Holdsworth, *A History of English Law* (1923), vol 1 at 287, citing 2 Edward III c 6.
[9] Holdsworth, *A History of English Law* (1923), vol 1 at 287, citing 18 Edward III St 2 c 2. Justices of the Peace would not hear more difficult matters, including treason. Those matters were sent to Assize Courts: Holdsworth, *A History of English Law* (1923) vol 1 at 293.
[10] The Ordinance of Labourers 1349, 23 Edw III. See Skryme, *History of the Justices of Peace* (1991), vol 1 at 23, 56.
[11] They are first called Justices in 36 Edward III, St I c 12. See Holdsworth, *A History of English Law* (1923) vol 1 at 288.
[12] Holdsworth, *A History of English Law* (1923) vol 1 at 288, citing 34 Edward III c I.

So even by this point the duties of a Justice of the Peace straddled a few fences; a police power of keeping the peace, a judicial power of trying and punishing offenders, along with ad hoc powers such as fixing wages and prices. From that point I can summarise the course of many centuries by saying that thereafter Justices of the Peace were given such a variety of powers that one legal historian observed that "long ago, lawyers abandoned all hope of describing the duties of a justice [of the peace] in any methodic fashion".[13] I will come back to address some of the critical functions but, for example, in 1613 certain Justices of the Peace were required to repair the dykes on some flooded rivers,[14] others were required to relieve the people of Hull from the ravages of the plague,[15] and 50 years prior four Justices of the Peace were required to be present at the execution of Mary Queen of Scots.[16]

Well just like judges, the Justices of the Peace had their critics and one of them happened to be William Shakespeare. His play, *Henry IV Part 2*, features two Justices of the Peace, one called Silence and the other called Shallow;[17] as you can guess, the portrait of Shallow is not very flattering.[18] However, Justices of the Peace were not the only ones with their critics. One part of *Henry VI Part 2* concerns the so-called Cade Rebellion, an uprising against corruption and maladministration. One of the rebels' main gripes was with the legal profession, hence the famous line "[t]he first thing we do, let's kill all the lawyers".[19]

Despite Shakespeare's concerns, the powers of Justices of the Peace in the United Kingdom continued to expand. They reached their high point in the 18th and 19th centuries before three important structural changes took place.

First beginning around 1829 there began to be established professional police forces in the United Kingdom that assumed responsibility for keeping the peace.[20] Until that time, the Justices of the Peace had held that role; they had appointed and supervised

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[13] Maitland, *Justice and Police* (1885) at 84.
[14] Gleason, *The Justices of the Peace in England* (1969) at 101.
[15] Gleason, *The Justices of the Peace in England* (1969) at 102.
[16] Gleason, *The Justices of the Peace in England* (1969) at 102.
[17] Shakespeare, *Henry IV, Part 2* (1599) Act III, Scene 2.
[18] See Shakespeare, *Henry IV, Part 2* (1599) Act III, Scene 2. Shallow also makes an appearance in the *Merry Wives of Windsor*: Shakespeare, *Merry Wives of Windsor* (1602) Act I, Scene 1.
[19] Shakespeare, *Henry VI, Part 2* (1591) Act IV, Scene 2, line 75.
[20] Skyrme, *History of the Justices of Peace* (1991), vol 2 at 148-149, 187.

their own constables.[21] You can see the legacy of this change today in Tasmania. The oaths and affirmations sworn by various classes of Tasmanian police officers include a promise to "cause the peace to be kept"[22] but that is no longer part of the oath of office for a Justice of the Peace.[23] They are about peace and you are about justice.

The second major structural change in the United Kingdom was that in 1888 the vast duties which Justices of the Peace had acquired over local government were transferred to the newly formed County Councils.[24]

The third major change was that from the end of the 18th century through to the middle of the 19th century there were various reforms affecting the judicial functions of Justices of the Peace.[25] While some of those reforms led to some aspects of the Justices' roles being partly replaced by a body of professional magistrates,[26] the exercise of judicial functions in England and Wales by unpaid lay Justices of the Peace continued and still exists today.[27] I will come back to this but in the United Kingdom the titles of 'Magistrate' and 'Justice of the Peace' are now used interchangeably.[28]

Tasmania

Well in the meantime Europeans arrived in Australia and they brought the office of Justice of the Peace with them. In 1788 Governor Phillip received a commission as a Justice of the Peace and the power to appoint other Justices of the Peace.[29] In the early days of penal colonies, Justices of the Peace exercised wide-ranging powers. As an illustration, when Western Australia commenced as a colony in 1829, the Governor, Captain James Stirling appointed eight Justices of the Peace, originally referred to as 'Conservators of the Peace'. They were given authority to "inquire into

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[21] See *Queensland v Stradford* (2025) 99 ALJR 396 at 430 [137]; 421 ALR 376 at 411.
[22] *Police Service Act 2003* (Tas), s 36, sch 1, pts 1-4.
[23] *Justices of the Peace Act 2018* (Tas), s 6; *Promissory Oaths Act 2015* (Tas), s 6.
[24] *Local Government Act 1888* (51 & 52 Vict c 41); Skyrme, *History of the Justices of Peace* (1991), vol 2 at 212-219.
[25] *Summary Jurisdiction Act 1848* (11 & 12 Vict c 43) and *Stipendiary Magistrates Act 1863* (26 & 27 Vict c 97).
[26] See *Middlesex Justices Act 1792* (32 Geo 3 c 48), repealed by *Statute Law Revision Act 1861* (24 & 25 Vict c 101).
[27] See Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 1' (2000) 74 *Australian Law Journal* 509 at 514-516.
[28] See, eg, 'Magistrates' (Judiciary, United Kingdom) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/magistrates/>.
[29] Tsavaridis, 'From Whence We Came: Justices of the Peace and the Birth of the Magistracy' (Speech, NSW Justices Association Conference, 2022) at [11].

the truth of [all] felonies, poisonings, enchantments, sorceries, arts-magic, trespasses, forestalling, regrating, ingrossings and extortions whatsoever".[30] For my part I would like to know what their inquires revealed on the enchantments, sorceries and arts-magic front.

Justices of the Peace were used in Tasmania from the outset of European arrival to impose criminal punishment and to maintain discipline amongst the convict population. So broad was their authority that one Governor described their powers as amounting to a "Slave Code".[31] I came across an academic study which is tracing the identities of all of the Justices of the Peace of Van Diemen's Land from 1804 to 1860.[32] The study refers to them as "Vandemonian magistrates".[33] Maybe you should have that printed on your business cards.

Of those Vandemonian Magistrates or Vandemonian Justices of the Peace, I believe, but am not entirely sure, that the first woman appointed to be a Justice of the Peace was Eliza Burnell. She was appointed a Justice of the Peace in 1894[34] and lived in Duck River or, as I would call it, Smithton. As fate would have it one of Eliza's daughters, Enid, was married in my old hometown of Wynyard in 1915. Seventeen years later in 1932, Enid's husband, Joe Lyons, became the tenth prime minister of Australia and in 1943 Enid became the first woman elected to the Commonwealth Parliament, winning the Tasmanian seat of Darwin, which is now known as Braddon.

I could spend the rest of the weekend tracing developments in the office of the Justice of the Peace in Australia from colonial settlement to the present but I will save you that joy.[35] Instead I will mention one very significant change that stands in contrast to

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[30] Martin, ' The role of a Justice of the Peace in Western Australia's justice system' (Speech, 2016) at 7.

[31] Strike and Roberts, 'Counting and Coding the Magistrates: A Report on a Project to Identify the Justices of the Peace of Van Diemen's Land, 1804-1860' (2021) 23 *Journal of Australian Colonial History* 185 at 186, quoting Governor Bourke of New South Wales.

[32] Strike and Roberts, 'Counting and Coding the Magistrates: A Report on a Project to Identify the Justices of the Peace of Van Diemen's Land, 1804-1860' (2021) 23 *Journal of Australian Colonial History* 185.

[33] Strike and Roberts, 'Counting and Coding the Magistrates: A Report on a Project to Identify the Justices of the Peace of Van Diemen's Land, 1804-1860' (2021) 23 *Journal of Australian Colonial History* 185.

[34] *Examiner*, 'Obituary: Mrs E Burnell, Devenport' (13 January 1941).

[35] As one example of a historic function, around Federation, a person seeking a certificate of naturalisation was required to obtain a certificate from a Justice of the Peace, a postmaster, a teacher or a police officer confirming that they were "a person of good repute": *Naturalisation Act 1903* (Cth), s 6(1)(b).

England and Wales. Gathering force over time and accelerating over the last 40 years has been a progression from lay Justices of the Peace exercising judicial power towards a situation where only full-time legally qualified professional magistrates or judges exercise judicial power to hear and determine criminal charges and civil disputes.[36] That journey is not yet finished.[37] This development stands in contrast to England and Wales which still has over 12,000 part time lay magistrates or Justices of the Peace performing judicial functions[38] compared with only 400 full-time professional, qualified judicial officers deciding cases summarily (referred to as District Judges).[39] This development in Australia was prescient in that there have been case law developments in the High Court which have brought State courts that are repositories of federal jurisdiction within the purview of Ch III of the Constitution, and which requires such Courts to meet certain standards of independence and tenure for its members.[40]

The balance of this talk is not concerned with those duties of Justices of the Peace that have passed into history but with the contemporary importance of the historical duties that remain and which I suspect will be with you and your office for a long time to come, specifically the power and duty to administer oaths and affirmations and the power to issue search warrants.

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[36] Lowndes, 'The Australian Magistracy: From Justices of the Peace to Judges and Beyond – Part 1' (2000) 74 *Australian Law Journal* 509, 510.

[37] In Queensland two or more Justices of the Peace are empowered to hear and determine sentences for specified minor offences where a defendant pleads guilty, and to determine bail applications (see *Justices of the Peace and Commissioners for Declaration Act 1991* (Cth), ss 3 and 29(3), 29(4)). Justices of the Peace in Queensland hear cases in Magistrates Court's in certain remote communities: 'Remote Justices of the Peace (Magistrates Court) Program' (Queensland, 2021, online) <https://www.courts.qld.gov.au/services/court-programs/remote-justices-of-the-peace-program>. In South Australia there are special justices who sit on the bench of Magistrates' Courts (see *Justices of the Peace Act 2005* (SA), s 8(2)). In Victoria, a 'bail justice' can determine bail applications under the *Bail Act 1977* (Vic) (see *Honorary Justices Act 2014* (Vic), s 11), and hear Interim Accommodation Orders (specifying where a child must live while the court considers their long-term care and protection) (see *Children, Youth and Families Act 2005* (Vic), s 262(4)). Certain Justices of the Peace are empowered to conduct specific procedures in relation to interstate extradition proceedings: see *Service and Execution of Process Act 1992* (Cth), s 83 read with s 3 (definition of "magistrate"); see also *Gummer v Commissioner of Police* (1994) 71 A Crim R 140. In certain jurisdictions, on application by a police officer, a Justice of the Peace may extend an initial period of detention for investigation or questioning: see, eg, *Police Powers and Responsibilities Act 2000* (Qld), s 405(2).

[38] See, eg, 'Magistrates' (Judiciary, United Kingdom) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/magistrates/>.

[39] See, eg, 'List of District Judges' (Judiciary, United Kingdom) <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-judiciary/district-judge-list/>.

[40] *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 at 76 [63]-[64]; 79 [73], 80-81 [78], 87 [97] but see 82 [82] in relation to Justices of the Peace.

Oaths and Affirmations

I do not need to tell you that administering oaths and affirmations is an important part of your job.

Before I come to the current significance of that function, please indulge me while I use history and popular culture to explain why oaths and affirmations are an important part of our legal and societal architecture.

Beyond Reasonable Doubt

It is a fundamental aspect of the criminal law of this country that a person accused of a crime should be given the benefit of any reasonable doubt;[41] that is, the prosecution must prove an accused person's guilt beyond reasonable doubt. For serious charges they must ordinarily prove that guilt beyond reasonable doubt to a jury.[42] During the course of every criminal trial in this country before a jury, the jury will be told that the prosecution must prove the accused's guilt beyond reasonable doubt and that, if they cannot, then the accused must be found not guilty.

In Tasmania, each person who forms part of a jury must either swear an oath or give an affirmation that they will "faithfully and impartially try the issues between" the Crown and the accused and "give a true verdict according to the evidence".[43] Juries have been swearing oaths to give true verdicts since jury trials first commenced in the 12th century.[44]

In their original form, juries were self-informing; jurors did not come to court to hear the evidence; instead, their role was to inquire and speak.[45] Being drawn from the local communities, jurors were meant to already know what had happened with respect to the alleged crime being charged, or at least to know people who could find out.[46] Over the centuries that understanding fell away (although sometimes the jury did not receive

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[41] *Cheatle v The Queen* (1993) 177 CLR 541 at 553, 561. See also *Brownlee v The Queen* (2001) 207 CLR 278 at 289 [22].
[42] Cf *Vunilagi v The Queen* (2023) 279 CLR 259.
[43] *Juries Act 2003* (Tas) s 38, Schedule 3.
[44] Holdsworth, *A History of English Law* (1923), vol 3 at 312.
[45] Langbein, *The Origins of Adversary Criminal Trial* (2010) at 64.
[46] Langbein, *The Origins of Adversary Criminal Trial* (2010) at 64.

the memo[47]) and instead it came to be accepted that a criminal trial was adversarial and that the prosecution bore the burden of proof,[48] so that any doubt should be resolved in favour of the accused.[49] In the second half of the eighteenth century a practice crystalised of telling juries that they had to be satisfied of the accused's guilt beyond reasonable doubt.[50] There is debate amongst legal historians as to how and why that standard came to be adopted.[51] One school of thought contends that the reason the standard was introduced was not to offer protection for the accused, but to calm the fears of jurors who had given an oath to deliver a true verdict, as they still do today.[52] Jurors were said to be concerned that if their verdict was wrong, then they would have violated their oath and convicted an innocent man, and so committed a mortal sin damming their immortal soul.[53]

Games of Thrones

But you do not need to be a student of history to be aware of the historical significance of oaths; all you need is a television and a preparedness to pay the ever-increasing cost of a subscription service. Unless you were living under a rock in the last decade, and being a judge is a little bit like living under a rock, you could not have missed the Game of Thrones medieval-inspired fantasy series. By now you might be guessing that I might have watched a few episodes.

Consistent with its medieval setting, one of the constant themes of Game of Thrones was the importance of oaths. During the first three seasons, the heroic leader of the rebellious north, Robb Stark, looked set to avenge his father's unjust execution. At one

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[47] See, eg, the jury conducting internet searches in *HCF v The Queen* (2023) 280 CLR 596 and *R v K* (2003) 59 NSWLR 431, or the jury obtaining information about the accused in *Matthews v Western Australia* (2015) 257 A Crim R 55.
[48] Langbein, *The Origins of Adversary Criminal Trial* (2010) at 258-266.
[49] Langbein, *The Origins of Adversary Criminal Trial* (2010) at 258-266.
[50] Langbein, *The Origins of Adversary Criminal Trial* (2010) at 261.
[51] See *Dookhea v The Queen* (2017) 262 CLR 402 at 419 [30], citing May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases" (1876) 10 *American Law Review* 642 at 656-659; Wigmore, Evidence in Trials at Common Law, Chadbourn rev (1981), vol 9 at 405 §2497; Morano, "A Reexamination of the Development of the Reasonable Doubt Rule" (1975) 55 *Boston University Law Review* 507 at 515; Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence (1991) at 20, 23, 40-41.
[52] *Dookhea v The Queen* (2017) 262 CLR 402 at 419 [30].
[53] Whitman, *The Origins of Reasonable Doubt; Theological Roots of the Criminal Trial* (2008) at 3, 5, 153; see also Gallanis, *Reasonable Doubt and the History of the Criminal Trial* (2009) The University of Chicago Law Review 941.

point he secures the use of a crucial bridge from a warlord[54] by promising to marry the warlord's daughter, but reneges when he falls in love and marries someone else. Robb Stark pays the price for breaking his promise at the famous 'Red Wedding' when he is double crossed by the warlord and slaughtered along with his pregnant wife, his mother and many of his supporters, bringing his rebellion to an end.

One of the most reviled characters in the series is Ser Jaime Lannister whose mocking title is 'Kingslayer', a title he earned for betraying his oath as a member of the Kingsguard and stabbing a mad king in the back. The fact that he did that after that king ordered the genocide of his own people seems to have mattered for nothing. Having completed a redemptive character arc by the end of the series, Ser Jamie ultimately rewards the most loyal of the series' characters, Lady and later Ser Brienne of Tarth, with the gift of a special sword named "Oathkeeper".

Mind you, there were loopholes for oaths in Game of Thrones. The ultimate survivor of the series, Jon Snow, pledged on his "life and honour" to serve in the Night's Watch to protect the wall at the north of the seven kingdoms from what lay beyond but he was eventually able to leave that post. How? Well at one point Jon Snow died but was brought back to life by a witch.[55] He interpreted his oath as only relating to one life, not two.

The Oaths You Take

Well, this is not the Middle Ages and adherence to Christianity rightly affords no special privileges to anyone, but we still have oaths and affirmations.[56] There are the oaths and affirmations you take and the oaths and affirmations you administer. They are important.

Oaths and affirmations are not just taken by people appointed to your office and mine but by other office holders who owe duties to the public. The oath or affirmation brings home to them that the job they assume is not about them, it is about the public they serve. As I mentioned earlier, police officers swear oaths and make affirmations, as do

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[54] Lord Walder Frey.
[55] Melisandre, the Red Witch.
[56] *Oaths Act 2001* (Tas), s 16.

parliamentarians[57] and government ministers.[58] Oath and affirmation-taking is not just confined to public officials. To be admitted to legal practice lawyers take an oath or affirmation before a Supreme Court of a State or Territory.[59] In doing so they subject themselves to the supervision of that Court and not just in the conduct of legal practice. Lawyers admitted to a Supreme Court are subject to obligations no matter what they do.[60] For example, if you are a journalist and an admitted lawyer you do not shed your obligations as an admitted lawyer just because you write for a newspaper; you remain accountable to the Court that admitted you.

Of all the oaths that are taken by officials I consider that the one you take as Justices of the Peace and the one I take as a judicial officer is the most important. Along with judges of the Supreme Court of Tasmania, magistrates and coroners, Justices of the Peace take the judicial oath or affirmation;[61] you pledge to "do equal right and justice to all persons to the best of my judgment and ability according to law". Like judges, Justices of the Peace have been taking oaths like that for centuries. The 17th century oath taken by Justices of the Peace required them to "Doe equall right to rich and poor, as wit and law extends."[62]

This oath embodies a fundamental norm of our legal system, which is equal justice. Equal justice has been described as "the starting point of all other liberties".[63] The concept of equality before the law is not some new-fangled concept or something that can be derided or dismissed as woke; it is an old concept. All that has changed over the centuries is that our conception of who is entitled to the promise of equal justice has expanded. We once excluded Indigenous people from that promise, now we do not. An oath or affirmation to afford equality before the law is of particular significance to a country with convict origins and a rich ongoing Indigenous heritage and which rejects the English tradition of medieval titles and hierarchies.

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[57] The *Constitution*, s 42, requires that every senator and member of the House of Representatives shall make an oath or affirmation of allegiance before taking their seat.
[58] *Promissory Oaths Act 2015* (Tas), ss 3, 4.
[59] See, eg, *Legal Profession Act 2007* (Tas), s 34.
[60] See, eg, *Legal Profession Act 2007* (Tas), ss 37, 46-47.
[61] *Promissory Oaths Act 2015* (Tas), ss 7-10, 15; *Justices of the Peace Act 2018* (Tas), s 6.
[62] Holdsworth, *History of English Law,* 3rd ed (1922-1972), vol 1 at 289.
[63] Lauterpacht, *An International Bill of the Rights of Man* (1945) at 115, cited in *Green v The Queen* (2011) 244 CLR 462 at 472-473 [28].

The Oaths You Administer

There are the oaths and affirmations you give and the oaths and affirmations you administer. You administer oaths and affirmations for statutory declarations[64] as well as when witnessing affidavits given on oath or affirmation used in court proceedings.[65] To reinforce what I have been saying, making a false statement in an affidavit to be used in court proceedings is perjury.[66] False swearing[67] and making a false statement in a statutory declaration[68] is also a crime. The maximum penalty for these offences in Tasmania is 21 years.[69]

It is not part of your role to verify the truth of what people say in their affidavits or statutory declarations but your role as the administrator of the oath or the affirmation is vital to vindicating a very old concept, namely the truth. My former colleague, the Chief Justice of New South Wales, has spoken of how we live in an age of '"truth decay".[70] We have misinformation, selective reporting, commentary dressed up as fact, personal truths, my personal favourite of alternative facts and then there are general bald-faced lies. To top it off, we now have machine generated lying; algorithms that generate supposed truths and when confronted tell you that the information they previously provided was a "constructed illustrative example".

Oaths and affirmations cut across this. There were many times as a lawyer and then as a trial judge when I saw a witness who had told one version of events, sometimes publicly, but when they were required to take an oath or make an affirmation, quite a different or at least a fuller version of events came out. You may have had the same experience.

One of the most famous examples of the focus that comes from giving evidence on oath concerns President Nixon's White House Counsel John Dean. Dean was a qualified lawyer and, originally, a strong supporter of President Nixon. In his biography,

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[64] *Oaths Act 2001* (Tas), s 14.
[65] Tasmanian Department of Justice, *Handbook for Justices of the Peace: A guide for Justices of the Peace in Tasmania* (January 2026) at 21.
[66] *Criminal Code Act 1924* (Tas), ss 94(1), (2).
[67] *Criminal Code Act 1924* (Tas), s 95.
[68] *Criminal Code Act 1924* (Tas), s 113.
[69] *Criminal Code Act 1924* (Tas), s 389.
[70] Bell, 'Truth Decay and its Implications for the Judiciary: An Australian Perspective' (Speech, Durham University, 23-26 April 2024).

Dean recounts how he and others caught up in Watergate had been prepared to brazenly lie to everyone, especially the public, about what had happened but were seriously anxious about perjuring themselves.[71] Dean was subpoenaed by a Congressional Committee, took the oath and told the truth about President Nixon's involvement in the cover up of the break-in to the Watergate building in Washington and the payment of hush money to those involved to keep them quiet.[72] In doing this, he admitted his own involvement. He ultimately went to prison for obstruction of justice.[73] His evidence about his conversations with President Nixon was confirmed when the existence of a secret taping system of conversations in the oval office was revealed and those parts of the tapes that were not wiped corroborated what he said.[74] I will leave it to you to ponder the similarities and contrasts between those events and people and what we see today.

Administering oaths and affirmations is not just about Court proceedings. When those functions are taken with your function of witnessing documents, you facilitate one of the most important of rights; the right to have an identity and the corresponding right not to have someone steal your identity. Before anyone can engage with society these days, they need to establish who they are.[75] You need an identity to access services, to get a job, to get Medicare, to deal with the government, and to deal with banks and financial institutions. For many marginalised people negotiating all that can be bewildering and they can get stuck in a catch-22; they cannot get a driver's licence without proof of their identity and sometimes they cannot get enough points to establish their identity without a driver's licence. The problem of people becoming marginalised, disenfranchised, disillusioned and literally going off the grid is a very real one; if it happens in sufficient numbers then communities can break down.[76] Your function of certifying documents and administering oaths is vital for people, especially the marginalised, to have the opportunity to engage.

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[71] See, eg, Dean, *Blind Ambition* (1976) at 129-131, 220-225, 308.
[72] See, eg, Dean, *Blind Ambition* (1976) at 307-327.
[73] See, eg, Dean, *Blind Ambition* (1976) at 355.
[74] Neisser, "John Dean's memory: A case study" (1981) 9 *Cognition* 1 at 2.
[75] See ConnectID, *Identity in Crisis - Addressing the Gaps for Aboriginal and Torres Strait Islander Peoples* (December 2024).
[76] See, eg, Orenstein, "The Difficulties Faced by Indigenous Victorians in Obtaining Formal Identification" (2008) 7(8) *Indigenous Law Bulletin* 14.

Your function of certifying documents and administering oaths is also a protection against someone's identity being stolen. We are all aware of identity fraud these days and the havoc it can cause, not just for the people dealing with the fraudsters but for the people whose identity is stolen; they can become trapped in a nightmare and if they are marginalised it may be one they cannot escape from. Your job in eyeballing the person or the original document is a protection, not a foolproof protection, but a protection nonetheless.

Search Warrants

As you know, a Justice of the Peace is an issuing officer for the purposes of the *Search Warrants Act 1997* (Tas).[77] Issuing a search warrant is one of the most serious functions you perform. Prior to my current appointment I was a judge of the Supreme Court of New South Wales. In that role I would occasionally be required to consider applications for search warrants. Perhaps like you I often found myself taken aback by what the search warrant material suggested was going on around me. For completely understandable reasons there are strict secrecy requirements governing the information that is disclosed and you have to put it out of your mind. Unlike me, some of you live in smaller communities; there is a real discipline in learning to unlearn what you are told when deciding an application for a search warrant.

Wilkes v Wood and *Entick v Carrington*

Issuing warrants for arrest, as well as warrants authorising search and seizure, has been a function of Justices of the Peace for centuries.[78] Two of the most seminal cases in English legal history which have had ramifications across three continents concerned search warrants and the fact that they were not of a kind issued by a Justice of the Peace.

In the early years of the reign of King George III, before he became the camp star of the musical Hamilton, some of his officials were very enthusiastic about clamping down on what were described as seditious publications. In late 1762 and into 1763 the King's messengers and accompanying henchman raided a series of homes, generally

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[77] *Search Warrants Act 1997* (Tas), s 3 (definition of "issuing officer"). An issuing officer may issue a warrant to search premises, subject to certain conditions being satisfied: *Search Warrants Act 1997* (Tas), s 5.
[78] Holdsworth, *A History of English Law* (1923) vol 1 at 294-296.

tearing up the place and carrying off charts, pamphlets and papers. One of the homes they ransacked was that of John Wilkes. John Wilkes was a radical journalist and parliamentarian and from what I can tell a serious writer. Another person whose house was raided was John Entick. Entick was not a serious writer; he was described as a hack writer. Both Wilkes and Entick sued the government officials for trespass. In both cases the government officials[79] said they were authorised to do what they did by a "general warrant" issued by a government minister or member of the Privy Council; the general warrant simply authorised the officials to seize the "authors, printers, and publishers" of a publication alleged to 'libel' the King, Lords and Commons, in the case of *Wilkes,*[80] and to seize and apprehend the "books and papers" of the author of "seditious papers" in the case of *Entick*.[81]

In *Wilkes v Wood* the Court of Common Pleas held that the general warrant was invalid because it did not specify who the offenders were or the items authorised to be seized.[82] Then in *Entick v Carrington* the King's Bench reached the same conclusion and distinguished general warrants from warrants issued by a Justice of the Peace.[83] The Court also stated the more general principle that to interfere with a person's property the State must point to a legal justification.[84] This statement has come to be viewed as an illustration of the fundamental principle that the State cannot act unless expressly authorised by law but individuals are free to do what they wish unless it is forbidden by law.[85] It encapsulates the core meaning of the rule of law: that is government under and governed by the law.[86]

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[79] In *Wilkes v Wood* (1763) 98 ER 489, Robert Wood. In *Entick v Carrington* (1765) 95 ER 807, Nathan Carrington and three others.
[80] *Wilkes v Wood* (1763) 98 ER 489 at 490, 493, 496.
[81] *Entick v Carrington* (1765) 95 ER 807 at 808, 810.
[82] *Wilkes v Wood* (1763) 98 ER 489 at 498.
[83] *Entick v Carrington* (1765) 95 ER 807 at 817.
[84] *Entick v Carrington* (1765) 95 ER 807 at 817.
[85] See, eg, *Clough v Leahy* (1904) 2 CLR 139 at 160; *Shaw Savill v Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 355.
[86] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [31], 513 [103]; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at 31-32 [85], 32-33 [87].

In the United States, these two cases, *Wilkes v Wood* and *Entick v Carrington*, have achieved almost mythical status.[87] They can be directly traced[88] to the adoption of the Fourth Amendment to their Constitution which provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

In the United States, the lustre of *Wilkes v Wood* may have rubbed off a bit because one of John Wilkes' distant relatives who bore his name, John Wilkes Booth, thought it was a good idea to shoot President Lincoln half-way through a theatrical performance, but that as they say is another story.

In Australia, *Wilkes v Wood* and *Entick v Carrington* have been cited numerous times in the High Court. The most recent reference to both was in 2020 in *Smethurst v Commissioner of the Australian Federal Police*[89] where the Court held invalid a search warrant which was relied on to search the home of a journalist who had allegedly received some classified information. The warrant was held invalid because it did not specify the offence to which the warrant related;[90] 255 years later and on the other side of the world and it's another case about a journalist, a raid and a warrant that was not specific enough. Justice Gageler (as his Honour then was) noted that the judgment of Lord Camden in *Entick v Carrington* "recognised a link between protection of personal property and protection of freedom of thought and political expression".[91]

This distinction between general warrants and specific warrants resonates with your function in authorising warrants under the *Search Warrants Act 1997* (Tas). The warrants you issue are, in the language of *Entick v Carrington*, specific warrants. Amongst other things the warrant must state the offence to which the warrant relates, describe the premises to which the warrant relates, the kind of material to be searched

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[87] See *Boyd v United States* (1886) 116 US 616 at 630, describing *Entick v Carrington* as "the very essence of constitutional liberty and security", and protecting against "the invasion of this sacred right".
[88] See, eg, *Boyd v United States* (1886) 116 US 616 at 626.
[89] *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177.
[90] *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 205 [41]-[43], 227 [115], 236 [142], 246 [166], 259 [203]-[204].
[91] *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 230 [124].

for and the names of the officers responsible for executing the warrant.[92] In issuing or refusing to issue these warrants, you are exercising the same function performed by Justices of the Peace all those years ago. There is limited scope in Tasmania for the Commissioner of Police to issue a type of general warrant to search for stolen property,[93] but generally[94] parliaments across the country, including Tasmania, have recognised the wisdom of specific warrants and also have recognised the wisdom of having someone independent of the police, such as you, review an application for the issue of a warrant.

Rule of Law

All this discussion of warrants is simply an aspect of the fundamental principle illustrated by *Entick v Carrington*; being the need for the government to point to some lawful authority for its actions.

One rather spectacular example of that rule in action took place on the evening of 30 November 1983, when an up to that point largely unknown government organisation bearing the name the 'Australian Secret Intelligence Service' announced its existence to the world by conducting a "training exercise" at the Sheraton Hotel on Spring Street, in Melbourne.

The "training exercise" was a role-play of a hostage rescue but no one told the hotel or its guests. Things got a little out of hand when the "secret agents" used a sledgehammer to break open a hotel room door on the floor in which the "hostage" was being held.[95] When the hotel manager went to investigate he was met by one of the "secret agents", who was wearing a mask. They jostled one another in the lift as they made their way back down to the Hotel's entrance. Other agents wearing masks emerged from the lift on the ground floor and startled the staff and guests by parading weapons including two sub-machine guns through the hotel foyer.[96]

After the event, the Victorian police asked the Commonwealth government to reveal the identities of the agents so they could charge the agents with a smorgasbord of

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[92] *Search Warrants Act 1997* (Tas), s 5(2).
[93] *Police Offences Act 1935* (Tas), s 60.
[94] Cf *Summary Offences Act 1953* (SA), s 67.
[95] *A v Hayden (No 2)* (1984) 156 CLR 532 at 539-540.
[96] *A v Hayden (No 2)* (1984) 156 CLR 532 at 540.

criminal offences.[97] The agents sought an injunction in the High Court of Australia to stop that happening and my predecessors did not have much difficulty in saying no. Our greatest judge, Sir Anthony Mason, who recently passed away at the age of 100, commenced his judgment by describing what happened as having "the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart".[98]

If one contrasts that comment and those events with recent events overseas it illustrates how comparatively lucky we are. In this country at that time violent rogue action by Commonwealth officials was so unusual it was treated with derision. The State police had no hesitation in deciding to hold the federal agents involved accountable for their crimes committed in their State. The federal government had no hesitation in agreeing they should be held accountable and facilitating that occurring. The High Court rejected any possible contention that that should not happen.

The important thing is that in performing your functions, as exemplified by considering whether to issue a warrant, you are putting the rule of law in action and doing so in communities big and small. And with search warrants, where for good reason the applications are not made in public, obedience to your judicial oath assumes great importance.

The Vexatious, Sovereign Citizens and the Disenfranchised

Before I finish I will briefly touch on one topic of central concern to the Courts that may affect your role, although I am not sure.

I mentioned earlier that right back in 1327, the keepers of the peace could not be a "barretor", an old word for vexatious litigants. I also mentioned the concern about people falling off the grid. The period during and since the COVID-19 pandemic has seen a rise of so-called sovereign citizens, who deny any authority of the State over them. They present an ever increasing problem for the Courts either because they repeatedly bring legal proceedings that are baseless or, most frequently, they present to Local and Magistrates Courts in response to summons for, say, traffic offences and

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[97] *A v Hayden (No 2)* (1984) 156 CLR 532 at 561.
[98] *A v Hayden (No 2)* (1984) 156 CLR 532 at 550.

clog up the Court's processes and time mounting specious arguments that deny the Court's authority or even their own legal existence.[99]

I do not know whether this is a problem for the performance of your functions. I am not sure if sovereign citizens see you as emanations of the state and therefore something to be avoided. If you are encountering these people in your roles, the only advice I can give is to avoid engagement with the underlying conspiracy, theory or ideas they are trying to espouse. If you are asked to witness documents or administer oaths then do so in accordance with your judicial oath or affirmation but perhaps avoid any attempt to dissuade them from these beliefs. The experience of the Courts suggests that is futile and if you try it will only make your job harder and not easier. The impartial and conscientious exercise of your functions is the best you can do and provides the best example to others who may have become disenfranchised and embittered.

Conclusion

Hopefully from pondering a bit of history and a few anecdotes it is clear that the Justices of the Peace are part of the legal history of the United Kingdom and the legal history of this country since Europeans arrived. Most importantly, that history illustrates how you came to do what you do, why you do it and why it's important. Your office and the functions you perform are practical examples of equality before the law and the rule of law in action in communities.

Thank you for your service and thank you for listening.

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[99] See, eg, *Commonwealth Bank of Australia v Moir* [2024] WASC 319; *Stefan v McLachlan* [2023] VSC 501; *Re Coles Supermarkets Australia Pty Ltd* [2022] VSC 438; *Federal Commissioner of Taxation v Bonaccorso (No 2)* [2016] NSWSC 766; *Deputy Commissioner of Taxation v Bonaccorso (No 3)* [2016] NSWSC 1018; *Palmer v No Respondent* [2023] VSCA 322; see generally Hobbs et al, "The Internationalisation of Pseudolaw: The Growth of Sovereign Citizen Arguments in Australia and Aotearoa New Zealand" (2024) 47(1) *University of New South Wales Law Journal* 309.